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NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

JOHN C. REED, *Plaintiff,* vs. ATLANTIC CITY SUBURBAN GAS AND FUEL COMPANY, *Defendant.*	ACTION AT LAW. NOTICE OF APPEAL.	10

To Thompson and Smathers, Attorneys for the Defendant above named:

Sirs: 20

Take Notice that the plaintiff appeals from the whole of the judgment entered in this cause, on the following grounds: The following questions were admitted:

1. To the witness, John C. Reed:

"Q. This question was put to you, the following questions and you gave these answers, and I ask you if you recollect giving that testimony:— 30

(Objected to.)

The Court: The proper way is to ask him whether or not this question was propounded to him and whether or not he gave this answer.

'Q. The company had a board of directors, didn't it? A. They had a dummy board, practically. Q. Who were they? A. I don't know. There were thirteen of them. Q. Can you give us the names of any of them? A. Well, that is a matter of record. Q. Well, do you—I am asking you if you know, and if you don't know I want you to say so. A. I don't remember their names.' Is that testimony correct? Do you remember giving that testimony?

Mr. Carr: That is objected to as irrelevant. It does not contradict this witness. He remembers today some of the names that he did not remember at that time. It does not impeach or contradict him.

(Objection overruled.)

(Objection noted for plaintiff.)''

2. To the witness, John C. Reed:

''Q. That is what I wanted to know and if you had said that a long time ago, we would not have had all this. As president of the company and as a lawyer, you knew it was necessary to have a board of directors pass a resolution in order to borrow money?

Mr. Carr: That is objected to as not a true statement of the law, and as calling for a legal conclusion. A company by course of dealings, may get far away from the formal action of the board of directors.

(Objection overruled.)

(Objection noted for plaintiff.)''

3. To the witness, John P. Tompkins:

''(Last question repeated as follows: 'I show you the minute book of the Atlantic Suburban

Gas and Fuel Company as it was kept by that company in the year 1907, and ask you if you have examined that to ascertain whether there is any minute in there relating to any loan made by Mr. Reed to the Atlantic Suburban Gas and Fuel Company?")

Mr. Carr: I object upon the ground that it is irrelevant and immaterial. It makes no difference at all whether there was any entry in that book. If Mr. Reed loaned this money, his checks show that he did and the failure of the secretary to enter it in the minute book, simply shows nothing except that the secretary was careless, perhaps.

(Objection overruled.)

(Objection noted for plaintiff.)"

4. To the witness, John P. Tompkins:

"Q. Have you examined the cash book and the ledger to ascertain if there is any memorandum or record of any loan made by Mr. Reed to this company?

Mr. Carr: I object to that upon the ground that all the books are not here, that some of the books were not turned over until 1910.

(Objection overruled.)

(Objection noted for plaintiff.)

(Question repeated.)

A. There doesn't appear to be any entry in the cash books, but there is a memorandum or an entry in the ledger.

Q. And will you turn to that, please, and read the entry on the record?

A. There appears to be two, one on uage 34 and one on page 54.

Mr. Carr: I object on the ground that you

cannot prove the payment of money by a book entry. It had been settled in two or three cases in this State that books of original entry never go that far, to prove the payment of money. You can prove the sale of articles of merchandise, you can prove labor performed, but you cannot exculpate yourself from a debt by crediting in your own books a sum of money which you claim you have paid to somebody else. These books were not kept by us. He cannot sit down and write an entry in his own books and in that way prove that he paid it.

Mr. Smathers: We will withdraw the question. The books are in evidence.

Mr. Carr: That is just the point. That is why the books have no place in evidence. They are not books kept by this man. There is nothing to prove that these entries were made at that or about the time they purport to bear date. If the bookkeeper were here, I would have a right to cross-examine, I would have a right to say, 'When did you make that entry? Does it truly represent the thing recorded?' But here comes a man who did not keep these books. I ask that the books be excluded from evidence. He says he withdraws it because the books themselves are in evidence.

The Court: I will hold this matter under advisement."

5. To the witness, Richard M. Sooy:

"Q. And I suppose you knew Mr. John Reed——

A. Yes, sir.

Q. —the plaintiff in this suit? Did you, as a member of the board of directors of this company, ever learn that Mr. Reed had loaned the company twenty-five hundred dollars to pay a bond issue?

Mr. Carr: That is objected to as irrelevant and immaterial.

(Objection overruled.)

(Objection noted for plaintiff.)''

6. To the witness, L. H. Barrett:

''Q. Now, as a director, did you ever attend any meeting where the question of a loan was considered, which Mr. Reed made to the company of twenty-five hundred dollars?

(Objected to as irrelevant and immaterial.)

(Objection overruled.)

(Objection noted for plaintiff.)''

7. To the witness, L. H. Barrett:

''Q. When did you first learn that Mr. Reed had claimed to have loaned twenty-five hundred dollars to the company?

(Objected to as irrelevant and immaterial.)

(Objection overruled.)

(Objection noted for plaintiff.)''

8. That the Court admitted in evidence the ledger of the defendant after the following argument of counsel:

''Mr. Smathers: Now, I ask that the books be admitted on the ground that they are put directly in issue by Mr. Reed's word of mouth. He says one thing and the books says the opposite.

Mr. Carr: Here is an incomplete system of

bookkeeping. The records are incomplete here. It is sought to put in an entry here, a vague entry made by some person who has not been identified, of thirty-two hundred and fifty dollars, and to say by that means that a note was given to Mr. Reed. How can that be evidence? The man who made it, the man who has personal knowledge, ought to come here and subject himself to cross-examination. We cannot cross-examine a book. How can Mr. Reed be bound by an entry of that kind, of which he has no knowledge?

The Court: Is not all that for the jury?

Mr. Carr: No, sir, I think it is for the Court, because placing the most favorable construction on this, it is not evidence.

The Court: You have the examination of Mr. Reed with regard to certain entries in this book. If you could examine him for part of the entries, should the book not be admitted in evidence?

Mr. Carr: I do not think so. I only examined him here while this offer was pending for the purpose of showing that he had nothing whatever to do with it.

The Court: You first said, 'Here is fifteen hundred dollars and here is an entry of a thousand dollars, do they represent the twenty-five hundred dollars which you put in the company?' Then you go on and call his attention to other items. Is that book not before the Court and jury then, and should it not be admitted and considered?

Mr. Carr: I do not see why it should. I do not see how it can possibly have any evidential force.

The Court: Don't you think it should go in, in connection with Mr. Reed's explanation? He said he did not get the note, he never got the money and so forth.

Mr. Carr: No, because I say this book cannot possibly be legal evidence of the fact that Mr. Reed received a note, and if it is not legal evidence, Mr. Reed's denial that he got such a note does not make it such. What is the jury to weigh, if this is not legal evidence on its face, if this does not prove that he got a note?

The Court: I am inclined to admit this book.

(Ledger marked on the outside 'Ledger No. 1, Atlantic City Suburban G. & F. Co., marked Exhibit D1.')

(Objection noted for plaintiff.)"

9. Because the Court refused to direct a verdict for the plaintiff on the ground that the plaintiff has shown by the two checks that he loaned to defendant the sum of twenty-five hundred dollars, and the defendant made no proof of payment or extinguishment of the debt.

10. The Court improperly charged the jury in part as follows:

"(Objection having been duly noted on the record for the plaintiff.)

'The defendant, however, says that there are facts and circumstances in the case from which the jury may legitimately infer payment. Whether there are or not sufficient facts in the case to warrant the assumption that this claim has been satisfied is a jury question. Of course, a case may be proved in

two ways. It may be proved either by positive facts of the actual occurrence, or by the proof of facts and circumstances from which the occurrence itself may be legitimately and reasonably inferred; but then you cannot grasp at nothing. There must be tangible facts and circumstances in the case to justify your saying that this claim has been paid. If there are such facts and circumstances, which show to your satisfaction that the claim has been paid, then there should be a verdict for the defendant.' ''

11. The Court refused the plaintiff's request to charge the jury as follows:

''The plaintiff having shown the loan by him to the defendant of the sum of twenty-five hundred dollars, and its use by the company in the payment of interest upon its bonded indebtedness, a *prima facie* case has been made out against the defendant. The defendant having failed to meet this *prima facie* case by affirmative proofs of payment, or of facts discharging it from liability, your verdict must be for the full amount with interest from the date of the loan.''

''The payment by Reed to the company of the sum of twenty-five hundred dollars as a loan casts upon the defendant the legal duty of repaying the same to Reed.''

''The plaintiff, Reed, having shown that he paid to the defendant gas company the sum of twenty-five hundred dollars by checks drawn upon his personal account, the defendant to escape liability, must show by affirmative proofs either that Reed was repaid by the

company, or that Reed had collected twenty-five hundred dollars of the company's funds for which he had not accounted. Mere suspicion or conjecture will not take the place of proof, and unless affirmative proofs of these facts appear in the case, your verdict must be for the plaintiff.

"It is immaterial whether Reed had any authority from the company to loan it money or not. The payment of the money to the company and its use for the company's benefit in the payment of interest on its bond issue makes the company liable. It cannot at one and the same time retain this benefit and reject the burden of repaying its debt to Reed."

12. The Court refused to charge the jury as requested by the plaintiff as follows:

"1. The plaintiff having shown the loan by him to the defendant of the sum of twenty-five hundred dollars, and its use by the company in the payment of interest upon its bonded indebtedness, a *prima facie* case has been made out against the defendant. The defendant having failed to meet this *prima facie* case by affirmative proofs of payment, or of facts discharging it from liability, your verdict must be for the plaintiff for the full amount with interest from the date of the loan.

"2. The payment by Reed to the company of the sum of twenty-five hundred dollars as a loan casts upon the defendant the legal duty of repaying the same to Reed.

"3. The plaintiff, Reed, having shown that he paid to the defendant gas company the

sum of twenty-five hundred dollars by checks drawn upon his personal account, the defendant, to escape liability, must show by affirmative proofs either that Reed was repaid by the company or that Reed had collected twenty-five hundred dollars of the company's funds for which he had not accounted. Mere suspicion or conjecture will not take the place of proof, and unless affirmative proofs of these facts appear in the case, your verdict must be for the plaintiff.

"4. It is immaterial whether Reed had any authority from the company to loan it money or not. The payment of the money to the company and its use for the company's benefit in the payment of interest on its bond issue makes the company liable. It cannot at one and the same time retain this benefit and reject the burden of repaying its debt to Reed."

Attorneys for Appellant.

JUDGMENT RECORD.

NEW JERSEY SUPREME COURT,
ATLANTIC COUNTY.

JOHN C. REED,

vs.

ATLANTIC CITY SUBURBAN GAS AND FUEL COMPANY,

JUDGMENT RECORD. 10
THOMPSON & SMATHERS, ATTORNEYS.

Atlantic City Suburban Gas and Fuel Company, the defendant in this cause, was summoned to answer unto John C. Reed, the plaintiff therein, in an action 20 at law upon the following complaint:

Plaintiff, a resident of the City of Atlantic City, County of Atlantic and State of New Jersey, says that:

1. That on July 9th, 1907, he loaned the defendant the sum of $1500.00, in cash.

2. That on July 26th, 1907, he loaned the defendant the sum of $1000.00, in cash. 30

3. Defendant has not repaid said loans, or either of them.

Plaintiff demands as damages the sum of $2500.00,

with interest on the sum of $1500.00, from July 9th, 1907, and on the sum of $1000.00, from July 26th, 1907.

WILSON & CARR,
Attorneys for Plaintiff.

Defendant, Atlantic City Suburban Gas and Fuel Company, answering plaintiff's complaint says:

1. Denies that John C. Reed loaned defendant the sum of $1500.00 on July 9th, 1907, or any other sum, or at any other time, in cash or otherwise.

2. Denies that John C. Reed loaned defendant the sum of $1000.00 on July 26th, 1907, or any other sum at that or any other time in cash or otherwise.

3. *Furthering* answering defendant says that at the time of the alleged loans, John C. Reed was president and general manager of the defendant company and that if he loaned or advanced any money to said company, he did so without the knowledge, consent or request on the part of the board of directors of said company; that there was no authority given by said company to anyone to borrow money from Reed or anyone else; that if he loaned said money the company did not receive any benefit therefor, and that while president and general manager, he repaid himself either out of the funds of the company by appropriating its capital stock or its property.

THOMPSON & SMATHERS,
Attorneys for Defendant.

Plaintiff, replying to defendant's answer, says: He denies every allegation in the answer, save

that he admits that as set forth in the third paragraph of said answer, he was, at the time of the alleged loans, president and general manager of the defendant company.

WILSON & CARR,
Attorneys for Plaintiff.

This action was tried before Judge Howard Carrow with a jury, in the presence of the counsel of the respective parties, at the Atlantic County Circuit, on May 13th, 1914.

The cause having been heard and submitted to the jury, they returned their verdict as follows: We find for the defendant.

Whereupon it is adjudged that the
Costs $46.10 complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff its costs, which are taxed at forty-six dollars and ten cents.

Judgment entered May 19, 1914.

WM. S. GUMMERE,
C. J.

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my
(Seal) hand and the seal of said Court at Trenton, this fourth day of October, A. D. nineteen hundred and fifteen.

WM. C. GEBHARDT,
Clerk.

TESTIMONY.

NEW JERSEY SUPREME COURT,
ATLANTIC COUNTY.

JOHN C. REED,
Plaintiff,
vs.
ATLANTIC CITY SUBURBAN GAS AND FUEL COMPANY,
Defendant.

ACTION AT LAW.

Mays Landing, N. J., May twelfth, 1914.

TESTIMONY.

Before HON. HOWARD CARROW, Judge, and Jury.

APPEARANCES:

For the Plaintiff: WILSON & CARR, ESQS.
For the Defendant: THOMPSON & SMATHERS, ESQS.

JOHN C. REED, sworn.

Direct examination.

By Mr. Carr:

Q. Mr. Reed, where do you live?
A. Pleasantville.
Q. What is your business or profession?
A. I am an attorney at law and counsellor.
Q. Are you also in business?
A. Yes.
Q. Where do you live, Mr. Reed?
A. I live at Pleasantville.
Q. Were you at one time connected with the Atlantic City Suburban Gas and Fuel Company?
A. Yes.
Q. How long were you connected with that company?
A. From its incorporation up until, I believe, 1908.
Q. How long was that?
A. About four years, three or four years.
Q. Did that company have a bond issue?
A. It did.
Q. How much?
A. One hundred thousand dollars.
Q. What per cent. did it pay?
A. Five per cent.
Q. Payable semi-annually?
A. Yes, sir.
Q. What provision was made for the payment of its interest on the bonds up until 1907, inclusive?
A. The company never earned its interest at any period of time up to 1907, and out of the construction contractor's profit, which was the Union Rail-

way Supply Company, the interest was provided for the payment of the interest on the bonds, that is, the deficiency was provided.

Q. Simply advanced in the company, was it?

A. Yes.

Q. Any formal action of the board of directors governing that?

A. No.

Q. Coming down to July, 1907, how was the interest upon the bonds met?

A. By my putting up two checks, one—I think the interest was due on the fifteenth. I put up a thousand dollars or fifteen hundred dollars then. Then as the coupons came in, there were some came in later, I put up the balance of the twenty-five hundred dollars.

Q. I show you a check dated July ninth, 1907, upon the Guarantee Trust Company, payable to the order of the Atlantic City Suburban Gas and Fuel Company for fifteen hundred dollars and signed John C. Reed, and marked in the lower left-hand corner the words, "For loan," and I ask you whether or not that is one of the checks which were used in part to pay the interest upon the bond issue?

A. It was.

Q. Is that your signature?

A. It is.

Q. That check passed through the bank?

A. It did.

Q. Was it paid?

A. It was.

Q. Whose money was it?

A. Mine.

Q. Where did the money go to?

A. Into the treasury of the Atlantic City Suburban Gas and Fuel Company.

Mr. Carr: The check is offered in evidence.

