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TESTIMONY.

EXHIBITS.

Bill of Complaint.

Filed March 23, 1916.

In Chancery of New Jersey.

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

The complainant, Bertha E. Feick, executrix of the last will and testament of Charles A. Feick, deceased, of Roselle, New Jersey, respectfully shows that:

1. On September 30, 1911, Charles A. Feick, late of the City of Newark, died leaving a last will and testament by which he appointed this complainant the sole executrix.

2. On October 13, 1911, said will was duly admitted to probate by the Surrogate of Essex County and letters testamentary were issued thereon to this complainant, who accepted the same and has ever since acted and still is acting as such executrix.

3. On October 13, 1911, this complainant obtained an order from the Essex County Orphans' Court directing the creditors of the said Charles A. Feick to present their sworn claims within nine months from the date thereof in accordance with the statute in such case made and provided, and on July 15, 1912, obtained an order from said court barring all creditors who had not so presented their claims.

4. On January 28, 1912, the Union National Bank, a corporation organized and existing under the laws of the United States of America

and carrying on business in the City of Newark, in the County of Essex and State of New Jersey, presented its claims to this complainant on certain promissory notes made by the said Charles A. Feick during his lifetime and held by said Union National Bank, one for $25,000, dated June 21, 1911, payable four months after date; one for $20,000, dated August 27, 1911, payable four months after date, and one for $20,000, dated September 22, 1911, payable four months after date, and on certain notes made by the Hill Bread Company, a corporation of the State of New Jersey, to the order of said Charles A. Feick; one dated August 1, 1911, for $5,000, payable four months after date; one dated September 13, 1911, for $2,000, payable four months after date; and one dated September 15, 1911, for $3,500, payable four months after date, which said last mentioned notes having first been endorsed by said Charles A. Feick were discounted by him during his lifetime at the said Union National Bank. A true copy of this proof of claim is hereto attached and marked Schedule A.

5. On or about July 9, 1912, the Hill Bread Company presented its claim to this complainant on a certain promissory note for $10,000 made by the said Charles A. Feick in his lifetime to the said Hill Bread Company, dated April 12, 1911, payable six months after date, and on a book account for goods sold and delivered to the said Charles A. Feick during his lifetime in the amount of $89.91, a true copy of which is hereto attached and marked Schedule B.

6. At the time of the death of the said Charles A. Feick there was on deposit to his credit with the said Union National Bank the

sum of $23,500.01, which said sum the Union National Bank claimed to be applicable to the payment of said note dated June 21, 1911, and all of which said deposit the bank did apply in part payment of said note. The Union National Bank also held as collateral for said indebtedness thirty shares of stock of the Fidelity Trust Company of Newark, which shares were sold by this complainant on January 20, 1915, for the sum of $26,730. The proceeds realized from said sale were applied to said indebtedness.

7. On March 26, 1915, a decree was made by the Essex County Orphans' Court allowing the claim of the said Union National Bank and establishing the amount due thereon in the sum of $89,573.33, after the application by the court of the said moneys on deposit and the proceeds from the sale of said collateral, and a decree was made by said court adjudging the estate of the said Charles A. Feick to be insolvent.

8. On April 23, 1915, an order was made by said Essex County Orphans' Court directing this complainant to pay a dividend of 45% on the claims filed with her, and this complainant did thereupon on May 1, 1915, in conformity with said order, pay to the Union National Bank on its claim the sum of $13,307.99, being a dividend of 45% on the balance due on this claim after the application of the moneys on deposit to the credit of Charles A. Feick at his death with that bank, and after the application of the proceeds from the sale of the above mentioned collateral held by that bank as security for the notes of the said Charles A. Feick, and said bank has applied the said dividend generally as a creditor on its said claim. Of

this amount, the sum of $4,725.00 is the amount which represents a percentage of 45% of the amount due on the notes of the Hill Bread Company to the order of Charles A. Feick and discounted by the said Charles A. Feick with said bank.

9. The aforesaid notes made by said Hill Bread Company were issued and delivered by it to said Charles A. Feick in his lifetime for a valuable consideration, and complainant alleges that as between said Hill Bread Company and the said Charles A. Feick, the former was and is primarily liable thereon, and that the liability of the said Charles A. Feick thereon was and is the secondary liability of an endorser only.

10. Said Hill Bread Company, though often requested so to do by complainant, has paid nothing to said bank on its said notes, and has utterly failed and refused to discharge its primary liability thereon.

11. The said Hill Bread Company was indebted to this complainant in the sum of $2,500 with interest from July 1, 1911, on a certain promissory note for that amount made by Hill Bread Company to Charles A. Feick during his lifetime, dated July 1, 1911, payable four months after date, a true copy of which is hereto attached and marked Schedule C. Said note is now the property of complainant and has not been paid in whole or in part.

12. This complainant has made no payment on account of the claims of the Hill Bread Company because of the indebtedness of said Hill Bread Company to this complainant on its said note of $2,500 and because of its failure

to pay and discharge its said notes held by said Union National Bank and by reason of the liability which said Hill Bread Company has incurred to complainant upon the payment of said dividends to said bank and because complainant is fearful that said Hill Bread Company will continue to neglect and refuse to discharge its said notes held by said bank, whereby said Hill Bread Company may hereafter become further indebted to her by reason of the payment of further dividends to said bank and because of the uncertainty and doubt which exists in complainant's mind in respect to the true amount at which the claim of said Hill Bread Company should be recognized and allowed, if at all.

13. On March 3, 1916, said Hill Bread Company instituted an action in the New Jersey Supreme Court against this complainant on said note of $10,000 made by the said Charles A. Feick and on said book account and for the return of certain moneys paid by said Hill Bread Company to the said Charles A. Feick or to this complainant, as will appear from said complaint, a true copy of which is hereto attached and marked Schedule D.

14. This complainant admits the indebtedness of her said testator on the said note of $10,000 and on said book account, but this complainant alleges that she is entitled to a set-off against this liability of the debt of said Hill Bread Company on its said note of $2,500, and is entitled to set off against any dividends now or hereafter payable to the said Hill Bread Company on the indebtedness of said Charles A. Feick to it, and the amounts of the dividends

heretofore and hereafter paid by complainant to said bank insofar as they represent dividends on the indebtedness of said Charles A. Feick, as such indorser.

15. Said Hill Bread Company at the time of the maturity of said notes so made by it and discounted by the said Charles A. Feick had on deposit with said Union National Bank large sums of money and still has on deposit with said bank large sums of money to its credit.

16. This complainant alleges that the said Charles A. Feick in his lifetime purchased a certain plot of ground known as the Turnbull plot on the corner of Fillmore and Market streets in the City of Newark, New Jersey, for the use of the Hill Bread Company, and agreed to erect buildings thereon for the use of the Hill Bread Company at such times as the said Hill Bread Company might designate; that the said Hill Bread Company was to furnish at such time as it might desire plans and specifications for the erection of said buildings and agreed to pay to the said Charles A. Feick the taxes on said plot of ground and the interest money on the purchase price. The Hill Bread Company did not furnish said plans and specifications and did not request the erection of said buildings, but the said Hill Bread Company has had the uninterrupted use of the same and has been in possession thereof.

17. The Hill Bread Company did not file with this complainant its claim for the moneys alleged in the third count of the complaint in the said action at law to have been paid to the said Charles A. Feick during his lifetime.

18. On March 2, 1916, this complainant paid to the said Hill Bread Company the sum of $1,000 paid by said Hill Bread Company to this complainant under the agreement for the sale of premises at Market, Frederick and Fillmore streets in the City of Newark, which is the same sum alleged in the fourth count of said complaint to have been paid to this complainant under the agreement for the purchase of said premises. This complainant has received no interest on said sum of $1,000 whatsoever.

19. This complainant charges that the said action in the New Jersey Supreme Court is vexatious and harassing to this complainant in that it seeks to enforce the claims of said Hill Bread Company against this complainant without regard to the indebtedness of the Hill Bread Company to this complainant, and that this complainant in said action cannot safely and adequately set up in defense thereof the question of said indebtedness of said Hill Bread Company by reason of the dividends paid to said bank upon the indebtedness of said Charles A. Feick, as endorser aforesaid; and in particular, that she cannot in a Court of Law have the benefit of a set-off which may hereafter arise upon any such payment to said bank; and further in equity and good conscience the complainant is entitled to set off such payments against the dividends payable to said Hill Bread Company on the said indebtedness of said Charles A. Feick to said Hill Bread Company and not merely as against the full amount of the indebtedness to said Hill Bread Company, but complainant cannot avail herself of such set-off and defense in an action at law nor have and enforce

an application of the funds held by the said Union National Bank to the credit of the Hill Bread Company so as to work out justice between this complainant and the Hill Bread Company and the said Union National Bank, as well as the other creditors of the insolvent estate of said Charles A. Feick as in justice and equity ought to be done.

The complainant is without adequate remedy in the Courts of Law, and therefore prays:

(1) That Union National Bank and Hill Bread Company, who are the defendants to this suit, may answer this bill of complaint without oath and each statement therein made.

(2) That the said Hill Bread Company, its agents, attorneys and employees, pending the hearing of this complaint, may be enjoined from doing anything further in the prosecution of the action in the Supreme Court of this State, so as aforesaid begun by said Hill Bread Company, and that the said Hill Bread Company and the Union National Bank, their attorneys, agents and employees, may be enjoined from any other proceeding or action in the courts of this State in any way involving any inquiry into the question of the indebtedness between said Hill Bread Company, the Union National Bank and this complainant, and that a decree may be made for the issuance of a permanent injunction restraining the said Hill Bread Company and Union National Bank, their agents, attorneys and employees from further prosecuting any such action as aforesaid.

(3) That it may be decreed that as between this complainant and said Hill Bread Company, the latter is principally and primarily liable for

the payment of the said notes held by the said Union National Bank endorsed by the said Charles A. Feick, and that a decree be made declaring the respective rights of all parties in interest determining the adjustment of the equities and their application to the indebtedness between the complainant and the defendants, and compelling the said Hill Bread Company to relieve and exonerate this complainant from liability on the endorsements of said Charles A. Feick on the notes of the said Hill Bread Company by application of the funds on deposit with said bank to the credit of the said Hill Bread Company or otherwise, as may be equitable and just; and that it may be decreed that this complainant is entitled to the set-offs herein claimed, and that the amount of the dividends already paid by this complainant to said bank or hereafter paid on said liability as endorser be credited upon such dividends as said Hill Bread Company is now or may hereafter be entitled to upon the true indebtedness of said Charles A. Feick to it; and that it may be decreed that this complainant is entitled to be subrogated in equity to such amount of the indebtedness of said Hill Bread Company as maker of said notes held by said bank as equals the dividends paid now or hereafter on the liability of said Charles A. Feick, as such endorser.

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

PITNEY, HARDIN & SKINNER,
Solicitors for and of Counsel with Complainant.

Affidavit of Bertha E. Feick.

IN CHANCERY OF NEW JERSEY.

I, Bertha E. Feick, of full age, being duly sworn according to law, upon my oath depose and say:

That I am the Bertha E. Feick, complainant in the above entitled action and that I reside in Roselle, Union County, New Jersey.

That on September 30th, 1911, Charles A. Feick, late of the city of Newark, died, leaving a last will and testament by which he appointed me as sole executrix. That on October 11th, 1911, said will was duly admitted to probate by the Surrogate of Essex County and Letters Testamentary were issued thereon to this deponent, who accepted the same and who has ever since acted and is still acting as such executrix.

That on October 13th, 1911, I obtained an order from the Essex County Orphans' Court directing the creditors of the said Charles A. Feick to present their sworn claims within nine months from the date thereof, in accordance with the statute in such case made and provided and that on July 15th, 1912, I obtained an order from said court barring all creditors who had not so presented their claims.

On January 28th, 1912, the Union National Bank, a corporation, organized and existing under the laws of the United States of America and carrying on business in the city of Newark, Essex County, New Jersey, presented its claims to me on certain promissory notes made by the said Charles A. Feick, during his lifetime, and held by said Union National Bank;

one for $25,000, dated June 20th, 1911, payable four months after date; one for $20,000, dated August 20th, 1911, payable four months after date, and one for $20,000 dated September 22nd, 1911, and payable four months after date: and on certain notes made by Hill Bread Company, a corporation of the state of New Jersey, to the order of Charles A. Feick, one dated August 1st, 1911, for $5,000, payable four months after date; one dated September 13th, 1911, for $2,000, payable four months after date, and one dated September 15th, 1911, for $3,500, payable four months after date, which said last mentioned notes having first been endorsed by said Charles A. Feick were discounted by him during his lifetime at the said Union National Bank, a true copy of which proof of claim is hereto attached and marked Schedule "A."

On or about July 9th, 1912, the Hill Bread Company presented its claim to me on a certain promissory note for $10,000 made by the said Charles A. Feick, in his lifetime, payable to the said Hill Bread Company, dated April 12th, 1911, and payable six months after date and on a book account for goods sold and delivered to the said Charles A. Feick, during his lifetime, in the amount of $89.91, a true copy of which claim is attached to this complaint and marked Schedule "B."

At the time of the death of the said Charles A. Feick there was on deposit to his credit with the said Union National Bank, $23,500.01, which said sum the Union National Bank claimed to be applicable to the payment of said note dated June 21, 1911, and all of which said deposit the bank did apply as part payment of said note.

The said Union National Bank also held as collateral for said indebtedness thirty shares of stock of the Fidelity Trust Company. That on January 20, 1915, I sold said shares of Fidelity Trust Company stock and paid the proceeds thereof, amounting to the sum of $26,730, to the said Union National Bank to be applied on said indebtedness.

On March 26th, 1915, a decree was made by the Essex County Orphans' Court, allowing the claim of the said Union National Bank and establishing the amount due thereon in the sum of $29,573.33 after the application by the court of the said moneys on deposit and the proceeds from the sale of said collateral, and on the same day a decree was made by said court adjudging the estate of the said Charles A. Feick to be insolvent.

On April 23rd, 1915, an order was made by said Essex County Orphans' Court directing me to pay a dividend of forty-five per cent. on the claims filed with me and I did thereupon, on May 1st, 1915, in conformity with said order, pay the said Union National Bank on its claim the sum of $13,307.99, being a dividend of forty-five per cent. on the balance due on this claim after the application of the moneys on deposit to the credit of Charles A. Feick, at his death, with that bank and after the application of the proceeds from the sale of the above mentioned collateral held by that bank as security for the notes of the said Charles A. Feick, and said bank has applied the said dividend generally as to the credit of its said claim. Of this amount the sum of $4,725 is the amount which represents the percentage of the forty-five per cent. of the amount due on the notes of the Hill Bread

Company to the order of Charles A. Feick and discounted by the said Charles A. Feick with said bank.

The aforesaid notes made by said Hill Bread Company were issued and delivered by it to said Charles A. Feick in his lifetime for valuable consideration and I allege that as between said Hill Bread Company and said Charles A. Feick, the former was and is primarily liable thereon and that the liability of the said Charles A. Feick thereon was and is a secondary liability of an indorser only.

The said Hill Bread Company is indebted to me as executrix of the last will and testament of Charles A. Feick, deceased, in the sum of $2,500, with interest from July 1st, 1911, on a certain promissory note for that amount made by the Hill Bread Company to Charles A. Feick during his lifetime, dated July 1st, 1911, and payable four months after date, a true copy of which is attached to this bill of complaint marked Schedule "C." This note is now my property and has not been paid in whole or in part.

Said Hill Bread Company, though often requested by me, has paid nothing to said bank on these said notes and has utterly failed and refused to discharge its primary liability thereon.

I have made no payment on account of the claim of the Hill Bread Company because of the indebtedness of said Hill Bread Company to me on its said note of $2,500 and because of its failure to pay and discharge its said notes held by said Union National Bank, and by reason of the liability which said Hill Bread Company has incurred to me upon the payment

of said dividend to said bank, and because I am fearful that said Hill Bread Company will continue to neglect and refuse to discharge its said notes held by said bank whereby said Hill Bread Company may hereafter become further indebted to me by reason of the payment of further dividends to said bank and because of the uncertainty and doubt in my mind as to the amount in which the claim of said Hill Bread Company should be allowed, if at all.

On March 3rd, 1916, said Hill Bread Company instituted an action in the New Jersey Supreme Court against me on said note of $10,000 made by said Charles A. Feick and on said book account and for the return of certain money paid by said Hill Bread Company to the said Charles A. Feick or to me as appears from said complaint, a true copy of which is attached to this bill of complaint and marked Schedule "D."

I admit my indebtedness as such executrix on the said note of $10,000 and on said book account, but I allege that I am entitled to a set-off against this liability of the debt of the said Hill Bread Company on its said note of $2,500 and am entitled to a set-off against any dividends now or hereafter payable to said Hill Bread Company on the indebtedness of said Charles A. Feick to it, the amounts of the dividends heretofore and hereafter paid by me to said bank insofar as they represent dividends on the indebtedness of said Charles A. Feick as such indorser.

Said Hill Bread Company at the time of the maturity of the said notes made by it and discounted by the said Charles A. Feick had on deposit with said Union National Bank large

Schedule A.

sums of money and still has on deposit with said bank large sums of money to its credit.

BERTHA E. FEICK.

Sworn and subscribed to before me this 23rd day of March, 1916.

ALBERT W. HARRIS,
Master in Chancery of New Jersey.

SCHEDULE "A."

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER OF THE ESTATE OF CHARLES A. FEICK, deceased.	*Proof of Claim of Union National Bank.*

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

ARCHIBALD W. CONKLIN, being duly sworn, upon his oath says: I am..... of Union National Bank, of the City of Newark, New Jersey. Said Union National Bank has a claim against the Estate of Charles A. Feick, on account of money loaned on six promissory notes made by said Charles A. Feick in his lifetime and delivered to said Union National

Schedule A.

Bank and discounted by it. Said promissory notes were as follows:

"Newark, N. J., June 21, 1911.

$25,000.

Four months after date for value received the undersigned promises to pay to The Union National Bank of Newark, at the Banking House of said bank Twenty-five thousand 00/100 Dollars, having deposited with said Bank as Collateral security Thirty (30) shares Fidelity Trust Company Capital Stock, which the undersigned hereby authorizes said Bank or its President or its Cashier to sell without notice at the Board of Brokers or at public or private sale at the option of said Bank or its President or Cashier in case of non-payment of this promise, applying the proceeds to the payment of this Note, including interest and accounting to the undersigned for the surplus, if any.

In case of decline in the market value of the securities at any time pledged for any of the above liabilities, the undersigned agrees to deposit with the said Bank, without notice or demand, additional securities sufficient to maintain a margin of market value of the securities pledged equal to twenty percentum of the said liabilities; and in case of failure so to do forthwith, this Note shall become at once due and payable without demand of payment thereof, and the said Bank may immediately sell and apply the said securities in the manner above stated.

In case of Deficiency the undersigned promises to pay to said Bank the amount thereof forthwith after such sale with Legal interest; and it is hereby agreed and understood that if recourse is had to the collaterals, any excess of

Schedule A.

collaterals upon this Note shall be applicable to any other Note or claim held by said Bank against the undersigned, and in case of any exchange of or addition to the collaterals above named, the provisions of this Note shall extend to such new or additional collaterals.

CHAS. A. FEICK."

Endorsed: "CHARLES A. FEICK."

"$5,000. Newark, N. J., Aug. 1, 1911.
Four months after date we promise to pay to the order of Charles A. Feick Five thousand no/100 Dollars at Union National Bank.
Value received with interest
No. Due Dec. 1. HILL BREAD CO.,
John J. Hill, Pres.
Frederick Scharringhausen, Secy."

Endorsed: "Charles A. Feick,
by Frederick Scharringhausen,
Attorney in fact."

"$20,000. Newark, N. J., Aug. 28, 1911.
Four months after date I promise to pay to the order of myself Twenty thousand 00/100 Dollars at Union National Bank
Value received CHARLES A. FEICK,
No. Due Dec. 28.
By Frederick Scharringhausen
Attorney in fact."

Endorsed: "Charles A. Feick,
by Frederick Scharringhausen,
Attorney in fact."

Schedule A.

"$2,000. Newark, N. J., Sept. 13, 1911.
Four months after date we promise to pay to the order of Charles A. Feick Two Thousand no/100 Dollars at Union National Bank.
Value received with interest
No. Due HILL BREAD CO.,
John J. Hill, Pres.
Frederick Scharringhausen, Secy."

Endorsed: "Charles A. Feick,
by Frederick Scharringhausen,
Attorney in fact."

"$20,000. Newark, N. J., Sept. 22, 1911.
Four months after date I promise to pay to the order of Myself Twenty thousand and 00/100 Dollars at Union National Bank.
Value received
No. Due Jan. 22.
CHARLES A. FEICK."

Endorsed: "Charles A. Feick."

"$3,500. Newark, N. J., Sept. 15th, 1911.
Four months after date we promise to pay to the order of Charles A. Feick, Thirty-five hundred Dollars at Union National Bank.
Value received with interest
No. Due Jan. 15. HILL BREAD CO.,
John J. Hill, Pres.
Frederick Scharringhausen, Secy."

Endorsed: "Charles A. Feick,
by Frederick Scharringhausen,
Attorney in fact."

Schedule A.

The total amount of said promissory notes is Seventy-five thousand five hundred dollars.

Against this sum there has been credited the sum of Twenty-three thousand five hundred dollars and one cent on account of the moneys due on the note dated June 21st, 1911, leaving a balance due of Fifty-one thousand nine hundred ninety-nine dollars and ninety-nine cents, together with lawful interest on the respective amounts due on each note from the respective due dates thereof, which said amounts are now due and owing from said Estate to said Bank.

Said Union National Bank holds thirty shares of stock of the Fidelity Trust Company of Newark, New Jersey, as collateral security, which said shares of stock said Bank is willing to surrender on payment in full of the aforesaid claim together with the lawful interest thereon.

ARCHIBALD W. CONKLIN.

Sworn to and subscribed before me this twenty-eighth day of June, Nineteen hundred and twelve.

ARTHUR F. EGNER,
Master in Chancery of New Jersey.

Schedule B.

SCHEDULE "B."

TO

BERTHA E. FEICK,
Executrix of Charles A. Feick, deceased.

HILL BREAD COMPANY, a corporation of the State of New Jersey, hereby claims that there is due to it from the estate of Charles A. Feick, deceased, the sum of $7,589.91, with lawful interest on $28.38 thereof from September 1, 1911; on $61.53 thereof from September 30, 1911; on $7,500 thereof from July 1, 1911, and on $10,000 from April 12, 1911, to July 1, 1911, the said sums of $28.38 and $61.53 with interest as aforesaid are due from the estate of the said Charles A. Feick to this claimant for hay and feed delivered by it to the said Charles A. Feick on September 1 and September 30, 1911. A copy of the bill therefor is annexed to this claim and marked Schedule A. The said sum of $7,500 with interest as aforesaid, and the interest on $10,000 from April 12, 1911, to July 1, 1911, as aforesaid is the amount due to said claimant from the estate of the said Charles A. Feick on a certain promissory note for $10,000 made by the said Charles A. Feick to the said claimant under date of April 12, 1911, payable with interest six months from that date, after deducting the amount of a certain other promissory note for $2,500 made by the said claimant to the said Charles A. Feick under date of July 1, 1911, payable with interest in four months from that date. A copy of the said promissory note of the said Charles A. Feick to the said claimant is hereto annexed and marked Exhibit B. In the event that the amount of the

Schedule B.

indebtedness of the estate of the said Charles A. Feick to the said claimant is not reduced by the amount of the said promissory note for $2,500 made by the said claimant to the said Charles A. Feick under date of July 1, 1911, then the said claimant hereby claims that there is due to it from the estate of the said Charles A. Feick, deceased, the sum of $10,089.91 with lawful interest on $28.38 thereof from September 1, 1911; on $61.53 thereof from September 30, 1911, and on $10,000 thereof from April 12, 1911.

HILL BREAD COMPANY,

By JOHN J. HILL, *President.*

Dated, July 8th, 1912.

EXHIBIT A.

HILL BREAD CO.

Newark, N. J., Dec. 18, 1911.

Sold to Est. of Chas. A. Feick

1911.					
Sept. 1,	7 Bales	Hay 1470#@1.40	20.58		
	3 "	Straw 635#@ .85	5.40		
	4 Bags	Bran 400#@ .60	2.40	28.38	
Sept. 30,	25 Bags	Oats @1.30	32.50		
"	10 Bales	Hay 1880#@1.30c	24.44		
"	3 "	Straw 512#@ .90c	4.59	61.53	
				89.91	

Schedule B.

EXHIBIT B.

$10000 00/ Newark, N. J., April 12, 1911.

Six months after date I promise to pay to the order of Hill Bread Co.

Ten thousand..... Dollars

at 758 Broad St.

Value received with interest

No. Due Signed, Chas. A. Feick.

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

JOHN J. HILL being duly sworn according to law on his oath says: That he is the President of Hill Bread Company in the foregoing claim named; that the goods and merchandise therein enumerated as being of the value of $89.91 were duly delivered to the said Charles A. Feick on September 1 and September 30, 1911; that annexed to said claim is a true copy of a bill of the said goods and merchandise; that to the said claim there is also annexed a true copy of the note for $10,000 given by the said Charles A. Feick to the said claimant under date of April 12, 1911;

Deponent further says that on July 1, 1911, the said claimant made its note for $2,500 to the said Charles A. Feick, which note was payable three months from that date with interest; that no part of the foregoing claim has been paid and that the whole sum of $7,589.91 therein named, with interest on $28.38 thereof from September 1, 1911; on $61.53 thereof from September 30, 1911; on $7,500 thereof from July 1, 1911, and on $10,000 from April 12, 1911, to July 1, 1911, is justly due and owing to the said claimant.

Schedule C.

Deponent further says that if the amount of the indebtedness of the estate of the said Charles A. Feick to the said claimant is not reduced by the amount of the said promissory note for $2,500 made by the said claimant to the said Charles A. Feick under date of July 1, 1911, then the sum of $10,089.91 with interest on $28.38 thereof from September 1, 1911; on $61.53 thereof from September 30, 1911, and on $10,000 thereof from April 12, 1911, is justly due and owing to the said claimant.

JOHN J. HILL.

Sworn and subscribed before me this 8th day of July, 1912.

JOHN W. BISHOP, JR.,
Attorney at Law of New Jersey.

SCHEDULE "C."

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—
00

$2500.100 Newark, N. J., July 1, 1911.

Four months after date we promise to pay to the order of Charles A. Feick.....
Twenty five Hundred no/100.....Dollars
at Union National Bank.
Value received with interest.

HILL BREAD CO.

No.....Due.

Frederick Scharringhausen, Treas. Secy.

John J. Hill. Pres.

Schedule D.

SCHEDULE "D."

THE STATE OF NEW JERSEY TO BERTHA E. FEICK, EXECUTRIX OF THE LAST [L. S.] WILL AND TESTAMENT OF CHARLES A. FEICK, DECEASED.

YOU ARE SUMMONED to answer the annexed complaint of Hill Bread Company, a corporation, in an action at law in the Supreme Court.

AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Esq., Chief Justice of the Supreme Court at Trenton, this first day of March Nineteen hundred and sixteen.

WM. C. GEBHARDT,
Clerk.

FRANK E. BRADNER,
Attorney.

Schedule D.

SUPREME COURT OF NEW JERSEY.

ESSEX COUNTY.

HILL BREAD COMPANY, a corporation, *Plaintiff,* *vs.* BERTHA E. FEICK, Executrix of the Last Will and Testament of Charles A. Feick, deceased, *Defendant.*	*Action at Law.* *Complaint.*

Plaintiff, Hill Bread Company, a corporation organized under the laws of the State of New Jersey, with its principal office at Newark, in the County of Essex, in said State, says:

FIRST COUNT.

1. It sues for the amount of a promissory note for $10,000.00, made by Charles A. Feick in his lifetime to plaintiff; a copy of which note is hereto annexed.

2. Charles A. Feick, the maker of said note, departed this life on September 30, 1911, leaving a last Will and Testament, in which he appointed Bertha E. Feick, Executrix; and that said Will was subsequently admitted to probate by the Surrogate of the County of Essex aforesaid, and Letters Testamentary issued thereon by said Surrogate to the defendant, Bertha E. Feick, and were accepted by her.

3. The said defendant as Executrix aforesaid, has promised to pay the said note, but has neglected to do so.

Schedule D.

4. Said note is the property of the plaintiff and has not been paid.

Plaintiff demands as damages under this first count $10,000.00 with interest from April 12, 1911.

The following is a copy of the promissory note referred to in the first count:

$10000.00. Newark, N. J., April 12, 1911.

Six months after date, I promise to pay to the order of Hill Bread Company, Ten thousand dollars, at 758 Broad Street, value received, with interest. CHARLES A. FEICK.

SECOND COUNT.

1. Plaintiff sues for the price of goods sold and delivered to Charles A. Feick in his lifetime, upon a book account, of which a copy is attached hereto, and the whole of which is due and unpaid.

2. Plaintiff repeats paragraph 2 of first count.

3. Said Bertha E. Feick, as Executrix aforesaid, has promised to pay the said debt.

Plaintiff demands as damages on this second count the sum of $89.91 together with interest thereon from September 30, 1911.

The following is a copy of the book account referred to in the second count of this complainant:

Sold to Charles A. Feick.

Sept. 1, 1911,	7 bales of hay	1470 @	1.40	20.58
	3 " " Straw	635 @	85c	5.40
	4 bags " bran	400 @	60c	2.40
Sept. 30, "	25 " " oats		@ 1.30	32.50
	10 bales " hay	1880 @	1.30	24.44
	3 " " straw	512@	90c	4.59
				$89.91

Schedule D.

THIRD COUNT.

1. In the month of April, 1911, Charles A. Feick, in his lifetime agreed with plaintiff to purchase from the owner thereof a certain plot of ground known as Turnbull lot on the corner of Fillmore street and Market street, in the City of Newark, New Jersey, and to forthwith erect a building thereon, for use by plaintiff in its business of baking and selling bread; and plaintiff at the same time agreed to pay to said Charles A. Feick the taxes on said plot of ground and the interest on the purchase price.

2. Plaintiff repeats paragraph 2 of the first count.

3. The said Charles A. Feick did in his lifetime purchase said plot of ground, but did not erect a building thereon, and the said Bertha E. Feick, as executrix, has not erected a building thereon.

4. Plaintiff has paid interest as agreed, to the said Charles A. Feick in his lifetime, and to the said Bertha E. Feick, as executrix, since his death, in the total sum of $417.21, and has paid taxes on the said land for the year 1911 to the City of Newark, in the sum of $53.19, and water taxes in April, 1912, to the City of Newark, in the sum of $75.01, making a total of $545.41.

5. Plaintiff has collected rents for the use of said land in the sum of $68.00, and the City Water rent from Charles A. Feick on July 24, 1911, in the sum of $40.00, making a total credit of $108.00.

6. Plaintiff alleges that the agreement not having been carried out by the said Charles A. Feick, or by the said executrix, it is entitled

Schedule D.

to be reimbursed in the amount of the difference between the interest and taxes paid by it, and the moneys received for rent and water rent as aforesaid; which is a balance of $437.41.

Plaintiff claims damages under this third count of $437.41, together with interest thereon from January 1, 1912.

FOURTH COUNT.

1. On June 13, 1912, plaintiff and defendant Bertha E. Feick, executrix of the last will and testament of Charles A. Feick, deceased, entered into a written agreement for the sale to plaintiff of certain lands and premises in the City of Newark, located on Market street, Frederick street and Fillmore street; which said agreement plaintiff brings into court.

