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Complaint.

IN CHANCERY OF NEW JERSEY. 10

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

The complainant, Charles F. Nesler, of the City of Newark, in the County of Essex and State of New Jersey, says that:

1. On February 1, 1910, William K. Grove, being indebted to complainant in the sum of \$10,000, executed to him a bond of that date to secure that sum, payable on February 1, 1913, with interest at the rate of six per cent per annum, payable half-yearly from the date of the bond. 20

2. To secure the payment of the bond said William K. Grove and Mary B. Grove, his wife, executed to complainant a mortgage of even date with the bond; and thereby conveyed to him in fee the land hereinafter described on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which mortgage having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was recorded in the Register's office of Essex County in Book H 25 of Mortgages, page 200. 30

3. The mortgaged premises are described as follows: All those lots, tracts, or parcels of land and 40

premises, hereinafter particularly described, situate, lying and being in the Town of West Orange, in the County of Essex and State of New Jersey:

10 FIRST TRACT: BEGINNING on the northeasterly corner of Northfield and Gregory Avenues; running thence along said Gregory Avenue north twenty-five degrees two minutes east four hundred feet to lot No. 15 and land of Walter D. Osborne; and thence along that land and lot No. 15 south sixty-five degrees thirty minutes east two hundred and ninety and thirty-five one-hundredths feet to land conveyed by Frank Koewing and wife to the Golf Land Company of Essex County, by deed dated February 1, 1909, and recorded in the Essex County Register's office in Book R 44 of Deeds for Essex County, on page 240; and thence 20 along that land south twenty-four degrees forty-three minutes west four hundred feet to Northfield Avenue; and hence along the northerly side thereof north sixty-five degrees thirty minutes west two hundred and ninety-two and fifty one-hundredths feet to Gregory Avenue and the point of BEGINNING. Together with all the right, title and interest of the party of the first part in and to the streets or avenues lying in front of the above described premises.

30 Being the same premises conveyed to the said William K. Grove by Frank Koewing and Jessie E., his wife, by deed dated October 28, 1909, and recorded in the Register's office of the County of Essex in Book A 46 of Deeds for said County, on page 315.

40 Subject to the covenants and restrictions contained in deed from John B. Gardner & al., Trustees, &c., to Benjamin H. Hutton recorded in Book R 14 of Deeds for Essex County, page 501, and in

deed from Charles G. Landon & al., Executors, &c., to Charles Gordon Hutton & al., recorded in Book M 24 of Deeds for Essex County, page 419.

SECOND TRACT:—BEGINNING at the corner formed by the intersection of the westerly line of Gregory Avenue with the southerly line of a private right of way known as Hutton Avenue; running thence south twenty-five degrés two minutes west along said westerly line of Gregory Avenue four hundred and seven feet to line of land now or formerly belonging to Frank Koewing; thence along said Koewing's line south sixty-five degrees thirty minutes east two hundred and ninety-three feet; thence north twenty-six degrees fifty-four minutes east four hundred and five and sixty-four one-hundredths feet to the southerly line of Hutton Avenue; thence along said southerly line of Hutton Avenue north sixty-five degrees eleven minutes west three hundred and six and nineteen one-hundredths feet to the place of BEGINNING. Being part of Lot No. 16 and part of lot No. 15 on map entitled "Map of Hutton Park, Orange, N. J., surveyed by Mead & Taylor under the direction of William B. Hutton, C. E., 35 Broadway, N. Y., December, 1888," together with the soil to the middle of said Avenue and private right of way, and right of way over said private way.

Subject to the covenants and restrictions contained in deed from Adolph Francois Rene de Portes and wife to Walter D. Osborne & al., recorded in Book C 38 of Deeds for Essex County, page 414.

Being the same premises conveyed to the said William K. Grove by Walter D. Osborne and wife by deed dated November 23, 1909, and recorded in

the Register's office of the County of Essex in Book L 46 of Deeds for said County, page 164.

Subject also to the covenants and restrictions contained in said last mentioned deed.

10 4. On July 28, 1913, said William K. Grove and Mary B. Grove, his wife, mortgaged the said land to Allen N. Terbell for \$45,000, which mortgage was, on July 29, 1913, recorded in the Register's office of said County in Book I 31 of Mortgages, page 586.

Any interest which said Allen N. Terbell may have in said lands is subject to the lien of complainant's mortgage.

20 5. On March 8, 1917, said William K. Grove and Mary B. Grove, his wife, conveyed said land, by deed of that date, to Herbert N. Bradley in fee; which deed was, on March 23, 1917, recorded in the Register's office of Essex County.

Any interest which said Bradley had in said land was subject to the lien of complainant's mortgage.

30 6. On March 8, 1917, said Herbert N. Bradley, single, conveyed said land, by deed of that date, to Mary B. Grove in fee; which deed was, on March 23, 1917, recorded in the Register's office of Essex County.

Any interest which said Mary B. Grove has in said land is subject to the lien of complainant's mortgage.

7. Said Mary B. Grove is married and her husband's name is William K. Grove.

40 Any claim or interest he may have by way of inchoate right of courtesy or otherwise is subject to the lien of complainant's mortgage.

8. On March 21, 1917, at the suit of the Globe Tire Company, a writ of attachment against the said William K. Grove was issued out of the Essex County Circuit Court in the sum of \$36,000, or some such sum; by virtue of which said writ of attachment the said Globe Tire Company may claim to have some lien upon, or interest in, the said mortgaged premises or some portion thereof. 10

Any interest which the said Globe Tire Company, or any applying creditors under the said attachment may have in said land is subject to the lien of complainant's mortgage.

9. The taxes assessed against the said mortgaged premises, or some portion thereof, for the years 1914, 1915 and 1916 have not been paid; by reason whereof complainant may be compelled to pay the said taxes, or some part thereof, in order to protect his title and save his mortgage from extinguishment; in which event complainant claims that he should be permitted to have the amount so paid by him added to and made part of his mortgage debt, as well by the terms of his said mortgage as by his equitable right. 20

10. Said William K. Grove and Mary B. Grove, his wife, or one of them, has always been in possession of the mortgaged premises. 30

11. The whole amount of principal, with interest thereon from October 1, 1916, is due upon complainant's bond and mortgage.

Complainant is without adequate remedy in the courts of law and therefore prays—

(1) That William K. Grove and Mary B. Grove, his wife, Allen N. Terbell and Globe Tire Com- 40

pany, who are the defendants to this suit, may answer this bill of complaint without oath and each statement therein made;

(2) That an account may be taken of the amount due on complainant's mortgage;

10

(3) That the defendants, or one or more of them may be decreed to pay complainant the amount so found due, with interest and costs, by a short day to be appointed by this Court; and that in default of such payment they and each of them be debarred and foreclosed of all equity of redemption in said lands; or

20

(4) That a decree may be made for the sale of the mortgaged premises to raise and pay to the complainant the amount so found due on his mortgage, with interest and costs;

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

30

ARCHIBALD F. SLINGERLAND,
EDWARD A. DAY,
WILLIAM T. DAY,

Solicitors for and of counsel
with Complainant.

40

IN CHANCERY OF NEW JERSEY.

Between

CHARLES F. NESLER,

Complainant,

and

WILLIAM K. GROVE, and others,
Defendants.On Bill, &c.
Answer and
Counter-Claim.
Mary B. Grove.

10

The answer of the defendant Mary B. Grove to the bill of complaint of Charles F. Nesler and the counterclaim of said Mary B. Grove against the defendants Allen N. Terbell and Globe Tire Company and Second National Bank of Hoboken, a third party.

20

This defendant, who resides in West Orange, New Jersey, says that:

1. Paragraphs One, Two and Three are admitted.

2. Defendant admits that with her husband, William K. Grove, on July 28, 1913, she executed a certain mortgage to Allen N. Terbell, which mortgage was recorded in the Register's Office of Essex County in Book I 31 of Mortgages, 586, as set forth in paragraph Four of said bill. Said mortgage is void as against this defendant for the reasons hereinafter stated in her counterclaim.

30

3. Paragraphs Five, Six and Seven are admitted.

4. This defendant admits that on March 21, 1917, at the suit of the Globe Tire Company, a writ of attachment issued against the said William K. Grove,

40

10 5. Paragraphs Nine, Ten and Eleven are admitted.

1. She is a married woman, and her husband's name is William K. Grove; she married her said husband on or about _____, 1907, and lived with him continuously thereafter until March 10, 1917, when her said husband removed to the Republic of China where he now resides. This defendant, at the time of her said marriage, was an infant of the age of eighteen years; she has never been engaged in business, and is entirely without business experience or training.

2. Said William K. Grove purchased the premises described in paragraph Three of complainant's bill of complaint, in the months of October and November, 1909. Shortly thereafter, and on or about Christmas Day, December 25, 1909, he told this defendant that he then gave her the said lands and premises. This defendant, relying thereon, and well believing that she was the owner of said premises, did in the year 1910 improve the same by the erection thereon of a dwelling house and a private garage. She spent and laid out in and by said improvements, out of her own separate estate, the sum of \$50,000 or thereabouts, no part of which sum was given to her by her said husband.

3. Shortly before March 8, 1917, this defendant was informed by her said husband that according to the strict rules of the common law, the title to said premises and the improvements erected thereon was in him and not in her, and that it so appeared upon the records of the Register of Essex County. This defendant thereupon caused a deed of conveyance for said premises to be drawn and executed and delivered by her and her said husband to one Herbert N. Bradley, and another deed to be drawn and executed and delivered by the said Herbert N. Bradley to this defendant; said last mentioned deeds were recorded in the Register's Office of Essex County on March 23, 1917. 10

4. On or about July 28, 1913, this defendant, at the request of her said husband, with him, did sign and seal a mortgage to Allen N. Terbell, one of the defendants to this counterclaim, said mortgage recites that the said William K. Grove is justly indebted to the said Terbell in the sum of \$45,000 secured to be paid by his certain bond or obligation of even date with said mortgage, and that said mortgage is given for the better securing of the sum of money mentioned in the condition of the said bond or obligation with the interest thereon according to the true intent and meaning thereof, as by the said mortgage or a copy of the record thereof may more fully appear. 20 30

5. This defendant has no knowledge or information sufficient to form a belief as to whether or not her said husband did in fact make and deliver any bond or obligation to the said Allen N. Terbell; neither this defendant nor her said husband were at the date of the said mortgage, or at any time 40

since then indebted to said Terbell in the sum of \$45,000 or any other sum. Said mortgage is absolutely void as to this defendant.

