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NOTICE OF APPEAL.

Filed January 21, 1930.

Essex County Circuit Court

JOSEPH C. HUGHES,

Plaintiff,

vs.

RANKIN REALTY Co., a New
Jersey corporation, *et als.*,
Defendants.

*Action
at Law.*

*Notice
of Appeal.*

10

To Messrs. Peck & Rawson, attorneys of the
plaintiff;

20

Gentlemen:

PLEASE TAKE NOTICE that the defendant, Irving-
ton Iron Works, a corporation, hereby appeals
to the Court of Errors and Appeals, from the
judgment entered in the above-entitled action on
October 21, 1929, in favor of the plaintiff against
the defendant, Irvington Iron Works, a corpora-
tion.

Yours, etc.,

30

KANTER & KANTER,
Attorneys of Defendant,
Irvington Iron Works, a corporation.

Newark, New Jersey, January 20, 1930.

Service of the foregoing notice of appeal is
hereby acknowledged this 20th day of January,
A. D. 1930.

THOMAS J. MARKEY,
Attorneys of Plaintiff.

40

SUMMONS.

The State of New Jersey to Rankin Realty Co., a New Jersey corporation, Charles H. Smith, Israel Smith, Hyman Smith, Max Stupelman, Hyman Rogorein, and Irvington Iron works.

10

You are summoned to answer the annexed complaint of Joseph C. Hughes, in an action at law in the Circuit Court of Essex County. AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

WITNESS, NELSON Y. DUNGAN, Judge of the Circuit Court, at Newark, this 19th day of May, Nineteen Hundred and Twenty-eight.

JOHN H. SCOTT,
Clerk.

PECK and RAWSON,
Attorneys.

30

40

Summons.

STATE OF NEW JERSEY, } ss.
 ESSEX COUNTY.

CHAS. BRUEMMER, Special Deputy Sheriff of the County aforesaid, being duly sworn, on his oath deposes and says that on the 22nd day of May, A. D. 1928, he delivered personally to the said defendant Charles W. Smith, a true copy of the within summons and complaint, with a ten days' notice endorsed thereon. 10

CHAS. BRUEMMER.

Subscribed and sworn to, this 29th day of May, A. D. 1928.

HARVEY W. KEOUGH,
 Notary Public of New Jersey.

20

STATE OF NEW JERSEY, } ss.
 ESSEX COUNTY.

CHAS. BRUEMMER, Special Deputy Sheriff of the County aforesaid, being duly sworn, on his oath deposes and says that on the 22nd day of May, A. D. 1928, he delivered personally to the said defendant Irvington Iron Works, Wm. Katchen, Agent in charge, a true copy of the within summons and complaint, with a ten days' notice endorsed thereon. 30

CHAS. BRUEMMER.

Subscribed and sworn to, this 29th day of May, A. D. 1928.

HARVEY W. KEOUGH,
 Notary Public of New Jersey.

40

Summons.

STATE OF NEW JERSEY, } ss.
 ESSEX COUNTY.

10 CHAS. BRUEMMER, Special Deputy Sheriff of
 the County aforesaid, being duly sworn, on his
 oath deposes and says that on the 23rd day of
 May, A. D. 1928, he delivered personally to the
 said defendant Israel Smith and Rankin Realty
 Co., (Irving Seigler reg. agent), a true copy of
 the within summons and complaint, with a ten
 days' notice endorsed thereon.

CHAS. BRUEMMER.

Subscribed and sworn to, this 29th
 day of May, A. D. 1928.

20 HARVEY W. KEOUGH,
 Notary Public of New Jersey.

30

40

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH C. HUGHES,

*Plaintiff,**vs.*

RANKIN REALTY Co., a New
 Jersey corporation; CHARLES
 H. SMITH, ISRAEL SMITH,
 HYMAN SMITH, MAX STUPEL-
 MAN, HYMAN ROGOREIN and
 IRVINGTON IRON WORKS,

Defendants,

*Action
 at Law.
 Complaint.*

10

Plaintiff residing in the City of Newark,
 County of Essex and State of New Jersey says
 that:

20

(1) On March 2, 1928, the defendant, Rankin
 Realty Co., a corporation of the State of New
 Jersey, made and delivered to Stupelman &
 Rogorein its note of that date for thirteen hun-
 dred (\$1,300.00) dollars payable to Stupelman
 & Rogorein their order two months from the
 date, at the Colonial Trust Company at Newark,
 New Jersey.

30

(2) The said note was endorsed by Charles
 H. Smith, Israel Smith and Hyman Smith and
 the payee Stupelman & Rogorein and the Irv-
 ington Iron Works, a corporation of the State
 of New Jersey, which said corporation before
 the date of maturity of said note, duly endorsed
 and delivered it to plaintiff herein.

40

Complaint.

(3) On the date that the same fell due, it was presented for payment at the place where it was made payable, but not paid.

(4) Notice was therefore duly given to said corporation of the State of New Jersey and Rankin Realty Co., a New Jersey corporation.

(5) Said note is now the property of the plaintiff and is unpaid.

Plaintiff demands as damages the sum of thirteen hundred (\$1,300.00) dollars with interest from March 2, 1928, and protest fees of three dollars and eight (\$3.08) cents, besides costs of court to be taxed.

PECK and RAWSON,
Attorneys of Plaintiff.

“SCHEDULE A”

\$1300.00 Newark, N. J. March 2, 1928

Two months (2) after date we promise to pay to the order of Stupelman & Rogorein,

Thirteen Hundred 00/100 Dollars
at Colonial Trust Co., Newark, N. J.

Value received with Int.

Rankin Realty Co.,
Charles H. Smith, Treas.
Israel Smith, Pres.

No. 35589 Due 5/2

Endorsements:
Charles H. Smith
Israel Smith
Hyman Smith
Max Stupelman

Complaint.

Hyman Rogorein
 Irvington Iron Works
 B. Bernstein, Pres.
 Joseph C. Hughes

To the Within Named Defendants:

TAKE NOTICE that if the within summons and complaint be served upon you personally and you intend to make defense, then you must file an affidavit of merits within ten days of such service, and must file an answer within twenty days of such service; and in default thereof, judgment will be entered against you. Lawful service upon a corporation is deemed personal service.

10

PECK and RAWSON,
 Attorneys for Plaintiff.

20

I hereby appoint and depute Charles Bruemer to serve the within writ.

Witness my hand and seal this 21st day of May, 1928.

CONRAD DEUCHLER,
 Sheriff.

By: ALFRED C. WALKER,
 Under Sheriff.

30

Rankin Realty Co. a corp.

I served the within summons and complaint with a ten day notice endorsed thereon upon the following within named defendants on May 21, 1928, upon Hyman Rogorein by leaving a true copy thereof with his wife at his usual place of abode 82 Aldine street, Newark, N. J.,

40

Complaint.

- on May 22, 1928, upon Irvington Iron Works by leaving a true copy thereof with Wm. Katchen agent in charge at 485 Lyons avenue, Irvington, N. J., and by delivering a true copy thereof to Charles H. Smith at his usual place of abode 61 Elmwood avenue, Montclair, N. J. On
- 10 May 23, 1928, by delivering a true copy thereof to Israel Smith at his usual place of abode, 757 Stuyvesant avenue, Irvington, N. J., and by delivering a true copy thereof to Irving Seigler as agent of Rankin Realty Co., a corp., at 164 Market street, Newark, N. J., and upon Max Stupelman by leaving a true copy thereof with his wife at his usual place of abode 108 Goodwin avenue, Newark, N. J. On May 25, 1928,
- 20 upon Hyman Smith by leaving a true copy thereof with a member of his household over the age of 14 years at his usual place of abode 85 S. Orange avenue, Newark, N. J.

CONRAD DEUCHLER,
Sheriff.

By CHAS. BRUEMMER,
Special Deputy.

30

40

AFFIDAVIT OF MERITS.

Filed May 29, 1928.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH C. HUGHES,

Plaintiff,

vs.

RANKIN REALTY Co., a corporation, *et als.*,

Defendants,

*Action
at Law.*

*Affidavit
of Merits.*

10

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

20

CHARLES KANTER, of full age, being duly sworn, according to law, on his oath, deposes and says:

I am a member of the firm of Kanter & Kanter, attorneys of the defendant, Irvington Iron Works. I believe that this defendant has a just and legal defense to the action on the merits of the case.

CHARLES KANTER.

Sworn and subscribed to before me
this 29th day of May, A. D. 1928.

30

IRVING HODES,
A Notary Public of New Jersey.

40

**ANSWER OF DEFENDANT, IRVINGTON
IRON WORKS.**

Filed June 9, 1928.

ESSEX COUNTY CIRCUIT COURT.

10

JOSEPH C. HUGHES,

*Plaintiff,**Action
at Law.**vs.*RANKIN REALTY Co., a cor-
poration, *et als.*,*Defendants,**Answer of
Defendant
Irvington
Iron Works.*

20

The defendant, Irvington Iron Works, an-
swering the complaint herein says that:

1. This defendant has no information suffi-
cient to form a belief as to the truth of the al-
legations contained in paragraphs 1 and 3 of
the complaint herein.

30

2. This defendant denies that portion of
paragraph 2 of the complaint which says that
the defendant "before the date of maturity of
said note, duly endorsed and delivered it to
plaintiff herein."

3. This defendant denies so much of para-
graph 4 of the complaint that says that this de-
fendant was given due notice.

FIRST SEPARATE DEFENSE.

40

4. This defendant says that it is an accom-
modation endorser on the note set forth in the
complaint, and that the plaintiff, before he took
said note, knew that this defendant was an ac-
commodation endorser of said note.

Answer of Irvington Iron Works.

SECOND SEPARATE DEFENSE.

5. The note set forth in the complaint herein was negotiated to the plaintiff by Max Stupelman and Hyman Rogerein, two of the defendants in this suit, and two of the prior endorsers on the note set forth in the complaint.

10

THIRD SEPARATE DEFENSE.

6. This defendant endorsed said note for the accommodation of Max Stupelman and Hyman Rogerein and said fact was known to the plaintiff when he received the note set forth in the complaint.

FOURTH SEPARATE DEFENSE.

7. This defendant is a corporation of the State of New Jersey organized and existing under and by virtue of the Statute of the State of New Jersey entitled "An Act concerning corporations (revision of 1896)" as supplemented and amended, and as such a corporation cannot legally become or be an accommodation endorser.

20

OBJECTION IN LAW TO COMPLAINT.

8. The complaint herein set forth no cause of action in favor of the plaintiff against this defendant, and this defendant will move at or before the trial of this cause, for an order striking out said complaint as to this defendant.

30

KANTER & KANTER,
Attorney of Defendant,
Irvington Iron Works.

40

AFFIDAVIT OF JOSEPH C. HUGHES.

Filed June 16, 1928.

ESSEX COUNTY CIRCUIT COURT.

10	JOSEPH C. HUGHES, <i>Plaintiff,</i> <i>vs.</i>	}	<i>Affidavit.</i>
20	RANKIN REALTY Co., a New Jersey corporation; CHARLES H. SMITH, ISRAEL SMITH, HYMAN SMITH, MAX STUPEL- MAN, HYMAN ROGOREIN and IRVINGTON IRON WORKS, <i>Defendants,</i>		

JOSEPH C. HUGHES, of full age, being duly sworn according to law on his oath, deposes and says:

I am the plaintiff in the above-entitled action: that Rankin Realty Co., a New Jersey corporation, Charles H. Smith, Israel Smith, Hyman Smith, Max Stupelman, Hyman Rogorein and Irvington Iron Works, are indebted to me in the amount of thirteen hundred (\$1,300.00) dollars, the amount due with interest, upon a certain promissory note dated March 2, 1928, a true copy of which is annexed hereto and made part hereof. The said note was made by Rankin Realty Co., by Charles H. Smith Treasurer and Israel Smith, President and endorsed by Rankin Realty Co., a New Jersey corporation, Charles H. Smith, Israel Smith, Hyman Smith, Max Stupelman, Hyman Rogorein and Irvington Iron Works before delivery thereof to plaintiff.

40

Affidavit of Joseph C. Hughes.

That the said signature of the maker and endorsers to the note are the true signatures of said parties to the best of my knowledge and belief: that the full amount of said note is due and owing to deponent, with interest from the date of its maturity, no part having been paid.

JOSEPH C. HUGHES.

10

Sworn to and subscribed before me
this 11th day of June, 1928.

HOWARD PECK,

A Master in Chancery of New Jersey.

“SCHEDULE A”

\$1,300.00 Newark, N. J. March 2, 1928.

20

Two months (2) after date we promise to pay to the order of Stupelman & Rogorein Thirteen Hundred 00/100 Dollars at Colonial Trust Co., Newark, N. J.

Value received with int.

Rankin Realty Co.

Charles H. Smith, Treas.,

Israel Smith, Pres.

No. 35589 Due 5/2

Endorsements

30

Charles H. Smith

Israel Smith

Hyman Smith

Max Stupelman

Hyman Rogorein

Irvington Iron Works

B. Bernstein, Pres.

Joseph C. Hughes

40

Filed June 16, 1928.

ESSEX COUNTY CIRCUIT COURT.

Plaintiff,

vs.

RANKIN REALTY Co., a New
Jersey corporation; CHARLES
H. SMITH, ISRAEL SMITH,
HYMAN SMITH, MAX STUPEL-
MAN, HYMAN ROGOREIN,
Defendants.

This action is founded on a promissory note of which the following is a true copy.

\$1,300.00 Newark, N. J. March 2, 1929.

Two months (2) after date I promise to pay to the order of Stupelman & Rogorein Thirteen Hundred 00/100 Dollars at Colonial Trust Co., Newark, N. J.

Value received with int.

Rankin Realty Co.

Charles H. Smith, Treasurer

Israel Smith, Pres.

Affidavit of Joseph C. Hughes.

#35589 Due 2/5

Endorsements:

Charles H. Smith

Israel Smith

Hyman Smith

Max Stupelman

Hyman Rogorein

10

Note Due May 2, 1928.

\$1,300.00

Protest Fees and Postage

3.08

Interest from March 2, to June 16,
at 6%

22.51

Amount due

\$1,325.59

I, JOHN H. SCOTT, Clerk of the Circuit Court, 20
 having examined the plaintiff's complaint and
 being satisfied that the above statement and
 calculation are correct, do hereby assess the
 damages of the plaintiff against the defendant
 in the above stated cause, at the sum of One
 Thousand Three Hundred Twenty-five Dollars
 and Fifty-nine Cents (\$1,325.59), besides costs
 of suit to be taxed.

JOHN H. SCOTT,

Clerk.

30

Dated June 16, 1928.

RULE FOR JUDGMENT INTERLOCUTORY

Filed June 16, 1928.

ESSEX COUNTY CIRCUIT COURT.

10	JOSEPH C. HUGHES,	}	<i>Action at Law. Rule for Judgment.</i>
	<i>Plaintiff,</i>		
	<i>vs.</i>		
	RANKIN REALTY Co., a New Jersey corporation; CHARLES H. SMITH, ISRAEL SMITH, HYMAN SMITH, MAX STUPEL- MAN, HYMAN ROGOREIN, <i>Defendants,</i>		

20 The summons and complaint in this cause having been duly served upon the defendants on May 22, 1928, and defendants having failed to file an answer or taken any other step in response to said complaint within the time limited by the rule of the Court.

30 It is ordered that judgment interlocutory be entered against the defendants Rankin Realty Co., a New Jersey corporation, Charles H. Smith, Israel Smith, Hyman Smith, Max Stupelman, Hyman Rogorein, and in favor of the plaintiff Joseph C. Hughes,

And the damages of the plaintiff having been assessed by the Clerk of the Court at the sum of one thousand three hundred twenty-five dollars and fifty-nine cents (\$1,325.59), with costs to be taxed.

On motion of

PECK & RAWSON,

Attorneys.

40 Rule entered this 16th day of June, 1928.

**ORDER DENYING PLAINTIFF'S MOTION
TO STRIKE OUT ANSWER.**

Filed July 16, 1928.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH C. HUGHES,

Plaintiff,

vs.

RANKIN REALTY Co., a New
Jersey corporation, *et als.*,
Defendants,

*Action
at Law.*

*Order Deny-
ing Plain-
tiff's Motion
to Strike
Answer.*

10

This matter having been opened to the Court by Messrs. Peck & Rawson, attorneys of the above named plaintiff, on due notice to and in the presence of Messrs. Kanter & Kanter, attorneys of Irvington Iron Works, one of the defendants, in the above-entitled action, on motion of the said plaintiff's attorneys to strike out the answer filed by the aforesaid defendant, Irvington Iron Works, a corporation and the Court having read and considered the affidavits in support of, and in opposition to, said motion, and having heard and considered the arguments of respective counsel, and the Court being of opinion that the aforesaid motion should be denied, it is thereupon on this fourteenth day of July, A. D. 1928, ORDERED that the said plaintiff's motion to strike out the answer of the defendant, Irvington Iron Works, a corporation shall be and hereby is, denied.

20

30

WORRALL F. MOUNTAIN,

Judge.

40

REPLY.

Filed July 24, 1928.

ESSEX COUNTY CIRCUIT COURT.

10	JOSEPH C. HUGHES,	}	<i>Action at Law. Reply.</i>
	<i>Plaintiff,</i>		
	<i>vs.</i>		
	RANKIN REALTY Co., a New Jersey corporation, <i>et als.</i> , <i>Defendants,</i>		

20 Plaintiff denies each and every of the allegations contained in the answer of the defendant, Irvington Iron Works, and joins issue thereon with said defendant.

PECK and RAWSON,
Attorneys of Plaintiff.

The within reply, if filed by July 25, 1928, shall be deemed filed in time.

30 Service of the within is hereby acknowledged this 18th day of July, 1928.

KANTER & KANTER,
Attorneys of Defendant,
Irvington Iron Works.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH C. HUGHES,	}	<i>Action at Law.</i>	10
<i>Plaintiff,</i>			
<i>vs.</i>			
IRVINGTON IRON WORKS, INC.,			
<i>Defendant.</i>			

On verdict by a jury.

Judgment entered October 21, 1929.

Damage	\$1,427.50	20
Costs	110.01	
Total	\$1,537.51	

Peck & Rawson, attorneys of plaintiff.

This action was tried before Judge Worrall F. Mountain, with a jury at the Essex Circuit Court on October 21, 1929.

The cause having been heard and submitted to the jury they return their verdict as follows: 30

They find in favor of the plaintiff Joseph C. Hughes and against the defendant Irvington Iron Works, Inc., for the sum of one thousand four hundred twenty-seven dollars and fifty cents (\$1,427.50), damage.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of one thousand four hundred twenty-seven dollars and fifty cents and costs which are taxed at one 40

Judgment.

hundred ten dollars and one cent making in the whole the sum of one thousand five hundred thirty-seven dollars and fifty-one cents.

Judgment entered and signed October 21, 1929.

Book 108 Circuit Court Judgments, page 482.

10

ESSEX COUNTY CLERK'S OFFICE.

(STATE SEAL)

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

I, JOHN H. SCOTT, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey.

20 Do HEREBY CERTIFY, That the foregoing is a true and correct copy of all the pleadings in the case of Joseph C. Hughes, plaintiff, *v.* Rankin Realty Co., a New Jersey corporation, *et als.*, defendants, together with a copy of the judgment record entered in Book 108 Circuit Court Judgments, page 482, prepared for removal to the Court of Errors and Appeals, and the same is taken from and compared with original copies of all records and as the same now remains on

30 the files of said office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this 29th day of January, A. D. 1930.

JOHN H. SCOTT,
(SEAL) Clerk.

TESTIMONY.

ESSEX COUNTY CIRCUIT COURT.

October 18, 1929.

JOSEPH C. HUGHES,

*Plaintiff,**vs.*RANKIN REALTY Co. and IRVING-
TON IRON WORKS, *et al.**Defendants,**Action
at Law.*

10

Before Hon. Worrall F. Mountain, J., and a jury.

20

For the plaintiff appear Peck & Rawson (by Thomas J. Markey).

For the defendants appear Kanter & Kanter (by Elias Kanter).

(A jury is called and sworn.)

Mr. Markey opens for the plaintiff.

Mr. Kanter opens for the defendant, Irvington Iron Works.

The Court: There has been a judgment entered against the other defendants, hasn't there? Is that open?

30

Mr. Kanter: Judgment was entered by Mr. Markey and no execution issued.

Mr. Markey: No execution issued on the property.

The Court: Against all defendants except the Irvington Iron Works?

Mr. Markey: Yes, your Honor.

40

Joseph C. Hughes, direct.

JOSEPH C. HUGHES, plaintiff, sworn in his own behalf.

Direct examination by Mr. Markey.

Q Where do you live? A 63 Stecher street.

10 Q You are the plaintiff in this action? A Yes, sir.

Q I show you a note dated March 2, 1928. Are you the owner of that note? A I am.

Q Has anything been paid on account of that note? A No.

Q By whom was that note endorsed? A Charles H. Smith, Israel Smith, Hyman Smith, Max Stupelman, Hyman Rogovin, Irvington Iron Works, B. Bernstein, President and Joseph C. Hughes.

20

Mr. Markey: I offer the note in evidence.
(Same is marked Exhibit P. 1.)

Q Do you remember the date when you acquired this note? A March 9th, I believe.

Q What year? A 1928.

Q Explain to the Court and jury the circumstances under which you received that note.

30 A Upon the same day as I received the note the Irvington Iron Works, Bernard Bernstein called on the phone stating that he had some papers there which he would like to dispose of, to which over the telephone I first replied, "I do not think I would be able to do anything at all." He suggested I come to see him anyway and after a little conversation by telephone I agreed I would go up to this office, which I did. Upon entering the office we then discussed, by me stating first, "Well, what is it you have the
40 matter?" and he said then and there by holding

Joseph C. Hughes, direct.

in his hand this particular note that Stupelman and Rogovin had given them this note, but didn't say for what, but that they would like to get some money out of it and he wanted to know what I would give for it. I said I would give a sum which I knew could not be accepted as adequate, *i. e.* \$1,000. After some conversation with Bernard Bernstein and cross conversation between Bernard Bernstein and Rogovin and Stupelman a sum was agreed upon at a discount of \$62.50. During this time Stupelman and Rogovin for the first time in my life became known to me and at that time I didn't know where they came from and still do not know where they reside. I therefore negotiated with Bernard Bernstein in person and with no other for the purchase of that note.

10

20

By the Court.

Q Was this at the office of the Irvington Iron Works? A Yes, your Honor.

By Mr. Markey.

Q What is the amount of this note? A \$1,300.

Q How much did you pay for it? A \$1,232.50.

30

Q I show you a check. Is that your check? A It is.

Q To whom is that made payable? A Irvington Iron Works.

Q Is that the check you gave in payment of this note? A It is.

Q Was it used by the Irvington Iron Works? A It was.

40

Joseph C. Hughes, direct.

Mr. Markey: I offer the check in evidence.

Mr. Kanter: No objection.

(Same is marked Exhibit P. 2.)

10 Q After you received this note what did you do with it? A Took it to the Mutual Bank of Roseville, now the Washington Trust Company and sold the note to the bank.

Q When was the first time you learned that that note had not been paid? A On the day of May 2nd in that afternoon.

20 Q How did you find out it had not been paid? A The bank called me on the telephone advising me that this note had not been paid and asked my advice with regard to the endorsers and their notification. I advised the bank—

Mr. Kanter: I object to the witness going on to state any conversation not in the presence of the defendants, because that would not, of course, be binding upon us.

By the Court.

30 Q Just tell us what you know of your own knowledge without relating any conversation.

By Mr. Markey.

Q Did you receive notice of nonpayment from the bank? A Yes, sir.

Q On what date? A May 3rd.

Q I show you a paper. Was that received by you on May 3rd? A It was.

40 Q I show you another paper. Was that received on May 3rd (indicating)? A Yes, sir.

Joseph C. Hughes, direct.