2. In said written agreement, plaintiff agreed to pay $1,000.00 in cash upon the execution of the agreement, and plaintiff did pay said sum of $1,000.00 in cash to the defendant on June 13, 1912.

3. In said written agreement, defendant agreed to apply to the Orphans' Court of Essex County for confirmation of said sale, and that in the event of her being unable to obtain such confirmation she would repay to plaintiff said sum of $1,000.00.

4. In said written agreement, the defendant also agreed that if the sale was not consummated within sixty days from said June 13, 1912, plaintiff should have the option to terminate this agreement, and that in the event of its so doing, she would repay to plaintiff the said sum of $1,000.00.

5. Defendant has not obtained confirmation of said sale from the Orphans' Court of the

County of Essex, and plaintiff has exercised its option to terminate the agreement, and has so notified the defendant, and has demanded repayment of said sum of $1,000.00.

6. Defendant has not repaid said sum of $1,000.00 to plaintiff and still owes the same to plaintiff.

Plaintiff demands damages under this fourth count in the sum of $1,000.00, together with interest thereon from June 13, 1912.

FRANK E. BRADNER,
Attorney of Plaintiff.

Order to Show Cause.

Filed March 23, 1916.

Upon reading the bill of complaint in this cause and the affidavit hereto annexed, and on motion of Pitney, Hardin & Skinner, of counsel with the complainant,

It is on this Twenty-third day of March One Thousand Nine Hundred and Sixteen, Ordered that the defendants show cause at the Chancery Chambers, in the City of Newark, on the 28th day of March inst., at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the said defendants should not be enjoined and restrained according to the prayer of the said bill and for such further relief as may be just; and

It is Further Ordered, that the said Hill Bread Company, its agents, attorneys and employees, in the meantime and until the further order of this Court in the premises, desist and

refrain from doing anything further in the prosecution of the action in the Supreme Court of this state instituted by said Hill Bread Company, as set forth in said bill, and that the said defendants, their attorneys, agent and employees, desist and refrain from any other proceeding or action in the courts of this state in any way involving any inquiry into the question of the indebtedness between said defendants and said complainant.

It is Further Ordered, that true copies of the said bill and affidavit and of this order be served on Frank E. Bradner, the attorney of the defendant, Hill Bread Company, in said action at law and on the said corporate defendants respectively within two days from the date of this order.

E. R. WALKER,
C.

Respectfully advised,

J. E. Howell,
V. C.

Order for Preliminary Injunction.

Filed March 29, 1916.

An order to show cause having been made in the above entitled cause on the filing of the bill of complaint and the affidavit annexed thereto, requiring the defendants to show cause at the Chancery Chambers in the City of Newark on the 28th day of March then next, at ten o'clock in the forenoon or as soon thereafter as counsel could be heard, why the said defendants should not be enjoined and restrained according to the prayer of the said bill and for such further relief as might be just, and it appearing that Frank E. Bradner, solicitor for the defendant, Hill Bread Company, and McCarter & English, solicitors for the defendant, Union National Bank, consent hereto;

It is on this 28th day of March, 1916, on motion of Pitney, Hardin & Skinner, solicitors for the complainant, Ordered that the said Hill Bread Company, its agents, attorneys and employees, pending the final hearing of this cause and until the further order of this court in the premises, be restrained and enjoined from doing anything further in the prosecution of the action in the Supreme Court of this state begun by the said Hill Bread Company against the complainant in this cause, and that the said Hill Bread Company and the Union National Bank, their attorneys, agents and employees be restrained and enjoined from any other proceeding or action in the courts of this state against the complainant in this cause in any way involving any inquiry into the question of the indebtedness between said Hill Bread Company, the Union National Bank and the complainant in this cause.

And it is Further Ordered that the costs of this motion abide the result of the final hearing of this cause.

E. R. WALKER,
C.

Respectfully advised,

John E. Foster,
V. C.

We hereby consent to the making and entry of the above order.

McCARTER & ENGLISH,
Solicitors of the Defendant,
Union National Bank.

Answer of Hill Bread Company.

Filed.

The answer of Hill Bread Company, a corporation, one of the defendants in the above stated cause, to the bill of complaint of Bertha E. Feick, executrix of the last will and testament of Charles A. Feick, deceased.

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted.

4. Defendant has no knowledge or information sufficient to form a belief as to the allegations in paragraph 4.

5. Paragraph 5 is admitted.

6. Defendant has no knowledge or information sufficient to form a belief as to the allegations in paragraph 6.

7. Defendant admits that a decree was made on March 26, 1915, as alleged in paragraph 7, but denies that the decree is correct as to the amount of the claim of Union National Bank, and denies that the moneys on deposit and the proceeds from the sale of collateral, were properly applied on the claim of said Union National Bank; and admits that the decree adjudges the estate of said Charles A. Feick to be insolvent.

8. Defendant admits paragraph 8 to the extent, that a decree was made on April 23, 1915, directing the payment of a dividend of 45%, but as to the other allegations, defendant has no knowledge or information sufficient to form a belief.

9. Paragraph 9 is denied.

10. Defendant denies that it has ever been requested by the complainant to pay anything to Union National Bank, and denies any liability to said bank, except as hereinafter stated.

11. Paragraph 11 is admitted.

12. Defendant has no knowledge or information as to the allegations in paragraph 12, sufficient to form a belief.

13. Paragraph 13 is admitted.

14. Paragraph 14 is admitted, except as to the allegation that complainant is entitled to offset any dividends paid to said Union National Bank, which is denied.

15. Paragraph 15 is admitted, but defendant insists that the allegation is irrelevant and immaterial and should be stricken out.

16. Paragraph 16 is admitted, except the allegation that the defendant did not furnish plans and did not request the erection of said buildings and has had the uninterrupted use of

the same, and has been in possession thereof, which is denied.

17. Paragraph 17 is admitted and defendant says that it was not necessary to file a claim for the moneys alleged to have been paid in the third count of the defendant's complaint in the action at law, for the reason, that all the moneys were paid to said complainant after the death of said Charles A. Feick, with the exception of $56.22.

18. Paragraph 18 is denied, except that the complainant did send to the defendant on March 2, 1916, a check of her attorneys for $1,000.00, which the defendant refused to accept, because it did not include interest on said sum of money, and afterwards returned the said check to the attorneys of the complainant.

19. Defendant denies that the action in New Jersey Supreme Court is vexatious and harassing to the complainant, and denies that the complainant is entitled to set off any moneys paid by her to Union National Bank on account of the indebtedness of Charles A. Feick to said bank.

Defendant admits that the complainant is entitled to offset against its claims the note for $2,500.00 held by it and in addition thereto the sum of $500.00, balance due on the other notes given to said Charles A. Feick in his lifetime and now alleged to be held by said Union National Bank. Defendant has set forth in the next succeeding paragraph a statement of its transactions with said Charles A. Feick in relation to said promissory notes.

20. On September 13, 1910, Charles A. Feick had in his possession four promissory notes

made by the defendant to his order, as follows: A note for $2,000.00, a note for $3,500.00, a note for $3,000.00 and a note for $5,000.00; and also several notes of $416.67 each, which were afterwards on November 1, 1910, included in one note for $2,500.00, which represented rent due and payable to said Charles A. Feick.

On September 13, 1910, the said Charles A. Feick requested a payment of $10,000.00 on account of the notes which he then held, and as he was the treasurer of the defendant corporation he said that a note could be issued for $10,000.00 and the money borrowed from James Doyle & Company of New York, and that upon receipt of the $10,000.00 he would surrender to the defendant notes to that amount. On September 13, 1910, defendant corporation made its promissory note for $10,000.00 to the order of James Doyle & Company, which note was signed by the said Charles A. Feick as treasurer, and John J. Hill as president, and carried interest from its date. On the same day, James Doyle & Company gave to the defendant corporation a check payable to its order for $10,000.00, and the defendant corporation endorsed said check over to said Charles A. Feick, who deposited the same to his credit in the Essex County National Bank, and received the money. Upon the delivery of the check to the said Charles A. Feick, he was requested to surrender the promissory notes which he had in his possession, to the amount of $10,000.00, and he stated that he could not take the time then to get the notes, and would give his personal note to the defendant corporation, which he did. From time to time defendant corporation requested the said Charles A. Feick to surrender the notes that he

had, and he always made some excuse or other for the delay, and in the meantime insisted that new notes should be given to him as the others which he held fell due, and new notes were given from time to time, and the said Charles A. Feick renewed the note which he had given for $10,000.00 to the defendant corporation and the defendant corporation was obliged to renew its note, which it had given to the said James A. Doyle & Company. At the time of the death of the said Charles A. Feick he had in his possession promissory notes made by the defendant corporation, as follows:

A note for $2,000.00, a note for $3,500.00, a note for $3,000.00, a note for $5,000.00, and a note for $2,500.00, which covered the rents as aforesaid; making a total of $16,000.00, and he was indebted to the defendant corporation in the sum of $10,000.00, which he had expressly agreed to apply on the notes aforesaid and to surrender the notes to that amount.

Defendant corporation was not aware until after the death of said Charles A. Feick that he had discounted any of its promissory notes at the Union National Bank, or any other bank. Defendant corporation paid the note for $3,000.00, which was the first one that came due after the death of said Charles A. Feick. Defendant corporation has been obliged to pay to James A. Doyle & Company the sum of $10,000.00, which amount was actually received as hereinabove stated, by the said Charles A. Feick.

21. Defendant insists that the complainant should release the notes held by Union National Bank to an extent sufficient to surrender to the defendant notes to the amount of $10,000.00 to carry out and perform the agreement made by

the said Charles A. Feick with the defendant. The defendant is ready and willing to pay to the complainant the difference between the $10,000.00 and interest and the $3,000.00 and interest, subject, of course, to an adjustment of the merchandise claim of the defendant corporation against the estate of said Charles A. Feick.

22. Defendant insists that the claim set out in the third count of its complaint in the action at law, and also the claim set out in the fourth count of said complaint, are not relevant to the issue in this proceeding in equity, and that the complainant is not entitled to any relief in equity as to those two claims, and claims the same benefit as though it had demurred to the bill of complaint.

23. Defendant insists that the complainant is not entitled to any relief in equity until she shall first perform the agreement made by said Charles A. Feick, by taking up and surrendering promissory notes of the defendant corporation to the extent of $10,000.00 together with accrued interest thereon.

FRANK E. BRADNER,
Solicitor for and of
Counsel with Defendant.

The Answer of the Defendant, Union National Bank to the Bill of Complaint of the Complainant.

Filed.

This defendant for answer to so much of the bill of complaint as it is advised it is necessary and proper for it to make answer unto, answering, says:

1. Defendant admits the allegations of paragraphs 1, 2, 3, 4, 6, 7, 8 and 15 of the bill of complaint.

2. This defendant has no knowledge with respect to the allegations of paragraphs 5, 9, 10, 11, 12, 13, 14, 16, 17, 18 and 19 of the bill of complaint, which relate to transactions between Charles A. Feick and the Hill Bread Company, and the complainant and the Hill Bread Company, and this defendant leaves the complainant to make such proof with respect thereto as she may be advised is necessary.

3. This defendant says that as between the complainant and the defendant Hill Bread Company, and with respect to the equities which may exist between them as to the matters set forth in the bill of complaint this defendant is entirely neutral and interested only in securing payment of the amount of indebtedness owing to it from them. It is therefore a matter of indifference to this defendant what decree is made in this cause so long as its rights and remedies as a creditor of the estate of Charles A. Feick, deceased, and of the Hill Bread Company, are in no manner affected.

This defendant further says that nothing has been alleged in said bill of complaint which

would justify any curtailment whatever upon the full exercise by this defendant of its rights and remedies as a creditor of the estate of Charles A. Feick, deceased, and said Hill Bread Company, and this defendant, therefore, prays to be hence dismissed with its costs and charges in this behalf sustained.

McCARTER & ENGLISH,
Solicitors for Union National Bank.

Opening.

IN CHANCERY OF NEW JERSEY.

Between

BERTHA E. FEICK, Executrix, &c,

Complainant.

and

HILL BREAD COMPANY, *et al.*,

Defendants.

Transcript of testimony and proceedings in the above entitled case before Hon. John E. Foster, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, on Monday, October 16th, 1916, at 10 A. M.

APPEARANCES:

Mr. Waldron M. Ward, of Pitney, Hardin & Skinner, and Mr. Carl A. Feick for complainant.

Mr. Frank E. Bradner for defendant Hill Bread Co.

Mr. Arthur F. Egner, of McCarter & English, for defendant Union National Bank.

Court. Application being made by the complainant to amend the bill of complaint, I will allow the amendment, giving the defendants leave to meet it, amending their answer, if necessary.

Mr. Ward. Counsel for the Union National Bank produces at my request notes held by the Union National Bank at the time of the death of Mr. Feick, and I offer in evidence note for $25,000, signed by Mr. Feick, dated June 21,

1911, for four months, and endorsed by Mr. Feick.

(Marked Exhibit C 1.)

I next offer in evidence note of Charles A. Feick for $20,000, dated September 22, 1911, payable four months after date, and endorsed by Mr. Feick.

(Marked Exhibit C 2.)

I next offer in evidence a note of Charles A. Feick for $20,000, dated August 28, 1911, payable in four months after date, together with a certificate of Frederick Scharringhausen, Notary Public, of the presentation and protest of this note, and endorsed by Mr. Feick.

(Note and protest marked Exhibit C 3.)

Mr. Bradner. It is endorsed "Charles A. Feick by Frederick Scharringhausen, Attorney in Fact."

Mr. Ward. I next offer in evidence note of the Hill Bread Company for $5,000, dated August 1, 1911, payable four months after date to the order of Charles A. Feick, with interest, at the Union National Bank, endorsed Charles A. Feick, by Frederick Scharringhausen, Attorney in Fact, together with a certificate of Frederick Scharringhausen, Notary Public, of the presentation and protest of this note on December 1, 1911.

(Note and protest marked Exhibit C 4.)

Mr. Scharringhausen is the Notary for the bank and also has a power of attorney in fact for Mr. Feick, to endorse for him.

It is admitted that there is no question about Mr. Scharringhausen's authority to endorse the notes.

Opening.

Mr. Ward. I offer in evidence note of the Hill Bread Company for $2,000, dated September 13, 1911, payable four months after date to the order of Charles A. Feick at the Union National Bank, with interest, endorsed by Charles A. Feick, by Frederick Scharringhausen, Attorney in Fact, together with a certificate of Frederick Scharringhausen, Notary Public, dated January 15, 1912, of the presentation and protest of this note.

(Note and certificate of protest marked Exhibit C 5.)

Mr. Ward. I next offer in evidence note of the Hill Bread Company for $3,500, dated September 15, 1911, payable four months after date, to the order of Charles A. Feick, at the Union National Bank, with interest, endorsed Charles A. Feick, by Frederick Scharringhausen, Attorney in Fact, together with a certificate of protest of Frederick Scharringhausen, Notary Public, dated January 15, 1912, of the presentation and protest of this note.

(Note and certificate of protest marked Exhibit C 6.)

Mr. Ward. I offer in evidence proof of claim of the Hill Bread Company against the Estate of Charles A. Feick.

(Marked Exhibit C 8.)

Mr. Ward. I offer the proof of claim of the Union National Bank against the Estate of Charles A. Feick.

(Marked Exhibit C 9.)

Mr. Ward. I offer certified copy of the orders of the Orphans' Court of Essex County in the matter of the Estate of Charles A. Feick, including an order for the payment of forty-five

per cent. dividend, decree on exceptions to the claims, decree adjudging the estate to be insolvent.

(Marked as one Exhibit, C. 10.)

Mr. Bradner. There was no exception filed to the claim of the Hill Bread Company.

Mr. Ward. Counsel for the Union Bank produce a written statement of the manner in which the security held by the bank has been applied, including the proceeds of the sale of the Fidelity Trust Company stock, and the deposit to the credit of his account at his death. If there is no objection, I offer that as a statement of the manner in which they have applied their securities.

Mr. Egner. May it appear on the record that the collateral was sold on January 20, 1915, the date of that statement?

Mr. Bradner. I don't know who sold it, except what the bill says.

(Statement referred to marked Exhibit C 11.)

Mr. Ward. I offer the receipt of the Union National Bank under date of May 1, 1915, for $13,307.99 in payment of the first dividend of 45% on the claim of the bank as filed and allowed against the estate.

(Marked Exhibit C 12.)

It is stipulated that the copy of the complaint at law annexed to the bill of complaint is a correct copy.

WILLIAM L. MORGAN, sworn for complainant.

Direct examination by Mr. Ward.

Q You reside in this city? A Yes.

Q And are a member of the firm of Pitney, Hardin & Skinner? A I am.

Q Have you been acquainted with the administration of the estate of Charles A. Feick? A I have.

Q Did you have to do with the sale of the stock that the Fidelity Trust Company held in the Union National Bank as collateral? A I did.

Q Was that stock, as far as you know, ever surrendered by the Bank to the executrix? A It was surrendered by the Bank to the purchaser, as I recall it.

Q Who made the sale of the stock? A The sale was made by the executrix with the consent of the Union National Bank who held the stock as collateral.

Q Did it in any way release its lien upon the stock?

Mr. Bradner. I object. You mean in fact?

Court. The arrangement made between the Bank and Mrs. Feick would be a proper inquiry.

Q Was there any understanding between the executrix and the Bank as to the disposition of the proceeds of the sale? A It was understood and agreed that the proceeds of the sale should be turned over to the Union National Bank, and they were less the commissions which were paid the broker upon the sale.

Q Subsequent to the death of Mr. Feick did you on behalf of the executrix—

Court. How was the stock sold, at public or private sale?

Witness. It was sold at private sale.

Court. And what determined its price?

Witness. The executrix, or I obtained for the executrix a statement from all the brokers in town as to the value of the stock their opinion of the present value of the stock and their statement as to whether in their judgment they considered a bid of $900 a satisfactory bid.

Court. Was that the price paid per share?

Witness. Yes, sir, that was the price paid per share.

Court. And the sale took place when?

Witness. I think in January, 1915, on or about January 20th.

Q After the death of Mr. Feick did you confer with the Hill Bread Company in reference to the notes made by the Hill Bread Company held by the Union National Bank and endorsed by Mr. Feick? A I did, with Mr. Hill, the president of the Hill Bread Company, many times.

Q Did you make any demand upon him with reference to the payment of these notes? A I did. I demanded that he pay the notes at the Union National Bank upon which the Hill Bread Company were primarily liable, and immediately prior to the first of May, 1915, which I recall to be about the time that the dividend of 45% was paid, I took the matter up with

Mr. Bradner, counsel for the Hill Bread Company, and asked him to pay the notes at the Union National Bank upon which the Hill Bread Company were primarily liable. Mr. Hill refused to make the payment, and Mr. Bradner said that Mr. Hill wouldn't permit it.

Court. Any reason given why the payment would not be made by Mr. Hill?

Witness. None whatever.

Q Did Mr. Hill make any claim to you that the notes had been paid? A He did not.

Court. What did he say, if anything, about it?

Witness. Nothing other than that the Hill Bread Company would never pay those notes, and I might also add that I took the matter up with Mr. Scheerer, the president of the Union National Bank, and asked him on behalf of the Bank to enforce the liability of the Hill Bread Company, which was a primary liability upon the notes and required that the Hill Bread Company pay them.

Q Did he comply with that demand? A This Mr. Scheerer refused to do.

Court. Did he give any reason?

Witness. He did.

Court. What?

Witness. He was afraid that he might lose the account of the Hill Bread Company if he took such action.

Cross examination by Mr. Egner.

Q Did the stock certificates covering the Fidelity stock leave the possession of the Union

National Bank until they were transferred to the purchaser? A Not to my knowledge.

Q As far as you know, they remained in the possession of the Union National Bank until they were delivered to the purchaser? A They did.

Examination by the Court.

Q When did you first speak to Mr. Hill about the payment of the notes, do you recall? A Soon after the death of Mr. Feick, I spoke to Mr. Hill a number of times; I cannot recollect the dates.

Q Did he know or did you inform him at that time that the notes were under protest and being held by the Union National Bank? A He knew that they were held.

Q What did he say that indicated that he had that knowledge? A I cannot say specifically that he said anything more than to recognize that those notes were there and were held there, and he knew evidently all about them.

Cross examination by Mr. Bradner.

Mr. Bradner. I call for my letters to Pitney, Hardin & Skinner, dated May 27, 1915, and May 20, 1915.

Mr. Ward. You may use copies, if you have them.

Q You came over to my office, did you not, to talk to me about these notes? A I did.

Q And did you not suggest at that time that the claim of the Hill Bread Company against the estate and claim of the Feick Estate against the Hill Bread Company, and claim of the Union National Bank against the Feick Estate

were mutual claims, and could all be adjusted? A I suggested to you at that time that the solution, in my opinion, of the entire matter was the payment of the notes held by the Union National Bank, the notes by the Hill Bread Company, and then the recognition of the claim of the Hill Bread Company against the Feick Estate; the same claim had been proven both by the Union National Bank and by the Hill Bread Company against the Feick Estate.

Q You thought it was the same claim? A I did.

Q Were you aware at that time that Mr. Hardin had written a letter in 1911, October 13, to the president of the Hill Bread Company, to the effect that his opinion was that this $10,000 note held by the Hill Bread Company was an accommodation note? A I don't think I was.

Q Did you ever take the matter up with Mr. Faulks, of the firm of Lindabury, Depue & Faulks, who represented the Hill Bread Company? A I don't recall of ever having taken it up with them.

Q Or Mr. Twining? A I don't recall ever having taken it up with him.

Q I show you a carbon copy of a letter dated May 20, 1915, and will ask you to read that over and see if it refreshes your memory of the receipt of the original letter addressed to Mr. Hardin? A I believe that such a letter was received by Mr. Hardin, and I think that I saw the original.

Mr. Bradner. May I read it in evidence now?

Court. Yes.

(Letter referred to and read and marked Exhibit D 1 for identification.)

Q I show you Mr. Hardin's answer dated May 20, 1915? A Yes.

Q That is Mr. Hardin's signature? A Yes.

Mr. Bradner. I offer that for identification.

(Marked Exhibit D 2 for identification.)

Mr. Bradner. I also offer copy of my letter of May 27, 1915, to Mr. Hardin.

Q Do you recognize that as a copy of the letter I sent to Mr. Hardin? A I remember this letter; I am sure that Mr. Hardin received that letter, if that is a copy.

Mr. Bradner. I offer this copy in evidence for identification.

(Marked Exhibit D 3 for identification.)

Q I have Mr. Hardin's letter of May 28, 1915, and show it to you, Mr. Morgan. A Mr. Hardin sent that letter.

(Marked Exhibit D 4 for identification.)

Mr. Bradner. I call for the letter of June 3, 1915, to Pitney, Hardin & Skinner.

Mr. Ward. It is not in the file I have here; you may use a copy, if you have it.

Q I show you a copy of a letter to Pitney, Hardin & Skinner, dated June 3, 1915; have you seen that before? A I am not sure, Mr. Bradner, that I ever saw this letter; I don't recall it.

Q I show you a letter of December 28, 1915, signed John R. Hardin, addressed to me; can you identify that? A That is Mr. Hardin's signature.

Q In that letter of December 28 he refers to my letter of the 27th instant, 1915. A I believe we did receive such a letter; whether that

is an exact copy of it or not, I don't know, but I remember seeing a letter with practically the statement contained in that one. I refer to the letter from Mr. Bradner to Pitney, Hardin & Skinner, dated December 27, 1915.

Mr. Bradner. I offer the copy of the letter dated December 27, 1915, for identification.

(Marked Exhibit D 5 for identification.)

Mr. Bradner. I offer in evidence the letter from Mr. Hardin of December 28, 1915, to me, for identification.

(Marked Exhibit D 6 for identification.)

Q Then the action at law was brought, as far as you recall it? A Yes.

Q And the estate applied for an injunction to restrain those proceedings? A It did.

Q Going back to the sale of the Fidelity Trust Company stock, at that time had there been any announcement made which had reached your ears as a representative of the Estate, that the Fidelity Trust Company was about to declare a large stock dividend? A There had not.

Q You don't know that it was commonly rumored on the street? A No, sir; I had never heard it.

Q Was a large stock dividend declared very soon after that sale of January 20? A I believe that there was.

Q How soon? A I cannot say how soon afterwards, but sometime after.

Q What was the amount of that dividend? A I don't remember the amount of the dividend at the present time, but I was interested enough to compute the value of the stock based upon that dividend, and found that it was sub-

stantially the same as what we had received in cash; in other words, the price of the stock as we sold it, the dividend evidently had been discounted and we sold it for the same price practically as the stock was worth after the turnover.

Q The dividend was in the shape of further stock? A Yes, I believe there was some other stock included in the dividend.

Q Share for share? A I think so.

Q Any cash? A I think so; $400, I believe, or thereabouts, in cash.

Q Who purchased the stock at the sale? A It was purchased by Mr. Young.

Q A lawyer? A A lawyer, or perhaps by Mrs. Young; I don't know whether the transfer was made to Mr. Young or to his wife.

Q That was a private sale? A It was.

Q And has it been reported to the Orphans' Court? A It has.

Q In the accounting? A I think so.

Re-direct examination by Mr. Ward.

Q In the course of your negotiations with Mr. Hill, did the legal representatives of the Hill Bread Company—when was it that the claim was first made that these notes held by the Union Bank had been paid in part by the check of $10,000? A I think the claim first appears as shown in the correspondence.

Court. Between Mr. Bradner and Mr. Hardin?

Witness. Between Mr. Bradner and our firm.

Q You refer to the letter of May 27, 1915? A It seems to be the letter of May 27, 1915.

It is admitted by all parties that the Hill Bread Company had on deposit to its credit with the Union National Bank on the respective dates of the maturity of the three notes made by it, and has today, sufficient moneys to have met these obligations as they had matured, or to meet them now, if those notes were charged against the account of the Hill Bread Company.

COMPLAINANT RESTS.

JOHN J. HILL, sworn for defendants.

Direct examination by Mr. Bradner.

Q You are president of the Hill Bread Company? A Yes, sir.

Q How long have you been president? A Since it was founded, seventeen years.

Q Was Charles A. Feick the treasurer in his lifetime? A He was.

Q This company was organized by you and Mr. Feick, was it not? A Yes, sir.

Q How was the stock owned as to the amount of shares of the different parties? A At the time of organization?

Q Yes. A Eighty per cent; I had 40%; Henry L. Muller, 10%, and Mr. Feick—

Q Did that ownership continue in that way up to the time of Mr. Feick's death? A Yes, sir.

Q And since his death how has the stock ownership been represented? A How far do you want me to go?

Q Up to the time of Mr. Muller's death. A Mr. Muller died last February; I voted 80 shares, Muller voted 20 shares, Mr. Carl Feick

voted 1 share, Mr. Benedict Prieth 1 share, and Mrs. Bertha Feick 98 shares.

Q Did she attend any of the meetings of the stockholders? A No, sir, only by proxy.

Q Who held the proxy? A Mr. Feick, Carl Feick, the son.

Q Mr. Hill, did you make any agreement with Mr. Feick in September, 1910, relating to some outstanding notes of the Hill Bread Company held by him? A Yes, sir; he sent for me.

Q To come where? A He sent for me to have a talk with him.

Q Where did you see him? A In his office.

Q Were you and he alone there? A Yes, sir.

Q At that time what occurred? A. He sent for me; he said, "Here, I have got quite a number of people and clerks outside there and I need money to go on transacting my business"; so he said, "Is there no way you can raise $10,000?" I said, "Mr. Feick, I think I can raise $10,000, but not to loan to you, on the condition that I will take up $10,000 worth of those notes." He said, "All right, how soon can you do it?"

Q Relying upon your memory, what notes did he have at that time? A He had $16,000.

Q Had those notes been given to him for moneys that he advanced to the company? A Yes, sir.

Q Except some for rent? A I assumed that was the same as cash.

Q Go on with your conversation with him at that first meeting. A I tried one friend and he wasn't able to help me out; so finally I went back and saw Mr. Feick that afternoon;

I told Mr. Feick, "I think I can get that money; I can get that money from Doyle." He said, "Go ahead."

Q Who was Mr. Doyle? A Mr. Doyle was the man we bought our flour from.

Q Did Mr. Feick know him? A Very well.

Q Following that out, what further occurred? A I went to New York with a note from Mr. Feick and got a check from Mr. Doyle; Mr. Doyle brought the check over, in fact; I gave him the note in our office, and Mr. Doyle and I went up to Mr. Feick's office with the $10,000 check drawn on the Central Trust Company of New York, James Doyle & Co.; we endorsed the check.

Q What note do you refer to? A I mean the check.

Q You say you had a note up there? A I meant a check.

Court. You took a note to New York?

Witness. Yes, I took that note he had made payable to James Doyle & Co., for the company.

Q What note do you refer to? A The $10,000 note, either September 12th or 13th, I am not positive.

Q A note by the Bread Company? A Yes, made by the Hill Bread Company.

Court. You used an expression that you took a note from Mr. Feick.

Witness. No, we signed a note, the Hill Bread Company did, and I went to New York and gave Mr. Doyle the note, and then the next afternoon Mr. Doyle came over with the check.

Q Have you got that original check, Mr. Hill? A No, that went back; I don't know whether I have it or not; I didn't bring it; perhaps you have that.

Q What was the amount of it? A $10,000.

Q You say that was made by the Hill Bread Company to James Doyle & Company? A Yes, correct.

Q And Mr. Doyle came out with you then to Mr. Feick's office? A He came to my office, and he and I both went up to Mr. Feick's office with the check.

Q Tell what occurred. A I said, "Mr. Feick, I have got you all right," and I laid down my check, and I said, "Hand over your notes," just like that; he said, "Well, I am too busy here now, never mind that," and he had a note all prepared for me; he said, "I have got to go out." That is what occurred that day.

Q Was Mr. Doyle there then? A He was with me.

Q What became of the check of Doyle & Co.? A That was endorsed by the Hill Bread Company, I as president, Mr. Feick as treasurer, and endorsed by Mr. Feick and deposited in the Essex County Bank to his credit.

Q How do you know that? A I saw the check.

Q You have seen the check? A Yes.

Q Do you know where the check is now? A I cannot tell; I have looked all over my safe for it, unless it is here somewhere.

Q The check would go back to Doyle & Co.? A Yes.

Mr. Bradner. Mr. Doyle couldn't find it either; I have seen it, too, and it is not disputed. It is on Mr. Feick's books.

Q You said something about "give me the notes"? A Yes, he said, "I ain't got any time"; he said, "Take this one and we will adjust it later on."

Q Did you go back there again to get the notes? A Who, me?

Q Yes. A I asked him several times for them and he would always put me off, a number of times.

Q What would he say? A He was too busy, but he would look it up some day and fix it all up.

Q That was in September, 1910? A Yes, sir.

Q Do you recall whether Mr. Feick went abroad that fall? A No, he went after that, the next year I think it was.

Q He was treasurer of the company then? A Yes, sir.

Q When the $10,000 note came due to Doyle & Company was it renewed? A Yes, sir.

Q I show you a note for $10,000, dated January 12, 1911, to the order of Doyle & Company; that is the one that was given in renewal? A Yes.

Mr. Bradner. I offer it in evidence.

(Marked Exhibit D 7.)

Q This note of January 12, 1911, was endorsed by whom? A John J. Hill, Charles A. Feick and James Doyle & Co.

Q I show you a note dated April 12, 1911, for $10,000, to the order of James Doyle & Co.; who made that note? A Hill Bread Company.

Q And by whom is it endorsed? A John J. Hill, Charles A. Feick, James Doyle & Co., with a certificate of protest annexed.

Mr. Bradner. I offer that in evidence.

(Marked Exhibit D 8.)