(Check marked Exhibit P1.)

Q. I show you another check dated July twenty-sixth, 1907, upon the Guarantee Trust Company of Atlantic City, payable to the order of the Atlantic City Suburban Gas and Fuel Company, amount one thousand dollars, signed John C. Reed, marked in lower left-hand corner with the words "For Loan," and I ask you whether that is your check?

A. It is.

Q. What was done with the moneys represented by that check?

A. Deposited to the credit of the Atlantic City Suburban Gas & Fuel Company.

Q. Whose money was that?

A. Mine.

Mr. Carr: That check is offered in evidence.

(Check marked Exhibit P2.)

Q. For what purpose was that check used?

A. Same purpose.

Q. Taking care of the interest on the bonds?

A. Yes, sir.

Q. Did the company have any claim whatever to this twenty-five hundred dollars?

A. Why, of course not. He might as well say that I stole the money.

Q. Did you ever steal any of the money?

A. I want him to prove it, yes, if he can prove it.

Q. Have you ever been repaid this twenty-five hundred dollars?

A. I certainly have not.

Q. Did you tell any of the board of directors that you had advanced this money?

A. I think I discussed this matter with Mr. Keuhnle.

Q. Was he one of the directors?

A. Yes.

Q. Was he a large stockholder?

A. He was.

Q. Were you a large stockholder?

A. Yes.

Q. Why was it you did not present this claim until about the time the company was changing hands?

A. Well, they generally knew about it. This claim was discussed among the active people in this company all the time. They knew that I paid this interest, and I was a large stockholder. I had induced a great many of my friends to buy these bonds. They still own them. I have one friend that owns probably twenty-five thousand dollars' worth of these bonds, and there are a number of people, friends of mine, that are interested in this company, and at the time this company was not strong enough to pay this claim. They never had the money to pay it, and if the claim was pressed at that time, the entire stockholdings of myself and Mr. Keuhnle and Mr. McNamee and everybody else would have been wiped out, and I nursed it along until such time as the company was leased to the new owners. At that time and promptly after that, I wrote the new owners a letter and demanded payment of this claim.

Q. When was that, Mr. Reed?

A. 1909, early in January, I think. It is a long while ago, but I think it was at that time.

Q. Do you know whether a record of this money coming into the company appeared upon its books?

A. Yes, of course it must appear there. The bookkeeper had charge of the books. Every cent of the moneys collected from the income of this company was deposited to the credit of this company. At no time in its history, while I was interested in it, was a cent ever deposited in anybody's account except in the account of this company, and the books will show how the collections were made, and the books will show that these checks were entered in there, and it is a long book, and the book was devised and gotten up by Mr. McNamee. It will show the entry of all the cash. When they paid a bill it will show the check number and voucher number and what it was for and so forth, and what account it was charged to, and if they have paid it, all they have to do is produce that book. On one side is the entry of these two checks, and on the other—they have the books. It was turned over to the new management. I haven't got them.

Mr. Smathers: We have them.

A. You want to show it then.

Q. Was it possible to draw any money out of the company——

(Objected to.)

Q. Under the system pursued there, could any money be drawn out except by checks?

A. No money was ever drawn out except by check. No bills were ever paid except by check. No petty cash account was ever carried in this company while I managed it. Every cent was deposited to its credit, every cent was paid out by check and voucher, and

everyone of those vouchers were turned over to this company, the new management. They exist.

Q. Were these accounts ever audited while you were there?

A. Yes, twice or three times.

Q. All of the books and vouchers placed in the possession of the——

A. Everything.

Q. —auditor? Mr. Reed, you said that in January, 1909, you brought this claim to the attention of the lessee?

A. Yes.

Q. Then how long did you wait before beginning suit?

A. Why, I don't know. I don't know when this first suit was begun. Probably six, seven or eight months.

Mr. Smathers: Three years after the loan before the first suit was brought.

A. That is not true. I loaned the money in July. I demanded its payment in January, 1909. The board of directors of this company and its officers knew that this money had been advanced. They must have known it, because it was generally discussed.

Mr. Smathers: There is no question pending.

A. In December, 1908, this company was turned over to the new lessees, and it took my stock to turn it over, and I voted to turn it over and they knew at that time, the new lessees, the people who are fighting this case, knew that this claim existed, that I had paid this money.

Q. Do you remember when this was put into attorneys' hands for suit, about when it was?

A. Why, I guess somewheres in 1909; I don't know just when.

Q. Sometime in the year 1909?

A. Yes.

Q. Something was said about the claim being assigned to Mr. Low. What have you to say about that?

A. It was. You advised me to do it. It was more convenient to try this case in Camden at that time than it was here, for all of us.

Q. Afterwards, was the case tried down here in Mays Landing?

A. We consented. The Supreme Court didn't send the case back here. As soon as they objected, you asked me and we consented to have the case tried here, and it was tried here in Mays Landing.

Q. And afterwards, was it non-suited because of your absence from the court?

A. It was.

Q. Then this suit was commenced?

A. Yes.

Q. Have you been in this court room before, prepared to try this case?

A. Yes.

Q. How many times?

A. Well, I have been here a great many times, prepared at least half a dozen times, it seems to me. I spent a good deal of time here. Quite a job to get this money.

Cross-examination.

By Mr. Smathers:

Q. Since this last suit has been instituted, you

have requested that it be postponed for three different terms in succession, haven't you, Mr. Reed?

A. I remember two.

Q. Then there have been two terms that you haven't wanted to try the case, or at least found it inconvenient to try the case?

A. Inconvenient. I was away.

Q. You could have had it tried two terms ago anyhow?

A. We spent all last May and June here last year, and didn't get it.

Q. You also realize that the other side was trying to have it tried, don't you?

A. Certainly. Did the best we could.

Q. You say you live in Pleasantville?

A. My home is there, my legal residence there, and I vote there.

Q. Where is your place of business?

A. Philadelphia and New York.

Q. How often are you at Pleasantville?

A. In the summer time, all summer.

Q. Why was it more convenient for you to try this case in Camden?

A. Why, at that time, I was constantly spending almost all of my time in Philadelphia.

Q. Well, why was it necessary to have this suit brought in the name of Mr. Low? How did that suit your convenience?

A. That suited my convenience because I was advised to do it.

Q. Wouldn't it have been just as convenient for you to have brought the suit in Camden in your name, would it?

A. Well, I wasn't advised to bring it in my own name.

Q. You are a lawyer, are you not?

A. I don't know. I have a license to practice law.

Q. You have not been practicing any since you left the management of the gas company?

A. I have been practicing law and am practicing law today.

Q. I thought you just said you didn't practice law?

A. I didn't say that. Your memory is a little bad.

Q. We will find out whose is best, yours or mine.

A. I wouldn't enter into any contest with you. I know yours is best.

Q. You had some disagreement with the management of the board of directors is the reason you severed your relations with them?

A. No. I got tired of carrying the bag. I had been manager and president and managing director ever since the company was organized, and never drew a cent salary.

Q. Didn't you go to Philadelphia shortly after you severed your relations with the gas company?

A. No; after I severed——

Q. That isn't answering the question. You say that you consented to transfer the case from Camden County to Atlantic County?

A. Yes, sir.

Q. Did you consent until after an order of the Supreme Court was made by Justice Garrison to transfer it?

A. I am not sure, but I think we consented the minute the motion was made, did we not?

Mr. Carr: Consented immediately, yes.

Q. Consented after an order was made?

A. No, didn't do anything of the kind.

Q. Now, Mr. Reed, who were the members of the board of directors at the time you were president and general manager, and at the time you loaned this money?

A. Well, there were thirteen, and I think Mr.——

Q. Give us their names.

A. I will try and remember them, just to see whether I can remember anything. I think Mr. Hugh Collins was a member of the board; I think Mr. Charles Collins was a member of the board; Mr. Charles Burkard; Mr. Louis Kuehnle; Mr. John F. Ryan; Mr.—what is that tinsmith's name down there? Mark Sanders; Mr. McNamee; Mayor Riddle; myself. I don't know. This little fellow that had the grocery store over on the—Job Stebbins. He was a member. How many is that? I don't know. That is a part of them.

Q. Mr. McNamee?

A. I said McNamee.

Q. And Mr. Adams?

A. I said Mr. Adams.

Q. Mr. Ryan?

A. I named Mr. Ryan.

Q. I want to call your attention to testimony you gave in this same matter at another stage of it, and ask you if it is correct?

Mr. Carr: I object to that. You cannot confront the witness with a typewritten copy of some stenographic notes. The way to do that is to bring the stenographer to prove them.

Mr. Smathers: I am asking if he recollects giving this testimony.

The Court: He may ask him whether he testified so and so.

Q. On the same subject?

A. I object to your saying the same subject. You ask a question and I will answer it.

Q. Are you the witness or are you trying the case?

A. I am the witness.

Q. This question was put to you, the following questions and you gave these answers, and I ask you if you recollect giving that testimony:——

(Objected to.)

The Court: The proper way is to ask him whether or not this question was propounded to him and whether or not he gave this answer:

"Q. The company had a board of directors, didn't it? A. They had a dummy board, practically. Q. Who were they? A. I don't know. There were thirteen of them. Q. Can you give us the names of any of them? A. Well, that is a matter of record. Q. Well, do you—I am asking you if you know, and if you don't know I want you to say so. A. I don't remember their names." Is that testimony correct? Do you remember giving that testimony?

Mr. Carr: That is objected to as irrelevant. It does not contradict this witness. He remembers today some of the names that he did not remember at that time. It does not impeach or contradict him.

(Objection overruled.)

(Objection noted for plaintiff.)

A. Yes, I stated that.

Q. Since then you have had your memory refreshed as to who they were?

A. I have.

Q. Now, who, Mr. Reed, did you talk to of the board of directors, concerning the necessity for a loan?

A. Probably Mr. Kuehnle.

Q. Probably? You happen to know, do you not, that it is impossible to have Mr. Kuehnle here today?

(Question objected to.)

(Objection overruled.)

Q. Are you certain about that? You happen to know that it is impossible to have Mr. Kuehnle here as a witness today, do you not?

Mr. Carr: I object to that because it is not impossible. I presume the thought is that Mr. Kuehnle by common repute is in prison, but that does not mean you cannot produce him as a witness.

The Court: I think it is proper cross-examination.

(Question repeated.)

A. I don't know that to be a fact, no.

Q. You know he is in prison, don't you?

A. I have never seen him in prison.

Q. And because you have never seen him, you don't know he is in prison?

A. I know just the same as probably everybody else does down there.

Q. That is your answer to that question, is it?

A. Yes, but I have never seen him there.

Q. And you say possibly Mr. Kuehnle. Can you tell us where it was you had that conversation and what you said to him?

A. Probably in my office. No.

Q. Probably in your office?

A. Yes; he used to come there every morning.

Q. You are certain about it?

A. I am certain I spoke to him.

Q. What did you say to him?

A. I told him we had to have money to pay the coupons.

Q. What did he say? What do you mean by that? That doesn't get on the record?

A. Well, you will have to get it.

Q. Did you tell him you were going to make the loan?

A. I probably did.

Q. Do you know whether you did or not?

A. I don't remember. I am willing to swear that I probably discussed that thing with him, that I told him I was going to put the money up, yes, and we spoke of the other members.

Q. Who were the other members?

A. I don't remember the names.

Q. Couldn't you give us some idea who they were? They were interested. You loaned this money?

The Court: Were you the president?

A. I was the president, yes, sir.

Q. Who were the other officers, Mr. Reed?

A. Well, I think Mr. Kuehnle was treasurer. He was at one time. He may not have been. I don't remember.

Q. You don't remember who the other officers were?

A. No, it is possible to find out.

Q. I am not asking what is possible.

A. I don't really remember.

Q. Who were these other people you talked to about this matter? If you know, I want to know who they are, and if you don't know, I want you to say so, and no probabilities.

A. Before the loan was made I don't remember, but I am positive that——

Q. If you don't remember then we don't want it. If you do remember, we want it.

A. Well, honestly, I don't remember.

Q. You don't know who else you spoke to besides Mr. Kuehnle?

A. No, I don't believe I do. I wouldn't want to swear to it.

Q. Did you tell Mr. Kuehnle you would like for him to put up some of this money to save the company in time of financial peril?

A. I don't think so.

Q. You don't think so? Did you tell him that you were going to advance the money for the company?

A. I probably did, yes.

Q. You probably did? Did you or not?

A. I don't remember.

Q. You knew, didn't you, Mr. Reed, as president of the company, and as counsel for the company—weren't you counsel for the company also?

A. They didn't have any lawyers.

Q. Weren't you counsel for the company? Weren't you acting as attorney of record in cases that had been brought against the company at that time?

A. There were no cases brought against the company.

Q. Weren't you acting as counsel for the company at that time?

A. No, I was the president.

Q. And at the same time, if it became necessary for the company to have counsel, didn't you counsel the company?

A. It wasn't necessary.

Q. What other attorney represented the company in drawing up bonds and contracts and agreements?

A. Mr. J. H. McNeal was one of the attorneys who participated. I think he was a member of the board of directors.

Q. Of Atlantic City?

A. Philadelphia.

Q. Was he drawing up contracts for the Atlantic City Suburban Gas and Fuel Company?

A. He drew up all of the contracts that were ever drawn for the construction company.

Q. Who passed upon the contracts for your company?

A. The stockholders at the time, I guess.

Q. They had no counsel?

A. They had no legal counsel, no.

Q. And you say you didn't represent the company or did not counsel the company?

A. I didn't say that.

Q. I am asking you if you did, and I am trying to get you to answer it.

A. They had no counsel employed. I suppose that if there were questions that arose, they were discussed. Mr. Riddle is a fairly good business man and Commodore Kuehnle and the rest of them.

Q. And Mr. Riddle and the Commodore acted as their own attorneys in this matter?

A. I never received any fees from this company as its counsel.

Q. You know very well what I want to know, whether you received any fees or not, I want to know whether or not you were at that time——

A. No.

Q. —acting in the capacity when it was necessary as counsel for this company?

A. No.

Q. To pass upon——

A. No.

Mr. Carr: That is objected to as not cross-examination, irrelevant and immaterial.

The Court: I cannot see that it is of any relevancy. The vital question in this case is whether Mr. Reed loaned this money to the company.

Q. Now, Mr. Reed, you did not discuss this with any other except Mr. Kuehnle as to the question of needing money, and you went down in your own pocket and loaned your own money, as I understand?

A. That is what I have sworn to, yes.

Q. Did you tell anyone that day or the next day or any days following that for a month that you had loaned this money, and if so, who did you tell it to?

(Objected to as irrelevant and immaterial and not cross-examination.)

(Objection overruled.)

A. I don't remember.

Q. Mr. Reed, were you, by resolution of the board of directors of the Atlantic Suburban Gas and Fuel Company, appointed counsel for that company at any time during your connection with the company?

Mr. Carr: That is objected to as irrelevant and immaterial.

Mr. Smathers: He said he was not.

Mr. Carr: It is an irrelevant matter. Why waste time on it?

A. If you have a resolution deciding that fact, of course it is true, but I have no recollection.
Q. I read to you a portion of minutes——

Mr. Carr: I object to that. The minutes have not been proved or identified. It is not cross-examination.

A. What date was it?
Q. June sixth, 1904.
A. I probably was if the minute book says so.
Q. Then your testimony a while ago that you did not represent the company as counsel, you are mistaken about that, are you?
A. At the time—I have no recollection of ever having served as counsel except in the organization of this company, and after the organization was over the company did not appoint any counsel as I recollect.
Q. You continued to act as counsel, did you?
A. I suppose I was a director and president and general manager and we had no litigation of any kind. Whatever the company needed in the way of legal advice, I very gladly gave it to them. I did everything I could, Mr. Smathers.
Q. That is what I wanted to know and if you had said that a long time ago, we would not have had all this. As president of the company and as a lawyer you knew it was necessary to have a board of directors pass a resolution in order to borrow money?