Q And two other papers (indicating). Were these received on May 3rd? A Yes, sir; May 4th, I beg your pardon.

Q Which were received on May 4th? A This notice of the check being charged back to me.

Q When this notice of the check being charged back to you was received on May 4th— A 10
Yes, sir.

Q When were the other papers received? A
May 3rd.

Mr. Kanter: I ask that the papers be marked separately. He showed the witness a number of papers.

Q When was this paper received? A May 3rd.

Q What is this? A Notice of protest of a 20
certain document.

Mr. Markey: I offer these certificates in evidence.

Mr. Kanter: No objection.

(Same is marked Exhibit P. 3.)

Q This paper was received on what date? A
May 3rd.

Q What is that? A Notice of protest to me 30
personally.

Mr. Markey: I offer this in evidence.

Mr. Kanter: No objection.

(Same is marked Exhibit P. 4.)

Mr. Markey: Is there any objection if we strike out the other exhibit numbers that are on these papers?

Mr. Kanter: No objection.

Joseph C. Hughes, direct.

Q What is this paper? A A paper notifying me that a charge has been made against my account by the Mutual Bank of Roseville.

Q On what day was that received? A Received by me on May 4th.

10 Mr. Markey: I offer this paper in evidence.

Mr. Kanter: No objection.

(The same is marked Exhibit P. 5.)

Q I now show you a certificate of protest marked Exhibit P. 3 and notice of protest marked Exhibit P. 4. Tell the Court and jury what you did upon receipt of this notice. A Upon receipt of this on May 3rd I called the
20 Irvington Iron Works by telephone and received a response thereon by a person whom I believe to be Bernard Bernstein and states that this note had been protested, and I would like to see him on the matter. Thereupon, soon after, within a few minutes, I made the journey to the Irvington Iron Works office, but did not find Bernard Bernstein in the office, but on that visit to the office I had a conversation with Mr. Katchen, Sr., with relation to this and he suggested to me that we might go over to some
30 works where we could see the prior endorsers, that was Stupelman and Rogovin. We journeyed to this works, somewhere in Irvington, in the vicinity of Olympic Park, the exact street I do not know. At the works there we saw one of these men, which one I do not remember, and discussed the fact of the note not being paid. That day I did not see the other person at all, but the following day I again journeyed to the Irvington Iron Works office seeking to interview
40

Joseph C. Hughes, direct.

Mr. Bernstein, which I had requested. Again he was not there and I left a copy of this notice of protest with the office of Mr. Katchen, Sr.

Q On what date was that? A On May 4th, as at this time I then had the note from the bank and was seeking to obtain a payment. 10

Q Had you received any other papers from the bank together with that certificate of protest? A No.

Q Were there any other notices? A One for myself and one for the Irvington Iron Works.

Q Was that the notice that you delivered to the Irvington Iron Works? A It was.

Q About what time of day was that? A 11:30 in the forenoon. 20

Q Who was present to receive it? A Mr. Katchen, Sr., whom I waited in the office to see until he arrived. He was not in the office on my arrival, only a girl stenographer or book-keeper was there.

Q Did you have any conversation with Mr. Katchen at that time? A Yes, sir.

Mr. Kanter: I object.

Q Did you have any conversation with Mr. Katchen at that time relative to this note? 30

Mr. Kanter: I object to the question on the ground the agency to bind the Irvington Iron Works by Mr. Katchen has not been proved.

The Court: Sustain the objection.

Q Were you acquainted with Mr. Katchen? A Yes, sir. 40

Joseph C. Hughes, direct.

Q Had you had any previous dealings with the Irvington Iron Works? A Yes, sir.

Q Were they known to you? A Yes, sir.

Q Do you know who the officers for the company were? A Only as president, Bernard Bernstein.

10 Q Did you know any of the other officers?
A No.

Q Did you know what Mr. Katchen's position was there? A No, excepting on prior occasions he was the man in charge of the works more frequently than any other person to whom you could refer.

Q Had you talked to Mr. Bernard Bernstein at all relative to this note and this nonpayment?
A Not on that day.

20 Q When did you speak to him about it? A
At an early date thereafter, but I could not state the date.

Q What was the conversation?

Mr. Kanter: I object to the conversation on the ground that it is not material, unless the time and place are definitely stated, so we can be ready to meet it.

30 The Court: I will admit it.

A The conversation when I did come in contact with Mr. Bernstein was that he was endeavoring to obtain some payment from prior parties of interest. My reply being that that was all I was looking for whomsoever it comes from.

Q Did you receive any payment at any time subsequent thereto or any time on account of this note? A No.

Joseph C. Hughes, cross.

Cross examination by Mr. Kanter.

Q Do you recall testifying at a prior trial of this case on March 13, 1929? A Yes, sir.

Q Is your recollection of the events which occurred in 1928 clearer today than it was in March, 1929? A No, I don't know why it would be. 10

Q You think your recollection was clearer then than it is today? A I don't know why it should be different.

Q You think your recollection was equally good on both occasions? A Probably so, yes.

Q Do you remember distinctly that you received a notice which has been marked Exhibit P. 3, being what you call a protest notice or Exhibit P. 4, another notice relating to protest of May 3, 1928, don't you? A Yes. 20

Q You also recall that you received Exhibit P. 5, that is the slip advising you that charge has been made to your account on May 4th. You remember those two dates as a fact, don't you? A Yes, sir.

Q You do not think you received those various papers on the date you have given because of the dates of the papers, do you? A No. 30

Q You say you know as a fact that on May 3, 1928, you received such papers and that on May 4, 1928, you received another paper, don't you? A Yes, sir.

Q And you say that you have an independent recollection of that fact, don't you? A I didn't relate it as independent.

Q It is a fact that you have such an independent recollection of those facts? A It is a fact that I have a recollection of those things. 40

Joseph C. Hughes, cross.

Q Do you remember testifying on March 13, 1929, that you had an independent recollection of the fact of those dates. Do you remember that? A I don't remember the word-for-word testimony at that time.

10 Q Did you make any memorandum of the dates upon which you received these various papers? A Yes, sir.

Q You testified that you kept the memoranda showing the receipt of these various papers in a book? A Yes, sir.

Q You have that book with you? A No.

Q Why didn't you produce it today? A That has not been requested before.

20 Q You knew that question came up, didn't you, on March 13, 1929, before Judge Smith in this court when you testified as follows: "Q You have an independent—" I will have to read back a question or two. Do you recall that on March 13, 1929, before Judge Smith you testified as follows: "Q This slip, Exhibit P. 3, you got on May 3rd because you saw it was dated May 2, 1928? A I got this notice on May 3rd in the morning mail. Q Do you say that because the date on that slip, Exhibit P. 3, is May 2nd? A No. Q You have an independent recollection of that fact? A I have an independent record of that fact. Q Where is that record? A In my books at home. Q Then, your recollection is based upon that record? A Yes, sir. Q You haven't that record with you? A No." Did you testify as I have just read to you? A I believe I did.

30 Q Then, it is a fact that your recollection of the dates is based upon the record which you have at home? A Yes.

40

Joseph C. Hughes, cross.

Q And you haven't brought that record with you? A No.

Q Your recollection of the dates, is that based upon that record of yours at home? A Yes.

Q You have looked up, have you not, to determine what day of the week May 2, 1928, fell?
A I am not sure. 10

Q You haven't looked it up? A No.

Q Do you know on what day of the week May 3, 1928, was? May 3rd, I am emphasizing now 1928. A No, I don't know, I believe it is on a Friday.

Q Do you recall at the last examination that you had a positive and independent recollection that May 3, 1928, was a Thursday?

Mr. Markey: I object to that, your Honor. 20

The Court: Sustain the objection.

Q You say that May 3rd was on a Friday, that is your recollection now, is that the idea?

A I haven't a recollection on the matter to be positive.

Q You say that you got in touch with Mr. Bernstein by telephone? A Yes, sir.

Q You got in touch with Mr. Bernstein by telephone on May 3, 1928, whatever day of the week that was, is that correct? A Yes, sir. 30

Q You say you think it was Mr. Bernstein you talked to? A I believe it might have been.

Q You are not certain of that fact though, are you? A I cannot see over the telephone.

Q I did not ask you that. You are not certain that you talked with Mr. Bernstein, are you? A No. 40

Joseph C. Hughes, cross.

Q You spoke to someone on the telephone on May 3, 1928, whom you thought was Bernstein, but you do not know that it was, is that right?

A No.

Q You mean I am correct in that statement?

10 A I spoke to someone and I am not certain it was Bernard Bernstein.

Q That was on May 3, 1928? A Yes, sir.

Q Now, you did not go down to the Irvington Iron Works plant on May 3, 1928, did you?

A Yes.

Q You did? A Yes.

Q What time of the day was your telephone conversation? Can you tell us that? A Between ten and eleven in the forenoon.

20 Q Did you go down to the Irvington Iron Works in the forenoon? A I did.

Q You have told us that you did not meet Mr. Bernard Bernstein there? A Correct.

Q You told us that on that occasion you met Mr. William Katchen? A Yes, sir.

Q Is that correct? A Yes, sir.

30 Q And that you spoke to Mr. William Katchen and he went up with you to see Mr. Stupelman somewhere near Olympic Park? A He suggested that we go to the works and I said, "All right, we will go."

Q The only thing that happened on May 3rd was a telephone conversation and your trip with Mr. William Katchen to Fortieth street or thereabouts in the Town of Irvington, is that correct? A Yes, sir.

Q You did not see Mr. Bernard Bernstein on May 3rd? A No.

40 Q Nor did you see any other officer on May 3, 1928? A I saw only William Katchen and the bookkeeper.

Joseph C. Hughes, cross.

Q I say you did not see Mr. Bernard Bernstein nor any other officer of the Irvington Iron Works on May 3rd? A Mr. William Katchen.

Q You do not know that he is an officer, do you? A No.

Q The only individual you saw there was William Katchen on May 3, 1928. A Yes, sir. 10

Q And the only thing you did that day was to go with Katchen and see a man by the name of Stupelman, is that correct? A Stupelman or Rogovin, I don't know which.

Q One of the two. A Yes, sir.

Q That is the only thing you did. A Yes, sir.

Q On the next day, May 4th, you did not see Mr. Bernard Bernstein, did you? A No. 20

Q Nor did you see Mr. Bernard Bernstein on May 5, 1928? A No, I did not see anyone at the Irvington Iron Works on May 5th.

Q Because that day was a Sunday, wasn't it? A I think it was a Sunday.

Q Therefore you say you saw no one on May 5, 1928. A No.

Q Is that the reason for your conclusion because you base it upon your belief that May 5, 1928 was a Sunday? 30

Mr. Markey: I object.

The Court: I will admit it.

Q (Question read.) A Yes.

Q You say you did not see anyone at the Irvington Iron Works on May 5th because it is your belief that May 5th was a Sunday and you therefore wouldn't have seen anyone on Sunday?

A Correct. 40

Joseph C. Hughes, cross.

Q The first time you saw Mr. Bernstein was about how many weeks after you received the notice of dishonor? A It was not weeks, it was but days.

Q About how many days? A Three days, four days.

10 Q You mean to indicate a lapse of— A The early part of the week following.

Q The week following. You did not see him on the Monday of the week following, did you? A I don't know.

Q You don't believe so, do you? A I don't know.

Q You wouldn't say so as a fact? A No.

Q The only thing that happened in the week following, can you tell us whether it was the early part or the latter part of the week? A
20 The early part of the week.

Q By that you mean Monday, Tuesday or Wednesday? A Not later.

Q Not later than Wednesday? A No.

Q You do not believe it was Monday? A I don't know.

Q In any event the only thing that happened on that occasion was that Mr. Bernstein asked you to get a payment from some of the end-
30 dorsers, is that the idea? A At that time there were—

Q I say when you saw Mr. Bernstein during the week commencing with the Monday when you had this episode the only conversation that you had with Mr. Bernstein was his suggesting to you that you get part payment from the prior endorsers? A I was seeking the payment and I didn't care from whom.

Q He suggested that you get it from the prior endorsers, didn't he? A I was calling on Mr.
0

Joseph C. Hughes, cross.

Bernstein at the time seeking payment and it wouldn't matter whether the Irvington Iron Works or the Rankin Realty Company paid it.

Q Didn't Mr. Bernstein tell you, "Try to get payment from the prior endorsers or the maker"? A No.

Q The only thing you came there for was to demand payment? A Yes, sir. 10

Q And his answer was what? A The answer that was made at that time was that they would give me another note.

Q Another note? A In payment.

Q Another note of whom? A They said the note would be made by the prior endorsers, I will not relate whether it was the Smith people only or Rogovin or Stupelman only, but it would have a firm name that was a prior endorser and the Irvington Iron Works indicated their willingness to do in a similar manner what they had done before, make the necessary negotiations. 20

Q I want to get this fact fixed, please. The first time that you spoke to Mr. Bernard Bernstein personally was sometime during the following week, is that correct? A Yes, sir.

Q That is undoubtedly correct, is it? A Yes, sir.

Q You received the notice from the Mutual Bank of Roseville on May 3rd, you say? A Yes, sir. 30

Q You lived where in 1928? A The Forest Hill section of Newark, at 313 Clifton avenue.

Q You did not receive that notice on May 2nd, did you? A No.

Q Do you know the length of time that it takes for a letter to reach from Newark to Irvington in the due course of mail? A Probably twenty-four hours. 40

Joseph C. Hughes, cross.

Q You mean when you drop a letter in the letter box on May 3rd it will reach Irvington on May 4th? A Generally.

Q That was the due course of mail? A Yes.

Q And vice versa? A Yes.

10 Q You did not mail any notice to the Irvington Iron Works, did you? A I did not.

Q The occasion that you say you presented the notice of dishonor, or when you gave it to Mr. William Katchen— A That is correct.

Q When you gave that notice to Mr. William Katchen did you go up to see Stupelman right after that? A No.

20 Q There is no question in your mind, is there, but that you had given this notice to William Katchen? A None whatever.

Q The date that you gave the notice to him was what? A May 4th.

Q Are you sure about that? A The day following which I received it from the bank in the forenoon.

Q On May 4th you gave it to Katchen? A I did.

30 Q Did you, following the presentation of this notice to Katchen, go up to see Stupelman and Rogovin? A In the afternoon, yes.

Q Did you go back again and see Mr. Katchen? A I went to lunch between the time I gave Mr. Katchen the notice and my return trip to the office of the Irvington Iron Works and our trip to see Stupelman and Rogovin. I went to lunch. In the afternoon we did go out together.

40 Q You did not see Bernstein that afternoon, did you? A I did not.

Joseph C. Hughes, cross.

Q You did not mention the occasion of your second trip, did you, this afternoon trip of May 4th prior to this present occasion? A I do not remember; they were divided into two separate trips, but I do remember the incident was testified before.

Q Now, I want to be sure of the fact that you telephoned, you say, on May 3rd? A Yes. 10

Q You did not go down to the Irvington Iron Works on May 3rd? A I did.

Q But saw nobody? A I saw Mr. William Katchen.

Q And gave him the notice? A I didn't give him the notice at that time. We discussed the question and he suggested that we see Stupelman and Rogovin.

Q Then did you go up to see Stupelman and Rogovin on May 3rd? A We went to the works in Irvington together. 20

Q I want this absolutely straight because I am not clear in my mind about it. You say on May 3rd you came down to the office of the Irvington Iron Works, didn't you? A Yes.

Q Did you on that day give a notice of dishonor to William Katchen, yes or no? A No.

Q When did you give a notice of dishonor to William Katchen? A On the forenoon of May 4th, or the day following its receipt by me in the mail. 30

Q You gave a notice of dishonor to William Katchen in the forenoon of May 4th? A Yes, sir.

Q Your first occasion when you spoke to William Katchen was on May 3rd? A Yes, sir.

Q Did you on May 3rd go up to see Stupelman and Rogovin? A I went up to the works 40

Joseph C. Hughes, cross.

and saw someone there, Stupelman or Rogovin, I don't know which.

Q On May 3rd? A Yes, sir.

Q You say you delivered the protest notice to Mr. Katchen on May 4th? A Yes, sir.

10 Q You did not go up to see Stupelman and Rogovin on May 4th? A In the afternoon we endeavored to see them.

Q Did you see Stupelman and Rogovin on May 4th? A No, not that I remember.

Q I call your attention to your testimony in the prior trial.

Mr. Markey: I object to the use of that testimony, unless it is identified as a true copy.

20 Mr. Kanter: I have my own notes and this was taken by Mr. Kirschenbaum, Judge Smith's stenographer.

30 Q Did you testify as follows on May 13th, "When you delivered the notice of protest to Mr. Katchen, did Mr. Katchen say anything to you?" and your answer was "Yes." "Q What did he say, if anything? A He suggested that we go over to see Stupelman and Rogovin and in his car I went with him to their works, it was somewhere in Irvington, the upper end of Irvington. It seems to me to be 40th street or thereabouts. We went to find Stupelman or Rogovin and found one of the men there." Did you so testify? A Yes.

Q In other words, you testified on a prior occasion when you went to see Stupelman and Rogovin it was on May 4, 1928, and you did on that occasion see one of those men, either Stupelman or Rogovin? A Yes.

Joseph C. Hughes, cross.

Q Your present testimony is that you went with Mr. Katchen and you testified here today that the occasion of your going up to see Stupelman and Rogovin was on May 3, 1928. I have read you from testimony in a prior trial from which it appears you testified that you went to see Stupelman and Rogovin on May 4, 1928, and only saw one of those men, either Rogovin or Stupelman on May 4, 1928? Now, I ask you which date is correct? A They are both correct. 10

Q You said here that you saw Stupelman on only one occasion, either Stupelman or Rogovin, and on one of those occasions when you went up with Mr. Katchen? A Yes.

Q You said you went up there on May 3rd and saw Mr. Stupelman with Mr. Katchen and that when you went up there May 4th you did not see either Stupelman or Rogovin or Katchen. Do you remember so testifying here? A I testified that on May 3rd we went to the works and saw one of the two. I testified that we went to the works on May 4th and saw one or two. 20

Q You say you so testified here today, do you? A Yes.

Q Did you give Mr. Katchen the notice of dishonor on May 3rd? A No. 30

Q You had it? A Yes.

Q Why didn't you give it to him? A I endeavored to see Mr. Bernstein whom I wanted to see on the matter of the adjustment, he being the person with whom I had negotiated the original transaction.

Q On the occasion of May 3rd you came down to the office in the morning and did not see Bernstein? A I did not. 40

Joseph C. Hughes, cross.

Q You came back in the afternoon and did not see Bernstein? A I did not.

Q You saw Mr. William Katchen? A On all three occasions.

Q On the afternoon of May 4, 1928, you then for the first time delivered to Mr. William
10 Katchen the notice of dishonor that you had in your possession dated May 3rd? A In that forenoon, I believe, the notice of dishonor.

Q When did you come to see Stupelman, in the forenoon or the afternoon? A We went in the afternoon of the 4th and endeavored to see Stupelman. I went together with Mr. Katchen.

Q When did you actually see Stupelman? A He wasn't at the works.

Q I didn't ask you that; I asked you when
20 you actually saw him. A Late in the afternoon.

Q Of May 4th? A If I remember the date correctly.

Q Was it just prior to seeing Stupelman that you delivered the notice of protest or whatever paper you did deliver to Mr. William Katchen? A Several hours before. This was in the afternoon.

Q You delivered the paper to Katchen in the morning? A Yes, sir.
30

Q And went up to see Stupelman in the afternoon? A Yes, sir.

Q Let me refresh your recollection from former testimony on page nineteen: "Q When you delivered the notice of protest to Mr. Katchen did Mr. Katchen say anything to you? A Yes. Q What did he say, if anything? A He suggested that we go over to see Stupelman and Rogovin and in his car I went with him to their works, it was somewhere in Irvington,

Joseph C. Hughes, cross.

the upper end of Irvington, it seems to me to be 40th street, or thereabouts. We went to find Stupelman or Rogovin and found one of the men there." That testimony was given in connection with the fact that you delivered the notice of protest to Mr. Katchen and in your answer you suggest nothing about two visits on May 4th, do you? A You have the testimony. 10

Q Can you explain why you did not tell us about two visits on May 4th in your prior testimony? A Presumably I was not asked whether I had lunch or not.

Q Were you ever up there on Saturday at the office of the Irvington Iron Works? A Yes.

Q Were you up there on Saturday, May 5, 1928? A I don't remember.

Q You do not deny it, do you? A I don't remember. 20

Q Do you deny the fact that you were there on May 5, 1928? A If I do not remember I would never affirm or deny it.

Q Do you remember on May 5, 1928, meeting Mr. Bernstein and Mr. Katchen while they were making up some work in the office there? A No.

Q You do not remember it? A No. 30

Q You never saw Mr. Katchen and Mr. Bernstein together? A I have seen them together, but if you rely on this occasion, is that your question?

Q Yes, on May 5, 1928? A I do not remember seeing them.

Q You do not deny that you may have seen them on that day? A I don't remember.

Q May 5, 1928, was Saturday. Were you there on Saturday? A I don't remember. 40

Joseph C. Hughes, cross.

Q Was it not a fact that on your trip to see Mr. Stupelman or on Saturday morning that you went up with Katchen? A No.

Q Whose car did you go in? A Mr. Katchen's car.

Q What day of the week did you go? A
10 I believe it was Friday, insomuch as they were very much interested in making up the payroll at that time.

Q You remember the fact of the payroll, do you? A Yes.

Q When you came into the office did you find someone making up the payroll? A The bookkeeper and Mr. Katchen were there interested in work on hand in the afternoon.

Q Was Bernstein there? A If he was he
20 disappeared rapidly.

Q Did you see him while the payroll was being made up? A No.

Q The occasion of the payroll being made up is definite in your mind? A Interested in the payroll; I saw no moneys.

Q Was it on that occasion that you went up to see Stupelman? A I went out with Mr. Katchen to see Stupelman and Rogovin.

Q Was it in the morning or afternoon? A
30 Afternoon.

Q You say it was Friday? A I believe it was Friday. It was the day following the receipt of the protest, the same day on which I delivered the protest notice to Katchen.

Q Your recollection in each case is going back to the date of the notice, and you refer to my question back to the exact date. A They connect the question very clearly.

Q You have no independent recollection of the fact, have you? A I have some memory.
40

Joseph C. Hughes, cross.

Q You remember the date, do you? A I remember the day the parties—

Q What day of the week was April 27, 1928?

A That is more than I can tell you.

Q What day was April 15, 1928 on? A That is more than I can tell you.

Q In other words, in each of your answers you were referring back to some other event to fix the date. A One forming the other.

10

Q You say it was May 4th you went up there because you received the notice on May 3rd. A Yes.

Q That is the reason you say you went up there on May 4th to meet Mr. Stupelman and Rogovin? A I went out with Mr. Katchen, yes.

Q You are basing it all on the fact that you think you received the notice on May 3rd. A I received the notice on May 3rd.

20

Q On the occasion when you saw Stupelman and Rogovin, was it on that day when you saw Stupelman and Rogovin that another note was tendered to you? A I didn't see Stupelman and Rogovin together on any occasion after the purchase of this note.

Q You saw one or the other? A Yes.

Q When you saw either one or the other, either Mr. Stupelman or Mr. Rogovin following the date of the receipt of the various notices, was it then that another note was tendered to you? A The early part of the week following.

30

Q It was not on the occasion when you saw Stupelman or Rogovin. A It wasn't on either occasion when I went out with Mr. Katchen and endeavored to see one or the other at the works.

Q You told us before you saw either Mr. Stupelman or Mr. Rogovin on one occasion, I think, isn't that the truth? Didn't you so test-

40

Joseph C. Hughes, cross.

ify? A I testified that on May 3rd, the date I received this notice, I saw one of the partners at the works, whether Stupelman or Rogovin I don't remember which. I stated furthermore that on the 4th we saw Stupelman or Rogovin again.