Q You stated that Mr. Feick had a note made out for you? A Yes, sir.

Q What note did you refer to? A I referred to the first note that he gave us for $10,000, for the check.

Q On what date did he have that made out? A Either on the 12th or 13th, I haven't got that in my mind; I was to bring back to my office, understand, the notes, $10,000 worth of the Hill Bread Company notes. Instead, all I did get from him was that $10,000 note, under the promise of his giving them to me some other day when he wasn't so busy.

Q He had to sign the $10,000 note to Doyle, as treasurer? A Yes.

Q And he endorsed it in his individual capacity, too? A Yes.

Q His personal note, when was that made out? A These were his personal notes to the Hill Bread Company September 12.

Court. No, the $10,000 one.

Q The original personal note for $10,000 to the Hill Bread Company, when was that made out; when you were there alone or when Mr. Doyle was there with you, or before you got there? A He had it made out before we got there; then he handed it to us just as soon as we met.

Q And that personal note for $10,000 has since been surrendered by you, has it not? A The original, yes.

Q And a renewal taken? A Yes.

Court. How long were the notes drawn for?

Witness. One for four months; the next, three, and the last, six months. That is the one in question.

Q It has been renewed twice, has it not? A Yes.

Q I show you a note dated April 12, 1911, for $10,000, purporting to be made by Charles A. Feick; is that the last renewal that you refer to? A That is the one he owes us.

Q Is that endorsed by anybody? A No, sir.

Q Has it ever been deposited or discounted or used for any other purpose? A No, sir.

Q The previous notes of which this is a renewal, were they either deposited by the Hill Bread Company or discounted or used in any way? A None whatever.

Mr. Bradner. I offer this note in evidence of April 12, 1911, made by Charles A. Feick.

(Marked Exhibit D 9.)

Court. Do I understand they were not discounted by the company with the Doyle Company?

Witness. No, sir, got cash from us; Doyle discounted the Hill Bread Company notes.

Q But you didn't use Mr. Feick's note? A No, that was lying in the safe; that is how Mr. Doyle came to get the money for us.

Q What did you do with the original Feick note, his individual note? A The one he gave to us?

Q Yes. A We had to return that when it was renewed.

Q What did you do with it when you got it; where did you put it, or what use did you make of it? A I put it in the safe.

Q Did you enter it on your books in any way? A Yes.

Q Who made the entries? A George Schmidt, under the supervision of our auditor, Mr. Leonard.

Q Who is your auditor? A Mr. Leonard.

Q Did you ever have returned to you any of the notes that Feick had in his possession at the time the Doyle check was given to him? A Not after that.

Q None of them returned to you? A None of them were returned to me.

Q Perhaps you don't understand me. The actual notes that he had were surrendered to you afterwards, were they not? A The $10,000 note?

Court. No, the $16,000 note.

Witness. How do you mean? Of course, he kept renewing them.

Q And when you renewed, the old notes were given up to you? A Yes, sir.

Q Why did you renew them? A Why did I renew them?

Q Yes. A He politely put me off; "Leave it go, I will fix them all up." He was nervous; as soon as I demanded the notes he would run all around the office and would get all excited; he was too busy.

Examination by the Court.

Q Did you know any of those notes forming the $16,000 were under discount? A No, sir.

Q Was that given as a reason at any time

for having them renewed? A They were notes of ours given four months, whenever I made a deal. I had already taken up the $10,000 worth; he would always put me off.

Q At the time you gave the renewal of any of these notes, did you understand that the old ones were under discount? A No, I always understood they were in his vault.

Q What did you understand his purpose was if they were in the vault or in the safe? A I didn't give it any thought; I thought he had them there, and at no time—

Q Didn't it occur to you that if he had them in the safe, or vault, he wouldn't want renewals of them? A There were quite a number of them; I didn't know that he had them discounted until after.

Q There were only four or five of them? A About five.

Q Why did you think he was entitled to any renewals of four or five notes of your company if he had the original notes in the safe or vault? A I don't know; the only reason why I thought so; I thought he has got them there, he is too busy, the way he always spoke to me.

Q And yet you were entitled to have all these notes, $10,000 of them, returned to you? A Yes, sir.

By Mr. Bradner.

Q I show you nine notes running from September 13, 1910, to April, 1911, and ask you whose notes they are? That is, by whom they were made? A All made by the Hill Bread Company.

Q To whom? A Charles A. Feick.

Q To whom were they delivered, if anybody? A To Mr. Charles A. Feick.

Q And what are these notes that I show you, actual transactions? A Actual transactions.

Q Is there any endorsement on any of them? A I don't see any now.

Q When were they returned to you?

Court. What do you mean by actual transactions; money loaned by Mr. Feick to the company?

Mr. Bradner. Do they represent actual transactions with Mr. Feick, either original loans—

Witness. Original loans, every one of them.

Q Money he loaned your company? A Yes; and they have been renewed.

Q These notes began September 13, 1910, and are renewals, are they not? A Yes.

Q On any of these renewal notes is there any endorsement whatever? A I don't see any.

Q Was there any there that you know of? A Evidently there was, I see it now.

Q You mean that it has been erased? A Before returned to me.

Q When did you discover that any endorsement on these notes had been erased? A About the 21st or 22nd of October, 1911, when that first $3,000 note came due; when the Bank drew that first $3,000 from our account.

Q A $3,000 note came due at the Bank and how was that paid? A They withdrew it from my account.

Q Charged it up to the company's account? A Yes.

Q Had you directed them to do that beforehand? A I knew nothing of it. I didn't know the notes were there.

Q Then when you went to the Bank, or when you were told that that $3,000 had been charged to you, what did you say to any officer of the Bank? A I told Mr. Scheerer; I said, "Those notes have no right here; those notes belong to me and don't you dare pay another one."

Q Who is Mr. Scheerer? A The president of the Bank.

Q What notes did you call his attention to? A He told me how much there was there at that time; there are $10,500 still due, $3,000 was paid.

Q When was this, in relation to the maturity of the $3,000 note? A That matured on the 20th of October.

Q When did you see Mr. Scheerer? A One or two days after.

Q It was before any other note came due? A Yes.

Q How did you find out that note had been paid? A I am not just—I cannot recall whether it was a difference in the account, or how it was; I cannot recall it just clearly now, but I know my attention was called to it, or else I wouldn't have gone up there.

Q The note that was given to Doyle & Company was carried for a while, was it not? A After Mr. Feick's death?

Q Yes. A That note fell due on October 12th and was protested and we paid it in May, two years after.

Q I show you a letter purporting to be from Doyle & Co. May 24, 1913; suppose you look at that. A That is about it.

Q You were called upon finally to take up that note? A Yes.

Q You paid it when? A May 22, with two years' interest.

Q When I say "you," I mean the company. A The company, yes, sir.

Q This note difficulty has been a subject matter of conversation between you and Mr. Morgan, has it not? A Not very much; at first it was through Mr. Faulks.

Q Mr. Faulks was your attorney at the time? A Yes, attorney for the company.

Q When did you first disclose to any person your claim that $10,000 had been paid to Mr. Feick to take up some of the notes that he held? A I think you are the first one I went right to on that.

Q Didn't you bring that out with Mr. Faulks? A They knew he owed me $10,000 and they had the papers, filed the claim, and I told them it was for notes, but they didn't seem to make any progress.

Court. The claim filed against the Feick Estate was prepared by Mr. Faulks or his firm?

Witness. His firm, yes, sir.

Q This action at law was brought by the Hill Bread Company; how does it happen that you brought that by the Hill Bread Company? A Because I had been begging and pleading for some kind of a settlement, and I got tired on account of the additional interest; there is $3,000 we claim we owe them.

Q Was there any discussion or action by the stockholders of the company? A Yes, there was a resolution passed that I should proceed.

Q Have you got that resolution here? A Yes, sir.

Mr. Bradner. I offer the nine notes which I showed the witness in evidence.

(Exhibit D 10.)

Q You produce the resolution adopted by the stockholders of the Hill Bread Company on November 9, 1915? A Yes, sir.

Q Is that the original? A That is the original.

Q The original minute of it? A Yes.

Mr. Bradner. I offer that in evidence; the portion of the minute containing this resolution:

"Whereas, there is a controversy existing between the Hill Bread Company and the Estate of Charles A. Feick, deceased, relating to notes of the company held by the Union National Bank and the note of Charles A. Feick held by the company, and what disposition should be made of the same; and

"Whereas, it is desirable to have the controversy adjusted as speedily as possible so as to determine the liability of the company, if any, or the liability of the Feick Estate, if any; now, therefore,

"Be it resolved by the stockholders of said company at a meeting specially called for the purpose on this ninth day of November, 1915, that the president of the company be, and he is hereby authorized to take such proceedings at law or in equity as he may be advised, to determine the liability of the company and the liability of the Feick Estate in relation to the notes

of the company held by the Union National Bank and the note of Charles A. Feick held by the company, and to have the matter finally disposed of."

"Motion made by John J. Hill, seconded by N. Doyle, proxy. Voted as follows:

Feick Estate..... 98 shares, yes
C. A. Feick..... 1 share yes
B. Prieth ..... 1 share yes
John J. Hill..... 80 shares yes
H. L. Muller..... 20 shares yes."

Q I show you two checks, Mr. Hill, both dated November 30, 1915, one purporting to be for the sum of $2,500, to the Estate of Charles A. Feick, the other for the sum of $500, to the Estate of Charles A. Feick; are those checks made by you? A Yes.

Q You are both president and treasurer now? A A single signature, yes, sir.

Q These two checks were made out for what purpose? A At your solicitation in accordance with an agreement you made with Mr. Morgan that they were ready to accept $3,000, and I immediately brought those checks up to you.

Q And have they been charged off on your account? A They have been charged off.

Court. You mean charged off in the bank?

Witness. No, on the books of the company; that money has been lying in the bank.

Mr. Bradner. I ask for the production of a letter of December 9, 1915, signed by me to Mr. John R. Hardin.

Mr. Ward. I am unable to produce it now; you may use a copy.

John J. Hill, cross.

Mr. Bradner. I will use and offer in evidence a copy of letter dated December 9, 1915.

(Marked Exhibit D 11.)

Cross examination by Mr. Ward.

Q You think it was on September 12, 1910, that Mr. Feick asked you for the $10,000? A Yes, sir.

Q The day before you actually gave him the check for that amount? A I cannot recall the date right on that, but thereabouts; it was two days before I gave him the check, when he called me to his office.

Q Why did you at once say that you couldn't loan him the money, but you could pay it to him on account of the notes? A I thought I knew something about law; no stockholder has a right to borrow money from a corporation.

Q Was it his suggestion that you should loan him $10,000? A Yes, he did suggest that —no, get him $10,000; get that right; get him $10,000.

Court. What did you understand that to mean, to apply on the notes that the company owed him?

Witness. I told him I would provided he would give me those notes.

Q Is that what you understood him to mean? A I told him that, or said I would get it for him on those notes.

Q How did you understand his first suggestion, as a request that you loan him $10,000? A He had a lot of employees in his office, that is what he told me, and he has got lots of business, but he has got to have money; "is there no way you can help me out and raise $10,000;"

then I told him I would, provided "you give me the notes," and he agreed to it.

Q Had he ever asked you before for payment of any of those notes? A No, sir.

Q Did he afterwards ask you to pay off the balance of the $16,000 notes? A No, sir.

Q You say that you went out and tried one source to raise the money but were unsuccessful? A Yes, sir.

Q Do you remember where that was?

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

Q Who were James Doyle & Company? A Our flour merchants.

Q Commission merchants? A Yes, sir.

Q Did they sell flour to the Hill Bread Company? A Yes, sir.

Q Mr. Doyle wasn't a stockholder at that time? A No, sir.

Q Is he a stockholder at this time? A He is.

Q How many shares does he hold?

Court. You went into the question of shares, Mr. Bradner?

Mr. Bradner. At the time of the transaction.

Court. Yes, and also at the time of the resolution in 1915.

A Twenty shares.

Q Is he the true owner of the shares standing in the name of Nathaniel Doyle? A Yes, he is.

Q Who first suggested that you should get the money from Doyle? A I did myself.

Q Was the note of the Bread Company to Doyle signed at once? A After I had made

arrangement with Mr. Doyle for the $10,000 note, Mr. Feick gave me the note; he signed it and I signed it. Doyle brought over the $10,000; I gave him the note, and Mr. Doyle and I went up to see Mr. Feick to present the check to him in anticipation of getting the $10,000 worth of notes.

Q Mr. Feick called you to his office and asked you for $10,000; you tried to get it one place and you could not, and then suggested that you could get it from Doyle? A I said at that time I thought I could.

Q Did you go to New York then to see Mr. Doyle? A I did.

Q That same day? A I cannot remember.

Q When did you give Mr. Doyle the note of the Hill Bread Company? A I gave him the note the moment he presented the check to me.

Q Was that a day after you had arranged with him to get the $10,000? A I cannot answer that, because I am not positive; within twenty-four hours.

Q Did you come back to Newark and report to Mr. Feick that you had arranged to get the money? A Yes, sir.

Q And was it that time that the note was made out to Doyle? A Yes, after I made the arrangements; there is no use of getting out the note until I got that and knew whether he was going to take it up or not.

Q Was Mr. Doyle with you when the note of the Hill Bread Company was made? A No, sir.

Q After you had that note did you go back to New York again with the note? A No, sir.

Q You met Mr. Doyle in Newark? A In my office.

Q He came to your office? A Yes, sir.

Q Did you come back to New York with him? A No, sir.

Q You gave him the note of the company at the company's office? A I did, and he handed me the check.

Q Was any reason suggested why Mr. Doyle went with you to the office of Mr. Feick? A Not that I know particularly; I told Mr. Doyle what it was for, and why I wanted the $10,000; I told him that in New York, and perhaps we might have thought of it, "Well, go on up."

Q Referring to the note of the Hill Bread Company for $2,000, dated September 13, 1910, part of Exhibit D 10, I ask you whether you gave that to Mr. Feick at the same time that you gave him the check for $10,000? A No, sir; I recall that was delivered in the morning.

Q Before— A The $10,000 interview at all, before it was presented; that was in the morning early when I gave him that.

Q On the same day? A It might have been a day before I gave it to him, but I know I handed him that before I handed him the $10,000 note.

Q Was it after you had arranged to give him $10,000? A He had that note then.

Court. Before your first interview with him?

Witness. No, but I didn't know whether I could get the money or not.

Q Did you give the renewal of the $2,000 note after you had arranged to get the $10,000 from Doyle? A That I cannot recall; it might have been after; it was before, I am sure of that.

Court. You mean before you had learned from Mr. Doyle that he could loan the money, or before—

Witness. I gave Mr. Feick that note before I had the assurance of the Doyle money.

Q The first note signed by the company to the order of James Doyle & Company was for how long, do you remember? A The first note to James Doyle was for four months; the second one three months and the last six months.

Q The first one was renewed by a note dated January 12, 1911, marked Exhibit D 7? A Yes, sir.

Q With that note before you, will you say whether the original note was dated September 12 or September 13? A I cannot say.

Q Your recollection is that the first note was four months? A Yes, sir; I kept the note right in the safe.

Q Your records of the corporation will show? A Yes; whether it was delivered on that day or not, I cannot say.

Q I show you the note of the Hill Bread Company to Mr. Feick for $3,500, dated September 14, 1910, part of Exhibit D 10; didn't you give that note to Mr. Feick after he had the check for $10,000? A Most assuredly; he wouldn't give me the other notes and then he insisted on this; I said, "You had better give me the others."

Q This appears to be the day after he gave you his note for $10,000? A Very likely.

Q And therefore it would be the day after you gave him the check for $10,000? A Very likely, and he gave me a note back; he gave it back to me afterward.

Q On this day, September 14, 1910, didn't he give you back an old note for $3,500, of which this is a renewal? A How do you mean, on September 14, 1910, did he give me back an old one at this time when I gave him this renewal?

Q Yes. A Yes, he gave me a renewal; he gave me the old one back for the same amount and I paid the interest.

Q That was a part of the notes which you understood were to be paid off by this $10,000 check? A I was going to get them all in bulk.

Court. That doesn't answer the question.

Witness. I cannot answer it any other way. I didn't consider it that far.

Mr. Bradner. We don't claim that they were not surrendered to us. The notes were surrendered when the renewals were made. We appreciate the difficulty of that position, but he is simply telling the fact that he gave new notes from time to time.

Q You did get some of the old notes back? A Yes, always renewed and got the old ones back. They were not extended.

Court. Did you get all the old notes back that the $10,000 was to cover and give renewals of the same?

Witness. Up to that time?

Court. Up to any time.

Witness. I guess I did.

Q At the time you gave him the check for $10,000 he had $16,000, didn't he? A Yes.

Q Consisting of a note for $5,000? A I don't recall $16,000; there was $13,500 in the bank, I learned after, and $2,500 the estate holds.

John J. Hill, cross.

Q The $13,500 was made up of a note for $5,000, one note for $3,500, and one for $2,000, and one for $3,000? A Yes.

Q Do I understand that Mr. Feick was to surrender to you all of those notes at one time? A Yes, he was to surrender $10,000 worth of paper at one time.

Q Those notes all bore interest, didn't they? A Yes, sir.

Q Did you at the time you had this understanding make any arrangement about adjusting the interest on the notes that you expected to get back? A I paid the interest on these, but he paid the interest on the $10,000 that he owed me; he paid me and I paid him.

Q After the time that he gave you the $10,000 note he paid the interest on it? He paid interest on the $10,000 note? A Yes.

Q And renewed it twice? A Yes.

Q And the Hill Bread Company always paid interest on every one of those notes as they came due? A Yes.

Q And separately renewed each one of them as they fell due? A Yes, sir.

Q And renewed the notes which were those renewals, up to the time of Mr. Feick's death? A Yes.

Q These notes were renewed more than once? A Yes, ever since we started.

Court. He means after September, 1910?

Witness. Yes.

Q You said in your direct examination an entry was made in the books of the corporation when this $10,000 check was given to Mr. Feick; did you cause that entry to be made yourself? A Yes, sir.

John J. Hill, cross.

Q And direct what the nature of the entry should be? A Into the cash book, and followed in the note book.

Mr. Ward. Will you produce the books, please, Mr. Bradner?

(Cash book produced.)

Q Have you found the entry in the cash book of the Hill Bread Company? A Yes, sir, I have.

Q What is the date of the entry? A September 13, 1910, page 226.

Mr. Bradner. What does it show?

Q Cash book No. 6 you refer to? A Yes, sir. (Reading.) "James Doyle & Co. check delivered direct to Charles A. Feick, folio 872, $10,000 same date, bills receivable No. 438 folio 14, account C. A. Feick $10,000." Page 227, "September 13 Charles A. Feick check of James Doyle on Central Trust Company endorsed and delivered to Charles A. Feick direct; his note for same, even date, $10,000."

Court. Just above that I notice an item of James Doyle & Co. for $3,500, what is that?

Witness. Flour.

Mr. Bradner. September 13, bills payable, account of C. A. Feick $10,000. Ledger page 14.

Q The entries which Mr. Bradner first read were on the debit side of the cash book? A Yes.

Q And the entries which he read thereafter were on page 227 on the credit side of the cash book? A Yes.

Mr. Bradner. Page 228, September 13, Charles A. Feick note for J. D. & Co. $10,000.

Witness. That is when we got individual note, where we expected to get the other notes and got one single note. On the opposite page, September 13, 1910, James Doyle & Co. note from C. A. Feick for $10,000. That is on page 229.

Q On the same page, 227 of this book, I see entries under date of September 13, 1910, relating to three bills payable? A Correct.

Q Two on the 13th and one on the 14th? A Yes, sir. Those are all Mr. Feick's notes. The first one is for $5,000, the second for $2,000 and the third for $3,500. There was no money transaction in them; that was just a renewal.

Q Were those notes renewed on the date they appear on the books? A Perhaps I had all three there at one time, I don't know. Sometimes I go up, they come together, and hand over quite a few, and then as soon as I get a chance, and the next day or two days after he would hand them over to me.

Q What date does that signify, the date of the notes or what? A The date of the checks or the notes; it doesn't signify the dates they were delivered.

Q It signifies the date they were made out, the date from which they run? A Yes.

Court. Are these entries made during the day's transactions?

Witness. Yes.

Court. So that an entry on the 13th of September would indicate a transaction that took place that day?

Witness. You cannot go back.

Court. Or you cannot go ahead?

Witness. No, you cannot go either way.

Re-direct examination by Mr. Bradner.

Q When Mr. Feick agreed to surrender to you $10,000 worth of notes, why did you continue to renew the notes? A Assuming he would give them all together to me at one time and likely fix it up within a few days, and it was a hard job to make an attempt to get them out of him.

Q He has given to you all the notes that were outstanding on September 13, 1910? A They have been renewed right along.

Q And they were brought back to you with the endorsements erased? A Yes.

RECESS.

Mr. Ward. In view of the circumstances of this case, I think I am justified in asking that Mr. Doyle be excluded from the court-room during the remainder of the examination of Mr. Hill.

Re-cross examination by Mr. Ward.

Q Do you remember what day of the week it was Mr. Feick came to you and asked for the $10,000? A I cannot.

Q Do you remember what time of the day it was that you went to his office in response to that request? A In the afternoon.

Q Do you remember what day of the week it was that you went to New York to arrange with Mr. Doyle for the $10,000? A I do not.

John J. Hill, re-cross.

Q Do you remember what time of the day it was you went to New York? A I cannot really recall that.

Q Do you remember what day of the week it was that you and Mr. Doyle went to Mr. Feick's office? A 12th or 13th.

Q Do you remember what day of the week? A No, I cannot remember that.

Q Do you remember what time of the day it was that you met Mr. Doyle at your office? A I think about two o'clock.

Q Do you remember what time you went to Mr. Feick's office with Mr. Doyle? A We went up there immediately.

Q Did you have to wait to see Mr. Feick on that occasion? A Yes.

Q Did you have to wait long? A I don't remember now; I know we had to wait a few minutes.

Q Do you remember whom you saw there besides Mr. Feick? A That is the only one I looked for and the only one I went in to.

Court. That isn't responsive; did you see anyone there but Mr. Feick?

Witness. I cannot say, because we used to go there every day.

Court. Say if you remember.

Witness. No.

Q When you gave Mr. Feick the check for $10,000 what was it you said to him? A "Here is a check; give me the notes;" something alluding to that.

Q And he said what? A He said, "Well, now, I will fix that up later." He got excited and I handed him the check and he handed me a personal note.

Q Did he write that out in your presence? A No.

Q Did you ask him for a receipt for the $10,000? A No, sir.

Q What did you expect him to give you when you handed him the check for $10,000? A I expected to get $10,000 worth of Hill Bread Company notes.

Q Did you express any surprise to him when you got a personal note for his $10,000? A I did; I told him this wasn't right, and he said, "I will fix it up with you in a few days."

Q Was that the end of the conversation? A That was all right; he just shook hands and said, "All right, boys," he was in a hurry.

Q Did he leave the office then or did you leave the office first? A I don't remember.

Q Did you all go out together? A I don't remember.

Q Did Mr. Doyle say anything to Mr. Feick? A They shook hands together and had a little chat, as they always did.

Q Mr. Feick went to Europe the summer before his death, did he not; that is in 1911? A Yes.

Q And he was there about how long? A I cannot keep his time.

Court. Do you know?

Witness. I don't remember. About three months; I don't remember.

Q He was away during the summer of 1911? A Yes.

Q During that time were any of those notes renewed? During the time he was in Europe? A I think they were.

John J. Hill, re-cross.

Q Who signed them on behalf of the Hill Bread Company? A If there were any signed, they were signed by Frederick Scharringhausen.

Q What office did he hold. A Secretary.

Court. And by yourself as president?

Witness. And myself as president, yes, sir.

Q Was Mr. Scharringhausen in Mr. Feick's office in some capacity? A He acted as secretary for the Hill Bread Company.

Q He had an office with Mr. Feick, didn't he? A Yes, I believe he was employed by him.

Q When the renewals were signed in the summer of 1911, while Mr. Feick was away, who surrendered the old notes to you? A If there were any surrendered at all, it must have been Fred Scharringhausen, as near as I can recall; he is the only one that acted in his behalf in his absence.

Q You referred this morning to $3,000 made up of two checks, one for $2,500 and one for $500, and those checks were produced, and you also made some reference to an agreement with Mr. Morgan; you didn't make any such agreement yourself, did you, that he should accept the checks for $3,000? A Those checks are with Mr. Bradner, this $3,000 check.

Q You didn't make any agreement personally with Mr. Morgan? A That was with Mr. Bradner.

Court. That agreement, if it was made, was made with Mr. Bradner and not with you?

Witness. No, sir, with Mr. Bradner.

Re-direct examination by Mr. Bradner.

Q Do you remember when Mr. Feick went away in the summer of 1911? A I think it was in June.

Q How late in June? A I think the latter part of June, I am not sure. Young Mr. Feick was with him; he can tell the date.

Q I don't understand you to say positively that there were any renewals made while he was away? A I thought there were.

Q You don't know? A I am not positive.

Mr. Bradner. The three notes, Exhibits C 4, 5 and 6, show that they were renewed while Mr. Feick was absent in Europe, and signed by Frederick Scharringhausen, Secretary.

Q I show them to you; that is so? A Yes.

Q So that those three were signed in his absence? A Yes.

Q Who requested you to make out those notes? A These notes here?

Q Yes, those three. A I made them out myself, or had them made out.

Q Whose handwriting are they in? A My bookkeeper.

Q Did you have any conversation with Mr. Scharringhausen at the time? A I didn't care to on account of Mr. Feick's absence, awaiting his return.

Q Did you have any conversation with Mr. Scharringhausen? A None whatever

Examination by the Court.

Q Will you tell me, if you can, why, if those notes or the originals of them were to be returned to you when you made the payment of

$10,000 to Mr. Feick, you voluntarily, in his absence, and while you thought the originals were in his safe or vault, made out those renewals? A The only thing I can say is this: it was a matter of confidence, understand, absolutely matter of confidence. Mr. Feick loaned the Hill Bread Company money as far as I wanted to go, and I paid him back again, and it was purely and simply a matter that I thought Mr. Feick was a very busy man and that he would hand them all later.

Q That doesn't explain why you thought, if those original notes were in his safe, that there was any question or necessity for renewing? A I had confidence in him.

Q It is not a question of confidence; what was in your mind; why did you think it necessary voluntarily to make out those renewals? A I did it voluntarily because Mr. Feick wouldn't give me the others.

Q That is the only explanation you can give me? A Yes.

Q Mr. Feick was treasurer of the company in September, 1910, when he asked you to get him $10,000? A Yes.

Q He of course was familiar with the amount of money that the company had to its credit in the bank? A Every week he knew that.

Q He knew whether the company could or could not pay him $10,000? A Yes.

Q Did the company have money enough at that time to spare $10,000 from its funds to pay him? A No.

Further re-direct by Mr. Bradner.

Q Do you now whether Mr. Doyle had ever been with you at Mr. Feick's office before? A

Oh, a number of times; sometimes on business, sometimes on friendly visits.

Q They knew each other, then? A Yes, Mr. Doyle, we owed Mr. Doyle as high as twenty-five or twenty-eight thousand dollars for flour, and if we would run short, I would say, "Mr. Feick, give me a note for $5,000 so as to tame Doyle down a little bit." That was right after we started. You asked me a question: on September 30, 1910, we owed Doyle $6.43; we had in the bank $1,656.18. On that day we had $15,881.44 worth of flour in the house paid for; money was all in stock, paid for. That is why we didn't have the $10,000 to hand over.

NATHANIEL DOYLE, sworn for defendants.

Direct examination by Mr. Bradner.

Q Are you connected with James Doyle & Company? A I am, sir.

Q I show you Exhibit D 8, note for $10,000, dated April 12, 1911, to the order of James Doyle & Company, purporting to be made by Hill Bread Company; do you recognize that paper? A I do, sir.

Q Was it held by James Doyle & Company? A It was.

Q What is that, an original or a renewal? A That is a renewal.

Q What was the original amount? A It was sometime in September, 1910, as near as I can recall.

Q Here is Exhibit D 7, a note for $10,000, January 12; that seems to have preceded Exhibit D 8? A That is another renewal.

Q There was a renewal note September, 1910? A About that date.

Q What was the amount of that note? A $10,000.

Q Whose note was it? A The note of the Hill Bread Company to the order of James Doyle & Co.

Q Did James Doyle & Company get possession of that note? A They did.

Q And what did they give for it? A They gave a check for that amount of $10,000.

Q Have you got the original check? A I don't think we have it. My recollection is that we mailed it to Mr. Hill about a year or so ago. We have a letter—a carbon copy of a letter to that effect, and since that time I am not familiar as to what became of it.

Q But you did give the Hill Bread Company a check for $10,000? A We did.

Q Do you know whether that check was paid by you? A It was.

Q What was that transaction? A It was in the nature of a loan to the Hill Bread Company.

Q Did you know Mr. Feick? A I did.

Q How long had you known him? A I would say probably in the neighborhood of ten years at that time.

Q Had you known him in connection with the business of the Hill Bread Company? A Yes.

Q What were your dealings with the Hill Bread Company? A I sold them flour almost from the time they first started.

Q Where had you ever seen Mr. Feick? A Mostly at his office, on frequent visits that I used to make there during the year with Mr. Hill.

Q What became of your check for $10,000 to the Hill Bread Company, if you know from

observation? A On the day that I brought that check out, I went to the Hill Bread Company office, and Mr. Hill had a note made out, note due from him, of the Hill Bread Company to the order of the James Doyle & Company, and after some preliminary business discussion in the office, he said he was going up to Mr. Feick's office and wouldn't I like to go along; I said, "Certainly, I will go up and shake hands with him." Upon arriving at Mr. Feick's office we were detained in the outer office for six or seven minutes, and we were then usherd into Mr. Feick's office, which was at the end of a line of offices, and my recollection of the occurrence was to the effect that Mr. Hill preceded me in, and I right behind him. The usual salutation of "Good afternoon," and Mr. Feick stood up from behind his desk, and Mr. Hill presented him with my check and said to him, "Now, let us get those old notes out of the way." My recollection further is that Mr. Feick at that time looked at some kind of an electric mechanism he had on his desk that announced when people were outside that gave their name on this writing machine of some kind, and I was interested in it, and looked at it for a moment, and he said, "I am so busy, there are a couple of more names on there, I am pretty busy," and turned to Mr. Hill; he said, "Here is a note for you and those other matters we can take up some other time." He said, "I have got a good deal of work to do this afternoon," and shooed us out of the office.

Q Is that all that occurred, as you recall it? A Yes, all that I recall at the present time; it is a good long while ago.

Q Did you subsequent to that have any further conversation with Mr. Feick? A I probably had at different times later on, but I don't recall them.

Q In reference to this $10,000 transaction? A Nothing that comes to my memory at the moment.

Q Has the $10,000 been paid to Doyle & Company? A It has.

Q It has been paid since Mr. Feick's death? A Yes, it was paid subsequent to Mr. Feick's death, because I think we wrote to the Hill Bread Company we would like the matter settled, that it had been dragging too long.

Q I show you letter of May 24, 1913; did that come from you? A That is correct.

Q Does that refresh your memory as to the time of payment? A That must have been the time of payment, May 24, 1913, as we acknowledged it over our signature. That is my signature.

Cross examination by Mr. Ward.

Q Did Mr. Hill come to your office over in New York first and ask you for a loan of $10,000? A Yes.

Q You don't remember what day of the week that was? A No, I really cannot say; it was probably two or three days ahead of the actual date; it might have been one or two or three days, I cannot tell exactly, but before the actual handing over of the check.

Q Did he have the note of the Hill Bread Company made out at that time? A The day he visited my office?