- 10 6. This defendant is informed that the said Terbell was, at the date of the said mortgage, the Cashier of the Second National Bank of Hoboken; that her said husband was then indebted to said bank in the sum of \$40,000 or thereabouts, as evidenced by his certain promissory notes, and that said mortgage was made and delivered by her said husband under and by a secret understanding or agreement between him and the said Terbell that said Terbell would hold the said mortgage as a trustee for said bank to secure the sum due as aforesaid. This defendant did not execute and deliver or acknowledge, in the manner required by 20 Section 39 of an Act Concerning Conveyances (Revision of 1898), any mortgage to said bank or to secure said notes.

7. Said bank did not pay or satisfy to this defendant or her said husband, any money or consideration whatever for said mortgage.

- 30 8. On or about March 21, 1917, Globe Tire Company sued out a writ of attachment against said William K. Grove as in the eighth paragraph of complainant's bill of complaint is mentioned. By virtue thereof, the Sheriff of Essex County did attach part of the above mentioned lands and premises and said Globe Tire Company claims to have some lien upon or interest in said premises. None of said lands and premises were, however, the property of said William K. Grove, and this defendant denies that said attachment is a lien upon

said premises or any part thereof, or that said Globe Tire Company has any interest therein.

This defendant therefore prays:

1. That said Allen N. Terbell, Globe Tire Company and Second National Bank of Hoboken may answer this counterclaim and each statement herein made. 10

2. That said Terbell may be decreed to deliver up for cancellation the said mortgage held by him, and that the same may be cancelled.

3. That the said Second National Bank of Hoboken may be decreed to have no interest in or lien upon said lands and premises by virtue of said mortgage or otherwise. 20

4. That said Globe Tire Company may be decreed to have no interest in or lien upon said lands and premises by virtue of said writ of attachment or otherwise, and may be restrained by the decree of this Court from asserting any such lien or interest or interfering with this defendant's title and possession to and of said premises.

5. That a writ of subpoena may issue commanding said Second National Bank of Hoboken to answer this counterclaim and to abide by such decree as this Court may make in the premises. 30

YOUNG, BIGELOW & FAYERWEATHER,
Solicitors and Counsel
with defendant Mary B. Grove.

Answer and Counterclaim of Globe Tire Company.

IN CHANCERY OF NEW JERSEY.

10

CHARLES F. NESLER,
Complainant,

vs.

WILLIAM K. GROVE, et als.,
Defendants.

Answer and Counter-
Claim of Globe
Tire Company.

The defendant, Globe Tire Company, a corporation of the State of New Jersey, having its principal office in the City of Jersey City, answering complainant's bill, says:

20

1. It has no knowledge respecting the allegations made in paragraphs 1, 2 and 3 of the complaint, other than that a mortgage of the description specified in paragraphs 2 and 3 of the complaint is of record. This defendant therefore leaves complainant to such proof thereof and of the debt secured thereby, as he may be advised.

30

2. This defendant admits that a mortgage made by William K. Grove and wife to Allen N. Terbell for \$45,000 appears of record, as stated in the complaint, paragraph 4.

On information and belief this defendant says that said mortgage was without consideration and that nothing is lawfully due or growing due thereon and that said mortgage is void as against this defendant.

40

3. This defendant admits that deeds of conveyance from William K. Grove and wife to Herbert

Answer and Counterclaim of Globe Tire Company.

N. Bradley, and from Herbert N. Bradley to Mary B. Grove were recorded, as stated in the complaint, paragraphs 5 and 6. This defendant denies, however, that said deeds, if lawfully executed at all, were delivered prior to the levying of the writ of attachment sued out by this defendant, referred to in the complaint, paragraph 8, and avers the fact to be that said deeds of conveyance, if lawfully executed at all, were executed and delivered for the purpose of hindering, delaying and defrauding this defendant and other creditors of William K. Grove, and that the interest and estate, if any, conveyed thereby are subject to the prior lien of said writ of attachment sued out by this defendant. 10

4. This defendant admits suing out a writ of attachment as stated in the complaint, paragraph 8, and says that the amount of the debt for which said attachment was issued is the sum of \$18,054.29; that defendant has entered an appearance in said suit and that no creditors appeared therein prior to the entry of such appearance. 20

This defendant admits that the lien of its said attachment is subject to the prior lien of complainant's mortgage, to the extent of the money which may be lawfully due to the complainant thereon.

This defendant claims, however, that its said attachment is a prior lien to the mortgage made to Allen N. Terbell, set forth in the complaint, paragraph 4, and is a prior lien to the interest or estate claimed by Mary B. Grove under the conveyances specified in the complaint, paragraphs 5 and 6. 30

5. This defendant has no knowledge respecting the tax liens as alleged in complaint, paragraph 9, and, therefore, leaves complainant to such proof thereof as he may be advised. 40

Answer and Counterclaim of Globe Tire Company.

6. This defendant has no knowledge as to the allegations of the complaint, paragraph 11, and, therefore, leaves complainant to such proof thereof as he may be advised.

COUNTERCLAIM AGAINST DEFENDANT
ALLEN N. TERBELL.

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By way of counterclaim against said defendant Allen N. Terbell, the defendant Globe Tire Company says:

1. It repeats the allegations, admissions and denials of paragraphs 1 to 6, inclusive, of this answer.

20

2. It avers that under date of July 28, 1913, William K. Grove and Mary B. Grove, his wife, did execute a mortgage to Allen N. Terbell, purporting to secure payment of \$45,000, and that said mortgage was thereafter, on July 29, 1913, recorded in the Essex County Register's Office, Book I-31 of Mortgages, page 586, and that said mortgage still appears open and uncanceled of record.

30

This defendant is informed and believes and therefore charges the fact to be that neither said William K. Grove and Mary B. Grove, his wife, was at the time thereof indebted to said Allen N. Terbell in said sum of \$45,000 or any other sum.

That said mortgage was wholly without consideration; that the consideration, if any, was the securing of an alleged indebtedness owed by a corporation known as Grove Straw Hat Manufacturing Company, or by some other name, to Second National Bank of Hoboken, for which

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Answer and Counterclaim of Globe Tire Company.

neither said mortgagors nor mortgagee were liable.

That thereafter said alleged indebtedness of Grove Straw Hat Manufacturing Company was fully paid, satisfied and discharged.

3. That on March 21, 1917, this defendant Globe Tire Company caused a writ of attachment to be issued out of the Essex County Circuit Court against the goods and chattels, lands and tenements, &c., of William K. Grove, and said writ was thereupon, in due form of law, levied upon the mortgaged premises, in which attachment suit this defendant claims \$18,054.29. By reason of such attachment this defendant claims a lien upon the premises specified in paragraph 3 of the complaint, free and clear of any lien, claim or interest of Allen N. Terbell under the aforesaid mortgage.

COUNTERCLAIM OF GLOBE TIRE COMPANY
AGAINST WILLIAM K. GROVE, HERBERT N. BRADLEY AND MARY B. GROVE.

By way of counterclaim against William K. Grove, Herbert N. Bradley and Mary B. Grove, this defendant, Globe Tire Company, says:

1. This defendant here repeats the allegations, admissions and denials of paragraphs numbered 1 to 6 inclusive of the answer, as fully as though here set forth.

2. Defendants William K. Grove, Herbert N. Bradley and Mary B. Grove have caused to be recorded under date of March 23, 1917, in the Essex County Register's office, a certain deed of

Answer and Counterclaim of Globe Tire Company.

conveyance, dated March 8, 1917, made by William K. Grove and Mary B. Grove, his wife, to Herbert N. Bradley, and a certain other deed of conveyance of the same date, made by Herbert N. Bradley, unmarried, to Mary B. Grove, both purporting to convey the premises described in paragraph 3 of the complaint.

10 3. This defendant avers that said deeds were wholly without consideration and that at the time of the date thereof, as well as prior thereto, said William K. Grove was largely indebted to this defendant, and that legal proceedings against him for the recovery of such indebtedness were threatened and impending to his knowledge and to the knowledge of said Herbert N. Bradley and Mary B. Grove, and that said deeds of conveyance were
20 executed for the purpose of hindering, delaying and defrauding this defendant and other creditors of William K. Grove.

4. That under date of March 21, 1917, this defendant caused a writ of attachment to be sued out of the Essex County Circuit Court against William K. Grove for the recovery of a claim of \$18,054.29, and that said writ of attachment was, in due form of law, levied upon the lands and premises covered
30 by said deeds of conveyance and has never since been satisfied or discharged, and that this defendant's lien under said writ is in law and equity a prior lien to the right, title and interest, if any, acquired by Mary B. Grove under the aforesaid deeds.

This defendant Globe Tire Company therefore prays:

1. That Allen N. Terbell, William K. Grove, Herbert N. Bradley and Mary B. Grove may, but
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Answer and Counterclaim of Globe Tire Company.

without oath, answer the counterclaims made against them respectively as aforesaid.

2. That the mortgage made by William K. Grove and Mary B. Grove, his wife, to Allen N. Terbell, aforesaid, be decreed to be void; or, in the alternative, that it be decreed to have been fully paid and satisfied and that the same may be cancelled of record. 10

3. That the deed of conveyance made by William K. Grove and wife to Herbert N. Bradley, dated March 23, 1917, and the deed of conveyance made by said Herbert N. Bradley to Mary B. Grove, bearing the same date, above referred to, be decreed to be null and void as against this defendant, Globe Tire Company, and that said defendants, or one of them, pay the debt due to Globe Tire Company, or, in lieu thereof, that said deeds be set aside, and that the premises described therein be sold to satisfy the debt due to said Globe Tire Company; or, in the event that said premises be sold to pay such indebtedness which as be adjudged to be due to the complainant in this cause, then that the balance of the proceeds of said sale be paid to Globe Tire Company, to the extent necessary to satisfy its aforesaid debt. 20 30

McDERMOTT & ENRIGHT,
Solicitors for and of Counsel with
Defendant Globe Tire Company.

IN CHANCERY OF NEW JERSEY.

Between

CHARLES F. NESLER,
Complainant,

and

WILLIAM K. GROVE, et als.,
Defendants.On Bill, &c.
Answer of Second
National Bank of
Hoboken, a third
party to the Coun-
ter-Claim of Mary
B. Grove.