10 Q Was it on either of these occasions to which you refer, either May 3rd or May 4th, upon which the note was offered to you? A No.

Q Do you know what note was offered to you at the time? A There was no personal possession of the note tendered.

Q When this note was offered to you was any name mentioned? A I don't know what names were to be on there but I said I would not accept it.

20 Q You do not know what names were on there? A No.

Q You do not know what note was offered you? A I did not see any note, but the note verbally was offered in payment.

Q I call your attention to your testimony on page 12, line 15, and I ask you if you so testified on a prior occasion, "Q Your lawyer has not asked you what the conversation was so I won't ask you, but that was the last time you saw them about this note? A And immediately subsequent tendered your offer to tender another note which I refused. Q That is Rankin? A Yes. Q Who offered you that new note? A It was offered to me in the office of the Irvington Iron Works by the Irvington Iron Works." Did you so testify? A Yes, sir.

30

Q You referred to the note of the Rankin Realty Company, didn't you? A Referred to a note.

Joseph C. Hughes, cross.

Q Of the Rankin Realty Company? A Yes, sir.

Q Where was that note shown you? A In the office of the Irvington Iron Works immediately subsequent to the protest time, early in the following—

Q Therefore it was not offered to you after Katchen went with you up to see Stupelman on May 3rd or 4th. A Positively not. 10

Q You say here no name was mentioned or no note. You testified here? A I beg your pardon?

Q You say here that no name was mentioned on any note. A That is what I am testifying now. I do not know what names would be on the note.

Q You testified before this occasion that the note of the Rankin Realty Company was mentioned, didn't you? A If it is a matter of record I must accept. 20

Q Didn't you go up to see Stupelman in your car? A I don't remember.

Q You don't remember whose car it was? A No.

Q Do you remember that you were introduced to Mr. Stupelman, you said, on March 9, 1928? A Yes, there was some person there whom they introduced as Mr. Stupelman. 30

Q Was Rogovin there? A Yes.

Q You never knew these people before? A Never.

Q Is your recollection of that date also definite as March 9th? A As produced by the records and the papers in question.

Q Look at the check and see if the date is March 9th (indicating). A It appears to be March 7th. 40

Joseph C. Hughes, cross.

Q So, your statement of the date is also based upon what you thought was the fact, is that right? A It appears that that check was made on March 7th.

Q Your statement that you were introduced on March 9th was incorrect? A Yes.

10 Q It was based upon your supposition that the check was dated March 9th? A Yes, sir.

Q In all cases you are relying for your answers on other facts than your independent recollection, to aid you, aren't you? A Yes, I must be aided.

Q When you were introduced to Mr. Stupelman on March 7, 1928, at the office of the Irvington Iron Works didn't Mr. Bernstein tell you that they could not use a note of the Rankin Realty Company? A He did not.

20 Q I call your attention to the testimony you have at the last examination, page 15, "Q Isn't it a fact that in your presence and in the presence of these other people, Mr. Bernstein told you that Stupelman and Rogovin offered to give a note, it being the note in question in this case, to the Irvington Iron Works in part payment of an account and they would not take it? A They said they wanted to give the note but they could not use it." Did you so testify? A Yes, sir.

30 Q A further question you were asked, "The Irvington Iron Works could not use a note of the Rankin Realty Company? A That was what Mr. Bernstein told me." Did you so testify? A Yes.

Q Why do you change your testimony now?

Mr. Markey: The question is objected to on the ground that on direct examination

Joseph C. Hughes, cross.

the witness distinctly stated that was the conversation between Bernstein and himself and this statement of counsel is misleading.

The Court: Sustain the objection.

Q All I asked you a few minutes ago was if Mr. Bernstein did not tell you that the note in question had been offered to them, and that they, the Irvington Iron Works, could not use it, and you answered my question here this afternoon that no such statement was made. Didn't you say so this afternoon? A The question was not— 10

Q Didn't you testify here this afternoon in answer to my question that Mr. Bernstein did not tell you he could not use the Rankin Realty Company note? A Mr. Bernstein told me at that time that they could not use the note for the reason that their limit had been reached in their bank accommodations and they desired to sell the note. 20

Q It is a fact that they told you that they could not use the note. Is that a fact? A That their bank—

Q Did you testify at the prior examination as follows: "Q The Irvington Iron Works could not use the note of the Rankin Realty Company? A That was what Mr. Bernstein told me." A That's correct. 30

Q That statement was correct? A Yes, sir.

Q And the testimony is correct? A Yes, sir.

Q Did you turn to Mr. Stupelman or Mr. Rogovin and ask them to whom to make out the check? A I did not.

Q You asked them no directions as to how the check was to be made out? A Yes, I did. 40

Joseph C. Hughes, cross.

Q From whom did you ask directions?

Mr. Markley: I object on the ground that this line of examination is attempting to prove a defense instead of examining on my case. It is improper cross examination.

10 The Court: I will admit it.

Q (Question read.) A Bernard Bernstein had possession of that note at the time and was endorsing it which evidence shows itself it is endorsed in the name of the Irvington Iron Works and I said to him, "To whom is this check to be made payable?" I said—I rather used a slang word meaning whose signature was on the bottom and he said, "Irvington Iron Works, Bernard Bernstein, President," and I
20 said all right that's who gets it.

Q You knew then that the Irvington Iron Works was a corporation of New Jersey, didn't you? A I did.

Q Did you not ask Mr. Bernstein that his company endorse the note for your accommodation so that you could discount it at your bank?

Mr. Markey: I object.

30 The Court: I will admit it.

A I asked that they endorse the note for my accommodation, and my intention in asking who was the past person on that note, the last endorser on the note is evident that was the intent.

Q The note had been endorsed when you came into the office? A It had not.

Q You asked for the endorsement, didn't you? A I asked for the endorsement. I could
40

Joseph C. Hughes, cross.

not accept any one paper from anyone but the person to whom it was endorsed.

Q Before you left there you asked that the endorsement be put on, didn't you? A Most naturally before I purchased it I would have to have it endorsed. A document unendorsed would be of no value.

10

Q Had the other endorsements been on the note before the Irvington Iron Works endorsement? A Yes.

Q They were already on the note when you saw it? A To the best of my knowledge.

Q Did you discuss the question as to who the other parties on the note were? A Only the Rankin Realty Company whom I had known for possibly sixteen or eighteen years.

20

Q You knew Smith of the Rankin Realty Company? A I did.

Q You considered him good? A Regarded as fair credit.

Q You discussed that fact? A I knew the makers of the note.

Q You discussed how much discount you were to get for taking this note, didn't you? A Yes.

Q There was a little argument over that subject, wasn't there? A Yes.

30

Q Rogovin didn't want to pay you as much as you wanted? A Rogovin didn't want to pay anything. I had no business with Rogovin.

By the Court.

Q Was he there at the time? A Yes, sir.

40

Stanley J. Marek, direct.

By Mr. Kanter.

Q Rogovin and Stupelman were there at the time? A Two persons stated to be Rogovin and Stupelman.

10 STANLEY J. MAREK, sworn in behalf of the plaintiff.

Direct examination by Mr. Markey.

Q By whom are you employed? A By the Franklin Washington Trust Company.

Q Were you on May 2, 1928, employed by the Mutual Bank of Roseville? A I was.

20 Q In what capacity? A As assistant trust officer.

Q Were you on May 2, 1928, a notary public of New Jersey? A I was.

Q You took your oath of office as such? A I did. Not on that day.

Q I show you a certificate of protest and I ask you if that is your signature which appears on the foot there.

30 Mr. Kanter: I object on the ground that the certificate cannot be evidential of any fact in this case.

The Court: I will admit it.

A This is my signature.

Q By referring to that signature can you recall that on May 2, 1928, there was in the possession of the Mutual Bank of Roseville a certain note? A I can recall.

40 Q What was the amount of that note? A The amount of that note was \$1,313.22.

Stanley J. Marek, direct.

Q Did you present that note for payment?

A I did.

Q Who was the owner of the note on that date? A The owner of the note was the Mutual Bank of Roseville.

Q To whom did you present the note? A I presented the note to the Colonial Trust Company of Newark. 10

Q Was the note paid? A The note was not paid.

Q Did the Colonial Trust Company return it to you? A They did.

Q Did you on May 2, 1928, protest the note? A I did.

Q Did you send out notices of protest? A I did.

Q Referring to that certificate which you have there, can you tell us where you sent the notice of protest which was directed to the Irvington Iron Works? A To Mr. Joseph Hughes. 20

Q On what date did you mail that notice to Mr. Hughes? A The day of May 2nd.

Q Did you have actual physical possession of that note on May 2nd? A It was on my desk when I protested it.

Q Was there anything on that note to indicate that the note had not been paid? A There was a little return ticket indicating it was returned for insufficient funds. 30

Q I show you the note. Have you any recollection of that specific note? A My recollection of the note is that this is the note.

Q Have you a record of the notes protested in your bank? A I keep a record of the notes protested.

Q In what way? A These protest notices are in duplicate. This top one folds over the 40

Stanley J. Marek, direct.

bottom one and it is torn off as you can see on the perforation and we keep these duplicates in regular manner altogether in chronological order.

Q Have you the duplicate with you today?

10

Mr. Kanter: I object to the use of the duplicate on the ground the statute requires a notary public to keep his books in a certain manner and apparently this witness has not done so and is trying to use some other paper to bolster up his recollection which he cannot do under the statute.

(Argument.)

The Court: I will admit it.

A I do have the duplicate with me.

20

Q Produce the duplicate and compare it with the original and tell us if the original is the same certificate that you completed on May 2, 1928. A This Exhibit P. 3 is the original of the carbon of my record indicating that this note was protested.

Q Now, you say on May 2, 1928, the Mutual Bank of Roseville was the owner of this particular note, is that true? A That is true.

30

Q In what manner was that note presented for payment? A The note was presented through the clearing house from Newark.

Q Do you know as a matter of fact whether or not the note actually reached the Colonial Trust Company of Newark? A It must have reached the Colonial Trust Company because the return ticket was on it marked "insufficient funds, Colonial Trust Company."

40

Mr. Kanter: I object. I do not think that is the proper method of proving pre-

Stanley J. Marek, cross.

entment of notice of dishonor and I ask the Court to strike out this testimony.

(Argument.)

Cross examination by Mr. Kanter.

Q You told us at the outset that you presented this note to the Colonial Trust Company, didn't you? A I did. 10

Q Do you remember your prior examination in this case when you were asked this question on March 13, 1929, question by me, "Did you in fact present this note to the bank? A No, I did not." Did you so testify? A I did testify to that fact.

Q The testimony which you now give contradicts the testimony which you gave on a prior occasion, doesn't it? A I think that testimony was amplified. 20

Q The testimony that you now give that you presented the note to the Colonial Trust Company differs from the testimony you had given on a previous occasion? A It may be if it is in the record.

Q Now, which is the fact, did you or did you not in fact present the note to the Colonial Trust Company? A The note was presented to the Colonial Trust Company. 30

Mr. Kanter: I ask that the answer be stricken out as not responsive.

The Court: Strike it out.

Q Did you or did you not in fact present this note to the Colonial Trust Company? A I did present the note to the Colonial Trust Company. 40

Stanley J. Marek, cross.

Q When did you go there? A I did not go myself.

Q I asked you whether you did or did not present the note. I did not ask you what someone else did. A I did not go personally.

10 Q Then, you did not present the note, did you? A I did insofar as it was presented by my agent.

Q I am not asking you about your agent? A I did not go myself.

Q You did not go yourself to the banking office of the Colonial Trust Company and present that note at the counter or to one of the tellers and ask for payment of the note, did you? A Not myself.

20 Q You did not physically accept that note or present it to any teller or officer of the Colonial Trust Company at the window. A I did not.

Q You did not at any time on May 2, 1928, present that note actually, physically and personally for payment at the place where it was payable. A I did not personally present the note on that day.

Q Someone told you that the note was presented on that day, is that right, which you say was your agent? A I know it was presented.

30 Q Who told you that he or she presented it, who is the person? A The person was the bookkeeper.

Q Who identified the name of the bookkeeper? A I cannot identify the name of the bookkeeper.

Q Some person told you then that she or he did it and you based your statement that the note was presented upon that report, do you not?

40 A I base my statement on the fact that the note was returned with a ticket attached to it marked "insufficient funds," and the confirmation of it was received by me.

Stanley J. Marek, cross.

Q You personally never took this note to the bank? A I did not.

Q You believe some young man or some young woman took it there. A I know it was taken there.

Q Can you tell us who took it there? A Their runner. **10**

Q Who is he by name? A That I know not.

Q Was it a man or woman? A What do I care who it was?

Q Do you know? A I do not.

Q What were the banking hours of the Colonial Trust Company on May 2, 1928? A I do not know.

Q What were the banking hours of banks on that day? A The banking hours of our bank is 8:15 until what time we please to close. **20**

Q Do you know what the banking hours of the Colonial Trust Company are? A No.

Q What are the customary banking hours of banks in the City of Newark? A The general hours are from 9:00 until 3:00.

Q Have you any knowledge as to what the banking hours of the Colonial Trust Company were on May 3rd? A I presume somewhat similar.

Q From nine in the morning until three in the afternoon? A I presume so. **30**

Q They close every afternoon at three o'clock? A They may.

Q That is the time they close, at three in the afternoon? A I don't know; they may.

Q You did not go with this note personally to the bank at any time during that day? A I told you I did not.

Q What you did do was call up some book-keeper and ask him if the note was good and the **40**

Stanley J. Marek, cross.

bookkeeper said it was no good and you protested it? A No, I verified the fact that the note was not good after it had been returned.

Q By telephone you said. A Yes.

Q You called up somebody on the telephone at the Colonial Trust Company and asked them
10 if the note was good and they said, "No," and based upon that report you protested the note.
A I did.

Q Upon that report you as a notary public of this State certified that you presented the note at the Colonial Trust Company on May 2, 1928?

A I did, which it had been.

Q Do you also recall what time of night you mailed out the notice? A I mailed them out I presume around five o'clock or something like
20 that. I don't remember exactly what time it was. Soon after I had protested the item.

Q The duplicate of which you kept as your record? A Yes.

Mr. Kanter: I ask that this be marked for identification.

(Same is marked D. 1 for identification.)

Q This paper is a duplicate of Exhibit P. 3, isn't it? A Yes, sir.
30

Q And in this duplicate, there is no copy of the note given in there, is there? A What do you mean by that?

Q Is there a copy of the note? A Why, it says, "Note signed by Rankin Realty Company."

Q No, were you familiar with your duties as a notary under the statute of this State that it provides that you were to keep a book with certain information in it with regard to these notes?
A I could tell from that what it was, certainly.
40

Stanley J. Marek, cross.

Q This is what you call a book? A Yes, sir.

Q Where did you mail the notice to Joseph Hughes? A 313 Clifton avenue, Newark.

Q Where did you get that from? A From the ledger.

Q What ledger? A Mr. Hughes had a commercial account with us and I took that address from his commercial account. 10

Q You are now reading from Exhibit P. 4, aren't you? A Yes, sir.

Q That was a paper that Hughes got? A Yes, sir.

Q Was there anything on the record that you kept to indicate to you where the notices were mailed out? A No, it is not necessary.

Q I asked you if there was anything on the records you kept to indicate where you mailed the notice, to the street or town. A No, care of Joseph Hughes. 20

Q There is nothing to indicate what city or town it is mailed to? A No.

Q Did you see the name of the Irvington Iron Works on the back of that note when you sent out these notices? A Yes.

Q Did that suggest to you that this company may be located in Irvington? A No.

Q You did not look up to see whether it was in Irvington or not? A No, I looked in Newark. 30

Q Do you know how long it takes for mail to go from Newark to Irvington? A No.

Q Do you know what the customary time is? A No.

Q Don't you know whether it is a day or a week? A No.

Q A week or a month? A No, I don't know how long it would take. 40

Roger W. Hill, direct.

Re-direct examination by Mr. Markey.

Q You say their runner took the note to the bank. Whose runner do you mean? A Our runner took it to the clearing house and their runner took it from the clearing house to the bank.

10

By the Court.

Q Is that the customary way? A It is done every day in the year.

Q Every fact would indicate that the note had been in the Colonial Trust Company on that particular day.

Mr. Kanter: I object to that as immaterial.

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The Court: I will sustain the objection because it is improper. It is for the jury to determine that.

Adjourned to Monday, October 21, 1929,
at ten o'clock A. M.

October 21, 1929.

30

SECOND DAY.

Continued pursuant to adjournment.

Counsel present as before stated.

ROGER W. HILL, sworn in behalf of plaintiff.

Direct examination by Mr. Markey.

Q What is your occupation? A Secretary and treasurer, Colonial Trust Company, Newark.

40

Roger W. Hill, direct.

Q Are you familiar with the records and transactions and books of the company? A Yes, sir.

Q Did the Rankin Realty Company have an account with your bank during the year 1928?

A They did.

Q Was that account an active one?

10

Mr. Kanter: I object to that as not being material to the issue in this case.

The Court: I will admit it.

A It is rather difficult to say how active it was. I cannot tell you.

Q Do you know how much money the Rankin Realty Company had in their account on May 2, 1928?

20

Mr. Kanter: I object, as the accounts would be the best evidence of that fact.

The Court: Sustain the objection.

Q Were you subpoenaed here today? A Yes, sir.

Q Have you the subpoena with you? A I have not.

Q Did you read the subpoena? Did the subpoena call for the production of the account of the Rankin Realty Company or the ledger sheet of that account? A Yes, sir.

30

Q Can you tell the Court and jury why that account is not here? A We were unable to locate the sheet, this account being closed out a year or so ago, and for some reason or other we could not locate the sheet.

Q Did you, since the time the account was closed out or at any time prior to that, have any occasion to examine that particular account? A

40

Roger W. Hill, direct.

We have examined the account several times for different reasons.

Q Can you from your own recollection tell us whether or not there were moneys in the account on May 2, 1928, sufficient to pay an item of \$1,300?

10

Mr. Kanter: I object. He hasn't said there was that much in the account.

The Court: You will have to qualify him as to the account because he is evidently testifying from his memory as to the account. He has to show some familiarity with it first.

By the Court.

20

Q Can you answer yes or no to this question? Did you happen to know what the general balance or exact balance was or could you state what the account was on the 2nd of May, 1928?
A I couldn't tell the exact amount, no.

By Mr. Markey.

Q Can you tell us generally, in general figures?

30

Mr. Kanter: I object. It appears that the witness has no knowledge.

The Court: Sustain the objection.

Q Is the Colonial Trust Company a member of the Newark Clearing House? A Associate member.

Q What system does the Newark Clearing House use to transfer items to your bank for collection?

40

Roger W. Hill, direct.

Mr. Kanter: Objected to as immaterial.
(Argument.)

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10

A Notes are usually put through in clearing the same as checks and they come up for clearing from the clearing house as a check will on the day it is due.

Q When notes are received in your bank from the clearing house to whom are they delivered?

Mr. Kanter: I object on the ground that it calls for the usual case and for that reason it is immaterial.

20

Mr. Markey: I want to prove that nothing else could happen to this note except that it went through in the usual course adopted by the bank for their convenience and for presentation of these notes.

(Argument.)

The Court: I will let you prove as to what extent Mr. Hill's knowledge goes, in other words, as to what was done with this note.

30

Mr. Markey: I first have to lay a foundation to get that evidence in. I cannot merely ask him what he knows. If I prove the system I can prove that a particular item was there on a particular day.

The Court: Can't you tell from the records of the Colonial Trust Company outside of this particular account that was lost whether this note was ever received there?

40

Roger W. Hill, direct.

Mr. Markey: I will ask him that question.

The Court: There is testimony here that it went to the Clearing House and from the Clearing House it went to the Colonial Trust Company.

10 Q I show you a note. Do you from your own recollection recognize that note as an item that was presented to your bank? A I couldn't say that I do.

Q Would it be possible for you to tell from an examination of that note that that note was at your bank, presented to your bank?

20 Mr. Kanter: I object on the ground that that is a question that impliedly requests that the witness examine something on the note and from that give us an answer after he has already stated whether it was presented to his bank or not; it would be a hearsay conclusion.

The Court: Sustain the objection.

30 Q In presenting items for payment through the Clearing House is there any mark or identification put on a note or check that is presented for payment? A There is usually a little slip attached to the note or check when it is returned, stating the reason for its return, which is pasted onto the corner of the check or note.

Q If such a ticket were placed upon this note would that show that it had been at your bank?

Mr. Kanter: I object to that question on the ground it is asking him to embody a hearsay conclusion.

40 The Court: I do not see any sense in asking that question. Sustain the objection.

Roger W. Hill, direct.

Q Have you any records that would show that this particular note was presented for payment to the Colonial Trust Company on May 2, 1928? A I am wondering just exactly how to answer that. I have records to indicate that a note, but I couldn't say it was this particular note other than that the amounts agree.

10

Q Refer to that note and tell us the amount of the item that appears on your records.

Mr. Kanter: May I cross examine as to whether that record is pertinent to this note?

The Court: Yes, not as to that but as to the record. It is for the jury to say that.

Mr. Kanter: Whether the record will be admissible.

The Court: I do not think this would be admissible. We will not put it in evidence; we will let him just refresh his recollection.

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By Mr. Kanter.

Q Now, without using anything else on the paper you have two items on the book here which read "Rankin Realty Company, \$1,330.32" under the words "not good," is that correct? A Correct.

80

Q Then, another item, "\$984.50, Rankin Realty Company, not good," that is the only notation on this record that pertains to the Rankin Realty Company. Yes.

Q That is dated May 2, 1928. What do you call this paper (indicating). A That is a slip made up by the bookkeeper of all items, checks, notes that are being returned for any reason.

Q What is this? A A list of the items returned that day.

40

Roger W. Hill, direct.

Q "Returned items." This list was made up by the bookkeeper? A Yes.

Q Do you know by whom it was? A No.

Q You cannot identify the man who made it? A No.

10 Q This refers to items not necessarily notes, does it? A No, items.

Q It may mean a bill of exchange, a check, draft or any other instrument? A Not necessarily.

Q There is nothing on that slip to indicate that it was a note or check or whatever the item may have been? A No.

By Mr. Markey.

20 Q What is the amount of that returned item as it appears on that draft?

Mr. Kanter: I object as not being material. There is nothing on the slip to indicate that a note was presented and returned.

The Court: What is the memorandum supposed to indicate?

The Witness: Items returned, notes, checks or other instruments.

30 *By the Court.*

Q Presented to the bank and returned? A Yes.

Mr. Kanter: I object to the question on the ground it would embody in his answer a conclusion or statement made by some person not identified. This witness not having made the record, it is therefore not evidential of any fact in this case. It merely

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Roger W. Hill, direct.

refers to a return generally without indicating whether it was a check or note or other instrument.

The Court: Do you dispute the fact that the Colonial Trust Company at that time had funds of the Rankin Realty Company?

Mr. Kanter: I do not know one way or the other. The records of the bank will indicate that and I do not intend that my client shall be bound by this loose course of banking practice.

The Court: I can hardly say "loose" is the word because if they tried to get the record and this witness says the records are lost; in other words, if that is the official record—

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By the Court.

Q Is this the official record? A Yes, sir.

Q Kept in the course of business? A Yes, sir.

Q Not by you? A No, by a bookkeeper.

Q You do not know what the bookkeeper's name is? A I think not; I am not sure of the name as we change bookkeepers quite often.

30

Mr. Kanter: It would be immaterial as to when the presentation was made also in this case.

The Court: They were made the same day. The only question before me is whether this gentleman can use this to refresh his recollection. I do not think as a bank record it is evidential.

Mr. Markey: As a record of this transaction I feel it is admissible.

40

Roger W. Hill, direct.

By the Court.

Q That was kept in the regular course of business? A Yes, sir.

10 Q You cannot identify the man from the initials but you use that record in the course of your business or reference in connection with it? A Oh, yes. We keep one each day.