Q Yes. A Not that I know of.

Q The first note was how long, do you remember, Mr. Doyle? A I really cannot say offhand.

Q You think it was for four months? A It was in that neighborhood; I cannot say offhand; it is quite a little time back, and I didn't refresh my memory from my own books before coming out today.

Court. Did the note carry interest or was the discount deducted?

Witness. It was a demand note carrying interest, the first one.

Q After Mr. Hill came to your office what was the next step in the transaction? A My coming out with the check one or two days afterwards. At the time he came in I was debating whether I would loan that amount of money or not. I didn't care to say to him at the moment.

Q Do you remember what time of the day it was that you went to Mr. Hill's office with that check? A I imagine I arrived there, it must have been just before noon, maybe; I usually go out either on the 11 or 11:30 train as a rule.

Q Do you remember what time of the day you went to Mr. Feick's office? A I should say probably in the neighborhood of two or three o'clock; between two and three, I imagine it was.

Q Did you understand the purpose of the visit to Mr. Feick's office? A The purpose of the visit was to hand over that check, as far as I knew at the moment, or at the time of the visit, because I was in the habit of going up there every once in a while to make a visit.

Q And Mr. Hill said what when he handed Mr. Feick the check? A He said, "Here is a

check for $10,000," as near as I can remember his words now, "where are those notes we have been talking about?"

Q And Mr. Feick's reply? A Mr. Feick's reply was interrupted by the announcer, the beginning of his reply, which showed that there were some more people waiting for him; he said, "I am too busy at this moment to take this matter up, here is a note for the $10,000, and we will settle that matter up"—I don't know whether he said "later" or "very soon."

Q Did Mr. Hill express any surprise at Mr. Feick's reply? A No, not at that moment; when he got outside he said, "Well, there is the usual way of doing things, always rushing and always in a hurry."

Q Did Mr. Feick come out of the office with you? A Unless he followed right behind me, I cannot say.

Q Do you recall that he said he had to go out of the office? A He said at the time he was very busy, I know, and this announcing proposition he had there gave him a couple of more names that seemed to take his attention. I don't know what it was, of course.

Q How long were you detained in Mr. Feick's office before you were ushered in? A I should say somewhere between six and eight minutes, maybe.

Q You are a stockholder in the Hill Bread Company, are you not? A At the present time, yes.

Mr. Bradner. I would like to see Mr. Feick's account showing that check transaction.

(Book produced.)

Court. I would like to ask Mr. Hill a question.

JOHN J. HILL, recalled.

Examination by the Court.

Q When you got this note from Mr. Feick did you have it discounted? A No, sir; I never touched his note, I always threw it right in the safe.

Q Was it renewed? A Oh, yes.

Q What was the purpose of having it renewed if it were not discounted? A Because he wouldn't give me the cash or he wouldn't give me the other notes and I had to do something.

Q If you threw it in the safe why was it necessary to have the original note renewed; why didn't you leave the original in the safe? A He asked me to bring it up; he gave me a note and asked me for the other one. We got into that custom.

Q You said he paid you interest on this note? A He paid the interest on the note, certainly, and then we renewed the note; he paid the interest and we transferred the interest right over to James Doyle & Co. The note never left our possession.

Q I didn't understand the reason for making the renewals. A It has been our custom for seventeen years; if it was a two months' note, we would renew it.

Mr. Bradner. The other side has produced Mr. Feick's account showing the check transaction; it is a book marked "Ledger," and it is agreed this is Mr. Feick's personal ledger.

On page 193 there is an entry on the credit side of the ledger, "James Doyle 1910, September 13, check $10,000."

Mr. Hardin. It was deposited in the Essex County National Bank to the personal credit of Charles A. Feick on September 14, 1910. It says here "Check of James Doyle."

Mr. Bradner. That is admitted.

Mr. Hardin. And I admit that on page 152 of a book called "Blotter 5," taken from Mr. Feick's office after his death, there is an entry indicating that on September 14, 1910, check of James Doyle for $10,000 was deposited to the credit of Charles A. Feick in the Essex County National Bank.

HILL BREAD CO. DEFENDANTS REST.

Mr. Egner. I would like to have leave later to offer any evidence we desire; at present I do not think we are called upon to offer anything. I do not think there is any doubt about the facts so far as we are concerned.

FREDERICK SCHARRINGHAUSEN, sworn in rebuttal for complainant.

Direct examination by Mr. Ward.

Q Are you a resident of this city? A I am.

Q Counsellor at law of the State of New Jersey? A I am.

Q Did you know Charles A. Feick? A I did.

Q And had been acquainted with him for many years before his death? A Yes, I was.

Q You are acquainted with Mr. Hill of the Hill Bread Company? A I am.

Q Were you an officer of the Hill Bread Company? A Yes, I was secretary.

Q For what period? A From the time of its organization until possibly two years after his death; I think that is about the time.

Q Two years after Mr. Feick's death? A Yes.

Q Sometime in 1913? A About that time.

Q Were you associated with Mr. Feick in the practice of law? A I was employed by him.

Q You were in his office? A Yes.

Q For many years prior to his death? A Yes.

Q Are Exhibits C 6 and C 5 and C 4 signed by you as secretary of the Hill Bread Company? A Yes, sir, they are.

Q What, if anything, do you remember regarding the circumstances surrounding the execution of those notes? A Those notes were executed during the period that Mr. Feick was in Europe, and those notes are renewal notes which had been renewed from time to time and had been discounted in the Union National Bank. The reason I signed them as secretary was a period of time that Mr. Feick was in Europe.

Q Did you surrender any old notes to Mr. Hill at the time those were signed? A Yes, when those notes were renewed Mr. Hill received the notes for which those were the renewal notes.

Q For like amounts? A I should say so, without referring to anything; that is my recollection, like amounts.

Q Did he at that time say anything about the old notes having been paid or satisfied in any way? A Not to me.

Q Did you ever hear him say anything to Mr. Feick in respect to such a claim? A No, sir, never heard him say anything to Mr. Feick.

Cross examination by Mr. Bradner.

Q Have you any record of the notes? A There was a note book; I personally have no record of it.

Q Mr. Feick kept a note book? A Yes, I kept one to keep track of these notes.

Q Is it here, do you know? A Yes, I think they have it here.

Q Will you produce it? (Book produced.) Find the record of the note of which Exhibit C 4 is the renewal, Exhibit C 4 being note dated August 1, 1911, for $5,000. A The date of the note of August 1, 1911, the drawer was the Hill Bread Company in favor of Charles A. Feick, and was payable at the Union National Bank in four months, $5,000 with interest.

Q What follows after that? A "C. A. F." —credit I presume that means.

Q Who wrote that? A I did.

Q That was a renewal of a preceding note, that is one we have here; the note you just read is the one we have here? A Yes.

Q Is that a renewal of a preceding note? A Yes.

Q Find that, please. A One dated April 1, 1911; made by Hill Bread Company to the order of C. A. Feick, payable at the Union National Bank four months, and payable August 1, 1911, $5,000 and interest.

Q What does it say after that? A "C. A. F. endorsed."

Q Who wrote that? A I did.

Q Can you trace that note back? A "December 1, 1910, Hill Bread Company, note to

the order of Charles A. Feick, payable at Union four months and due April 1, 1911, $5,000 and interest. C. A. F. end."

Q Trace it back further. A "August 1, 1910, Hill Bread Company Charles A. Feick payable at the Union in four months and due December 1, 1910, $5,000 and interest. C. A. F. end."

Q It does not say anything about its being discounted, does it, in the remarks? A No. I made the record from the fact that I had discounted it; I note the fact that C. A. F. endorsed it, that is all.

Q In the note preceding that of August 1, 1910, one of July 12 to Rose Stratton for $2,500, it says under "Remarks," "Dis. C. A. F." What does "Dis." mean? A Discounted.

Q When the note was discounted didn't you enter it there "discounted"? A I did in that case, the Stratton note; I know that it was discounted.

Q Whenever a note was discounted did you make a note of it on that book that it was discounted? A I didn't do it always, Mr. Bradner.

Mr. Hardin. There are no notes there that were discounted?

Witness. I am not sure; I think the notes had been discounted, and that is how I got a record of it.

Q Did you know, Mr. Scharringhausen that the Hill Bread Company held Mr. Feick's note for $10,000? A No, sir, I did not.

Q You didn't know anything about it? A No.

Q You were the secretary of the company? A Yes, sir.

Q I show you Exhibit D 9, being a number of notes; have you ever seen that note before? A Yes.

Q Did you know that Mr. Feick had previous to the date of that note given his note to the Hill Bread Company for $10,000? A I never knew it.

Q Did you know that the Hill Bread Company had paid a note to Doyle & Company for $10,000? A I did not know it.

Q It wasn't a matter that was taken up at any meeting of the Board of Directors? A We never had any meetings.

Q Never had any meetings? A No, Mr. Hill would come to Mr. Feick almost daily and they would have their confabs in Mr. Feick's office.

Q Was it one of those two-men corporations? A If you call it such.

Q Business carried on in Mr. Feick's office? A Yes.

Q Mr. Feick was really the controlling man, wasn't he? A I cannot answer that question.

Q Didn't he generally give orders to Mr. Hill as to what he wanted done? A I cannot answer that.

Q You cannot? A No, sir.

Q If there was any money to be supplied it came from Mr. Feick, didn't it? A My recollection is that Mr. Feick put up considerable money when this bakery was first organized.

Q Do you know whether about September, 1910, Mr. Feick needed any money particularly? A I don't know; I do not know that he needed any money particularly.

Q Did you know anything about his bank account in the Essex County Bank? A No, sir, no more than that he had an account there at the time.

Q You didn't know that he had deposited a check there for $10,000? A No, sir.

Q You knew all the other transactions of the Hill Bread Company with Mr. Feick? A No, sir.

Q You knew about all these notes? A About these notes, because Mr. Feick got me to take them down to the bank and discount them, and I followed out the renewals of them, as shown by this record.

Q Do you know anything about the erasure of Mr. Feick's endorsement on any of those notes? A Yes, sir, I know it.

Q Who did it? A I did.

Q Did anybody direct you to do it? A Mr. Feick directed me to do it.

Q Did he tell you why? A No, sir.

Q Did you take the endorsement off of the last notes that were renewed; these renewals of these three notes you have, when those were given to you, you surrendered the old note, and did you take the endorsement of Feick off the old note before it was surrendered? A I must have, it is not there; I must have done so.

Court. Do you know the reason or purpose for which the endorsement was erased?

Witness. He didn't state it; he wanted me to do it.

Q Mr. Feick and Mr. Hill were on very friendly and close terms, were they not? A Oh, yes, indeed.

Q Mr. Hill was in there nearly every day? A Yes.

Cross examination by Mr. Enger.

Q You say that you had charge of the discounting of these notes at the Union National Bank? A Yes.

Q You traced back the note for $5,000; the other two notes, being Exhibits C 5 and C 6; were they also renewals of other notes which had been discounted at the Union National Bank? A Yes.

Q And was the same series of renewals in connection with these two notes? A Yes, sir, as I recall it without comparing the dates; I know that there was a series of notes.

Re-direct examination by Mr. Ward.

Q What did you record in this book from which you read the entries; did you record only the notes which were discounted or did you record all of the promissory notes which Mr. Feick held? A The notes that I discounted that had gone through the bank; that is how they came into my possession and came through my hands; I felt I would have to follow them up, being discounted; that is my recollection.

Q Do you know how long this series of notes of the Hill Bread Company had been under discount in the Union National Bank? A I do not know positively. I don't know if this is the first entry of those notes or not.

Court. Have you any independent recollection without using the book?

Witness. No, sir; I don't know how far back.

Q Did you go back prior to September 13, 1910? A Yes.

Q And can you support your recollection in that respect by reference to this book? A The reference to this book tells me when I made the first entries in reference to these notes; I don't know whether that commenced the period of discount.

Q They had been under discount as far back as what time? A Apparently 1906, from this record.

Court. When you signed the three notes, C 4, C 5 and C 6, did you do so at Mr. Hill's request?

Witness. The notes were brought to the office and I signed them as secretary.

Court. Did you request renewals of them?

Witness. No, sir.

Re-cross examination by Mr. Bradner.

Q Your recollection is that all the notes of the Hill Bread Company to Feick were discounted by Mr. Feick? A I am only speaking of these that I know were discounted.

Q There may have been others that were not discounted? A It may be, for all I know.

Court. Apparently there is one for $2,500. That is admitted by all parties.

Mr. Hardin. That was in the safe when Mr. Feick died.

Q Here is a note dated July 1, 1911, for $2,500, which was signed by you as secretary; do you identify that? A It is one of the notes that came through and was renewed.

Q Why wasn't it put in the bank? A I cannot tell you.

Q What became of the note of which this is a renewal, referring to a note which hasn't been offered yet?

Mr. Hardin. It would not be in there unless it was discounted.

Witness. No; it may have been discounted.

Q "November 1, 1910, Hill Bread Company $2,500 C. A. F." What is the note on there in pencil? It says "Discounted Essex." A Yes.

Q Where payable? A Yes, I guess that was it.

Q It was discounted at the Essex County Bank? A Yes.

Q What is the note in pencil on there? A "Taken up $2,549.32, taken up by Mr. Feick's check."

Mr. Hardin. That is eight months ahead of this.

Q Has this note of July 1, 1911, ever been endorsed? A I cannot say.

Q Find the one of March 1, 1911. A I have no entry of March 1, 1911.

Mr. Ward. I offer in evidence the note of $2,500, dated July 1, 1911.

Court. The answer admits liability on that and $500 more?

Mr. Ward. Yes.

Court. Did Mr. Feick ever loan his credit or notes as an accommodation for the Hill Bread Company that you know of?

Witness. Not that I know of.

Q Are you familiar with Mr. Feick's books, Mr. Scharringhausen? A Only generally.

Q Did any one in the office have any special charge of his books? A Mr. George usually looked after his books; he followed out the entries.

Mr. Egner. I have here a transcript of Mr. Feick's account in the Union National Bank beginning May 31 and extending down to the time of his death; I had this prepared at the request of counsel on both the other sides, and neither of them has offered it in evidence. It may be helpful to the Court and I therefore offer it now.

(Marked Exhibit D 1 for defendant Union National Bank.)

ALL REST.

Opinion.

Filed January 30, 1917.

Submitted December 4, 1916.

Decided January 9, 1917.

Messrs. Pitney, Hardin & Skinner (Waldron M. Ward on brief) for complainant.

Mr. Frank E. Bradner for defendant, Hill Bread Company.

Messrs. McCarter & English for defendant, Union National Bank.

FOSTER, *V.-C.*

The bill is filed to restrain the prosecution of an action pending in the Supreme Court, in so far as it relates to an indebtedness claimed to be due the defendant, Hill Bread Company, from the estate of Charles A. Feick, on a note for $10,000 and on a current book account for $89.91; and for the determination of the liability of these parties on certain other promissory notes held by the defendant Union National Bank.

Complainant is the executrix of the last will and testament of Charles A. Feick, who died September 30th, 1911. At the time of Mr. Feick's death, the Union National Bank held three unmatured notes made by him amounting to $65,000, and at this time the bank also held four other unmatured notes for $5,000, $2,000, $3,500 and $3,000 respectively, made by the Hill Bread Company to the order of Mr. Feick, and endorsed and discounted by him with the bank. These notes carried interest, and were renewals of other notes for like amounts, which had been given by the Hill Bread Company to Mr. Feick for money borrowed from him from time to time.

At the time of Mr. Feick's death there was on deposit to his credit with the Union National Bank $23,500.01, which amount the bank applied in part payment of his personal note for $25,000, being one of the three, making the above mentioned total of $65,000 indebtedness, the other two being for $20,000 each. The bank also held at this time as collateral for the payment of any indebtedness owing to it by Mr. Feick, 30 shares of the stock of the Fidelity Trust Company of Newark, and this stock was sold by complainant, as executrix, and the bank for $26,730. This amount was applied in part payment of the balance of Mr. Feick's personal indebtedness to the bank, leaving due the bank, after the rebate and adjustment of interest, a balance on the three notes of Mr. Feick's of $19,073.33.

By a decree of the Essex County Orphans' Court made on March 26, 1915, the Feick estate was adjudged insolvent, and the claim of the bank duly filed against the estate was allowed to the amount of $29,573.33, this amount being made up of the balance above mentioned and of the total of three of the notes made by the Hill Bread Company endorsed and discounted by Mr. Feick, and amounting to $10,500; the fourth note for $3,000 having been charged to the company's account at its maturity.

Under an order of the Orphans' Court made on April 23, 1915, complainant, as executrix, was directed to pay a dividend of forty-five per cent. on all claims filed with her, and in conformity with this order she paid the bank $13,307.99, being a dividend of forty-five per cent. on the above amount for which its claim had been allowed. Of the amount so paid, $4,725 represents the forty-five per cent. dividend due

on the three notes of the Hill Bread Company. In addition to the notes mentioned, the Hill Bread Company admits being indebted to the estate for a note of $2,500 and interest, made by the company to Mr. Feick for rent due to him, and complainant admits the estate is indebted to the company on a note for $10,000, with interest, for money complainant claims was loaned by the company to Mr. Feick, and also for the sum of $89.91 due on a current book account.

It was under Section 69, 3 Comp. St. p. 3834, and Section 101, 3 Comp. St. p. 3850, which permits claims to be filed against an estate for debts due and payable in the future, upon a rebate of interest being made, that the bank and company filed their respective claims against the estate; and it seems clear, under the terms of the agreement respecting the collateral held by the bank, that it properly applied the proceeds of the sale thereof to the reduction of the indebtedness owing by Mr. Feick to the bank; and I think, under the doctrine of the case of *Camden National Bank* v. *Green,* 18 Stew. 546, affirming the opinion of the court below, reported in 1 Dick. 607, it is equally clear that the bank had the right to apply the money on deposit with it to the credit of Mr. Feick, at the time of his death, to the payment of his indebtedness to it *pro tanto;* and this was particularly the right of the bank, because the estate has been formally adjudged insolvent, and this insolvency gave to the bank the right to equitable relief. In *Crisp* v. *Dunn,* 27 Vr. 355, it was said:

> "That one who is indebted to an insolvent estate may set off his own debt against

> claims of such an estate upon him, but cannot purchase or acquire the debts of others to the estate to set off against such claims, was conceded in the argument to be the law, and the doctrine accords with reason and the deliverances of our courts."

I consider that the bank's claim was properly allowed for the amount named. The claim of the company on the $10,000 note and on the book account of $89.91 was also allowed, but no dividend was paid by the complainant thereon, because she contended that until the claim of the bank was satisfied, the company was indebted to the estate for more than the amount for which it filed its claim. She bases this contention on the ground that the company as maker was primarily liable to pay the bank the three notes aggregating $10,500 endorsed by Mr. Feick; that these notes had been given him by the company for a valuable consideration, and that the company should also credit the estate with the note for $2,500 given by the company to Mr. Feick. In other words, she contends that the company is indebted to the bank and to the estate on these four notes to the amount of $13,000, with interest to be added, and that the estate is indebted to the company on the note and book account to the amount of $10,089.91, with interest to be added.

The company's answer to this is that in September, 1910, not knowing its notes to Mr. Feick were under discount in the bank, it paid him $10,000 on account of its indebtedness to him, which at that time amounted to $16,000; that it made this payment to him on his promise to surrender or return to the company its notes to the amount of this payment of $10,000, when

such payment was made; that at the time of payment Mr. Feick was very busy and instead of giving up $10,000 of the notes of the company, he gave to Mr. Hill, the president of the company, his personal note for $10,000, with interest. At this time Mr. Feick and Mr. Hill were the principal owners of the company's stock, and whatever the original arrangement may have been about this $10,000, it was afterwards apparently treated as a loan by the parties—a loan which the company had no legal right to make to one of its stockholders. Mr. Feick renewed his note for $10,000 from time to time and paid interest on it, and Mr. Hill kept the note in the company's safe; the company continued to renew its notes to Mr. Feick, including those which it claims he was to surrender, and continued to pay interest thereon, and received the old notes when the renewals were delivered. Although Mr. Hill claims he did not know these notes were under discount, he continued to voluntarily renew them and to pay the interest due thereon, for no apparent reason, even during the absence of Mr. Feick in Europe in the summer of 1911. The company's contention now is that by reason of its payment to and arrangement with Mr. Feick, his estate is now primarily liable for the payment of these notes to the bank. If the payment and arrangement were ever made as Mr. Hill claims, I find it was voluntarily abandoned; that the company treated the payment of $10,000 to Mr. Feick as a loan, and by the renewals of its notes to him it continued the relation of debtor and creditor, and it has filed its claim with the estate, treating the matter of the $10,000 note as an ordinary debt. As between it and the estate, the company is primarily liable to the

bank, as maker, for the payment of its notes, and until it satisfies this liability it should not be permitted to assert its claim on the note it holds against the estate; or if, in order to give effect to the order of the Orphans' Court in allowing it, its claim is to be regarded as a valid one against the estate, then its action at law on this claim should be restrained in order that the complainant may in this cause avail herself of an equitable set-off of the amount of the dividend paid by her to the bank on account of the company's notes, against the dividend due on the company's claim. At the time of Mr. Feick's death and ever since the company has had on deposit with the bank sufficient funds to pay its three notes.

In the interest of the other creditors of this insolvent estate, it seems clear that complainant should not be required or allowed to pay dividends to both the bank and to the company on the same claim. $10,000 of the company's claim is represented by a like amount included in the bank's claim against the estate, on Mr. Feick's liability as an endorser on the three notes of the company amounting to $10,500. The total amount of the combined claims filed by the bank for $29,573.33 and by the company for $10,089.91, is $39,663.24, on which at the time of filing there was due only $29,063.24. On this amount there has been paid to the bank a dividend of forty-five per cent., amounting to $13,307.99, and of this amount $4,725 represents the amount paid by the estate as an endorser on the company's notes.

The company admits, if the estate paid the bank the $10,500 on the three notes of the company, with interest, that it would have no further

claim against the estate for the payment of the $10,000 note, and it also admits that it would then be indebted to the estate for the excess of $500 paid on these notes, and in the further sum of $2,500 on its note for rent which the estate holds.

The dividends from the estate are not expected to be sufficient to satisfy the liability of Mr. Feick as an endorser on the company's notes, and no equitable ground has been suggested on which the court could direct complainant, as executrix, to treat the claim therefor as preferred, and direct its payment in full, to the detriment of other creditors of the estate, in order to relieve the company from possible liability, as the maker of these notes, for the payment to the bank of any deficiency that may be due thereon.

The company on paying the bank the amount due on the notes would be entitled to be subrogated to the rights of the bank, on its claim filed thereon against the estate, and the company would be entitled in making such payment to be credited with the amount of the dividends paid thereon by the complainant to the bank, and to any other dividend directed to be paid. The company's claim against the estate on the $10,000 note is based on a contingency, depending as it does on the company being compelled to pay the bank the amount of its notes on account of which it claims to have already paid Mr. Feick this $10,000. And this view is not altered whether we consider this $10,000 as a payment on account of these notes, or as a loan by the company to Mr. Feick on his note; nor does the fact that the company could not legally loan its money to a stockholder change the situation.

Opinion.

If the company insists on the payment of dividends on its claims, then it must indemnify complainant for the amount of dividends paid the bank on account of the company's notes, and also relieve the estate from further liability for the payment thereof, and if such insistment is not made and the company permits the bank to receive from complainant further dividends on account of these notes, then complainant is entitled, in order to protect her and the other creditors of the estate from having double dividends paid on the same claims, to set off the dividends paid, and to be paid the bank on account of the company's notes, against the dividend due the company, which is unpaid, and against any further dividend that may be payable on the company's claim.

In order that complainant may be indemnified for the dividends paid and relieved from further liability on the company's notes as stated, or that she may be able to equitably set off the dividends paid and to be paid the bank, against the dividends due and to become due the company on its claim, a decree will be advised restraining the action at law brought by the company against complainant so far as this action relates to the claim on the $10,000 note and on the current book account.

Final Decree.

Filed.

This cause coming on to be heard in the presence of John R. Hardin and Waldron M. Ward, of counsel with the complainant, and Frank E. Bradner, of counsel with the defendant, Hill Bread Company, and Arthur F. Egner, of counsel with the defendant, Union National Bank, and the pleadings having been read and the proofs taken, and the arguments of the respective counsel having been heard, and the court having duly considered the pleadings, proofs and arguments;

And it appearing to the Court that complainant's testator, Charles A. Feick, died insolvent, as by the decree of the Essex County Orphans' Court bearing date March 26, 1915, appears, and said testator was at the date of his death indebted to the defendant Hill Bread Company in the sum of $10,000.00, with interest amounting to $281.09, upon the promissory note by him made in his lifetime, dated April 12, 1911, and in the further sum of $89.91 upon a current book account; and that the defendant Hill Bread Company was at the time of his death to him indebted in the sum of $2,500.00, with interest amounting to $37.40, upon the promissory note by it made, dated July 1, 1911; and that the latter should be set off against the said indebtedness of said testator to said defendant; and that said defendant filed with the complainant its verified proof of its claim upon the indebtedness of said testator aforesaid, after setting off against the same its said indebtedness to him, and that no exception was made to the same;

And it further appearing that at the date of the death of the said testator the defendant Union National Bank held three promissory notes mentioned in the pleadings in this cause, made by the defendant Hill Bread Company to the order of said Charles A. Feick, and by him indorsed, one for $5,000.00, dated August 1, 1911, one for $2,000.00, dated September 13, 1911, and one for $3,500.00, dated September 15, 1911, and that said defendant Union National Bank filed with the complainant its verified proof of its claim upon said notes, and that the same was duly allowed;

And it further appearing that, in the due course of the administration of the estate of said testator, and on or about May 1, 1915, the complainant paid a dividend of 45% upon the claims presented to her, and that accordingly the sum of $4,725.00 was paid by complainant to said defendant Union National Bank upon its claim on said notes, but that the dividend of 45%, amounting to $3,525.12, upon the above mentioned claim of the defendant Hill Bread Company has not been paid by complainant;

And it further appearing by admission of counsel for defendant Hill Bread Company in open court that after final hearing of this cause and on or about April 28, 1917, defendant Hill Bread Company paid to defendant Union National Bank the amount remaining due on said notes by it held, of principal and interest, after crediting thereon the amount of the dividend so as aforesaid paid by complainant to defendant Union National Bank, upon an understanding between said defendant Hill Bread Company and Union National Bank that the claim of the defendant Union National Bank

against the estate of complainant's testator upon the said notes be assigned to said defendant Hill Bread Company;

And it further appearing that the defendant Hill Bread Company was primarily liable upon the notes aforesaid by it made, and held by the defendant Union National Bank, and that the defendant Hill Bread Company should have indemnified the complainant against any liability upon the said claim of said defendant Union National Bank on said notes and ought to reimburse her for the dividend heretofore paid to said defendant thereon, and that the payment as aforesaid by defendant Hill Bread Company to defendant Union National Bank of the amount remaining due on said notes extinguished said notes and the secondary liability thereon of complainant's testator and his estate, and any and all liability of his estate for the payment of dividends upon the claim heretofore filed by defendant Union National Bank upon the indorsement of said notes by complainant's testator;

And it further appearing that the dividend which has accrued to the defendant Hill Bread Company upon its claim aforesaid, and any dividends hereafter accruing thereon, ought to be set off against its liability to reimburse complainant for the sum heretofore paid as a dividend upon the said claim of the defendant Union National Bank;

And it further appearing that the defendant Hill Bread Company, on or about March 1, 1916, commenced an action at law against complainant in the New Jersey Supreme Court to recover judgment upon the above mentioned note for $10,000.00 and the above mentioned book

account of $89.91 (and upon other causes of action), notwithstanding no exception was made to its proof of its claim thereon, and that the prosecution of said action at law upon said causes of action is vexatious and inequitable;

It Is on this fifth day of November, A. D., 1917, by Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, Adjudged and Decreed and the said Chancellor, by virtue of the power and authority of this Court, doth Order, Adjudge and Decree that the aforesaid dividend of 45%, amounting to $3525.12, on the said claim of said defendant Hill Bread Company, be and it hereby is set off against the aforesaid sum of $4725.00, by complainant paid to said Union National Bank, and that complainant be and she hereby is wholly acquitted and discharged from any and all liability to said defendant Hill Bread Company upon or by reason of said dividend, and that the defendant Hill Bread Company is liable to pay to complainant the sum of $1199.88, with interest from May 1, 1915, and that the said sum should be retained and set off by the complainant against any dividend or dividends hereafter accruing to defendant Hill Bread Company upon its said proof of claim, and that complainant be and she hereby is wholly acquitted and discharged from any and all liability to defendant Hill Bread Company upon or by reason of any dividend or dividends, or portions thereof, hereafter so as aforesaid set off; provided that if such dividend or dividends so hereafter accruing to defendant Hill Bread Company and so as aforesaid to be set off are insufficient to fully pay and discharge the said sum of $1199.88 with interest as aforesaid, then complainant may,

and leave is hereby granted to her to apply at the foot of this decree for the issuance of a writ of execution to raise the said sum, and for such other and further relief as may be necessary in the premises to carry this decree in effect or otherwise as equity and good conscience may require;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the payment as aforesaid by defendant Hill Bread Company to defendant Union National Bank of the amount remaining due on said notes extinguished said notes and the secondary liability thereon of complainant's testator and his estate, and any and all liability of his estate for the payment of dividends upon the claim heretofore filed by defendant Union National Bank upon the indorsement of said notes by complainant's testator; and that the defendant Hill Bread Company, its officers, attorneys and agents, be and it and they hereby are strictly enjoined and commanded, under the penalty that may fall thereon, that it and they do, from henceforth and forever, absolutely desist and refrain from all further proceedings at law in the action against the complainant above mentioned upon the said note for $10,000.00, and the said book account of $89.91.

And it further appearing to the Court that the complainant is not entitled to an injunction against the prosecution of the action at law in the New Jersey Supreme Court at the suit of the defendant Hill Bread Company against the complainant in the pleadings in this cause mentioned, in so far as respects the third and fourth counts of the complaint in said action at law;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the prayer of the complainant's

Notice of Appeal.

bill of complaint for an injunction against the prosecution of said action at law in so far as respects the third and fourth counts in said complaint, be and it hereby is denied, and that the complainant's bill of complaint, as to those matters and things only, be and it hereby is dismissed, without costs.

E. R. WALKER,
C.

Respectfully advised,

JOHN E. FOSTER,
V. C.

Notice of Appeal.

Filed Nov. 15, 1917.

Hill Bread Company, a corporation, one of the defendants in the above stated cause, hereby appeals from the final decree made in said cause on November 5, 1917, and from the whole and every part thereof, to the Court of Errors and Appeals, in the last resort in all causes.

Dated November 12, 1917.

FRANK E. BRADNER,
Solicitor for and of Counsel with Defendants.

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

FRANK E. BRADNER,
Of Counsel with Defendants.

Petition of Appeal.

Filed December 5, 1917.

New Jersey Court of Errors and Appeals

Between.

BERTHA E. FEICK, Executrix of CHARLES A. FEICK, deceased, *Complainant-Respondent,*

and

HILL BREAD COMPANY, *Defendant-Appellant.*

Petition of Appeal.

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

The petition of Hill Bread Company, a corporation, one of the defendants in the above stated cause, and the appellant in the above stated cause, respectfully shows:

That your petitioner finds itself aggrieved by a decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date November 5, 1917, wherein the said Bertha E. Feick, Executrix of the last Will and Testament of Charles A. Feick, deceased, was complainant, and Hill Bread Company, and another, defendants; in the following particulars, to wit:

1. Because the said decree adjudges that the dividend of 45%, amounting to $3525.12, on the claim of said Hill Bread Company presented to the said Executrix, shall be set off against the

sum of $4725.00 paid by the complainant to the Union National Bank, and that the complainant shall be wholly acquitted and discharged from any and all liability to said Hill Bread Company by reason of said dividend.

