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N. J. COURT OF ERRORS AND APPEALS.

Benjamin W. Titus and Uriel T. Scudder, Partners, &c., vs. The Mechanics National Bank of Trenton.	Writ of Error.

Writ of Error.

[Filed November 1st, 1870.]

State of New Jersey, *ss.*—The state of New Jersey to
[L. S.] our Justices of our Supreme Court of Judicature, GREETING:

Because in the record and proceedings, and also in the giving of judgment in a plaint which was in our said court, before the Justices thereof, between Benjamin W. Titus and Uriel T. Scudder, partners, trading as Titus & Scudder, plaintiffs, and The Mechanics National Bank of Trenton, defendants, in a plea of trespass on the case, as it is said, manifest error hath intervened, to the great damage of the said Benjamin W. Titus and Uriel T. Scudder, as by their complaint we are informed. We being willing that the error, if any there be, should in due form be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given, then you do cause a transcript of the record of the judgment, and all things concerning the same, to be brought before the Judges of our Court of Errors and Appeals, at the city of Trenton, on the third Tuesday of November next, and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of

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right, and according to law and custom of the state of New Jersey, ought to be done.

Witness, Abraham O. Zabriskie, President Judge of our said court, at Trenton, this twelfth day of August, in the year of our Lord one thousand eight hundred and seventy.

HENRY C. KELSEY, *Clerk.*

EDW. T. GREEN, *Att'y.*

The answer of the Justices of the Supreme Court of New Jersey within named, the record and proceedings whereof
10 mention is within made, with all things touching or concerning the same, we do certify to the Court of Errors and Appeals in a certain schedule to this writ annexed, as within commanded.

M. BEASLEY,
Ch. Jus. [L. S.]

NEW JERSEY SUPREME COURT.

Benjamin W. Titus and Uriel T. Scudder, trading, &c., *vs.* The Mechanics National Bank.	*In Case. On Postea and Verdict*

20 As yet of the twenty-ninth day of November, A. D. eighteen hundred and sixty-nine.

Witness: M. BEASLEY, ESQ., *Chief Justice.*

CHARLES P. SMITH, *Clerk.*

New Jersey Supreme Court, of the twenty-ninth day of November, in the year of our Lord one thousand eight hundred and sixty-nine.

Mercer County, *ss.*—The Mechanics National Bank, the defendants in this suit, were summoned to answer Benjamin W. Titus and Uriel T. Scudder, partners, trading as Titus & Scudder,
30 the plaintiffs herein, of a plea of trespass on the case upon promises, and thereupon the said plaintiffs, by Edward T. Green, their attorney, complain, for that, whereas, the said plaintiffs

heretofore, to wit, on the twenty-second day of August, in the year of our Lord one thousand eight hundred and sixty-nine, at Trenton, in the county of Mercer aforesaid, were the owners, holders and possessors of two certain orders for the payment of money, commonly known and designated as cheques, both of which said cheques were drawn by one George H. Levis, and were directed to certain persons therein named, to wit, to Harney & Searles, bankers, commanding them to pay to the order of B. W. Titus, twenty-one hundred and thirty-four dollars, one of which said cheques was numbered a certain number, to wit, 10 number one hundred and sixty-nine (169), and bore date a certain day and year therein named, to wit, the twenty-third day of August, eighteen hundred and sixty-nine, and the other said cheque was numbered a certain number, to wit, number one hundred and seventy (170), and bore date a certain day and year therein named, to wit, the twenty-fourth day of August, eighteen hundred and sixty-nine, and which said cheques were payable at the office of the said payors, to wit, the said Harney & Searles, in the city of New York, to wit, at Trenton aforesaid, according to the said tenor and effect thereof. And 20 the plaintiffs say that afterwards, to wit, on the day and year last aforesaid, at Trenton aforesaid, the said plaintiffs delivered the said cheques to the said defendants for collection, and that in consideration thereof, and of the trust and confidence in them thereby by the said plaintiffs reposed, they, the said defendants undertook and faithfully promised to the said plaintiffs, that they, the defendants aforesaid, would diligently and promptly present or cause to be presented, the said two cheques for payment, to the payors in the said cheques named, to wit, the said Harney and Searles, bankers, as aforesaid, and would promptly 30 procure the said cheques to be paid by the said payors; and although the said defendants did then and there, to wit, on the day and year last aforesaid, at Trenton aforesaid, receive and accept from the said plaintiffs the said two cheques, upon the conditions aforesaid, and did accept and undertake the said trust for the purposes aforesaid, yet the said defendants, not regarding their said several promises and undertakings, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiffs on this behalf, did not nor would on the day and year last aforesaid, at New York, to wit, at Trenton afore- 40

said, nor at any time before or since said day, diligently and promptly present, or cause to be presented, the said two cheques, or either of them, to the payers therein named, to wit, to the said Harney & Searles aforesaid, nor to any person or persons on their account or for them, and did not nor would diligently and promptly require the said cheques to be paid by the said payors, to wit, by the said Harney & Searles, or by any person or persons for or on account of them, the said payors, although the said defendants so to do were often specially requested by
10 the said plaintiffs; but on the contrary thereof, the said defendants to present said cheques, or either of them, to the said payors as aforesaid, and to require said cheques to be paid by the said payors, or by some person or persons on their account, wholly neglected and refused, and still do neglect and refuse, to wit, at Trenton aforesaid.

And for that whereas the said plaintiffs, heretofore, to wit, on the twenty-second day of August, in the year of our Lord one thousand eight hundred and sixty-nine, at Trenton aforesaid, were the owners, holders and possessors of two other certain
20 cheques, each bearing date a certain day and year therein named, to wit, one being dated the twenty-third day of August, eighteen hundred and sixty-nine, and the other being dated the twenty-fourth day of August, eighteen hundred and sixty-nine, and drawn by one George H. Levis, wherein and whereby certain bankers therein named, to wit, Messrs. Harney & Searles, were by each of said cheques required to pay to the order of B. W. Titus the sum of twenty-one hundred and thirty-four dollars, at New York, to wit, at Trenton aforesaid on demand, according to the tenor and effect of said cheques. And
30 the said plaintiffs say that afterwards, to wit, on the day and year aforesaid, at Trenton aforesaid, at the special instance and request of the said defendants, the said plaintiffs delivered the said two cheques to the said defendants for collection. In consideration whereof, and of the delivery of the said cheques to them, the said defendants then and there, to wit, on the day and year last aforesaid, at Trenton aforesaid, undertook and faithfully promised the said plaintiff diligently and promptly to present, or cause to be presented, to the payors therein named for payment, the said two cheques, and would promptly and
40 diligently require payment of the said two cheques of the said

payors, and the said defendants, in consideration as aforesaid, undertook and faithfully promised the said plaintiffs, in the event of the said payors, to wit, the said Harney & Searles refusing or failing to pay, or cause to be paid, the said cheques, or either of them, that they, the said defendants, would protest, or cause to be protested, according to law and in due time, the said cheques for non-payment, and would give, or cause to be given, all reasonable, proper and legal notices of such non-payment and protest to the drawer and endorser of said cheques, to render the drawer and endorser of said cheques liable to pay 10 and satisfy the said cheques, according to the statute in such case made and provided. Yet the said defendants, although they received and accepted the said cheques upon the terms and conditions and for the purposes aforesaid, not regarding their said several promises and undertakings, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiffs on this behalf, did not, nor would at the time when, &c., (although they did present the said cheques for payment to the said payors, payment thereof being then and there refused by the said payors at New York, to wit, at 20 Trenton aforesaid), require the said cheques to be paid by the said payors, or by any person for or on account of the said payors, and did not nor would protest, or cause to be protested, according to law or in due time, the said cheques, or either of them, for non-payment, and did not nor would give, or cause to be given, all or any reasonable, proper and legal notices of said non-payment and protest to the drawer and the endorser of said cheques, or to either, or to any person on their account or for them, but to do so wholly neglected and refused, and still do neglect and refuse, to wit, at Trenton aforesaid. 30

And whereas also, the said plaintiff heretofore, to wit, on the twenty-second day of August, in the year of our Lord eighteen hundred and sixty-nine, at Trenton aforesaid, were the owners, holders and possessors of two other certain cheques, one of which said cheques was dated the twenty-third day of August, and the other the twenty-fourth day of August, both in the year eighteen hundred and sixty-nine, each of which said cheques required, by its terms, in effect, that certain persons therein named should pay to the order of B. W. Titus the sum of twenty-one hundred and thirty-four dollars, on presentation of 40

said cheques to said payors and demand of payment; the said cheques having been previously, to wit, on the day and year aforesaid, at Trenton aforesaid, endorsed by the said B. W. Titus. And the plaintiffs say that before then, to wit, on the day and year aforesaid, at Trenton aforesaid, and for a long time previously the said defendants were, and ever since have been, engaged in the business of banking, including the receiving of deposits of money, and including also the collection of drafts, cheques, bills, notes, and other commercial paper entrusted to
10 them, the said defendants, by those who were accustomed to deposit moneys as aforesaid with them, for collection both within and without the territorial limits of this state; and these plaintiffs say that the said defendants accepted and received said bills, notes, drafts, cheques, and other commercial paper for collection, and did actually collect the same from and for their said depositors, in consideration of the said deposits made and to be made with them as aforesaid, by their said depositors, to wit, at Trenton aforesaid. And the said plaintiffs further say that heretofore, to wit, on the day and year aforesaid, at Trenton
20 aforesaid, and for a long time before then elapsed, and ever since, they, the said plaintiffs, were and are large depositors of money with, and customers of the said defendants. And the said plaintiffs say that afterwards, to wit, on the day and year aforesaid, at Trenton aforesaid, the plaintiffs delivered to the said defendants the said two cheques for collection, and that the said defendants then and there, to wit, on the day and year aforesaid, at Trenton aforesaid, in consideration of the deposits of money, theretofore and thereafter to be made with them, the said defendants, by the said plaintiffs, and in consideration of the
30 trust and confidence by the said plaintiffs in them the said defendants reposed, did accept and receive the said two cheques upon the terms and conditions, and for the purposes aforesaid, and did undertake, and faithfully promise the said plaintiffs for the consideration aforesaid, promptly and diligently to present the said cheques to the payors thereof, to wit, to Harney & Searles, at New York, to wit, at Trenton aforesaid, and require and demand of them, the said payors, payment of the said cheques, and if the said Harney & Searles refused or failed to pay the said cheques, or either of them, when presented as afore-
40 said, that the said defendants would protest the same in due form