Mr. Carr: That is objected to as not a true statement of the law, and as calling for a legal conclusion. A company by course of dealings may get far away from the formal action of the board of directors.

(Objection overruled.)

(Objection noted for plaintiff.)

A. The usual course of business for this company had been for us to advance the money without consulting the board.

Q. Will you please answer the question?

A. Yes, I know that.

Q. And you did not call a meeting of the board of directors, did you, as president, to pass upon the question of borrowing money?

A. No, we did not.

Q. And you had no meeting of the board of directors called for the purpose of giving you any security for your loan, or making arrangements to repay you, did you?

A. No.

Q. Did you ever at any meeting of the board of directors inform them that you had loaned twenty-five hundred dollars for the purpose just mentioned?

A. I am not sure. I don't remember whether I ever attended any meetings of the board or whether they ever had any after that, up until the next following annual meeting in November, I think it was.

Q. Now, Mr. Reed, tell us why you did not tell the board of directors as a body that you had loaned this money, put yourself on record as being a creditor of the company?

A. We loaned the money and paid the interest on these bonds since the beginning of the company until that time, and we never consulted the board of directors about it, Mr. Smathers.

Q. Who is we?

A. Mr. Kuehnle and myself and Mr. Woodman, who was interested in this thing, Mr. Starr.

Q. Were Mr. Woodman and Mr. Starr directors?

A. I don't know. They were at one time, I think, you will find some of them were directors.

Q. Were they at the time you loaned this money?

A. I am not sure; I don't remember. It is unfair to ask me. I am interested in a number of things. I really don't remember.

Q. Did you make any effort, Mr. Reed, while you were president of this company, to get the board to repay you this money?

A. I didn't bring any suit. I don't know what you would call effort.

Q. You didn't?

A. No.

Q. Did you ask them to pay you back the money or make a loan from some other source to pay you back your money?

A. I was satisfied with my position as long as my friends held the bonds, to advance this money and help nurse this company along.

Q. You were satisfied to loan the money and to let that be a secret to the board of directors——

A. Oh, I didn't say that.

Q. That is what I am gathering?

A. That is what you say.

Q. Well, what was it?

A. It isn't a secret, no. I am positive——

Q. Who did you tell?

A. I don't remember.

Q. Mr. Reed, do you recollect who the book-

keeper was at the time you loaned this money to the company?

A. John Nichterline.

Q. Do you remember who did the banking for the company?

A. He did.

Q. And under whose direction and supervision was he?

A. Mine.

Q. The moneys that came into the company were sent to whom?

A. They were collected by Mr. Martz, who was the superintendent, and usually delivered to me with the slips showing the amounts.

Q. Moneys were turned over to you finally before being put in bank?

A. I handed those to Mr. Nichterline and he checked them against the depositors' register and deposited them in bank.

Q. Moneys were handed to you and you turned them over to Mr. Nichterline to put into bank?

A. To check the amount with the consumers' register.

Q. Did you direct the bookkeeper to make an entry in the minute book, that was kept at that time, of this loan that you had made to the company?

A. The bookkeeper didn't keep the minute book.

Q. Well, who did keep the minute book?

A. A secretary.

Q. And who was the secretary?

A. Well, they had several secretaries.

Q. Well at that time?

A. I don't remember; Mr. Starr was secretary, and I don't really remember. There were several secretaries. If you want——

Q. Who do you think it was at that time?

A. I don't remember.

Q. Where were the books kept?

A. They were kept in my office.

Q. Did you direct anyone——

A. The company never paid any office rent.

Q. The minute book was at your office at that time?

A. Probably.

Q. Now, wasn't it?

A. It probably was there, yes. I wouldn't swear it was there.

Q. Wasn't it there with the other books, or supposed to be?

A. Probably. I didn't watch it all the time. I don't know where it was.

Q. Did you direct anyone to make an entry in this minute book of this loan to the company?

A. No.

Q. That would be the proper place to put it, wouldn't it, Mr. Reed?

A. I don't know.

Q. You don't know?

A. Proper place to put money is in bank when you need it.

Q. How about when you want to have some evidence that you had made a loan, where would be the proper place to put it?

A. I thought the checks were evidence enough.

Q. As a lawyer you think the checks are sufficient?

A. I certainly do.

Q. To bind the company?

A. I certainly do. They got the money and I never got it back. That is a plain, simple transaction to me.

Q. Did you make any entries or direct anyone to make any entries in any of the other books of this loan?

A. I presume that entry was made.

Q. Do you know?

A. I didn't make them. I don't know.

Q. Did you tell anyone to make them?

A. I probably did.

Q. Who?

A. The bookkeeper.

Q. How do you know?

A. I will not swear positively. He had charge of all the funds. Yes, these checks are endorsed in Nichterline's handwriting, and I probably handed him these checks and says to him, "Deposit that to the credit of the gas company and make a proper entry in the books," because they are both endorsed in his handwriting.

Q. I hand you all the books that were kept by this company at that time, and ask you if you won't look through them and see——

A. They weren't all the books that were kept by that company at this time.

Q. What books are absent?

A. The book I speak of, which is—I don't know what they call it, a journal, ledger, a long book, which has in simple, plain language the entire history of every financial transaction of this company.

Q. And it has this one in it?

A. Yes, and it isn't here. If you produce that book——

Q. You do remember what books were kept?

A. I remember that book distinctly.

Q. The book that isn't here, you remember?

A. I remember that very well.

Q. In that book was an entry to the effect that you had loaned this company this amount of money; is that right?

A. Yes.

Q. Are you sure of that?
A. I think so, yes.
Q. You think so?
A. I think so, yes. Produce the book.
Q. We will produce it.
A. All right, produce it. You will find it is there.

Mr. Carr: If you have that book I want you to produce it, because you presented these books to this witness with a statement that they were all the books of the company. If you have it, produce it and let the witness examine it.

Mr. Smathers: We will try our case our way and produce it when we are ready.

Q. When did you first present a claim against this company for this amount of money, Mr. Reed?
A. Probably at the annual meeting in the fall, that fall. I don't know.
Q. At that time it was about to turn over its assets to another company, was it not?
A. Yes, under an agreement that they were to pay all its debts.
Q. And that time you thought would be the proper time to get your money?
A. I certainly did think they ought to have noticed that they owed me that amount of money.
Q. And that was the first time you presented your claim?
A. I thought that was the time to present it, when there was some chance of its being paid.
Q. And you hadn't presented it before?
A. I have testified to that part of it half a dozen times. I don't say now that I presented any legal demand or written demand for that money until after 1908 or 1909, when I wrote them about it.

Q. And you loaned it in July, 1907?

A. There are the checks. Yes, I loaned it at that time.

Q. At the time the old company was selling out to the new company, was there a statement of the debts of the old company prepared?

A. I don't know. I wasn't manager at that time.

Q. Did you have any connection with it?

A. Yes, I had a very large connection as a bondholder, and representing a lot of bondholders, and a very large stockholder. I had many thousands of dollars connection with it just at that time.

Q. Well, you don't happen to know then the terms of this agreement of sale?

A. Well, it was stated to me when they got my proxy to vote for this lease that they were to pay all——

Q. You voted for it?

A. I think so. I think you will find my proxy there. I don't know whether I did or not. I know it was discussed, because I was a large stockholder.

Q. Was your name listed among the claimants——

A. I never saw the list. I was out of the management at that time.

Q. Has Mr. Low any interest in this suit now?

A. No.

Q. Has he re-assigned back to you?

A. Yes.

PLAINTIFF RESTS.

DEFENDANT'S TESTIMONY.

JOHN P. TOMPKINS, sworn.

Direct examination.

By Mr. Smathers:

Q. Mr. Tompkins, you are at present secretary I believe of the Atlantic City Suburban Gas and Fuel Company?

A. I am.

Q. And you remember the present board of directors which succeeded the former board?

A. I do.

Q. At the time your board of directors succeeded the old board, did you get some books from the board of directors, purporting to be the books kept by that board of the affairs of the company?

A. Yes.

Q. Have you those books with you?

A. Well, they are some of them.

Q. What books have you here with you?

A. Well, there is a couple of check books and what appears to be a cash book and the ledger.

Q. You also have a——

A. And the minute book.

Q. How did you happen to bring just those books?

A. Well, they were about the only books I could find about the office there that had any bearing on this case on the short notice I got from you that the case was coming up.

Q. When did you get notice to bring the books here?

A. I think it was a little bit before twelve o'clock today.

Q. And you had no knowledge up to that time that this case was going to be on today?

A. Absolutely none.

Q. And you were told to get what books you could get?

A. Yes.

Q. You heard Mr. Reed speak of some long book. Know anything about that book?

A. No, I don't. That question came up at the last trial and——

Q. Do you know where that book is?

A. No, I have never seen that book.

Q. And the books you have here are the books that were turned over to you when you succeeded the old company?

A. They are some of them, yes.

Q. The other books are books that have no record——

(Objected to.)

A. The other books——

(Objected to.)

Q. What are the other books?

A. They were books that appeared to me, as I say, from looking them over in the short time I had——

Mr. Carr: What were the books? Not what they appeared to you.

Q. What books were handed over to you that you haven't got here today?

A. Well, there was a lot of old check books, lot of old bank books, and a lot of canceled checks, and some registers showing the names of consumers, and books of that sort. I don't remember just how many or what the names were. There were quite a number of books.

Q. You can get those books?

A. Oh, yes.

Q. Mr. Tompkins, have you had these books in your possession since they were turned over to you?

A. Practically, yes.

Q. When were they turned over to you?

A. Well, I don't know whether it was in—I think it was in 1910. I think some of them were turned over before then, but some weren't turned over until I think in 1910. I am not sure about that.

Q. I show you the minute book of the Atlantic Suburban Gas and Fuel Company as it was kept by that company, in the year 1907, and ask you if you have examined that to ascertain whether there is any minute in there relating to any loan made by Mr. Reed to the Atlantic Suburban Gas and Fuel Company?

Mr. Carr: That is objected to. The book has not been proved, and the book itself is the evidence, if it is properly proved.

Mr. Smathers: I offer the books in evidence, if you have no objection.

Mr. Carr: The book has not been proved. You cannot offer it yet.

The Court: He is the secretary and this is the minute book of that company.

Mr. Carr: Not kept by him.

(Witness temporarily withdrawn.)

JOHN C. REED, recalled.

By Mr. Smathers:

Q. Mr. Reed, I ask you to examine this book and tell me if that is not the minute book that was kept at the time you were president of the company in the year 1907?

A. Sure that is the book.

The Court: Put the books in.

JOHN P. TOMPKINS, recalled.

Direct examination continued.

By Mr. Smathers:

(Last question repeated as follows: "I show you the minute book of the Atlantic Suburban Gas and Fuel Company as it was kept by that company, in the year 1907, and ask you if you have examined that to ascertain whether there is any minute in there relating to any loan made by Mr. Reed to the Atlantic Suburban Gas and Fuel Company?")

Mr. Carr: I object upon the ground that it is

irrelevant and immaterial. It makes no difference at all whether there was any entry in that book. If Mr. Reed loaned this money, his checks show that he did and the failure of the secretary to enter it in the minute book, simply shows nothing except that the secretary was careless, perhaps.

(Objection overruled.)

(Objection noted for plaintiff.)

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A. I have.
Q. Is there any?
A. I haven't found any.
Q. Have you examined the cash book and the ledger to ascertain if there is any memorandum or record of any loan made by Mr. Reed to this company?

Mr. Carr: I object to that upon the ground that all the books are not here, that some of the books 20 were not turned over until 1910.

(Objection overruled.)

(Objection noted for plaintiff.)

(Question repeated.)

A. There doesn't appear to be any entry in the cash books, but there is a memorandum or an entry 30 in the ledger.
Q. And will you turn to that, please, and read the entry on the record?
A. There appears to be two, one on page 34 and one on page 54.

Mr. Carr: I object on the ground that you cannot prove the payment of money by a book entry. It has been settled in two or three cases in this State that books of original entry never go that far, to prove the payment of money. You can prove the sale of articles of merchandise, you can prove labor performed, but you cannot exculpate yourself from a debt by crediting in your own books a sum of money which you claim you have paid to somebody else. These books were not kept by us. He cannot sit down and write an entry in his own books and in that way prove that he paid it.

Mr. Smathers: We will withdraw the question. The books are in evidence.

Mr. Carr: That is just the point. That is why the books have no place in evidence. They are not books kept by this man. There is nothing to prove that these entries were made at that or about the time they purport to bear date. If the bookkeeper were here I would have a right to cross-examine, I would have a right to say, "When did you make that entry? Does it truly represent the thing recorded?" But here comes a man who did not keep these books. I ask that the books be excluded from evidence. He says he withdraws it because the books themselves are in evidence.

The Court: I will hold this matter under advisement.

Q. Mr. Tompkins, at the time the new company took over the affairs of the old company, did you have a list of the debts of the old company that you were to assume?

Mr. Carr: That is objected to as irrelevant and immaterial.

(Objection sustained.)

No cross-examination.

Doctor Richard M. Sooy, sworn.

Direct examination.

By Mr. Smathers:

Q. Doctor, you are a physician practicing in Pleasantville, I believe?

A. Yes, sir.

Q. And in 1907 you were a member of the board of directors of the Atlantic Suburban Gas and Fuel Company?

A. That is my recollection.

Q. And I suppose you knew Mr. John Reed——

A. Yes, sir.

Q. —the plaintiff in this suit? Did you as a member of the board of directors of this company ever learn that Mr. Reed had loaned the company twenty-five hundred dollars to pay a bond issue?

Mr. Carr: That is objected to as irrelevant and immaterial.

(Objection overruled.)

(Objection noted for plaintiff.)

A. Never learned of it officially, you may say. I

heard something discussed outside of the directors' meeting, that is, before we were called to meet.

Q. When was that that you heard this discussion outside the meeting?

A. I don't recollect the exact date.

Q. About when, Doctor?

A. My recollection it was sometime in the fall of 1907.

Q. When did the company sell out its assets to a new board of directors?

Mr. Carr: I object to a "new board of directors."

Q. Well, to a new concern, new company?

A. It was 1910. I haven't recollection of all those dates.

Q. What did you hear, Doctor, about this claim?

A. Well, just as a little talk, and seemed to be frowned down upon and squashed and that is all there was to it.

Q. Do you remember who mentioned it? Was it a member of the board of directors who mentioned it?

A. Yes.

Q. Who?

The Court: Would that be evidence, what the members of the board of directors said among themselves?

Mr. Smathers: I do not think it would be.

The Court: No. You cannot make evidence for yourself.

Q. Were you a member of the board of directors

up until the time you were superseded by another board?

A. Not all the time, no.

Q. When did you get out of the company, do you recollect?

A. I think I was in two or three years and then I was dropped and went back again during the last year or two.

Q. What do you mean, the last year or two?

A. I was in at the time of leasing to the new company, and had been in for a year or more.

Q. Was this time that you heard Mr. Reed's claim on or about the time that the leasing proposition came up?

A. No, it was before that. Nothing said about it then to my recollection.

The Court: I understand this witness to say that nothing ever came before him officially with regard to this claim.

A. That is it.

Q. Was it ever brought up in a meeting of the board about Mr. Reed making a loan to the company?

A. Never to my recollection.

Q. Do you know anything about the necessity for securing a loan to meet a bond issue?

A. Well, as far as I was observant of the facts, I did not. We had money of our own.

Cross-examination.

By Mr. Carr:

Q. How did the company get the money to pay the interest on the bonds the first year or two? How did they get the money?

A. Got it from their receipts from the sale of gas.

Q. Right from the first minute they were able to pay the interest on their bond issue from the sale of gas, were they?

A. And two per cent. besides, dividends.

Q. You know that that came from the sale of gas?

A. Well, it was so reported and declared two per cent.

Q. Did you ever examine the books of the company yourself?

A. Not particularly, no.

Q. What?

A. No, not particularly.

Q. As a matter of fact you don't know where the money came from to pay the interest on the bonds, do you, of your own knowledge?