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20

This defendant, Second National Bank of Hoboken, a third party, a corporation organized under the National Banking Laws of Congress of the United States, having its principal office and place of business at No. 77 River Street, Hoboken, Hudson County, New Jersey, says that:

1. It denies any knowledge or information sufficient to form a belief as to paragraphs 1, 2 and 3 (of cross claim).

2. It admits paragraph 4.

3. It denies paragraph 5 except as admitted in the following statement, on and prior to the said July 28th, 1913, said William K. Grove was indebted to this defendant in the sum of \$45,000.00 as an endorser on certain notes made by the Grove Straw Hat Manufacturing Company, a corporation of the State of New York, of which corporation the said William K. Grove was president (and the said defendant, Mary B. Grove, was a large stockholder) and in order to secure the said indorsements, said William K. Grove executed and delivered to the said defendant, Allen N. Terbell,

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Answer of Second National Bank of Hoboken.

his bond in the penal sum of \$90,000.00 conditioned for the payment of the said sum of \$45,000.00 on July 28th, 1916, with interest at the rate of six per cent., payable semi-annually; and in order to secure the payment of the said sum of money, did execute and deliver to the said defendant, Allen N. Terbell, a mortgage bearing date with said bond and covering the premises described in the bill of complaint filed herein, which mortgage is the mortgage mentioned in paragraph 2 of the said counterclaim, in which mortgage the said Mary B. Grove joined as the wife of the said defendant, William K. Grove; that said Allen N. Terbell was then the cashier and the agent for the defendant, Second National Bank of Hoboken, and acted in its behalf in the taking of said mortgage, and thereafter, and on or about July 30th, 1913, the said Allen N. Terbell, by assignment in writing under his hand and seal, assigned the said mortgage hereinabove mentioned to said Second National Bank of Hoboken.

4. Paragraph 6 is denied, except as is admitted in the following statement; on and prior to the said July 28th, 1913, said William K. Grove was indebted to this defendant in the sum of \$45,000.00 as an endorser on certain notes made by the Grove Straw Hat Manufacturing Company, a corporation of the State of New York, of which corporation the said William K. Grove was president and the said defendant, Mary B. Grove, was a large stockholder; and in order to secure the said endorsements, said William K. Grove executed and delivered to the said defendant, Allen N. Terbell, his bond in the penal sum of \$90,000.00, conditioned for the payment of the said sum of \$45,000.00

Answer of Second National Bank of Hoboken.

on July 28th, 1916, with interest at the rate of six per cent., payable semi-annually, and in order to secure the payment of the said sum of money, did execute and deliver to the said defendant, Allen N. Terbell, a mortgage bearing even date with said bond and covering the premises described in the bill of complaint filed herein, which mortgage is the mortgage mentioned in paragraph 4 of the said counterclaim, in which mortgage the said Mary B. Grove joined as the wife of the said defendant, William K. Grove; that the said Allen N. Terbell was then the cashier and the agent of this defendant, Second National Bank of Hoboken, and acted in its behalf in the taking of said mortgage, and thereafter, and on or about July 30, 1913, the said Allen N. Terbell by assignment in writing under his hand and seal, assigned the said mortgage hereinabove mentioned to this defendant.

5. It denies paragraph 7, except as is admitted in the following statement; that at the time of the making of said mortgage the said Grove Straw Hat Manufacturing Company was solvent and had sufficient assets to pay the notes made by it and endorsed by William K. Grove, and to pay its other debts and obligations; that relying upon the said bond so made and executed by said William K. Grove and said mortgage so made and executed by William K. Grove and the defendant, Mary B. Grove, did not press payment of said notes or any of them; thereafter, and on or about the fifteenth day of April, 1915, the said Grove Straw Hat Manufacturing Company was adjudicated a bankrupt and there was paid to this defendant, the sum of \$5,750.00 as its dividened or pro rata share

Answer of Defendant Allan N. Terbell.

of the assets of said corporation; that no money was paid by this defendant to said William K. Grove or unto the said Mary B. Grove upon the execution and delivery of said bond and mortgage, except the one dollar mentioned therein as the consideration therefor, which was paid by this defendant.

10

6. It denies any knowledge or information sufficient to form a belief as to statements in paragraph 8.

F. N. EBERHARD,
Attorney of Defendant, Second
National Bank of Hoboken.

IN CHANCERY OF NEW JERSEY.

20

Between

CHARLES F. NESLER,
Complainant,
and

WILLIAM K. GROVE, et als.,
Defendants.

On Bill, &c.
Answer of the De-
fendant, Allen N.
Terbell, to the
Counter-Claim of
the Defendant,
Globe Tire Com-
pany, against the
Defendant, Allen
N. Terbell.

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This defendant, Allen N. Terrbell, residing at
in the city of
Orange, in the County of Essex, and State of New
Jersey, answering the counter claim of the defend-
ant, Globe Tire Company, a corporation of the
State of New Jersey, says that:

1. He denies paragraph 2 of the answer of said
defendant, Globe Tire Company, referred to as
repeated in paragraph 1 of said counterclaim.

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2. He has no knowledge or information sufficient to form a belief as to the statements in paragraph 3 of said answer referred to as repeated in paragraph 1 of said counterclaim.

10 3. He denies that the attachment issued or sued out by said defendant, Globe Tire Company, is a prior lien to the mortgage made to this defendant set forth in paragraph 4 of the bill of complaint as alleged in paragraph 4 of the answer of said defendant, Globe Tire Company, referred to as repeated in paragraph 1 of the counterclaim.

20 4. Paragraph 2 is denied except as admitted in the following statement, on and prior to the said July 28, 1913, said William K. Grove was indebted to this defendant in the sum of \$45,000, as an endorser on certain notes made by the Grove Straw Hat Manufacturing Company, a corporation of the State of New York, of which corporation the said William K. Grove was president; and in order to secure the said endorsements, said William K. Grove executed and delivered to the said defendant, Allen N. Terbell, his bond in the penal sum of \$90,000, conditioned for the payment of the said sum of \$45,000 on July 28, 1916, with interest
30 at the rate of six per cent, payable semi-annually; and in order to secure the payment of the said sum of money, did execute and deliver to the said defendant, Allen N. Terbell, a mortgage bearing even date with said bond, and covering the premises described in the bill of complaint filed herein, which mortgage is the mortgage mentioned in paragraph 2 of the said counterclaim, in which mortgage the said Mary B. Grove joined as the wife of the said defendant, William K. Grove; that said

Allen N. Terbell was then the cashier and the agent for the Second National Bank of Hoboken, N. J., and acted in its behalf in the taking of said mortgage, and thereafter, and on or about July 30, 1913, the said Allen N. Terbell, by assignment in writing under his hand and seal, assigned the said mortgage and bond herein above mentioned to said Second National Bank of Hoboken, N. J.; on or about April 15, 1915, the said Grove Straw Hat Manufacturing Company was adjudicated a bankrupt, and there was paid to the Second National Bank of Hoboken, N. J., the sum of \$5,750 as its dividend or pro rata share of the assets of said corporation; that no other moneys have been paid either to this defendant or to the said Second National Bank of Hoboken, N. J., by said Grove Straw Hat Manufacturing Company, or said William K. Grove or Mary B. Grove.

5. He denies any knowledge or information sufficient to form a belief as to the statements in paragraph 3.

F. N. EBERHARD,
Solicitor of Defendant Allen N. Terbell.

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*Replication of and Answer to Counterclaim of
Mary B. Grove.*

IN CHANCERY OF NEW JERSEY.

10	Between CHARLES F. NESLER, Complainant, and WILLIAM K. GROVE, et als., Defendants.	} On Bill, &c. Replication of and Answer to Counter- Claim of Mary B. Grove by Allen N. Terbell.
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The defendant, Allen N. Terbell, of the City of Orange, in the County of Essex and State of New Jersey, says:

- 20 1. Defendant joins issues on the answer of the defendant, Mary B. Grove.

AS TO THE COUNTERCLAIM CONTAINED IN
SAID ANSWER, DEFENDANT SAYS:

- 30 1. He admits that said Mary B. Grove and William K. Grove are husband and wife; but has no knowledge or information sufficient to form a belief as to the other matters in paragraph 1 contained.

2. He has no knowledge or information sufficient to form a belief as to paragraph 2.

- 40 3. He has no knowledge or information sufficient to form a belief as to paragraph 3, excepting, however, that he admits that a deed of conveyance of the premises described in the bill of complaint was made, executed and delivered by William K. Grove and Mary B. Grove, his wife, to one Herbert

*Replication of and Answer to Counterclaim of
Mary B. Grove.*

N. Bradley, and that the said Herbert N. Bradley conveyed the said premises to the said defendant, Mary B. Grove, as in said paragraph 3 set forth.

4. He admits paragraph 4.

5. He denies each and every allegation of paragraph 5.

6. He admits that the said Mary B. Grove is properly informed that defendant was at the date of the making of said mortgage an official of said Bank, and that her husband, the said William K. Grove, was indebted to said bank at the time of the execution and delivery of said bond and mortgage to this defendant, Allen N. Terbell, in the sum of \$40,000 or thereabouts, to wit, the sum of \$45,000, and that said indebtedness was evidenced by certain promissory notes; but denies that said mortgage was made or delivered by her said husband under or by virtue of a secret understanding or agreement between him and this defendant, that this defendant would hold the said mortgage as trustee for the said bank to secure the sum due as aforesaid, and denies that the said defendant, Mary B. Grove, did not execute, deliver or acknowledge said mortgage as in said paragraph 6 alleged, but says that said bond and mortgage were made, executed and delivered by the said William K. Grove and Mary B. Grove with knowledge on their parts that the same was given to and held by this defendant to secure the payment of the said sum of \$45,000, together with interest, by the said William K. Grove to said Second National Bank of Hoboken, as hereinafter stated.

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*Replication of and Answer to Counterclaim of
Mary B. Grove.*

7. He denies that said Second National Bank of Hoboken, New Jersey, did not pay or satisfy to the defendant, Mary B. Grove, or to her husband, William K. Grove, any money or consideration whatever for said mortgage, but says that on or
10 about the day of the making of said mortgage, the defendant, Second National Bank of Hoboken of which this defendant, Allen N. Terbell, was and is the Secretary and Vice-President, agreed to loan and advance to the said William K. Grove, the sum of \$45,000, and thereafter, and on the 30th day of July, 1913, actually loaned and advanced said sum of \$45,000 to the said William K. Grove, and to secure said indebtedness the said bond and mort-
20 gage were executed by the said William K. Grove and Mary B. Grove, his wife, to this defendant, Allen N. Terbell, to be held by him for and in behalf of the defendant, Second National Bank of Hoboken, New Jersey, as security for the repayment of said sum of \$45,000 together with interest; and that there is due on said mortgage the full amount of the principal thereof, together with interest; less the sum of \$9,750 realized on account thereof. That said bond and mortgage were executed and delivered to this defendant, Allen N. Ter-
30 bell, and received by him as the agent and representative of, and for the use and benefit of the defendant, Second National Bank of Hoboken, New Jersey, and with the understanding that the same was to be assigned by this defendant, Allen N. Terbell, to the defendant, Second National Bank of Hoboken, New Jersey, upon request; and that immediately upon and simultaneously with the delivery of said bond and mortgage to this defendant, he delivered said bond and mortgage to the defend-

Amended Replication of Defendant Allan N. Terbell.

ant, Second National Bank of Hoboken, New Jersey, and thereafter, and on the 30th day of July, 1913, executed and delivered a formal assignment in writing, of said bond and mortgage to the defendant, Second National Bank of Hoboken, New Jersey.

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F. N. EBERHARD,
Solicitor for Defendant, Allen N. Terbell.