of law, or cause the same to be done for such non-payment, and would give, or cause to be given, all reasonable, proper, timely and legal notice of such non-payment and protest to the drawer and endorser, so as to render the said drawer and endorser liable to pay the said cheques, when they, or either of them, should be thereunto afterwards requested, according to the statute in such case made and provided, to wit, at Trenton aforesaid. Yet the said defendants, although the said plaintiffs at the time when, &c., were depositors with them, the said defendants, of large sums of money, and did, at the time and after the delivery to the said defendants for collection of the said two cheques as aforesaid, make large deposits of money with them, the said defendants, and have ever since continued so to do, not regarding their said several promises and undertakings, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiffs on this behalf, did not nor would promptly and diligently present, or cause to be presented to the payors, in said cheques named, to wit, to Harney & Searles, at New York, to wit, at Trenton aforesaid, and require and demand of them, the said payors, payment of the same. Nor did they, nor would, upon the failure or refusal of the said Harney & Searles to pay the said cheques, or either of them, protest the same in due form of law, or cause the same to be done, for such non-payment; nor did they, nor would, give, or cause to be given, all or any reasonable, proper, timely and legal notices of such non-payment and protest to the drawer and endorser of said cheques, or to either of them, or to any person or persons on their account, so as to render the endorser and drawer liable to pay the said cheques when they, or either, should be thereunto afterwards requested, but to do so, or any part thereof, the said defendants have hitherto wholly neglected and refused, and still do neglect and refuse, to wit, at Trenton aforesaid.

And for that whereas the said defendants, heretofore, to wit, on the first day of September, in the year of our Lord one thousand eight hundred and sixty-nine, at Trenton aforesaid, were indebted unto the said plaintiffs in the sum of ten thousand dollars for goods, wares and merchandise, before that time sold and delivered to the said defendants by the said plaintiffs, at their special instance and request; and on the sum of ten thousand dollars, for the work and labor, care and diligence of

the said plaintiffs, by them before that time done, performed and bestowed in and about the business of the said defendants, at their special instance and request, and in the sum of ten thousand dollars, for so much money by the said plaintiffs before then paid, laid out and expended for the said defendants, at their special instance and request; and in the sum of ten thousand dollars for other money by the said defendants before that time had and received, to and for the use of the said plaintiffs, and in the further sum of ten thousand dollars for so much money
10 before then found to be due from the said defendants to the said plaintiffs, on an account stated between them; and in the sum of ten thousand dollars for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendants to the said plaintiffs, and by the said plaintiffs forborne to the said defendants, for divers long spaces of time before then elapsed, at the like special instance and request of the said defendants; and being so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at Trenton aforesaid, undertook and
20 faithfully promised the said plaintiffs to pay them the said several sums of money in this count mentioned, when they, the said defendants, should be thereunto afterwards requested.

Nevertheless, the said defendants, not regarding their said several promises and undertakings, but contriving and fraudulently intending, craftily and subtly to deceive the plaintiff in this behalf, have not, as yet, paid the said several sums of money, or any, or either, or any part thereof to the said plaintiffs, although often requested so to do, but the said defendants, to pay the same, have hitherto wholly neglected and refused, and
30 still do neglect and refuse.

To the damage of tht said plaintiffs ten thousand dollars, and therefore they bring their suit, &c.

EDW. T. GREEN,
Att'y of Plaintiffs.

And the said defendants, by Richey & Emery, their attorneys, come and defend the wrong and injury, when, &c., and say that they did not undertake or promise, in manner and form as the said plaintiffs have above thereof complained against them, and of this they put themselves upon the country, &c.

40 And the plaintiffs do the like.

Therefore let a jury thereupon come before the Chief Justice, or some other Justice of the Supreme Court of the state of New Jersey, at a Circuit Court to be holden at Trenton, in and for the county of Mercer, on the 10th day of May, A. D. eighteen hundred and seventy, by whom, &c., and the same day is given to the parties aforesaid, then, &c.

And now at this day, to wit, the seventh day of June, in the year last aforesaid, before the said Supreme Court, at Trenton, come the parties aforesaid, by their attorneys aforesaid, and the Justice before whom, &c., sends here the reeord had before him in these words, to wit: 10

Afterwards, that is to say, on the tenth day of May, eighteen hundred and seventy, at a Circuit Court held at Trenton, in and for the county of Mercer, before the Honorable Bennet Van Syckle, Esq., Associate Justice of the Supreme Court, according to the form of the statute in such case made and provided, come as well the within named Benjamin W. Titus and Uriel T. Scudder, partners as aforesaid, as the within named The Mechanics National Bank, by their respective attorneys within mentioned; and the jurors of the jury, whereof mention is within made, being also summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, withdrew from the bar here to consider of the verdict to be by them given of and upon the premises, and after they had considered thereof and agreed among themselves, they returned to the bar here to give their verdict in this behalf. 20

Thereupon the said Benjamin W. Titus and Uriel T. Scudder, partners as aforesaid, being solemnly called, come not, nor do they further prosecute their writ against the said The Mechanics National Bank. 30

Therefore it is considered that the said Benjamin W. Titus and Uriel T. Scudder, partners, &c., as aforesaid, take nothing by their said writ, but that he and his pledges to prosecute be in mercy, &c., and that the said The Mechanics National Bank of Trenton do go thereof without day, &c.

And it is further considered by our said court, that the said The Mechanics National Bank of Trenton do recover against the said Benjamin W. Titus and Uriel T. Scudder the sum of forty-nine dollars and thirty-one cents, for its costs and charges by it about its defence in this behalf expended, by our said court now 40

here adjudged to the said defendants, with its assent, according to the form of the statute in such case made and provided, and that the said defendants have execution thereof, &c.

Judgment signed this seventh day of June, A. D. eighteen hundred and seventy.

M. BEASLEY,
Ch. Jus.

I, Charles P. Smith, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript
10 from the record of judgment in the above stated cause as the same remains in my office.

In testimony whereof I hereto set my hand and seal of said court, at Trenton, this twelfth day of October, A. D.,
[L. S.] eighteen hundred and seventy.

CHARLES P. SMITH,
Clerk.

Bill of Exceptions.

Afterwards, at a Circuit Court held at the Court House, in the city of Trenton, in and for the county of Mercer, on the
20 second Tuesday in May, A. D. eighteen hundred and seventy, before Bennet Van Syckle, Esquire, one of the Justices of the Supreme Court, according to the form of the statute in such case made and provided, the aforesaid issue, so joined between the parties aforesaid, came on to be tried by a jury of the county of Mercer aforesaid, for that purpose duly empannelled, good and lawful men of said county. At which day came there as well the said plaintiffs as the said defendants, by their respective attorneys, and the jurors of the jury aforesaid being called also came, and were then and there in due manner
30 chosen and sworn to try the said issue, *pro ut* the pleadings in this cause.

And upon the trial of said issue, to prove and maintain the issue on their part, the counsel for said plaintiffs offered in evidence the following depositions:

Depositions of witnesses taken before me, Thomas Sadler, a Commissioner to take affidavits, duly appointed by the Governor of the State of New Jersey, at my office, No. 11 Wall Street, New York city, on May 26th, 1870, in presence of Edward T. Green, Esq., of counsel with plaintiffs, and John R. Emery, Esq., of counsel with defendants, upon notice admitted. All objections as to the manner of taking said depositions being waived—the Commissioner's oath being waived. Objections taken to the questions and answers to be reserved for the court. 10

City and county of New York *ss.*—*George H. Levis*, aged thirty-eight years, a witness produced and sworn on the part of the plaintiffs as follows:

Quest. Where do you reside?

Ans. At the Union Place Hotel, New York.

Quest. Were you in business in New York city in August, 1869, and if so, in what business?

Ans. I was, and was a broker.

Quest. Were you indebted in August, 1869, to B. W. Titus, one of the plaintiffs in this suit. 20

Ans. I was.

Quest. *Exhibit A*, on the part of defendants, being check No. 169, dated August 23d, 1869, for $2,134. Being shown witness, he is asked—Who drew that check, and to whose order is it payable?

Ans. I drew that check, and it is drawn to the order of B. W. Titus.

Quest. *Exhibit B*, on the part of defendants, being check No. 170, dated August 24th, 1869, for $2,134. Being shown witness, he is asked—Who drew that check, and to whose order is it 30 payable?

Ans. I drew that check, and it is payable to the order of B. W. Titus.

Quest. Were you indebted to said B. W. Titus for the amount of those checks when given?

Ans. I was.

Quest. You were unfortunate in your business affairs in August, 1869, were you not?

Ans. I was.

Quest. Do you know Charles P. H. Ripley?

Ans. I do.

Quest. When you found that you were becoming embarrassed in your business affairs, did you have any conversation with Mr. Ripley in reference to the checks which you had been accustomed to give upon Harney and Searles, bankers? [Counsel for defendant objects to the question as leading and irrelevant.]

Ans. I did.

Quest. Tell me what that conversation was. [Counsel for
10 defendant objects on same ground.]