A. I do not.

Q. And you don't know where the money came from to pay the interest on the July bonds, do you, July interest?

A. Mr. Reed was running the whole thing.

Q. I asked you whether you know or not?

A. No, I said I didn't know.

Q. And you don't know whether it was necessary or not for Mr. Reed to advance the twenty-five hundred dollars, do you?

A. I didn't think it was.

Q. I asked you whether you knew or not?

A. No, I didn't know.

Q. Well, not knowing, why do you think it was not?

A. Because putting out enough gas, I observed that, we were putting out enough, we ought to be able to pay our bills.

Q. That is your estimate without having seen the figures on the books, isn't it?

A. That is the idea.

By Mr. Smathers:

Q. Weren't you paying dividends on the stock at the time this alleged loan was made?
A. The year before that.
Q. The year before that?
A. Yes.
Q. Well, how about that year? Do you remember anything about that year, whether they were paying dividends or not?

The Court: Obviously he does not know.

Q. Did you hear, Doctor—were you called on as a member of the board of directors at any meetings to make arrangements or that it became necessary to borrow money to pay interest on the bonds?
A. I never heard anything like that.
Q. Did you know the company was financially in peril?

(Objected to as irrelevant and immaterial.)

(Objection overruled.)

A. I didn't know.
Q. You did not?
A. No.

L. H. Barrett, sworn.

Direct examination.

By Mr. Smathers:

Q. Mr. Barrett, you were, I believe, secretary and

director at one time of the Atlantic Suburban Gas and Fuel Company?

A. Yes, I was a secretary a short time and director nearly all the time of its existence until the leasing to the new company.

Q. And you were such during the time Mr. Reed was president of the company?

A. Yes, president and manager.

Q. By the way, who was your counsel at that time?

(Objected to as immaterial.)

(Objection overruled.)

Q. Who was your counsel at that time, counsel for the company?

A. I don't remember. To be honest with you, I don't remember who was counsel.

Q. Now, as a director did you ever attend any meeting where the question of a loan was considered, which Mr. Reed made to the company of twenty-five hundred dollars?

(Objected to as irrelevant and immaterial.)

(Objection overruled.)

(Objection noted for plaintiff.)

A. I was not, sir.

Q. Did you attend all the meetings of the board of directors?

A. Well, now, I don't think all. Practically so. I wouldn't like to take an oath to that.

Q. At no meeting that you attended the matter was ever considered or discussed?

A. No, sir.

Q. Did you know that the company was financially embarrassed and needed to borrow money?

(Objected to as irrelevant and immaterial.)

(Objection overruled.)

(Objection noted for plaintiff.)

(Question repeated.)

A. I did not, sir.

Q. When did you first learn that Mr. Reed had claimed to have loaned twenty-five hundred dollars to the company?

(Objected to as irrelevant and immaterial.)

(Objection overruled.)

(Objection noted for plaintiff.)

A. After we had leased to the company which Mr. Tompkins now represents.

Q. After you had leased to the company? You mean the new company?

A. Yes, sir.

Q. And did you learn it then at a meeting of the board of directors?

A. His claim—you know after the organization there was a re-organization. Probably it would make it plainer to you that I think we operated about one year under the old company after Mr. Reed was out as manager and president of the company, I think somewhere about a year with Mr. Johnson. Then after that the company went to the new company and then this bill was presented.

No cross-examination.

The Court: Have you any evidence to show that this money was not advanced by Mr. Reed?

Mr. Smathers: Nothing except our books and the further fact that these directors, who ought to have known about it, at no time ever knew that it was made, and the company was not in need of money. Of course, everything is presumed to be done in the regular way.

The Court: In the face of specific evidence by Mr. Reed that he loaned the money, and he produces these checks?

Mr. Smathers: As against that we have the books bearing no evidence of any loan, we have positive evidence of the men, showing it was not necessary to have any loan. Those are circumstances from which the jury has as much right to infer no payment or no loan as they have to believe Mr. Reed. The plaintiff certainly is not entitled to a direction. That is ignoring absolutely the facts and circumstances here which the jury has a right to take into consideration just as much as they have his testimony.

JOSEPH A. MCNAMEE, sworn.

Direct examination.

Q. Mr. McNamee, you live in Atlantic City?
A. Yes.
Q. And were one of the directors of the Atlantic Suburban Gas and Fuel Company in 1907?

A. Yes.

Q. You knew at that time that Mr. Reed was president and manager of the company?

A. Yes, as far as I can locate so far back. I think the year is all right.

Q. Did you attend the meetings of the board of directors of the Atlantic Suburban Gas and Fuel Company?

A. I attended a great many of them.

Q. At any of those meetings did the matter come up about a loan made by Mr. Reed to the company?

A. I don't recall that it did or that it did not.

Q. When did you first hear that Mr. Reed loaned the company this money?

A. I couldn't say positive. My recollection is that it was about the time that the lease went into the hands of the Pleasantville Heat, Light, Fuel and Power Company, whatever it is.

Q. It was several months——

A. They say 1910. I think that was the right year.

Cross-examination.

By Mr. Carr:

Q. Mr. McNamee, do you remember designing for Mr. Reed a book which showed in detail the receipts and collections of the company?

A. I heard Mr. Reed say that I designed such a book and I think I did. I haven't a positive recollection of it.

Q. Does that bring it back to your recollection——

A. Yes, some kind of a journal, day book.

Q. —that a book of that kind was kept by the company?

A. Yes.

Q. You don't find it here, do you, among these books? These are the books produced, consisting of a ledger, two check books——

A. No. Good deal larger book.

Q. You don't find it here among the books produced?

A. No.

Q. But you do remember it? That is all.

JOHN F. RYAN, sworn.

Direct examination.

By Mr. Smathers:

Q. Mr. Ryan, you were a member of the board of directors of the Atlantic Suburban Gas and Fuel Company in 1907?

A. I was.

Q. Did you attend the meetings of the board of directors of that company?

A. Very seldom.

Q. Well, at the ones that you did attend, did you ever hear that Mr. Reed had loaned the company twenty-five hundred dollars?

A. No, sir.

Q. When did you first hear it?

A. It was quite a while after the company was sold out to the new company.

No cross-examination.

Mr. Smathers: I offer the books in evidence.

The Court: I will consider it.

Recess taken until 9.30 A. M. Wednesday, May 13, 1914.

Mays Landing, N. J., Wednesday, May 13, 1914.

Trial of the cause resumed at 9.30 A. M.

Mr. Smathers: Does your Honor want to hear Mr. Carr on a motion for a direction?

The Court: Is there a motion pending before me to direct a verdict for the defendant?

Mr. Carr: Yes, sir; I make that motion.

Mr. Smathers: Before making the formal offer of the books, I would like the privilege of calling Mr. Reed for the purpose of proving the book in question, the ledger, identifying the book and also for the purpose of showing that the handwriting where the entry in question is made, is in the handwriting of Mr. Nichterline, the bookkeeper who was there keeping the books, under the direction of Mr. Reed.

JOHN C. REED, recalled.

Direct examination.

By Mr. Smathers:

Q. I show you a book marked "Ledger No. 1 Atlantic City Suburban Gas and Fuel Company," and ask you if you know what that is?

A. I suppose that is ledger No. 1 of the Atlantic City Suburban Gas and Fuel Company.

Q. Will you please turn to page 34 of that book and tell us, if you know, in whose handwriting the entry "January thirteenth, 1905," is made?

A. No, I don't recognize that handwriting.

Q. Do you recognize the handwriting "January thirteenth, bills payable thirty-four hundred dollars?"

A. No, I don't know whose writing that is. I think there were two or three people who worked on those.

Q. Are you acquainted with the handwriting of Mr. Nichterline?

A. There are three different handwritings in here.

Q. I mean "bills payable." That isn't in three different handwritings. In whose handwriting is "Bills payable thirty-four hundred dollars?"

A. I don't know.

Mr. Carr: There is no thirty-four hundred dollar item.

Q. Eight hundred and forty-four dollars?

A. That isn't in Nichterline's handwriting.

Q. It is not?

A. I don't think so.

Q. In whose handwriting is the entry "May second fifteen hundred dollars" on the cash side?

A. I can't tell you.

Q. Can you tell us in whose handwriting is "July tenth, one thousand dollars?"

A. No, I don't recognize that. There are three handwritings here.

Q. I am not talking about anything except those two.

A. I can't say positively whose handwriting that is.

Q. You can't say it wasn't Mr. Nichterline's?

A. I can't say it is. That is my answer. I don't know positively.

Mr. Carr: I object to this.

Q. I will ask you to look at page 54 of the same book, and ask you if you know in whose handwriting under date of 1907, September twenty-eighth, "J. C. Reed thirty-two hundred and twenty-five dollars" is, and under the title of "Bills payable" on the—would that be the credit side or debit side?

A. I don't know.

Q. On the right-hand side of the page?

A. I don't know whose handwriting it is. There are three handwritings there.

Q. I am not talking about anything else.

A. I said I didn't know in whose handwriting that is.

Q. That is all right for that. In whose handwriting is the entry under January, 1908, thirteenth, "J. C. Reed eight hundred and forty-four dollars?

A. Haven't the slightest idea. I didn't have a thing——

Q. That isn't Mr. Nichterline's?

A. I don't know. I wasn't in any way connected with the company and I think Mr. Nichterline left my service—he was in my employ—probably in 1907.

Q. Did you ever see him write?

A. I suppose I have, yes.

Q. You are familiar with his handwriting?

A. I am not familiar with his handwriting.

By the Court:

Q. When did Mr. Nichterline go out of the employment of the company?

A. He wasn't in the company's employ. He was in mine.

Q. He was your own——

A. Yes, this company paid nothing for their bookkeeping services. I provided the bookkeeper.

Q. This man was your employee?

A. He was in my office, yes.

Q. When did he cease to have anything to do with these books?

A. Why, I had several clerks in there, Judge. Just when Mr. Nichterline went I don't remember.

Q. Did Mr. Nichterline make these entries?

Mr. Smathers: Yes, sir, that is what Mr. Tompkins said. He is not able to connect it up, but they are in Mr. Nichterline's handwriting.

The Court: It seems to me if these entries were made by a private employee of Mr. Reed's, that is to say, a person who was not in the employ of the company, they were Mr. Reed's entries, if they were made by his agent.

A. He worked for the Kent Construction Com-

pany and he was on their pay roll. He wasn't my personal employee. He was paid by the Kent Construction Company, another concern in my office. He was employed by the Kent Construction Company and in my office and paid by them.

Q. And not paid by you?

A. No, he was paid actually by the Kent Construction Company.

By Mr. Smathers:

Q. As a matter of fact, wasn't he a clerk in your office?

A. He was employed by the Kent Construction Company.

Q. Wasn't he an employee in your office, a clerk in your office?

A. He was employed by the Kent Construction Company, whose headquarters were in my office.

Q. Was he not an employee and clerk in your office at the same time?

A. He was employed by the Kent Construction Company.

Mr. Smathers: I have asked that question three times and he will not answer.

A. Well, he was not, then, because he was employed by the Kent Construction Company.

Q. Mr. Reed, wasn't that young man a clerk in your office, doing legal business for you, going to other lawyers' offices at the time and taking your papers and doing the usual things that a clerk in your office does? Wasn't he doing that for you at that time?

A. I don't know what all his duties were. He was

there and employed and paid by this Kent Construction Company.

By the Court:

Q. Mr. Reed, if he was employed by the Kent Construction Company, how is it he did any work for this company?

A. Well, he was there and he did that as he was told to do. This company paid nothing for bookkeeping. They paid nothing for office rent. There are three handwritings in this book, some of them by Mr. McNamee, some of them, I think, in Mr. Louis D. Champion's and some of them Nichterline's, and some of them are entries made by persons whose handwriting I don't know anything about, after I had severed my connection with the company.

(Mr. Reed's testimony repeated by the stenographer as follows: "Q. When did Mr. Nichterline go out of the employment of the company? A. He wasn't in the company's employ. He was in mine. Q. He was your own—— A. Yes, this company paid nothing for their bookkeeping services. I provided the bookkeeper. Q. This man was your employee? A. He was in my office, yes.")

A. I desire to correct that and say emphatically that he was paid by the Kent Construction Company.

By Mr. Smathers:

Q. Did you not say at the time that the endorsements, "Deposit to the credit of the Atlantic City

Suburban Gas and Fuel Company, J. C. Reed, General Manager," on the back of the two checks in question, marked Exhibit P1 and P2, are in the handwriting of Mr. Nichterline?

A. Yes, I said that.

Q. Now, I ask you to look at that writing and say if the writing on the back is not the same as the writing in the ledger, page 54, "Bills Payable" under date September twenty eighth, 1907, "J. C. Reed, thirty two hundred and twenty five dollars"?

A. I am unable to say.

Q. "J. C. Reed," then, written here, "J. C. Reed, General Manager," is not in the same handwriting as the "J. C. Reed" in the ledger?

A. I am unable to say.

Q. Do they look alike?

(Objected to.)

Mr. Smathers: Now, I make the offer of the ledger, not to prove a book account, but to prove a fact, a circumstance from which this jury can infer payment of this particular claim that Mr. Reed is now suing on. If he took a note for this sum of money, certainly he cannot maintain this action for money loaned upon a check, because for all we know that note has been paid. If not paid, it may be in the hands of some innocent holder for value, and to whom this company would be liable in case suit was brought.

JOHN C. REED, recalled.

Direct examination.

By Mr. Carr:

Q. Mr. Reed, your attention has been directed to a bookkeeping entry appearing upon page 34 of Ledger No. 1 of Atlantic City Suburban Gas & Fuel Company, item July tenth, 1907, fifteen hundred dollars, July twenty-sixth, one thousand dollars, apparently money paid by you to the company. Did you pay that money to the company?

A. I did.

Q. On those dates?

Mr. Smathers: You say "apparently." Does that show Mr. Reed paid that money?

Mr. Carr: Yes, it says, "John C. Reed, by cash fifteen hundred dollars; by cash one thousand dollars."

Mr. Smathers: Now, on the other side.

Mr. Carr: On the other side there is an entry, "September twenty eight, bills payable, thirty two hundred and twenty five dollars."

Q. Did you ever get any note from the company covering this item of twenty-five hundred dollars?

A. No.

Q. Your attention is called to page 54 of the same book, September twenty eighth, "J. C. Reed, thirty two hundred and fifty," referring to page 17 of

some other book which is not produced. You are asked whether you ever received on that date or on any other date a note in payment of the twenty five hundred dollars, which you advanced, or a note which in any way included the twenty five hundred dollars?

A. No.

Q. Do you know anything about the entries which I have referred to?

A. I do not.

Q. Did you direct that they be posted in this book?

A. I don't think so. I don't remember. I didn't direct him to do anything. He attended to the affairs, I think.

Q. Did you give any specific arrangements with regard to the entry of the twenty-five hundred dollars?

A. Most assuredly not.

Q. Did you give any specific directions with regard to the entry "Bills payable, thirty two hundred and twenty five dollars"?

A. Absolutely know nothing about it.

Q. Is that item intelligible to you in any way?

A. No. I have never received a note or the money for the money that I advanced.

Q. And have you any other, or did you ever have any other evidence of indebtedness except these two checks Exhibits P1 and P2?

A. No.

Cross-examination.

By Mr. Smathers:

Q. Mr. Reed, who else had authority besides yourself as president and general manager to direct the bookkeeper as to what entries to make in the book?