IN CHANCERY OF NEW JERSEY.

Between

CHARLES F. NESLER,
Complainant,
and

WILLIAM K. GROVE, et als.,
Defendants.

On Bill, &c.
Amended Replication of the Defendant, Allen N. Terbell, and Amended Answer to Counter-Claim of Globe Tire Company.

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The defendant, Allen N. Terbell, of the City of Orange, in the County of Essex and State of New Jersey, says:

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1. He denies that the mortgage made by William K. Grove and wife to him was without consideration, and that nothing is lawfully due or growing due thereon, or that said mortgage is void as against said defendant, Globe Tire Company, but says that on or about the day of the making of said mortgage, the defendant, Second National Bank of Hoboken, of which this defendant was and is the Secretary and Vice-President, agreed

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*Amended Replication of Defendant Allan N.
Terbell.*

to loan and advance to the said William K. Grove, the sum of \$45,000, and thereafter, and on the 30th day of July, 1913, actually loaned and advanced said sum of \$45,000 to the said William K. Grove, and to secure said indebtedness the said
10 bond and mortgage were executed by the said Wm. K. Grove and Mary B. Grove, his wife, to this defendant, Allen N. Terbell, to be held by him for and in behalf of the said bank, as security for the repayment of said sum of \$45,000 together with interest; and that there is due on said mortgage the full amount of the principal thereof, together with interest, less the sum of \$9,750 realized on account thereof. That said bond and mortgage were executed and delivered to this defendant and
20 received by him as the agent and representative of, and for the use and benefit of the said Second National Bank of Hoboken, New Jersey, and with the understanding that the same was to be assigned by him to said Second National Bank of Hoboken, New Jersey, upon request; and that immediately upon and simultaneously with the delivery of said bond and mortgage to him, he delivered said bond and mortgage to the said Second National Bank of Hoboken, New Jersey, and
30 thereafter, and on the 30th day of July, 1913, executed and delivered a formal assignment in writing, of said bond and mortgage to the said bank.

2. He admits the making of the deeds referred to in paragraph 3 of the answer, but has no knowledge or information sufficient to form a belief as to the other matters contained in said paragraph.

3. He has no knowledge or information sufficient to form a belief as to paragraph 4, except-
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*Amended Replication of Defendant Allan N.
Terbell.*

ing, however, that he denies that the attachment of the said Globe Tire Company is a prior lien to the mortgage made to this defendant.

AS TO THE COUNTER CLAIM CONTAINED
IN SAID ANSWER DEFENDANT SAYS:

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1. He repeats the allegations, admissions and denials of paragraphs 1 to 3 inclusive of this answer.

2. He admits that under date of July 28, 1913, William K. Grove and Mary B. Grove, his wife did execute a mortgage to him to secure the payment of \$45,000, and that said mortgage was recorded on July 29, 1913, and remains open and uncanceled of recorded. He denies that neither the said William K. Grove nor Mary B. Grove were at the time of the making of said mortgage indebted to this defendant in the sum of \$45,000, or any other sum, or that said mortgage was without consideration, and denies that the consideration for said mortgage was the securing of an alleged indebtedness owing by the Grove Straw Hat Manufacturing Company as alleged, to the Second National Bank of Hoboken, New Jersey, and for which neither the mortgagors nor the mortgagees were liable, and denies that any alleged indebtedness of the Grove Straw Hat Manufacturing Company to the said Second National Bank of Hoboken was paid, satisfied or discharged; but says that said mortgage, and the bond accompanying the same were made, executed, delivered and held as alleged in paragraph 1 of the above replication, and paragraph 1 of this answer to counterclaim.

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Reply of Globe Tire Company.

3. He has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 3, but denies that the lien, if any, of the said Globe Tire Company, upon the premises specified in paragraph 3 of the complaint, are free and clear of any lien, claim or interest under the said mortgage executed to this defendant and assigned to said Second National Bank of Hoboken; but says that the said mortgage is a valid and existing lien on said premises, prior to the lien or claim, if any, of said defendant, Globe Tire Company.

F. N. EBERHARD,
Solicitor for Defendant, Allen N. Terbell.

20 WELLER and LICHTENSTEIN,
of Counsel.

IN CHANCERY OF NEW JERSEY.

30	CHARLES F. NESLER, Complainant, vs. WILLIAM K. GROVE, et als., Defendants.	}	On Bill, &c. Reply of Globe Tire Company to the Amended Answer of Allen N. Terbell to the Counter-Claim of Globe Tire Company, and the Answer of Second National Bank to the Counter-Claim of Globe Tire Company.
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This defendant, Globe Tire Company, for reply to the separate amended answers filed by Allen N. Terbell and Second National Bank of Hoboken to the counterclaim of Globe Tire Company against said Allen N. Terbell, says:

Reply of Globe Tire Company.

(1) This defendant joins issue upon such parts of the amended answer of said Terbell and the answer of said Second National Bank as traverse the allegations of said Globe Tire Company.

(2) This defendant, Globe Tire Company, was induced to enter business relations with William K. Grove and to extend the credit to him which resulted in the indebtedness now merged in the attachment and judgment of said Tire Company against said Grove, set forth in its counterclaim, by the introduction and recommendation of said Bank, acting through its authorized agents in that behalf, including the said Allen N. Terbell. 10

That at the time thereof and at all times thereafter Globe Tire Company was a customer of said Bank, having both deposits and discounts therein: 20

That said Bank, acting through its said agent introduced said Grove to said Tire Company and urged said Tire Company to enter into a contract with said Grove for the sale to him of large quantities of automobile tires upon credit, and in order to induce said Tire Company to enter into said contract and extend said credit said Bank, acting through said agent, did represent to the Globe Tire Company that said Grove was a responsible and energetic business man, competent to carry on and make a success of the business of selling automobile tires, and of abundant financial responsibility to carry on said business, and that he was the owner of a beautiful home at Orange, New Jersey, meaning the mortgaged premises described in the complainant's bill: 30

That Globe Tire Company, relying upon said representations, did enter into contract with said 40

Reply of Globe Tire Company.

Grove as aforesaid under date of February 3, 1916, providing among other things for the sale of automobile tires upon credit, and pursuant thereto and in reliance upon said representations did sell such automobile tires to said Grove to the amount of the judgment recovered by said Globe Tire Company and upwards, and that the judgment of said
10 Tire Company is the amount of the balance due therefor, and that said amount is wholly unpaid.

That said Bank and said Terbell did conceal from said Tire Company the existence of the aforesaid mortgage made by said Grove to said Terbell, and did conceal from said Tire Company that said Grove was indebted to said Bank in any sum whatsoever: that the representations of said Bank and
20 said Terbell that said Grove was a responsible business man, competent to make a success of said business and of abundant financial responsibility to carry on the same, were in fact untrue: that the representation that said Grove was the owner of a beautiful home at Orange, New Jersey, meaning thereby the premises described in the bill, was intended to and did imply that said premises were owned free of encumbrances and that the interest of said Grove therein was a valuable asset, and
30 that said representation in such sense was untrue; that at the time thereof said Bank and said Terbell well knew that said Grove was without any financial responsibility whatever and that he had failed in business and that the amount of the mortgage held by said Bank, together with the other liens against said premises, exceeded the value thereof, and that said Bank held notes of said Grove overdue since the year 1913 which it had been unable to collect, in amount over \$40,000.

That Globe Tire Company would not have extended credit to the aforesaid Grove except for the
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representations of said Bank and its agent, nor would it have entered into such contract and such credit had it known of the existence of the afore-said mortgage held by or in behalf of said Bank and of the existence of the unpaid indebtedness due to said Bank.

(4) Said W. K. Grove is and was wholly without financial responsibility, and the debt due to Globe Tire Company is wholly uncollectible unless it can be enforced against said premises, and that the value of said premises is insufficient to pay the debt due to the complainant and the debts due to said Bank and said Tire Company, so that this defendant will lose the amount due to it as afore-said unless the claim of said Bank is postponed to the lien of said judgment.

(5) This defendant therefore says that the said Allen N. Terbell and said Bank are estopped from now enforcing said mortgage or asserting any claim to said premises as a prior lien to the judgment of said Tire Company, and that the lien of this defendant's judgment is in equity prior to the lien of any amount which might otherwise be found to be due upon said mortgage.

McDERMOTT & ENRIGHT,
Solicitors of Globe Tire Company.

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Replication to Answer of Mary B. Grove.

IN CHANCERY OF NEW JERSEY.

10	Between CHARLES F. NESLER, Complainant, and WILLIAM K. GROVE, et als., Defendants.	} On Bill, &c. Replication to Answer of Mary B. Grove to Counter-Claim of Second National Bank of Hoboken.
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This defendant, Second National Bank of Hoboken, N. J., joins issue to the answer of Mary B. Grove to the counterclaim of this defendant.

20	F. N. EBERHARD, Solicitor of Defendant, Second National Bank of Hoboken, N. J.
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IN CHANCERY OF NEW JERSEY.

30	Between CHARLES F. NESLER, Complainant, and WILLIAM K. GROVE, et als., Defendants.	} On Bill, &c. Replication of and Answer to Counter-Claim of Mary B. Grove by Second National Bank of Hoboken, New Jersey.
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40	The defendant, Second National Bank of Hoboken, New Jersey, having its principal office in the City of Hoboken, Hudson County, New Jersey, says:
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*Replication of and Answer to Counterclaim of
Mary B. Grove.*

1. Defendant joins issue on the answer of the defendant, Mary B. Grove.

AS TO THE COUNTERCLAIM CONTAINED IN
SAID ANSWER, DEFENDANT SAYS:

1. It admits that said Mary B. Grove and William K. Grove are husband and wife; but has no knowledge, or information sufficient to form a belief as to the other matters in paragraph 1 contained.

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2. It has no knowledge or information sufficient to form a belief as to paragraph 2.

3. It has no knowledge or information sufficient to form a belief as to paragraph 3, excepting, however, that it admits that a deed of conveyance of the premises described in the bill of complaint, was made, executed and delivered by William K. Grove and Mary B. Grove, his wife, to one Herbert N. Bradley, and that the said Herbert N. Bradley conveyed the said premises to the said defendant, Mary B. Grove, as in said paragraph 3 set forth.

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4. It admits paragraph 4.

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5. It denies each and every allegation of paragraph 5.