Ans. I got Mr. Ripley to go and see the Notary of the Commonwealth National Bank, I think it was, and asked him if he could arrange with Mr. Farnham, who was the Notary, to occasionally hold my checks until next day, when I would take them up, which he did for me on several occasions, and several of the checks were paid the day following as I had agreed. I also told Mr. Ripley that I would remunerate him if he would do so, and I sent to Mr. Farnham upon one occasion $50, and at another time $15 or $20. [Counsel for defendant objects to the answer
20 as irrelevant.]

Quest. Were these two checks *Exhibits A* and *B*, *ex parte* defendants included in that arrangement.

Question withdrawn.

Quest. What checks were included in that arrangement? [Counsel for defendant objects to that question as leading.]

Ans. Any checks that might fall in his hands.

Quest. Do you know a man who was a runner for the Commonwealth Bank, in August, 1869?

Ans. I do—by sight.

30 *Quest.* Did yon have any arrangement in August, 1869, with him in reference to your checks on Harvey & Searles—if so, what was it? [Objected to by counsel for defendant as irrelevant.]

Ans. There had been other checks and drafts of mine brought to me by him prior to my having an account with Harvey & Searles, and when these come there he brought these also.

Quest. You say when these came there, what do you refer to by the word "these?"

Ans. The checks on Harney & Searles.

40 *Quest.* Please state more fully the arrangement that you had

with the runner to which you have referred—I want the way the thing was done? [Defendants counsel objects to the question as irrelevant.]

Ans. I don't know that I can make it any more distinct than my answer was.

Quest. You say that these came there—to what place do you refer when you say "there?"

Ans. My office.

Quest. Did the runner of the Commonwealth Bank bring the checks drawn by you on Harney & Searles to your office? 10

Ans. He did.

Quest. Was that his usual custom? [Defendants counsel objects to the question as immaterial.]

Ans. With me it was.

Cross-examination by the counsel for defendant, as follows:

Quest. Where is your home?

Ans. I consider my home at the Union Place Hotel, New York city; my father's home is Mount Holly, Burlington county, New Jersey.

Quest. What is your father-in-law's name? 20

Ans. Charles Magarge.

Quest. Where did he live when you lived in Mount Holly?

Ans. Philadelphia.

Quest. When did you leave Mount Holly as a residence?

Ans. About twenty-two years ago.

Quest. To what place did you remove, and how long did you reside at that place?

Ans. Philadelphia, and resided there until two years since.

Quest. What was your business there—and state the changes in your business until the time you left Philadelphia? 30

Ans. Paper business for about twelve years; clerk, assistant clerk and chief clerk in the Philadelphia post office for about four years, and then I was in the brokerage business for about two years; I was also out of business during some part of the twenty-two years I speak of.

Quest. During the time of your residence in Philadelphia, were you under any arrest or indictment for any crime—and if so, what? [Objected to by plaintiffs counsel as improper, irrelevant and insulting to the witness.]

Ans. I was sued in Philadelphia for a debt of $30,000, and arrested by the sheriff on a capias; and sooner than pay the debt I was placed in the debtors department, where I remained until the plaintiff in the case was so well satisfied of no intent on my part to wrong him, that I was discharged; have never paid the debt and never intend to. The plaintiff's name was James Smith—I think it was—and I think his residence was Philadelphia.

Quest. Was the debt, or any part of it, ever paid by anybody?

10 *Ans.* No, not a dollar. I was never under arrest for crime.

Quest. Where did you establish your office when coming to New York?

Ans. No 24 Broad street—in the office of Moss & Co.

Quest. Is not the office of Moss & Co. connected with that of Harney & Searles?

Ans. No, sir; they were in the same building, but not connected.

Quest. Was not your office in the office of Moss & Co.?

Ans. Yes; I was one of the firm; E. A. Moss and J. L.

20 Moss were the other partners.

Quest. You say that you spoke to Mr. Ripley to make an arrangement with the notary of the Commonwealth Bank about the holding of your checks—was this arrangement to extend to any other holders?

Ans. It was not.

Quest. Was it to extend to any other checks than those which came through the Commonwealth Bank?

Ans. To any checks which might fall in his hands.

Quest. For what other banks was he notary?

30 *Ans.* I don't know.

Quest. When you made this arrangement, did you not make it with special reference to the checks coming through the Commonwealth Bank—was not that your idea in making it?

Ans. Not specially.

Quest. What checks coming through any other bank were ever held over?

Ans. I don't know that any were by anybody.

Quest. When you spoke as you say to Mr. Ripley to make this arrangement, was it not for the purpose of providing an

arrangement for these and other checks to B. W. Titus, of Trenton, which you knew came through the Commonwealth Bank?

Ans. Not specially; any that got in his hands.

Quest. Did you give any other checks than these to B. W. Titus, which were likely to come into the hands of the Notary of the Commonwealth Bank?

Ans. I think likely some Philadelphia checks might have come in that way.

Quest. When did you speak to Mr. Ripley about making this arrangement—fix the time? 10

Ans. Somewhere about the 15th of August, 1869.

Quest. What was Mr. Ripley, by the arrangement, to do for you?

Ans. He was to get Mr. Farnham to hold the checks till morning without sending the protest.

Quest. You mean, I suppose, to withhold the notice of non-payment till morning?

Ans. Yes.

Quest. Did you pay Mr. Farnham anything yourself?

Ans. I did not. 20

Quest. To whom did you give money on this arrangement?

Ans. Mr. Ripley.

Quest. How much did you give him, when, and in what way?

Ans. One time $50; I can't fix the date; another time $15 or $20; I cannot fix the date; I gave it to him in money; I cannot fix the date, but it was between the 15th and 25th of August, 1869.

Quest. Why did you suppose it was necessary to give the notary money?

Ans. Because everybody works better on being paid. Had 30 he been a friend I should have put it on the ground of favor.

Quest. Did you suppose that by holding the notices from the mail the notary was neglecting his duty, and that you must pay him to do what you call working better?

Ans. I did not think anything about it; nor much about it.

Quest. Did you not know that you were bribing an officer to neglect his duty, and was not that your intention?

Ans. I did not know it, and it was not my intention.

Quest. Did you not suppose that it was the duty of the notary to mail the notices before the next morning?

Ans. I did not think much about it; my only object was to 40

have my checks held over—many of which were so held over and duly paid next morning.

Quest. How did the notary know when to hold your checks over—did you never have money to meet them, pending this arrangement?

Ans. He knew it by their getting into his hands—a great many of the checks were paid pending the arrangement.

Quest. You were engaged in speculation at the time of the giving of these checks and pending this arrangement, were you
10 not?

Ans. I was buying and selling stocks and gold.

Quest. On what day did you fail and stop carrying on business?

Ans. Somewhere about the 25th or 26th of August, 1869—I cannot give the exact day.

Quest. Witness is here shown *Exhibit A* check, dated August 23d, 1869—When was that sent to Trenton?

Ans. I cannot tell the day—it might have been sent the night before, and it might have been delivered in person.

Quest. Both these checks were sent to Trenton before the
20 day they bore date, were they not?

Ans. I cannot tell.

Quest. Don't you know that they were both post-dated checks, that is, checks dated ahead?

Ans. I don't know, and cannot say.

Quest. Did you have any arrangement with Mr. Titus in relation to these checks?

Ans. I did not.

Re-direct.

30 *Quest.* Did you ever see Mr. Farnham when he came down with one of your checks from the Commonwealth Bank, to Harney & Searles' office—and if so, what took place between you? [Defendants counsel objects to the question as incompetent.]

Ans. I met him in the hall on one occasion and asked him not to present the check—that I would pay it in the morning.

Quest. Not to present it to whom? [Defendants counsel objects to the question as leading and irrelevant.]

Ans. Harney & Searles.

Quest. Fix the time, as near as you can, between what dates?

40 *Ans.* Somewhere between the 15th and 25th of August, 1869; cannot fix the exact day.

Quest. What did Mr. Farnham do on your making that request? [Defendants counsel objects to the question as irrelevant.]

Ans. He turned around and walked out.

Quest. Did he present the check to Harney & Searles for payment at that time? [Defendants counsel objects to the question as irrelevant.]

Ans. No.

Quest. Was that one of your checks drawn on Harney & Searles? [Defendants counsel objects to the question as irrelevant.] 10

Ans. Yes.

GEORGE H. LEVIS.

Charles P. H. Ripley, aged thirty-eight years, being produced as a witness for plaintiffs, and being duly sworn, says—

Quest. Where do you reside?

Ans. No. 40 Union Square, New York.

Quest. Are you in any active business at the present time?

Ans. I am not.

Quest. Do you know George H. Levis, and how long have you known him? 20

Ans. I do, and have known him about one year.

Quest. Did you have any conversation with him about checks drawn by him on Harney & Searles—and if so, when was it and what was it, and what did you do in consequence of it? [Objected to by defendants counsel as irrelevant.]

Ans. About August 15th, 1869, Mr. Levis told me that he had made a check on Harney & Searles in favor of B. W. Titus; that check was in the Commonwealth Bank; he could not pay it that afternoon, but his arrangements were such that he could pay it before 12 o'clock of the next day, and if it could be kept here until that time it would save his credit; at his request I went to the Commonwealth Bank, and from the note teller of said Commonwealth Bank learned where I could find their notary; I then saw the notary and stated to him the facts as Mr. Levis had given them to me; the following day I took from the notary this check of Levis, drawn in favor of B. W. Titus, on Harney & Searles, and gave him the amount of the face of it; after that there were other checks treated in the same way by 30

the notary of said Commonwealth Bank; checks drawn by Levis in favor of B. W. Titus, on Harney & Searles; what I mean by being treated in the same way, was that these checks were so held by the notary that Harney & Searles and B. W. Titus should be led to suppose—first, that Harney & Searles should be led to suppose that no checks drawn by Levis on them were in the hands of a notary for protest, and that B. W. Titus should be led to suppose that these checks were promptly paid at maturity, instead of being paid the next day, as they
10 were. [Answer objected to by defendants counsel as giving, in many respects, the opinion of the witness, as no proper answer to the question, and as irrelevant.]