A. Why, Mr. McNamee, I think, used to direct some of the entries and some of them he made.

Q. Who was Mr. McNamee?

A. Well, at one time he was a director——

Q. At this time?

A. I don't know. He may have been secretary and treasurer at the time.

Q. You don't know?

A. No.

Q. The books being kept in your office——

A. Mr. McNamee designed this system of bookkeeping and instructed the bookkeeper how to keep them.

Q. The books were in your office, you said yesterday, and kept by Mr. Nichterline under your supervision and direction. Is that so today?

A. They were part of the time.

Q. Would Mr. Nichterline make entries in any book of this character or any other character without getting directions from you as general manager?

A. Yes, he would.

Mr. Smathers: Now, I ask that the books be admitted on the ground that they are put directly in issue by Mr. Reed's word of mouth. He says one thing and the books says the opposite.

Mr. Carr: Here is an incomplete system of bookkeeping. The records are incomplete here. It is sought to put in an entry here, a vague entry made by some person who has not been identified, of thirty-two hundred and fifty dollars, and to say by that means that a note was given to Mr. Reed. How can

that be evidence? The man who made it, the man who has personal knowledge, ought to come here and subject himself to cross-examination. We cannot cross-examine a book. How can Mr. Reed be bound by an entry of that kind, of which he has no knowledge?

The Court: Is not all that for the jury?

Mr. Carr: No, sir, I think it is for the Court, because placing the most favorable construction on this it is not evidence.

The Court: You have the examination of Mr. Reed with regard to certain entries in this book. If you could examine him for part of the entries, should the book not be admitted in evidence?

Mr. Carr: I do not think so. I only examined him here while this offer was pending for the purpose of showing that he had nothing whatever to do with it.

The Court: You first said, "Here is fifteen hundred dollars and here is an entry of a thousand dollars, do they represent the twenty-five hundred dollars which you put in the company?" Then you go on and call his attention to other items. Is that book not before the Court and jury then, and should it not be admitted and considered?

Mr. Carr: I do not see why it should. I do not see how it can possibly have any evidential force.

The Court: Don't you think it should go in, in connection with Mr. Reed's explanation? He said he did not get the note, he never got the money and so forth.

Mr. Carr: No, because I say this book cannot possibly be legal evidence of the fact that Mr. Reed received a note, and if it is not legal evidence, Mr. Reed's denial that he got such a note does not make it such. What is the jury to weigh, if this is not legal evidence on its face, if this does not prove that he got a note?

The Court: I am inclined to admit this book.

(Ledger marked on the outside "Ledger No. 1 Atlantic City Suburban G. & F. Co., marked Exhibit D1.")

(Objection noted for plaintiff.)

Mr. Carr: Is the motion for a direction overruled?

The Court: Yes.

During the argument of the case to the jury the following was said by the Court: Judge Smathers, the transcript in this case shows no plea of payment. You do not make that a feature of your defense?

Mr. Smathers: No, but we say that we do not owe it, there is nothing to show that we ever did owe it. It is for the jury to say in what way we owe it.

The Court: You are limited to your defense unless you desire to amend.

Mr. Smathers: If that is not set up I will ask permission to amend.

The Court: You may amend.

Mr. Carr: I object to the amendment on the ground that there are no proofs to which the amendment could fasten.

Mr. Carr: I move for a directed verdict for the plaintiff on the ground that the plaintiff has shown by the two checks that he loaned to defendant the sum of twenty-five hundred dollars, and the defendant made no proof of payment or extinguishment of the debt.

(Motion overruled.)

(Objection noted for the plaintiff.)

COURT'S CHARGE TO JURY.

Carrow, J.:

Gentlemen, this is an effort upon the part of the plaintiff to recover twenty-five hundred dollars, with interest, from the defendant. Plaintiff's contention in the case is that in the month of July, 1907, while he was the president and general manager of the defendant company, it was in need of funds with which to pay the semi-annual interest upon its bonds, and that on that date he loaned the company fifteen hundred dollars, and he has offered in evidence his check drawn to the order of the de-

fendant, signed by himself, upon the Guarantee Trust Company of Atlantic City, for fifteen hundred dollars. Upon this check is the word "loan." His contention is that this check went into the treasury of the defendant; that the defendant got the benefit of the money; and that he had never been repaid. On July twenty-sixth of the same year, he gave to the defendant company a check for one thousand dollars, signed by himself, drawn upon the Guarantee Trust Company of Atlantic City. On the face of the check is the word "loan." Plaintiff's contention is that this check went to the defendant, was endorsed by the defendant, deposited by the defendant and used by the defendant, and that he has never been repaid the money.

If what plaintiff says be true he is entitled to have a verdict for the twenty-five hundred dollars plus the interest, which will have to be computed. Have you made a calculation?

Mr. Carr: Yes, sir; the interest calculation is ten hundred and twenty-five dollars.

The Court: You have the dates of the checks and may do your own figuring. He is entitled to interest down to date, at the rate of six per cent. upon the principal sum.

What I have thus far said relates to the plaintiff's side of the case. I will direct your attention to the other side of the case. The contention of the defendant is that this claim has been satisfied, has been paid. But there is no positive proof in the case of payment. The Court, I think, is obliged to say that. The defendant, however, says that there are facts and circumstances in the case from which

the jury may legitimately infer payment. Whether there are or not sufficient facts in the case to warrant the assumption that this claim has been satisfied is a jury question. Of course, a case may be proved in two ways. It may be proved either by positive facts of the actual occurrence, or by the proof of facts and circumstances from which the occurrence itself may be legitimately and reasonably inferred; but then you cannot grasp at nothing. There must be tangible facts and circumstances in the case to justify your saying that this claim has been paid. If there are such facts and circumstances, which show to your satisfaction that the claim has been paid, then there should be a verdict for the defendant. But if not, if the defendant has not met the plaintiff's case by showing a payment of this indebtedness, if you find from the evidence that there was an indebtedness, plaintiff is entitled to succeed. It has been argued that if a note had been given by the defendant, and paid, the note would in all probability be in the possession of the defendant, and not in the possession of the plaintiff. If it were paid by check, the check would be in the possession of the defendant. If it were paid by cash, the probability is that a receipt would have been given.

However, you are required to take this case and give it your time and thoroughly investigate all the facts and circumstances and let your decision be in strict accordance with the evidence as you shall understand it.

PLAINTIFF'S OBJECTIONS TO CHARGE.

Mr. Carr: The plaintiff objects to that part of the Court's charge to the jury wherein the Court said: "The defendant, however, says that there are facts and circumstances in the case from which the jury may legitimately infer payment. Whether there are or not sufficient facts in the case to warrant the assumption that this claim has been satisfied is a jury question. Of course, a case may be proved in two ways. It may be proved either by positive facts of the actual occurrence, or by the proof of facts and circumstances from which the occurrence itself may be legitimately and reasonably inferred; but then you cannot grasp at nothing. There must be tangible facts and circumstances in the case to justify your saying that this claim has been paid. If there are such facts and circumstances, which show to your satisfaction that the claim has been paid, then there should be a verdict for the defendant."

(Which objection is hereby noted.)

The plaintiff objects to the Court's refusal to charge the jury in the language following: "The plaintiff having shown the loan by him to the defendant of the sum of twenty-five hundred dollars, and its use by the company in the payment of interest upon its bonded indebtedness, a prima facie case has been made out against the defendant. The defendant having failed to meet this prima facie case by affirmative proofs of payment, or of facts discharging it from liability, your verdict must be for the plaintiff for the full amount with interest from the date of the loan."

(Which objection is hereby noted.)

The plaintiff objects to the Court's refusal to charge the jury in the language following: "The payment by Reed to the company of the sum of twenty-five hundred dollars as a loan casts upon the defendant the legal duty of repaying the same to Reed."

(Which objection is hereby noted.)

The plaintiff objects to the Court's refusal to charge the jury in the language following: "The plaintiff Reed having shown that he paid to the defendant gas company the sum of twenty-five hundred dollars by checks drawn upon his personal account, the defendant to escape liability must show by affirmative proofs either that Reed was repaid by the company, or that Reed had collected twenty-five hundred dollars of the company's funds for which he had not accounted. Mere suspicion or conjecture will not take the place of proof, and unless affirmative proofs of these facts appear in the case your verdict must be for the plaintiff."

(Which objection is hereby noted.)

The plaintiff objects to the Court's refusal to charge the jury in the language following: "It is immaterial whether Reed had any authority from the company to loan it money or not. The payment of the money to the company and its use for the company's benefit in the payment of interest on its bond issue makes the company liable. It cannot at one and the same time retain this benefit and reject the burden of repaying its debt to Reed."

(Which objection is hereby noted.)

PLAINTIFF'S REQUESTS TO CHARGE.

1. The plaintiff having shown the loan by him to the defendant of the sum of twenty-five hundred dollars, and its use by the company in the payment of interest upon its bonded indebtedness, a prima facie case has been made out against the defendant. The defendant having failed to meet this prima facie case by affirmative proofs of payment, or of facts discharging it from liability, your verdict must be for the plaintiff for the full amount with interest from the date of the loan.

2. The payment by Reed to the company of the sum of twenty-five hundred dollars as a loan casts upon the defendant the legal duty of repaying the same to Reed.

3. The plaintiff Reed having shown that he paid to the defendant gas company the sum of twenty-five hundred dollars by checks drawn upon his personal account, the defendant to escape liability must show by affirmative proofs either that Reed was repaid by the company, or that Reed had collected twenty-five hundred dollars of the company's funds for which he had not accounted. Mere suspicion or conjecture will not take the place of proof, and unless affirmative proofs of these facts appear in the case your verdict must be for the plaintiff.

4. It is immaterial whether Reed had any authority from the company to loan it money or not. The payment of the money to the company and its use for the company's benefit in the payment of

interest on its bond issue makes the company liable. It cannot at one and the same time retain this benefit and reject the burden of repaying its debt to Reed.

All of plaintiff's requests to charge are refused, and an exception is noted to such refusal in each instance.

EXHIBITS.

EXHIBIT P1. 5/12/14. N.

No. 17th Atlantic City, N. J., July 9th 1907

Guarantee Trust Company
of Atlantic City, N. J.

Pay to the order of Atlantic City Suburban Gas & Fuel Co $1500.00—Fifteen hundred Dollars
For loan

John C Reed

(Stamped)—Guarantee Trust Co. Paid Jul 10 1907 Atlantic City, N. J.

[ENDORSED]
Deposit to Credit
Atlantic City Suburban Gas and Fuel Co
J. C. Reed Gen. Mgr.

New Jersey Supreme Court

John C. Reed, Plff
vs
Atlantic City & Suburban Gas & Fuel Co., Dft

Exhibit P.1 for Plff
Jos. B. Nixon
Sup Ct Comr.

6-23-13

(Stamped) Pay to the order of
Any Bank, Banker or Trust Co.
Endorsement Guaranteed,
Jul 10 1907
Marine Trust Co.
Atlantic City, N. J.
Joseph A. McNamee, Sec'y & Treas.

(Word PAID perforated through check.)

EXHIBIT P2. 5/12/14. N.

No 23 Atlantic City, N. J., July 26th 1907
Guarantee Trust Company
of Atlantic City, N. J.
Pay to the order of Atlantic City Suburban Gas & Fuel Co $1000.00—One thousand Dollars
For loan
John C Reed

(Stamped)—Guarantee Trust Co. Paid Jul 27 1907 Atlantic City, N. J.

[ENDORSED]
Deposit to credit
Atlantic City Suburban Gas and Fuel Co

New Jersey Supreme Court

John C Reed, Plff
vs
Atlantic City and Suburban Gas & Fuel Co., Dft

Exhibit P2 for Plff.
Jos. B. Nixon
Sup Ct Com

6-23-13

(Stamped) Pay to the order of
Any Bank, Banker or Trust Co.
Endorsement Guaranteed,
Jul 27 1907
Marine Trust Co.,
Atlantic City, N. J.
Joseph A. McNamee, Sec'y & Treas.

(Word PAID perforated through check.)

EXHIBIT D1.

54.

Bills Payable

1907						
Sept.	28	Cash	H. H. Johnson	17	50 00	
	28	"	Jos. A. McNamee	17	25 00	
	28	"	Wm Riddle	17	50 00	
	28	"	John C. Reed	17	181 00	
Dec.	12	"	M. N. Weinman	20	50 00	
1908						
Feb.	1	"	Wm Riddle	22	50 00	
Mar.	2	"	John C. Reed	24	44 00	
May	15	"	Wm Riddle	26	100 00	
	23	"	J. C. Reed	26	252 00	
	25	"	Stiffel & Freeman	26	25 00	
June	3	"	J. C. Reed	27	75 00	
	3	"	J. A. McNamee	27	25 00	
	3	"	H. H. Johnson	27	50 00	
	3	"	M. N. Weinman	27	50 00	
	3	"	Wm Riddle	27	25 00	
	29	"	Union Petrol. Co.	27	100 57	
Aug.	15	"	Kniff	29	20 00	
	15	"	Borton	29	20 00	

		17	"	Wm Riddle	29	50 00
		18	"	John C. Reed	29	92 00
		31	"	Stiffel & Freeman	29	25 00
	Sept.	12	"	H. H. Johnson	30	100 00
		21	"	J. A. McNamee	31	52 00
	Oct.	1	"	Union Petroleum Co.	32	65 00
		5	"	J. C. Reed	32	25 00
	Nov.	9	"	Marine Trust Co.	34	800 00
		16	"	H. H. Johnson	34	50 00
	Dec.	8	"	Wm Riddle	35	25 00
10		12	"	Kemper & McNamee	35	13 00
		12	"	J. A. McNamee	35	4 00
		16	"	C. I. Burkard	35	4 00
		19	"	Wm Riddle	36	20 00
		19	"	John C. Reed	36	50 00
		21	"	Walt Reynolds	36	10 00
	1907					
	Sept.	28		Jos. A. McNamee	17	100 00
		28		H. H. Johnson	17	200 00
20		28		J. C. Reed	17	3225 00
		28		Max Weinman	17	200 00
		28		Wm Riddle	17	250 00
	1908					
	Jan.	18		Louis Keuhnle	21	620 00
		13		C. I. Burkard	21	54 00
		13		L. H. Barrett	21	76 00
		13		H. H. Johnson	21	400 00
		13		Wm Riddle	21	500 00
		13		J. A. McNamee	21	200 00
30		13		Max Weinman	21	140 00
		13		P. J. L. Carberry	21	20 00
		13		John C. Reed	21	844 00
		23		John L. Kelly	21	40 00
	Feb.	1		Kemper & McNamee	21	13 00
		1		J. E. Borton	22	20 00
		1		W. K. Kniff	22	20 00

	1	J. A. McNamee	22	4 00	
	5	Walt Reynolds	22	10 00	
	5	J. J. Mahoney	22	30 00	
	5	W. E. Shackelford	22	50 00	
	21	Cornelia R. Killinger	22	60 00	
	29	Stiffel & Freeman	23	25 00	
	29	" "	23	25 00	
Mar.	30	Union Petroleum Co.	24	465 57	
May	23	J. A. McNamee	26	252 00	
Sept.	12	Ourselves	30	1800 00	
Dec.	12	Mark Sanders	35	118 66	10

34.

John C. Reed.

1905					
Aug.	16	To Cash	2	225 00	
1907					
Sept.	28	Bills Payable	17	3225 00	
				3225 00	
Jan.	13	Bills Payable	21	844 00	20
1904					
Oct.	1	By Cash	1	225 00	
1907					
Mar.	22	" "	12	600 00	
May	2	" "	13	125 00	
July	10	" "	15	1500 00	
	26	" "	15	1000 00	30
				3225 00	
1908					
Jan.	9	" "	21	844 00	

NEW JERSEY
COURT OF ERRORS AND APPEALS.

JOHN C. REED,
Plaintiff-Appellant,

vs.

ATLANTIC CITY AND SUBURBAN GAS AND FUEL COMPANY,
Defendant-Appellee.

BRIEF FOR THE PLAINTIFF-APPELLANT.