2. Because the said decree adjudges that the Hill Bread Company is liable to pay to the complainant the sum of $1199.88, with interest from May 1, 1915.

3. Because the said decree adjudges that the sum of $1199.88, with interest from May 1, 1915, may be retained and set off by the complainant against any dividend or dividends hereafter accruing to said Hill Bread Company upon its claim presented to said Executrix, and that the said Executrix shall be wholly acquitted and discharged from any and all liability to said Hill Bread Company upon or by reason of any dividend or dividends or portions thereof, which may be hereafter set off as aforesaid.

4. Because the said decree adjudges that if any future dividend or dividends accruing to said Hill Bread Company, upon its claim presented to said Executrix as aforesaid, are insufficient to fully pay and discharge the said sum of $1199.88 with interest aforesaid, the complainant may apply for a writ of execution to raise the said sum.

5. Because the said decree adjudges that the Hill Bread Company has paid to the Union National Bank the amount remaining due upon the several promissory notes held by said Union National Bank and made by the said Hill Bread Company, and has extinguished said notes and the liability thereon of the complainant's testator and of his estate, and any and all liability

of his estate for the payment of dividends upon the claim presented to said Executrix by the defendant, The Union National Bank, upon the endorsement of said notes by complainant's testator.

6. Because the said decree adjudges that the appellant, its officers and attorneys and agents, shall be enjoined from prosecuting the action at law brought to recover the amount due upon the note for $10,000.00, and the book account of $89.91, against said Charles A. Feick, deceased.

7. Because upon the pleadings and proofs the appellant was entitled to prevail in the said suit, and was entitled to a decree dismissing the bill of complaint, or was entitled to a decree requiring the complainant to take up the notes held by the Union National Bank, and to surrender them to the appellant upon payment to the complainant of the difference between the amount due upon said notes, together with a note for $2500.00 held by the complainant, and the appellant's claim of $10089.91.

And your petitioner humbly appeals from the said decree and from the whole and every part thereof, upon the ground that the said decree is erroneous in the particulars hereinbefore stated and set forth.

Your petitioner, therefore, prays that the said decree may be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable Court may seem meet.

FRANK E. BRADNER,
Solicitor for and of Counsel with Appellant.

Respondent filed formal answer to petition of appeal on February 9, 1918.

Exhibit D. 1.

EXHIBIT D. 1.

May 20, 1915.

John R. Hardin, Esq., Prudential Bldg., City.

Dear Mr. Hardin:

Some time ago, it was suggested by Mr. Morgan that the mutual claims of Hill Bread Company against Estate of Charles A. Feick, and claim of Feick Estate against Hill Bread Co., and the claim of Union National Bank against Feick Estate, could all be adjusted.

I took the matter up with Mr. Hill, and he was satisfied to pay indebtedness of Hill Bread Company to Feick Estate in excess of the total amount of claim of that Company against the Feick Estate. I was doubtful at one time, whether these were mutual demands, so that one could be set off against the other, but upon a further investigation of the facts, I am satisfied that they are mutual demands.

It is desirable to have the settlement made speedily, for the reason that interest charges are accumulating, which are, of course, a loss to both parties.

Will you kindly take the matter up and let me know as soon as possible. The difficulty now seems to be that the Estate is uncertain about the legal right to pay the Union Bank in full, but it seems to me that if an action should be brought by the Estate against the Company, and the Company could offset its claim, it would be proper now to anticipate that result and make the settlement.

Yours very truly,

Exhibit D. 2.

EXHIBIT D. 2.

[Letterhead of Pitney, Hardin & Skinner.]

Prudential Building,

Newark, N. J., May 25, 1915.

Mr. Frank E. Bradner, Essex Building, Newark, N. J.

Dear Mr. Bradner:

Yours of the 20th instant at hand. I have talked with Mr. Morgan about the Hill Bread Company-Feick Estate debt complications and find the situation a bit puzzling from the standpoint of offset, if exact justice is to be done to all other creditors of the Estate. By that I mean that in working out the offset it is probably incumbent on the Estate to see that no greater advantage comes to the Hill Bread Company, as to the balance, than the dividend ratably paid gives to other creditors.

Taking Mr. Morgan's figures the situation is this, the Feick Estate owes the Hill Bread Company $10,000 and the Hill Bread Company owes the Feick Estate $2500, which would leave a balance due from the Feick estate to the Hill Bread Company of $7500, on which the Bread Company would be entitled to have against the Estate the same dividend paid to other creditors.

This balancing, of course, ignores the debt of the Bread Company to the Union National Bank of $10,500 on notes of that company originally given to Mr. Feick and discounted by him at the bank after endorsement by him. If Mr. Feick had retained these notes in his possession without discount and they had remained unpaid

Exhibit D. 2.

to him at the time of his death the Bread Company would have owed the Estate $13,000, which would have represented the net obligation, after the application of the Feick Estate debt to the Hill Bread Company of $10,000, of $3000.

If the Hill Bread Company paid these notes to the Union Bank, in accordance with its primary responsibility, the Estate would not be concerned at all with the Union Bank-Hill Bread Company situation, but the Bread Company has not paid its notes and the bank has enforced the obligation against the Feick Estate on the endorsement to the extent of the 45% dividend paid to Feick Estate creditors. The Estate has thus far paid the debt of the Hill Bread Company to the bank in the amount of $4,725.

The real balance due from the Feick Estate to the Hill Bread Company, as above suggested, after the application of the offset, is $7,500, on which the normal dividend of 45% would have been $3,375. The Estate has not paid this dividend because of this bank complication, and by the payment to the bank, under the endorsement on the Hill Bread Company notes, the Estate has paid for the Bread Company account to the bank $4,725, or $1,350 in excess of the proper dividend due the Bread Company. This temporarily disturbs the proper dividend relation of the Bread Company to the other creditors of the Estate, but can readily be straightened out later when further dividends become payable.

If the Union National Bank would accept the Hill Bread Company's note for the balance of $5,775, and release the Feick Estate from further liability under its endorsement, the matter

Exhibit D. 2.

could be adjusted with fairness to all concerned. The Bread Company is just now in receipt of a larger dividend from the Feick Estate than has been paid the other creditors, but on the next dividend that could be straightened out. The Estate cannot pay the Union Bank notes in full on its endorsement without overpaying the Hill Bread Company as a creditor of the Estate, and I cannot advise the Estate to make an arrangement with the Hill Bread Company which will result in paying the Hill Bread Company, on any claim it may have, a larger dividend than the other creditors receive. Mr. Morgan says there is no doubt that the notes in the bank are the primary obligation of the Hill Bread Company and he is under the impression that you do not dispute this. We are quite ready to do anything we can to clear up the situation with as little embarrassment as possible to the Hill Bread Company, but we cannot, of course, overlook the necessity for equality in treatment of all creditors of the Feick Estate.

The Hill Bread Company seems entitled in finality only to the same dividend on $7,500 as all other creditors of the Estate received, and in the end will have to reconcile itself to the same loss as falls on other creditors.

If you can suggest any better solution than indicated above we will be glad to discuss it.

Yours very truly,

JOHN R. HARDIN.

Exhibit D. 3.

EXHIBIT D. 3.

May 27, 1915.

John R. Hardin, Esq., Prudential Bldg., City.

Dear Mr. Hardin:

Your favor of the 25th inst., duly received. As I understand the situation, it is this:

Hill Bread Company paid to Charles A. Feick $10,000 on account of outstanding notes held by him, and he promised to return the notes, but instead of doing so, gave his note for $10,000, and afterwards renewed the same, and also obtained renewal of the said outstanding notes made by Hill Bread Company; and Hill Bread Co. did not know that any of those notes had been discounted by the Union National Bank until after Mr. Feick's death. Therefore if the Feick Estate should take up the notes in the Bank which amount to $10500, there would be no valid claim against Hill Bread Co., except for $500.00, the $10,000 having been previously paid as stated.

The $2500.00 note held by the Estate is also a valid claim, which added to the $500.00 makes the claim of the Estate $3000.00.

The trouble was caused by Mr. Feick having the notes discounted when he ought to have surrendered them. You will perceive that Hill Bread Co. is justified in insisting that all the notes shall be surrendered as a condition precedent to the payment of the $3,000.00, and of course, the $10,000 note held by the Company must be surrendered also. No doubt the Bank has a valid claim against the Estate on Mr. Feick's endorsement, and perhaps the Bank could sustain an action against Hill Bread Co.

Exhibit D. 4.

for any deficiency in the amount collected from the Feick Estate. But the result of such an action would be merely to increase the claim of Hill Bread Co. against the Feick Estate.

I suggest that the whole matter be left in abeyance upon agreement that the Hill Bread Co. shall not be called upon to pay any interest upon the $3000.00. Mr. Hill's anxiety concerns the accruing interest, and if I can have some assurance that the Company will not be called upon to pay interest, there will be no objection to letting the matter rest until a final dividend is paid.

Very truly yours,

EXHIBIT D. 4.

[Letterhead of Pitney, Hardin & Skinner.]

Prudential Building,
Newark, N. J., May 28, 1915.

Mr. Frank E. Bradner,
Essex Building,
Newark, N. J.

Dear Mr. Bradner:—

Yours of the 27th instant at hand. There seems to be a misunderstanding, as between you and me, about the real existence of an indebtedness on the part of the Hill Bread Company to the Feick Estate on the notes discounted in the Union Bank. Mr. Morgan has investigated this matter with great care and does not agree to your conclusion of fact, which doubtless is in accordance with information coming to you from Mr. Hill. I have asked Mr. Morgan to

Exhibit D. 5.

take up this question of fact for discussion with you, in the hope that you and he will be able to agree thereon.

Yours very truly,

JOHN R. HARDIN.

EXHIBIT D. 5.

Dec. 27, 1915.

Pitney, Hardin & Skinner, Esqs.,
Prudential Bldg., City.

Gentlemen:—

At a recent meeting of the stockholders of Hill Bread Company, a resolution was adopted authorizing the President of the Company to take such proceedings at law or in equity as he may be advised, to determine the liability of the Company and the liability of the Feick Estate, in relation to the notes of the Company held by the Union National Bank, and the note of Charles A. Feick held by the Company, and to have the matter finally disposed of.

Since my meeting with you at your office, at which time I had an opportunity to see and did see some of the check books and the ledger of Mr. Feick, from which it appears that Mr. Feick did on Sept. 13, 1910, receive a check for $10,000 made by James Doyle & Co. to the order of Hill Bread Company and endorsed by that Company to Mr. Feick, and that the check was deposited to the credit of Mr. Feick in the Essex County National Bank, I have had a conference with Mr. Hill and Mr. Doyle. At the time of the payment of said check to Mr. Feick, he accepted the same on account of notes of Hill Bread

Exhibit D. 5.

Company, which he then held, and which, as appears from the books of the Company amounted to $13,500.00 exclusive of some small notes for rent. Mr. Feick at that time, promised in the presence of Mr. Hill and Mr. Doyle, to surrender notes to the amount of $10,000. It was suggested to Mr. Feick that he ought to give his note to the Hill Bread Co. for $10,000 and he did so. Mr. Hill on several occasions requested Mr. Feick to turn over some notes and he was always put off with one excuse or another, and was requested to execute further notes, which he continued to do from time to time as president of the company. Mr. Hill did not know that Mr. Feick had any of the notes discounted until after Mr. Feick's death, but supposed that Mr. Feick either had them in his safe or deposited somewhere else. The undoubted agreement was, that Mr. Feick would credit $10,000 on the notes held by him and would surrender notes to that amount. Such an agreement, in my judgment, can be proved by legal evidence and would be enforcible against Mr. Feick's estate.

The question arises as to the relation of the Union National Bank to the situation; and I believe that there would be no difficulty in maintaining a suit for the performance of the agreement and making the bank a party. I do not see any reason why the agreement that Mr. Feick made should not be carried out by the executrix, and, if necessary, I will furnish you with proof of the agreement in the shape of affidavits from Mr. Hill and Mr. Doyle. On the basis of those affidavits, it seems to me that the Orphans' Court would approve a payment to the bank in full for the purpose of getting

Exhibit D. 6.

possession of the notes and the surrender of the notes to the Hill Bread Company upon payment of the amount admited to be due.

Will you kindly take this matter up with me as speedily as possible and let us have it disposed of finally?

Very truly yours,

FRANK E. BRADNER.

EXHIBIT D. 6.

[Letterhead of Pitney, Hardin & Skinner.]

Pitney, Hardin & Skinner,
Prudential Building.

Newark, N. J., December 28, 1915.

Mr. Frank E. Bradner,
Essex Building,
Newark, N. J.

Dear Sir:

Yours of the 27th instant at hand.

I am very desirous of getting a basis for adjustment of the controversy between the Hill Bread Company and the Feick estate. My difficulty about the suggestion in your last letter is that it apparently results in a higher dividend to the Hill Bread Company than other creditors receive.

We seem to be agreed that the Feick estate owes the Hill Bread Company $10,000, and that the Hill Bread Company owes the Feick estate $2,500, and originally owed Charles A. Feick in his lifetime $10,500, represented by notes which he discounted in the Union National Bank

and which have been made the basis of the claim by that bank against the estate on which the dividend of 45%, directed by the Orphans' Court to the creditors of the Feick estate has already been paid. But for the complications arising out of this discount an adjustment would be easy. If Mr. Feick in his lifetime had not discounted the $10,500 of notes he would, at the time of his death, have owed the Hill Bread Company $10,000 and would have had owing to him from the Hill Bread Company $13,000, a cash balance in favor of the estate of $3,000. As the notes were situated, however, at the time of Mr. Feick's death, such an offset was impossible, except possibly as to the note of $2,500. The situation really is then that Feick owes the Hill Bread Company $7,500, and the Hill Bread Company owes the Union National Bank $10,500, the Union National Bank debt originating out of the Feick notes, but, because of the change of ownership of the notes, one debt being incapable of being offset against the other.

It seems to me, under these circumstances, that the claim of the Hill Bread Company, as filed against the Feick estate, proceeds on the only tenable legal theory, and that the Hill Bread Company must perforce pay its own obligation to the Union National Bank and be content with the dividend that may come on its claim, which claim, I understand, has not been disputed. The dividend was withheld because of the Hill Bread Company's refusal to relieve the Feick estate of its liability to the Union National Bank. The 45% of $10,500, paid to the Union National Bank, amounts to $4,725, which amount the estate has paid on the Hill Bread Company's liability. Forty-five per cent.

Exhibit D. 6.

on $7,500, the provable claim of the Hill Bread Company against the Feick estate, amounts to $3,375. The Feick estate has, therefore, in effect, up to the present time, overpaid the Hill Bread Company in the amount of $1,350, or about that, as my figures are not strictly accurate, having ignored some small items in the Hill Bread Company claim against the Feick estate, as filed, which are not the subject of dispute.

I do not see that the facts you refer to in your letter can change this result as against the other creditors of the Feick estate. We do not seem to be at odds about the origin of these notes. While I do not want to see any more litigation than absolutely necessary, if you can see any way to work out a final result by litigation it would seem to me wise to get it going as soon as possible.

To bring the Hill Bread Company square with the other creditors of the Feick estate, at the present writing, we should have a receipt for 45% of the Hill Bread Company claim against the Feick estate, and check for the difference between that 45% and the $4,725 paid the Union National Bank by way of dividend on $10,500, Hill Bread Company notes endorsed by Charles A. Feick.

Yours very truly,

JOHN R. HARDIN.

Exhibits.

EXHIBIT D. 11.

December 9, 1915.

John R. Hardin,Esq.,
Prudential Building, City.

Dear Mr. Hardin:

I have been urged by Mr. Hill, of Hill Bread Company, to have a conference with you as representing the estate of Charles A. Feick, in respect to certain matters that were brought to the attention of the stockholders' recent meeting.

Mr. Hill is particularly desirous of having the note difficulty adjusted and has placed in my hands a check for $2,500, and also a check for $500.00, which I am ready to hand over to you, if I can make an adjustment.

He also desires to have the question of any allowance made from the rents disposed of. There cannot be any valuation placed upon the stock until this note difficulty is out of the way. With that disposed of, I think I will be able to make you a definite offer for the stock held by the Feick estate.

If you can see me to-morrow, will you let me know and I will be glad to call at your office.

Yours very truly,

Exhibit D. 7 is a promissory note made by Hill Bread Company, dated January 12, 1911, for $10,000.00, payable 90 days after date to the order of James Doyle & Co.

Exhibit D. 8 is a promissory note dated April 12, 1911, made by Hill Bread Company, for $10,000.00, payable 6 months after date to the order of James Doyle & Co., and protested October 13, 1911.

Exhibits.

Exhibit D. 9 is a promissory note dated April 12, 1911, for $10,000, made by Charles A. Feick and payable 6 months after date to the order of Hill Bread Co., with interest.

Exhibit D. 10 consists of 9 promissory notes made by Hill Bread Company to the order of Charles A. Feick, as follows:

Note, September 14, 1910, for $3,500.00.
Note, January 14, 1911, for $3,500.00.
Note, May 15, 1911, for $3,500.00.
Note, September 13, 1910, for $2,000.00.
Note, January 13, 1911, for $2,000.00.
Note, March 1, 1911, for $2,500.00.
Note, February 20, 1911, for $3,000.00.
Note, April 1, 1911, for $5,000.00.

Each one of these notes in Exhibit D. 10 shows that an endorsement which had been made has been taken out by acid.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between BERTHA E. FEICK, Executrix, etc., *Complainant-Respondent,* *and* HILL BREAD COMPANY, *Defendant-Appellant.*	*On Appeal from Chancery.*

Brief for Respondent.

Charles A. Feick died September 30, 1911, leaving a will whereof he appointed respondent the executrix.

His estate was insolvent; and was so adjudged on March 26, 1915, by the Essex County Orphans' Court. (Ex. C. 10.)

At the time of his death he was indebted to appellant, Hill Bread Company, on a promissory note for $10,000 made by him, dated April 12, 1911, with interest, due on October 12, 1911. (Ex. D. 9.)

With interest, this note amounted to $10,281.09 on the day of Mr. Feick's death, when it was matured by the force of the statute. *Comp. Stat. 3850, Sec. 101.*

Mr. Feick was also indebted to same defendant on a current book account for the same month of his death, amounting to $89.91 (Case, p. 26). No interest is claimed to have accrued prior to the date of his death. The total of these claims as of the date of death is $10,371.00.

Hill Bread Company was indebted to Mr. Feick at the time of his death on a promissory note for $2,500 made by it, dated July 1, 1911, payable November 1, 1911, with interest (Ex. C —; offered, Case, p. 96; printed as Schedule C annexed to bill of complaint, Case, p. 23). Interest to September 30, 1911, amounts to $37.40; total, $2,537.40.

Setting off these amounts against each other, Mr. Feick owed the Hill Bread Company on the date of his death the sum of $7,833.60, and this is the true amount on which Hill Bread Company is entitled to receive dividends from the insolvent estate.

The proof of claim filed by Hill Bread Company (Ex. C. 8) was drawn on this basis, was not excepted to, and stands as an adjudication of the legal liability of the estate to the claimant on the indebtedness existent at the date of death. *Comp. Stat. 3850, Sec. 104.*

At the time of Mr. Feick's death he was indebted to defendant Union National Bank, of Newark, as maker of certain promissory notes aggregating $65,000.00 (Ex. C. 1, C. 2 and C. 3).

Union National Bank was indebted to Mr. Feick at the time of his death on a deposit account, and also held as collateral security for Mr. Feick's indebtedness certain shares of stock.

The ultimate result of the application of the money on deposit and the proceeds of the sale of the stock left the sum of $19,073.33 still owing on the notes made by Mr. Feick. (Ex. C. 11; and see Opinion below, Case, p. 99.)

Prior to Mr. Feick's death he was the holder of four other notes made by the Hill Bread

Company, all of which he had discounted at the Union National Bank. It was not disputed at the hearing that these notes were renewals of a long existing indebtedness. All were payable at the Union National Bank, and were, in amounts as follows:

Note dated June 20, 1911, due Oct. 20, 1911, for $3,000.

(This note was charged against the account of Hill Bread Company after Mr. Feick's death, and thereby retired. Case, p. 61.)

Note dated Aug. 1, 1911,
due Dec. 1, 1911, for... $5,000.00 (Ex. C. 4.)
Note dated Sept. 13, 1911,
due Jan. 13, 1912, for... 2,000.00 (Ex. C. 5.)
Note dated Sept. 15, 1911,
due Jan. 15, 1912, for... 3,500.00 (Ex. C. 6.)

Total, $10,500.00

All of the above notes bore interest. They had not been paid at the time of the hearing. The liability of Mr. Feick as indorser thereon was also included in the claim filed by the Union National Bank (Ex. C. 9). Its claim was excepted to, and allowed by the Orphans' Court on March 26, 1915, at $29,573.33, being the balance of $19,073.33 on the notes made by Mr. Feick, plus the face amount of the above notes made by Hill Bread Company (Ex. C. 9, C. 10. See Opinion below, Case, p. 99).

On May 1, 1915, the respondent paid to Union National Bank a dividend of 45% on its claim (Ex. C. 12); of which the sum of $4,725.00 represented the dividend at that rate upon the liability of Mr. Feick as indorser on the notes of the Hill Bread Company aggregating $10,500.

The respondent has withheld payment of the dividend on the claim of the appellant, amounting, as above stated, to $7,833.60, on which a dividend of 45% would be $3,525.12. (Bill, par. 12, Case, p. 4.)

It is submitted that the above are all of the facts which are material to a consideration of the case. The defense below, and the appeal, are based entirely upon the testimony of Mr. Hill and Mr. Doyle as to the origin of the $10,000 note made by Mr. Feick. We contend that, giving such testimony the fullest force, it has no effect on the result of the case, and therefore we prefer to deal with it separately.

On the facts as we have summarized them above, which we reiterate we consider the "facts of the case," and which are the facts as found by the learned Vice-Chancellor, the legal contentions of the respondent are:

1. She was entitled to the equitable remedies of a surety in respect to the Hill Bread Co. notes held by the Union National Bank.

2. She was entitled to be exonerated from further liability on the notes of the Hill Bread Co. held by the Bank.

3. She was entitled to be indemnified for the amount paid to the Union National Bank as a dividend on the liability as indorser on the notes of the Hill Bread Co., held by the Bank, viz., $4,725.00—45% of $10,500, with interest from May 1, 1915.

4. If necessary for her protection, she was entitled to set-off above payment of $4,725.00 against the dividend due Hill Bread Company, and unpaid, viz., $3,525.12, and against further dividends payable to Hill Bread Company on its claim; and, on the other hand, Hill Bread

Company was not entitled to set off the face amount of Mr. Feick's note for $10,000.00 against its liability to indemnify her.

5. The action at law on the note and book account was vexatious and should be enjoined.

Before passing to the argument of these points, it should be noted that the questions raised by the pleadings in respect to the subject matter of the third and fourth counts of the appellant's action at law were not tried below, and are not before this Court.

By amendment at the hearing, the word "and" in line 40, Case, p. 5, was struck out of the bill of complaint, which is necessary in order to make clear the meaning of the pleader.

I. Respondent was entitled to the equitable remedies of a surety.

While Mr. Feick's obligation to the Union National Bank was that of an indorser, and not technically that of a surety, nevertheless his estate was entitled to the equitable remedies of a surety in respect to its legal relationship with Hill Bread Company, the maker.

In a broad sense, suretyship includes every species of relationship occupied by one person who is collaterally liable for payment of money by another.

> *32 Cyc.* 14.
>
> *15 Halsbury's Laws of England,* p. 442.
>
> *Brandt on Suretyship,* (3rd Ed.) Sec. 1.
>
> *Note to Dering* v. *Earl of Winchelsea,* 1 White & Tudor's L. C. (4th Amer. ed.) 148.

Chief Justice Cooley said, in *Smith* v. *Sheldon,* 35 Mich. 42; 24 Am. Rep. 529.

> "Now a surety, as we understand it, is a person who, being liable to pay a debt

or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established or whether the creditor is or is not contracted within the two capacities, as is often the case when notes are given or bonds taken; the relation is fixed by the arrangement and equities between debtors or obligors, and may be known to the creditor, or wholly unknown. * * *

"Every element of suretyship is here present, as much as if, in contracting an original indebtedness, the contract itself had been made to show on its face that one of the obligors was surety merely. As already stated, it is immaterial how the fact is established or whether the creditor is or is not a party to the arrangement which establishes it."

Indorsement of a negotiable instrument gives rise to a special form of suretyship, although its terms in some respects are expressly governed by the law merchant, as codified by the Negotiable Instruments Act.

15 Halsbury's Laws of England, 443.

32 Cyc. 35.

Brandt on Suretyship (3rd ed.), p. 14.

Daniels on Negotiable Instruments (6th ed.), secs. 1303, 1305.

Note to Dering v. *Earl of Winchelsea,* 1 White & Tudor's L. C. (4th Amer. ed.), 186.

"* * * a contract of suretyship is necessarily included in every unqualified indorsement of a negotiable instrument."

Tanner v. *Gude,* 100 Ga. 157; 27 S. E. 938.

The "principles of equity are not less applicable to cases * * * in which there is,

> strictly speaking, no contract of suretyship, but in which there is a primary and secondary liability of two persons for one and the same debt, by virtue of which, if it is paid by the person who is not primarily liable, he has a right to reimbursement or indemnity from the other—than to those of the class, in which there is a contract of suretyship to which the creditor is not a party. To this (former) class of cases, the rights of an indorser against an acceptor of a bill of exchange may most properly be referred."
>
> By Lord Chancellor Selborne in *Duncan, Fox & Co.* v. *North and South Wales Bank,* L. R. 6 App. Cas. 1; 50 L. J. Ch. 355.

The text-books and case-books on Suretyship are full of cases dealing with negotiable instruments, and the reports are full of cases applying the legal principles of suretyship to bills and notes. The principles of the law merchant are, in substance, the principles of suretyship applied to a special form of contract.

Under section 5 of our "Married Women Act," (*Comp. Stat. 3226*), a married woman is not expressly disenabled to become an accommodation *maker* of a note; but such contract has repeatedly been held void, on the ground that "the form of suretyship is immaterial," both before and after the passage of the Negotiable Instruments Act. *Wolverton* v. *Van Syckel,* 57 N. J. L. 393; and see *Elliott* v. *Morehead,* 69 N. J. L. 216; *Vliet* v. *Eastburn,* 63 N. J. L. 450, 64 N. J. L. 627; *Peoples National Bank* v. *Schepflin,* 73 N. J. L. 29.

Whatever the rule in a court of law, equity may deal with the rights of parties to negotiable instruments according to their real status. *Anthony* v. *Fritts,* 45 N. J. L. 1; *Shute*

v. *Taylor,* 61 N. J. L. 256; *Grier* v. *Flitcraft,* 57 N. J. Eq. 556.

An indorser was treated as a surety in respect to the right of contribution in *McKenna* v. *Corcoran,* 70 N. J. Eq. 627.

Other instances (which doubtless might be multiplied), in which the principles of suretyship have been applied to indorsers, are:

D. L. & W. R. Co. v. *Oxford Iron Co.,* 38 N. J. Eq. 151.

Bensel v. *Anderson,* 85 N. J. Eq. 391, 402.

Polhemus v. *Prudential Realty Corp.,* 74 N. J. L. 570.

Young v. *Vough,* 23 N. J. Eq. 325, aff'd. 24 N. J. Eq. 535.

Demott v. *Stockton Paper Ware Mfg. Co.,* 32 N. J. Eq. 124.

Brick v. *Freehold Nat'l. Bank,* 37 N. J. L. 307.

Whitehead v. *Hamilton Rubber Co.,* 52 N. J. Eq. 78.

It is submitted that nothing in the Negotiable Instruments Act (*Comp. Stat. 3734*) affects the applicability of the principles of suretyship. See Secs. 68, 84, 115, 119, 120, 121, 192.

If anything, the act opens wider the door of inquiry as to the true relationship between the parties. *Wilson* v. *Hendee,* 74 N. J. L. 640; *Schneider* v. *Mueller,* 82 N. J. L. 503; *Nat'l. Newark Banking Co.* v. *Sweeney,* 88 N. J. L. 140.

See also *Bldg. & Eng. Co.* v. *Northern Bank,* 206 N. Y. 400; 99 N. E. 1044.

II. Respondent was entitled to exoneration.

The equitable remedy is, in this state, absolute. No special circumstances need be shown.

Holcombe v. *Fetter,* 70 N. J. Eq. 300.

D. L. & W. R. Co. v. *Oxford Iron Co.,* 38 N. J. Eq. 151.

Irick v. *Black,* 17 N. J. Eq. 189.

There was, however, a special equity in this case, the insolvency of the surety's estate. This rendered it impossible for respondent to take up the notes and sue the maker.

This point is, perhaps, not material on this appeal. The learned Vice-Chancellor decided that the respondent was entitled to exoneration and indemnity as prayed in her bill. Notice was given of the settlement of the decree, and a proposed form of decree was served on appellant which provided for payment by appellant of its notes held by the Union National Bank, and indemnity. When this form of decree was presented to the Vice-Chancellor, it was stated that the appellant had a day or two theretofore paid the notes to the Union National Bank. The terms of the decree as entered adjudged that this payment extinguished Mr. Feick's liability as indorser. This is indisputable. A payment by the maker of notes—primarily liable therefor, as the Vice-Chancellor had determined—necessarily extinguished them, as to one secondary liable therefor. This is so, not only by the express language of the Negotiable Instruments Act (Comp. Stat. 3748, Secs. 119, 120), but by fundamental legal principles. The situation is the same as if the Hill Bread Company had been decreed to exonerate respondent by the payment of the notes and had thereafter paid the notes.

No arrangement the Hill Bread Company might have made with the Bank in such case could have kept the notes alive as against respondent. *In re Jules Bouy & Co., Inc.,* 244 Fed. 896) any attempt to do so would have been contempt of the court.

III. Respondent was entitled to indemnity, or reimbursement, for the amount paid to the bank as dividend.

This right arises immediately upon payment of any part of the debt by a surety.

32 Cyc. 260.

Brandt on Suretyship (3rd Ed.), p. 458.

Where the contract of suretyship is the special contract of an indorser, it may be doubtful whether he can sue at law except on the note, in which case it may be that he cannot split the cause of action by bringing successive actions.

The question, however, is immaterial, since the right of indemnity or reimbursement lies within the original jurisdiction of equity, being in origin a creature of equity.

Note to Dering v. *Earl of Winchelsea,* 1 White & Tudor's L. C. (4th Amer. Ed.), 136, 179.

Stearns on Suretyship (2nd Ed.), p. 503.

Childs on Suretyship, etc., p. 293.

Spencer on Suretyship, p. 156.

Dean Ames, "History of Assumpsit," 2 Harvard Law Review, p. 59; Lectures on Legal History, p. 155.

See *Bosden* v. *Thinne,* Yelv. 40; 80 Eng. Repr. 29 (1603).

Ford v. *Stobridge,* Nelson 24; 21 Eng. Repr. 780 (1632).

Scot v. *Stephenson,* 1 Levinz, 71; 83 Eng. Repr. 302 (1662).

Stirling v. *Forrester,* 3 Bligh 575, 590; 4 Eng. Repr. 712, 717.

Decker v. *Pope,* 1 Sel. N. P., 91 (1757).

Toussaint v. *Martinnat,* 2 T. R. 100, 105; 100 Eng. Repr. 55.