20 The Court: I have come to the conclusion that that is not admissible. Apparently, as far as I can find in this case it is not admissible under the common law and I haven't any English citation, but they have passed an act known as the Bankers Books Evidence Act in 1879; nothing of that kind as far as I know exists in this State. The act which so far as I can tell from reading the only case I can find that relates to it is very sensible, but since 1900 when the evidence act was passed there has been another amendment or supplement to that act and I think the case at law was Hart versus Williams, 14 Chancery Division, decided in 1880. That apparently was decided after Bankers Books Evidence Act had been passed and ruled directly on it, and I assume that that was the act intended to relieve the practice under the common law.

30

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Markey: That is so far as the record itself goes.

By Mr. Markey.

40 Q When was that record made? A May 2, 1928.

Roger W. Hill, direct.

Q Was that record made in accordance with the usual custom of the business?

Mr. Kanter: I understand counsel is doing this for the purpose of preparing a record. I will say that it was made by some one in the bank in the usual custom of that officer that day. 10

Mr. Markey: Under the practice of Mr. Hill, the treasurer of the bank.

Mr. Kanter: If counsel desires to introduce the evidence I mentioned I object to it and the Court has sustained me.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 20

By the Court.

Q Mr. Hill, as I understand it this paper is a paper that is regularly used every day in the course of the bank's business and its entries are such entries as are made every day by your employees indicating paper that has to be returned.

A For some reason.

Q For insufficient fund or otherwise? A Yes, sir.

Q And that paper is a part of the records of the bank and is paper upon which you even base any action of yours so far as its accuracy is concerned, that is true, is it? A Yes, sir. 30

By Mr. Markey.

Q What time of day is that paper made up?

A Between 12:15 and 1:00, not late than 1:00.

Q Therefore, every item that appears on that paper was in the bank between those hours. 40

Roger W. Hill, cross.

Mr. Kanter: That is objected to on the ground that your Honor's ruling would be immaterial and incompetent.

Withdraw the objection.

The Court: I will admit it.

10 Q (Question read.) A Between the hours of nine and one o'clock.

Q Between the hours of nine and one o'clock?

A Yes, sir.

Q Is your bank open every day with the exception of Sundays and holidays between that time? A Yes, sir.

Cross examination by Mr. Kanter.

20 Q What were your banking hours in May, 1928? A May 2nd?

Q Yes. A I don't know what day of the week that was.

Q It was a weekday, a Wednesday. A If it was on a Wednesday the banking hours would be from nine to three.

Q The bank closes at three o'clock? A Yes, sir.

30 Q Do you know what the usual course, what time elapsed in the usual course of mailing a letter from Newark to Irvington?

Mr. Markey: I object to the question on the ground that it is immaterial and not cross examination.

The Court: Sustain the objection.

I would like to ask one more question so you may have all the information possible on this question because it is interesting.

Motion for a Non-suit.

By the Court.

Q The paper that we have been referring to, the bank records concerning which I have asked you has upon it one or two items that we believe refer to this case and those items have attached to them in some way certain initials. You do not know who made that memorandum as I understand it, you do not remember? A I can find out when I return.

10

Q I mean at the present time you do not know who it was who made that memorandum? A No.

Mr. Kanter: I think it also should appear officially on the record and of course the Court will take judicial notice of the fact that May 2, 1928, was on a Wednesday. That is a fact, Mr. Markey.

20

Mr. Markey: Yes.

PLAINTIFF RESTS.

Mr. Kanter: I respectfully move for a non-suit on the ground that the plaintiff has failed to prove a due presentment or notice of dishonor as provided by our Negotiable Instruments Act.

30

(Argument.)

The Court: There has been no proof as I recollect who William Katchen is in the Irvington Iron Works.

I will deny the motion for this reason: First as to the law, it has been held and been made the subject of legislative enactment that an endorser on a note must have notice of its dishonor or it cannot be held, which of course is quite proper, and the

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Motion for a Non-suit.

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legislature has defined the manner in which those notices should be given. If it has provided the time when it should be given when the parties reside in different places, and it would appear as I have listened to this case, that the endorser Irvington Iron Works was located in Irvington and the owner of the note at that time, the Mutual Bank of Roseville, was in Newark, in any event, one party was in Newark and the other in Irvington. It provides that that notice should be given orally or in writing and says that it may be in writing or merely orally, and may be given in any terms to sufficiently identify the instrument that it has been dishonored for non-acceptance or non-payment, and it may be given either personally or through the mails, and it further provides that as to conditions of presentment, in section 72 of the Negotiable Instruments Act, that presentment for payment must be made to the person primarily liable, that is, the person primarily liable on the instrument, by the holder, and at a reasonable hour and at a proper place and either to the person primarily liable or if not accessible any person at the place where presentment is made.

In this case, as I recall the testimony, it appears that this note was sent by the owner of the note to the Colonial Trust Company where it was payable on May 2nd, and that it was protested for lack of funds; that a notice and copy of protest was mailed to Mr. Hughes, the present plaintiff, and was received by him on May 3rd; that on May 4th, the next day, he went to the Irvington Iron Works. Notice given by him on that

Motion for a Non-suit.

day in my opinion would be legal because the Negotiable Instruments Act provides for that. Now, whether the notice was given to the Irvington Iron Works or not is a jury question.

It is complained that this notice was given to a man named Katchen in the Irvington Iron Works and that was not sufficient, but I say it is for the jury because the jury can infer from the testimony whether the Irvington Iron Works had notice or not. There is testimony that Hughes went to the offices of that company, and there is testimony that when he got there a man named Katchen was there, and it may be inferred from the testimony that he was in the employ of the Irvington Iron Works, because I have to resolve for the purposes of this motion, I have to give the plaintiff the benefit of the most favorable inferences I can draw, and I say there is testimony that Katchen was there with the bookkeeper. There is testimony that Katchen must have had some familiarity with the note in question because, as I recall it, he told Mr. Hughes to see two of the other endorsers on the note, Stupelman and Rogovin. There is testimony that subsequently and after this call by the plaintiff upon the Irvington Iron Works that he had a conversation with Mr. Bernstein and that Mr. Bernstein said he would endeavor to obtain payment by prior persons in interest. There is no testimony that Hughes ever mailed any notice to the Irvington Iron Works, so he must rely, to recover, on the notice he gave as to whether he gave personal notice according to the law or whether

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Bernard Bernstein, direct.

he did not. My recollection is that on the 3rd of May when he visited the defendant Irvington Iron Works he delivered this notice of protest to this man Katchen, and on the afternoon of that day, he went to see Stupelman.

10

You may have an exception. I will hear the defense.

20

I should say before the defendant puts in its case that this ruling should not prejudice the jury in any wise. The motion was properly made on the law, and for the purposes of the motion, as I say, I have to regard the testimony most favorable to the plaintiff, but it does not mean that there isn't a defense and it has nothing to do with your decision, gentlemen of the jury, on the facts in the case, so you must not be prejudiced at all by my ruling, because I cannot rule on any fact, so keep your minds open until the conclusion of the case.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30

BERNARD BERNSTEIN, sworn in behalf of defendant.

Direct examination by Mr. Kanter.

Q You are president of the Irvington Iron Works? A Yes, sir.

Q You have in your employ a man named William Katchen? A We have.

Q Was he in May, 1928, or is he now an
40 officer or director of your firm? A No, sir.

Bernard Bernstein, direct.

Q What is his connection or what is the scope of his employment? A Superintendent in the shop.

Q Shop foreman? A Yes, sir.

Q What is the nature of your business? A Construction iron.

Q He is the practical man in the shop who takes care of iron construction? A Yes, sir. 10

Q I show you a check dated May 5, 1928, and I ask you whether you signed that check? A I did.

Q Is the endorsement on this check in your handwriting? A It is.

Q What did you do with this check? A I made this out and went to the bank and got the money for this.

Mr. Kanter: I offer the check in evidence. 20

Q Does the date of this check refresh your recollection as to a certain account of what happened on May 5, 1928? A It does.

Mr. Markey: I object.

The Court: I will admit it.

Q Now, what does this check recall to your mind as to what happened on May 5th? A We were making out the payroll and Mr. Hughes came in. 30

Q All right, it recalls a visit Mr. Hughes made to your shop. A Yes, sir.

Q What day of the week was that? A Saturday.

Q What were the proceeds of this check used for? A Payrolls.

Mr. Kanter: I offer the check in evidence. 40

Bernard Bernstein, direct.

Mr. Markey: No objection.

(Check is marked Exhibit D. 2.)

Q He came to the shop on May 5, 1928, which was a Saturday, in the morning? A Yes, sir.

Q Had you seen Mr. Hughes that week at all?

10 A No, sir.

Q Did you receive any telephone communication from Mr. Hughes that week? A No, sir.

Q Had you been in touch with him in any way, shape or form that week? A No, sir.

Q I show you a check dated March 7, 1928, Exhibit P. 2, and I ask you what date it was when Hughes came to your shop with reference to this note of the Rankin Realty Company. What date was it? A March 7th.

20 Q Did you see Hughes at any time between March 7, 1928, and May 5, 1928? A I probably have on previous occasions but not at this time.

Q I asked you between those two dates, March 7, 1928, and May 5th. Did you or not? A I cannot recollect. Probably we had other transactions at that time.

Q You did not see him with reference to this note? A No.

30 Q You did see Hughes on May 5th? A Yes, sir.

Q Did you speak to Hughes on the telephone on May 2nd, 3rd or 4th? A I did not.

Q On March 7, 1928, Hughes came to your shop in response to your telephone communication? A Yes, sir.

Q And you introduced him to Stupelman and Rogovin? A Yes, sir.

Q Did they have a note there now in evidence marked Exhibit P. 1? A Who?

40 Q Stupelman and Rogovin. Did they have a note on March 7th? A Yes.

Bernard Bernstein, direct.

Q What did you tell Mr. Hughes in reference to this note? A I went to Stupelman and Rogovin on that day and asked them to pay me for the note that had been protested for the amount of \$2,500 and they offered me this note in part payment of that, and I refused to accept and I told them I knew a man by the name of Hughes who discounted notes, he of course charges pretty steep prices for it, and if they are satisfied I will get Mr. Hughes and they can negotiate with him in regard to discounting their note. They said they would be glad to do that and I went and called up Hughes, telephoned to his house and asked him to come down immediately, and he said he would and he did. At that time I introduced Stupelman and Rogovin to Mr. Hughes and they went into a haggle pretty near an hour as to the amount they should pay for the note. He wanted at first \$100 and they didn't want to pay any more than \$25 or \$30, and finally after haggling they agreed to an amount of \$68.50. At that time Mr. Hughes said to Stupelman, "Who shall I make the check out to?" Stupelman said, "Make it out to the Irvington Iron Works, because I have to give it to them anyway, so it will save a lot of transmitting of checks." Then Mr. Hughes asked me to endorse the note and I said, "What for? That thing is on account with me. You are doing business with Stupelman and Rogovin." He said, "It will help me to discount the note and permit me to keep a record of the transaction and not miss anybody" I said, "I don't want to be liable." He said, "You won't, because the maker and endorser is good and I am perfectly satisfied."

Q Did Mr. Hughes discuss with you of the maker or endorser being known to him? A Yes, sir.

Bernard Bernstein, direct.

Q Who did he specify? A Smith.

Q You received that check (indicating)? A Yes, sir.

Q And you credited the account of Stupelman and Rogovin with \$1,232? A I did.

10 Q Now, on Saturday, May 5, 1928, what were you doing when Mr. Hughes came into your shop? A Making out the payroll and Mr. Katchen gave me the information of how much the men were making downstairs in the shop and we were getting the payroll ready and Mr. Hughes came in and said—

Q Katchen was telling you how much the individual men were getting? A Yes.

Q And Mr. Hughes came in? A Yes, sir.

20 Q And that was on Saturday morning, May 5th? A Yes, sir.

Q You heard Mr. Hughes refer to the fact that on his visit he delivered the notice of protest, on the occasion when the payroll was being made up—you heard Mr. Hughes testify to that effect? A I did.

Q Now, Hughes came in when the payroll was being made up, didn't he? A Yes.

30 Q Did he at that time deliver to you or Mr. Katchen in your presence any notice of protest or order of dishonor? A No.

Q It is a fact that he came in on the day the payroll was being made up? A It is.

Q On that Saturday, May 5th, what did Mr. Hughes say? A Mr. Hughes said, "How about this note?"

By the Court.

40 Q Was that the first time you had seen him? A Yes, sir. "How about this here note? It hasn't been paid."

Bernard Bernstein, direct.

By Mr. Kanter.

Q Did he have the note with him? A I don't remember.

Q What did he say? A So I said, "Well, why don't you look to the previous endorsers on it? We have nothing to do with it. Why do you bother with us now?" "Well," he said, "come and help me try to collect the note." I said, "I will," so I said to Mr. Katchen, "Go along with Mr. Hughes to Stupelman and Rogovin on 40th street, Irvington, and see what you can do with them," and they went out. 10

Q You did not go with them? A No.

Q Did you see Mr. Hughes during the following week, that is, the week commencing Monday, May 7th? A I did. 20

Q What was the occasion? What did you do? A He came again and said, "Well, how about this note?" I said, "How did you make out so far with Stupelman and Rogovin?" He said, "He offered me \$500 check and a new note in exchange for this and I wanted \$100 again for discounting it and they refused to give it to me."

Q Did you go anywhere with him? A I did.

Q Where? A To the Smith Brothers.

Q He went with you? A Yes, sir. 30

Q That was the following week? A Yes, sir.

Q What was the subject matter of the conversation then? A Well—

Q In general what did they want and what did he want? A He wanted money and they didn't want to give him what he wanted.

Q Your corporation is a corporation of the State of New Jersey? A Yes, sir.

Bernard Bernstein, cross.

Cross examination by Mr. Markey.

Q You testified that you asked Stupelman and Rogovin to pay notes which had gone to protest. A I didn't know of any protests.

10 Q How did this question of calling Mr. Hughes to your place and asking him to discount the note of Stupelman and Rogovin take place? A I didn't quite get you.

Q Was Stupelman and Rogovin indebted to you firm on May 2, 1928? A May 2nd?

Q March 7, 1928? A They have and they are now.

Q Do you remember a meeting between Stupelman and Rogovin and Hughes and yourself? A Distinctly.

20 Q Do you remember Mr. Hughes telling you that he would not take the note unless you endorsed it? A He never said it.

Q Did you have any previous transactions with Mr. Hughes? A We have.

Q Had you given your endorsement on previous occasions? A Yes, sir.

Q But you do not remember Mr. Hughes saying that he would not accept the note unless you endorsed it? A He never asked for it.

30 Q How did it get on there? A In regard to what?

Q The endorsement. A He asked me to oblige him and endorse the note afterward and I told him I didn't want to do that. He said, "Don't worry about it," he wouldn't come to me at all because Smith is first class, he will pay it, there is no doubt about it.

40 Q Who had possession of the note during the conference? A Mr. Hughes and Stupelman and Rogovin.

Bernard Bernstein, cross.

Q Who delivered the note to Mr. Hughes? A Stupelman and Rogovin.

Q You had nothing to do with it on that day?

A None at all.

Q The first thing you knew was when the note had been discounted, that was the first time that you knew anything had happened. A I knew 10
right along—I was in the room when the transaction was going on. They were haggling over an hour to get to an understandable price to charge for the note.

Q Do you remember how much Mr. Hughes said he was going to charge for the note? A \$100.

Q How much did he finally accept? A \$67.50.

Q How many men have you in your employ?

A In the shop all around?

Q Yes, all around. 20

The Court: You mean at that time?

Mr. Markey: Yes.

A We must have had about fifteen in the shop and about four and five on the outside and two in the office.

Q Who were they? A A draftsman and a bookkeeper.

Q What were their names? A The draftsman's name was Hague and the bookkeeper's name was Miss Katchen. 30

Q What were Mr. Katchen's duties? A Shop superintendent.

Q Did he spend all of his time in the shop?

A Most of it.

Q Did he have an office with the rest of your office personnel? A No.

Q Do you know whether or not Mr. Katchen was at the plant and in the office on May 3, 1928? 40

Bernard Bernstein, cross.

Mr. Kanter: I object to that as not being cross examination.

The Court: I will admit it.

Q (Question read.) A He must have been.

10 Q Was he there on May 4th? A He must have been.

Q You had considerable difficulty in collecting your money from Stupelman and Rogovin, didn't you? A We did.

Q The Irvington Iron Works needed money quite badly on March 7, 1928? A We always need money.

Q How many shares of stock do you own in the Irvington Iron Works? A Ninety-eight.

20 Q Who are the other stockholders in that company? A My wife and my sister.

Q Who were the original stockholders in the company? A Myself, my wife and my sister.

Q You are certain of that? A Positive.

Q Did you testify on direct examination that you and Mr. Hughes went to see the Smiths? A I did.

Q Do you remember when that was? A That was the following week after that Saturday.

30 Q That was after that Saturday? A Yes, sir.

Q How did you come to pick out this particular check (indicating) to guide you in your discourse on these events? A Because I know the date when it was paid for the payroll.

Q How much is your payroll? A On this day?

Q Yes. A \$991.49.

40 Q That covers all your employees? A Yes, sir.

Bernard Bernstein, cross.

Q What time of the day did you make that check out? A In the forenoon between nine and ten o'clock.

Q Do you know that as a matter of fact or do you merely know it as the usual custom? A I know it for a fact because the payroll must be down in the shop by that time and sometimes it takes an hour or an hour and a half to pay the men at the outside so that the payroll is always in the shop at ten o'clock. 10

Q When do you begin making up your payroll? A In the morning.

Q About what time? A As soon as the girl gets in there between seven-thirty and nine o'clock.

Q What are your office hours? A Half-past eight until half-past five. 20

Q On Saturdays? A Until half-past twelve.

Q And half-past eight to half-past twelve on Saturdays? A Yes, sir.

Q That is when the office help must be there? A Yes, sir.

Q That is mandatory? A Yes, sir.

Q Do you remember tendering to Mr. Hughes a new note? A Never tendered it.

Q Do you remember ever being with Stupelman when you and Stupelman tendered a new note to Mr. Hughes? 30

Mr. Kanter: I object as not cross examination. This witness hasn't said so.

The Court: I will admit it.

Q Did you and Stupelman ever tender a new note to Mr. Hughes making no offer of cash whatsoever? A Never.

Q How do you know that Stupelman offered to pay Hughes \$500 on account of this note? A 40

William Katchen, direct.

That is the report I got from Mr. Stupelman and Katchen.

Q Do you know when that offer was made?

A The next week following Saturday.

Q You were not present? You were never present with Stupelman when a new note was offered? A No.

10 Q When Mr. Hughes paid you this money, do you claim it was given by him to Stupelman or to yourself? A He asked Mr. Stupelman first who to make the check payable to and Stupelman said, "Make it payable to the Irvington Iron Works because they have to get it anyway, we being a corporation would have to deposit the check for our account and draw against this for the Irvington Iron Works," and we had to get
20 credit for it right away because there was a protested note in the bank at that time waiting to be taken up by that cash payment.

Q Mr. Hughes gave you a check and did you deposit it in your own account in the bank? A Yes, sir.

WILLIAM KATCHEN, sworn in behalf of defendant.

30

Direct examination by Mr. Kanter.

Q Are you employed by the Irvington Iron Works? A Yes, sir.

Q Do you remember Saturday, May 5, 1928? A Yes, sir.

Q Do you remember that day? A Yes, sir.

Q Do you remember Mr. Hughes coming in that day while the payroll was being made up?

40 A Yes, sir.

William Katchen, direct.

Q Mr. Hughes has testified that at some time during that week, sometime between May 2nd and May 4th, I think the testimony was that on May 4, 1928, he gave you personally a copy of the notice of dishonor like Exhibit P. 4. He said he gave you a copy of this kind of paper. Did he give you such a paper or not, or any copy of it at any time? A No. 10

Q Did you go with him to see Stupelman? A Yes, sir; it was a Saturday.

Q Was that after the conversation in the office on Saturday May 5, 1928? A Yes, sir; he came in Saturday and I helped Bernstein make the payroll and he notified that the note he got from Stupelman and Rogovin—

Q Talk more distinctly. A He notified—

20

By the Court.

Q Who did? A Mr. Hughes notified—

By Mr. Kanter.

Q He told Mr. Bernstein something and what did he say to him? A He told him the note is protested, what are you going to do?

By the Court.

30

Q Is that the first time he had been there? A The first time I saw him was that Saturday.

Q May 5th, that Saturday? A Yes, sir.

Q That is when he told Bernstein the note had been protested? A Yes, sir.

By Mr. Kanter.

Q What did Bernstein tell you to do? A He asked me to go over to Stupelman and Rogovin and tell them to pay the note. 40

William Katchen, cross.

Q Bernstein said to you— A That I should go to Stupelman and Rogovin with Mr. Hughes and see that they should pay the note.

Q Bernstein told you to go with Mr. Hughes to see Stupelman and Rogovin to see that they should pay the note? A Yes, sir.

10 Q Did you go with Mr. Hughes to see Stupelman and Rogovin? A Yes, sir.

Q Where did you go to? A 40th street.

Q Irvington? A Yes, sir.

Q Did you see Stupelman? A Yes, sir.

Q What happened? A I told Stupelman the note was protested that was cashed by Mr. Hughes.

Q What did Stupelman say? A He went and called his partner Rogovin and in about ten
20 minutes he brought him over and they started to make some kind of arrangement with Mr. Hughes.

Q What did you hear? A They offered him \$500, a new check and another note and then they did not agree about the bonus.

Q For what? A Changing the notes.

Q Did Hughes accept it or not? A No, Hughes did not take it, and I asked Mr. Hughes he should take better the \$500, it would be better
30 than the \$1,300, and he said, "No."

Cross examination by Mr. Markey.

Q On May 3rd, were you in the office of the Irvington Iron Works? A I worked in the shop all the time.

Q You are there most of the time?

Mr. Kanter: In the shop, he said.

Q Did you ever visit the office of the Irvington Iron Works? A Yes, I visited it, why not?
40

William Katchen, cross.

Q You were there every day, all around the plant? A Yes, sir.

Q You are in the factory and then you come back to the office? A Yes, sir.

Q You are an executive, aren't you?

Mr. Kanter: I object as calling for a legal conclusion. 10

The Court: Ask him what he does and how he is employed.

Q What are your duties? A Manager of the shop.

Q That consists of what? A Taking care of the workmen and seeing the work should go out right.

Q Are you an engineer? A Well, I don't have to be an engineer, I have been working all my life in this kind of business. 20

Q Do you understand drafting? A Yes, sir.

Q Do you assist the men in setting up machines or moulds? A Everything.

Q Do you supervise the work of the draftsmen? A Yes, sir.

Q Where was the draftsmen's offices located? A In the same room where Mr. Hughes was and Bernstein and Stupelman and Rogovin. 30

Q On May 3, 1928, did you see Mr. Hughes? A No.

Q You are sure of that? A Yes.

Q Don't you remember having taken Mr. Hughes in your car to Fortieth street where Stupelman and Rogovin were working? A It was a Saturday night I drove Mr. Hughes in the car to go over to see Stupelman and Rogovin after we made out the payroll.

Q What time of day was it that Mr. Hughes arrived at the office? A Half-past ten. 40

William Katchen, cross.

Q About half-past ten? A Yes, sir.

Q What did you happen to be doing at that particular hour? A Helping Bernstein put the payroll in the envelopes.

10 Q What time of the day was it that Mr. Hughes and yourself left the Irvington Iron Works to see Stupelman and Rogovin? A About ten minutes to eleven.

Q What time did you arrive at the place where Stupelman and Rogovin were working? A About eleven o'clock.

Q You are certain of that? A Yes, because our shop isn't far from Fortieth street.

Q Do you recall distinctly the day that you visited Stupelman and Rogovin? A I beg your pardon?

20 Q Have you a distinct recollection of the time when you visited Stupelman and Rogovin? A Because we made out the payroll on that day, May 5th.