6. It admits that the said Mary B. Grove is properly informed that the said Allen N. Terbell was at the date of the making of said mortgage an official of said bank, and that her husband, the said William K. Grove, was indebted to said bank at the time of the execution and delivery of said bond

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*Replication of and Answer to Counterclaim of
Mary B. Grove.*

10 and mortgage to the said Allen N. Terbell in the sum of \$40,000 or thereabouts, to wit, the sum of \$45,000, and that said indebtedness was evidenced by certain promissory notes; but denies that said mortgage was made or delivered by her said husband under or by virtue of a secret understanding or agreement between him and the said Terbell, that the said Terbell would hold the said mortgage as trustee for the said bank to secure the sum due as aforesaid, and denies that the said defendant, Mary B. Grove, did not execute, deliver or acknowledge said mortgage as in said paragraph 6 alleged, but says that said bond and mortgage were made, executed and delivered by the said William K. Grove and Mary B. Grove with knowledge on their
20 parts that the same was given to and held by the said Allen N. Terbell to secure the payment of the said sum of \$45,000, together with interest, by the said William K. Grove to said Second National Bank of Hoboken, and as hereinafter stated.

30 7. It denies that it did not pay or satisfy to the defendant, Mary B. Grove, or to her husband, William K. Grove, any money or consideration whatever for said mortgage, but says that on or about the day of the making of said mortgage, the defendant, Second National Bank of Hoboken, of which the defendant, Allen N. Terbell, was and is the Secretary and Vice-President, agreed to loan and advance to the said William K. Grove, the sum of \$45,000, and thereafter, and on the 30th day of July, 1913, actually loaned and advanced said sum of \$45,000 to the said William K. Grove, and to secure said indebtedness the said bond and mortgage were executed by the said William K. Grove

*Replication of and Answer to Counterclaim of
Mary B. Grove.*

and Mary B. Grove, his wife, to said defendant, Allen N. Terbell, to be held by him for and in behalf of this defendant, Second National Bank of Hoboken, New Jersey, as security for the repayment of said sum of \$45,000, together with interest; and that there is due on said mortgage the full amount of the principal thereof, together with interest, less the sum of \$9,750 realized on account thereof. That said bond and mortgage were executed and delivered to said defendant, Allen N. Terbell, and received by him as the agent and representative of, and for the use and benefit of this defendant, Second National Bank of Hoboken, New Jersey, and with the understanding that the same was to be assigned by said Allen N. Terbell to this defendant, Second National Bank of Hoboken, New Jersey, upon request; and that immediately upon and simultaneously with the delivery of said bond and mortgage to said Allen N. Terbell, he delivered said bond and mortgage to this defendant, Second National Bank of Hoboken, New Jersey, and thereafter, and on the 30th day of July, 1913, executed and delivered a formal assignment in writing, of said bond and mortgage to this defendant. That said bond and mortgage have at all times since the execution and delivery thereof to the said Allen N. Terbell, been the property and security of this defendant, for the repayment of the said indebtedness of the said William K. Grove.

F. N. EBERHARD,
Solicitor for Defendant,
Second National Bank of Hoboken,
New Jersey.

Replication of Second National Bank of Hoboken.

IN CHANCERY OF NEW JERSEY.

10	Between CHARLES F. NESLER, Complainant, and WILLIAM K. GROVE, et als., Defendants.	} On Bill, &c. Replication of Second National Bank of Hoboken, New Jersey, to the Answer and Counter-Claim of Globe Tire Company.
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The defendant, Second National Bank of Hoboken, New Jersey, having its principal office in the City of Hoboken, Hudson County, New Jersey, says:

- 20 1. It denies that the mortgage made by William K. Grove and wife to Allen N. Terbell was without consideration, and that nothing is lawfully due or growing due thereon, or that said mortgage is void as against said defendant, Globe Tire Company, but says that on or about the day of the making of said mortgage, the defendant, Second National Bank of Hoboken, of which the defendant, Allen N. Terbell, was and is the Secretary and Vice-President, agreed to loan and advance to the said William K. Grove, the sum of \$45,000, and thereafter, and on the 30th day of July, 1913, actually loaned and advanced said sum of \$45,000 to the said William K. Grove, and to secure said indebtedness the said bond and mortgage were executed by the said William K. Grove and Mary B. Grove, his wife, to said defendant, Allen N. Terbell, to be held by him for and in behalf of this defendant, Second National Bank of Hoboken, New Jersey, as security for the re-
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Replication of Second National Bank of Hoboken.

payment of said sum of \$45,000, together with interest; and that there is due on said mortgage the full amount of the principal thereof, together with interest, less the sum of \$9,750 realized on account thereof. That said bond and mortgage were executed and delivered to said defendant, Allen N. Terbell, and received by him as the agent and representative of, and for the use and benefit of this defendant, Second National Bank of Hoboken, New Jersey, and with the understanding that the same was to be assigned by said Allen N. Terbell to this defendant, Second National Bank of Hoboken, New Jersey, upon request; and that immediately upon and simultaneously with the delivery of said bond and mortgage to said Allen N. Terbell, he delivered said bond and mortgage to this defendant, Second National Bank of Hoboken, New Jersey, and thereafter, and on the 30th day of July, 1913, executed and delivered a formal assignment in writing, of said bond and mortgage to this defendant. That said bond and mortgage have at all times since the execution and delivery thereof to the said Allen N. Terbell, been the property and security of this defendant, for the repayment of the said indebtedness of the said William K. Grove.

2. It admits the making of the deeds referred to in paragraph 3 of the answer, but has no knowledge or information sufficient to form a belief as to the other matters contained in said paragraph.

3. It has no knowledge or information sufficient to form a belief as to paragraph 4, excepting, however, that it denies that the attachment of the said Globe Tire Company is a prior lien to the mort-

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Replication of Second National Bank of Hoboken.

gage made to the said Allen N. Terbell, as aforesaid, belonging to this defendant.

AS TO THE COUNTERCLAIM CONTAINED
IN SAID ANSWER DEFENDANT SAYS:

10 1. It repeats the allegations, admissions and denials of paragraphs 1 to 3 inclusive of this answer.

20 2. It admits that under date of July 28, 1913, William K. Grove and Mary B. Grove, his wife, did execute a mortgage to Allen N. Terbell to secure the payment of \$45,000, and that said mortgage was recorded on July 29, 1913, and remains open and uncanceled of record. It denies that
30 neither the said William K. Grove nor Mary D. Grove were at the time of the making of said mortgage indebted in the sum of \$45,000, or any other sum, or that said mortgage was without consideration, and denies that the consideration for said mortgage was the securing of an alleged indebtedness owing by the Grove Straw Hat Manufacturing Company as alleged, to this defendant, Second National Bank of Hoboken, New Jersey, but says that its said mortgage is a valid and existing lien on said premises, prior to the lien or claim, if any, of said defendant, Globe Tire Company.

F. N. EBERHARD,
Solicitor for Defendant,
Second National Bank of Hoboken,
New Jersey.

IN CHANCERY OF NEW JERSEY.

Between

CHARLES F. NESLER,
Complainant,
and

WILLIAM K. GROVE, et als.,
Defendants.

On Bill, &c.
Reply of Mary B.
Grove to the An-
swer of Second
National Bank of
Hoboken.

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This defendant, by way of reply to the answer of Second National Bank of Hoboken, a defendant herein, says :

1. She repeats all the allegations contained in her answer heretofore filed in this matter, as fully as though said allegations were here set forth.

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2. With reference to paragraphs three and four of said answer, this defendant says that the notes aggregating \$45,000.00 referred to in said paragraphs and made prior to July 28, 1913, on which said William K. Grove was endorser, and which endorsements were alleged to have been secured by the bond and mortgage held by the defendant Allen N. Terbell as stated in said paragraphs, were, subsequent to said July 28, 1913, cancelled and new notes were executed and delivered in their place, and that by virtue thereof the principal debt, namely, said notes, was extended by valid enforceable agreement and for valuable consideration between the holder and the principal debtor: that such extension of said principal debt was made without the consent of this defendant, Mary B. Grove, and without her knowledge, and that by

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10 virtue thereof, this defendant is discharged and released from any obligation by virtue of any guarantee or surety on her part of said obligations, and said bond and mortgage held by said Terbell as security for said indebtedness are likewise discharged; that on information and belief, this defendant says that said Allen N. Terbell did not have authority to assign said bond and mortgage to said Second National Bank of Hoboken as further stated in said paragraphs.

20 3. This defendant denies any knowledge or information to form a belief as to statements in paragraph five except that she admits that said Grove Straw Hat Manufacturing Company was adjudicated a bankrupt, and that no money was paid to her upon the execution and delivery of said bond and mortgage.

YOUNG, BIGELOW & FAYERWEATHER,
Attorneys of Defendant,
Mary B. Grove.

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IN CHANCERY OF NEW JERSEY.

Between

CHARLES F. NESLER,
Complainant,
and

WILLIAM K. GROVE, et al.,
Defendants.

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Transcript of shorthand notes of testimony taken in the above entitled cause, on November 15, 1917, at Chancery Chambers, Jersey City, New Jersey, before Honorable Merritt Lane, Vice Chancellor.

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APPEARANCES:

MR. ARCHIBALD F. SLINGERLAND, for the complainant.

MR. JOHN M. ENRIGHT (of McDermott & Enright) for Globe Tire Company.

Messrs. YOUNG, BIGELOW & FAYERWEATHER, for Mary B. Grove. Mr. Robert H. Southard and Mr. William M. Seufert of counsel. 30

MR. FREDERICK N. EBERHARD, for the Second National Bank of Hoboken. Mr. Julius Lichtenstein of Counsel.

Mr. Lichtenstein: I want to present amended replication and answer of the Second National Bank; it is not amended, it is replication of the

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Second National Bank to the answer and counterclaim.

Mr. Enright: What does it set up?

Mr. Lichtenstein: Just the things you have in your interrogatories.

10 Mr. Enright: No objection, provided I am permitted to file a reply.

Mr. Lichtenstein: Any reply will suit.

Mr. Enright: These amendments I say were anticipated on both sides.

Mr. Lichtenstein: I also desire to file an amended replication and answer to the counterclaim of Mary B. Grove in behalf of the Second National Bank of Hoboken.

The Court: Any objection to that?

Mr. Southard: I would like to see that.

20 The Court: You may file any answer you may want to at any time. I will permit this to be filed.

Mr. Lichtenstein: I also desire to file an amended replication and answer in behalf of Allen N. Terbell to the counterclaim of Mary B. Grove. It is the same thing as the answer of the Second National Bank, excepting the changing of the name.

Also amended replication of the defendant Allen N. Terbell and answer to the counterclaim in exactly the same language.

30 Mr. Enright: I have not had an opportunity to know what is in all these pleadings. I would like to reserve the right, because I think the trial will probably not be concluded in one day. May I reserve the right to move, during the trial, to amend our pleadings to conform to the proofs.

The Court: Any time.

Mr. Southard: I wish the same privilege.

40 The Court: On whom rests the burden of going forward with the proof?

Mr. Enright: It seems logical the first thing to be taken up is proof of the mortgage by the bank.