IV. Appellant cannot set off Feick's indebtedness as maker of the $10,000 note against its liability to reimburse respondent for the dividend paid on the indorsement.

Equity as well as the law refuses to allow set-off *en autre droit.*

Robbins v. *McKnight,* 5 N. J. Eq. 289, 45 Am. Dec. 406; aff'd 5 N. J. Eq. 642.

Brewer v. *Norcross,* 17 N. J. Eq. 219.

Warwick v. *Ely,* 59 N. J. Eq. 44.

Set-off is permitted of the $2,500 note made by defendant, because this note and the $10,000 note made by Mr. Feick accrued in the same right, to and from him individually in his lifetime. Only this set-off is authorized by the statute. *Comp. Stat.* 4836. None is permitted between debts due from testator and those accruing to the representative out of transactions arising subsequent to death.

3 Williams on Excutors (7th Amer. Ed.), 455 (*1781), 477; 532 (*1846).

"But the defendant in a suit by an administrator upon an indebtedness accrued after the grant of letters cannot be allowed to set-off a claim which he may have against the deceased; because to do so would give him an undue advantage over other creditors, if the estate should prove insolvent."

2 Woerner, American Law of Administration (2nd Ed.) *828 (citing cases).

2 Daniel on Negotiable Instruments (6th Ed.) Secs. 1432, 1433.

18 Cyc., 895-898.

14 Halsbury's Laws of England, p. 329.
25 Ibid., 498.

Rees v. *Watts,* 11 Ex. Ch. 410; 25 L. J. Ex. 30 (a leading case, and on all fours in respect to the construction of our statute of set-off).

Lambarde v. *Older,* 17 Beav. 542; 23 L. J. Ch. 18, 51 Eng. Repr. 1144 (very similar in facts to *Bateman* v. *Connor, post.*).

Ex parte Morier, 12 Ch. Div. 491; 49 L. J. Ch. 9

"* * * the decisions are clear that a debt due by a testator in his lifetime, and for which his executor was never personally liable, cannot be set-off against a sum never payable to the testator at all, and in respect of which he never had a right of action, but which first became payable after his death, and then became payable to the use of the executor * * * there can be no set-off between a debt due by a testator and a debt accruing to his executor * * *." In re *Gregson,* 36 Ch. Div. 223; 57 L. J. Ch. 221.

In re Gedney, (1908) 1 Ch. 804; 77 L. J. Ch. 428.

Mardell v. *Thellusson,* 6 E. & B. 976; 119 Eng. Repr. 1127.

Laighton v. *Brookline Trust Co.* (Mass.) 114 N. E. 671.

A person dealing with an insolvent cannot acquire a right of set-off against the insolvent by means of a transaction subsequent to insolvency.

Alloway v. *Steere,* 10 Q. B. Div. 22; 52 L. J. Q. B. 38.

Groom v. *Mealey,* 2 Bing. (N. C.) 138; 4 L. J. C. P. 274; 132 Eng. Repr. 54.

Lord (Trustee of) v. *G. E. Ry.,* (1908) 2 K. B. 54; 77 L. J. K. B. 611.

Greif v. *James H. Wright Co.,* (Del.) 91 Atl. 205.

34 Cyc. 198.

7 Corpus Juris, 144.

By so doing, a creditor would obtain *pro tanto* payment in full.

Lister v. *Hooson,* (1908) 1. K. B. 174; 77 L. J. K. B. 161.

No set-off is allowed where the creditor is a *quasi* partner in the enterprise.

Stone v. *N. J. & Hudson River R. R. Co.,* 75 N. J. L. 172 (mutual insurance company).

Vanatta v. *N. J. Mutual Life Ins. Co.,* 31 N. J. Eq. 15 (mutual insurance company).

Stockton v. *Mechanics & Laborers Savings Bank,* 32 N. J. Eq. 163 (mutual savings bank).

Hannon v. *Williams,* 34 N. J. Eq. 255 (mutual savings bank).

Nor where the liability is in the nature of a trust fund.

Williams v. *Traphagen,* 38 N. J. Eq. 57; *Arnold* v. *Searing,* 78 N. J. Eq. 146, 165; *Holcombe* v. *Trenton White City Co.,* 80 N. J. Eq. 122, 161; *aff'd.* 82 N. J. Eq. 364 (unpaid stock subscriptions).

On the same principle an executor is denied the right of retainer when the estate is insolvent. *Wheedon* v. *Nichols,* 72 N. J. Eq. 366.

To allow a set-off of Mr. Feick's debt against Hill Bread Company's liability for reimbursement, is to pay, *pro tanto,* Mr. Feick's debt to it at the rate of 100% on the dollar—it prefers the Hill Bread Company, and permits it

to "swallow up the rights of the other creditors."

Bateman v. *Connor,* 6 N. J. L. 104.
More v. *Richards,* 90 N. J. L. 626.

The principle of those cases concludes the question under discussion.

See also *Crisp* v. *Dunn,* 56 N. J. L. 355.

In short, the allowance of such a set-off would necessarily destroy the equal and just distribution of the assets among the creditors.

The proper basis of set-off is as between the liability to respondent for indemnity and her liability for the payment to Hill Bread Company of its ratable dividend.

V. The action at law was vexatious.

The statute contemplates and permits suit against the representative of an insolvent estate only in the case of a disputed claim. *Comp. Stat.* 3850, sec. 105. *Reeves* v. *Townsend,* 22 N. J. L. 396.

The Hill Bread Co. claim as filed was not excepted to, but is admitted.

Nothing can be accomplished by the action (as to the first two counts) except to establish the amount of an admitted claim. Its only effect is to vex and embarrass respondent by placing her in the dilemma adverted to in *Crisp* v. *Dunn,* 56 N. J. L. 355.

VI. The origin of the $10,000 note.

All of the contentions of the appellant are based upon the testimony of Mr. Hill as to the circumstances under which this note originated. The claim is that the $10,000 for which this note was issued was a payment to Mr. Feick

upon the notes of the appellant which it was supposed, according to Mr. Hill, were held by Mr. Feick at the time. In fact, they had been discounted at the Union National Bank and were renewals of a series of notes which had been discounted at the bank at least as far back as 1906 (Case, p. 95). The substance of Mr. Hill's testimony, indefinite as it is, is that he understood that the $10,000 was paid to Mr. Feick to be applied upon the notes aforesaid and that Mr. Feick promised to produce those notes at some other time when he was not so busy.

Mr. Feick held at the time one-half of the stock of the company and was its treasurer. Mr. Hill held forty per cent. of the stock. A man named Muller held the remaining ten per cent., whether in his own right or not does not appear (Case, p. 52). Mr. Hill was the president. The secretary was Mr. Scharringhausen. According to him, the business was conducted by Mr. Hill and Mr. Feick without the formality of meetings of the board of directors (Case, p. 92).

Notwithstanding Mr. Hill's understanding of the transaction, he accepted from Mr. Feick on September 13, 1910 (Case, p. 73) Mr. Feick's note for $10,000, which Mr. Hill testified was already prepared by Mr. Feick when Mr. Hill reached Mr. Feick's office to transact this business (Case, p. 57). Under the same date the note of Mr. Feick was regularly entered upon the books of the company as a debit to bills receivable. Why Mr. Hill did not take Mr. Feick's receipt for the money instead of his promissory note has not been suggested.

Mr. Feick's note of this amount was renewed twice, namely in January and April, 1911, and interest was paid on the same (Case, p. 72).

All of the notes of the Bread Company, supposed by Mr. Hill to be held by Mr. Feick at the time of this transaction and aggregating $16,000, were renewed thereafter at intervals of four months. (The $16,000 of notes was made up of the notes aggregating $10,500, renewals of which were held by the Union National Bank at the time of Mr. Feick's death, the note for $3,000, renewal of which was held by the Union National Bank at the time of Mr. Feick's death, but charged against the account of the maker after his death, and thereby retired, and the $2,500 note, the renewal of which was held by Mr. Feick at the time of his death, but which he had not discounted and which the respondent admits as a set-off against the $10,000 note.) The note for $2,000 was renewed upon the same day (Exhibit D. 10; Case, p. 74), and the note for $3,500 was renewed upon the following day, September 14, 1910 (Exhibit D. 10; Case, p. 74), and yet of these notes which were thus renewed at least three or four times prior to Mr. Feick's death Mr. Hill claims to have paid off $10,000. Interest was paid to Mr. Feick on the notes of the Bread Company (Case, p. 72). If Mr. Hill had known that the notes were discounted, he might have felt compelled to issue renewals, but lacking that knowledge, no reason was suggested why he did not mark the notes paid and retain them up to the extent of $10,000, when they were from time to time surrendered to him at their maturity. Mr. Hill was president of the company, and it does not appear that Mr. Feick personally dominated him. If Mr. Feick did exercise any dominant influence over him, that was removed during the summer of 1911, during all of which Mr. Feick was absent from Newark (Case, pp. 77, 79). During this interval the

notes were renewed by Mr. Hill, as they had been before, and countersigned by Mr. Scharringhausen as secretary.

On Mr. Hill's version of this transaction, it is clear that the $10,000 note given by Mr. Feick, renewed from time to time and on which he paid interest, was not a promissory note at all, but merely a receipt for money paid by the Bread Company on its obligations. Nevertheless, Mr. Hill, as president of the company, verified a proof of claim against the estate (Case, pp. 22, 23), in which it was set forth that the $10,000 note was justly due and owing to the Bread Company. This claim was not prepared without adequate legal advice (Case, p. 63). According to Mr. Hill's own testimony (Case, p. 63), he never disclosed to his counsel, Mr. Faulks, that this $10,000 was not a loan but was a payment. He first divulged this important fact to his present counsel (Case, p. 63), and neither respondent nor her attorneys had notice of this claim until nearly four years after Mr. Feick's death, when they received Mr. Bradner's letter of May 27, 1915 (Exhibit D. 3). The action at law to enjoin which the bill of complaint was filed sets up a right of action upon this note, which cannot be at one and the same time an evidence of a promise to re-pay money loaned and the mere acknowledgment of the receipt of money applied upon an indebtedness owing to the maker.

On this testimony it is not clear even that the company, one of the parties to the transaction, intended that the transaction should be one of payment rather than one of loan. Mr. Hill may have so regarded it, but he was only one of two officers and stockholders participating in the transaction. Certainly Mr. Feick in-

tended nothing of the sort as he knew perfectly well that it was beyond his power to surrender the notes without going to the bank and using this sum to take them up. It is equally clear that he never had any intention of doing that, as his entire conduct shows. In fact, he deposited the money in his personal account in another bank (Case, page 88). And the fact that he had his promissory note already made out for delivery shows perfectly well what his view of the transaction was.

There may well have been reasons why the company did not at that time wish to effect a permanent reduction of its indebtedness. The company did not, in fact, have the cash with which to reduce its indebtedness to Mr. Feick and the arrangement which the parties in fact entered into is one which it is quite plausible to believe was in accordance with the actual intention of the parties. Mr. Feick, as a creditor of the company, may have needed $10,000 temporarily; the company, as a debtor, may have felt obliged to extend its credit to him temporarily, but without being in a position to spare $10,000 from its working capital for payment on account of a continuing indebtedness. In such a state of affairs, the loan to Mr. Feick, which no doubt was expected to be repaid within a short time, was an arrangement more suitable to the convenience of the parties than absolute and final payment on account of the company's debt.

There was nothing illegal in such a loan, between the parties. If there were, it would not help the appellant's position.

At the best, the testimony of Mr. Hill shows that one of the parties entering into this transaction intended that the transaction should take

a certain form; but when the parties came to the point of crystallizing their mutual intention into a legal relationship, the original intent of one of them was abandoned and in fact they entered into a different contract. How can the intention of one of the parties to enter into a certain form of agreement in any way survive the mutual integration of a different agreement, which subsisted and was renewed and confirmed from time to time over a long period?

When the appellant in fact transferred a credit to Mr. Feick, and took his negotiable promise to re-pay, the legal consequences were those adhering to a loan of money. "Payment" of an obligation excludes any idea of an express or implied promise to refund by the payee. Appellant, in bringing about the facts, could not avoid the legal consequences by saying that it did not foresee or intend them, or that it forbade them. (To paraphrase language of Justice Holmes in *Thomas* v. *Matthiessen,* 232 U. S. 221, 234; 58 L. ed. 577, 583, 584.)

If the intent was doubtful or inconsistent with the legal effect of dominant facts, it must fail. The result of the dealings between these parties cannot be done away with by a wish or intention. (See *National City Bank* v. *Hotchkiss,* 231 U. S. 50, 56, 57; 58 L. ed. 115, 119, 120.)

One thing is certain—that there was no actual payment or discharge of the notes. "Payment" is more than a mere state of mind. The alleged intention in this case was never carried out in any act constituting payment. But if "payment" be reduced to a matter of mere intention, the "payment," if such it was, to Mr. Feick, was utterly ineffective to discharge these unmatured negotiable notes in the hands of a third person, the bank. And, what-

ever else may be said, there is no escape from the fact that Mr. Feick did not accept the money as "payment," but as a loan.

> "It is an impeachment of the common sense of the jury, and of mankind, to suppose that they do not understand that payment in money, or in anything else by one party, always implies an acceptance of the money or goods, as payment by the other party." *Oliver* v. *Phelps,* 20 N. J. L. 180, 195.

The contention of appellant therefore is necessarily reduced to this: that Mr. Feick made a promise, never executed, to apply a certain sum received by him to the extinguishment of the appellant's obligations held by a third person. And, in the last analysis, the appellant asks that this promise be indirectly specifically enforced against the respondent.

There has been, of course, no attempt to trace the funds which were placed in Mr. Feick's hands more than a year prior to his death. If these funds could have been found in traceable and identifiable form at Mr. Feick's death, there might be some force in appellant's contention that the surety had indemnity (Brief, p. 7) at the time when the relative equities of the appellant and the respondent, as representative of the other creditors, must be adjudged, viz., at Mr. Feick's death. But this not being so, the appellant, we reiterate, has no equity except the performance of the alleged promise—in substance, a promise to pay money—which equity is subordinate to the superior equities of the other creditors, likewise holding promises to pay money.

When the estate passed to the executrix upon a trust to hold for and distribute among creditors, the alleged former and natural equity of

the appellant disappeared in superior equities vesting in the general body of creditors. The latter are then interested in having equality of distribution, and if a creditor, who, when the estate passed, had no right in or lien upon any specific portion of the assets of the estate, be allowed thereafter to enforce the application of a part of the assets in such manner as to fully relieve it from the consequences of having relied on the mere promise of the deceased insolvent to apply a portion of his assets in a certain manner, it gains a preference. By the intervention of the rights of third persons the equities change with the change in the situation of the original parties, to the misfortune, perhaps, of the creditor holding the promise of the insolvent, but, nevertheless, in accordance with equitable principles. The situation is one where equity must refuse relief to one when such relief would necessarily be given to the prejudice of others who are in similar position.

This, it is submitted, is the basic reasoning of *National City Bank* v. *Hotchkiss, supra;* and was adopted by Vice-Chancellor Howell in *McManus-Kelly Co.* v. *Pope Mfg. Co.,* 70 Atl. 297. The result of that case was disapproved by Vice-Chancellor Stevens in *Shields* v. *John Shields Construction Company,* 83 N. J. Eq. 21, but on grounds of statutory construction, while indorsing the reasoning in so far as it was based on equitable principles alone.

See also *Williston on Sales,* secs. 143, 144.

Article on "Insolvency and Specific Performance," *31 Harvard Law Review,* 702.

To accede to appellant's contentions will be to single out appellant among the creditors, and concede to it a preference upon a claim in nowise distinguishable from the great body of

unpreferred claims, and accord it a preferential status, conspicuously opposed to the letter and spirit of the law, which liquidates such claims upon a basis of equality in the distribution of assets. *More* v. *Richards, supra* (90 N. J. L. 626).

Lastly, the appellant, viewed in the light of a suitor for specific performance, is in gross laches. During the five years of silence in respect to its present claim, the other party has died, and his creditors have acquired intervening equities.

VII. The decree should be affirmed, with costs.

Respectfully submitted,

PITNEY, HARDIN & SKINNER,
Solicitors for Respondent.

WALDRON M. WARD,
Of Counsel.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

BERTHA E. FEICK, Executrix of Charles A. Feick, deceased,
Complainant-Respondent,

and

HILL BREAD COMPANY,
Defendant-Appellant.

On Appeal from Chancery.

Brief for Appellant.

This is an appeal from a decree made in favor of the executrix of the will of Charles A. Feick, deceased, as the representative of his insolvent estate, adjudging that she as such representative is entitled to relief in equity by way of exoneration, upon the theory, that she as executrix, succeeded to the liability of Charles A. Feick, as endorser on certain promissory notes made to him by the Hill Bread Company, and endorsed over by him to Union National Bank, and placed to the credit of his account in that bank.

The facts may be stated as follows: On September 13, 1910, Feick, who was the treasurer of Hill Bread Company and owner of 50% of the capital stock, was a creditor of the company in the sum of $16,000.00 for loans of money made by him to the company, to the amount of $13,500.00, for which he held four notes for $2,000.00, $3,500.00, $3,000.00 and $5,000.00. The company also owed him $2,500.00 for arrears of rent of the building and lands occupied by the

company, of which he was the owner, which amount was also included in a note for $2,500.00. On September 13, 1910, Feick requested a payment of $10,000.00 on account of the notes which he then held. It was arranged that $10,000.00 should be borrowed by Hill Bread Company from James Doyle & Co. of New York, and a note was made by Hill Bread Company, signed by Hill, as president, and Feick, as treasurer, to the order of James Doyle & Co.; for which Doyle & Company gave a check for $10,000.00 to the order of Hill Bread Company, which was then endorsed over to Charles A. Feick, who received the money.

Feick gave his personal note to Hill Bread Company for the sum of $10,000.00 at that time. It is contended by Hill that the $10,000.00 was paid to Feick on account of the indebtedness of the company, and that the personal note of Feick was given by Feick without request, and was deposited in the safe of the company, and was never used for any purpose. However, the personal note was renewed from time to time, and the notes of the company made to Feick were renewed from time to time. Feick died September 30, 1911, and at the time of his death the situation was precisely the same. He was the holder of notes to the amount of $16,000.00, and the company held his note for $10,000.00. After his death one of the company's notes matured and was paid at Union National Bank, where the company had an account, and where the note was made payable. Hill, the president of the company, went to the bank and told Mr. Scheerer, the president of the bank: "Those notes have no right here; those notes belong to me, and don't you dare pay another one." The note that was paid matured on October 20, 1911,

and was for $3,000.00. Hill discovered at that time that the other notes, amounting to $10,-500.00 for money loaned had been discounted at the bank by Feick. He had not known before that any of the notes had ever been discounted, although they were renewed from time to time. It appears that when the notes were surrendered by Feick, he had obliterated his endorsement by the use of chemicals; so that Hill did not know that they had ever been used. On July 8, 1912, Hill, as president of the company, made proof of claim against the Feick estate (p. 20). This claim is based upon Feick's personal note for $10,000.00, and a book account of $89.91, and in the claim there is an offer to credit the rent note of $2,500 held by Feick, which had not been discounted, and which was then in the possession of the executrix.

There is nothing to show that the estate appeared to be other than solvent at the time this proof of claim was made. In March, 1915, the Orphans' Court, however, made a decree adjudging that the estate of Feick was likely to be insolvent, and afterwards in April, 1915, directed the executrix to pay a dividend of 45% on the claims filed by her. No payment of dividend has been made on the claim filed by John J. Hill, as president of Hill Bread Company. The executrix paid a dividend to Union National Bank on the three notes, amounting to $10,-500.00, made by Hill Bread Company and endorsed by Feick. The failure of the executrix to pay a dividend to the company led to a dispute and to some correspondence between the attorney of the company and the attorneys of the executrix, which is contained in Exhibits D. 1, 2, 3, 4, 5, 6 and 11. The executrix being the holder of 50% of the stock of the company had

transferred one share each to Carl Feick and Benedict Prieth, who represented her on the Board of Directors of the company. The board was composed of Hill and Doyle, Feick and Prieth.

Nothing resulting from the correspondence between the attorneys, a meeting was called on November 9, 1915, of the stockholders of the company, and at that meeting the stockholders being all represented, adopted a resolution (p. 64) authorizing the president of the company "to take such proceedings at law or in equity as he may be advised, to determine the liability of the company and the liability of the Feick estate in relation to the notes of the company held by the Union National Bank, and the note of Charles A. Feick held by the company, and to have the matter finally disposed of."

This resolution was agreed to by all the stockholders, including the executrix and her two representatives. The president of the company consulted counsel, and it was conceived that the best way to bring the matter into court for adjudication, would be to bring an action on the note held by the company, and such an action was brought, with the result that the executrix immediately applied to the Chancellor for an injunction to restrain the action at law, claiming that by reason of Feick's endorsement on the notes held by the bank, he was secondarily liable as surety, and was entitled to be exonerated by the Hill Bread Company as maker, and as his estate is insolvent, the dividend paid by her to Union National Bank should be charged against any dividend payable to Hill Bread Company on its claim, and any excess should be paid back to the executrix. The company defended principally upon the ground that the $10,000.00 was

in fact a payment made on account of the notes held by Feick, and that that payment extinguished the liability of the company on notes to the amount of $10,000.00, so that Feick would not have any right of action over against the company, except for the balance of $500.00 on the notes held by Union National Bank, and would, of course, have a remedy on the $2,500.00 note which was not disputed. The Vice-Chancellor determined that the $10,000.00 had been treated as a loan to Feick and not as payment. He also determined that the executrix was entitled to have the dividend paid to the bank charged against the dividend payable to the company, and should recover from the company the excess of the dividend paid to the bank over that payable to the company. In his opinion, the Vice-Chancellor says, at p. 104, l. 20: "The company on paying the bank the amount due on the notes, would be entitled to be subrogated to the rights of the bank on its claim filed thereon against the estate, and the company would be entitled on making such payments to be credited with the amount of the dividends paid thereon by the complainant to the bank, and to any other dividend directed to be paid."

The opinion was filed January 30, 1917, and there was considerable delay in taking a decree.

Relying upon the opinion of the Court, that the company could pay the bank and be subrogated to the rights of the bank on its claim against the estate, the company took up the notes and paid to the bank the balance due on the notes together with interest in full, and had an agreement with the bank that the bank would assign its claim against the estate to the company. Afterwards, when the decree was made on November 5, 1917, the Court adjudged that

the payment of the notes by the company, extinguished the notes and the liability of the complainant's testator and his estate, and any and all liability of his estate for the payment of dividends upon the claim.

It is conceived that the case resolves itself into four questions which may be raised under the following specifications:

Specification of Reasons on Appeal.

1. The determination that no agreement was made between Feick and Hill Bread Company that $10,000.00 paid to him on September 13, 1910, should be specifically applied in payment of promissory notes of the company held by him, or that if such agreement was made, it was afterwards abandoned.

2. The adjudication that the executrix is entitled to enforce payment of the promissory notes made by Hill Bread Company to order of Charles A. Feick, and discounted for Feick's benefit by Union National Bank in full exoneration of Feick's estate without offsetting the sum of $10,000.00 paid to Feick.

3. The adjudication that the executrix is entitled to apply the dividend paid by her to Union National Bank in extinguishment of any dividend payable to Hill Bread Company, and to recover the excess from Hill Bread Company.

4. The adjudication that the agreement made between Hill Bread Company and Union National Bank, whereby the notes were paid and the claim of the bank against Feick estate is to be assigned to the company, operated to extinguish the liability of the estate to the bank, and to the company.

Brief of Argument.

POINT I.

FEICK ESTATE AS SURETY WAS ENTITLED TO EQUITABLE RELIEF BY EXONERATION ONLY UPON EQUITABLE TERMS, THAT IS, TO APPLY THE $10,000.00 IN PAYMENT OF THE NOTES *PRO TANTO*.

The cases are collected by Vice-Chancellor Stevens in *Holcombe* v. *Fetter*, 70 Eq. 300. No doubt a surety may file a bill to compel payment by the principal. The surety is entitled to be indemnified. In this case, the company contends that the surety was indemnified by the $10,000.00 paid into his hands. The fact of the payment on account of the notes is proved by the testimony of Hill, pp. 53, 55, 57, 59; and the testimony of Doyle, pp. 81, 82, 83. The substance of that testimony is that $10,000.00 was raised on a note made by the company to Doyle & Company, and the check of Doyle & Company was given to Hill Bread Company and endorsed over to Feick and deposited to his credit in Essex County National Bank. *It could not have been a loan to Feick.* It must have been a payment on account of the company's indebtedness to Feick. The subsequent dealings of the parties in renewing the notes on both sides is explained by Hill as occasioned by Feick's refusal to cancel the notes, and insisting from time to time that the notes should be renewed.

It must be remembered that Feick controlled one-half of the stock of the company, and Hill was at a disadvantage. There is nothing to show that any action that was taken in regard to the renewal of the notes was corporate action so as to estop the company. There was no waiver of any legal rights by the company, and

it may be said that the claim presented to the executrix is not a corporate act. It was sworn to by Hill, as president of the company, but there is nothing to show that the president was authorized to present any such claim, and at that time one-half of the stock was controlled by the executrix who had two representatives on the Board of Directors. *There was no waiver by the company by any act of the company of its right to have the $10,000.00, which it had paid to Feick applied on its indebtedness to Feick.* Such an appropriation of the payment having been made by the parties in Feick's lifetime, the executrix is bound by it, and so are the creditors and legatees. Surely, if these notes had been in Feick's possession at the time of his death, and the executrix had brought suit on them against the Hill Bread Company, the note for $10,000.00 would have been an off-set to that amount.

The executrix claims in her bill (par. 11, p. 4) that she holds the note of $2,500.00, but that it is her property, and has not been paid in whole or in part, and consequently she has not assented to its application as an off-set against the claim of $10,000.00 presented by the company, and that claim stands in its entirety. Equity requires that the surety should do equity, and that means in this case, that the surety should apply the $10,000.00 on the notes held by the Union National Bank, which would result in leaving a balance of $500.00 to be paid by the company to relieve the surety from any further liability, and such is the decree, which it is submitted, should have been made upon the evidence in this case.

Some doubt is expressed by the Vice-Chancellor as to whether any agreement was ever

made between the company and Feick, as stated by Hill. There is some significant testimony in the case which goes to show that the story told by Hill was not an afterthought. When the note for $3,500.00 was paid by the bank in October, 1911, Hill went to the bank and told the president that "those notes had no right there, that they belonged to me, and that he shouldn't pay another one"; (p. 62). This substantiates Hill's claim that the notes had really been paid and ought not to have been discounted by Feick, and this statement to the president was made in October, 1911, several years before the answer was filed in this case, and shortly after Feick's death.

POINT II.

THE EXECUTRIX AS SURETY, IS ONLY ENTITLED TO SET OFF THE DIVIDENDS PAID TO BANK AGAINST THE ENTIRE CLAIM OF HILL BREAD COMPANY.

The claim was presented for $10,000.00 on note, and $89.91 on book account. The executrix admits the allowance of that claim. The effect of that admission is, that the claim stands as an adjudged amount due to Hill Bread Company from the estate.

The company offered in the claim to credit the note for $2,500, but the executrix insists in her bill that she still holds the note, and that it has not been paid in whole or in part. Therefore, the $2,500 note does not enter into the case. As the case now stands under the finding of fact by the Vice-Chancellor, the executrix is entitled to recover $4,725 paid to the bank. As against that amount, the company presents an adjudicated claim for $10,089.91. The question is, whether

the $4,725 must be charged against the whole claim of the company, or only against such dividend as is payable to the company. It resolves itself into this proposition. If the executrix should bring an action at law against the company to recover $4,725 paid for the use of the company, the company could off-set the note for $10,000 and counter-claim the account of $89.91 under our present practice. But the executrix contends that this would be giving the company a preference over other creditors, which is equivalent to claiming that the company must pay in full, and can only recover a part of its claim. Such may be the rule in the absence of any right of set-off, but the executrix having applied to a Court of Equity, must even in this situation do equity, and must give the company the benefit of any claim that it has against the estate. The decree, that the company shall reimburse the executrix to the extent of the difference between the dividend paid to the bank and the dividend payable to the company on its claim, is inequitable. The decree should have been, that the dividend paid to the bank should be applied as a payment on account to the company and not in extinguishment of any dividend payable to the company.

POINT III.

PAYMENT OF THE NOTES OF HILL BREAD COMPANY TO THE UNION NATIONAL BANK ON AGREEMENT WITH BANK FOR ASSIGNMENT OF ITS CLAIM AGAINST FEICK'S ESTATE, DID NOT EXTINGUISH FEICK'S LIABILITY.

The intention was to keep the claim alive so that the dividends could be collected and applied to both claims, that of the bank and that of the

company. The company acted upon the opinion of the Vice-Chancellor, that it could make such a payment and be subrogated to the rights of the bank. If the opinion of the Vice-Chancellor is not sufficient to protect the company in making the payment to the bank, then the decree was outside of the issue and is void for that reason. Perhaps what the Vice-Chancellor says in his opinion was not necessary to be said, and was no part of the case before him. If that is so, then the company had no opportunity to be heard on the question of the payment to the bank and the effect of it. Therefore, the decree adjudging that the liability of Feick has been extinguished, is erroneous.

POINT IV.

THE REAL SITUATION IS, THAT THE ESTATE IS A CREDITOR OF HILL BREAD COMPANY FOR $13,000 ON NOTES LESS $10,000 ON NOTE OF FEICK HELD BY THE COMPANY, LEAVING BALANCE DUE FEICK ESTATE OF $3,000.

The company has a claim on book account for $89.91, for which it must accept dividend equally with other creditors. The decree should be, that the complainant should take up the notes held by the bank and surrender them to the company together with the note for $2,500, and that the company should pay to the complainant $3,000 and surrender the note for $10,000. Interest to be adjudged as between the parties on the respective claims. Such a decree would carry out the manifest intention of the company and Feick at the time the $10,000 was paid. Such a decree would merely be specific performance of the agreement that was made between the parties and would be manifestly equitable. The decree

as it now stands, takes out of the treasury of the corporation a large sum of money for which the company has received no benefit, and in effect puts Feick in a position of intentionally, as treasurer of the company, taking money to which he had no legal right.

In order to sustain the decree made in this case, the Court was obliged to find that an illegal act had been done and a loan made by a company which had no power to make it, to one of its directors.

The case should be governed by the equitable rule that there are mutual credits, that is: *"A knowledge on both sides of an existing debt due to one party, and a credit by the other party founded on and trusting to such debt as a means of discharging it."* Hill Bread Company trusted to the note of Feick which it held, as a means of discharging the notes held by Feick.

Story's Eq. Jur., par. 1435, *et seq.*
Black v. *Whitall,* 9 Eq. 572, at p. 577.
Brewer v. *Norcross,* 17 Eq. 219, at p. 225.
Jackson v. *Bell,* 31 Eq. 554, at p. 556.
Trotter v. *Heckscher,* 40 Eq. 612, at p. 657.
Dade v. *Irwin, Excr.,* 2 How. U. S. 383, at p. 391.
Law Ed., Book 11, p. 311.

See also - Scott v. Armstrong 146 U.S. 499 - L. Ed. 36 - 1059

The same rule has been applied also in this state, at law.

Receivers v. *The Paterson Gas Light Co.,* 23 Law 283, at p. 291, distinguished in *Roseville Trust Co.* v. *Barney,* 96 At. 69.

It is respectfully submitted that the decree should be reversed.

FRANK E. BRADNER,
Of Counsel with Appellant.

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Opinion of Supreme Court.

Filed March 7, 1917.

New Jersey Supreme Court.

November Term, 1916.