Quest. What was the notary to do with the checks of Levis when they came to his hands, according to the arrangement you made with him? [Objected to by defendants counsel, on the ground that the question has been already answered by the witness, and as irrelevant.]

Ans. As to the checks I arranged with him about, he was to retain them until next day.

20 *Quest.* What was he to do with them, so far as the presentation of them to the payors? [Defendants counsel objects to the question as leading and irrelevant.]

Ans. He was to present them to the closed doors of the office of Harney & Searles; I mean Mr. Farnham, the notary, with whom I made this agreement.

Quest. Explain what you mean by "the closed doors of the office of Harney & Searles?"

Ans. He would go there late in the day, when he would be sure to find the office closed.

30 *Quest.* At whose request was this arrangement made with the notary? [Objected to—same reasons.]

Ans. At the request of George H. Levis; the notary said to me that the law did not say at what time of the day he should go to any one's office to protest or demand payment of paper in his hands.

Cross-examination by defendants counsel.

Quest. Where were you employed, or in what business were you engaged in August, 1869?

Ans. I was Vice President of the United States Regulation

Fire Arms Company, which company hold patents; I sometimes speculated in stocks and gold; the office of the company, corner of Wall street and Pearl street, New York, was my office.

Quest. Were you engaged in speculation with Mr. Levis at that time?

Ans. I was not—but I had an account with him and his partners, Morse & Co.

Quest. Was this firm in your debt at that time?

Ans. They were.

Quest. Can you state in what amount? 10

Ans. At that time in the neighborhood of $3000.

Quest. On speculation?

Ans. I had money there which was held as a margin on purchases and sales of stocks and gold I might have made.

Quest. Did you consider this concern of Morse & Co. good at this time?

Ans. I did.

Quest. Had you known them previous to August, 1869?

Ans. Yes.

Quest. At your first conversation with Mr. Levis about the check 20 on Harney & Searles by Levis, in favor of B. W. Titus, and in reference to seeing the notary, did you receive any money from Levis—and if so, how much?

Ans. In reference to the first check, I did receive from Levis some money, which I think was $10, and which money I gave to the notary.

Quest. How did Mr. Levis come to apply to you to get the notary to hold the check?

Ans. Some time in the month of July, 1869, Mr. Levis said to me, "as soon as I can get out of this arrangement that I have 30 made with the two Morses, I should like to make an arrangement with you to go into business with me alone;" from what little I had seen of Mr. Levis I liked him, and expected to make the arrangement some time in the fall.

Quest. You were, I suppose, pretty well acquainted with the course of his business up to the time he failed?

Ans. I was not.

Quest. Did Mr. Levis give you any reason why he did not go himself to the notary?

Ans. I do not recollect that he did, but I would infer that he 40 was too busy, as he always seemed to be full of business.

Quest. Did you go to see the notary about every check you wished treated in this way?

Ans. I saw the notary a number of times, but I did not wish any check treated in this way for myself.

Quest. Did you give the notary money or check more than once—if so, when and how much?

Ans. I did; I don't recollect when or how much.

Quest. About how much money did you pay the notary?

Ans. I think the notary received from me from $65 to $85—
10 it might have been but $65, and my impression is that it was $65; but at the same time the notary wished it to be understood that he did not receive this money for holding the checks back, but as an earnest of good feeling; but at the same time I was given to understand that this earnest money was expected to be forthcoming—that he would take it if it was left with him; still he did not ask for it, and still gave me to understand that he certainly expected it.

Quest. How did you understand it?

Ans. Just exactly the same way.

20 *Quest.* By withholding the checks, do you mean withholding the notices to the drawers and endorsers of the check?

Ans. I am not a notary nor a lawyer, and I don't know anything about the details as to how they do these things.

Quest. Have you been, since August, 1869, or are you now in any way connected in business interest with Mr. Levis—and if so, how?

Ans. No, I have not; I have loaned him money once or twice, and I have done one or two personal favors for him.

Quest. Did you know that any of the checks you have spoken
30 about were not presented in any other way than by information from Mr. Farnham, Mr. Levis, or some one else?

Ans. I do not, with but one exception. [Defendants counsel here objects to so much of the direct examination as from the answer to this question appears to be made without personal knowledge of the witness.]

Quest. Had you known Mr. Farnham before your application to him in this matter?

Ans. I did not.

Quest. Please state in explanation whether the exception al-
40 luded to by you on your cross-examination consisted of one or

more checks on Harney & Searles? [Defendants counsel objects to the question as leading.]

Ans. I can only state in answer to this, that late one afternoon in the month of August, 1869, and after my acquaintance with this notary I was standing in the hall of the building in which was the offices of Harney & Searles and George H. Levis, talking to George H. Levis; Mr. Farnham, the notary, came in to the hall with one of these checks—he might have had more; he had something in his hand; the front door of the office to Harney & Searles' was closed; the back door was open and a man was 10 sweeping the office; Mr. Farnham had a talk with Mr. Levis and myself in relation to a paper that he held in his hand, which paper he said was Mr. Levis' check on Harney & Searles; and that he came there for the purpose of protesting it, and he would wait until the man got through sweeping and had shut the doors and then he would present it. [So much of answer as relates to conversation with third parties, objected to.]

Quest. Was there any person in the office of Harney & Searles that afternoon when the man closed the doors, to whom the check in question could have been presented for payment? 20

Ans. After the sweeping I suppose he locked the offices up for the night; it was late in the afternoon, and there could be no question but that the office was closed.

CHAS. P. H. RIPLEY.

James L. Searles, aged thirty-six years, being duly sworn as a witness for said plaintiffs, testifies as follows:

I reside No. 49 West Thirty-ninth street, in the city of New York; my business is that of a banker; I am one of the firm of Harney & Searles, No. 24 Broad street; that firm has been in existence two years next July; prior to that I was a member of 30 the firm of Gilles, Harney & Co., in about the same locality and engaged in the same business.

Quest. Did you ever do any business with B. W. Titus, individually, of Trenton, New Jersey?

Ans. No, sir, not directly.

Quest. Did you ever do any business with Titus & Scudder, of Trenton, New Jersey?

Ans. Only so far as receiving drafts on them for collection or deposit from Morse & Co., or from George H. Levis.

Quest. Did George H. Levis have an account with your house, or do any business with you, individually?

Ans. He had an account at our house, and transacted business with and through it.

Quest. Can you state what his transactions with the house consisted of, in the way of presentation and payment of checks between the 21st and the 26th of August, 1869, inclusive, or about that period?

Ans. I will answer from memoranda taken from the books
10 and from personal knowledge of the business, being the only anthorized person in charge of the business of our house during that time; which memoranda I now have before me, shows that on the morning of August 23d, 1869, the account of George H. Levis exhibited a credit of $1721.87; on August 24th, 1869, morning, a credit of $2849.26; morning of August 25th, 1869, a debit of $1988.06; morning of August 26th, 1869, a credit of $955.23; on August 23d, 1869, we paid on his account, drafts $1628.86; on August 24th, 1869, we paid drafts amounting to $10,251.81; on August 25th, 1869, we paid drafts amounting to
20 $2432.96; on August 26th, 1869, we paid drafts amounting to $1202.

Quest. Exhibits A and *B ex parte* defendants, shown witness. Were these checks, or either of them, ever presented to you for payment?

Ans. But once, to me—that is, they were presented in my presence to our cashier late in the afternoon, about five o'clock, on September 3d, 1869, by the runner of the Bank of the Commonwealth.

Quest. What was then the condition or character of the checks
30 when presented?

Ans. My recollection is that they were presented without the protest.

Quest. What bank was it that presented it, and what was the inquiries of the person presenting the checks? [Objected to by defendants counsel as irrelevant.]

Ans. Bank of the Commonwealth; the runner presented them for payment at the cashier's desk; he was answered that it was after bank hours, and that there were no funds to meet them; I then asked him, noticing the late day of presentation, whether
40 he had presented them before or not; he told me that he had—

to a curly haired man in the hall door leading to our office, but had not before presented them in our office. [Answer of the witness as to conversation with runner, objected to.]

Quest. Is the entrance to which the runner of the bank said where he presented the checks, the exclusive entrance to the office of Harney & Searles, or does it lead to other offices?

Ans. It was at that time and is now used for a dozen or more offices.

Quest. Do you know who played the character of the curly haired man, and did you authorize any person to represent you? 10

Ans. No, sir.

Quest. On the 24th, 25th, or 26th of August, 1869, or the 27th of August, 1869, or at any time previous to September 3d, 1869, were either of these checks presented to you or your cashier, or to any one else in your office authorized to answer a demand, without your knowledge?

Ans. Never, to my knowledge, except on the day mentioned, September 3d, 1869.

Quest. At or during that time, who constituted the house of Harney & Searles, and who were authorized to act and answer 20 for it in the matter of a demand for payment of a check, draft, or bill of exchange?

Ans. The firm at that time was composed of C. H. Harney and myself; Mr. Harney was absent in Europe; I alone having the power to sign checks, and but two others in the house, employees, E. P. Chamberlain, our then cashier, William M. Levis, our book-keeper, were entrusted with the drawing of checks without the power to sign; I was rarely absent from my office during banking hours, and then but for a few moments at a time; no check or draft of any magnitude was paid during my absence, 30 unless within the knowledge of the book-keeper or cashier that the check was good and money being on deposit at the time.