The Court: There is offered in evidence on behalf of the complainant bond made by William K. Grove to Charles F. Nesler in the penal sum of \$20,000, dated February 1st, 1910, payable in three years, and mortgage securing the bond, recorded in the Register's office of Essex County, H-25 of Mortgages, page 200, and affidavit of the amount due under that mortgage, indicating that the amount due at the present time is the sum of \$10,675.00 as of November 15, 1917; also an agreement to pay interest at the rate of six per cent.; also offered the abstract of title, search fees amounting to the sum of \$51.43. Any objection to the offer of these papers? 10

No objection. 20

The Court: An affidavit may be taken as testimony as to the amount due on the mortgage.

No objection.

Marked Exhibit C-1, Exhibit C-2 and Exhibit C-3.

Mr. Lichtenstein: I offer in evidence mortgage made by William K. Grove and Mary B. Grove, his wife, to Allen N. Terbell dated July 28, 1913, covering the premises described in the bill of complaint in this cause, which mortgage is recorded in the office of the Register of the County of Essex, New Jersey, on the 29th day of July, 1913, in book 131 of mortgages, page 586, &c. 30

Marked Exhibit D-1.

I offer the bond referred to in this mortgage, made by William K. Grove to Allen N. Terbell, which bond is dated on the 28th day of July, 1913.

Marked Exhibit D-2.

I offer an assignment made by Allen N. Terbell 40

to the Second National Bank of Hoboken of the mortgage offered in evidence, and which assignment is dated, July 30, 1913.

Marked Exhibit D-3.

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ALLEN N. TERBELL, sworn.

Direct Examination by Mr. Lichtenstein:

Q. You are an officer of the Second National Bank of Hoboken, one of the defendants in this suit? A. Yes.

Q. What position do you hold in the bank? A. Vice-president and cashier.

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Q. And you are also a director of the bank? A. Yes.

Q. And you have been such officer for how many years? A. Five or six years, and cashier.

Q. You are acquainted with Mr. William K. Grove? A. Yes.

Q. And knew him at the time of the execution and delivery of the mortgage in question which has been offered in evidence here? A. Yes.

30

Q. And were you such officer of the bank at the time of the dealings which are the subject matter of this proceeding here on your mortgage? A. Yes.

Q. Have you made a calculation of the amount due at the present time on this mortgage of the bank? A. I have.

Q. Will you tell us, please, how much is due? A. \$38,170.30.

Q. (By the Court) Is that of this date? A. Up to November 15.

40

Q. Does that include the principal and interest up to date? A. It does.

Cross Examination by Mr. Enright:

Q. You in addition to these titles are the practical manager every-day manager of the bank, are you not? A. Yes.

Q. And you personally had to do with the negotiations which resulted in the giving of this mortgage, didn't you? A. Yes. 10

Q. You know all about the subsequent dealings between the bank and Mr. Grove? A. I do.

Q. Now this sum of \$38,170, just tell us how you arrived at that? A. Well, it is the amount due on the mortgage, with interest at the present time.

Q. I know that is what you say; I ask you to tell us how you arrive at that calculation? A. By deducting the moneys received at the time the mortgage was drawn, and figuring the interest. 20

Q. Well, tell us what moneys were received after the mortgage was drawn? A. I have to refresh my memory on those dates.

The Court: Isn't it conceded that this mortgage was given to secure an indebtedness of the Grove Straw Hat Manufacturing Company, on which Mr. Grove was endorser?

Mr. Enright: Perhaps. Better let Mr. Terbell say that. I don't know whether he concedes it or not. 20

A. Is that a question asked of me?

Q. (By the Court) What was the transaction that led to the giving of this mortgage? A. Why, we loaned W. K. Grove \$45,000 and took a bond and mortgage; that was a new loan at that time, July, 28, 1913; we gave him our cashier's check for \$45,000, and deposited it to his personal account.

Q. You say that this was a new transaction 40

when the mortgage was taken, do you? A. New loan, yes, sir.

Q. To whom was that loan made? A. William K. Grove.

Q. And that loan was made by your bank on the bond introduced in evidence in this case? A. Yes.

10 Q. And then the bank took a mortgage to secure that bond? A. Yes.

Q. Your bank is a national bank, isn't it? A. Yes.

Q. And had no authority under the law to make mortgage loans at that time, did it?

Mr. Lichtenstein: I object to that.

20 The Court: I will exclude it. I am supposed to have judicial knowledge of the statutes of the United States, although I have not.

Q. Is that an ordinary course of business with your bank to make mortgage loans?

The Court: Where in the pleadings is any such situation set up?

30 Mr. Lichtenstein: The fact is, if the Court please, there actually are new pleadings conforming to the facts as appears by the books, and also by the facts set forth that on the date that this mortgage was given that a loan was arranged.

The Court: That was a mere matter of form.

Mr. Lichtenstein: It was given at that time and check given for the purpose of paying that loan.

The Court: What do you rely upon?

Mr. Lichtenstein: We are relying upon the facts as they exist, as the witness will state, and that is on the twenty-eighth of July, the day the mortgage was given, that Mr. Grove owed the bank \$45,000, \$10,000 note, personal note, and also \$35,000 note of Grove Straw Hat Manufacturing Company, on which he was liable as endorser, and on that day the bank gave Mr. Grove, or at least agreed to loan Mr. Grove \$45,000, and two days afterwards, after the execution of the bond and mortgage, actually gave him, after it was recorded, gave him cashier's check for \$45,000, which check was deposited to his credit, and he paid off the old note of \$45,000. 10

The Court: Then the Straw Hat Company gave new notes? 20

Mr. Lichtenstein: Then the Grove Straw Hat Works gave Mr. Grove its note, because he paid off, gave its note for \$35,000 and Grove gave also new note for \$35,000 and \$10,000, payable on demand, so that the bank at that time held for this advance of \$45,000 the bond and mortgage and also the note for \$35,000, which was made on that day, and note of \$10,000, which was made on that day. 30

Mr. Enright: It is a question whether the bank customarily made loans on real estate mortgage security. You see it has become an issue in this case now just what sort of a loan this was, whether it was real estate mortgage loan or whether it was collateral loan.

The Court: It is rather remarkable that

a national bank should file two answers in the cause setting up diametrically opposite theories.

Mr. Lichtenstein: It is a matter of what the actual facts are.

10 The Court: I will permit that. It is the business of the bank to take all the security it can get, whether mortgage or otherwise.

Q. You don't make new loans ordinarily on real estate mortgage security? A. Occasionally.

Q. New loans? A. Occasionally, not unknown.

Q. Why was this mortgage taken in your name rather than the bank? A. It is customary to take.

Q. And the assignment from you to the bank was never recorded, was it? A. No, sir.

20 Q. You did not want it to appear of record that the bank was making this loan on real estate security, was that it? A. As a rule it is not recorded.

Q. And as a rule the reason is you don't want the public to know about it? A. Nothing to do with the public.

30 Q. How about the bank examiners? A. Bank examiners, they don't encourage you to take those things, but they don't make any fuss if you do take them, if you do take them, take all the security you can get.

Q. Do you say that this mortgage was not taken as collateral security to the bank to secure an existing indebtedness owned by the Grove Straw Hat Manufacturing Company?

Mr. Lichtenstein: Isn't that asking for a conclusion as a matter of law? Hadn't we better find what the facts are?

The Court: It is a question of fact; it don't make any difference what form it took.

Q. (Question read.) A. I do.

Q. For sometime prior to the date of this mortgage is it not true that the Grove Straw Hat Manufacturing Company was indebted to the bank upon notes held by the bank aggregating \$45,000? A. Aggregating \$35,000. 10

Q. Well, at and prior to the date of this mortgage is it not true that the bank held notes made by the Grove Straw Hat Manufacturing Company as maker, aggregating \$45,000? A. No, sir.

Q. How much do you say those notes of that character did aggregate? A. \$35,000.

Q. Is it not true that the bank held a note, a demand note in addition to the \$35,000 made by the Grove Straw Hat Manufacturing Company to the order of W. K. Grove and endorsed by him, amounting to \$10,000? A. No, sir. 20

Q. You are here under subpoena from the Globe Tire Company to-day, aren't you? A. I don't know whose subpoena I am here.

Q. You have been subpoenaed to produce the discount sheets of the bank showing the discounts to either Grove Straw Hat Manufacturing Company or William K. Grove on July 28, 1913; will you please produce them? I call your attention to the discount sheet headed with the name, I call your attention to the sheet headed with the name W. K. Grove; is it not true that on July 28, 1913 your bank held a demand note amounting to \$10,000 of which William K. Grove was maker, and upon which the Grove Straw Hat Manufacturing Company was endorser? A. No, sir; I can tell you straight if you want me to; it is W. K. Grove's personal note, not time note, on demand. 30 40

Q. How do you account for the fact that in the column on the right hand side headed "Accommodation" appears the name "Grove Straw Hat Manufacturing Company"? A. Because it was endorsed on \$35,000; the \$10,000 was his note.

10 Q. And there was another name on the ten thousand dollar note? A. No; you have got it twisted, that is all. Those were the facts in the case.

Q. Now for some time prior to July 28, 1913 you knew the Straw Hat Company was in trouble, didn't you? A. I think their trouble came later.

Q. Don't you remember conferences at the bank with Mr. Grove, or with representatives of the Grove family respecting the financial affairs of the hat company? A. Well, those lines are cleaned up every year; we wanted that line cleaned up as usual.

20 Q. How long had this line been running? A. Referring to that season at least, they were cleaned up every season.

Q. Doesn't this sheet which you have before you indicate that this line had been running since 1911? A. No; there it was down to \$5,000 you see (indicating).

Q. But you had been loaning money to the Straw Hat Company at least as far back as 1911? A. Yes.

30 Q. And this is the first time you ever got any collateral security, isn't it? A. We didn't get any collateral security.

Q. This is the first time you ever cleaned it up, as you put it? A. No, here it was down to \$5,000 (indicating).

Q. That is not a clean up. A. Well, pretty near.

Q. It is your testimony that the only reason for this mortgage transaction was the annual desire to clean up the account? A. Oh, we understood

40

the New York banks had been paid and we desired to be paid also.

Q. You knew the Hat Company had large loans with the New York banks, didn't you? A. They had some loans, to the best of my recollection; I don't know how large they were.

Q. You knew there was a good deal of trouble about it too, didn't you? A. There may have been. 10

Q. Didn't you know that? Isn't that your recollection? A. I think so, yes; the New York banks wanted their money, as they always do at the end of the season.

Q. And you knew that the Hat Company could not pay them, didn't you? A. Yes; it was so stated to us.

Q. By whom? A. Mr. Grove; he was the Hat Company practically. 20

Q. And didn't you know that his wife had to raise a very large sum of money to meet these demands of the New York banks? A. I was so told.

Q. And weren't you told, weren't you asked about what the attitude of the Second National was going to be? A. Very likely.