Q You are certain it was May 5th? A Yes, sir.

Q You are certain at that time you arrived at their plant about eleven o'clock? A Well, me and Mr. Hughes?

30 Q Yes. A Yes.

Q That was about eleven o'clock in the morning? A Yes, sir.

Q Did you have to wait for Stupelman and Rogovin at all? A No, we found Stupelman in the front of the building in the lobby and then he went and called and we were waiting ten or fifteen minutes while he went to find Rogovin and they stood together with Mr. Hughes there arranging things and I heard Stupelman and Rogovin want to give \$500 and a new note.

40

William Katchen, re-direct.

Q Never mind that. You told us that before. Are you certain that you went to Fortieth street?

A Yes, sir.

Q That was the only time Mr. Hughes spoke to you about this note? A Yes, sir.

Q Don't you remember the time when you visited there and you could not find either Stupel- 10
man or Rogovin. Mr. Hughes was with you that time, too? A No.

Q You don't remember that? A No.

Q Don't you remember Mr. Hughes saying, "Well, I'll go home and come back and meet you this afternoon and we will look for them again"? A At one time I was there and I didn't go with him no more.

Q You only went with him once? A Yes, 20
sir.

Q Are you a stockholder in the Irvington Iron Works, Inc.? A No.

Q Are you still employed by the Irvington Iron Works, Inc.? A Yes, sir.

Q In the same capacity? A Yes, sir.

Q Do you know a P. Katchen? A Yes, sir.

Q Who is that? A My wife.

Q Is she a stockholder in the company? A 30
She has one share.

Re-direct examination by Mr. Kanter. 30

Q P. Katchen is related to Bernstein? A
A sister.

DEFENDANTS REST.

Motion for Direction of a Verdict.

JOSEPH C. HUGHES, plaintiff, recalled in his own behalf in rebuttal.

Direct examination by Mr. Markey.

10 Q Who was in the office when you delivered that notice of protest to Katchen?

Mr. Kanter: I object as not being rebuttal. This has all been gone through.

The Court: Sustain the objection.

Q When you visited the plant of Stupelman and Rogovin what time of day was it?

20 Mr. Kanter: I object. This has all been gone through on the main case.

The Court: Sustain the objection.

CROSS EXAMINATION WAIVED.

PLAINTIFF RESTS.

DEFENDANT RESTS.

Mr. Kanter: I respectfully move now for the direction of a verdict on two grounds:

30 First, there has been no due presentment, and Secondly, no due presentment of dishonor, Third, the endorser on the note appears to have been executed for the accommodation of the plaintiff or some other person not the defendant Irvington Iron Works, and therefore the Irvington Iron Works would not be liable.

The Court: I will deny the motion.

Defendant's counsel prays an exception to this ruling of the Court.

40 Exception noted as ground of appeal.

Motion for Direction of a Verdict.

Mr. Markey: I make a similar motion with respect to the defense. I will ask the Court to suppress the defenses of the defendant known or indicated as the first separate defense, third and fourth which relate to the Irvington Iron Works being an accommodation endorser. The Negotiable Instruments Act provides that a holder for value is one who gives value and value is defined as any consideration necessary to support a simple contract. 10

We have proven to the Court that we have given value in that we gave money. We have shown that the Irvington Iron Works used this money and we have shown and the Court has proof before it that the Irvington Iron Works' signature appears on this instrument and the case which is directly at point is cited at 85 Federal Reporter 120. 20

Mr. Kanter: What is the motion?

Mr. Markey: To direct a verdict on those three defenses.

Mr. Kanter: Your motion is for the direction of a verdict, also?

Mr. Markey: Yes.

The Court: I do not see why we should discuss the case of an accommodation endorser. It might have been an accommodation endorser if they had endorsed the instrument and never received anything. There is absolute proof that not only did they get a check for a certain amount of money, but they put it in their bank to their credit. They are not an accommodation endorser, they received money for this note. If the money was paid by Mr. Hughes to Mr. Stupelman then they would have been an accommodation endorser, but they paid the money to 30 40

Charge to Jury.

the Irvington Iron Works and they put the money into their own account and admittedly deposited it in the Hawthorne Avenue Trust Company, and it cannot be claimed that they were accommodation endorsers.

That disposes of that defense.

10

Mr. Markey: Further, that the defense—

The Court: That is all I can rule on, the other questions are questions of fact for the jury.

Mr. Kanter sums up for the defendant, Irvington Iron Works.

Mr. Markey sums up for the plaintiff.

20

CHARGE TO JURY.

The Court charges the jury as follows:

30 MOUNTAIN, J. The plaintiff in this case has brought an action against the maker and endorsers of a certain note, and one of the endorsers alone has set up a defense to this action claiming that it is not liable on the note in question. The note itself is dated Newark, New Jersey, March 2, 1928, in the amount of \$1,300, and is payable two months after its date with interest. The note was made by the Rankin Realty Company and signed by its treasurer and president and endorsed by those two gentlemen individually and then by one Hyman Smith and then by one Max Stupelman and Hyman Rogovin and then by the Irvington Iron Works, by Bernard Bernstein, president, the defendant who is now contesting this action.

40

According to the plaintiff's story, and you must not take my recollection of any of the testi-

Charge to Jury.

mony that does not agree with your own, because you have to decide all questions of fact, Mr. Hughes told us that he was summoned to the office of the Irvington Iron Works and there a note was exhibited to him, which is the note in question, and he was told by Mr. Bernstein that Mr. Bernstein wanted to sell it, and finally he consented to buy it, and he said he paid \$1,232.50 for it. As far as that transaction goes, the purchase of the note for less than its face value was entirely legitimate. The consideration, that is, the money he gave when he got possession of this note, was given in the form of a check drawn to the Irvington Iron Works dated March 7, 1928, and is endorsed by the Irvington Iron Works and was deposited by them in their account with the Hawthorne Avenue Trust Company as appears by its endorsement. I think an answer to a question of mine elicited that from Mr. Bernstein.

The two defenses that are interposed to this note are, first, improper presentment, and, second, that the note was not legally dishonored. Before I discuss any of the details of the testimony, there is a statute in this State passed by the legislature in reference to negotiable instruments, such as the note in question, which provides among other things, that the endorser on a note, that is, the one who puts his name on the reverse side of a note as the endorser, must have notice in accordance with the act of its dishonor at presentment or he is freed from liability. As to presentment the act says, "Presentment for payment is necessary to charge the drawer and endorsers."

When this note came due it was owned by the Mutual Bank of Roseville; it was, you will ob-

Charge to Jury.

serve, payable at the Colonial Trust Company of Newark. It became the duty of the Mutual Bank of Roseville on that date, that is, the date it became due, May 2, 1928, to present this note itself to the Colonial Trust Company of Newark and ask for payment. If payment was refused
10 because of lack of funds, or any other reason, then, in the ordinary course of business, as I understand it, the note would be returned to the Mutual Bank of Roseville and if they were wise it would be immediately protested by them. They say that was done.

As I understand the testimony, or perhaps I might better say in making some inferences from the testimony that I have heard, and I am discussing the plaintiff's case now, there is testi-
20 mony indicating that this note was sent to the Colonial Trust Company by the Mutual Bank of Roseville and payment was refused. A Mr. Marek of the Mutual Bank of Roseville protested it and it is alleged that among other things on that day, May 2nd, he sent notice to Mr. Hughes, the plaintiff in this suit, who was the last endorser on the note. When Mr. Hughes received that notice, as I understand his testimony, he gave no written notice to the Irvington Iron
30 Works, who had endorsed this note just prior to his endorsement, but he claims that he gave them actual notice of the dishonor of the note. Now, there is a difference, as you will have observed, between presentment and dishonor. Presentment is taking the note when it becomes due to the proper person and handing it to him, and demanding payment. Presentment in this case, if properly made, must have been made by the owner delivering this note to the Colonial Trust Company and asking for its payment; that was
40

Charge to Jury.

presentment. Dishonor is different; dishonor is the action taken by the owner when payment has been refused, in protesting it and giving notice to those who are liable, whether they are makers or endorsers. You are concerned in this case of course with the notice given to the endorser, Irvington Iron Works. I am not now speaking of presentment; I have passed that.

10

As I understand the plaintiff's story, he specifically claims that no written notice was given to the Irvington Iron Works, but personal and oral notice was given. He claimed that this note was presented for payment on May 2nd and protested on that day, and that he received his notice of protest on the 3rd of May, and on the 4th of May went to the Irvington Iron Works and notified them. You may ask whether he should not have done that on the 3rd of May, but the statute provides that where a party receives a notice of dishonor, he had after the receipt of such notice, the same time for giving notice to antecedent parties that the holder had of the dishonor; that is, if Mr. Hughes received this notice of dishonor on the 3rd of May, he had another day to give notice to the Irvington Iron Works. He could do that by writing or orally. He said he went to the Irvington Iron Works and saw Mr. Katchen. I think there was testimony that he telephoned Mr. Bernstein and I have forgotten for the moment the date of that telephone conversation, but whatever contact he had with the Irvington Iron Works, he had to fulfil this legal admeasurement of notice of dishonor. If given orally by him it had to be given at the usual place of business of the Irvington Iron Works. Whether it was so given or not is a question for you to decide.

20

30

40

Charge to Jury.

If either presentment or notice of dishonor was not properly given the Irvington Iron Works, it is not obligated to pay and your judgment should be for the defendant. Whether presentment was properly made under the law is, as I have indicated, for you to determine. In
 10 view of the fact that I have a number of requests to charge I will not dwell on the law further.

Mr. Bernstein denied that Mr. Hughes was at the factory or office of the Irvington Iron Works before May 5th; Mr. Katchen made a similar denial. If he did not get there until that time and gave no notice, it was too late. If you believe that story of the defendant, the plaintiff cannot recover. Mr. Bernstein said that on May
 20 5th when Mr. Hughes did come to the shop no notice of protest was given, but Mr. Hughes did say, "How about this note? It hasn't been paid."

There is an insistment on the part of the defendant that if notice was given to Mr. Katchen it was not notice at all at the usual place of business, not sufficient to apprise the defendant Irvington Iron Works of the fact that the note had been dishonored. Mr. Katchen, it is alleged by the defendant, was the shop superintendent.

30 I have been asked to charge by the defendant, and I will charge you as follows, but before I do charge you I wish to say that the burden of proof is upon the plaintiff to prove by the greater weight of the evidence that he is entitled to recover, and unless you are satisfied that he has sustained that burden by a preponderance of the evidence, of course your judgment should be for the defendant.

The first request by the defendant I will deny.
 40 That leads me to the second request. "If the

Charge to Jury.

testimony, upon the entire case, leaves it uncertain in your mind as to whether or not the plaintiff has sustained the burden of proof by a fair preponderance of the evidence, that is, if you are in doubt concerning the essential elements of the plaintiff's case, or any essential element of the plaintiff's case, or any essential of the plaintiff's case, then you must return a verdict in favor of the defendant."

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3. "In this case, as the note was payable at a bank, Colonial Trust Company, it was necessary that the note should have been presented for payment at the bank during banking hours. If presentment was not made during banking hours on the due date of the note, then the defendant, endorser, is discharged, and you must return a verdict in favor of the defendant. The plaintiff has the burden of proving to you, by a fair preponderance of the evidence, that the note was presented on the due date thereof, during banking hours."

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In order to constitute a good presentment in this case, it was necessary (first) that the instrument should have actually been presented on the due date, (second) it must have been presented by the holder, or by some person authorized to receive payment on his behalf, (third) the instrument, that is, the note, must have been exhibited to the person from whom payment was demanded, (fourth) it must have been presented during banking hours, unless the maker had no funds at the bank to meet it at any time during the day, in which latter event, it was necessary that the presentment should have been made before the bank closed. If all or any one of these elements are proved to you by a fair pre-

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Charge to Jury.

ponderance of the evidence, then you must return a verdict in favor of the defendant."

5. "Even if it be a fact that there were no funds at the bank where the note was payable wherewith to pay the note, that did not justify any failure to present the note on the due date at the bank, and if there was no such presentation, that is, a physical exhibition and demand for payment on the due date at the bank, you must return a verdict in favor of the defendant."

I do not understand the sixth request to charge, whether you mean for me to say that that was the only incident of presentment or not.

Mr. Kanter: Just that particular fact to be called to the jury's attention in view of what was said about it. I say that that fact itself does not show the proper presentment.

The Court: Standing by itself.

Mr. Kanter: Yes.

The Court: As I understand it, "You must disregard the statement made by the notary, Mr. Marek, that the note was returned to him with a slip attached, that it was returned for insufficient funds." That, of course, is only one factor in the question of presentment, and that standing by itself is not legal evidence that a proper presentment of the note had been made.

The seventh request is the same situation. That is another factor, the fact standing by itself. You understand that the question of presentment presents congeries of fact, several things, the sending of the note down to the bank, the going with it, perhaps, the ascertainment of whether there were funds. Counsel has picked out one particular thing and wants me to say that one thing showed that it was not

Charge to Jury.

presentment, and I cannot do that I will modify it this way.

"The one factor or one fact standing alone that Mr. Marek called up the Colonial Trust Company to find out if the note was good, was not a sufficient presentation of the note." That was obvious, I think. I think it is silly to charge it, because, of course, one factor would not be presentation. I do not think it is wise to charge that.

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"That one fact standing alone is not a sufficient presentation of the note. A telephone call does not take the place of the actual and physical presentation of the note.

"8. In addition to the other elements which the plaintiff is required to prove, it is also necessary that notice of dishonor, which I will more fully explain to you, should have been given or mailed within the time and in the manner, as I will indicate; the plaintiff has the burden of proving to you, by fair preponderance of the evidence, that such notice of dishonor occurred in this case, and if due notice of dishonor did not occur, proved by a fair preponderance of the evidence, then you must return a verdict in favor of the defendant."

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The ninth I will deny.

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"10. The plaintiff claims that on May 3, 1928, he telephoned to the president of the defendant company, notifying him of the fact that the note had not been paid. This is not sufficient notice of dishonor, unless the plaintiff actually talked to the president of the defendant company." I charge you that because he said he did. Of course, if he did not, he did not tell the truth; I mean if he did not talk to the president of the company as he said he did, why the testi-

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Charge to Jury.

mony is not worth anything. "If, from the testimony, it appears doubtful that such a telephone communication was actually made to the president of the defendant company, or, if such telephone communication is not proved to you by a fair preponderance of the evidence, then you cannot take such alleged telephone conversation as establishing the fact of due notice of dishonor."

The eleventh is denied for this reason: I will refer counsel to the 73rd Section of the Negotiable Instruments Act, which in paragraph 3 also disposes of request No. 12.

"13. It was not sufficient to give notice of dishonor, excepting to the defendant or to its agent in that behalf; the giving of a notice of dishonor to a mere employee, without being more, of the defendant company, was not sufficient."

The Court: I don't know what you mean by the 14th. That act is only a step in the proceedings.

Mr. Kanter: Withdraw No. 14.

"15. You must find a verdict in favor of the defendant, unless both presentment and due notice of dishonor are proved to you by a fair preponderance of the evidence. Proof of one without the other is not sufficient to charge the defendant, so that, even if presentment was made, without there being due notice of dishonor, or if due notice of dishonor was given, without there having been a proper presentment, you must return a verdict in favor of the defendant."

The 16th is denied.

"17. If from the testimony you come to the conclusion that notice of dishonor was not given

Charge to Jury.

to the defendant company until Saturday, May 5, 1928, then you must return a verdict in favor of the defendant, even though the note may have been properly presented for payment."

"18. The liability of an endorser is not an absolute and unqualified liability. An endorser, such as the defendant in this case, has only a qualified liability, and it is liable only if the legal conditions which impose such liability, that is, due presentment in the manner which I have defined it, and due notice of dishonor (in the manner which I have defined it) being made and given respectively. If either of these conditions were not observed in this case, the law requires you to return a verdict in favor of the defendant."

"19. In determining what weight or credibility you will give to the evidence of the plaintiff, you have a right to take into consideration whether his evidence given at this trial is conflicting, whether the evidence given by him at this trial is contradictory of the evidence given by him at a former trial, and whether the non-production of the records, which he claims to have, touching one or more of the issues in this case, should be given any significance."

"20. In determining what weight or credibility you will give to the evidence of Mr. Marek, the notary, you have a right to take into consideration whether or not he attempted to mislead or confuse you, whether or not his evidence as given at this trial is not conflicting, and also whether or not the evidence given by him at this trial is contradictory of the evidence given by him at a former trial."

The 21st is withdrawn.

Defendant's Requests to Charge.

If you find for the plaintiff your judgment should be for the principal and the plaintiff is entitled to interest in accordance with the terms of the note at six per cent. and you must compute that interest yourselves. Please do not return a verdict for so much money, that is, indicating a certain amount and interest because I have no power to compute the interest. If you decide for the plaintiff the interest should be added to the principal and the whole amount brought in as one verdict, a verdict of so many dollars in favor of the plaintiff. If on the other hand, you decide for the defendant, then your judgment should be for the defendant, Irvington Iron Works, Inc.

(The jury retires.)

Mr. Kanter: I respectfully pray an exception to your Honor's failure to charge requests Nos. 1, 9, 11 and 16 of the defendant.

Exception noted as ground of appeal.

DEFENDANT'S REQUESTS TO CHARGE.

1. The plaintiff before he can recover, must satisfy you, by a fair preponderance of the evidence, of the truth of every averment, necessary to sustain this case, as the elements of this case are defined to you by the Court. DENIED.

2. If the testimony, upon the entire case, leaves it uncertain in your mind as to whether or not the plaintiff has sustained the burden of proof by a fair preponderance of the evidence, that is, if you are in doubt concerning the essential elements of the plaintiff's case, or any

Defendant's Requests to Charge.

essential element of the plaintiff's case, then you must return a verdict in favor of the defendant.

CHARGED.

3. In this case, as the note was payable at a bank, Colonial Trust Company, it was necessary that the note should have been presented for payment, at the bank, during the banking hours, on the due date of the note, then the defendant, endorser, is discharged, and you must return a verdict in favor of the defendant. The plaintiff has the burden of proving to you, by a fair preponderance of the evidence, that the note was presented on the due date thereof, during banking hours.

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CHARGED.

4. In order to constitute a good presentment in this case, it was necessary (first) that the instrument should have actually been presented on the due date, (second) it must have been presented by the holder, or by some person authorized to receive payment on his behalf, (third) the instrument, that is, the note, must have been exhibited to the person from whom payment was demanded, (fourth) it must have been presented during banking hours, unless the maker had no funds at the bank to meet it at any time during the day, in which latter event, it was necessary that the presentment should have been made before the bank closed. If all or any one of these elements are not proved to you by a fair preponderance of the evidence, then you must return a verdict in favor of the defendant.

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CHARGED.

5. Even if it be a fact that there were no funds at the bank where the note was payable wherewith to pay the note, that did not justify any failure to present the note on the due date

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Defendant's Requests to Charge.

at the bank, and if there was no such presentation, that is, a physical exhibition and demand for payment on the due date at the bank, you must return a verdict in favor of the defendant.

CHARGED.

- 10 6. You must disregard the statement made by the notary, Mr. Marek, that the note was returned to him with a slip attached that it was returned for insufficient funds; that fact, if it be a fact, is not legal evidence that a proper presentment of the note had been made.

DENIED.

- 20 7. The fact(if it be a fact) that the notary, Mr. Marek, called upon the Colonial Trust Company to find out if the note was good, is not a sufficient presentation of the note; a telephone call does not take the place of the actual and physical presentation of the note. DENIED.

- 30 8. In addition to the other elements which the plaintiff is required to prove, it is also necessary that notice of dishonor, which I will more fully explain to you, should have been given or mailed within the time and in the manner, as I will indicate; the plaintiff has the burden of proving to you, by fair preponderance of the evidence, that such notice of dishonor occurred in this case, and if due notice of dishonor did not occur, proved by a fair preponderance of the evidence, then you must return a verdict in favor of the defendant.

CHARGED.

- 40 9. The plaintiff, asserting that he received notice of nonpayment of the note on May 3, 1928, had to give notice of such dishonor, within either one of the following times: (First) He had to mail the notice so that it would go

Defendant's Requests to Charge.

out on May 3, 1928; (Second) if the notice of dishonor was given otherwise than through the post office, then it must actually have been given within the same time that the notice would have been received had it been deposited in the post office on May 3, 1928. If you are not satisfied by a fair preponderance of the evidence, that the notice of dishonor was given, within the time which I have indicated, then you must return a verdict in favor of the defendant. DENIED.

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10. The plaintiff claims that on May 3, 1928, he telephoned to the president of the defendant company, notifying him of the fact that the note had not been paid. This is not sufficient notice of dishonor, unless the plaintiff actually talked to the president of the defendant company. If, from the testimony, it appears doubtful that such a telephone communication was actually made to the president of the defendant company, or, if such telephone communication is not proved to you by a fair preponderance of the evidence, then you cannot take such alleged telephone conversation as establishing the fact of due notice of dishonor.

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CHARGED.

11. The plaintiff also claims that on May 4, 1928, he delivered a copy of the notice of dishonor to a Mr. Katchen, the older Mr. Katchen as the plaintiff describes him, and who has been identified as Mr. William Katchen. There is no testimony in the case that Mr. William Katchen, if he in fact was given that notice, was ever authorized to receive it. It was, therefore, not sufficient notice of dishonor to deliver that notice to Mr. William Katchen.

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DENIED.

12. It was not sufficient to give notice of dishonor, excepting to the defendant or to its agent

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Defendant's Requests to Charge.

in that behalf; the giving of a notice of a notice of dishonor to a mere employee, without being more, of the defendant company, was not sufficient.

DENIED.

- 10 13. The notice of dishonor, whether given orally or otherwise, must have described the note with such particularity as would apprise the defendant what instrument was referred to. If you are not satisfied that this kind of a notice was given to some agent of the defendant authorized to receive it, by a fair preponderance of the evidence, then you must return a verdict in favor of the defendant.

CHARGED.

- 20 14. The fact that the notary, Mr. Marek, mailed the notice of dishonor to Mr. Hughes is not sufficient to charge the defendant.

WITHDRAWN.

- 30 15. You must find a verdict in favor of the defendant, unless both presentment and due notice of dishonor are proved to you by a fair preponderance of the evidence. Proof of one without the other is not sufficient to charge the defendant, so that, even if presentment was made, without there being due notice of dishonor, or if due notice of dishonor was given, without there having been a proper presentment, you must return a verdict in favor of the defendant.

CHARGED.

- 40 16. If the defendant company signed the endorsement for the accommodation of Stupelman and Rogovin, or for the accommodation of the plaintiff, you must return a verdict in favor of the defendant. A corporation of the State of New Jersey cannot become an accommodation

Defendant's Requests to Charge.

endorser. In determining whether the note was made by the defendant, for accommodation, you have the right to consider the essence, and not the mere form, of the transaction. DENIED.

17. If from the testimony you come to the conclusion that notice of dishonor was not given to the defendant company until Saturday, May 5, 1928, then you must return a verdict in favor of the defendant, even though the note may have been properly presented for payment. 10

CHARGED.

18. The liability of an endorser is not an absolute and unqualified liability. An endorser, such as the defendant in this case, has only a qualified liability, and it is liable only if the legal conditions which impose such a liability, that is, due presentment in the manner which I have defined it, and due notice of dishonor (in the manner which I have defined it) being made and given respectively. If either of these conditions were not observed in this case, the law requires you to return a verdict in favor of the defendant. 20

CHARGED.

19. In determining what weight or credibility you will give to the evidence of the plaintiff, you have a right to take into consideration whether his evidence given at this trial is conflicting, whether the evidence given by him at this trial is contradictory of the evidence given by him at a former trial, and whether the non-production of the records, which he claims to have, touching one or more of the issues in this case, should be given any significance. 30

CHARGED.