Quest. Under your general instructions and the authority you delegated, were either of the parties you have mentioned and employed by you in the office, empowered to give an answer on the presentation, or to pay or draw a check for to pay drafts or checks drawn by George H. Levis, *Exhibits A* and *B?*

Ans. They were fully empowered to answer yes or no to any parties presenting any checks or drafts, or to draw, in my absence, a check to pay checks or drafts so presented, when 40

signed by me; it was my custom, on leaving the office temporarily, to sign two or three blank checks for the payment of checks or drafts drawn on us by parties having the privilege and right of doing so.

Quest. Were any checks of Mr. Levis drawn upon the house of Harney & Searles dishonored or payment refused, up to or before August 27th, 1869?

Ans. No, sir; I refused none, nor were any reported to me as having been refused.

10 *Quest.* Had either of your employees refused such a check or any check, would it not have been in the course of their business to have reported the fact to you? [Objected to by defendants counsel as immaterial.]

Ans. Yes, sir.

Quest. What were your instructions to your employees in the matter of the presentation or payment, or refusal of payment, of checks, and what was their custom in the matter? [Defendants counsel objects to the question as immaterial.]

Ans. The general rule of the house was, that any check, where 20 refusal of payment was made by any employee during my absence, to report it immediately on my return.

Cross-examination by defendants counsel.

Quest. Have you now the memorandum from which you testified yesterday, as to the balance account of G. H. Levis?

Ans. I have. [Paper handed to defendants counsel.]

Quest. Without looking at this paper, can you state any of the daily balances of G. H. Levis from August 23d, 1869, to August 27th, 1869?

Ans. I cannot.

30 *Quest.* Is this memorandum a copy, in any respect, from your books, or is it merely a statement of a single item of daily balances taken therefrom?

Ans. It is not a copy of the account, but a correct copy of the item of daily balances taken from the ledger.

Quest. You do not personally have charge of the keeping of the books and making a calculation of the daily balances, do you?

Ans. No, sir.

Quest. Can you swear, from your own knowledge, that these

daily balances you have given us are correct, or do you take them from the calculation and entry of your book-keeper?

Ans. They are based on the figures and calculations of our book-keeper. [Defendants counsel here objects to so much of the evidence in the direct examination of this witness as relates to the account of George H. Levis with Harney & Searles; it appearing by the answers to the above questions that the same is incompetent.]

Quest. Did George H. Levis have any balance standing to his account in your firm on the morning of August 27th, 1869? 10

Ans. He did not; the 26th of August, 1869, was the last day on which he had any balance standing to his credit up to the present time.

Quest. Can you state up to what hour on August 26th, 1869, he had a credit standing?

Ans. I cannot.

Quest. Was he overdrawn on the evening of the 26th of August, 1869?

Ans. He was; we had security for his overdrafts by collaterals. 20

Quest. Can you state, of your own knowledge, the nature of the credits of George H. Levis' account, from August 15th to August 26th, 1869?

Ans. They were composed of both cash and drafts, which were accepted as deposits.

Quest. In the month of August, 1869, were there not several employees in your office?

Ans. Yes, sir.

Quest. How do you fix the 3d of September, 1869, as the day when you first saw the checks in question? 30

Ans. From a memorandum taken by our cashier in my presence on the evening of that day.

JAMES L. SEARLES.

Edward P. Chamberlin, aged thirty-one years, a witness produced and sworn on the part of the plaintiffs, as follows:

Quest. What was your business in August, 1869?

Ans. Cashier for Harney & Searles, 24 Broad street, New York city, and am still with the same firm.

Quest. Exhibits A and *B ex parte* defendants shown witness. Were those checks ever presented to you for payment?

Ans. Not until after they had been protested.

Quest. Can you fix the date when they were presented to you first?

Ans. September 3d, 1869.

Quest. How do you fix that date?

Ans. I took a memorandum at the time of the numbers, dates, amounts, by whom drawn, and in whose favor, and where payable; and that they were presented by the runner of the Commonwealth Bank; the memorandum was made by me in the presence of Mr. Searles and the runner.

Quest. Did you wear a moustache in August, 1869?

Ans. No, and I never did.

Quest. State what was said by the runner of the Commonwealth Bank at the time he presented them, on September 3, 1869? [Objected to by defendants counsel as immaterial.]

Ans. He said that he had presented the checks before for payment and that they had been refused; I think that is all he said; that is all I remember of.

Quest. Who was present when the runner came in on September 3d?

Ans. Mr. Searles and myself—I don't remember any one else; it was late in the afternoon when the runner came in.

Cross-examination by defendants counsel.

Quest. Were you in attendance at Harney & Searles' office in the afternoon of August 26th, 1869?

Ans. I was.

Quest. Where were you in attendance and in what part of the office that afternoon?

Ans. Cashier's desk.

Quest. Were you there during the whole banking hours that afternoon?

Ans. Yes, sir.

Quest. Have you been employed at Harney & Searles' continuously since August, 1869—if not, state when you left there, where you were employed after leaving there, and when you returned?

Ans. I left there about the middle of September, 1869, and

then went into business for myself at No. 89 Beaver street; then I moved to 134 Pearl street; I returned to Harney & Searles' about May 15th, 1870.

Quest. Were there not, during August, 1869, a large number of checks presented daily at Harney & Searles' office?

Ans. A considerable number, but not a large number.

Quest. Can you state from memory what checks were presented on August 26th, 1869?

Ans. I cannot.

Quest. When, where and by whom was your attention first called to the question, whether either of these checks had been presented? 10

Ans. My first attention was called to the checks by the runner of the Commonwealth Bank at the office of Harney & Searles, on September 3d, 1869.

E. P. CHAMBERLIN.

State of New York, city and county of New York, *ss.*—I, Thomas Sadler, the commissioner named in the caption hereof, do hereby certify and return to the New Jersey Supreme Court, at Trenton, that I have taken the foregoing depositions by consent and in the presence of E. T. Green, Esq., of counsel with plaintiffs, and John R. Emery, Esq., of counsel with defendants, that said counsel each waived the oath of the commissioner and the form and manner of taking said depositions—reserving the objections to the questions and answers for the court. The witnesses were duly sworn by me, their depositions were read over to them before signing, and that the foregoing and I, at the request of said counsel for said plaintiffs and defendants, return to said court the foregoing depositions. 20

Witness my hand and seal May 26th, 1870. 30

THOS. SADLER,

Commissioner for New Jersey, 11 *Wall street, New York.*

The plaintiffs also called as witnesses—

William M. Lewis, sworn, says—I reside at Orange, Essex county, New Jersey; in August, 1869, I was book-keeper for Harney & Searles, in New York city; besides myself and Mr. Searles, and Mr. Chamberlain, who was the cashier, there were Mr. McDonald, the gold clerk, and a porter, named William; cheques drawn on Harney & Searles were not paid over the counter, but by other cheques drawn on the Bank of New York; neither in August, 1869, nor for eighteen months prior to that
10 time, did we ever pay currency over the counter for cheques drawn on us.

Cheques marked *Exhibits A* and *B* being shown witness, he says—

I first saw those cheques on the afternoon of September 3d, 1869, in the hands of a man in front of the cashier's desk, in Harney & Searles' office; the man handed them to the cashier—I mean to Mr. Chamberlain, the cashier; I do not know who that man was—he did not state to me from whom he brought the cheques; I fix the date September 3d, 1869, by a memoran-
20 dum made by Mr. Chamberlain in my presence at the time; the protests are dated August 25th and 26th; neither of these cheques were presented to me for payment on the 25th or 26th of August, 1869.

Paper shown witness, *Exhibit* *ex parte* plaintiffs, he says—

This is an account of George H. Levis with Harney & Searles, showing the condition of his account from August 23d to August 26th, 1869, inclusive—I made this copy from Harney & Searles' cash book and ledger; at the time mentioned I kept that cash book and ledger; the cash book is our book of original
30 entries.

The paper is offered in evidence.

Levis' account was not closed until some time in September or October—about the middle of October, I think; after August 26th, 1869, no deposits were made by Levis.

[The defendants counsel objects to the paper offered; it is admitted by the court and an exception taken.]

I had a conversation with the man who presented the cheques on September 3d—I said to him, he had never presented those cheques to our house for payment before; he said he knew he
40 had not—I asked him why; he said because Levis told him to

bring the drafts to him, and that he had taken them to him (Levis) out there, or back there, or some such expression; Levis had an office in the rear of the same building that our office was in; I turned to Chamberlain and remarked that that man had got himself into a pretty bad fix; our office is in No. 24 Broad street—it is a very large building, and there are perhaps fifty other offices in it; the door from Broad street opens into a large hall—this hall is the Broad street entrance to all the various offices in the building; it was the entrance to the office of Moss & Co., when Levis was with them; the hall extended directly back from the street to the door of Levis' office; to get to our office, after entering the hall, you must turn to the left a few steps out of the main hall to a double door opening into our office; I have here the memorandum which Mr. Searles had before him when he was testifying; Searles told me it was that memorandum.

[To meet an objection of defendants counsel, Mr. E. T. Green identified the paper as the one used by Mr. Searles.]

Witness says—This paper is a correct copy of the daily balance on Levis' account with Harney & Searles for August 23d, 24th, 25th and 26th, 1869, taken from our ledger and cash book; it shows the daily morning balance; on August 23d Mr. Levis had to his credit $1721.87; August 24th, he had to his credit $2849.26; August 25th he is overdrawn $1988.06; and on the 26th he has to his credit $985.23; on August 23d his drafts were paid to the amount of $1628.86; August 24th amounting to $10,251.81 and $2439.26, in all $12,684.77; August 25th, $1202, and August 26th $1250; our firm had collaterals for overdrafts and Levis was allowed to overdraw to the amount of $2000; the item of $1988.06 was an overdraft.