Q. Did you personally demand the payment of these loans? A. Yes, sir.

Q. To whom? A. To Grove.

Q. Just tell us what you said? A. I can't recall the exact words of the conversation. 30

Q. Your best recollection? A. Requested that the company pay the notes, clean the line up at the season end; we understood the New York banks were being paid and we wanted to be paid.

Q. That is all you recall about that now? A. Yes.

Q. Did you threaten any proceedings if you were not paid? A. Not to my knowledge. 40

Q. Didn't you put this matter in the hands of counsel for the bank? A. No.

Q. Wasn't it in Mr. Eberhard's hands at that time? No, sir.

Q. Did Mr. Eberhard have anything to do with the negotiation of this mortgage? A. Not to my
10 knowledge, no.

Q. It was taken by the bank just in the usual course of business to evidence a new loan that you were making at that time? A. Yes.

Q. When you told Mr. Grove you wanted this money paid what did he reply? A. I think the result of the conference was if we would loan him this money he would take care of those obligations; that is all the security he had to offer, was to give us a mortgage on his property.

Q. Did you know there was a first mortgage on
20 the property ahead of yours? A. Yes.

Q. He told you all about that? A. Yes.

Q. Did you ask him for any other security? A. We took his note and note of the company.

Q. Did you ask him for any other security? A. Yes, naturally.

Q. And he said this was all the security he could offer? A. Except the note of the company and his own note.

Q. Was there a note of the company given at
30 the same time that this mortgage was executed? A. Yes.

Q. For how much? A. \$35,000.

Q. Mr. Grove was endorser on that? A. Yes.

Q. Now before that the bank held a precisely similar security except that it was broken up in a series of three or four notes? A. Yes.

Q. And then he gave his personal note again for \$10,000? A. \$10,000.

Q. Payable on demand? A. Yes.
40

Q. And that was precisely the same sort of a note as you had before? A. The other note was a time note; they were due at different dates.

Q. Why did you take these notes?

The Court: Are the notes in existence, the new ones?

Mr. Lichtenstein: The new notes, no, sir.

10

Q. Did you have any written agreement with Mr. Grove to show the character in which you held these new notes for \$35,000 and \$10,000? A. No, sir.

Q. What was your oral agreement with him? A. If he paid the note of the company the company gave their note in return, he put it up with us as additional collateral.

Q. Additional collateral to the mortgage? A. The mortgage, yes, and accompanied by his own note of \$10,000.

20

Q. Didn't you consider the mortgage was sufficient security for the debt? A. As I say, banks take all the security they can get.

Q. Will you just produce whatever book of record there is in your bank to show how you entered this new note for \$35,000, and the new note for \$10,000 on the books? A. They were not on the books at that time.

30

Q. No entry was made in any book at that time, is that right? A. No, sir.

Q. In whose possession did those new notes remain? A. The bank's possession.

Q. Your possession, as cashier? A. Well, yes.

Q. (By the Court) How many notes were actually made on this date? A. July 28th?

Q. (By the Court) Yes. A. Two.

40

Q. (By the Court) Then there was no individual note taken for \$45,000 of Grove? A. Only on the mortgage; no, he gave his own note, the company's note for \$35,000, endorsed by him; the company owed him that money, and he paid that obligation.

10 Q. (By the Court) Then the evidence of the indebtedness of Grove was merely the possession by your bank of this bond and mortgage? A. Yes.

Q. (By the Court) Was there any entry in your book; any of your books of the advance of Grove of that \$45,000? A. Yes.

Q. (By the Court) Where is that? Where is the entry on your book showing what happened? A. Here is a transcript of Mr. Groves' account at that time, July, 1913, to April, 1914, that is \$45,000 deposit.

20 Q. (By the Court) You show cashier's check, Second National Bank, dated July 30, 1914, to order of W. K. Grove for \$45,000, endorsed by him, and deposited in his account July 30, 1914, as appears by the book of the bank, and withdrawal on the same day of \$45,000. Now, where are your general books that show that transaction? A. The general ledger shows that.

30 The Court: The general ledger is what I want. The general ledger, that shows the withdrawal of funds of the bank?

A. That will be the individual ledger, your Honor.

Q. (By the Court) I want to know where on the books of the bank it appears that \$45,000 was withdrawn from the funds of the bank. You mean to say there is no book in your bank that shows withdrawal of the \$45,000? The only evidence you

have got that \$45,000 was taken out of the funds of the bank is that cashier's check. Show me the books that indicate what that \$45,000 was used for?

Mr. Lichtenstein: The book you have here is the cash book, is that right?

A. Yes, cash book No. 36.

10

Mr. Lichtenstein: Shows the entry of cashier's draft, this number, William K. Grove, \$45,000. The Court now wants the next entry, wants you to show what became of that money?

Mr. Enright: On the debit side of this page; the entry which you have read is from the credit side from the cash book, July 30, 1913. Now, does that entry indicate the receipt or payment of the money?

20

A. Payment of the money.

Q. By the bank? A. Yes.

Q. On the opposite side of the page appears an entry "Mortgage account, W. K. Grove, West Orange property, \$45,000"; what does that indicate? A. It indicates we held mortgage for that amount on W. K. Grove's property at West Orange.

30

Q. What is the significance of the entry of the same amount in the fourth column on that page?

A. Just an extension.

Q. The appearance of these items on the opposite sides of the book indicates that the money never left the bank, does it? A. No, not at all.

Q. Well, one item— A. I gave this man a check, he could go to California with it if he liked.

Q. He didn't do it, did he? A. That is immaterial.

40

Q. Whether it is immaterial or not, he didn't do it? A. In this case he didn't do it.

Q. You knew very well he was not going to do it, didn't you? A. Why certainly.

10 Q. And the appearance of these items on the opposite sides of the cash book, they are what you call cross entries, aren't they? A. If I issue a check for cash and a man gives me cash there will be no entry here; if I don't issue a check for cash they issue it somewhere else; that ought to go on this side of the book to balance it up; you cash a check for \$100 and \$100 should go in my cash; there wouldn't be any corresponding entry here, this was not cash.

20 Q. By reason of making the entries in this way, one item on one side and one on the other, shows there was no change in the cash balance of the bank on account of this transaction? A. Not at all.

Q. Was there a change? A. Yes; you and I are working on two different lines.

The Court: Now, I want to know what happened to the \$45,000?

30 Q. Is there anything on this check you have produced to indicate what account it went into? A. Yes, W. K. Grove's account.

Q. And on the opposite side of W. K. Grove's account you have pointed to an item on the same day of \$45,000? A. Yes.

Q. Is not that the aggregate of the notes which were due on that day? A. That represents his personal check.

Q. How do you know that? A. There is a ledger to show it.

Q. You say then that he gave a personal check, gave that to the bank? A. Yes.

Q. And what did you give him for that personal check? A. He took up those notes of the Straw Hat Company and his own.

Q. Then, having taken up those notes he immediately gave you similar notes for exactly the same amount? A. They were not similar; they were similar in amount, yes. 10

Q. And similar in the parties? A. Yes.

Q. In what respect did they differ? A. His large note was on demand and the other on time, the other time note, it wasn't one note, several group of notes.

Q. (By the Court) Were the parties in the same relative position? A. In what way, your Honor?

Q. (By the Court) Were the notes made by the Straw Hat Company to Grove and then endorsed by Grove to the bank? A. They were endorsed by him and handed over to the bank as security; he did not endorse to the bank exactly. 20

Q. (By the Court) Was the other \$35,000 note made the same way, or was it from the company to him and by him endorsed? A. The one made July 28, 1913?

Q. (By the Court) Yes. A. Yes, sir.

Q. (By the Court) Was the one previous to that made at the same time? A. The one previous to that was previous to that time. 30

Q. (By the Court) Made in the same way? A. Yes, sir.

Q. (By the Court) From the Hat Company to Grove and endorsed by Grove? A. Yes.

Q. (By the Court) And was the individual note made by him direct to the bank or to his own order and endorsed by him? A. To his own order and endorsed by him. 40

Q. (By the Court) The other ten thousand dollar note, previous note, was also in the same way? A. Yes.

10 Q. (By the Court) So the parties were in the same relative position on paper? A. Yes, except the company owed, Grove's company owed the bank.

Q. (By the Court) That was also a fact before, wasn't it? A. No, they owed the company.

Q. (By the Court) So far as the notes themselves were concerned the parties were exactly in the same physical position? A. Yes, the physical position was the same, yes.

20 Mr. Lichtenstein: The Court asked the question after you gave him this cashier's check and deposited this personal check and he gave you check for \$45,000, what did you do with that \$45,000?

A. After he gave us his check?

Q. Yes. A. He took up these various notes, \$45,000 worth of notes, \$35,000 of the hat company and ten of his own, there is where it is shown they were paid.

30 Q. You are referring to July 30, 1913? A. These notes were paid in Hoboken?

Q. (By the Court) And that shows the payment of those notes? A. Yes.

Q. (By the Court) On that date? A. Yes.

Q. (By Mr. Enright) Is there any significance in your accounting system to the fact that these accounts are made in red? A. It shows that they were not due that day, that is all; if they are due and paid the same day, they are just crossed here, they are put down and the descriptive entries are

numbered 3038, \$10,000, due 7-31, \$10,000; 3081, due 8-1, \$5,000; 3125, due 8-4, \$5,000; 3217, due 8-15, \$5,000; 3362, due 8-20, \$10,000; 3518 19-26, \$10,000.

Q. Your bank keeps a book in which it enters collateral held by it for its various loans, doesn't it? A. Yes.

10

Q. Do these new notes taken at the time the mortgage was given appear in the book which shows your record of the collateral note? A. No, sir.

Q. Do they appear in any book whatever? A. No, sir.

Q. Now, will you turn to the mortgage account referred to in the cash book? You are now referring to the general ledger No. 25, page 429, and what is the entry there? A. "W. K. Grove, West Orange property, July 28, 1914, \$45,000."

20

Q. That is on the debit side of the account and indicates a mortgage loan taken by the bank at that time? A. A loan secured by mortgage, yes.

Q. There is no other entry on either side of that account, is there, except the entry of the balance, the credit balance of \$45,000? A. That is where it is transferred to the next ledger.

Q. Will you turn to the next ledger, please? You are now referring to ledger No. 27, page 470, and what is the debit entry there? A. "W. K. Grove, January 2, 1914, W. K. Grove, July 28, 1913, \$45,000, West Orange property."

30

Q. (By the Court) On the opposite side, January 8? A. \$45,000.

Q. (By the Court) Balance, I suppose? A. That was the book of original entry.

Q. This entry on the credit side, January 8, \$45,000, closed the account, didn't it? A. It didn't pay the mortgage.

40

Q. I asked you whether it did not close the account? A. It closed up that entry, yes.

Q. It closed the whole mortgage account, didn't it? A. So far as it referred to this property,—no, it didn't close the mortgage account.