20. In determining what weight or credibility you will give to the evidence of Mr. Marek, the 40

Defendant's Requests to Charge.

notary, you have a right to take into consideration whether or not he attempted to mislead or confuse you, whether or not his evidence as given at this trial is not conflicting, and also whether or not the evidence given by him at this trial is contradictory of the evidence given by him at a former trial.

10 CHARGED.

21. The fact that I have denied the defendant's motion for a non-suit is not to have any bearing in your consideration of this case.

WITHDRAWN.

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*Exhibit P. 1.***EXHIBIT P. 1.**

1313 22/100

\$1300 00/100

Newark N. J. March 2, 1928

Two (2) months after date we promise to pay to
the order of Stupelman & Rogosin

Thirteen Hundred 00/100.....Dollars 10

at Colonial Trust Co Newark, N J.

Value received with Int Rankin Realty Co

Charles H. Smith Treas

No. 35589 Due 5/2 Israel Smith, Pres.

Joseph C. Hughes

(Endorsed)

Charles H. Smith

Israel Smith

Hyman Smith

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Max Stupelman

Hyman Rogosin

Irvington Iron Works Inc

B. Bernstein Pres

Joseph C. Hughes

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*Exhibit P. 2.***EXHIBIT P. 2.**

JOSEPH C. HUGHES

158 First Street

Newark N. J.

MUTUAL BANK OF ROSEVILLE

10

No. 310

NEWARK, N. J. March 7th 1928

Pay to

the Order of Irvington Iron Works \$1232 50/100

Twelve hundred thirty two 50/100.....Dollars

Joseph C. Hughes

(Endorsed)

Irvington Iron Works Inc

B. Bernstein Pres

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Pay to the Order of

NATIONAL NEWARK & ESSEX

BANKING CO.

Prior Endorsements Guaranteed

HAWTHORNE AVE. TRUST CO.

Newark, N. J.

RECEIVED PAYMENT

Through the Newark Clearing House

Prior Endorsements Guaranteed

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MAR 2 1928

NATIONAL NEWARK & ESSEX

BANKING CO.

Newark, N. J.

No. 1

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*Exhibit P. 3.***EXHIBIT P. 3.****CERTIFICATE OF PROTEST**

Mutual Bank of Roseville, Newark, N. J.

UNITED STATES OF AMERICA—

STATE OF NEW JERSEY—

COUNTY OF ESSEX, ss.

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BE IT KNOWN, that I, a duly empowered Notary Public, at the request of MUTUAL BANK OF ROSEVILLE, NEWARK, N. J., did present on 5/2/28 the annexed note for \$1313 22/ dated 3/2/28 signed by Rankin Realty Co to Colonial Trust Co NEWARK, N. J., and demanded payment thereof, which was refused; whereupon I solemnly PROTESTED, and by these presents do publicly and solemnly protest the said instrument as against all parties whom it may concern, for exchange, re-exchange, and all costs, damages and interest already incurred, or hereafter incurred, by reason of the non-payment thereof; and I hereby certify that on the same day, I gave due notice to the makers and endorsers thereof by depositing in the Post Office at NEWARK, N. J., (postage prepaid) notices thereof directed to the parties to be charged as follows:

20

One for Rankin Realty Co. c/o Colonial Trust Co
City

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One for Charles H. Smith

“ “

One for Israel Smith

“ “

One for Hyman Smith

“ “

One for Max Stupelman

“ “

One for Hyman Rogasin

“ “

One for Irvington Iron Works c/o Joseph Hughes

B. Bernstein

Joseph Hughes

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Exhibit P. 3.

Each notice being directed to the reputed place of residence of the person for whom it was intended.

Reason for protest Insufficient Funds

10 IN WITNESS WHEREOF, I have
 (SEAL) hereunto set my hand and affixed my
 Seal of Office

Stanley J Marek Notary Public

AMOUNT	1,313 22
INTEREST	
PROTEST	2
NOTICES	90
POSTAGE	18
TOTAL	1,316 30

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Exhibits P. 4, P. 5.

EXHIBIT P. 4.

NOTICE OF PROTEST

Mutual Bank of Roseville, Newark, N. J.

Newark, N. J.

Dear Sir:

You will please TAKE NOTICE that on May 2, 1928 note for \$1313 22/ dated 3/2/28 signed by Rankin Realty Co payable at Colonial Trust Co Newark, N. J., and endorsed by you, and due this day, is PROTESTED for non-payment and that the holders look to you for the payment thereof; payment of same having been demanded and refused.

Respectfully yours,

*Stanley J. Marek
Notary Public*

*To Joseph Hughes
313 Clifton Ave
Newark, N. J.*

EXHIBIT P. 5.

MUTUAL BANK OF ROSEVILLE

NEWARK, N. J.

5/3/28

We are enclosing, duly cancelled, your note (our No. 35589) for \$1313.22 having received (payment) of same. Due 5/2
~~(renewal)~~

Rankin Realty Co
Joseph C. Hughes

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*Exhibit D. 2.***EXHIBIT D. 2.**

This Voucher Check Is In Settlement of
the Following: If Incorrect Please Return.

Week ending
May 5/28

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Net Amount \$991 49/100

IRVINGTON IRON WORKS, Inc.

Structural and Ornamental Iron Work

487-493 Lyons Avenue No. 2175

NEWARK, N. J., May 5, 1928

Pay to the

Order of Payroll.....\$991 49/100

Nine Hundred Ninety-One 49/100.....Dollars

20 Par in New York City

IRVINGTON IRON WORKS, Inc.

B. Bernstein President

TO

HAWTHORNE AVENUE TRUST CO.)

55-658

OF NEWARK, N. J.)

(Endorsed)

B. Bernstein

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Stamped: Cashed 1st Teller

GROUND S OF APPEAL OF IRVINGTON IRON WORKS.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH C. HUGHES,
Plaintiff-Appellee,

vs.

RANKIN REALTY Co., a New Jer-
sey Corporation, *et als.*,
Defendants.

*Grounds of
Appeal of
Irvington
Iron Works.*

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Irvington Iron Works, a corporation, the ap-
pellant in the above entitled matter, specifies the
following as its grounds of appeal:

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1. The trial court erred in denying the motion
made in behalf of Irvington Iron Works for a
non-suit.

2. The trial court erred in denying the motion
made in behalf of Irvington Iron Works for a
direction of a verdict in its favor.

3. The trial court erred in failing to charge
Irvington Iron Works' following request to
charge: "The plaintiff, asserting that he re-
ceived notice of non-payment of the note on May
3, 1928, had to give notice of such dishonor,
within either one of the following times: (First)
He had to mail the notice so that it would go out
on May 3, 1928; (Second) if the notice of dis-
honor was given otherwise than through the post
office, then it must actually have been given
within the same time that the notice would have
been received had it been deposited in the post

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Grounds of Appeal of Irvington Iron Works.

office on May 3, 1928. If you are not satisfied by a fair preponderance of the evidence, that the notice of dishonor was given, within the time which I have indicated, then you must return a verdict in favor of the defendant."

- 10 4. The trial court erred in failing to charge Irvington Iron Works' following request to charge: "The plaintiff also claims that on May 4, 1928, he delivered a copy of the notice of dishonor to a Mr. Katchen, the older Mr. Katchen as the plaintiff describes him, and who has been identified as Mr. William Katchen. There is no testimony in the case that Mr. William Katchen, if he in fact was given that notice, was ever authorized to receive it. It was, therefore, not sufficient notice of dishonor to deliver that notice
20 to Mr. William Katchen."

5. The trial court erred in failing to charge Irvington Iron Works' following request to charge: "If the defendant company signed the endorsement for the accommodation of Stupelman and Rogovin, or for the accommodation of the plaintiff, you must return a verdict in favor of the defendant. A corporation of the State of New Jersey cannot become an accommodation
30 endorser. In determining whether the note was made by the defendant, for accommodation, you have the right to consider the essence, and not the mere form, of the transaction."

KANTER & KANTER,
Attorneys for, and of counsel with, Appellant.

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New Jersey Court of Errors and Appeals

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JOSEPH C. HUGHES,
Plaintiff-Respondent,

vs.

RANKIN REALTY Co., a New Jersey
corporation, et als.,
Defendants-Appellants.

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**BRIEF OF PLAINTIFF-RESPONDENT
JOSEPH C. HUGHES.**

Introductory Statement of Facts.

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Joseph C. Hughes, plaintiff-respondent acquired a note from the Irvington Iron Works, a New Jersey corporation, which was the subject of a suit in the Essex County Circuit Court and which is now the subject of this appeal. He acquired this note by the payment of \$1,232.50 to the Irvington Iron Works, by check drawn to the order of the company and endorsed and deposited by the company in the National Newark and Essex Bank-

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ing Company, which check is Exhibit P-2 and is set forth at page 108 of the State of the Case. Thereafter, Joseph C. Hughes sold the note to the Mutual Bank of Roseville of Newark, New Jersey. The note referred to, which is the subject of this appeal, is Exhibit P-1 and reproduced on page 107 of the State of the Case. The note was payable at the Colonial Trust Company of Newark, New Jersey, on May 2nd, 1928.

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On the date of maturity of the note, the Mutual Bank of Roseville was the owner of it. The note was presented for payment at the Colonial Trust Company, through the clearing house in Newark, New Jersey. It was dishonored. Notice of dishonor was sent by the holder thereof to Joseph C. Hughes. He was obliged to pay the amount of the note to the Mutual Bank of Roseville, the owner thereof at the time of its maturity. After notice of dishonor was served upon all prior endorsers and the maker of said note and upon their refusal and neglect to pay, suit was instituted against them in the Essex County Circuit Court. Judgment by default was entered against all of the parties except the Irvington Iron Works, a New Jersey corporation. At the trial of the case before a jury, judgment was entered in favor of Joseph C. Hughes and against the Irvington Iron Works, a New Jersey corporation.

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Irvington Iron Works appealed from the judgment entered in the court below for the reasons stated in the brief filed in this cause.

This action is a controversy between an endorser who was obligated to pay the full amount of the note against an endorser prior to him and for whose benefit the note was accepted by the plaintiff-respondent.

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Plaintiff-respondent urges that the judgment of the Essex County Circuit Court be affirmed for the following reasons:

Reason No. 1.

That presentment of the note was made in accordance with the provisions of Sections 70, 74 and 75 of the "Uniform Negotiable Instruments Act," 3 C. S. of New Jersey, pages 3743, 3744. 10

Reason No. 2.

That notice of dishonor of the note was given agreeably to the provisions of Sections 89, 97 and 104 of the "Uniform Negotiable Instruments Act," 3 C. S., pages 3745 to 3747. 20

Reason No. 3.

Notwithstanding the fact that the defendant-appellant contends it is an accommodation endorser, it was conclusively proven at the trial of the case that they received a check from the plaintiff-respondent, which check is marked Exhibit P-2 and is reproduced at page 108 of the State of the Case, which was deposited by them in their account in the National Newark and Essex Banking Company. Proof of this check and its acceptance by the Irvington Iron Works along with other circumstances explaining the delivery of the note to Joseph C. Hughes, the plaintiff-respondent, as a matter of law shows that value was paid to the Irvington Iron Works and therefore their 30 40

plea of accommodation endorser is without merit and is raised solely to cloud the issue. Since value was paid, the defense of accommodation endorser does not stand and on this ground, plaintiff-respondent is entitled to a judgment of affirmance.

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Reason No. 4.

That the question as to whether or not the note in question was exhibited to the payee bank ready for surrender after payment and whether it was presented to the bank during the usual banking hours on the date of maturity of the note and whether notice of dishonor was received in the manner and by the company sought to be charged with this obligation, were all questions of fact and were properly submitted by the trial judge to the jury for their determination. The finding in favor of the plaintiff-respondent and against the defendant, Irvington Iron Works, is conclusive, since the verdict is amply supported by the evidence in the case, the weight of the evidence and the sufficiency of the evidence in such cases being solely within the province of the jury; see *Hunke vs. Hunke* (Court of Errors and Appeals of New Jersey), 103 N. J. L., page 645; 137 Atl. R., page 419; *Smith vs. Brunswick Laundry Company*, 93 N. J. L., 436, 108 A., 184.

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Defendant-appellant contends as his first ground for reversal that there was no proof of due presentment of the note. In his brief are set forth the sections of the statute, germane to this argument to determine the sufficiency and validity of the presentment. The relationship of the parties must be established.

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The note, Exhibit P-1, copied at page 107 of the State of the Case, was payable at the Colonial Trust Company, in Newark, New Jersey. The uncontradicted testimony of the plaintiff-respondent shows that on the date when the note fell due the Mutual Bank of Roseville was the owner of the note.

This testimony is as follows:

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JOSEPH C. HUGHES, direct—page 24, line 9, State of the Case:

“Q. After you received this note, what did you do with it? A. Took it to the Mutual Bank of Roseville, now the Washington Trust Company and sold the note to the bank.

Q. When was the first time you learned that that note had not been paid? A. On the day of May 2nd, in that afternoon.

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Q. How did you find out it had not been paid? A. The bank called me on the telephone advising me that this note had not been paid and asked my advice with regard to the endorsers and their notification.”

In further support of the fact that the Mutual Bank of Roseville was the owner of the note on the day it fell due, we offer the testimony of Stanley J. Marek, who was employed by the bank.

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STANLEY J. MAREK—page 50, lines 35 to 40, State of Case:

“Q. By referring to that signature can you recall that on May 2, 1928, there was in the possession of the Mutual Bank of Roseville a certain note? A. I can recall.

Q. What was the amount of that note? A. The amount of that note was \$1,313.22.”

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Page 51, lines 1 to 7, State of the Case:

“Q. Did you present that note for payment? A. I did.

Q. Who was the owner of the note on that day? A. The owner of the note was the Mutual Bank of Roseville.”

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On the date of maturity of this note, it is shown that the Mutual Bank of Roseville was the owner of the note and this fact is important, in that the bank was charged with the duty of presenting it in order to charge all prior endorsers on the note with liability. Therefore, when the defendant-appellant questions the validity of presentment, the test should be applied with the fact of ownership clearly in mind, that is, that a bank was the owner of the note and the note was payable at a bank.

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The defendant-appellant says that the note was not exhibited to the Colonial Trust Company. The testimony of Stanley J. Marek, a trust officer of the Mutual Bank of Roseville and the notary who protested this check and the testimony of Roger W. Hill, Secretary and Treasurer of the Colonial Trust Company, clearly established the fact that the Mutual Bank of Roseville, the owner of the note, presented this note to the Colonial Trust Company through the Newark Clearing House. Not only does it do this but the testimony goes farther and shows that the Rankin Realty Company, the maker of the note, was not able to discharge this obligation on the day it fell due.

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Their testimony is as follows:

Page 50, lines 18 to 20, State of the Case:

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“Q. Were you on May 2nd, 1928, employed by the Mutual Bank of Roseville? A. I was.

Q. In what capacity? A. As assistant Trust Officer.”

And continuing on page 51, lines 1 to 15:

“Q. Did you present that note for payment? A. I did. 10

Q. To whom did you present the note? A. I presented the note to the Colonial Trust Company of Newark.

Q. Was the note paid? A. The note was not paid.

Q. Did the Colonial Trust Company return it to you? A. They did.”

Page 51, lines 29-32, State of Case:

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“Q. Now, you say on May 2nd, 1928, the Mutual Bank of Roseville was the owner of this particular note, is that true? A. That is true.

Q. In what manner was that note presented for payment? A. The note was presented through the clearing house from Newark.

Q. Do you know as a matter of fact whether or not the note actually reached the Colonial Trust Company of Newark? A. It must have reached the Colonial Trust Company because the return ticket was on it marked ‘insufficient funds, Colonial Trust Company.’ ” 30

And on cross examination of Stanley J. Marek, by counsel for the defendant-appellant, the confirmation of its presence at the payee bank was conclusively established.

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Page 54, lines 20 to 40, State of the Case:

“Q. Who told you that he or she presented it, who is the person? A. The person was the bookkeeper.

Q. Who identified the name of the bookkeeper? A. I cannot identify the name of the bookkeeper.

10 Q. Some person told you then that she or he did it and you based your statement that the note was presented upon that report, do you not? A. I base my statement on the fact that the note was returned with a ticket attached to it marked ‘insufficient funds’ and the confirmation of it was received by me.”

20 And on re-direct examination, the exact method used by the bank in making presentation of items at another bank, through the clearing house was outlined by Stanley J. Marek.

Page 58, line 6, State of the Case:

“Q. You say their runner took the note to the bank, whose runner do you mean? A. Our runner took it to the clearing house and their runner took it from the clearing house to the bank.

30 By the Court:

Q. Is that the customary way? A. It is done every day in the year.”

40 ROGER W. HILL, sworn in behalf of plaintiff-respondent (p. 58, State of the Case, bottom), further explains the usage and custom of banks in presenting checks and notes for payment through the clearing house. His testimony is as follows:

Page 58, line 39, State of the Case:

"Q. What is your occupation? A. Secretary and Treasurer, Colonial Trust Company, Newark."

Page 60, line 35, State of the Case:

"Q. Is the Colonial Trust Company a member of the Newark Clearing House? A. Associate member. 10

Q. What system does the Newark Clearing House use to transfer items to your bank for collection? A. Notes are usually put through in clearing the same as checks and they come up for clearing from the clearing house as a check will on the day it is due."

We believe that the foregoing recital of the testimony is sufficient to satisfy Sections 74 and 75 of the "Uniform Negotiable Instruments Act" above quoted. Sufficient proof has been offered to show that the instrument itself was actually and physically in the banking house of the Colonial Trust Company, the place where it was payable, during the banking hours of the day it was payable. 20

The defendant-appellant rests his entire contention upon the fact that the notary public did not himself present it to any teller or officer of the Colonial Trust Company, at a window in the bank. The "Uniform Negotiable Instruments Act" does not require such a presentment, as the decisions under the act clearly show. The method employed by banking institutions in presenting items for payment through a clearing house is a custom universally accepted in the financial world. The necessity for such a system is obvious. With- 30 40

out it modern banking institutions would be unable to afford facilities to keep abreast of the requirements of modern business.

10 That this method of presentment is approved universally, we refer to Morse on Banking, Section 354, wherein is said "That the system of presentment to the clearing house is a legal presentment for payment to the bank on which the check is drawn, * * * a matter which it would seem could never be doubted * * * has been specifically ruled in England."

20 The language and ruling quoted from Morse on Banking, Section 354, as set forth above, was adduced in toto in the case of Biebe vs. Chicago Lake State Bank, 199 Northwestern, 513. In this case presentment had been made through a clearing house and the question before the court involved a consideration of the section of our Negotiable Instruments Act relating to the manner and form of presentment.

In the case of Columbia Knickerbocker Trust Company vs. Miller, supra, 108 Northwestern, 179, "Court of Appeals of New York, May 25th, 1915," wherein the court says:

30 "The check was in fact presented at the place (where it was payable) through the clearing house. Although the point does not expressly appear to have been ruled upon in this state, it has been assumed in many cases that presentments through the clearing house is sufficient; Turner vs. Bank of Fox Lake, 4 Abb. Dec., 434; Johnson vs. Bank of North America, 5 Rob., 554-594; Burkhalter vs. New Amsterdam National Bank, 128 App. Div., 554; 112 N. Y. Supplement, 973, affirmed 198 N. Y., 520, 92 N. E., 1080."

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The conclusion of the court was that under the Uniform Negotiable Instruments Act, Section 132, providing that presentment for payment must be made by some person authorized to receive payment, a bank to whom a check was endorsed may present it to the drawee bank through the clearing house.

The reason prompting the rule is stated by the court in the following language: "that arrangement obviates the necessity of having someone stand at the counter of the city bank to receive payment and in practical effect answer the same purpose. We agree with the learned counsel for the defendant-appellant that it is not competent for the clearing house association to change the ruling of the law merchant but we have not been able to discover wherein any attempt was made to do so. It is quite possible to give effect to the constitution and rules of the association in so far as concerns transactions between members, themselves without in any way affecting the rights of outsiders. To hold otherwise would make it difficult, if not practically impossible, to effect exchanges in a great financial center."

In the case at bar, where presentment was made through the clearing house, which is an agency created by the banks in the city of Newark for the purpose of facilitating the exchange of notes, checks and drafts between them, the clearing house was the agent of the owner of the note and was authorized to receive payment of the note. This method of presentation of items is common among bankers. The parties to this note, as a matter of law, should be bound by the custom and usage of the bank in that the custom and usage is universal and generally known to those transact-

ing business with banks. Knowledge of the custom and usages of banks should be chargeable more so to a corporate defendant than to individuals in view of the fact that their many checks received in the course of business are paid through clearing houses, as an examination of any one of them might have disclosed to the defendant-appellant.

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That a person who makes or endorses a note payable at a bank is presumed to have knowledge of the valid usages of the bank in respect to the presentation and protest of such paper has been made a subject of judicial decision; *Planter's Bank vs. Markam*, 37 A. M. Dec., 163, 397, 21 L. R. A., 445; *Mills vs. Bank of United States*, 24 U. S., 11 Wheat., 436; *Benedict vs. Rose*, 16 S. C., 129.

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This doctrine is set forth at length in 3 R. C. L., pages 855-64 (Custom and Usage):

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"Generally, the law merchant including the Law of Negotiable papers is founded on and is the creature of a commercial usage and custom. Custom and usage have really made the law and courts in their decisions merely declare it. The law of commercial paper is not only founded on commercial usage but is designed to be in aid of trade and commerce. Its rules, therefore, should be construed with reference to and in harmony with general business usages and as far as possible with the common understanding in commercial circles."

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And further in Volume 27, R. C. L., page 24, it has been said that usage ought to have great weight in determining a question relating to com-

mercial paper and that it is perhaps quite as important that usage should not be disturbed as that the point should be decided abstractly or theoretically right. Citing *Hastings vs. Thompson*, 54 Minn., 184, 55 Northwestern, 968, 40 A. S. R., 315-21, L. R. A., 178; *Williamson vs. Smith*, 1 Cald. Tenn., 1-78 A. Dec., 478; *Bank of Columbia vs. MacGruders, Admr's*, 6 Har. and J. (Md.), 172, 14 Am. Dec., 271; *Lincoln vs. Kennebeck Bank*, page 9, Mass., 155, 6 A. M. Dec., 152. 10

Section 75 of the Negotiable Instruments Act, 3 C. S., page 3744, requires that presentment for payment must be made during banking hours, when the instrument is payable at a bank. Proof of compliance with this section of the act is offered by the bank through the testimony of Roger W. Hill, Secretary and Treasurer of the Colonial Trust Company, the payee bank, whose testimony clearly shows the inability of the maker of the note, Rankin Realty Company to meet its obligation on May 2nd, 1928, the date when this note was due. State of Case, page 59, line 34, wherein he testified as to the loss of the sheet containing the account of the Rankin Realty Company with the Colonial Trust Company and under cross examination by Mr. Kanter, attorney for the defendant-appellant, it is shown that an item due from the Rankin Realty Company in the exact amount of the note exhibited as P-1 was refused by the Colonial Trust Company, his testimony is as follows: 20 30

ROGER W. HILL—page 63, lines 1 to 12, State of Case:

“Q. Have you any records that would show that this particular note was presented for 40

payment to the Colonial Trust Company on May 2nd, 1928? A. I am wondering just exactly how to answer that. I have records to indicate that a note, but I could not say it was this particular note other than that the amounts agree."

10 And further in his testimony, page 67, State of Case, line 23:

"Q. Mr. Hill, as I understand it this paper is a paper that is regularly used every day in the course of the bank's business and its entries are such entries as are made every day by your employees indicating papers that has to be returned. A. For some reason.

20 Q. For insufficient funds or otherwise? A. Yes, sir.

Q. And that paper is a part of the records of the bank and is paper upon which you even base any action of yours so far as its accuracy is concerned, that is true, is it? A. Yes, sir.