BRIEF FOR THE PLAINTIFF-APPELLANT.

FACTS IN THE CASE.

Pleadings.

This was an action for money loaned. The pleadings are brief, the complaint merely setting forth that on July 9th and 26th, 1907, the plaintiff loaned the defendant the respective sums of $1500. and $1000., and that the defendant has not repaid these loans. The answer of the defendant traversed these simple allegations, adding the defense, abandoned at the trial, that the loans, if made at all, were made without authority.

At the trial the defense amounted to little more

than an attempt to prove satisfaction of the plaintiff's debt. As there was no plea of payment, the trial Court suggested an amendment to supply that deficiency. The amendment was allowed and the case went to the jury on that issue. (*S. of C., p.* 67.)

Plaintiff's Case.

The plaintiff's case was virtually established by the production and proof of the two checks by which the loans had been made. These checks appear in the case as Exhibits P1 and P2. (*S. of C., pp.* 73, 74.) They contain in themselves full proof of the payment by John C. Reed to the defendant company of the successive sums of $1500. and $1000. Each is payable to the order of Atlantic City and Suburban Gas and Fuel Company; each is endorsed "Deposit to credit," signed "Atlantic City and Suburban Gas and Fuel Company," and on each the word "paid" is perforated. As evidence of their purpose there appears on each the words "For loan" in the lower left-hand corner. The endorsements to credit by the defendant company were signed by the bookkeeper Nichterline. (*S. of C., top of p.* 61.)

Mr. Reed further testified upon his direct examination that he had not received repayment in whole or in part. (*S. of C., top of p.* 18.)

No formal demand was made by Mr. Reed for the satisfaction of these loans until shortly after the accession of the new management in January, 1909, when a formal demand in writing was made upon the new directors. (*S. of C., bottom of p.* 18.) In the interim, Reed had talked to certain of the directors about his loan, but had refrained from pressing it, because, as he said, "They never had the money

to pay it, and if the claim was pressed at that time, the entire stockholdings of myself and Mr. Kuehnle and Mr. McNamee and everybody else would have been wiped out, and I nursed it along until such time as the company was leased to the new owners." (*S. of C., bottom of p.* 18.)

In the cross-examination of Mr. Reed it was brought out that the company had not been accustomed to calling directors' meetings for the purpose of authorizing loans by the company. Mr. Reed testified:

> "The usual course of business for this company had been for us to advance the money without consulting the board."
> (*S. of C., top of p.* 32.)

The board of directors—there were thirteen of them—was in reality a dummy board, (*S. of C., middle of p.* 25), and the business of the company was run entirely by its officers, and practically without written by-laws. Because of the informality of their mode of business, no formal record was made of Mr. Reed's loan, nor, to his knowledge, was any entry of it made in the minute book. (*S. of C., middle of p.* 35.)

This, in substance, was the evidence upon which the plaintiff rested his case. It was reinforced indirectly by certain entries in ledger No. 1, offered in evidence by the defendant. This ledger contained on page 34, (*S. of C., bottom of p.* 77), an itemized account of the company's indebtedness to John C. Reed. By that account, four cash payments to the company were credited to Mr. Reed, the last two of which on July 10th and 26th, recorded payments "By Cash" of $1500. and $1000. respectively. As these entries were manifestly against the interest of

the defendant company they were legal evidence, and while unnecessary to the plaintiff's case, afforded substantial verification of the proof of payment by the endorsed checks.

Upon this affirmative proof of the plaintiff's loans, the burden of proving satisfaction was thereupon cast upon the defendant. *Fein vs. Maier,* 71 N. J. L. 12.

Defendant's Case.

The defendant apparently made an initial effort to disprove the fact of payment. This, at least, was the evident purport of its counsel's questions addressed to the four former directors of the company, Dr. Sooy, L. H. Barrett, Joseph McNamee and John F. Ryan, as to whether these gentlemen had in their directors' meetings received any notice of the loans. This testimony was, of course, objected to on the ground that it was wholly inconclusive. None of them had attended all of the directors' meetings, and indeed Ryan testified that he "very seldom" attended the meetings of the board. In addition, it was, of course, immaterial whether or not the loan had ever been brought up in any formal way before the board, the custom of the company, as had been testified to, being to handle such matters informally, without the action of the directors as a whole.

Nor was the defendant company able to produce any check showing repayment. It was part of the system of the company to draw no money except by check, and when the new management took control of the company all checks and vouchers were turned over to it. (*S. of C., bottom of p.* 19.) If there

had been a repayment the due evidence of it would, therefore, have been in the company's hands.

The Books of Account.

The defendant also sought to prove, particularly through the testimony of its bookkeeper, John P. Tompkins, that the appropriate books of the company did not contain any entry evidencing such payment.

This effort was ineffectual because of their failure to produce all of the books of the company. Upon the cross-examination of Mr. Reed he was shown various books, and asked to point out the record in them of his loans; but his immediate reply was that they had not shown him all the books that were kept by the company at the time of his incumbency. Particularly he referred to the absence of "a long book" which, as he said, contained "in simple, plain language, the entire history of every financial transaction of this company." (*S. of C., middle of p.* 36.) This book, if any, would have contained the record of the loans, but was never produced at the trial. It was a book, Mr. Reed testified, that had been designed by Mr. McNamee, and McNamee verified the plaintiff's testimony in this regard.

> "Q. Mr. McNamee, do you remember designing for Mr. Reed a book which showed in detail the receipts and collections of the company?
>
> A. I heard Mr. Reed say that I designed such a book and I think I did. I haven't a positive recollection of it.
>
> Q. Does that bring it back to your recollection——

A. Yes, some kind of a journal, day book.

Q. ——that a book of that kind was kept by the company?

A. Yes.

Q. You don't find it here, do you, among these books? These are the books produced, consisting of a ledger, two check books——

A. No. Good deal larger book.

Q. You don't find it here among the books produced?

A. No.

Q. But you do remember it? That is all." (*S. of C., pp.* 53, 54.)

The omission of this book not only nullified the defendant's efforts to prove that no record of the loan had been made, but put upon it the burden of showing why the book had not been produced.

These efforts to disprove payment were, however, confounded by the entries in Ledger No. 1 introduced in evidence by the defendant. The primary purpose of its introduction was to prove payment of the loans; the incidental result was to establish from the defendant's own sources its receipt of Reed's $2500.

The admission in evidence of this ledger was vigorously opposed by counsel for the plaintiff. The bookkeeper who made the entries was not produced, and the privilege of cross-examination was thus denied the plaintiff. Moreover, every effort to invest this record with authenticity met with failure. Counsel for the defendant were unable to prove when the entries had been made, or even to prove their authorship. An attempt was made to establish through Mr. Reed that the entries were in the handwriting of Nichterline, but as Reed failed to identify the writing, the entries remained unproved.

The entries themselves were patently unconvincing. Under the general heading "Bills Payable" the item stood "1907, Sept. 28, J. C. Reed, 17 $3225." This was repeated on page 54 of the ledger. (*S. of C., middle of p.* 77.) The figure 17 appearing to the left of the amount referred to the page of another book from which the item had been borrowed. No attempt was made to produce this other book. The account in form is a mere record of credit. The debt is merely "payable," and no suggestion appears of its having been paid.

Issues Before This Court.

The admission of these entries as evidence before the jury is the most conspicuous error on the record. It has been made the eighth ground of appeal, and we shall presently show the legal errors involved in its admission.

In addition, and conceding for the time that the ledger was admissible, counsel contended at the trial that it was ineffectual, standing by itself, to establish the fact of payment. There was no other legal evidence upon which a jury could have based the conclusion of payment, and the Court's refusal to direct a verdict for the plaintiff on the ground that no proof of payment in extinguishment of the debt had been offered has been made the ninth ground of appeal.

The plaintiff's requests to charge were refused, and the Court's refusal, as well as its charge, represent the tenth to the twelfth grounds of appeal.

Other grounds, Numbers 1 to 7, deal with errors in the admission of testimony, and will be dealt with separately.

ADMISSION OF THE LEDGER.

The admission in evidence of the defendant's "Ledger No. 1" offended such fundamental principles of the law of evidence, and was apparently so far removed from the scope of the recognized exceptions to the hearsay rule, that we find it difficult to present an argument on this point. We will indicate briefly, however, the essential rights of the plaintiff which were invaded by the introduction in evidence of the ledger's entries.

Improper Proof.

At the start it is evident that these entries were not properly proved. Even if we are to admit that the ledger contained legal evidence, it cannot be denied that proper proof of the authenticity of its items must be first established.

> "Since on strict common law principles the books of a party are inadmissible in his favor, they will be rejected unless the requisite foundation in proof of their character, authenticity, correctness and regularity is laid for their introduction in evidence. Thus it is in general essential that the books should be supported by the suppletory oath of the party; a mere proof of his handwriting will not be sufficient. But the suppletory oath of the party making the entries may be dispensed with under certain circumstances upon proof of his handwriting."
>
> 17 *Cyc.* 368.

In this case there was not even proof as to whose hand had made the entries. Mr. Reed was unable to identify the writing, and the defendant had no other witnesses to prove it. The result was that the entries were admitted in evidence without any indication of their origin, much less of their accuracy.

As indicated by the column to the left of the amount, the items in question had been carried from other books, and there should have been testimony by the transcribers.

> "The persons who transcribed the writings into these books were not called to identify them or to prove their accuracy. The theory of the plaintiff seems to be that they proved themselves. This theory we incline to think unsound."
>
> *Bayonne vs. Standard Oil Co.*, 81 N. J. L. 717, 722 (E. & A. 1911).

The Hearsay Rule.

But for more fundamental reasons the ledger should not have been admitted. It is evident that the entries were offered in their assertive capacity. That is, they were to prove the facts which they purported to represent. As such they were pure hearsay.

> "It is settled that in the absence of special circumstances extra-judicial statements contained in accounts of sales, books of account, receipts, and similar forms of mercantile writings, are, so far as relates to the truth of the facts asserted, simply hearsay."
>
> 4 *Chamberlayne Evidence*, 3793.

As hearsay the entries offended three long estab-

New Jersey State Library

lished principles of the law of evidence. In the first place, in admitting them, the Court was admitting in evidence an unsworn statement to be used against the sworn testimony of the plaintiff. Secondly, no opportunity to cross-examine was thereby given the counsel of the plaintiff, and no means supplied by which the accuracy and truth of the statement could be tested. Thirdly, the statements were in themselves self-serving, and, therefore, particularly open to suspicion of their truth.

The right of a litigant to protection against the admission of such testimony is too well founded to call for elaborate citation of authorities.

> "Among these (the rights of a litigant) is the requirement that all testimonial facts designed to influence the jury should be given under the sanction of an oath. * * * * * Again it is conceived to be the absolute right of a party against whom evidence is offered to test it by cross-examination."
>
> 4 *Chamb. Evid.* 3475.

The entries were particularly dangerous and inimical to the plaintiff's rights as being self-serving.

> "Should the extra-judicial statement be self-serving, *i.e.*, in the interest of the declarant, an additional administrative reason is furnished for its rejection."
>
> 4 *Chamb. Evid.* 3789.

It has long been settled in New Jersey that the declarations of a party in his own favor are not evidence.

> *Woolston vs. King*, 3 N. J. L. 764 (1813);
> *Sayre vs. Sayre*, 14 N. J. L. 487;
> *Camden, etc., R. Co. vs. Williams*, 61 N. J. L. 646;
> *Kunz vs. Mason*, 75 N. J. Eq. 616.

Exceptions to the Rule.

In order to justify the admission of this ledger, counsel for the defendant must discover some exception to the rule that forbids the admission of hearsay testimony. It is immediately evident that only two possible exceptions could be applied to the present case, viz: the exception of the shop book rule, and the exception admitting declarations in the regular course of business.

As to the first it requires but the mere statement of the rule to show its inapplicability to the present circumstances.

> "The rule which aside from statute may be said to be recognized in the various courts of the United States is that the account books of a party, supported by his suppletory oath, are, subject to certain limitations or modifications, admissible in evidence to show a sale and delivery of goods or the performance of services."
>
> 4 *Chamb. Evid.* 4270.

This rule is in force in New Jersey.

> *Bayonne vs. Standard Oil Co., supra;*
> *Schlicher vs. Whyte,* 71 Atl. 337;
> *Rush vs. Hance,* 3 N. J. L. 860.

In this case the books were not supported by a suppletory oath; nor were they books designed to record the sale of merchandise or the performance of services. Indeed, no rule is better founded in this State than that which limits the production in evidence of books of account to books of merchants and professional men. From an early date the right to

prove moneys loaned and paid by a party's books has been denied.

Wilson vs. Wilson, 6 N. J. L. 95;
Carman vs. Dunham, 11 N. J. L. 189;
Inslee vs. Prall, 23 N. J. L. 457;
Oberg vs. Breen, 50 N. J. L. 145.

Nor was the book in this case a book of original entry as required by the shop book rule. The entries, as previously explained, were borrowed from other books, and were thereby rendered inadmissible in evidence.

New Jersey Zinc Co. vs. Lehigh Zinc Co., 59 N. J. L. 189, 191;
Lindenthal vs. Hatch, 61 N. J. L. 29.

The rule admitting as secondary evidence, declarations in the ordinary course of business, is equally inapplicable.

> "Another exception to the hearsay rule which substantive law has placed at the service of judicial administration in its efforts to elicit truth, is that which admits as proof of the facts asserted oral declarations or written entries made by deceased persons in the usual course of professional or official business, or in discharge of some duty."
>
> 4 *Chamb. Evid.* 3987.

Under this rule entries in the ordinary course of business are admitted if there has been established preliminarily, first, that the entrant is dead or incapable of production (4 *Chamb. Evid. Sec.* 2878, *et seq.*), and secondly, the adequate personal knowledge by the entrant of the truth of the entries made. (*Ibid. Sec.* 2884, *et seq.*) Neither of these essentials was established at the trial.

The only ground of admissibility suggested by the trial Court was that counsel for the plaintiff had made the book evidence by questioning the witness Reed as to the truth of certain of its contents. (*S. of C., bottom of p.* 65.) We do not follow the logic that proceeds from these premises to the conclusion that the items inquired about were thereby made legal evidence. No action of counsel could possibly make that which was inherently untrustworthy valid and legal evidence. At the time counsel for the plaintiff questioned the witness as to the truth of certain of its contents the book itself was not in evidence, and nothing that counsel did made it evidence. The trial Court must accept full responsibility for its admission.

As a matter of fact, the plaintiff had a legal right to produce the ledger as evidence in his own behalf. The entries showing the cash payments by John C. Reed were evidence despite the fact that the entries purporting to show satisfaction of these loan payments, appearing in the same ledger and on the same page, were not admissible. The distinction rests upon the difference between a declaration made in the interest of the declarant and an admission against his interest. Had the entries been proved the plaintiff could have offered them as the admission of the defendant.

> "Extra-judicial admissions are, speaking generally, declarations of a party or his legal representative regarding the existence of a probative or *res gestae* fact, and made *in pais.*"
>
> 2 *Chamb. Evid.* 1631.

> "Written admissions are frequently contained in *book entries.* In fact entries in

> books of account which the party has himself made, or which are made by others over his supervision or control, are among the most commonly employed vehicles for written admission, as the only fact of importance is that the party made the entry or is responsible for it. The form in which the book containing it is kept, or the nature of the book itself, is a matter of but little consequence in relation to admissibility."
>
> 2 *Chamb. Evid.* 1723.
>
> *Bird vs. McGowan,* 43 Atl. 278 (N. J. Ch. 1898).

It is thus apparent that the items crediting the plaintiff with the two payments of $1500 and $1000 were legal and valid evidence if offered by the plaintiff, while those which purported to show payment to him were wholly inadmissible.

No legal reason can be conceived to justify the admission in evidence of these entries of the ledger. They constitute practically the sole evidence presented by the defendant in its behalf, and their prejudicial character is apparent.