And being cross-examined witness saith—

The morning balance shows how the account stands at the opening of business; I cannot tell what the drafts or cheques deposited or paid were; they are all entered as cash; I cannot tell how long on the 26th of August, 1869, Levis' account remained good; I think nothing was deposited with us by Levis on that day; drafts were drawn on us and that day we paid several, so that there was a balance against him of $266.77 at the close of that day; the payment of the cheques in question

depended entirely on Mr. Searles, if they had been presented on August 26th; I cannot say whether they would have been paid or not; our customers frequently overdrew, and their drafts ordered to be paid by Mr. Searles; no one was authorized or had power to pay or answer an overdraft, except Mr. Searles, and no one, to my knowledge, ever did; cheques were sometimes presented to me for payment while Mr. Chamberlain was at lunch, but it was his business to pay checks regularly; I never saw the man who brought these cheques on September 3d,
10 at our office before; don't know whether he was the runner of the Commercial Bank.

A man stands up in court at the request of the defendants counsel—witness says—

That is not the man, although I recognize him as the runner of a New York bank; it was after business hours on the 3d of September, between four and five o'clock, when the man came to our office with the protests and cheques; that is the time Chamberlain made the memorandums; Levis had nothing to his credit after August 26th, 1869, or on September 3d; we never
20 had anything to do with Mr. Ripley; Levis was connected in business with Moss & Co., and Levis' office was the same as that of Moss & Co.; I never saw Levis' name on Moss & Co.'s door, but he had a desk there and represented himself to be a partner; I have paid Levis' drafts on our bank; the door leading to Harney & Searles' office is a few steps from the front door; our back office has a door leading out to the hall; there is a distance of at least twenty feet between Levis' office door and our rear door; the rear door of our office is probably forty feet from the front door; Moss & Co.'s sign was "Moss & Co., dealers in puts and
30 calls."

In chief.—Paper shown witness marked *Exhibit* Witness says—

This is in Chamberlain's handwriting; it was written in my presence on September 3d, 1869.

Paper offered in evidence.

Daniel W. Adams, sworn, says—I live in New York—am a counsellor-at-law; I know Harney & Searles, also Messrs. Levis and Chamberlain.

Cheques *A* and *B* shown witness, he says—

I cannot say I saw these cheques until the examination in New York; I did not examine them until then; I was at Harney & Searles' office on the 3d of September, 1869, when two cheques were presented for payment; am not positive as to the exact time, but it was early in September; Searles, Levis, Chamberlain, Titus and Scudder, one or both, I think both, were present; I was never present at any other time when all those gentlemen were present, and cheques were presented for payment; I am the counsel for Harney & Searles; Titus & Scudder came to 10 New York a short time previous to see about two cheques of Levis' on Harney & Searles, which were not honored; two cheques of about the amount of these two in question, were spoken of; that afternoon, September 3d, I had an appointment with Mr. Searles at his office; I saw, while I was there, two cheques brought in by some one, and when they were handed to the cashier the man was asked, why they had not been presented before; he answered, they had been, and when asked where and to whom, he answered, making a motion with his head, out there in the passage-way; he made a motion with his 20 hand toward the front door; it was about five o'clock in the evening, I think.

And being cross-examined, says—

I was in Harney & Searles' office when the man came in with the cheques; he had them in his hand; I saw only the one man; Titus & Scudder, or one of them, were there at the time; we were all, except Levis and Chamberlain, outside the railing, near the cashier's desk; I saw Mr. Chamberlain make a memorandum at the time; I am not the counsel of Harney & Searles in this suit, nor am I employed in it in any way, although I assisted Mr. 30 Green in the examination of witnesses in New York.

In chief.

Harney & Searles are not interested in this case at all.

Mr. Lewis, recalled, says—

The gold clerk is not only forbidden to have anything to do with the paying or receiving cheques, but he always refused to do so; he once refused when Mr. Searles requested him to attend to that part of the business.

Benjamin. W. Titus, sworn, says—I reside in Trenton, New Jersey; am one of the plaintiffs in this cause; am a partner in the firm of Titus & Scudder, which firm is composed of myself and U. T. Scudder; our firm kept their accounts at the Mechanics National Bank in this city, and have done so for twenty or twenty-five years; I always had an individual account there also, separate from the firm account. [Cheques in question shown.] These two cheques are payable to my order and are endorsed by me—they are also endorsed "pay to George Ellis, 10 cashier;" this endorsement is scratched out, and is signed by W. Howe, who is cashier of the Mechanics National Bank; Mr. Ellis is cashier of the Commonwealth Bank of New York. [Book shown witness.] This is the bank book of Titus & Scudder with the Mechanics National Bank; in it, on the credit side are the following entries: 24th August, cash, $2190; 25th August, cash, $6134; one of these cheques in question is embraced in the first entry, and the other in the second entry; I was present at Harney & Searles' office on September 3d, 1869, and saw these cheques there at that time; a runner from the Commonwealth 20 Bank brought them; he took them to the cashier's desk at Harney & Searles'; Mr. Searles, Gen. Adams, Mr. Scudder and I were outside the railing, and Mr. Levis and Mr. Chamberlain were on the inside; the runner came into the office and presented the cheques which he said had been sent back; the cheques in question are the cheques he presented; he was at the cashier's desk, and I stood within two feet of him; he handed them in to the cashier, and he and Levis looked at them and handed them to Mr. Searles, who was standing immediately at my side; Searles opened them, looked at them, and said, "these have never 30 been here before," or to that effect; the runner said, "I know that, and I will tell you just how that was--I brought them down to the outside door there," pointing to the main entrance of hall, "and a man outside told me take them away and not bring them back again; I took them away and did not bring them back;" the bank book of Titus & Scudder shows on the debit side these charges, viz. August 27th, Harney & S. and protest, $2135.55, that is for one of these cheques; August 30th, Levis, protest and interest, $2137.56, that is the other cheque; they are charged up against Titus & Scudder; the protests were at- 40 tached to these cheques when they were presented on September

3d at Harney & Searles'; I went to see the Bank of Commonwealth several times about this matter; Mr. Haight is the president and Mr. Ellis cashier of the bank. I know them both, personally; the first interview at that bank was about September 6th or 7th; the next interview with them was about a week after—I then saw Ellis alone; I had a conversation with him about those cheques; he showed me a book called the notary's book.

The plaintiffs offer to prove a conversation between Mr. Ellis and Mr. Titus; that in that conversation Mr. Ellis told Mr. Titus that a number of Levis' checks on Harney & Searles had been given to the notary of that bank to protest; that Mr. Titus told the cashier that he had never received either from that bank or the Mechanics National Bank, any notice of such protests; that thereupon Mr. Ellis said, that showed there was rascality in the transaction. Also offer to prove, as a fact, that no such notice, or any notice of such protests, was ever received by Mr. Titus or Mr. Scudder.

This offer is overruled by the justice trying the cause, and a bill of exceptions prayed for and tendered to be sealed, and it is sealed accordingly.

And being cross-examined, he says—

The first check was received by me either August 22d or 23d; I presume by mail; our young man deposited it on the 24th; he generally made the deposits—he is our book-keeper—Mr. Joseph Snyder; I presume I gave him that check to deposit; the whole deposit that day was $2190; cheque dated August 24th was deposited on the 25th; we generally sent with our book-keeper little memorandums of our deposits; the one now shown is in our book-keeper's handwriting; our first deposit on the 25th was $162, the second deposit was $6134; it was made up of a cheque of West, Titus & Co. for $4000, and this cheque for $2134; on the evening of the 25th, we (Titus & Scudder) would have been overdrawn if this cheque of $2134 had not been put to the credit of the firm; the overdraft would have been about $1100; this cheque was put to the credit of firm as cash; the bank paid for Titus & Scudder, on the 25th, about $800; late in the afternoon the bank notified us that we were overdrawn; I had told our book-keeper to deposit the cheques

in the morning, but he had neglected or forgotten to do it; finding he had not deposited them, I sent them over to the bank—I mean the $4000 and the $2134 cheques; we usually deposit about two o'clock; these cheques were kept with other cheques; the second cheque I received the night before it was deposited; cannot say that I received those cheques both together; I had an account with Levis; I gave him credit for those cheques; kept his account in a memorandum book; don't know where that book is now--have not seen it lately; can't say how long my
10 account with Levis had been running—but for some time; I first sold him Mount Holly gas stock—that is the commencement of the account; he bought stock for me, and when he sold it he would send me a cheque for the amount realized; I depended on him for the accounts; the cheques in question were sent to me for stocks and gold sold for my account; I gave Levis credit for these checks; I think my memorandum book, in which Levis' account is, is at home; I will produce it if I can find it; the bank paid for us on the 25th of August, on our cheques, about $8000; there was one acceptance of $4000 paid by the bank—
20 it was a draft of West, Titus & Co. on me--which I had accepted, and for which they had sent me their cheque—I had no interest in that transaction—it was all done for their accommodation; there is a draft on August 25th of $2000, charged against us—don't know what that was for; the $1000 draft charged the same day, I think, was a draft in favor of Levis; I occasionally sent him cheques—I sent him the $1000 check for some stock he purchased for me—cannot tell when it was sent to him; it might have been two or three days before it was paid; I do not know that I can show an exact account of this—I depended greatly
30 on Levis; at that time I had all confidence in him; I presume that the $1000 cheque was sent before I received the two cheques in question; I first heard that the $2134 cheque had not been paid on the 27th of August; protests of both cheques came to me in one envelope, at the same time; don't think I received any notice directed to Levis; don't recollect receiving any telegram from Levis that the check had not been met; I did receive a telegram authorizing me to draw on Moss & Co. on account; they owed us considerably more money than that draft; on the 27th of August I drew on Moss & Co.; entry in bank book
40 shows a credit of $2662.33. [Deposit book shown.] This is our