Q. What time of day is that paper made up? A. Between 12:15 and 1:00, not later than 1:00.

30 Q. Therefore, every item that appears on that paper was in the bank between those hours? A. Between the hours of 9:00 and 1:00 o'clock."

The necessity for testimony that inferentially proved the exhibition of the note during banking hours on May 2nd, 1928, becomes necessary in view of the loss of the sheet containing the account of the maker with the Colonial Trust Com-

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pany, with the payee bank. However, the fact that a note in the same amount as the note of the plaintiff-respondent was returned by the Colonial Trust Company on May 2nd, 1928, was a circumstance to be considered by a jury in determining whether or not this note was the note returned by the bank on May 2nd, 1928, marked "not good." The records containing this information were prepared during the usual banking hours and bore the record of items presented to the bank on that day. 10

The plaintiff-respondent does not rely, as the foregoing testimony will show, on presentment by telephone. The telephone conversation with the Colonial Trust Company with the notary public, was offered in evidence only to show to what extent the Mutual Bank of Roseville went in its endeavor to collect the note on the day of its maturity. The note had been in the bank earlier in the day and when it reached the Mutual Bank of Roseville again the fact of its dishonor was confirmed by telephone. Under the circumstances *Gelpin vs. Savage*, 201 N. Y., 167, 94 Northeastern, 656, has no application to the facts in this case. 20

Reason No. 2.

The judgment of the Essex County Circuit Court should be affirmed, because it was proven at the trial of the case that the plaintiff-respondent complied with the provisions of the "Negotiable Instruments Act" in so far as it relates to manner, form and time of giving notice of dishonor of the negotiable instrument. 30

The evidence in the case is to be examined with the following provisions of the "Negotiable Instruments Act" as the test: 40

Section 96, Negotiable Instruments Act, 3 C. S.,
page 3746:

- 10 a. "The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment; it may in all cases be given by delivering it personally or through the mails."

Section 104, Negotiable Instruments Act, 3 C. S.,
page 3747:

- 20 b. "If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision."

Section 107, Negotiable Instruments Act, #3
C. S., page 3747:

- 30 c. "Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor."

40 The following testimony was offered to show that the plaintiff in dealing with the notice of dishonor of the instrument in question, complied strictly with the terms of the act, in that it shows that he received notice of dishonor from the Mutual Bank of Roseville on May 3rd, 1928; that he immediately telephoned notice of its dishonor

to the President of the Irvington Iron Works and supplemented his telephone communication by a personal visit to the office of the Irvington Iron Works on the same day and on May 4th, 1928, within twenty-four (24) hours after receipt of his notice, he delivered a written notice of the dishonor of the note in question, to William Katchen, Sr., who was employed by the Irvington Iron Works, due to the inability of the plaintiff-respondent to obtain service upon the President of the Irvington Iron Works. 10

All of the relevant testimony bearing on this point is as follows:

Page 24, lines 34-40, State of the Case:

“Q. Did you receive notice of non-payment from the bank? A. Yes, sir. 20

Q. On what date? A. May 3rd.

Q. I show you a paper. Was that received by you on May 3rd? A. It was.

Q. I show you another paper. Was that received on May 3rd (indicating)? A. Yes, sir.”

Page 25, lines 1-40, State of the Case:

“Q. And two other papers (indicating) 30
were these received on May 3rd? A. Yes, sir,
May 4th, I beg your pardon.

Q. Which were received on May 4th? A.
This notice of the check being charged back
to me.

Q. When this notice of the check being
charged back to you was received on May
4th— A. Yes, sir.

Q. When were the other papers received? 40
A. May 3rd.

Q. When was this paper received? A. May 3rd.

Q. What is this? A. Notice of protest of a certain document.

Q. This paper was received on what date? A. May 3rd.

10 Q. What is that? A. Notice of protest to me personally."

Page 26, lines 15-40, State of the Case:

20 "Q. I now show you a certificate of protest marked Exhibit P-3 and notice of protest marked Exhibit P-4. Tell the Court and jury what you did upon receipt of this notice. A. Upon receipt of this on May 3rd I called the Irvington Iron Works by telephone and received a response thereon by a person whom I believe to be Bernard Bernstein and stated that this note had been protested, and I would like to see him on the matter. Thereupon, soon after, within a few minutes, I made the journey to the Irvington Iron Works office but did not find Bernard Bernstein in the office, but on that visit to the office I had a conversation with Mr. Katchen, Sr., with relation to this and he suggested to me that we might go over to some works where we could see the prior endorsers, that was Stupelman and Rogovin. We journeyed to this works, somewhere in Irvington, in the vicinity of Olympic Park, the exact street I do not know. At the works there we was one of these men, which one I do not remember, and discussed the fact of the note not being paid. That day I did not see the other person at all, but the follow-

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ing day I again journeyed to the Irvington Iron Works office seeking to interview Mr. Bernstein, which I had requested. Again he was not there and I left a copy of this notice of protest with the office of Mr. Katchen, Sr."

The defendant contends that notwithstanding the fact that this notice was received and within the period stated, that because the notice was served upon William Katchen, Sr., that effective proof was not adduced to show that he had authority to receive such notice. 10

The testimony above set forth indicates an earnest effort on the part of the plaintiff-respondent to obtain service of the notice upon the President of the Irvington Iron Works, personally. The testimony shows that he was present at the Irvington Iron Works on two consecutive days. That he sought the President and was unsuccessful and as a last resort left his notice with an employee, who was then in charge at the office and he further explains, for reason for delivering the notice to William Katchen at page 28, lines 1 to 17 of the State of the Case, wherein he testified as follows: 20

"Q. Had you had any previous dealings with the Irvington Iron Works? A. Yes, sir. 30

Q. Were they known to you? A. Yes, sir.

Q. Do you know who the officers for the company were? A. Only as president, Bernard Bernstein.

Q. Did you know any of the other officers? A. No.

Q. Did you know what Mr. Katchen's position was there? A. No, excepting on prior occasions he was the man in charge of the 40

works more frequently than any other person to whom you could refer.”

10 The requirements of the statute requiring the service of notice and the rules laid down relative to the service of notice by mail, have, for their purpose to acquaint the prior endorser of the dishonor of the note so that he may immediately protect himself in what ever way he can against all prior endorsers and the maker. The evidence of the plaintiff-respondent shows that he gave this notice, but the defendant says that assuming that he did give the notice in the manner in which he says that this notice was served was not enough because it was served upon an employee. Had testimony not been introduced, it would have been
20 sufficient service upon the corporation to leave the notice with William Katchen, Sr., under the well recognized principle of law stated in the case of the American Exchange National Bank vs. American Hotel Victoria Co., 1905, 92 N. Y. Supp., 1006, wherein the court said:

30 “Where personal service is relied upon, the evidence must show either actual personal service, or an ordinarily intelligent, diligent effort to make personal service upon the indorser, either at his place of business during business hours, or at his residence if he have no place of business, but if he be absent, it is not necessary to call a second time, and the notice may in that event be left with anyone found in charge, or, if there be no one in charge, or no one there, then the giving of notice is deemed to be waived.”

This notice was left with a man, whose duties indicated to the plaintiff not only on this occasion but on prior occasions that he was in general charge of the office. The fact was further strengthened at the trial by the records in this case, showing that service of the summons and complaint in this case was made upon William Katchen, Sr., and was not attacked by the defendant-appellant. 10

Under such circumstances the court properly left the question of notice to the jury as has been done in other states in interpreting these sections of the Negotiable Instruments Act, relating to the service of a notice of dishonor. We refer particularly to the case of Wilkens vs. Commercial Bank, 6 How. (Miss.), 217, wherein it was stated "The question as to whether an implied agency to receive notice exists is a matter of fact to be determined by the jury." 20

Our own courts have held that "When any material facts are in dispute even though the evidence be open to debate and leaves the mind in some doubt, a verdict should not be directed, but the question is for the jury." *D. L. & W. R. R. Company vs. Shelton*, 55 N. J. Law., 342, 345, 26 Atl., 937; *Bauman vs. Ham-Amt. Pack. Co.*, 67 N. J. L., 250, 252, 253, 51 Atl., 461; *Jordon vs. Reed*, 77 N. J. Law, 584, 71 Atl., 280, 285. 30

Therefore the questions of presentment and notice and whether the notice was timely, were properly submitted by the trial court to the jury. The verdict is amply supported by the evidence, therefore, the judgment should be affirmed.

Reason No. 3.

To show that the Irvington Iron Works was not an accommodation endorser, reference might be made to only one portion of the testimony of the plaintiff.

Page 22, line 27, State of the Case:

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“Q. Explain to the Court and jury the circumstances under which you received that note. A. Upon the same day as I received the note the Irvington Iron Works, Bernard Bernstein called on the 'phone stating that he had some papers there which he would like to dispose of, to which over the telephone I first replied, 'I do not think I would be able to do anything at all.' He suggested I come to see him anyway and after a little conversation by telephone I agreed I would go up to this office, which I did. Upon entering the office we then discussed, by me stating first, 'Well, what is it you have the matter?' and he said then and there by holding in his hand this particular note that Stupelman and Rogovin had given them this note, but didn't say for what, but that they would like to get some money out of it and he wanted to know what I would give for it. I said I would give a sum which I knew could not be accepted as adequate, i. e., \$1,000. After some conversation with Bernard Bernstein and cross conversation between Bernard Bernstein and Rogovin and Stupelman a sum was agreed upon at a discount of \$62.50. During this time Stupelman and Rogovin for the first time in my life became known to me and at that time

I didn't know where they came from and still do not know where they reside. I therefore negotiated with Bernard Bernstein in person and with no other for the purchase of that note."

The question then is, did Irvington Iron Works receive value. Value is defined by the Negotiable Instruments Act, Section 25, 3 C. S., 3738: "Value is any consideration sufficient to support a simple contract." 10

An accommodation signer is defined by the Negotiable Instruments Act, Section 29, 3 C. S., 3738: "An accommodation party is one who has signed the instrument as endorser * * *, without receiving value therefor."

The check paid to Irvington Iron Works, and used by them, Exhibit P-2, at page 108 of the State of the Case, speaks for itself. It was deposited and used by the Irvington Iron Works. While there is no necessity for citation of authority to support the plain language of the act yet a case directly in point dismisses any doubt about it. 20

The language of the case is as follows: "An accommodation endorsement for the sole benefit of another is ultra vires of a commercial corporation. But, if the endorsement is shown to be partially for its own benefit, as for the purpose of enabling its creditor to raise money to be partially used in discharging its debt, the corporation will be estopped, after receiving the money, to deny the validity of its contract." See *Lyon Potter vs. National Bank*, 85 Federal, 120 and to the same effect, *Hess vs. Sloan*, 173 N. Y., 616 (*Beacon vs. Montauk Brewing*, 130 A. D., 737). 30

Under the circumstances we respectfully urge that this ground for appeal should be dismissed. 40

Reason No. 4.

From the examination of the testimony adduced by the plaintiff at the time the plaintiff rested his case, facts were presented showing that a note owned by the Mutual Bank of Roseville was presented for payment at the place where it was made payable, namely, the Colonial Trust Company, in Newark, N. J., through the Newark Clearing House, that upon its return to the Mutual Bank of Roseville, the owner of the note, the assistant trust officer and notary public confirmed by telephone the fact that the note was presented and that there was insufficient funds in the account of the maker with the Colonial Trust Company to satisfy this obligation. That notice of protest was sent to Joseph C. Hughes by the Mutual Bank of Roseville and received by him on May 3rd, 1928. That Mr. Hughes telephoned to the President of the Irvington Iron Works on that day informing him of the dishonor of the note; that he immediately sought to interview the President of the Irvington Iron Works (May 3rd, 1928); that he sought to interview him again on May 4th, 1928, and being unable to locate him, left the notice with Mr. William Katchen, Sr., superintendent of the Irvington Iron Works and the man in charge of their offices. The court records themselves indicate that service of process in this suit was made upon Mr. William Katchen, Sr., agent in charge of the Irvington Iron Works.

With these facts before the court and the court being satisfied of the sufficiency of the presentment and notice of protest, properly refused a motion for a non-suit and submitted the case to the jury. Upon the close of the defendant-appellant's case,

the testimony adduced by them, in effect was a general denial of the evidence offered by the plaintiff. Under such circumstances, the court had no other alternative then to submit the case to the jury. Because the weight of the evidence, its credibility and its sufficiency as matters of fact could only be based upon by them; Hunke vs. Hunke, 103 N. J. Law, 645; Smith vs. Brunswick Laundry Company, 93 N. J. L., 436, 108 A., 184. 10

“When any material facts are in dispute even though the evidence be open to debate and leaves the mind in some doubt, a verdict should not be directed, but the question is for the jury.” D. L. & W. R. R. Company vs. Shelton, 55 N. J. Law, 342, 345, 26 Atl., 937; Bauman vs. Ham-Amt. Pack. Co., 67 N. J. L., 250, 252, 253, 51 Atl., 461; Jordan vs. Reed, 77 N. J. Law, 584, 71 Atl., 280, 285. 20

The judgment of the Essex County Circuit Court should be affirmed for the foregoing reasons with costs in favor of the plaintiff-respondent.

Respectfully submitted,

PECK & RAWSON,
Attorneys for Plaintiff-Respondent. 30

THOMAS J. MARKEY,
of Counsel.

New Jersey Court of Errors and Appeals

JOSEPH C. HUGHES,

Plaintiff-Appellee,

vs.

RANKIN REALTY Co., a New Jersey corporation, *et als.*,

Defendants-Appellants.

BRIEF OF DEFENDANT-APPELLANT, IRVINGTON IRON WORKS.

Kanter & Kanter, attorneys of defendant-appellant; Elias A. Kanter, of counsel.

Introductory Statement of Facts.

This action, tried in the Essex County Circuit Court, was a suit on a promissory note made by Rankin Realty Company to the order of Stupelman & Rogorein (Max Stupelman and Hyman Rogorein), endorsed by the payees, and also endorsed by Charles H. Smith, Israel Smith and Hyman Smith. The present appeal does not concern any of those defendants. The plaintiff in the action, Joseph C. Hughes, sought to charge the defendant, Irvington Iron Works, as endorser, the complaint alleging that "the said note was endorsed by * * * Irvington Iron Works, a corporation of the State of New Jersey, which said corporation, before the date of the maturity of said note, duly endorsed and delivered it to the plaintiff herein" (see State of Case, p. 5, ll. 35-40). In all cases where we use italics in this brief, unless otherwise specially noted, the italics are ours.

The trial resulted in a judgment in favor of the plaintiff against Irvington Iron Works, and from such judgment that defendant appeals, there being five grounds of appeal (State of Case, pp. 113-114), the substance thereof being the trial court's failure to non-suit the plaintiff, the trial court's failure to direct a verdict in this defendant's favor and the trial court's failure to make certain charges as requested by this defendant.

POINT I.

The Trial Court erred in denying the motion made in behalf of Irvington Iron Works for a non-suit.

This ground of appeal is the first of the grounds of appeal specified by Irvington Iron Works, the appellant (State of Case, p. 113, ll. 22-25); this Court will find that a motion was made for a non-suit (State of Case, p. 69, ll. 25-30), that the motion was denied (State of Case, p. 69, l. 35), and that an exception was noted (State of Case, p. 72, l. 28).

The motion for a non-suit was rested "on the ground that the plaintiff has failed to prove a due presentment or notice of dishonor as provided by our Negotiable Instruments Act" (State of Case, p. 68, ll. 25-30). As two reasons for the motion were presented, such reasons will be separately discussed.

Reason No. 1. There was no proof of due presentment.

As heretofore already indicated, Irvington Iron Works was sought to be charged as an endorser. Presentment was, therefore, required, under the

provisions of Section 70 of our Negotiable Instruments Act, which provides:

"Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part; but except as herein otherwise provided, *presentment for payment is necessary in order to charge the drawer and indorsers.*" 3 C. S. of N. J., page 3743, Section 70.

Another section of the same statute provides that:

"*The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.*" 3 C. S. of N. J., page 3744, Section 74.

And as the instrument in the case at bar was payable at a bank, the following section of our statutes was also applicable:

"Where the instrument is payable at a bank, *presentment for payment must be made during banking hours*, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient." 3 C. S., page 3744, Section 75.

The *only testimony* offered by the plaintiff in support of his contention, that the instrument was presented as required by the foregoing provisions of the Negotiable Instruments Act, is contained in the testimony of Stanley J. Marek, the notary public, at pages 50-58 of the State of the Case, and we respectfully contend that *such testimony is entirely barren of any proof that the instrument was properly presented.* On direct

examination, he testified that he presented the note to the Colonial Trust Company, that the note was not paid and that he thereupon sent out notices of protest to the plaintiff, Joseph C. Hughes (State of Case, p. 51, ll. 1-20). However, on cross examination, it *developed conclusively* that, as a matter of fact, *this witness did NOT present the note*, because the testimony is as follows:

“Q Now, which is the fact, did you or did you not in fact present the note to the Colonial Trust Company? A The note was presented to the Colonial Trust Company.

Mr. Kanter: I ask that the answer be stricken out as not responsive.

The Court: Strike it out.

Q Did you or did you not in fact present this note to the Colonial Trust Company?

A I did present the note to the Colonial Trust Company” (State of Case, bottom of p. 53).

The testimony of this witness continues (State of Case, p. 54):

“Q WHEN DID YOU GO THERE? A I DID NOT GO MYSELF.

Q I ASKED YOU WHETHER YOU DID OR DID NOT PRESENT THE NOTE. I DID NOT ASK YOU WHAT SOMEONE ELSE DID. A I DID NOT GO PERSONALLY.

Q Then, you did not present the note, did you? A I did insofar as it was presented by my agent.

Q I am not asking you about your agent. A I did not go myself.

Q YOU DID NOT GO YOURSELF TO THE BANKING OFFICE OF THE COLONIAL TRUST COMPANY AND PRESENT THAT NOTE AT THE COUNTER OR TO ONE OF THE TELLERS AND ASK FOR PAYMENT OF THE NOTE, DID YOU? A NOT MYSELF.

Q YOU DID NOT PHYSICALLY ACCEPT THAT NOTE OR PRESENT IT TO ANY TELLER OR OFFICER OF THE COLONIAL TRUST COMPANY AT A WINDOW. A I DID NOT.

Q YOU DID NOT AT ANY TIME ON MAY 2, 1928, PRESENT THAT NOTE ACTUALLY, PHYSICALLY AND PERSONALLY FOR PAYMENT AT THE PLACE WHERE IT WAS PAYABLE. A I DID NOT PERSONALLY PRESENT THE NOTE ON THAT DAY.

Q Someone told you that the note was presented on that day, is that right, which you say was your agent? A I know it was presented.

Q *Who told you that he or she presented it, who is the person?* A *The person was the bookkeeper.*

Q *Who identified the name of the bookkeeper?* A *I cannot identify the name of the bookkeeper.*

Q Some person told you then that she or he did it and you based your statement that the note was presented upon that report, do you not? A I base my statement on the fact that the note was returned with a ticket attached to it marked 'insufficient funds,' and the confirmation of it was received by me."

The testimony of this witness further continues (State of Case, p. 55 and top of p. 56) as follows:

Q YOU PERSONALLY NEVER TOOK THIS NOTE TO THE BANK? A I DID NOT.

Q You believe some young man or some young woman took it there. A I know it was taken there.

Q *Can you tell us who took it there?* A *Their runner.*

Q *Who is he by name?* A *That I know not.*

Q *Was it a man or woman?* A *What do I care who it was?*

Q *Do you know?* A *I do not.*

Q What were the banking hours of the Colonial Trust Company on May 2, 1928? A I do not know.

Q What were the banking hours of banks on that day? A The banking hours of our bank is 8:15 until what time we please to close.

Q Do you know what the banking hours of the Colonial Trust Company are? A No.

Q What are the customary banking hours of banks in the City of Newark? A The general hours are from 9:00 until 3:00.

Q Have you any knowledge as to what the banking hours of the Colonial Trust Company were on May 3rd? A I presume somewhat similar.

Q From nine in the morning until three in the afternoon? A I presume so.

Q They close every afternoon at three o'clock? A They may.

Q That is the time they close, at three in the afternoon? A I don't know; they may.

Q YOU DID NOT GO WITH THIS NOTE PERSONALLY TO THE BANK AT ANY TIME DURING THAT DAY? A I TOLD YOU I DID NOT.

Q WHAT YOU DID DO WAS CALL UP SOME BOOKKEEPER AND ASK HIM IF THE NOTE WAS GOOD AND THE BOOKKEEPER SAID IT WAS NO GOOD AND YOU PROTESTED IT? A NO, I VERIFIED THE FACT THAT THE NOTE WAS NOT GOOD AFTER IT HAD BEEN RETURNED.

Q BY THE TELEPHONE YOU SAID. A YES.

Q YOU CALLED UP SOMEBODY ON THE TELEPHONE AT THE COLONIAL TRUST COMPANY AND ASKED THEM IF THE NOTE WAS GOOD AND THEY SAID, "NO," AND BASED UPON THAT REPORT YOU PROTESTED THE NOTE. A I DID.

Q Upon that report you as a notary public of this State certified that you presented the note at the Colonial Trust Company on May 2, 1928? A I did, which it had been.

It is, of course, apparent from the testimony just quoted that Mr. Marek did *not* present the note at the bank where the same was payable, that he did not personally present this note at the counter of the payee bank to one of its tellers, that some unidentified bookkeeper told him (Marek) that the note had been presented, and that Mr. Marek called up some bookkeeper of the Colonial Trust Company on the telephone, and that such bookkeeper stated that the note was not good.

The mere recital of these facts is sufficient, we think, to show that the provisions of Section 74 of Negotiable Instruments Act, above quoted, have not been complied with, because there was no proof that the instrument was exhibited to the person from whom payment was demanded; nor was there any proof of actual physical presentment at the bank during banking hours, in order to meet the requirements of Section 75 of our Negotiable Instruments Act, above quoted.

Counsel for the plaintiff may, however, contend that the fact that Mr. Marek "called up on the telephone" is a sufficient presentment. There is no case in our own State supporting any such an unsound proposition where the rights of endorsers are involved, and where such a proposition has been advanced, it has met with disapproval. Thus, the Court of Appeals of New York in *Gilpin v. Savage*, 201 N. Y. 167, 94 N. E. 656, held that there could not be any "presentment by telephone," in order to charge an endorser. In that leading case, Chief Justice Cullen said:

"The action is brought against the indorser of a promissory note made payable at a particular place designated by street number, which was the residence of the maker.

The only question in the case is whether the presentment to the maker was sufficient to charge the indorser. At the maturity of the note it was in the hands of the Columbia National Bank, which was located about two miles from the maker's residence, in Buffalo. After some delays the cashier of the bank succeeded in calling up the maker at his place of residence. He stated to him that the bank held the note, and *the further conversation between the parties we will assume to be sufficient to establish a demand for its payment and refusal or statement of inability on the part of the maker to comply with the demand.* The cashier had the note in his possession when the demand was made and the maker made no request to see it or for its production, but stated he would call at the bank, which he did a short time subsequently; what then transpired between the parties does not appear. * * * IT SEEMS TO US ENTIRELY CLEAR THAT NO PROPER PRESENTMENT OF THE NOTE WAS MADE. *Presentment of a note and demand of payment must be made BY ACTUAL EXHIBITION OF THE INSTRUMENT ITSELF, or at least the demand should be accompanied by some clear indication that the instrument is at hand, ready to be delivered, AND SUCH MUST REALLY BE THE CASE.* * * * The counsel for the respondent seeks to sustain the judgment below on two propositions: *First*, that a demand over the telephone on the maker, at the place specified in the note, is the same as a demand at that place by ordinary speech; *second*, that the possession of the note by the cashier was sufficient to make the demand a proper one. The truth of the first proposition as a general rule may be conceded; but the argument ignores the fact that a valid presentment, as hitherto pointed out, consists of something more than mere demand. It requires personal attendance at the place of demand with the note, in readiness to exhibit it if required and to

receive payment and surrender it if the debtor is willing to pay. The counsel cites several cases in which it is said that the possession of the instrument by the person making the demand is sufficient although it is not actually exhibited. These statements were entirely accurate when made before the general use of the telephone. *When demand is made by ordinary human vocal power, unaided by mechanical device, it is plain that the person making the demand is necessarily present at the place at which the demand is made, and if the instrument is in his possession the presence of the instrument is equally clear. The statement if now inaccurate is so by the use of the telephone.*" (Judgment against indorser was reversed.)