Summary.

To conclude our argument upon the admissibility of the entries in Ledger No. 1, the following reasons may be set down for excluding from the case these entries of payment:

First: The entries were not properly proved by the entrant.

Secondly: The entries were hearsay, and as such unevidential because—

(a) They were unsworn statements.

(b) They afforded no opportunity for cross-examination.

(c) They were self-serving statements offered by the party benefited.

Thirdly: They were within none of the recognized exceptions to the hearsay rule.

(a) They were not shop book entries.

I. They were not original entries.

II. They recorded a mere payment and not a transaction of goods or a record of services.

III. The ledger was not a shop book.

(b) They were not entries in the regular course of business.

THE COURT'S CHARGE.

(Grounds of Appeal Numbers 9 to 12.)

The plaintiff has excepted to the refusal of the Court to direct a verdict for the plaintiff, and for its refusal to charge the plaintiff's requests, and because of the charge delivered. It is unnecessary to go separately into the merits of these grounds.

The essential ground of the plaintiff's contention is, that the plaintiff having established a *prima facie* case of indebtedness which was not rebutted by the defendant, there was nothing to go to the jury. As a matter of fact the only attempted proof of payment or extinguishment of the debt was that contained in the items in Ledger No. 1, which showed under the head "Bills Payable" a credit of $3225, and the date September 28th. It is patent that these

figures are no proof of the fact of payment of that sum to John C. Reed. They appear under a caption of "Bills Payable," and on their very face do not even indicate the payment to prove which they were offered in evidence. Reed denied emphatically any knowledge of this particular entry (*S. of C., p.* 68), and also that he had ever received the amount specified. We do not see that any reasonable inference could possibly have been drawn from the items in their present condition, and that without suppletory testimony there was any probative value whatsoever in them.

At the most they presented an unsworn, unidentified and unauthenticated record, made by unknown parties, from which an inference was attempted to be drawn that a promissory note had been given to the plaintiff. Any inference of payment of such note would be self-rebutted by the fact that if paid the note would have been in the possession of the maker, viz.: the defendant. The difficulty of the situation lies in this: That if a witness had been produced who swore that a note had been given to Reed, the witness could have been asked the pertinent question as to whether or not the note had been paid, and by what means it had been paid, with all the particulars relating thereto. Counsel deals with the supposititious danger of an outstanding note in the hands of third parties. This effort to bolster the defendant's case requires the further inference that the note was negotiable in form, and that it had been negotiated before its due date so as to expose the company to the hazard of double liability. This, if true, was a proper matter of defense, and should have been set up by the pleadings and supported by the proofs.

Plaintiff's first request to charge correctly stated

the law as to the burden of proof, and should have been allowed.

> "On an inquiry whether a debt recently created by a writing still outstanding has been paid, the burden of proof rests upon the debtor."
>
> *Fein vs. Meier*, 74 N. J. L. 597.

ADMISSION OF ERRONEOUS TESTIMONY.

(Grounds of Appeal Numbers 1 to 7.)

Of these grounds of appeal the first four scarcely need discussion.

The second states a correct proposition of law. The attempt was made (*S. of C., p.* 31) to induce the witness Reed to admit a false conclusion of the law. That a party by long custom may establish a by-law which does away with the formal action of a board of directors is a proposition that does not call for the citation of authorities.

The attempt was made at the trial to show through the witness Tompkins that the loans in question did not appear on the books of the company. If all the books of account in use at the time of these transactions had been before the witness there would have been probative value in his failure to find an entry, but in view of the fact (already discussed in the statement of fact) that only some and not all of the books were produced at the trial, it was wholly irrelevant and immaterial to allow testimony as to the contents of those submitted to the witness. This objection is the gist of grounds of appeal numbers 3 and 4.

In the fifth, sixth and seventh grounds of appeal the plaintiff has presented his objection to the ruling of the Court allowing testimony as to the recollection of the individual directors regarding the formal discussions of the loans upon which suit is brought. For the same reason that the testimony of the bookkeeper was inadmissible the testimony of these directors was inadmissible. They had not attended all of the meetings and, therefore, could not correctly testify as to whether the matter had been brought up before the board.

The lack of authority for the company to obtain this loan cannot be set up against the plaintiff. If the company had no right to borrow it they certainly had no right to retain it. If the loan had been made without authority it was the company's duty to have returned it. The retention makes the company liable in an action for money had and received, and this is true whether there is any precedent form of authority to borrow it or not. It would be outrageous for the company to say: "Our officers have no authority to borrow this money, but we have the right to retain it."

In conclusion we submit that the substantial rights of the plaintiff have been invaded by the admission in evidence of Ledger No. 1 with its entries purporting to show the satisfaction of the plaintiff's claim, and that other errors have resulted at the trial injurious to the plaintiff's rights. We ask that the cause be remanded for a new trial.

Respectfully submitted,
WILSON & CARR,
Attorneys for Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

JOHN C. REED,
Plaintiff-Appellant,
vs.
ATLANTIC CITY SUBURBAN GAS AND FUEL COMPANY,
Defendant-Appellee.

BRIEF FOR THE DEFENDANT-APPELLEE.

While the appellant's brief mentions many grounds of appeal, yet he apparently considers but one worthy of space and serious comment, namely, "the admission of the ledger," and that he characterizes as "the most conspicuous error in the record." If this is the most conspicuous, then we will assume, as the appellant does, that the other grounds of appeal are too inconspicuous and insignificant to consume space or the valuable time of this court.

The ledger in question was undoubtedly admissible on two different theories. First, as the plaintiff relied upon "his adversary's account books to prove credits, he is bound by entries therein of debits exhausting those credits." (S. of C. Pages 62 & 63.)

> "IF a party uses books of account against his adversary, he makes them evidence for him on the same subject. They are like any declaration or admission, by writing or orally; if part is used, the whole relating to the same matter is admissible. In the case now under consideration the plaintiff's offer was to read from the same books which the defendant had read from. The portions proposed to be read by the plaintiffs re-

lated to the same subject-matter as the parts read by the defendant, namely, the dealings between the parties. The defendant had read entries forming a part of the plaintiffs' account with the defendant. Other entries, in the same books, containing items of said account were pertinent to a full understanding of the accounts and to their completeness. The defendant had read items of credit to him from the books, and it was clearly competent for the plaintiffs to read from the same books charges and entries, which showed that these credits had been exhausted by counter-charges of debts made at about the same time and afterward." Dewey vs. Hotchkiss, N. Y. Court of Appeals reports, book 6, vol. 30, p. 497.

and in this connection the inquiry as to the handwriting of the party who made the entries is unimportant and immaterial. Dewey vs. Hotchkiss.

Speaking of the above rule, it is said, on page 683 of Encyclopedia of Evidence:

"The only thing peculiar to it is, that the books need not be actually used; for if inspected with a view to be used, they are, it is said, equally evidence for both sides; the reason is, that it would give an unconscionable advantage, to enable a party to pry into his antagonist's affairs, for the purpose of compelling him to furnish evidence against himself, without, at the same time, subjecting him to the risk of making whatever he inspects, evidence for both parties." Withers v. Gillespy, 7 Serg. & R. (Pa.) 10.

In the Second place THE BOOK IS CLEARLY ADMISSIBLE ON THE THEORY OF "AN ADMISSION AGAINST INTEREST."

In reality this book was the plaintiff's book. These entries are his entries or those of his agents, therefore binding upon him. At the time the entries in the ledger bear date, the ledger in question, as well as the other books of the company, were in the possession of the plaintiff as the president and general manager of the company. The bookkeeping was under his supervision and direction. He is, therefore, presumed to know the contents of the book in so far as his individ-

ual account is concerned and the entries are likewise presumed to be correct and he cannot now question their accuracy and authenticity. (S. of C. p. 33, l. 33, also pages 34 and 35, top of each page.)

> "The books in question were not strictly speaking, the books of the defendants, but the entries in the books of a corporation showing dealings between it and its managers, are competent evidence against the latter, upon proof of such connection and familiarity with the books as to justify an inference of actual acquaintance with their contents, on the basis of admissions or assertions of the facts stated therein." People vs. Leonard, 106 Cal. 302; 39 Pac. 617; Olney vs. Chadsey, 7 R. I. 224; Bacon vs. U. S., V. S. 97 Fed. 35; 38 C. C. A. 37.

> "Charges on an account of an officer of a corporation kept on the corporation's books, and known and not objected to by him, are competent as admissions." Born vs. McGowan (N. J. Ch.) 43 A 278.

> Worden vs. U. S., 204 Fed. 10. C. C. of A. 6th Circuit, 1913. Knappen Circuit Judge held:
> "Were the corporation the opposite party here, entries on its books would be competent evidence when in the nature of admissions, and without the necessity of strict authentication beyond establishing the identity of the books." Foster vs. U. S. (C. C. A. 6) 178 Fed. 165, 175, 101 C. C. A. 485, 495 and authorities cited.

In order to show this court, however, that the trial judge committed no error on either theory of the case, it now becomes necessary to apprise the court of the facts with which the trial judge was confronted at the time the ledger was offered and admitted.

Plaintiff claimed that while he was president and general manager of the defendant gas company in 1907 it needed money and as there was no other available he was obliged to loan it twenty-five hundred dollars. He adduces no evidence of the loan save his own testimony corroborated by the checks.

The defendant was in the peculiar and unfortunate position of knowing nothing about the loan. The situation was like this: In July, 1907, the loan was alleged to have been made. Reed was then president and general manager of the company as well as counsel for the company. (p. 31 S. of C.) The books of the company were kept in his office. (p. 35 S. of C.) The bookkeeping and banking were done by Mr. Nichterlein, (p. 34 S. of C.) an employee of Mr. Reed's, (p. 58 S. of C.) and under Reed's supervision and direction. (p. 34 S. of C.)

This situation and condition continued until sometime in the year 1908 when Reed got "tired of carrying the bag," and quit the company. (Middle of p. 23 and bottom of p. 51 S. of C.) The then board of directors continued the business of the company about one year after Mr. Reed's retirement and then turned the affairs, books and all over to a *new board of an entirely different personnel* who had leased the property and purchased the holdings of the old board. This is not denied.

When the new board took charge Reed then and for the first time formally made known his personal loan and demanded payment of the new board. (Bottom of p. 18 and bottom of p. 51 S. of C.) The new board knew nothing of the loan and the old board declared they had never heard of it before. (See testimony of Sooy, Barrett, Ryan and McNamee.) Reed himself admitted on cross examination as follows: That at the time of the alleged loan there was a duly elected and existing board of directors, (p. 24 and 35 S. of C.) ; that he never informed the board that money was needed; that he called no meeting to discuss or devise ways or means of securing money, (p. 32 & 33 S. of C.) ; that the board did not nor did any member thereof request him to make the loan; that he did not consult the board before making the loan nor any member thereof, save possibly Mr. Kuehnle; that he did not inform the board that he had made the loan and the only member of the board that he did "probably talk to" was Mr. Kuehnle. (l. 3, p. 26, also p. 27, 28, 32 and 33). He further admitted that he never asked

the Board to repay him or secure him and that he never formally demanded payment until after the new Board had been installed and taken charge of the Company's affairs sometime in the year 1909 (p. 18, l. 30, also p. 51, l. 30 S. of C.); that there was nothing to hinder or prevent him from calling a Board of Directors meeting to consider the question of the loan (p. 31, l. 30 and p. 32 S. of C.); that while he had the books in his possession and under his control, yet he himself made no entry of the loan therein, nor did he direct Mr. Nichterlein, the bookkeeper, to do so (p. 34 and 35 S. of C.). In explanation of his voluntary payment of the Company's debt, without the Company's request or without requesting the Company or any member of the Board to share in the loan, and in justification of his unselfishness and extraordinary generosity, he said:

> "I was satisfied with my position as long as my friends held the bonds, to advance this money and help nurse the Company along." (p. 33 l. 22 S. of C.)

Mr. Reed also admitted on cross-examination that when he did demand payment and was refused he did not immediately thereafter bring suit to enforce payment; that while he claimed to be a resident and voter of Pleasantville, Atlantic County, yet for the sake of "convenience" and "under advice of counsel" he instituted suit in Camden county in the name of Joseph Low, a clerk in Mr. Carr's office. (p. 21 and 22 S. of C.) Application was made to change the venue to Atlantic County. This was ordered done and there the case has remained ever since. (p. 22 and 23 S. of C.)

Mr. Reed's testimony was quite materially discredited and weakened in many important particulars by the various and violent contradictions that appear in his testimony. A few of them may be found as follows: Said he did not know the names of the board of directors of the company of which he was president, (p. 24 and 25) nor the names of the other officers of the company, (p. 27 and 28). Said he did not know Kuehnle was in states prison, (p. 26 S. of C.) Denied that he was counsel for the defendant company, (p. 29 and 30

S. of C.) This he retracted and corrected on page 31 when confronted with a resolution passed by the board of directors of the defendant company. Said that Nichterlein, the bookkeeper, was in his employ, (p. 58, line 10 S. of C.) When the court was about to admit the ledger in evidence on the ground that Nichterlein was Reed's agent and as such had made the entry in the ledger, (p. 58 l. 30 S. of C.), Mr. Reed thereupon denied that Nichterlein was in his employ, (p. 60 l. 20 S. of C.)

While admitting that Nichterlein had been in his office for years and being bookkeeper for the gas company under his supervision and direction, (p. 36 & 59 S. of C.), after identifying Nichterlein's handwriting on the two checks in question, yet when it became important for defendant to prove the entry in the ledger was made in Nichterlein's handwriting Reed declared that he "was not familiar with Nichterlein's handwriting" (P. 58 l. 7 S. of C.) On page 36 he said that he told the bookkeeper "to make the proper entries of the loan in the books" of the company. On page 63, line 14: "Q. Did you give any specific arrangements with regard to the entry of the $2500.00. A. Most assuredly not."

WITH THE CHECKS IN EVIDENCE AND REED'S TESTIMONY THUS CONTRADICTED AND CONFUSED, PLAINTIFF RESTS HIS CASE.

Defendant thereupon put the present secretary of the company on the stand. He said that at the time the new board succeeded the old board, certain books of the company were turned over to him. That among them were the minute book, cash book, ledger and certain other minor books; that he brought to court all the books that "had any bearing on this case;" namely, minute book, cash book and ledger; (p. 39 and 40 S. of C.) that the books of the company had been in his possession since the leasing and transfer sometime in 1910. (p. 41 S. of C.) The minute book was identified by Mr. Reed as the one kept by him during his encumbency as president and general manager and thereupon admitted in evidence. (p. 42 S. of C.) The minute book, while presumably accurate and prop-

erly kept, yet it contained no record of the Reed transaction or anything appertaining thereto. (p. 43, l. 15 S. of C.) The secretary was next asked:

> "Have you examined the cash book and the ledger to ascertain if there is any memorandum or record of any loan made by Mr. Reed to this company."

This was objected to but overruled. The answer was:

> "There doesn't appear to be any entry in the cash book, but there is a memorandum or an entry in the ledger.
>
> Q. And will you turn to that, please, and read the entry on the record?
>
> A. There appears to be two, one on page 34 and one on page 54."

At this point objection was again interposed. The question was then withdrawn with the court stating:

> "I will hold this matter under advisement." (P. 44 S. of C.)

NOTE THE BOOKS ARE NOT IN EVIDENCE UP TO THIS POINT.

On page 56 Mr. Reed was recalled for the purpose of proving and identifying the handwriting relative to the entries in the ledger on page 34 and 54. While it was quite apparent that he did recognize the handwriting as that of Mr. Nichterlein's, his employee, yet he would not, because as a lawyer he obviously recognized the importance of denying any knowledge on the subject. (Read questions put to him by the court and his answers on page 58, 59 & 60 S. of C.)