BERTHA E. FEICK, as executrix of the last will and testament of CHARLES A. FEICK,
Petitioner,

vs.

HILL BREAD COMPANY, a corporation, and JOHN J. HILL,
Defendants.

On petition for mandamus.

Before Justices Swayze, Minturn and Kalisch.

For the petitioner, Pitney, Hardin & Skinner.

For the defendants, Frank E. Bradner.

Per Curiam:

This is an application for a mandamus to inspect the books of the Hill Bread Company. The petitioner is the executrix of the last will and testament of her deceased husband, Charles A. Feick. The petitioner's husband was the owner of fifty per cent. of the stock in the Hill Bread Company at the time of his death, and the defendant, John J. Hill, and one Nathaniel Doyle are the owners of the remaining fifty per cent. Two of the four directors of the company represent the Feick estate, and a situation has arisen on which there is a deadlock.

The Feick estate has been declared insolvent. The one hundred shares of stock belonging to the Feick estate and a part of its assets has at present an uncertain value. In 1911, the stock was appraised at $500.00 a share and was paying dividends of 50% a year. Since 1913, it has paid no dividends. Shortly after her husband's death, the executrix was offered $40,000.00 for the stock which she declined. Since then she has been offered much less. The petitioner seeks to inspect the books and records of the company and to ascertain its condition, profits and earnings solely for the purpose of ascertaining the value of the stock by her, as executrix, with a view to considering the advisability of disposing of the same which it is claimed can only be secured by an investigation of the books and records of the company, with the aid of expert accountants. This appears to have been denied her by the defendants. We think the application of the petitioner in that regard is made in good faith, and under the facts stated, a writ of alternative mandamus should issue.

Order Granting Writ.

Filed April 3, 1917.

NEW JERSEY SUPREME COURT.

BERTHA E. FEICK, as executrix of CHARLES A. FEICK, *Petitioner,* *vs.* HILL BREAD COMPANY and JOHN J. HILL, *Defendants.*	*On Application for Writ of Mandamus.* *Order Directing Writ to Issue.*

The above entitled matter coming on to be heard on the return of the rule to show cause heretofore made, in the presence of Pitney, Hardin & Skinner, of counsel with the petitioner, and Frank E. Bradner, of counsel with the defendants, and the Court having read the petition, affidavits and schedules annexed thereto and the depositions taken in the said matter and having considered the argument of counsel thereon;

IT IS on this thirty-first day of March, 1917, hereby ORDERED and DIRECTED that an alternative writ of mandamus do issue out of this Court, commanding said Hill Bread Company and John J. Hill to produce at the office of the Hill Bread Company in the City of Newark all its books, including its books of account and books of the minutes of the proceedings of the directors' and stockholders' meetings, and all papers and documents in its possession showing, in summary or in detail for the period

from September 30, 1911, to the present time, income of said Hill Bread Company, the sources thereof, the disbursements, including therein the expenses of maintenance and operation of said company and otherwise, in the conduct of its business, its profits therefrom, its assets, the amount, items and value of the property of all kinds owned by said company, the amount of its liabilities, the nature thereof and to whom the same are payable, its financial condition, surplus, reserves, undivided profits, investments, cash on hand and in banks, the dividends declared and paid out by it since said date, any statement made during said period of the assets, liabilities, condition, income and outgo of said company and showing any depreciation or losses in the property of said company; and there to permit said Bertha E. Feick, by an expert accountant and an assistant to be selected by her, to inspect all of said books, papers and documents, to take copies thereof and of the entries in such books, papers and documents, according to the prayer of the petition filed in said cause.

SAMUEL KALISCH,
J. S. C.

Entered April 3, 1917.

On motion of

PITNEY, HARDIN & SKINNER,
Attorneys for and of Counsel with Petitioner.

Alternative Writ of Mandamus.

Allowed April 14, 1917. Issued April 17, 1917.

NEW JERSEY, *ss:*

(L. S.) The State of New Jersey, to Hill Bread Company and John J. Hill, its President, GREETING:

1. WHEREAS, Hill Bread Company is and since April 13, 1899, has been a corporation organized and existing under the laws of the State of New Jersey, with an authorized capital stock of $100,000., divided into one thousand shares of the par value of $100. each, of which capital stock two hundred shares is the entire amount issued and outstanding.

2. AND WHEREAS, upon the incorporation of said company, Charles A. Feick subscribed for and became the owner of one hundred shares of said stock and John J. Hill, aforesaid, subscribed for, became and still is the owner of eighty shares of said stock and Henry L. Mueller subscribed for and became the owner of twenty shares of said stock, which said twenty shares subsequently were sold and transferred to one Nathaniel Doyle, who is the present owner thereof.

3. AND WHEREAS, said Charles A. Feick died September 30, 1911, leaving a last will and testament wherein and whereby he appointed his wife, Bertha E. Feick, his executrix, which said will has been duly admitted to probate by the Surrogate of Essex County and letters testamentary thereon duly issued to said Bertha E. Feick, and said Bertha E. Feick, as such executrix, has become the owner of

ninety-eight of said shares of stock on the books of said company.

4. AND WHEREAS, the said estate of Charles A. Feick has been decreed to be insolvent by the Essex County Orphans' Court, and said Bertha E. Feick is and has been for some time past engaged in disposing of the assets of said estate to the best advantage and selling the same for the highest obtainable price for the benefit of the creditors of said estate.

5. AND WHEREAS, said Bertha E. Feick has no knowledge of the present value of the shares of stock of said Hill Bread Company and there have been no such sales thereof as to establish a market value thereof.

6. AND WHEREAS, the value of said stock owned by Charles A. Feick at the time of his death was determined, by appraisers duly appointed, to be $500. per share, but said Bertha E. Feick has found no purchasers at said price and has had offers of purchase at much below said figure, which offers she cannot safely accept without full and accurate knowledge of the value of said stock.

7. AND WHEREAS, John J. Hill is the President and sole executive manager of said company and a director thereof, and in full possession and control of all knowledge and information and the sources of such information as to the condition, profits, earnings, expenses, assets, liabilities, investments and dividends of said company, and under whose direction and control all the books, records, papers and documents are kept, and said Bertha E. Feick has frequently and at various times, by her agents and attorneys, applied to said John J. Hill for

detailed information as to said matters as to which she was ignorant, in order that she might learn the value of said stock, but said John J. Hill has failed and refused to give such detailed statements or such information or to permit any of the employees of said company to do so.

8. And whereas, Carl A. Feick and Benedict Prieth are secretary and treasurer, respectively, and directors of said company, and said Bertha E. Feick has frequently applied to them for information as to the same matters and for detailed information, necessary to ascertain the value of such stock, but said Carl A. Feick and Benedict Prieth have been unable to give such information.

9. And whereas, said Bertha E. Feick has personally and by her agents and attorneys frequently and especially on September 25, 1916, by notice in writing served upon Hill Bread Company and John J. Hill, aforesaid, requested of said company and said John J. Hill an opportunity to examine the books, papers, records and documents of said company as a stockholder thereof, stating at the time of such request that such information and permission were sought for the purpose of learning the value of such stock, and also requesting the opportunity to have the assistance of skilled accountants in such matters, as said Bertha E. Feick is ignorant of said books and papers and the methods of keeping the same and the significance of the entries therein, but said corporation and John J. Hill have always refused such permission and opportunity to examine said books, whether with or without such assistance.

10. AND WHEREAS, said Bertha E. Feick, by her agents, attorneys and proxies, has regularly attended meetings of stockholders of the said company, but has been unable to learn therefrom what is the actual value of said stock or the condition, profits, earnings, expenses, assets and liabilities of said company.

11. AND WHEREAS, the principal office of said Hill Bread Company is 620 Market street, in the City of Newark, County of Essex and State of New Jersey, at which address the business of said company is conducted and the various books and records of said company are kept.

12. AND WHEREAS, the object of such an inspection, above requested, and the purpose of the said Bertha E. Feick in applying therefor and in requesting the aforesaid detailed information as to the condition, profits, earnings, expenses, assets, liabilities and investments of said company, is to learn what the revenues and expenses of the Hill Bread Company are and how the same accrue and arise, the amount of its assets, liabilities and surplus, and of what said assets and surplus consist, and the basis upon which the same are estimated, to whom the liabilities of said company are owing, and to learn whether the said shares of stock have depreciated largely since the appraisal at the time of the death of the said Charles A. Feick.

WE THEREFORE, willing that due and speedy justice should be done in this behalf, command and strictly enjoin you that, immediately after the receipt of this writ, you do produce at the office of the said Hill Bread Company in the City of Newark in this State all its books, in-

cluding its books of account and books of the minutes of the proceedings of the directors' and stockholders' meetings, and all papers and documents in its possession showing, in summary or in detail for the period from September 30, 1911, to the present time, income of said Hill Bread Company, the sources thereof, the disbursements, including therein the expenses of maintenance and operation of said company and otherwise, in the conduct of its business, its profits therefrom, its assets, the amount, items and value of the property of all kinds owned by said company, the amount of its liabilities, the nature thereof and to whom the same are payable, its financial condition, surplus, reserves, undivided profits, investments, cash on hand and in banks, the dividends declared and paid out by it since said date, any statement made during said period of the assets, liabilities, condition, income and outgo of said company and showing any depreciation or losses in the property of said company; and there to permit said Bertha E. Feick, by an expert accountant and an assistant to be selected by her, to inspect all of said books, papers and documents, to take copies thereof and of the entries in such books, papers and documents, or cause to us to the contrary thereof signify, lest, in your default, complaint should come to us repeated, and how you shall execute this our command, certify to our Justice of our Supreme Court at Trenton on the fifth day of June, 1917, together with this our writ, and this in no wise omit at your peril.

Alternative Writ of Mandamus.

WITNESS, WILLIAM S. GUMMERE, Esq., Chief Justice of our Supreme Court, at Trenton, this seventeenth day of April, 1917.

WM. C. GEBHARDT,
Clerk.

PITNEY, HARDIN & SKINNER,
Attorneys.

Endorsement:

This writ is allowed by me in open court. Let it be sealed.

April 14, 1917.

SAMUEL KALISCH,
J. S. C.

Return to Writ.

Return.

Filed June 5, 1917.

NEW JERSEY SUPREME COURT.

BERTHA E. FEICK, as executrix of CHARLES A. FEICK, *Petitioner,* *vs.* HILL BREAD COMPANY and JOHN J. HILL, *Defendants.*	*On Alternative Writ of Mandamus.* *Return.*

Hill Bread Company, by John J. Hill, its president, makes the following return to the alternative writ of mandamus issued in the above stated cause on April 17, 1917.

1. The said John J. Hill, as President of said Hill Bread Company, says that he has no authority to permit any person to examine the books and records of the company, or to take copies thereof, and that the power to permit any person other than a director or officer of the Company, to examine the books and to take copies thereof, is vested solely in the Board of Directors of the Company.

2. That no demand has ever been presented by the relator to the Board of Directors of the Company requesting permission to examine the books, and no action has ever been taken by the Board of Directors upon any demand made by the relator.

3. That there is now no Board of Directors qualified to act, and the relator as owner of

and in control of 50% of the stock of the Company, has prevented an election to fill a vacancy so as to constitute a lawful Board of Directors.

4. John J. Hill, as President of the Company, has never denied permission to relator personally, or with the assistance of her representatives on the Board of Directors, Mr. Feick and Mr. Prieth, to examine the books, or to take copies thereof, but has refused to permit any accountant or person not connected with the Company, to examine the books, or to take copies thereof, and has stated that he has no authority to give such permission and now says that he has no authority to give such permission.

5. John J. Hill, as President of the Hill Bread Company, says that full and complete reports of the condition of business of the Company, showing its financial condition, surplus, reserves, undivided profits, investments, cash on hand and in bank, and depreciation or losses in the property, and generally the exact financial condition of the Company, have been made to the stockholders of the Company, including the relator, at annual meetings covering the years 1911, 1912, 1913, 1914, 1915 and 1916, and that at each of said meetings, the relator by her representatives on the Board of Directors, had the opportunity to inspect the said reports and to make copies thereof; and that the book value of the stock of the company is a mere matter of calculation, and could be ascertained from the reports aforesaid.

6. John J. Hill, as President of the Hill Bread Company, further says that the relator

has no personal interest in the shares of stock standing in her name as executrix of the last will and testament of Charles A. Feick, deceased, and that she has not been requested by the creditors of the estate of Charles A. Feick, deceased, or authorized by any court to take proceedings as such executrix to obtain an examination of the books of the said Company, and that her object in this proceeding is to have a stranger not connected with the Company, get information so as to speculate in the stock.

HILL BREAD COMPANY,

By JOHN J. HILL,
President.

Demurrer to Return.

Filed July 3, 1917.

NEW JERSEY SUPREME COURT.

BERTHA E. FEICK, as executrix of CHARLES A. FEICK, *Relator,* *vs.* HILL BREAD COMPANY and JOHN J. HILL, *Defendants.*	*On Alternative Writ of Mandamus.* *Demurrer to Return.*

Bertha E. Feick as executrix of Charles A. Feick, the relator, demurs to the return of the defendants above pleaded upon the following grounds:

1. Because the matters therein contained are insufficient in law to bar or preclude the relator from having or maintaining her said action thereof against the said defendants.

2. Because said return contains inconsistent defenses.

3. Because said return sets up matters which are immaterial, irrelevant and frivolous.

4. Because said return sets up scandalous and impertinent matter.

5. Because said return does not set up facts which are sufficient in law to bar or preclude relator, but pleads conclusions of law.

6. Because said return does not sufficiently set forth facts showing that the President had no authority to do the acts, the performance

of which is commanded by the alternative writ, or showing that the sole power to permit the acts is vested in the Board of Directors.

7. Because the said return admits there is and was no Board of Directors qualified to act and exercise the authority alleged in the said return to be vested solely in them.

8. Because the said return does not traverse with sufficient certainty the material allegations of the alternative writ in this case.

9. Because the said return does not set up matters excusing the performance of the command of the alternative writ by the defendant, Hill Bread Company, but only sets up matters alleged to bar or preclude the relator from having her said relief against the defendant, John J. Hill.

10. Because the matters alleged in said return as to the authority and acts of the said defendant, John J. Hill, President, do not bar or preclude the relator from having or maintaining her said action against the defendant, Hill Bread Company.

11. Because the Board of Directors of the defendant, Hill Bread Company, is not dissolved nor ordered incompetent to act by reason of the alleged vacancy in said Board.

12. Because the matters, alleged in said return as a reason why the relator should not have or maintain her said action, have been adjudged insufficient upon the granting of the alternative writ in this case upon notice and the taking of depositions and after argument.

Demurrer to Return.

13. Because said return admits that defendant, John J. Hill as President of the defendant, Hill Bread Company, has not and will not permit any accountant to examine the said books, pursuant to the command of the said writ.

WHEREFORE, by reason of the insufficiency of the said return in this behalf, the relator prays judgment and that a peremptory writ of mandamus may issue commanding the said defendants to perform, according to the command of the alternative writ above, with costs.

PITNEY, HARDIN & SKINNER,
Attorneys of Relator.

Notice of Appeal.

Filed April 24, 1918.

NEW JERSEY SUPREME COURT.

BERTHA E. FEICK, Executrix of Charles A. Feick, deceased, *Relator,*	*On Alternative Writ of Mandamus.*
vs.	
HILL BREAD COMPANY, *et al.*, *Defendants.*	*Notice of Appeal.*

TAKE NOTICE that the defendants appeal to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered in this cause.

Yours respectfully,

FRANK E. BRADNER,
Attorney of Defendants.

Dated April 22, 1918.

To PITNEY, HARDIN & SKINNER, ESQS.,
Attorneys of Relator.

Service acknowledged April 23, 1918.

PITNEY, HARDIN & SKINNER,
Attorneys of Relator.

Opinion of Supreme Court.

Filed April 4, 1918.

NEW JERSEY SUPREME COURT.

November Term, 1917.

BERTHA E. FEICK, Executrix of Charles A. Feick, deceased, *Relator,*

vs.

HILL BREAD COMPANY, *et al.*, *Defendants.*

Submitted November term, 1917. Decided April 3, 1918. On demurrer to return of alternative writ of mandamus. Before Gummere, Chief Justice, and Justices Parker and Kalisch.

For the relator and demurrant: Pitney, Hardin & Skinner. Edward Stanley, Jr., of counsel.

For the defendants, Frank E. Bradner.

The opinion of the court was delivered by KALISCH, *J.* An alternative writ of mandamus requiring the defendant company, and its president, John J. Hill, to show cause why they should not permit the relator, with the aid of an expert accountant, to examine all the books, including books of account and books of the minutes of the proceedings of the directors and stockholders of the company, and all papers and documents in the possession of the company relating to and concerning the business and financial affairs of the company, was directed against

them, permission to make such examination having been refused by the defendant company's president.

Although the writ was directed to the defendant company and John J. Hill its president, the return is made by the company alone, Mr. Hill remaining silent.

To the return made the relator demurred.

1. The defendant company sets up in its return that Mr. Hill as president had no authority to permit such an examination as asked for, and that the relator by demurring admits the truth of the statement. It is manifest that the bare statement in the return, that Mr. Hill had no authority as president, is a mere conclusion of law, and, therefore, the demurrer has not the legal effect contended for by defendant, namely, to admit the truth of the statement.

2. It is said in the return that no demand was ever presented, by the relator, to the board of directors of the company requesting such permission to examine the books, and it is, therefore, claimed that since this fact is admitted by the demurrer, the relator's right to the relief prayed for is barred. The answer to this is three-fold: (1) It is true that the demurrer admits that no such demand was made, but that fact is immaterial, for it was not necessary, as a basis for the present application. Garcin *v.* Trenton Rubber Mfg. Co., 60 Atl., 1098; People *v.* Throop, 12 Wend. 184. The return in the present case inferentially admits that such a demand in writing was made upon the president of the defendant company.

High on extraordinary legal remedies, in his treatise on the writ of mandamus, on p. 217, section 311, says: "As regards the person to whom the writ should be directed where inspection of corporate records is sought, the proper practice is to address it to the one actually having the custody of the books and records, even though he is merely a ministerial officer acting under the direction of others, as in the case of a bank cashier acting under a board of directors. In such case the rule applies that the writ should run to the particular person who is to perform the act required, and the cashier having charge of the books, his refusal to allow their inspection is his individual act, and the writ is therefore, properly addressed to him. Though there can be no impropriety in such a case in directing the writ also to the board of directors." (2) It appears from the return that there was no board of directors qualified to act. (3) The statement that the relator prevented an election is a mere conclusion based upon undisclosed facts. For aught that appears in the return, the prevention of the election was the exercise of a lawful act.

(3) It is asserted in the return that the president never denied the relator's right to examine the books personally or with the assistance of Mr. Feick and Mr. Prieth, but refused any accountant or person not connected with the company to examine the books, and has stated that he had no authority to give such permission.

This is clearly an express admission of the very facts upon which the relator bases her application.

The defendant does not attempt to justify the refusal of its president to permit the examination applied for, on the ground of lack of authority, in that official to grant it, but, in effect, asserts, that the relator is not entitled to such an examination, with the assistance of an expert accountant, not connected with the company.

The common law recognized the right of a stockholder to inspect the books of a corporation where the application is made in good faith and is germane to his rights as a stockholder. Huyler *v.* Cragin Cattle Co., 40 N. J. E. 398; Stettauer *v.* N. Y. Scranton Construction Co., 42 *Id.* 46; Fuller *v.* Hollander & Co., 61 *Id.*, 652; Venner *v.* Chicago City Ry. Co. *et al.*, 246 Ill., 170; 92 N. E. 643; Weihenmayer *v.* Bitner, 45 L. R. A. 456. See note, where cases are collected.

The weight of authority in this country appears to be that a stockholder may employ an expert accountant not connected with the corporation to assist him in making the examination. 7 Ruling Case Law, page and section 301.

The underlying reason for this view is well stated in the text: "The possession of the right would be futile if the possessor through the lack of knowledge necessary to its exercise, were debarred of the privilege to procure in his behalf the service of one competent to exercise it."

And in Huyler *v.* Cragin, *supra,* Chancellor Runyon, on p. 398, in discussing the right of stockholders, says: "And they are entitled to such inspection, though their only object is to ascertain whether their affairs have been prop-

erly conducted by the directors or managers. Such a right is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors and managers, but are the records of their transactions as trustees of the stockholders."

It is, therefore, plain in the present case that the relator was not legally obligated to accept the permission claimed by the defendant to have been tendered her, circumscribed as it was by the limitation that she might have the assistance of either Mr. Feick or Mr. Prieth to make the examination, because they were connected with the defendant company, it not appearing that either was an expert accountant competent for the task. But even if the persons designated were competent for the task, it is quite obvious that their selection would defeat the very purpose which was intended to be accomplished by the investigation, and, that is to obtain information of the affairs of the company through an independent source, by a disinterested expert accountant.

4. The allegations in the return that full and complete reports, showing the condition of the business of the corporation, were annually made to its stockholders, including the relator, covering a period of six years, and that the relator, by her representative on the board of directors, had the opportunity to inspect the reports and to

make copies thereof; and that the book value of the stock of the company is a mere matter of calculation and could be ascertained from the reports, furnish no legal excuse for denying the relator's present application. But apart from this, it may turn out, upon an examination of the books, that the annual reports made by the company were inaccurate and did not truly represent the business affairs and condition of the company, and, hence, the present value of the stock would be more or less affected. Such a possible result indicates not only the propriety but the necessity of the examination asked for by the relator.

5. The defendant company finally concludes its return, by asserting that the relator has no personal interest in the shares of stock standing in her name as executrix of the last will and testament of Charles A. Feick, deceased, and that she has not been requested by the creditors of the estate, or authorized by any court, to take this proceeding; and that her object is to have a stranger not connected with the company, get information so as to speculate in the stock.

The fact that the relator is the executrix of the Feick estate, without taking into consideration any other rights or interests that she may be entitled to under the will in her own right makes it plain that she stands in a fiduciary relation to the creditors of the estate, as to the marshaling of assets.

She would be considered highly remiss in the discharge of her duty, if she had reasonable grounds to believe that an examination of the books of the company would assist her in getting at the true value of the stock held by her in trust

for the benefit of the creditors of the estate and refrained from taking any action in the matters, and, in consequence, the stock was sold for less than its true value. Neither the consent of the court nor of the creditors of the estate was required, in order that the relator may properly make the present application.

The statement, made by the defendant, that the object of the proceeding is to have a stranger to get information so as to speculate in the stock, is a mere conclusion based upon assumed facts not disclosed, and moreover, the court can protect the defendant company against any such alleged scheme by supervising the selection of the accountant.

The demurrer is sustained and a peremptory writ of mandamus is allowed and directed to issue as prayed for, with costs.

Rule for Judgment and Order.

Filed April 16, 1918.

NEW JERSEY SUPREME COURT.

BERTHA E. FEICK, as Executrix of Charles A. Feick, *Relator,* *vs.* HILL BREAD COMPANY AND JOHN J. HILL, *Respondents.*	*Rule for Judgment and Order Directing Issue of Peremptory Writ of Mandamus.*

This matter being opened to the court by Pitney, Hardin & Skinner, attorneys of the relator:

Whereupon all and singular the premises aforesaid being seen, and by the said court now here fully understood and mature deliberation thereupon had, it appears to the court here that the return of the respondents to the alternative writ of mandamus heretofore issued, is not good and sufficient in law and that the demurrer thereto is well taken and that judgment be entered in favor of the said Bertha E. Feick, as executrix of Charles A. Feick, relator, against the said Hill Bread Company and John J. Hill, respondents, with costs:

AND IT IS FURTHER ORDERED on this thirteenth day of April, 1918, on motion of Pitney, Hardin & Skinner, aforesaid, that a peremptory writ of mandamus do issue out of this court, commanding said Hill Bread Company and John J. Hill to produce at the office of the Hill Bread Company in the City of Newark all its books, including its books of account and books of the minutes

of the proceedings of the directors' and stockholders' meetings, and all papers and documents in its possession showing, in summary or in detail for the period from September 30, 1911, to the present time, income of said Hill Bread Company, the sources thereof, the disbursements, including therein the expenses of maintenance and operation of said company and otherwise, in the conduct of its business, its profits therefrom, its assets, the amount, items and value of the property of all kinds owned by said company, the amount of its liabilities, the nature thereof and to whom the same are payable, its financial condition, surplus, reserves, undivided profits, investments, cash on hand and in banks, the dividends declared and paid out by it since said date, any statement made during said period of the assets, liabilities, condition, income and outgo of said company and showing any depreciation or losses in the property of said company; and there to permit said Bertha E. Feick, by an expert accountant and an assistant to be selected by her, to inspect all of said books, papers and documents, to take copies thereof and of the entries in such books, papers and documents, according to the command of the alternative writ of mandamus heretofore issued in said cause.

SAMUEL KALISCH,
Justice of the Supreme Court.

Entered April 16, 1918.

On motion of

PITNEY, HARDIN & SKINNER,
Attorneys of Relator.

Grounds of Appeal.

Filed May 1, 1918.

New Jersey Court of Errors and Appeals

BERTHA E. FEICK, Executrix, etc., of Charles A. Feick, deceased, *Relator-Respondent,* *vs.* HILL BREAD COMPANY, *et al.*, *Defendants-Appellants.*	*On Mandamus.* *On Appeal from Supreme Court.* *Grounds of Appeal.*

The appellants state the following grounds of appeal:

1. The determination of the Supreme Court, that the return to the alternative writ of mandamus was not made by John J. Hill as President of Hill Bread Company.

2. The determination of the Supreme Court, that the statement in the return to the alternative writ, that Mr. Hill had no authority as President of the Hill Bread Company, to permit any person to examine the books and records of the company, is a mere conclusion of law.

3. The determination of the Supreme Court, that it was not necessary for the relator to present a demand to the Board of Directors of the Company requesting permission to examine the books.

4. The determination of the Supreme Court, that the return shows that there was no Board of Directors qualified to act at the time the sup-

posed demand was made upon the President of the Company.

5. The determination of the Supreme Court, that the statement in the return that the relator prevented an election of a Board of Directors, is a mere conclusion based upon undisclosed facts.

6. The determination of the Supreme Court, that the return inferentially admits that a demand in writing was made upon the President of the defendant Company.

7. The determination of the Supreme Court, that the return expressly admits the very facts upon which the relator bases her application.

8. The determination of the Supreme Court, that the defendants do not attempt to justify the refusal of the President of Hill Bread Company to permit the examination applied for on the ground of lack of authority in that .official to grant it.

9. The determination of the Supreme Court, that the allegations in the return that full and complete reports showing the condition of the business of the corporation, all as stated in paragraph 5 of the return, furnished no legal excuse for denying the relator's application for a writ of mandamus.

10. The determination of the Supreme Court, that the return which states that the relator has no personal interest in the shares of stock standing in her name as executrix of the last will and testament of Charles A. Feick, deceased, and has not been requested by the creditors of the Estate of Charles A. Feick, deceased, or authorized by any court to take proceedings as such executrix to obtain an examination of the books

of the said company, is insufficient and does not present any legal excuse for denying the relator's application.

11. The determination of the Supreme Court, that the statement in the return, that the object of the relator in this proceeding is to have a stranger not connected with the company, get information so as to speculate in the stock is a mere conclusion based upon assumed facts not disclosed, and is not a statement of fact admitted by the demurrer to be true.

12. The judgment of the Supreme Court sustaining the demurrer, and directing that a peremptory writ of mandamus should be allowed.

FRANK E. BRADNER,
Attorney of Appellants.

Service acknowledged by PITNEY, HARDIN & SKINNER, Attorneys for Relator, April 30, 1918.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Bertha E. Feick, as Executrix of Charles A. Feick, *Relator-Respondent,* *vs.* Hill Bread Company, *et al.*, *Defendants-Appellants.*	*On Appeal from Supreme Court.*

Brief for Appellants.

Abstract of the Case.

This is an appeal from the judgment of the Supreme Court sustaining a general demurrer to a return to an alternative writ of mandamus. The writ was allowed after hearing on rule to show cause, and the opinion of the court allowing the writ, is printed on p. 1.

The writ (p. 5) is directed to Hill Bread Company and John J. Hill, its president. It is not directed to John J. Hill in his individual capacity. The return to the writ (p. 11), purports to be made by Hill Bread Company, by John J. Hill, its president, and is in effect the joint return of the Company and its president, insofar as the president had power to make a return for the Company, acting on his own responsibility. It is deemed that a comparative analysis of the allegations in the writ and in the return, will aid the court, as showing what facts are admitted and what are in dispute. The writ contains 12 paragraphs, and the return contains 6 paragraphs.

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted.

4. Paragraph 4 is admitted.

5. Paragraph 5 is admitted, except the allegation that "Bertha E. Feick has no knowledge of the present value of the shares of stock of said Hill Bread Company;" and Paragraph 5 of the return alleges that "full and complete reports of the condition of business of the Company, showing its financial condition, surplus, reserves, undivided profits, investments, cash on hand and in bank, and depreciation or losses in the property, and generally the exact financial condition of the Company have been made to the stockholders of the Company, including the relator, at annual meetings covering the years 1912, 1913, 1914, 1915 and 1916, and that at each of said meetings, the relator by her representatives on the Board of Directors, had the opportunity to inspect the said reports and to make copies thereof; and that the book value of the stock of the company is a mere matter of calculation and could be ascertained from the reports aforesaid."

6. Paragraph 6 is admitted, except the implication that the relator is without full and accurate knowledge of the value of the stock, which portion is answered by Paragraph 5 of the return as aforesaid.

7. Paragraph 7 is answered by Paragraph 1 of the return, in which it is alleged that the President of the Company "has no authority to permit any person to examine the books and records of the Company, or to take copies thereof, and that the power to permit any person other than a director or officer of the Company, to examine the books and take copies thereof, is

vested solely in the Board of Directors of the Company."

Paragraph 7 is also answered by Paragraph 4 of the return, which denies that the President of the Company has ever refused to give information to the relator personally, or to permit her with the assistance of her representatives on the Board of Directors, to examine the books, or to take copies thereof, and has expressly stated that he has no authority to give such permission.

8. Paragraph 8 is answered by Paragraph 4 and Paragraph 5 of the return, as stated.

9. Paragraph 9 is answered by Paragraph 4 of the return.

10. Paragraph 10 is answered by Paragraph 5 of the return.

11. Paragraph 11 is admitted.

12. Paragraph 12 alleges the object of the inspection requested, and is answered by Paragraph 6 of the return, in which it is distinctly alleged that the "object in this proceeding, is to have a stranger not connected with the Company, get information so as to speculate in the stock." The Supreme Court held, that some of the matters set up in the return, were not sufficiently pleaded as facts, and were therefore, not admitted by the demurrer; and that other matters set up, did not constitute any excuse for not complying with the command of the writ.

Twelve grounds of appeal are stated at p. 27, and they may be combined in the following:—

Specifications of Error.

1. The determination of the Supreme Court, that the return does not allege as a fact the want of authority of the President of the Com-

pany to permit any person to examine the books and records of the Company.

2. The determination of the Supreme Court, that a preliminary application to the Board of Directors of the Company, is unnecessary.

3. The determination of the Supreme Court, that the return contains an express admission of the very facts on which the relator bases her application.

4. The determination of the Supreme Court, that the allegations in the return that full and complete reports showing the condition of the business of the corporation, were annually made to its stockholders, including the relator, etc., as stated in Paragraph 5 of the return, furnished no legal excuse for denying the relator's application for a writ of mandamus.

5. The determination of the Supreme Court, that the allegation in the return, that the relator is only interested as the representative of creditors of the insolvent debtor's estate, and has not been requested by the creditors, or authorized by any court to take this proceeding, furnishes no legal excuse for denying the relator's application.