Gilpin v. Savage, 201 N. Y. 167, 94 N. E. 656.

The principle of the *Gilpin* case was followed, and the case cited with apparent approval in *Greco v. LoMonte*, 162 N. Y. S. 982 (January, 1917), and in *Reichert v. McQuade*, 217 App. Div. 779 (June, 1926).

The Court of Appeals of Maryland, after a very careful analysis of the Negotiable Instruments Act, and the nature of the contract of endorsement, speaking of the *Gilpin* case, above cited, said: "We find this decision sound in principle and generally accepted as stating the prevailing rule, whose application to the facts on this record require a reversal, without a new trial." The Maryland Court, among other things, said:

"The indorser is a party secondarily liable on the instrument, and, although known to the holder at the time of taking the instrument as only an accommodation party, his contract with the holder, or with any subsequent indorser who may be compelled to pay the negotiable paper, is that the instrument, on due presentment, shall be accepted

or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay. * * * Obviously, the rights and liabilities of the holder and the indorser are contractual, and no right of either may be waived, except by himself as the party bound according to these contractual rights and liabilities. *If the indorser were willing to give up his right to a due presentment, it was the indorser and NONE OTHER who could so waive or authorize another for him to waive this contractual right.* * * * The question on the instant appeal is, therefore, simply, Can a presentment be made by telephone? As has been pointed out, the language of the statute neither authorizes nor tolerates anything short of a personal presentment at the place specified by the note for presentment. * * * The contract of the indorser was that he should be liable to pay the instrument only in the event that presentment was made to the maker, on the day of its maturity, at the particular place named in the instrument. Hence, presentment is a condition precedent to the indorser's liability to pay, and his right to insist upon a presentment is contractual. So presentment is not rendered unnecessary by the fact that an indorser suffered no detriment, nor by the insolvency or bankruptcy of the maker. * * * **THUS IT APPEARS THAT PRESENTMENT IS SOMETHING MORE THAN A DEMAND FOR PAYMENT, AND CANNOT BE GRATIFIED BY THE HOLDER OR HIS AGENT DEMANDING BY TELEPHONE OF THE MAKER HIMSELF AT THE PLACE OF PAYMENT, THE SATISFACTION OF A NEGOTIABLE NOTE, ALTHOUGH THE MAKER IS NOTIFIED THAT THE NOTE IS IN THE POSSESSION OF HIS COMMUNICANT AND READY FOR DELIVERY, AND ALTHOUGH THE MAKER REFUSED TO COMPLY WITH THE DEMAND. This**

question was before the New York Court of Appeals * * *, on the facts last decided, and the Court there held that A DEMAND SO MADE OVER THE TELEPHONE WAS NOT A SUFFICIENT PRESENTMENT AND DEMAND FOR THE PURPOSE OF BINDING AN INDORSER.
* * *

Robinson v. Lancaster Foundry Co., 152 Maryland 81, 136 Atl. 58.

Of course, we are, in making this argument, disregarding all hearsay testimony given by Marek, to the effect that some messenger told him (Marek) that such unidentified messenger presented the note at the bank where it was payable. We rely only upon the legally competent testimony which established conclusively that there had been no presentment, as required by the statute, and hence, the defendant-indorser was discharged.

Reason No. 2. There was not notice of dishonor as provided by our Negotiable Instruments Act.

This was the second ground for the motion of non-suit, and was predicated upon the following provisions of our Negotiable Instruments Act:

"Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer AND TO EACH INDORSER, and any drawer or indorser to whom such notice is not given is discharged." 3 C. S., page 3745, Section 89.

"Notice of dishonor may be given either to the party himself or to his agent in that behalf." 3 C. S., page 3746, Section 97.

"Where the person giving and the person to receive notice reside in different places,

the notice must be given within the following times:

I. If sent by mail, it must be *deposited* in the post-office in time *to go by mail the day following the day of dishonor*, or, if there be no mail at a convenient hour on that day, by the next mail thereafter.

II. *If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last sub-division.*" 3 C. S., page 3747, Section 104.

There was no proof that notice of dishonor had been *mailed*. The notice of dishonor relied upon by the plaintiff was an *oral* notification to some unidentified person (see testimony bottom of p. 31 and top of p. 32 of the State of the Case).

It must be borne in mind that this note became due on May 2, 1928; and this Court will take judicial notice of the fact, as the Court below was bound to take judicial notice of the fact, that May 2, 1928, was a Wednesday. There was no proof that notice of dishonor had been *mailed*, although the plaintiff testified that he knew, on *May 3, 1928*, which was necessarily a Thursday, that the note had been dishonored. The plaintiff relied, for notice of dishonor, upon his alleged claim that he gave *actual notice*, over the telephone to some unidentified person on May 3, 1928 (see testimony bottom of p. 31 and top of p. 32 of the State of the Case). The plaintiff further testified that on May 3, 1928, he also spoke personally to a Mr. William Katchen (State of Case, p. 32), WHO WAS NOT SHOWN TO HAVE ANY OFFICIAL CONNECTION WHATEVER WITH IRVINGTON IRON WORKS, AND WHO WAS NOT SHOWN TO HAVE ANY AUTHORITY TO RECEIVE

NOTICE OF DISHONOR FOR THE DEFENDANT COMPANY. Mr. Hughes, the plaintiff, further testified that the first time that he communicated with any officer of the defendant company was "the early part of the week following (State of Case, p. 34, l. 12), on which occasion he spoke to Mr. Bernard Bernstein.

This testimony presented an entire absence of proof that due notice of dishonor had been given. The plaintiff knew, on May 3, 1928, that the note had been dishonored. By force of Section 104, as the plaintiff relied on notice "given otherwise than through the post-office," he was obliged to give the notice "within the time that the notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision." The "last subdivision" is "if sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or, if there be no mail at a convenient hour on that day, by the next mail thereafter." In the case at bar, "the day following the day of dishonor" was May 3, 1928, and had a notice been mailed on that day, the notice would have been received, in due course of mail, on May 4, 1928 (the plaintiff residing at No. 63 Stecher street, as indicated on page 22, line 8, which is in Newark, N. J., as indicated on page 5, line 20). The uncontradicted evidence, testified to by the plaintiff himself, indicated that a letter posted in Newark on May 3rd, would have reached Irvington on May 4th, that the "due course of mail" was twenty-four hours between the two municipalities (State of Case, bottom of p. 35 and top of p. 36). According to the plaintiff's own version, however, he did not give notice of the dishonor to the *defendant's president* until "the early part of

the week following" (State of Case, p. 34). Such notice, of course, was too late. It is stressed that if the plaintiff had given notice by mail, the notice of dishonor would have been received, in due course of mail, on May 4, 1928, and that any notice of dishonor given thereafter was not sufficient to hold the defendant endorser.

There is testimony to the effect that the plaintiff gave notice of the dishonor to a Mr. William Katchen on either May 3rd or May 4th, 1928. Such notice, however, if given (and the fact thereof was disputed on the defendant's case), was not notice to the corporate endorser because Mr. William Katchen was not shown to have any authority to receive such a notice. Section 89 of the Negotiable Instruments Act provides that notice must be given to the endorser or to his "agent in that behalf." In construing such provision, the Courts of our sister states have held that giving notice to a mere employee, not shown to have authority to receive the notice, was not sufficient wherewith to charge the endorser.

See

American Exchange National Bank v. American Hotel Victoria Co., 103 App. Div. 372, 92 N. Y. S. 1006;

American National Bank v. National Fertilizer Co., 143 S. W. 597, 125 Tenn. 328;

New York, etc. Co. v. Selma Savings Bank, 51 Ala. 305;

Swift & Co. v. Miller, 113 N. E. 447, 62 Ind. 312;

Louisiana State Bank v. Ellery, 16 Mart. 87;

Cross v. Smith, 1 Maul & S. 545.

For these reasons (first) there had been no proof of presentment of the note, and (second)

there was no proof of proper notice of dishonor within the time, and to a person, required by the statute, the motion for a non-suit should have been granted, and it was legal error for the Court to deny such motion. The failure of proof, shown in this point, *was not remedied by any evidence as of the close of the case* and the denial of the motion to non-suit was, therefore, prejudicial error.

POINT II.

The Trial Court erred in failing to charge Irvington Iron Works' following Request to Charge:

"The plaintiff, asserting that he received notice of non-payment of the note on May 3, 1928, had to give notice of such dishonor, within either one of the following times: (First) He had to mail the notice so that it would go out on May 3, 1928; (Second) if the notice of dishonor was given otherwise than through the post-office, then it must actually have been given within the same time that the notice would have been received had it been deposited in the post-office on May 3, 1928. If you are not satisfied by a fair preponderance of the evidence, that the notice of dishonor was given, within the time which I have indicated, then you must return a verdict in favor of the defendant."

The foregoing request to charge was Request No. 9, printed at the bottom of page 102 and top of page 103 of the State of the Case, but was not charged by the trial court (State of Case, p. 97, l. 30); exception was taken to the Court's refusal to make that charge (State of Case, p. 100, ll. 20-25).

The quoted request to charge embodied the provisions of Section 104 of our Negotiable In-

struments Act, which section has been quoted on page 12 of this brief. That sections refers to the *time* when the notice of dishonor must be given, whether given by mail, or given otherwise.

The plaintiff had testified as to when he had given notice of dishonor; that testimony was contradicted by the evidence submitted in behalf of the defendant, to the effect that Mr. Hughes, the plaintiff, had not given notice of the dishonor of the note on May 3, 1928 (State of Case, p. 83, ll. 30-35), that no telephone communication had been received from Mr. Hughes at any time up to May 5, 1928 (State of Case, top of p. 74), and that Mr. Bernstein, the president of Irvington Iron Works, had not spoken to the plaintiff on May 2, 3 or 4, 1928 (State of Case, top of p. 74). There was then, at least, a question of fact for the jury to determine, under a proper instruction, whether the notice of dishonor was given within the time required by the statute. The Court, however, by refusing to give the requested instruction, precluded the jury from on consideration of this question as to the time (if ever) when notice of dishonor was given, leaving it thus open to the jury, to the prejudice of this defendant, to find a verdict based on evidence of a tardy notice of dishonor.

The propriety of this request to charge has also been demonstrated by what we have written under *Reason No. 2* in POINT I, on the applicability of this section of the statute, and, hence, on the propriety of this request to charge; see particularly pages 11-14 of this brief.

POINT III.

The Trial Court erred in failing to charge Irvington Iron Works' following Request to Charge:

"The plaintiff also claims that on May 4, 1928, he delivered a copy of the notice of dishonor to a Mr. Katchen, the elder Mr. Katchen as the plaintiff describes him, and who has been identified as Mr. William Katchen. There is no testimony in the case that Mr. William Katchen, if he in fact was given that notice, was ever authorized to receive it. It was, therefore, not sufficient notice of dishonor to deliver that notice to Mr. William Katchen."

The foregoing request to charge was Request No. 11, printed on page 103 of the State of the Case, but was not charged by the trial court (State of Case, p. 98, l. 12); exception was taken to the Court's refusal to make that charge (State of Case, p. 100, ll. 20-25).

In denying the foregoing request to charge, the trial court referred to Section 73 of the Negotiable Instruments Act, apparently in justification of such refusal. That section of the Negotiable Instruments Act deals with the subject of the *proper place to make presentment*; the request to charge is concerned *with the agency* of the person to whom, Mr. Hughes testified, the *notice of dishonor was claimed to have been given*. We fail to see how the section of the statute to which the Court referred disposed of the question of the agency of the person to whom notice of dishonor was alleged to have been delivered.

Section 97 of our Negotiable Instruments Act provides:

“Notice of dishonor may be given either to the party himself or to his agent in that behalf.” 3 C. S., page 3746, Section 97.

At the conclusion of the plaintiff's case, the only evidence on the subject of *to whom* notice or dishonor had been given was in the testimony of the plaintiff that he had notified a Mr. William Katchen, but there was no proof of the latter's connection, if any, to the defendant. At the conclusion of the *entire case*, and, *without contradiction*, it was shown that Mr. William Katchen's sole connection with the defendant was as “manager of the shop,” “taking care of the workmen and seeing the work should go right,” and to “assist the men in setting up machines or molds” (State of Case, p. 85). In other words, William Katchen was, at most, a shop foreman, without any duties in regard to the executive, fiscal or financial affairs of the corporation, and clearly not the agent of the defendant authorized to receive notice of dishonor. It would be a very dangerous precedent to establish that notice of dishonor may be given to an employee of a factory, even though he be a shop foreman, and then to ascribe to such notice the effect of notice to the corporation by which he is employed.

The cases cited, on page 14 of this brief, sufficiently indicate that a mere employee of a corporate endorser is not such an agent as is clothed with authority to receive notice of dishonor, in order to charge such corporate endorser with notice to it. In the case at bar, the testimony that William Katchen had no authority to receive notice of dishonor was not denied.

In view of the fact that the uncontradicted testimony at the conclusion of the whole case was that William Katchen was not the agent of the defendant to receive notice of dishonor, the defendant was entitled to the binding instruction of Request to Charge No. 11. The Court's refusal was, therefore, prejudicial error, as the case was then left open for the jury to decide, despite the uncontradicted evidence to the contrary, that notice given to William Katchen was notice to the defendant.

POINT IV.

The Trial Court erred in failing to charge Irvington Iron Works' following Request to Charge:

"If the defendant company signed the endorsement for the accommodation of Stupelman and Rogorein, or for the accommodation of the plaintiff, you must return a verdict in favor of the defendant. A corporation of the State of New Jersey cannot become an accommodation endorser. In determining whether the note was made by the defendant, for accommodation, you have the right to consider the essence, and not the mere form, of the transaction."

The foregoing request to charge was Request No. 16, printed at the bottom of page 104 and the top of page 105 of the State of the Case, but was not charged by the trial court (State of Case, p. 98, l. 38); exception was taken to the Court's refusal to make that charge (State of Case, p. 100, ll. 20-25).

The complaint alleged that Irvington Iron Works was a corporation of the State of New Jersey (State of Case, p. 5, l. 35). By way of answer, the defendant alleged that its endorse-

ment was purely an accommodation endorsement (State of Case, p. 10, ll. 35-40), that it was a New Jersey corporation under the 1896 Corporation Act, and, hence, not legally competent to be an accommodation endorser (State of Case, p. 11, ll. 20-27). The note in this case was NOT held by a stranger to the transaction, without knowledge of the facts, *because the plaintiff testified that he negotiated for the acquirement of the note* (State of Case, bottom of p. 22), *and because the plaintiff further testified that he knew that the Irvington Iron Works was a corporation of New Jersey* (State of Case, p. 48, l. 22).

While some of the plaintiff's testimony is to the effect that he purchased the note from Irvington Iron Works, it is significant that the plaintiff himself testified that he asked the Irvington Iron Works to endorse the note for his (Hughes) accommodation, at the time that the plaintiff acquired the note. The testimony on this subject is as follows:

"Q You knew then that the Irvington Iron Works was a corporation of New Jersey, didn't you? A I did.

Q Did you not ask Mr. Bernstein that his company endorse the note for your accommodation so that you could discount it at your bank?

Mr. Markey: I object.

The Court: I will admit it.

A *I asked that they endorse the note for my accommodation, and my intention in asking who was the past person on that note, the last endorser on the note is evident that was the intent.*

Q *The note had been endorsed when you came into the office?* A *It had not."*

(State of Case, p. 48, ll. 25-38.)

It is evident from the testimony just quoted that the plaintiff had knowledge of the fact that the endorser was a New Jersey corporation before he acquired the note, and that he requested the endorsement of Irvington Iron Works "*for accommodation.*" In addition to this testimony from the plaintiff himself, it was testified for the defendant that the transaction by which Hughes acquired the note was by way of purchase from the payees (Stupelman and Rogorein, who were present when the plaintiff acquired the note, they being the payees), at a price representing a substantial discount, and that the endorsement of Irvington Iron Works was placed on the note in order to "help (Hughes) to discount the note and permit (Hughes) to keep a record of the transaction and not miss anybody," the Irvington Iron Works not intending to be liable.

It is, of course, clearly recognized that oral evidence is not admissible to vary the legal effect of a written instrument, but the evidence in this case was admissible, and was admitted, to show the *status* of Irvington Iron Works, in exactly the same way as evidence would be admissible to show that an individual was a lunatic or under some other personal disability which prevented the formation of a contract, and just as evidence would have been formerly (prior to the amendment to the Married Women's Act) been admissible to show that the endorsement of a woman was that of a married woman, without separate consideration, etc. The evidence was introduced in support of our contention that this was an accommodation endorsement, that is to show the *status* of the defendant with relation to the transaction, as similar evidence of status was held competent and admissible, by this Court, in the recent case of *Model Plan Finance Corp. v.*

Kelley, 9 A. R. 111, 153 Atl. 488, not yet officially reported. In the case at bar, we are dealing with the holder of a note who had actual knowledge of the facts, as he himself testified, or at least, had actual knowledge of the *status* of the defendant corporation, as being a corporation of the State of New Jersey, and hence chargeable, in the law, with knowledge of such corporation's capacity or lack of capacity. We are *not* dealing with a bona fide holder for value without notice of the infirmity. The plaintiff, Hughes, was not a bona fide purchaser for value without notice and, therefore, the defense of lack of capacity, known to him, was available against him.

A corporation of the State of New Jersey, which was the status of the appellant, has no capacity to become an accommodation endorser. The powers of a New Jersey corporation are fixed generally by Section 1 of the Corporation Act, and, briefly, those powers are: I, Succession; II, Sue and be sued; III, Employ a common seal; IV, Convey real and personal property; V, Appoint officers and agents; VI, Make by-laws; VII, Dissolve. Under Section 2, a corporation also has "implied powers," *but the right to make an accommodation endorsement, as the cases about to be considered indicate, is NOT among such "implied powers."*

This Court has ruled that a corporation has no power to become an accommodation endorser. Speaking for this Court, Justice Depue said:

"The crucible company, as a corporation engaged in business, had implied power to make negotiable paper for use within the scope of its business; but *it had no power, express or implied, to become a party to bills or notes for the accommodation of others*, and such paper is valid and enforceable only in the hands of a holder taking the

same before maturity, bona fide, and without notice. I Daniel Neg. Inst. Sections 382, 386; Green's Brice, *Ultra Vires*, 255, 272." *National Bank, etc. v. Young*, 41 E. 531.

The principle italicized has never been overruled.

Still more recently, Justice Parker, speaking for this Court, reiterated the principle by saying:

"A much more serious question is not raised at all, either by pleadings, evidence or argument. *We mention it to avoid any inference of our giving countenance, even sub silentio, to the idea that a corporation may lawfully execute a bond secured by mortgage on its property to the detriment of its creditors and stockholders, as a pure accommodation to one of its officers or stockholders, or indeed anyone else.* This is precisely what was done in this case; the corporation made the bond and mortgage to secure the debt of Rose. The law is settled to the contrary. 14a C. J. 552; 2 Cook on Corps. (6th Ed.) Section 681, 3 Cook, Section 774; *National Bank v. Young*, 41 N. J. Eq. 531, 7 A. 488; *Blake v. Domestic Co.*, 64 N. J. Eq. 500, 38 A. 241; *Vogel v. Atlantic Tar Works* (N. J. Err. & App.) 127 A. 181."

Heidler v. Werner & Co., 97 E. 505.

In other words, the italicized principle is of such moment that this Court would not, even in silence, give apparent sanction to a different doctrine.

Even in a case where the guaranteeing corporation obtained an incidental benefit from the performance of the contract which it guaranteed, the United States Circuit Court of Appeals (Second Circuit), with the opinion by Judge Rogers, fortified by numerous and respectable authorities from both the State and Federal Courts, held that a contract of guaranty executed by a corporation, otherwise *ultra vires*, is not validated because authorized by its Board of Directors or

by its stockholders. In re John B. Rose Co. (appeal of Metropolitan Bank), 275 Fed. 423.

The cases hereinabove cited are in accord with the weight of authority that a corporation has no power to execute accommodation paper; see Fletcher Cyclopedia of Corporations, Volume 3, page 3098, Section 1911. Such principles are merely an extension of the generally accepted doctrine that a corporation has no power to become either a surety or guarantor; see Fletcher Cyclopedia of Corporation, Volume 2, page 1868, *et seq.*, Chapter 23.

It follows from a consideration of these principles that the trial court should have charged the jury on this subject so that it might determine whether or not the note in suit was endorsed by Irvington Iron Works for the accommodation of other parties. By the trial court's failure to make this charge, in spite of the fact that the defendant's contention was, in accordance with its pleading, that its endorsement was purely an accommodation endorsement, the trial court permitted the jury to reach a verdict contrary to the law, and, in the light of the result prejudicial to the defendant.

POINT V.

The Trial Court erred in denying the motion made in behalf of Irvington Iron Works for a direction of a verdict in its favor.

This ground of appeal is the second of the grounds of appeal (State of Case, p. 113, ll. 25-28); this Court will find that the motion for the direction of a verdict in favor of Irvington Iron Works was made (State of Case, p. 88, ll. 28-35), that the motion was denied (State of Case, p. 88,

l. 35), and that an exception was noted (State of Case, p. 88, ll. 38-40).

The motion for a directed verdict was based on three grounds: (first) that there had been no due presentment, (second) that there had been no due notice of dishonor, and (third) that the endorsement of Irvington Iron Works was for accommodation, and it was, therefore, not liable.

Reason No. 1. There was no proof of due presentment.

At the close of the entire case, the evidence touching the subject of presentment was no greater than what we have indicated it to be in this brief, as of the close of the plaintiff's case when the motion was made for a non-suit because of the failure of due presentment. Accordingly, what we have said, under *Reason No. 1* under POINT I, as to why the motion for a non-suit should have been granted, on this ground, is applicable here, and, hence, will not be repeated; see page 2-10 of this brief.

Reason No. 2. There had been no due notice of dishonor.

While there was, at the conclusion of the entire case, a conflict in the evidence as to whether or not any notice of dishonor had been given, still, taking the evidence most strongly in favor of the plaintiff, such evidence indicated that no notice of dishonor had been given prior to May 5, 1928. As we have heretofore pointed out, under *Reason No. 2* under POINT I, such notice of dishonor was not given to the defendant's agent, and when (if ever) given, was too late. Accordingly, what we have said under *Reason No. 2* under POINT I, as to why the motions for a non-suit should have been granted on

these grounds, is applicable here, and, hence, will not be repeated; see pages 11-14 of this brief.

Reason No. 3. The endorsement of Irvington Iron Works (a New Jersey corporation) was for accommodation, and it was not, therefore, liable thereon.

The evidence touching this subject was uncontradicted, and has heretofore been presented in this brief under POINT IV, where the law on this subject, in support of a request to charge on this subject, has been considered. Accordingly, what we have said under POINT IV, as to why the request to charge should have been complied with, on the subject of the non-liability of a New Jersey corporation for an accommodation endorsement, is applicable here, and, hence, will not be repeated; see pages 19-24 of this brief.

SUMMARY.

At least one of the grounds upon which the motion for a direction of a verdict in favor of the defendant-appellant was based upon *uncontradicted evidence*, which precluded a recovery, and, hence, the motion should have been granted.

CONCLUSION.

The judgment should be reversed, and as the facts establishing the non-liability of the defendant, Irvington Iron Works, are fully before the Court, with the direction that judgment be entered in favor of the appellant, Irvington Iron Works.

Respectfully submitted,

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