In view of the facts thus established and not denied, namely, that the ledger in question was in Mr. Reed's possession as president and general manager in the year 1907; that at that time the bookkeeping of the company was under his supervision and direction; that the entries in the ledger bore date July and September, 1907, and they related to Mr. Reed's personal

account. The ledger, therefore, was admissible in evidence on the theory that the entries are presumed to have been made in the ledger with Reed's knowledge and consent, hence considered admissions against him. The book was again offered in evidence on page 61:

> "Not to prove the book account, but to prove a fact, a circumstance from which this jury can infer payment of this particular claim that Mr. Reed is now suing on. If he took a note for this sum of money, certainly he cannot maintain this action for money loaned upon a check, because for all we know that note has been paid. If not paid, it may be in the hands of some innocent holder for value, and to whom this company would be liable in case suit was brought."

There appears to be no ruling by the court on that offer at that time, (p. 62 S. of C.) but counsel for plaintiff proceeded to cross-examine Mr. Reed on the subject of the entries in the ledger:

> "Q. Mr. Reed your attention has been directed to a bookkeeping entry appearing upon page 34 of Ledger No. 1 of Atlantic City Suburban Gas & Fuel Company, item July tenth, 1907, fifteen hundred dollars, July twenty-sixth, one thousand dollars, apparently money paid by you to the company. Did you pay that money to the company?
> A. I did." (p. 62 S. of C.)

> "Mr. Carr: On the other side there is an entry "September twenty-eighth, bills payable, thirty-two hundred and twenty-five dollars."

NOTE. It was to get these items of the ledger in evidence that the book was offered on the part of the defendant. Counsel for the plaintiff proceeded to continue the examination of Mr. Reed on that subject as follows:

> "Q. Did you ever get any note from the company covering this item of twenty-five hundred dollars?
> A. No.

Q. Your attention is called to page 54 of the same book, September twenty-eighth, 'J. C. Reed, thirty-two hundred and fifty,' referring to page 17 of some other book which is not produced. You are asked whether you ever received on that date or any other date a note in payment of the twenty-five hundred dollars, which you advanced, or a note which in any way included the twenty-five hundred dollars?

A. No.

Q. Do you know anything about the entries which I have referred to?

A. I do not.

Q. Did you direct that they be posted in this book?

A. I don't think so. I don't remember. I didn't direct him to do anything. He attended to the affairs, I think.

Q. Did you give any specific arrangements with regard to the entry of the twenty-five hundred dollars?

A. Most assuredly not." (P. 62 & 63 S. of C.)

Whereupon counsel for the defendant again offered the book in evidence on page 64 on the ground that the ledger was put directly in issue by Mr. Reed's word of mouth. "He says one thing and the book says the opposite." The court admitted the book in evidence, giving his reasons therefor on page 65.

SUCH IS THE HISTORY OF THE CASE LEADING UP TO THE OFFER AND ADMISSION OF THE LEDGER.

The trial judge was justified in admitting it for the reason he assigned, namely, "If a party uses books of account against his adversary, he makes them evidence for him on the same subject." Dewey vs. Hotchkiss, supra.

If there is any doubt about it this court should sustain it upon the theory of an admission against interest. Obviously the ledger was admissible upon this theory if not upon the former theory. The evidence indubitably proves it. Here was the book of the corporation showing dealings between the corpora-

tion and its president and general manager. The book is opened at the personal account of the president, John C. Reed. On one side Reed is credited with $3225.00, which includes his $2500.00, under date of July 10th and 26th. On the other side in the same handwriting under date of September 28th, 1907, are entered these words: "bills payable, $3225.00," thus balancing the account. (p. 77 S. of C.)

At the time these entries bear date this book was in Reed's possession and as president and general manager of the company the bookkeeping was admittedly done under his supervision and direction. (p. 34 and 25 S. of C.) The violent and irrebuttable presumption, therefore, is that Reed's agent made the entries in question and that he knew they were there and that they are correct. (43 Atl. Rep. p. 278, supra). This "connection and familiarity with the books" by Mr. Reed cannot and is not denied. The inference is therefore justifiable that he was "acquainted with the contents of the books." (Bacon vs. U. S. Supra.)

THE APPELLANT'S BRIEF IS MISLEADING BECAUSE IT DOES NOT ACCURATELY OR ADEQUATELY STATE THE FACTS NOR DOES IT CORRECTLY DESCRIBE THE ISSUES RAISED BY THE PLEADINGS.

In addition to a general denial of the loan, defendant pleaded payment and "no authority" in these words:

> "Furthering answering defendant says that at the time of the alleged loans, John C. Reed was president and general manager of the defendant company and that if he loaned or advanced any money to said company, he did so without the knowledge, consent or request on the part of the board of directors of said company; that there was no authority given by said company to anyone to borrow money from Reed or anyone else; that if he loaned said money the company did not receive any benefit therefor and that while president and general manager, he repaid himself either out of the funds of the company by appropriat-

ing its capital stock or its property." Page 12 S. of C.

Far from "abandoning" these defenses at the trial, they were substantially supported as we shall subsequently show.

On page 3 of plaintiff's brief an effort is made to show a usurpation of the powers of the Board of Directors by Reed and a few other officers and an acquiescence therein on the part of the other directors; and furthermore that "the company had not been accustomed to calling directors' meetings for the purpose of authorizing loans by the company." This was not the case, but quite to the contrary. (p. 24 & 25 S. of C.)

That there was in fact and in law a duly elected and existing board of directors possessing the usual powers and exercising the usual functions, was freely conceded by Mr. Reed himself (p. 31, 32 & 33 S. of C.) and substantiated by four other directors. See testimony of Sooy, Barrett, Ryan and McNamee.

There is no evidence to be found in the record to justify, much less sustain, the statement on page 3 of appellant's brief, "that the business of the company was run entirely by its officers and practically without written by-laws." When the state of the case is read it will obviously appear that the so-called "custom" of calling no meetings for the purpose of authorizing loans was no "custom" at all, but a creature of Reed's own creation—not known to or acquiesed in by the board of directors.

Plaintiff in his brief, page 3, states as follows:

> "Because of the informality of their mode of business no formal record was made of Mr. Reed's loan, nor to his knowledge was any entry of it made in the minute book."

No support can be found in the record for this statement. Mr. Reed's own testimony, page 33, line 35 S. of C., and pages 33, 34, 35 and 36, conclusively proves the contrary.

Defendant's Defenses.

Defendant contends that the twenty-five hundred dollars which Reed claims to have loaned the Company, was not, in fact, Reed's money, but the money of the Company, which he had collected and placed to the credit of his own personal bank account. The record undoubtedly contains such facts and circumstances as would warrant a jury in so deciding. (Page 17, line 30, S. of C., pages 34 and 35 S. of C. See testimony of Dr. Sooy, Mr. Barrett, Mr. Ryan and Mr. McNamee).

Supplemented by the fact that Reed's testimony was not only contradicted, but his veracity seriously shaken and impeached.

IN THE SECOND PLACE, DEFENDANT CONTENDS THAT IF IN FACT, PLAINTIFF DID LOAN THE MONEY, HE STANDS IN THE SAME POSITION AS A "MERE VOLUNTEER" WITHOUT A RIGHT OF RECOVERY.

The record does not suggest, nor does Mr. Reed or anyone else intimate that the Board of Directors ever failed or refused to do its duty, or that it ever failed or refused to provide funds to meet the interest on the bonds, or that Mr. Reed had any reason to suppose that the Board would fail or refuse to provide the necessary money to make the payment in question. If the Board had failed or refused to provide the necessary money to make the payment in question, then there may have been some excuse for the voluntary payment made by Mr. Reed in behalf of the corporation; but here we witness the incredible and anomalous transaction of a lawyer and business man, a president and manager of a big corporation, voluntarily paying a twenty-five hundred dollar debt of the corporation when he had not been requested to do so; when there was no reason why he should do so any more than any other member of the Board of Directors; and where there were thirteen others just as interested, apparently, in the Company as himself. While these thirteen were just as willing no doubt to pay the debt, yet Mr. Reed does not call upon them or any of them to put up their share but voluntarily puts up the full amount for them

(Pages 28 and 30 S. of C.). As strange and extraordinary as this may seem, yet a stranger and more extraordinary thing was done when Mr. Reed informed no one of the fact that he had made the loan and requested no one to repay him for some six or eight months after he had made the loan. He did not even tell the other members of the Board of Directors, save "probably" Mr. Kuehnle. The very men who were benefitted most, and who had profited by Mr. Reed's payment, were the very men kept ignorant of the loan and were never called upon to repay it (Page 32 S. of C.). Instead of demanding payment of the old Board, Mr. Reed waited until the new Board had succeeded the old Board and then demanded payment of them some ten or twelve months later (page 51, line 30, page 37, line 20, S. of C.).

LAW.

"In reference to the rule of subrogation, a stranger has been said to be not necessarily one who has nothing to do with the transaction out of which the debt grew. Anyone who is under *no legal obligation* or liability to pay the debt is a stranger, and, if he pays the debt, *is a mere volunteer.*" Bennett vs. Chandler, 64 N. E., 1062 (Ill.).

In 37 Cyc., 375, we read:

"It always requires something more than the mere payment of a debt in order to entitle the person paying the same to be substituted in the place of the original creditor. *The payer must have acted on compulsion to save himself from loss, and it is only in cases where the person paying the debt of another stands in the relation of a surety or is compelled to pay in order to protect his own interests, or by virtue of legal process, that equity substitutes him in the place of a creditor without any agreement to that effect; in other cases the debt is absolutely extinguished, and thus a mere volunteer or intermeddler who, having no interest to protect, and without any legal or moral*

obligation, pays the debt of another, is not entitled to subrogation without an agreement to that effect, or an assignment of the debt, the payment in his case absolutely extinguishing the debt."

In this instance Mr. Reed does not pretend to have the assignment from the person to whom he paid the twenty-five hundred dollars, in behalf of the Company.

Mr. Reed admits he was not requested to pay the debt. He cannot well say that he was legally or morally bound to pay the debt. His only excuse for paying it was his statement that he was satisfied to do so "so long as his friends held the bonds." On the theory that he had a right to make the payment in order to protect his own interest, yet, was he not first required to request the official Board of Directors to make the payment before he can be heard to say, that he was obliged to pay in order to protect himself? In other words, until the official Board had failed or refused to pay, he cannot in law be heard to say that he was obliged to pay, in order to protect his own interest.

Counsel for the plaintiff contends that the Company has ratified the loan or accepted the benefits, and cannot, therefore, be permitted to plead "no authority."

It is our contention that the Company cannot be held to a ratification of this loan, without it had knowledge of the loan, or without the lapse of a sufficient length of time as to impute knowledge to it. Moreover this ratification must be saddled upon the Company if at all, through its official Board of Directors. It is not denied that there was a legally existing Board of Directors of thirteen men at the time the alleged loan was made; that the Board was holding meetings is also admitted. Mr. Reed himself confesses that he did not call a meeting of the Board of Directors for the purpose of raising money to pay the interest on the bonds, nor did he, after making the loan, inform the Board officially or otherwise that he had made the loan. He said "probably" he had talked it over with Mr. Kuehnle, so the uncontradicted proof is that the official Board never knew of the transaction. (See testimony of Dr. Sooy, Mr. Barrett, Mr. Ryan and Mr. McNamee). And cannot therefore be held to a ratification.

Conceding that the official Board was not formally or otherwise apprised of the loan, is it bound by reason of the fact that the money was traced into the Company's treasury, when it is admitted that Reed as president and general manager, had the custody of the books and kept them in his possession, and failed to notify the Board of the fact that he advanced the money? We think not.

As president and counsel for the Company, Mr. Reed should at least have made a formal entry on the books of the Company with respect to his loan, even though he did fail to have the Board officially authorize the loan and have the action of the Board evidenced and authenticated by resolution appearing in the minutes of the Company.

It is Mr. Reed's and not the Company's, fault that there is no written or documentary proof of the alleged loan. The Company only has what Mr. Reed saw fit to give it, yet he finds fault with the Company because it cannot disprove his loan and prove repayment. He no doubt, took particular pains to protect himself before turning the books over to the new Board of Directors.

We respectfully submit, therefore, that the plaintiff has failed to prove ratification on the part of defendant Company.

We also respectfully submit that Reed was without authority to make the loan to the Company, in view of the foregoing facts and circumstances. His unauthorized act of advancing the money in question, is not binding upon the Company in the absence of a request, acquiescence or ratification on the part of the official Board of Directors. (Clement vs. Young's Amusement Company, 70 N. J. E., 647; Thomson vs. Central Passenger Railway Company, 80 Vroom, page 328.)

There is no proof, save Reed's own word, that the Company got the benefit of the twenty-five hundred dollars. True, Reed says he put the money in the Company's treasury. He undoubtedly did put twenty-five hundred dollars in the Company's treasury, but whose money was it, Reed's or the Company's? He says it was his money, but his conduct contradicts him.

Which shall the jury believe? Evidently they preferred to believe his conduct, and properly so.

Reed's conduct in connection with the loan is susceptable of two interpretations; first, that he had accidentally deposited the Company's money to his own credit, and later, when the Company needed money, he voluntarily advanced it without mentioning the matter to the Board, or, secondly, that he repaid himself out of the funds of the Company while he had them under his control.

This explains why he did not call a meeting or call upon some or all of the Directors to pay their share; why he kept the loan a secret; why he did not call upon the Board for repayment; why he made no formal entry in the minute book; why he asked for no security nor did accept or receive any; why he let eight or ten months slip by without formally and *peremptorily* demanding payment; why he left the books, stocks, bonds, moneys and effects of the Company slip from under his control and in hostile hands without first satisfying that just and meritorious claim of his.

Is it possible, is it probable, is it human that this plain lawyer, a practical man of big business, should forget his own claim of twenty-five hundred dollars? Should fail to avail himself of the Company's funds in his own hands to reimburse himself? Should say nothing to the men whom he had benefited and befriended; should keep quiet many months and demand payment of a new Board who had not benefited by the loan, and who knew nothing of the transaction? Should continue to sleep on a fresh claim for many more months, and then bring suit, not in his own county where he was known, where he lived and the witnesses resided, and where the cause of action arose, but journey to an adjoining county for the "sake of convenience?"

Moreover, he was so timid and bashful about asserting this very just claim in an adjoining County, that he finally, "under advice of counsel," brought suit, not in his own name, but in the name of another.

Certainly such conduct unexplained and unaccounted

for, leads irresistibly to but one conclusion, namely, an audacious attempt to assert an *unjust claim.*

Reed knew that under the agreement of transfer the new Board was to pay the debts of the old Board (page 37 S. of C.). He waited until the new Board took charge. He had the checks. The Company had nothing. He knew the Company had no evidence of the loan, so he took a chance. He had nothing to lose and all to gain. Such were the thoughts and motives of plaintiff in error. If there is any doubt about it, read Reed's cross-examination and that doubt will disappear. Note his lack of candor and frankness, his adroit evasiveness. His inclination to argue the case. His efforts to try the case. His captiousness. His deception. His eagerness to say anything to help his case and hurt his adversary. His bold and unblushing denial of what was the obvious truth about the employment of Mr. Nichterlein; his knowledge of Mr. Nichterlein's hand writing; his failure to recall the names of the Board of Directors and other officers of the Company; his solicitorship of the Company. Watch him "spar" and start for "cover" when the minute book was flashed in his face; when the Court "cornered him with contradictions."

The jury sat silently by but they watched Reed's movements. They listened to his excuses and explanations. They heard his reasons for advancing the loan; for his failure to call upon the Directors to make the loan or inform them that he had made the loan, for his failure to protect himself and his failure to institute suit. Yes, they heard Mr. Reed, but they did not heed him; they couldn't; they wouldn't, when he had told so many "strange stories," as to why he had loaned the money, or why he had not immediately insisted upon reimbursement.

There can be no doubt but what if Reed had really loaned that money the jury's verdict would have been in his favor.

Respectfully submitted,

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