6. The determination of the Supreme Court, that the allegation in the return, that the object of the proceeding, is to have a stranger get information so as to speculate in the stock, is a mere conclusion based upon assumed facts not disclosed.

Brief of Argument.

POINT I.

The return alleges these facts, which are admitted by the demurrer:

1. The want of power in the President of the Company to comply with the request of the relator and with the command of the writ.

The return in Paragraph 1 alleges that the President has no authority to permit any person to examine the books, and that the power to permit any person other than a director or officer of the Company, to examine the books, is vested solely in the Board of Directors of the Company.

How could the statement be made with any more certainty. It is not an argument, that the President has no power by virtue of his office, or that the power is vested in the Board of Directors by law, but it is a clear statement that the sole power to permit stockholders to examine the books, is vested in the Board of Directors. The clear inference is that the power is so vested by the by-laws of the Company.

The Supreme Court (at p. 19) seems to have overlooked the concluding clause of the paragraph in the return, which alleges that the power is vested solely in the Board of Directors.

2. The present inability of the Board of Directors to act, because there is a vacancy, which the relator refuses to fill by preventing an election.

It seems to be assumed by the Supreme Court, that this statement in Paragraph 3 of the return, relates to the situation at the time the alleged request for permission to inspect the books was

made, as it is stated in the opinion on p. 20, l. 22:—"It appears from the return that there was no Board of Directors qualified to act." This is clearly a misapprehension of the fact stated in the return as follows:—"*That there is now no Board of Directors qualified to act.*" The further statement is made in the return, that the relator is in control of 50 per cent of the stock of the Company, and has prevented an election to fill a vacancy, so as to constitute a lawful Board of Directors. The express statement is made that there is now no Board of Directors qualified to act, and that the relator prevents an election to fill a vacancy. The inference is, that there is a vacancy in the Board which can only be filled by an election by the stockholders.

The argument in the Supreme Court's opinion is, that the prevention of the election may be the exercise of a lawful act. That may be so, but the fact still remains that the election is prevented, and there is no Board of Directors qualified to act upon the relator's request.

3. The President of the Company alleges that he has never denied permission to the relator personally, or with the assistance of her representatives on the Board of Directors, to examine the books, or to make copies thereof, but has refused to permit any accountant or person not connected with the Company, to examine the books, and has stated that he has no authority to give such permission. This is an allegation of a fact, that the President of the Company has refused for a given reason, to permit any accountant or person not connected with the Company to examine the books.

The argument in the opinion is (p. 21) that the defendant does not attempt to justify the

refusal of the President, on the ground of lack of authority in that official to grant it. I think his statement, that he had no authority, made at the time the request was made, is a justification of his refusal.

The return alleges as a fact, that the President of the Company, knowing that the sole power to permit inspection and examination of the books by any person other than a director or officer, was vested in the Board of Directors, refused to permit the relator to have the services of an accountant or person not connected with the Company to assist her in the examination of the books, or to take copies thereof. The return alleges a fact, which is admitted by the demurrer.

4. The return alleges that the object of the relator in this proceeding, is to have a stranger not connected with the Company, get information so as to speculate in the stock.

The return must be read in its entirety, and reading this clause in connection with the previous statements in the return, to the effect that the relator had received annually full and complete reports of the condition of the business of the Company, make it clear that this allegation that her object is to have someone speculate in the stock, is an allegation of a fact. She does not wish to assume the responsibility of making disclosures.

The Supreme Court holds that the statement is a mere conclusion based upon assumed facts not disclosed, but the statement is made without qualification and is a matter of fact which calls for a denial by the relator.

In the opinion of the Supreme Court, on allowing the writ originally (p. 2), it is said that the

application of the petitioner appears to be made in good faith. But that finding is not conclusive, and the defendants are entitled to have the fact tried as to what the object is in this proceeding. How could the fact be otherwise stated. *It certainly is not necessary to disclose the evidence to support the allegation.*

POINT II.

The defendants were entitled to judgment upon the demurrer for these reasons:

1. Until the Board of Directors has refused to act or has acted illegally, the relator is not entitled to a writ.

The general rule is, that a member of a corporation or association, must exhaust the remedy provided by the corporation or association before applying to the courts. It is true, that in *Garcin* v. *Trenton Lumber Mfg. Co.,* 60 At. 1098, it is stated that the relator in that case applied to the President of the Company in writing for permission to examine the books of the Company, which was refused.

This case is clearly distinguishable from that because in the case cited, it does not appear that the President was without power to act.

People v. *Throop,* 12 Wendell 184, is not in point, as it was a contest between a member of the Board of Directors and the Board which had refused him permission to inspect certain books.

The argument in the Supreme Court opinion regarding the person to whom the writ should be directed, it is respectfully submitted, is not in point. The question is, whether the relator is obliged to seek relief first from the Board of Directors. If after the refusal to act, or illegal

action of the Board, a writ is granted, it is perhaps immaterial to whom the writ is granted.

It is alleged in the writ in Paragraph 7 that the President of the Company is in full possession and control of all knowledge and information, and the sources of such information as to the condition, profits, earnings, expenses, assets, liabilities, investments and dividends of said Company, and under whose direction and control all the books, records, papers, documents are kept.

The return shows that the relator prevents the election of a director so as to have a Board qualified to act, with the result, that the burden of conducting the business is put upon the President. *His increased burdens caused by either the neglect or willful act of the relator and her representatives, do not increase his powers.* He may be required as a witness to disclose his knowledge of the business, but he certainly is not required to make any such disclosures in answer to the alternative writ. It is true that the books are in his control, but not because he has the power to control them, but because the relator aud her directors have put him in that position, putting a burden upon him, but giving him no power. It may be argued that even if there were a full Board of Directors, the relator could not accomplish anything with the Board, because there would be a deadlock. That might be her misfortune, but it would be no ground for allowing a writ of mandamus, to enforce an examination of the books.

It is stated in the opinion, on p. 2, that since 1913, no dividends have been paid, Manifestly, if no dividends have been paid, it is because no dividends have been declared, and it may be

that no dividends have been declared, because there has been no Board of Directors to declare them.

2. The relator admits that she has received full and complete reports showing the condition of the business of the corporation annually and covering a period of six years, and that she by her representatives on the Board of Directors, has had the opportunity to inspect the reports and to make copies thereof; and necessarily admits the allegation that the book value of the stock of the Company is a mere matter of calculation and could be ascertained from the reports made to her.

It is argued in the opinion of the Supreme Court, that the reports may have been inaccurate, and may not have truly represented the business affairs and condition of the Company. The relator has not alleged that the reports were inaccurate and untrue; she does not allege that anything has been concealed or misstated. If she already has all the information that could be gotten out of the books necessary for the purpose of figuring out the value of the stock, why should she be permitted to have an expert accountant go through the books again, for a period of five or six years, and especially, when it is not alleged or even intimated, that the reports made to her are inaccurate or untrue. If she is unable personally to figure out the value of the stock, she certainly can employ somebody to assist her, but her ignorance and incompetence are not sufficient reasons to justify the writ in this particular case.

3. The relator as representative of creditors of an insolvent debtor is not entitled to the relief asked.

It is admitted that she has no personal interest as an individual owner of the stock. She is before the court in her representative capacity only. She was made executrix by the will of her husband, but the estate having been adjudged to be insolvent, she derives her power now entirely from the statute and from the order of the Orphans' Court. She is chargeable with the value of the stock as fixed by the appraisers, and contained in the inventory. If it is necessary to sell the stock, the relator following the ordinary practice, should offer it for sale, and should report to the court any bid that she may have been able to get, and apply for leave to sell. The Orphans' Court could then require her to disclose what information she has of the condition of the Company, and could authorize the sale, if satisfied that the amount offered, is a fair and reasonable price. If upon such an application being made to the Orphans' Court, it should be made apparent that the information given to the relator by the annual reports, or obtained by her representatives on the books, is inaccurate or untrue, the relator could then be directed by the Orphans' Court to take any proceeding necessary to obtain accurate and truthful facts.

It does not appear that there is any present necessity for the information for which she now asks. The ordinary rule is, that a trustee in cases of insolvency must have permission from the court to which he is accountable, for leave to bring any action at law or in equity.

It is stated in the opinion of the Supreme Court, on p. 2:—The petitioner seeks to inspect the books and records of the Company, and to

ascertain its condition, profits and earnings solely for the purpose of ascertaining the value of the stock held by her as executrix, *with a view to considering the advisability of disposing of the same.* She there admits in her petition that she is not acting by direction of any court, *but she only seeks information for the purpose of considering the advisability of disposing of the stock, and not because it is necessary to sell the stock, or* because any court has authorized her and directed her to sell it, or has authorized her to take proceedings to get the information. *She seeks it for the purpose of consideration only.* As the representative of creditors, she should only act in the interest of the creditors and take legal proceedings only when authorized to do so.

4. The demurrer admits that the object of the relator is to have a stranger not connected with the Company get information so as to speculate in the stock.

Bearing in mind that this relator has not been authorized by the Orphans' Court to take any proceedings, and that she has stated that she desires the information for the purpose of considering it, that is, for the purpose of determining for herself whether it is advisable to dispose of the stock, and that there is no apparent necessity for disposing of it, and that she has received all necessary information to ascertain the book value of the stock, what can be her object in having an expert accountant go over the books of this company for a period of five years or more?

She does not allege that the books have been fraudulently kept. She does not allege that the statements made to the stockholders are in any respect inaccurate or incomplete, or untruthful,

or that anything is being concealed. Why then does she want an expert accountant?

The return alleges that she wants a stranger to get information so that he can speculate in the stock. This allegation is admitted, and therefore, it is admitted that the application is not made in good faith. If the return is good in part and bad in part, and that portion which is unobjectionable may be separated from that which is defective, a demurrer to the entire return will not be sustained.

Queen v. *Mayor of New Windsor,* 7 Ad. & E. (N. S.) 908.

It is contended that the return is certainly good in these respects:

It shows that the relator has not made any attempt to obtain action by the Board of Directors, and that she has from time to time received all the information that is required to ascertain the book value of the stock, and therefore, even assuming that the other parts of the return are defective, the defendants were entitled to judgment on the demurrer.

It is respectfully submitted that the judgment of the Supreme Court should be reversed and a judgment directed in favor of the defendants on the demurrer.

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New Jersey Court of Errors and Appeals

Bertha E. Feick, as executrix of Charles A. Feick, *Relator-Respondent,* *vs.* Hill Bread Company, *et al.*, *Defendants-Appellants.*	*On Appeal from Supreme Court.* *On Mandamus.*

Brief of Relator-Respondent.

This is an appeal from the judgment of the Supreme Court sustaining the demurrer of the relator to the return filed by defendant Hill Bread Company to an alternative writ of mandamus allowed by the Supreme Court. The alternative writ was allowed upon the return of a rule to show cause after testimony had been taken and argument thereon. The opinion of the Supreme Court allowing the alternative writ is found in case, page 1.

Respondent is doubtful, under the present practice, whether this Court will take cognizance of the present appeal for the reason that proceedings upon the prerogative writs are not governed by the new practice act (1912). It is submitted that a writ of error should have been sought.

Facts.

Bertha E. Feick, executrix of the will of her husband, Charles A. Feick, who died September 30, 1911, obtained the writ for the purpose of compelling defendants to permit an examination of the books of the company by her as a stock-

holder in order that she might ascertain the value of the stock held by her as executrix.

Hill Bread Company was organized as a New Jersey corporation in April, 1899, with an authorized capital stock of $100,000, divided into shares having a par value of $100 each, of which 200 shares is the entire amount issued and outstanding. Upon the incorporation, Charles A. Feick became the owner of 100 shares and John J. Hill, the president and one of the defendants, became the owner of 80 shares, the remaining 20 shares now being held by one Doyle. After Bertha E. Feick had qualified as executrix, the estate of her husband was decreed to be insolvent by the Essex County Orphans' Court and the executrix has been engaged in liquidating the assets of the estate and realizing the best possible prices for the benefit of the creditors. At the time of Mr. Feick's death the Hill Bread Company stock owned by him was appraised at $500 per share, but Mrs. Feick has found no purchasers at said price and has had offers of purchase at much below the said figure. She alleges in the writ that she does not know the present value of the shares and that there have been no sales thereof to establish a market value. The entire stock is held by the three parties mentioned above, except that Carl A. Feick and Benedict Prieth hold qualifying shares as directors, representing the executrix.

The writ alleges that Mr. Hill is the president of the company and sole executive manager and that he has full possession and control of all knowledge and information and the sources of such information as to the condition of the company in detail. Under his direction and control all the books, records and papers of the company are kept. Mrs. Feick has applied to Mr. Hill

for detailed information in order that she might learn the value of the stock, but Mr. Hill has refused to give the information or to permit any of the employees to do so. Mr. Feick and Mr. Prieth have naturally been unable to give the information, although they have been requested to do so, as Mr. Hill has entire control. Mrs. Feick, before beginning these proceedings, served notice in writing upon the Hill Bread Company and Mr. Hill, requesting an opportunity to examine the books as a stockholder, stating that she wished such permission in order to get information as to the value of the stock. She also requested the aid of skilled accountants, alleging her ignorance of bookkeeping, but both requests were refused. The executrix regularly attended, by proxy, or by agent, the stockholders' meetings, but could not there learn the value of the stock. The office and books of the company are at Newark.

The executrix, the relator herein, specifically alleges that her purpose in applying for leave to inspect the books is to learn in detail the condition of the company so as to judge whether the shares of stock are still of the value at which they were appraised, or whether they have depreciated to an extent that would make it her duty to accept and recommend to the Orphans' Court the offers which she has received for the stock at a lower price.

It must be apparent to the Court that Mrs. Feick, in good faith, is attempting to exercise her rights as a stockholder in order to perform her duties as executrix of an insolvent estate. She ought to have the information she seeks in order to act intelligently upon the offers she has received and to be able to advise the Court. It will also be obvious to the Court that the only

person who is obstructing her and who has constantly obstructed her in this exercise of her rights and performance of her duties is Mr. Hill, the owner of almost all the other half of the outstanding stock, and the president of the company.

The opinion of the Supreme Court on the granting of the alternative writ declares the existence of a deadlock and finds that the application was made in good faith.

The return does not deny the allegations of the alternative writ.

The writ is directed to Hill Bread Company and John J. Hill, its president. The return begins (case, p. 11) "Hill Bread Company by John J. Hill, its president, makes the following return," etc., and is signed "Hill Bread Company by John J. Hill, president." There is no return made to the writ by John J. Hill as an individual, although the appellants in their argument assume it to be a joint return. The Supreme Court on the demurrer found that the return was made by the company alone (case, p. 19, l. 10).

The proceedings on mandamus have been unaffected by the Practice Act of 1912 and the alternative writ still remains as a *narratio* of relator's cause of action, to which the defendant, or respondent, must plead after common law forms. Its pleadings must show either performance of the command of the writ or some legal excuse for not performing it. It may traverse the material allegations of the writ or plead in confession and avoidance.

In the present case, Hill Bread Company, the only answering defendant, has not traversed any

of the material allegations of the writ directly and specifically, except apparently in paragraph 4 of the return (case, p. 12, l. 10). It there asserts that Mr. Hill, as president, never denied permission to relator personally or with the assistance of Mr. Feick and Mr. Prieth to examine the books, which is apparently a traverse of the last averment of paragraph 9 of the writ (case, p. 7, ll. 38 to 40). But paragraph 9 alleges that the request for opportunity to inspect the books was coupled with a request for permission to use the assistance of a skilled accountant, and paragraph 4 of the return admits that Mr. Hill has refused to permit any accountant or person not connected with the company to examine the books. The right to use an accountant is one of the most important issues in this case.

In paragraph 10 of the writ (case, p. 8, ll. 1-10) Mrs. Feick says that she has been unable to learn the value of the stock by attending meetings of the stockholders. Paragraph 5 of the return (case, p. 12) alleges that reports of the condition of the business was made to the stockholders at the annual meetings and that the book value of the stock could be ascertained therefrom, which does not squarely meet the relator's allegations, supported by her statement of her ignorance of bookkeeping (case, p. 7, ll. 34-37). The reports so alleged to have been submitted to the stockholders are not set forth in the return for the Court to judge whether the book value could be ascertained therefrom. So the allegation of the return is a mere conclusion of the pleader without the support of the evidential facts necessary to sustain it.

State ex rel National Bank v. *Jessup & Moore Co.*, 4 Boyce (Del.), 248; 88 Atl. 449.

State v. *Ice* (W. Va.), L. R. A. 1915, D. 288; 84 S. E. 81.

The return presents no excuse for not performing the command of the writ.

The return sets up certain matters which the defendant conceives to be sufficient to justify its non-performance of the command of the writ. It alleges that the president had no power to permit the examination; that a preliminary application therefore should have been made to the board of directors of the company; that the reports to the stockholders were sufficient to furnish relator with the information she requested; that she has no personal interest in the application and therefore no right to examine the books without express authority from the Orphans' Court, to which she is subject, and finally alleges that "her object is to have a stranger not connected with the company get information so as to speculate in the stock." The Supreme Court said in deciding the demurrer (case, p. 24) that this allegation with its innuendo of bad faith was "a mere conclusion based upon assumed facts not disclosed." In granting the writ it said (case, p. 2, l. 23):

> "We think the application of the petitioner in that regard is made in good faith, and under the facts stated, a writ of alternative mandamus should issue."

This Court has only to determine whether there was error in the judgment of the Supreme Court that the return did not set up a legal excuse for not performing the command of the writ.

The president's lack of authority.

The appellant endeavors under this head to maintain that a stockholder's common law right to inspect the books of the corporation of which he is a member, can be defeated by a lack of power in the president of the corporation to grant it. The same defense has been raised elsewhere and has been decided to be without substance.

State ex rel Burke v. *Citizens Bank,* 51 La. Ann. 426; 25 So. 318.

Swift v. *Richardson,* 7 Houst. (Del.) 338; 6 Atl. 856.

In the latter case the Court said at page 864:

> "It is not in the power of the corporation to prohibit their president and agent from obeying the mandate of the Court below. Courts of law are not prohibited from exercising their rightful jurisdiction by such feeble authority, nor will they heed such impotent obstructions. If they have jurisdiction, in all proper cases they will proceed to judgment, and execute their judgments in the manner the law provides.

The common law right of a stockholder to inspect the books of a corporation of which he is a member, is well settled and has been recognized in this state repeatedly.

Huylar v. *Cragin Cattle Co.,* 40 N. J. E. 392.

Rosenfeld v. *Einstein,* 46 N. J. L. 479.

Garcin v. *Trenton Rubber Mfg. Co.,* 60 Atl. 1098.

Hodgens v. *United Copper Co.,* 67 Atl. 756.

Cook on Corporations, 7th Ed., Sec. 511.

The allegation of the defendant that the president has no authority is unsupported by any extract from the by-laws and therefore, as the Supreme Court well said, "Is a mere conclusion of law" (case, p. 19, l. 19) unsupported by any facts. If the proposition asserted derives support from the statute or common law of New Jersey, we confess to being unable to find any such support, nor has the appellant cited any. If support is derived from any instrument binding on the relator as a stockholder, such as a provision in the by-laws, such a by-law is invalid.

Hodgens v. *United Copper Co.* (*N. J.*) 67 Atl. 756.

People v. *Throop,* 12 Wend, 183.

State v. *Jessup & Moore Paper Co.,* 1 Boyce, 379; 77 Atl. 16; 30 L. R. A. (N. S.) 290.

But the lack of authority is no excuse for nonperformance of the command of the writ. The president is directed as a ministerial officer by the command of the Court to permit relator to exercise the right which the Court has declared by the issuance of this writ to be hers. "The command of the writ stands for the corporate order" as was said in *Freeholders of Mercer* v. *Penna. R. R. Co.,* 42 N. J. L. 491. The president is merely required thereafter to act as the custodian of the books and the writ is properly directed to him as such custodian.

See *People* v. *Throop, supra.*

High's Extraordinary Legal Remedies, Secs. 311, 545.

Cook on Corporations, Sec. 516.

Swift v. *Richardson,* 7 Houst. (Del.) 338; 6 Atl. 856.

The necessity of action by the Board of Directors upon relator's demand.

The argument of the appellant that application should have been made first to the Board of Directors is met by the averment in the writ, which is not traversed, as to the demand in writing upon the Hill Bread Company and John J. Hill on September 25, 1916 (case, p. 7, ll. 20-30). A demand upon the company is a demand upon its directors and has been sufficiently averred in the writ. The return also contains the admission that there is no Board of Directors qualified to act (case, p. 11, l. 39), so that respondent admits that an attempted demand would have been futile.

But it is established that a demand upon the directors was unnecessary. The defendant forgets that right of inspection of a stockholder is a common law right and not one subject to the discretionary control of the Board of Directors. If it were subject to the discretion of the directors, certiorari would be the proper remedy for reviewing their action rather than mandamus which has been established in this State to be the proper remedy.

Fuller v. *Hollander & Co.* (E. & A.) 61 N. J. Eq. 646, at 652.

A stockholder's right of inspection may not be absolute but the only restriction upon it is that it must be for a proper purpose and at a proper time, which facts have already been declared favorably to the relator in this case by the action of the Court in granting the alternative writ. The Supreme Court in its opinion (p. 19, l. 35), decides that an application to the Board of Directors is unnecessary. To require such an application assumes that the Board of Directors

in its discretion has the power to deny an inspection of the books and that when it has been denied an inspection may not be compelled. No authority is produced and we venture to say none can be produced to support such a proposition. The authorities seem to hold that any attempted interference with the stockholders' common law rights is unlawful and invalid. *Hodgens* v. *United Copper Co.* (N. J.) 67 Atl. 756. The statement in the return that relator prevents an election to fill a vacancy in the Board of Directors is utterly immaterial as it is apparent from the allegations of the return that there are three directors capable of acting and that there is only one vacancy so that there is a quorum qualified for the transaction of business, and objection can only be raised to a vacancy by a stockholder or possibly the attorney general of the state upon *quo warranto.*

Reports to the stockholders.

The demurrer admits that reports were made to the stockholders at the annual meetings but the writ alleging attendance at the annual meetings, avers that relator was unable to learn therefrom the actual value of the stock or the condition of the company (case, p. 8, ll. 1-10). The reason for her inability is found elsewhere in her statement of her ignorance of bookkeeping (case, p. 7, l. 35), and her request for expert accountants as assistant (case, p. 9, l. 25). It must be remembered that Charles A. Feick, in his lifetime, the owner of one-half of the stock of this company was undoubtedly familiar with its condition and with all the details of its financial statements, but that his widow has not the background of information that he had and that she has not the mental grasp of figures necessary to

understand the statements and reports of stockholders. The averment in the return that the book value of the stock could be ascertained by mere calculation is a conclusion of the pleader. The reports are not set forth from which the Court may determine whether the statement is well founded or not.

The relator in this proceeding is seeking to learn the market value of the stock and the mere ascertainment of the book value is not a conclusive answer to her request. There may be many things to be learned from an examination of the books, such as the times and rates of dividends, the reserves, etc., that would vitally affect the value of the stock.

Relator as a stockholder of the company can not be required to accept copies or extracts from the books of the company in lieu of her right to inspect the books themselves.

State v. *Jessup & Moore,* 4 Boyce (Del.) 248; 88 Atl. 449.

Swift v. *Richardson, supra.*

Kuhback v. *Irving Cut Glass Co.,* 220 Pa. 427; 69 Atl. 981, 20 L. R. A. (N. S.) 185.

Phoenix Iron Co. v. *Commonwealth,* 113 Pa. St. 563; 6 Atl. 75.

Her right to make copies is as complete as her right to inspection. *Cincinnati Volksblatt* v. *Hoffmeister,* 62 Ohio St. 189; 56 N. E. 1033. She should be allowed the opportunity of inspecting the books if only for the purpose of verifying or analyzing the reports made to her or the other stockholders.

The command of the writ is not answered by the return, in that the writ requires that relator be allowed to inspect the books of account, minutes of directors' and stockholders' meetings, pa-

pers and documents showing income, the sources thereof, the disbursements, expenses of maintenance and operation, profits, assets, amount, items and value of property, amount of liabilities, the nature thereof, to whom payable, dividends declared and paid. The only items which the return alleges the reports show are financial condition, surplus, reserves, undivided profits, investments, cash on hand and in bank, and depreciation. To the extent that the return does not supply relator with knowledge and information of the other items it is insufficient as an answer to the writ.

Relator's right to the assistance of an accountant.

The Supreme Court, in its opinion (case, page 20), deals with paragraph 4 of the return (case, page 12), where the defendant admits that Mr. Hill has refused to permit any accountant or person not connected with the company to examine the books or take copies thereof. The Supreme Court clearly sees that the defendant has admitted its refusal of the most important part of the relief asked by the relator and says that the justification of the defendant is upon the ground of lack of authority in the president rather than upon a denial of the right of the relator to the assistance of an accountant. The Supreme Court declares the weight of authority in this country to be "that a stockholder may employ an expert accountant not connected with the corporation to assist him in making the examination" (case, page 21, lines 21 to 30). The appellants in the 7th and 8th grounds of appeal apparently attempt to raise this question for review, but the brief of the appellants does not present any argument against the relator's right to have the

assistance of an expert accountant in her examination. Apparently, this ground of refusing the inspection is abandoned and it is not necessary for relator on this appeal to deal with the question. It may be proper, however, to add to the authorities cited by the Supreme Court the following:

State v. *Bienville Oil Works Co.,* 28 La. Ann. 204.

Ellsworth v. *Dorwart,* 95 Iowa, 108; 63 N. W. 588.

State v. *Ice* (W. Va.), L. R. A. 1915, D. 288; 84 S. E. 81.

Mitchell v. *Rubber Reclaiming Co.* (N. J. Ch.), 24 Atl. 407.

Phoenix Iron Company v. *Commonwealth,* 113 Pa. St. 563; 6 Atl. 75, at 80.

Varney v. *Baker,* 194 Mass. 239; 80 N. E. 524.

Machen v. *Machen & Mayer Co.* (Pa.), 85 Atl. 100.

Cincinnati Volksblatt Co. v. *Hoffmeister,* 62 Ohio St. 189; 56 N. E. 1033.

People v. *Columbia Paper Bag Co.,* 103 A. D. 208; 92 N. Y. Supp. 1084.

State v. *Citizens' Bank, supra.*

The right of a stockholder to the assistance of an expert was conceded in *Huylar* v. *Cragin Cattle Co.,* 40 N. J. Eq. 392, 398, and *Garcin* v. *Trenton Rubber Mfg. Co.,* 60 Atl. 1098 (N. J.), although in the last case the applicant was denied assistance until it appeared that it was necessary.

As relator was entitled to the assistance of an expert in the examination of the books, it is no legal excuse for the refusal of the president that she wishes the assistance of an expert. The fourth paragraph of the return, therefore, sets up no defense.

Relator's interest in the relief asked.

Appellant contends that because relator is executrix of an insolvent estate, she cannot proceed as an individual stockholder could in like circumstances. She is chargeable, as the Supreme Court recognizes, with a greater degree of diligence, being in a fiduciary relation, than an individual with relation to his own stock. She avers in her writ the amount at which the stock is charged to her in her inventory. She sets forth that she has received offers for its purchase which are much below the amount at which the stock is charged to her. For her own protection and the protection of the creditors whose sole interests she represents, she should be afforded every possible assistance in learning the value of the stock held by her. There can be no question of selfish interest in this proceeding. The estate is insolvent. The executrix cannot profit in the slightest degree by the sale, but she is balked and resisted at every turn by Mr. Hill, the president of the company who happens to be in control of the office and books of the company and the owner of nearly all of the balance of the stock. One begins to suspect that there is a sinister motive in this denial of right to one who is a one-half owner of the company. The situation should lead the Court quickly to lend its assistance to the executrix.

In the case of *State ex rel Burke* v. *Citizens' Bank,* 51 La. Ann. 426; 25 So. 318, the exact point here argued was decided in favor of the complainant.

In the case of *State ex rel Brumley* v. *Jessup & Moore Paper Co.,* 77 Atl. 16, *supra,* the relator was forced to acquire the stock for his own protection as pledgee and the corporation contended

he wished the information for improper purposes. The Court in a vigorous opinion refused to assume such a violent presumption in the absence of clear allegations.

The allegation of improper motive.

The defendant makes as a part of its return, in the sixth paragraph, a statement by John J. Hill that relator's "object in this proceeding is to have a stranger not connected with the company get information so as to speculate in the stock." No facts are pleaded to support this statement. It is as the Supreme Court says at page 24, "A mere conclusion based upon assumed facts not disclosed" and is an attempt to inject at this late stage of the proceedings an issue already determined favorably to the stockholder.

The allegations of the writ as to the object of the inspection in paragraph 12 (case, p. 8), are not denied. No prior conduct of the relator or any other facts support the assertion and the Court will not assume, upon the mere statement of a defendant to this action who has not seen fit individually to file any return, that the relator's motives are improper and such as to prevent the granting of the relief she seeks.

This Court should not compel the relator upon this simple allegation to have recourse to a jury trial to determine the question of good faith in this proceeding when the Supreme Court has, in granting the writ, been satisfied upon testimony taken on rule to show cause where the defendants had the opportunity to cross-examine and introduce testimony on their own behalf.

In *Bruning* v. *Hoboken Printing & Publishing Co.*, 67 N. J. L., at page 119, it was said that the proper purpose must appear by the proofs on the application for the alternative writ, impliedly saying that the question could not be raised at a later stage of the proceeding.

The test laid down by Vice-Chancellor Bird in *Mitchell* v. *Rubber Reclaiming Co.*, 24 Atl. 407, one of the earliest cases in this state upon this subject is as follows:

> "The question of good or bad faith is only considered so far as it pertains to the particular allegation presented by the petitioner. If such allegations show an essential right, he is entitled to relief unless the bad faith which is complained of and set up in opposition to such relief had its origin in the conduct of the petitioner in creating the condition or circumstances against which relief is sought. If the charge upon which the party rests his case be free from odium, the general rule is that he is entitled to have that right protected, whatever may be his motive in asking the aid of the Court for that purpose."

See also, *High's Extraordinary Legal Remedies*, Sec. 460.

There have been a number of cases where the defendant in the extremity of its resistance to a lawful right, has attempted to inject the issue of bad faith but in each of the following cases the Court has, in spite of that allegation by the defendant, granted the relief asked.

People v. *Throop*, 12 Wend, 183.

Kuhback v. *Irving Cut Glass Co.*, 220 Pa. 427; 69 Atl. 981, 20 L. R. A. (N. S.) 185.

State ex rel. Aultman v. *Ice* (W. Va.), 84 S. E. 181; L. R. A. 1915, D. 288.

State ex rel. English v. *Lazarus,* 127 Mo. App. 401; 105 S. W. 780.

State ex rel. Brumley v. *Jessup & Moore,* 30 L. R. A. (N. S.) 290; 77 Atl. 16 (Del.).

In the Brumley case the Court said:

> "It would seem upon principle as well as authority that the plaintiff is entitled to such information. We cannot assume that he wants it for an improper purpose when everything in the record shows the contrary, or can the right be denied him because he might use it in a way that would injure the defendant. The business of the defendant is a part of his business and it is not to be assumed that he would do a thing which would be an injury to his own affairs."

In conclusion, the respondent would remind the Court of all the circumstances of this application, from whom it proceeds and in pursuance of what obvious duties and obligations, from whom the resistance proceeds, and of the technical and unworthy character of the opposition, and having decided as the Supreme Court has, that the question of fact of good faith is not involved, to determine that there is nothing set forth in the writ which constitutes a valid legal excuse, in not performing the command of the writ.

Respectfully submitted,

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