book-keeper's handwriting, and is dated August 27th; the Moss & Co. draft is included in this memorandum; the Moss draft is for $2135.55—that is very likely the amount of the first cheque and protest; that draft was deposited to the credit of Titus & Scudder; I suppose it was done to meet the amount of the first cheque and protest; Levis was in with Moss & Co.; the bank gave us, (Titus & Scudder) credit for the Moss draft as cash—that draft came back protested; on the 30th of August the second cheque is charged up against us; just before that day there were several notes discounted for us by the bank; on August 20th three notes, one for $1000, one for $41.39, and one for $927.42, in all, $1968.82, were discounted and placed to our credit; until those notes were discounted we did not have funds in bank to take up the second check; I received notice of the protest of the second cheque at the same time as the first—it was on August 27th or 28th; I cannot recollect when I received notice of the protest of the Moss & Co. draft—I did receive such notice—it is charged against us September 6th; there are discounts on September 4th and 6th; until those discounts were made, we did not have enough to take up the Moss draft; we were short about $1000; there was another cheque of Levis' for $257.80, protested about the same time; it was given for a balance due me on a sale of stock—it was dated August 25th, 1869; when both these cheques in this suit had been protested, and I had heard that they had not been presented, I went to the bank to ask Mr. Howe to return them to the Commonwealth Bank—he did so reluctantly; I told Howe they had not been presented and to send them back; Howe said there had been trouble about those drafts sent to New York by this bank; I never asked Howe to send them back for presentation; I think it was about the 1st or 2d of September that I told Howe the cheques had not been presented—I heard so in New York about the 31st of August; after Howe sent the cheques back I went to New York to see about them—was there on the 3d of September; I saw those cheques at the office of Harney & Searles on the 3d day of September, about four o'clock, P. M., in the hands of a bank runner; I had not been at the Commonwealth Bank that day; Mr. Scudder and I were at Harney & Searles' that day, together; there was no arrangement to meet the others who were there; I know the runner of the Commonwealth Bank—have known him twenty or twenty-five years, and paid him thousands of dollars.

Counsel for defendants asks a man to stand up in court.

That is not the man; I had Levis arrested and imprisoned in our jail for fraud since this transaction—he was in confinement four or five days; I had him arrested on the cars as he was passing through.

In chief.

I arrested Levis because Mr. Moss told me that certain stock Levis said he had bought for me and for which I had paid, had never been bought; I found, however, that Levis had purchased
10 the stock, and that he had no money; I became satisfied that I had acted on false information and had Levis released; up to the time of Levis' failure I had full confidence in him; the $256 cheque was to the order of Titus & Scudder, and endorsed by them; the cheques sent me by Levis were regular business cheques—they were not kite flying cheques; one of the items in the account was one thousand Puts of Chicago and North Western Railroad stock; a put is the right to compel one to take the stock at a certain price; I made a demand of the Mechanics Bank that these cheques should not be charged against Titus &
20 Scudder, but against me personally—that I would answer for them; our firm never consented to have these cheques charged back against them; the bank never asked my consent, to my knowledge; I insisted that the firm should have credit for them, but the bank refused; that was after I had found out that the bank had charged them against the firm; when I drew the Moss draft I did not know that the first cheque had not been presented to Harney & Searles—I thought it was all regular up to that time.

And being again cross-examined, says—

30 I asked the bank to charge the cheques to me, and give the firm credit for them; this was some days after the protest—it might have been a week or two; I spoke to Mr. Brearley and Mr. Howe about it—the reason I gave was that the cheques had not been presented for payment; don't know that I gave any other reason; I released Levis when I found he had bought the stock which Moss said he had not bought—Levis bought the stock in his own name, but for me—that is customary.

Plaintiffs offer copy of Levis' account with Harney & Searles. Bank book of Titus & Scudder. Memorandum made by Levis, showing Levis' daily balances. Memorandum of September 3d, made by Chamberlain. The two checks of Levis on Harney & Searles. [*Vide* Exhibits.]

And being further examined in chief, says—

I told Mr. Howe, cashier of the bank, that the bank had upwards of $4000 of the money of Titus & Scudder; I pointed out these two cheques charged against us, and demanded that the amount be put to the credit of the firm, so that the firm could 10 cheque against it and use it—he refused, and then I told him we would bring suit against them for that amount; I went to the bank with our bank book and made the demand of the president and cashier, both, insisting that the firm should be credited with the money, and threatening suit if the demand was not complied with.

And being again cross-examined, says—

This is the same conversation, in substance, that I stated when I testified before I presented our book to Howe first; I had before tried him; the cheques had been properly presented; do 20 not think I said so at the time of demand; when I made the demand for the amount of these cheques on Brearley, I did not tell him that my reason for so doing was that they had not been properly presented in New York; I demanded that the amount of the cheques be put to the credit of the firm's account as cash; I demanded this of Howe and Brearley; presume that this was the same occasion heretofore detailed by me; I spoke to both of them the same day; Howe was at his desk and Brearley further back in the room—I made the demand of both of them.

In chief. 30

I had directions from Mr. Green on this subject, and I went to the bank in pursuance of those directions; this was all before the suit was commenced.

Plaintiffs rest.

At a suggestion of His Honor, Mr. Justice Van Syckle, the defendants counsel moved to nonsuit the plaintiffs. The motion was granted by the Justice and an exception to his ruling taken. A bill of exceptions was tendered, and it is sealed accordingly.

During the examination of Mr. Titus, the defendants counsel called, by consent, as a witness for the defendants—

George H. Cary, sworn, says—I reside in New York; I am a counsellor-at-law—have been since July, 1863; I am a notary public, and have been since March 17th, 1864; have been and
10 am now the notary of the Bank of Commonwealth, Bank of America and Bank of Commerce; I performed the duties of notary for the Bank of the Commonwealth up to August 11th, 1869—was then absent from the city until August 26th; previous to August 26th, I had no knowledge of ever having been to Harney & Searles' to demand payment of cheques or drafts. [Cheques in question shown.] I signed one of these protests—it is the cheque dated August 24th, No. 170; I received that cheque from the note teller at the Bank of Commonwealth—I received it on the afternoon of August 26th, 1869, between three and
20 three and a quarter o'clock P. M.; I went to Harney & Searles' office, 24 Broad street, and presented it to a person in charge; I entered by the Broad street entrance, and took the first door to the left hand on first floor; I presented the check to a person in attendance at the counter—demanded payment, and he replied that it was not good; this was about quarter past three o'clock; a check must be presented in New York between ten o'clock and sundown on private bankers and merchants; I have here the record of this protest; notices of this protest were sent on the following day—they were enclosed to William Howe,
30 cashier, Trenton. N. J.; mailed August 27th, 1869.

Book shown witness, he says—This is my protest book—it is the only book kept by notaries in New York; the entries in this book are made the day after the protests; I do not know anything about the protests made by Farnham; about the middle of the following month (September), I saw the person to whom I had presented these cheques in the presence of Titus and Scudder; they had called at my office and asked me to go with them to Mr. Chamberlain's office to identify him—that office was in Pearl street; I went with them—we went up stairs to his office

and inquired for Mr. Chamberlain of two persons who were in the office—they said he was out, but would be in soon; we went down stairs and I told Messrs. Titus & Scudder that I could not wait, but when Chamberlain came in, if they would come for me, I would come down again; I then walked on, but seeing that they did not follow I walked back, intending to ask them to come to my office; as I walked back to them the young man walked up to them about the same time; I put my hand on his shoulder, and said, "this is the man to whom I presented that cheque," and turning to Mr. Scudder, asked him if he was not 10 Mr. Chamberlain; Mr. Scudder said, I think you are mistaken, you have confused him with Mr. Levis—let us go to Levis' office and see him; we did so; I saw a man sitting there and asked him if Mr. Levis was in; he said, that is my name; I then spoke about the cheques; he said, "am I the man you presented them to," and I said, no; don't think any thing else of importance occurred; Messrs. Titus, Scudder and I talked about it, and I insisted that it was Mr. Chamberlain I had presented them to; that was the first time I ever saw Levis; have seen Titus and Scudder several times—once or twice—at the Bank of the Common- 20 wealth and at my office; I presented the cheque at an opening in the railing just beyond the desk; it was a large opening immediately opposite the front door; I only saw the left side of the face of the person I presented the cheque to—about three quarters of the face—and part of his shoulders; he leaned over from behind the counter; when I said Chamberlain was the man I presented the cheque to, he said he was there, but thought I was mistaken; I presented another cheque on August 27th, 1869, about the same time—at the same place—the same presentation and the same answer; I presented that to the same person, and 30 the answer was, "not good;" I presume the record of that protest is on my book; the cheque was for $256.25, drawn by B. W. Titus; a day or two after I presented a draft of Moss & Co.; I think it was on the Saturday following the 27th of August.

And being cross-examined, says—

My first interview with Titus & Scudder was about the 5th or 6th of September; it was in the parlor of the Bank of Commonwealth; Titus, Scudder, Mr. Haight the president, Mr. Ellis the cashier, and Mr. Leland, one of the directors, were present;

Messrs. Titus & Scudder asked me for a description of the person to whom I presented the cheque—I gave them a description—told them he was a tall man, with light curling hair, and a light moustache; that he was something like a young man who came into the bank at that moment; don't remember that I ever repeated that description again—not with particularity; I did not, to my recollection, about a week after, in the Bank of the Commonwealth, say to Titus & Scudder, or to either of them, that the man I presented the cheque to had a moustache—don't remember
10 that I repeated it to them at my office; after I had been with Titus and Scudder to see Chamberlain, as we were coming back through Exchange Place, I told them that Mr. Farnham had told me he had been paid something for keeping back notices of protest until the next day, and that if I would do the same thing probably I would also be paid for it; Farnham acted as notary in my absence—he did the work and we divided the fees; Farnham said he had been holding back cheques at the request of Ripley; Titus & Scudder told me the whole matter had been explained to them; I did not say to Titus
20 & Scudder, at the time we were returning from Chamberlain's, that it was the runner's fault, and that the Bank of the Commonwealth would settle with them; I remember talking about the matter, but don't recollect exactly what was said; I never said that I was satisfied that the runner had never presented the cheques to Harney & Searles; I do not know that several of Levis' checks were protested and notices of protest sent; I know that several came into Farnham's hands that were not protested; the president of the Bank of Commonwealth produced the note book, showing that there were several cheques
30 of Levis' protested, and notices not sent out; at the interview with Titus & Scudder at the Bank of the Commonwealth, in speaking of the $2134 cheque I protested, I did not say that I was certain I presented that cheque to Chamberlain, because I had a long conversation with him—that was when I presented the $256 cheque; when I first went to see Chamberlain with Titus & Scudder, I do not remember that Chamberlain, when I said he was the one to whom I presented the cheque, replied, "what answer did I give to you?" I did not then say "you made the same reply both times;" I did say, but not in reply to a
40 question from him, "you made the same answer both times;"

Chamberlain did not say at that interview, "you presented the $250 cheque to me, but not the other one," or words to that effect; at the first interview with Titus & Scudder, at the Bank of the Commonwealth, I did not say that I was sure I had presented the $2134 cheque to Chamberlain, because I had a long conversation with him at the time I presented it; I said I had a conversation with him when I presented the second cheque of $256; at the time I presented the last cheque I asked him about Levis and Ripley; I was there only a few minutes—he was disinclined to give me any reply—he gave me a very short answer; 10 that is all I recollect.

In chief.

At that time I did not know Mr. Levis or Mr. Ripley; the draft I presented on August 28th, was on Moss & Co., drawn by B. W. Titus, dated August 27th, 1869, for $2135.55, endorsed Titus & Scudder and William Howe, cashier; notice of protest sent on the following Monday.

[This evidence objected to, and is to be overruled unless defendants connect it, in some way, with their defence.]

My attention, as to the presentation of the draft, was first 20 called to it about the 6th or 7th of September, when Mr. Brearley, president of the bank in Trenton, first called on me; this was before Titus & Scudder called; went down to Harney & Searles' to identify the man to whom I presented the cheque—did not see him.

Cross-examined.

Titus & Scudder did not, at first interview, ask me to go down with them and identify Chamberlain; they did ask me and I promised to go down and see Chamberlain and write them, but 30 I never had an opportunity to do so; I went to see Chamberlain but did not find him; the handwriting in my book is that of my clerk, but it is all examined by me immediately after it is written.

Exhibits.

Copy of Cheques—Exhibits *A* and *B*.

No. 169. New York, Aug. 23d, 1869.

Harney & Searles, Bankers.

Pay to the order of B. W. Titus, twenty-one hundred and thirty-four dollars.

$2134.00. George H. Levis.

[Two cent U. S. sevenue stamp.] [No. 24 Broad street, on end of check.]

10 Endorsed as follows: B. W. Titus. Pay to the order of Geo. Ellis, cash. W. Howe, cashier.

[Paid at the National Bank of the Commonwealth.]

No. 170. New York, Aug. 24th, 1869.

Harney & Searles, Bankers.

Pay to the order of B. W. Titus, twenty-one hundred and thirty-four dollars.

$2134.00. George H. Levis.

[Two cent U. S. revenue stamp.] [No. 24 Broad street, on end of check.]

20 Endorsed as follows: B. W. Titus. Pay to the order of Geo. Ellis, Esq., cash'r. W. Howe, cashier.

[Paid at the National Bank of the Commonwealth.]

Copy of Bank Book.

The Mechanics National Bank in account with Titus & Scudder.

Dr.

Aug 24.	Cash,	$2190 00
25.	Cash,	6134 00
27.	Cash,	2662 33

Cr.

Aug. 27.	Harney & S. and protest,	$2135 55
30.	Levis, prot. and int.	2137 56
Sept. 6.	Moss & Co. and prot.	2140 80

COPY OF MEMORANDUM.

Aug. 23d, 1869. Geo. H. Levis' dft on us No. 170, $2134, favor B. W. Titus, and endorsed by him. Payable Bank Commonwealth.

Aug. 24th, 1869. Geo. H. Levis' dft on us, No. 169, $2134, favor B. W. Titus, and endorsed by him. Payable Bank Commonwealth. 10

Presented for payment by Bank Commonwealth, September 3, 1869.

Assignment of Errors.

Afterwards, that is to say, on the day of , in the year of our Lord, one thousand eight hundred and seventy, before our Court of Errors and Appeals in the last resort in all causes, as heretofore, at Trenton, came the said Benjamin W. Titus and Uriel T. Scudder, by Edward T. Green, their attorney, and say—that in the record and proceedings aforesaid, and in signing the judgment aforesaid, 20 there is manifest error in this—

1. That by the record aforesaid it appears that the judgment aforesaid was given against the said Benjamin W. Titus and Uriel T. Scudder, whereas, by the law of the land, the said judgment should have been given for the said Titus and Scudder.

2. That the Justice, at the trial of said cause, in contravention of the law, directed that the plaintiffs should be non-suited, whereas he should have refused so to do.

3. That the judgment of the said court is, in divers other respects, erroneous and contrary to law. 30

EDW. T. GREEN,
Att'y of plaintiffs.

Points.

The plaintiffs in error, to maintain the issue on their part, will rely on the following points:

1. The cheques in question were deposited in the Mechanics National Bank, and by them received as cash and credited as such to Titus & Scudder.

2. The bank assumed the responsibility of collecting the said cheques, and are therefore responsible for any neglect of duty on their own part, or of any of the agents employed in such col-
10 lection.

3. The law imposes the duty upon the bank receiving these cheques for collection, to cause the same to be presented for payment to the payor, and if payment be refused, to cause proper protests to be made, and notices of such protests sent to those who, by law, are entitled to receive them. The evidence in this cause shows a failure both to present and to protest the cheques in question. For such failure of duty, an action lies against the bank.

4. Upon the facts as proved in this cause the Justice erred in
20 directing the plaintiff to be non-suited.

EDW. T. GREEN,
Att'y for plaintiffs.

NICHOLSON, Printer, Trenton, N. J.

N. J. Court of Errors and Appeals.

BENJAMIN W. TITUS AND URIEL T. SCUDDER,
vs.
THE MECHANICS NATIONAL BANK OF TRENTON.
} *In Error.*

POINTS UPON WHICH THE DEFENDANTS IN ERROR MEAN TO RELY.

1. The action being brought by plaintiffs in error against the defendants in error, for money had and received by defendants as bankers, to the use of plaintiffs, and also for breach of a special contract in relation to the presentment of two cheques, and no evidence being offered below sufficient to charge the defendants upon either of these demands, the judge properly non-suited the plaintiffs.

2. As to the claim for money had and received, the defendants are not liable to an action for money deposited with them, or held by them as bankers, without a demand previous to suit.

3. As to special contract, the plaintiffs, upon the trial, proved at most, only a failure to present the cheques in question for payment, and the proofs did not establish any contract of the defendants to present the cheques in question for payment.

4. In the absence of any special contract or agreement, the contract implied by law upon the receipt by the defendants, without compensation, at their place of business in Trenton, of a cheque upon persons in the city of New York, was that of transmitting the cheque in due season to a competent bank or other agent in the city of New York.

5. The non-suit was properly ordered.

RICHEY & EMERY, H. S. LITTLE,
Of counsel with defendants in error.

Law is *a rule of action*, commanding what is right and prohibiting what is wrong. The rule requiring twelve per cent. interest to be paid on overdue taxes, has been *the rule* of law in this state ever since the 28th of March, 1862. *That* rule has been constantly, incessantly, in force, and has never been inoperative for a single moment of time.

A statute which was to have continuance for seven years, which, after the expiration of that term, by another statute had been made perpetual—the latter is a *continuance* of the former, and the former is said to be and is treated as if still in force, and that, although the continuing statute has made some alteration in the former one.

Bac. Ab., *Statute D.*

Shipman v. *Best*, 4 *Term. R.* 109.

If, before the expiration of a temporary statute, it be made perpetual by another statute, the former is as much in force as if it had at first been made perpetual. *Ib.*

Dingley v. *Moore*, *Cro. Eliz.* 750.

This was an information on the 33 Hen. VIII., ch. 16, for buying of worsted yarn, not being a weaver and recited that that statute and 1 Ed. VI., ch. 6, whereby it is made perpetual, and avered that it was contrary to statute 33 Hen. VIII., ch. 16, &c. Objection that it ought to be coupled with the statute Ed. VI., ch. 6 and concluded, *Contra formani statutorum.*

Popham said: "When a statute is made to endure for a certain time, and is afterwards made perpetual by a new act, *or made perpetual in part, and* where it is continued with a new addition; for where a statute is made purpetual, in part or in whole, without any new addition or alteration, the offence may well be supposed against the form of the first statute, for that act is made to continue; and here in this case, the 33 Hen. VIII., ch. 16, *is made to continue for yarn spun upon rocks, but not for other yarn, and the information* might well be *contra formani statuti* of 33 Hen. VIII., ch. 16."

This clearly shows that so much of the old act as was continued by the new, was the old act—not repealed, not expired.

1 *Hale's Pleas, Crown* 667, says: "But if a statute be continued till the end of the next session of parliament, and before that next session be ended, it is continued over, the indictment may run *contra formani* of the first statute, *for it never was interrupted*, or it may conclude *contra formani statutitorum.*"

1 *Kent. Com.* 466–7.

Thoriat v. *Hart*, 2 *Hill* 380.

Matter of Brown, 21 *Wend.* 316.

Steamship Company v. *Joliffe*, 2 *Wallace* 450–8. 10

Wright v. *Oakley*, 5 *Metc.* 406.

Sedgwick on Stat & Cons Law 129

Rex v Rogers 10 East 569

Camden v Anderson 6 Term Rep

Viner's Dig Pay 910 - paragraphs 6