10 Q. It did not close the mortgage account because of what? A. Because we still carried the mortgage; we changed the form when we carried that loan in our books, that was all.

Q. Will you turn to entry account in your books which shows a mortgage account after January 8, 1914? A. Here is one here.

Mr. Lichtenstein: He doesn't mean that; he means this Grove mortgage.

20 A. No, I say the loan was carried in different form, that is all.

Q. It was taken out of the mortgage account, wasn't it? A. Carried in different form.

Q. It was taken out of the "mortgage account," wasn't it? A. Yes, so far as the books goes, so far as that record shows.

Q. After January 8, 1914, is there any entry whatever in your book to show that the bank held that mortgage among its assets? A. No, sir.

30 Q. (By the Court) Where did the bank get the \$45,000 to balance its account? Tell me how that bank got that \$45,000 to balance that account. A. I will tell you, sir. Sometimes, as I told you, we took this mortgage of \$45,000 July 28th; we took Mr. Grove's demand note for \$10,000 and Grove Straw Hat Company demand note for \$35,000, endorsed by Mr. Grove as additional collateral for this loan. Now, it came up to January 8, 1914, and we did not wish to carry the Grove Straw Hat

Company's demand note any longer, because you are liable to lose the endorser on the demand note, requested a time note.

Q. (By the Court) So what happened? A. We took the time note and then we put the notes—

Q. (By the Court) Took the time note for how much? A. \$35,000, endorsed by W. K. Grove, took his demand note for \$10,000, put his demand note on our books as collateral, and \$35,000 note, and held the mortgage off to one side because the department does not like us to hold mortgages on our books. 10

Q. (By the Court) You don't mean collateral; you mean on January 8, 1914, you took time note of the parties physically related the same as the other two notes and discounted those notes, didn't you? A. We did not give the parties credit for those notes as a discount. 20

Q. You did give the parties credit for the notes?
A. They already had credit.

The Court: No, they didn't; they took new notes.

A. Grove had had credit originally; we didn't give him new credit; the loan was not paid; it was the same old loan.

Q. (By the Court) I am trying now to get what you did physically as far as your books are concerned? A. We had to pay \$10,000 and— 30

Q. (By the Court) You entered up the ten and discount, one was discount and one was loan? A. Yes.

Q. (By the Court) All right. Let me see those books. A. And still carried the mortgage as far as the physical entries went, your Honor. Here is \$10,000 demand note, W. K. Grove. 40

Mr. Lichtenstein: What do you mean?

A. Not substituting exactly, but we are continuing the original loan by changing the form of it being carried in our books, taking the demand note of W. K. Grove and putting it on the books.

10

Examined by the Court:

Q. That is, showing a loan to William K. Grove on his note of \$10,000 as far as the entries are concerned. You are now referring to cash book thirty-seven, the page showing entries January 8, 1914, and will you read the entry? A. "Demand loan, William K. Grove, \$10,000."

20

Q. That shows a loan made by your bank so far as the physical appearances are concerned to William K. Grove of \$10,000, does it, and credit given to him for that? A. Actual credit was not given to him.

Q. Credit was given on your books, because you carried that \$10,000 on your mortgage account so far as the books are concerned? A. Yes, so far as the books are concerned.

Q. And this entry is on the debit side of your cash book? A. Yes.

30

Q. Your discount ledger No. 9, January 8, 1914, shows a discount by your bank of a note made by the Grove Straw Hat Manufacturing Company to William K. Grove and endorsed by him for \$35,700, that \$700 was the discount? A. Interest, yes.

Q. \$35,000 was the principal and \$700 was the discount? A. Yes.

Q. And that \$35,000 you used to balance the mortgage account in your book? A. With the \$10,000, yes.

40

Q. And that is designated on that book as note No. 6685? A. Yes.

Q. And those are the demand notes that were subsequently used in the bankruptcy proceedings and for which you got credit, those are the last notes given, were they? A. Not last now, but they went on up to the bankruptcy; they were renewed from time to time, the time note was.

Q. The Straw Hat note was a time note? A. 10
Time note, yes, renewed from time to time, and then at the time of the bankruptcy we got—

Q. It is either the same notes or renewal? A.
Yes, renewal, yes.

Q. There was no new transaction went through your books except the time the time note was renewed I suppose it went through as a cross entry? A. As a cross entry, yes, debit and credit.

Further Cross Examination:

20

Q. Will you refer to the demand loan book which contains this \$10,000 loan and tell us what happened to that? A. That represents that \$10,000 item you saw in the cash book.

Q. You now refer to book of demand loans No. 3, entry under date of January 8, 1914, loan No. 9668. "To whom loaned. W. K. Grove. Amount. \$10,000." Under the head, "Securities" written, "Notes on Demand." Has that loan ever been paid? A. No, sir. 30

Q. Now, in your system of accounting at the bank whenever you hold a demand loan with security you enter it in this book, don't you? A. One entry in mortgage security there.

Q. You haven't any other place to enter mortgage security, have you? A. We don't enter mortgage securities in the National bank under mortgage securities.

40

Q. In this book don't you make a note of whatever collateral you have for the loan? A. Aside from a mortgage, yes.

10 Q. (By the Court): Why don't you enter a mortgage when you enter such things as assignment of rents, for instance? A. Because if we enter a mortgage the examiner reports real estate loan and we have numerous correspondence with the Secretary of the Treasury. No national bank enters mortgage. The examiner don't say we can't take it.

20 Q. (By the Court) The examiner don't object to your taking mortgage as collateral to a note where the note is properly endorsed? A. No, but he reports to Washington and Washington continually hammers you to have that cleaned up, so the bank keeps them in the safe and says nothing.

Q. Do you mean to say an examiner would be better satisfied with Mr. Grove's personal note without any security whatever than his note secured by real estate mortgage? A. I don't say that at all; I don't say that at all, no, sir.

30 Q. But there would be less inquiry and less criticism, is that it? A. That is the idea; every national bank in the country takes mortgages, keeps them in their safe, don't make entry in their book.

Q. Do you consider yourself an expert to state the bookkeeping system of every national bank in the country? A. I have been in the business almost thirty years.

Q. I think if you confine yourself to the practice of your own bank that will be sufficient for this case.

40 The Court: Let me ask you first if you do not enter mortgages, why do you enter deeds?

A. You can hold real estate, that might happen to be a note that was past due for some reason or other.

Q. And you did enter in this book among the list of securities a deed? A. Yes.

Q. (By the Court) And you again on May 28, 1914, enter as security a deed? A. Yes. 10

Q. Now, Mr. Terbell, what book of your bank shows collateral held for time loans? A. It is merely a little book, it has no title on it.

Q. Well, does that show? A. They keep those things in envelopes nowadays.

Q. Does that show the entry of the time note of January 8, 1914? A. No, sir.

Q. This book you have produced is the record of your bank which shows the time loans for which the bank held collateral in the period between July 28, 1913, to date, doesn't it? A. No; the book is not kept up strictly, because they use envelopes nowadays. 20

Q. The last entry here is October 29, 1917? A. I say it is possible there might have been one or two loans; I wouldn't say it is perfect; it is a book we are supposed to keep the time collateral, yes.

Q. Supposed to be accurate? A. Presumably, yes. 30

Q. Is there any entry in that book of any of these Grove notes, or of any collateral held by the bank for any of these Grove notes? A. No, sir.

Q. (By the Court) Is there any entry in this book to your knowledge of collateral held for any note where the collateral was a bond and mortgage? A. Not to my knowledge, your Honor, I don't think there is; if there is it was put down by one of the clerks who didn't know any better. 40

Q. Well, all of your entries are put down by the clerks? A. Yes.

Q. (By the Court) Here is one on September 21, 1915, apparently a mortgage? A. I say it would not be in there if I had seen it.

10 Q. (By the Court) That one happens to be there? A. Yes.

Q. On page 65, assignments of account? A. You can take assignments of account, there is no objection to taking those.

Q. (By the Court) Where you take deeds you enter them in this book, do you not? A. Yes.

Q. (By the Court) There is one on May 6, 1912, page 20? A. He handed me the deed; it is not made out to anybody; I simply made a record of it there to show that I had it.

20 Q. Now, can you tell us how many times this time loan of \$35,000 was renewed? A. The one dated January 8, 1914?

Q. Yes.

The Court: What difference does it make?

A. It ran along until 1915; we got the dividend.

30 Q. This time loan of January 8, 1914, upon its maturity appears as paid upon the books of your bank, doesn't it? A. That is a question.

Q. Upon the maturity of that note isn't it a fact that it was treated as paid and the bank passing new discount of a new note for the same amount? A. I would not so consider it, no; it was simply continued the same loan.

Q. And the discount of the new note was passed to the general credit of the Grove Straw Hat Company, wasn't it, debit and credit of their account?

40 A. We gave them no money; there is debit and credit entry, yes.

Q. You deducted the amount of the entry and passed credit to the Grove Straw Hat Manufacturing Company off hand, and then charged up against the Grove Straw Hat Manufacturing Company the amount of the maturing note, didn't you? A. That was the physical entry.

Q. And that situation was repeated from time 10
to time until the bankruptcy, wasn't it? A. Yes.

Q. And that happened in 1915? A. 1915, I haven't the exact day of the month.

Q. In the spring of 1915? A. I believe so, yes; I can refresh my memory of it, of course, but I haven't got the exact day in my head.

Q. And in the bankruptcy proceeding do you recall yourself making an affidavit to a proof of claim for the bank upon notes aggregating \$45,000? A. I think (Mr. Grove made that claim at your 20
request); I am not clear on that; my impression is he requested us to put in the claim so we could get what money we could for him and apply it on his loan.

Q. Just state that over again? A. My impres-
sion is he requested us to put in the claim and get what we could out of the bankruptcy and apply it on his loan; he had given us that on this col-
lateral by collateral of his mortgage loan; they
owed him that money. 30

Q. Do you mean to say whatever you did in the bankruptcy proceedings was at the request of Mr. Grove? A. Yes; he had left that note with us as collateral, practically; it is mortgage loan, we had the mortgage.

Q. Do you know where Mr. Grove is? A. I couldn't swear to it; I understand he is in China.

Q. That is your belief at the present time? A. Yes.

Q. Now, I show you a certified copy of the proof of claim filed on behalf of the bank in the bankruptcy proceedings and ask you to look at that and say whether it refreshes your memory as to the items which you proved on in the bankruptcy proceedings? A. Yes; of course, this \$10,000 note was a note that Mr. Grove held himself; the company owed him \$45,000.

Q. But this proof of claim includes the two notes, does it? A. Yes.

Q. One is a note dated March 11, 1915 for \$35,000 made by the Grove Straw Hat Manufacturing Company to W. K. Grove, endorsed W. K. Grove, Grove Straw Hat Manufacturing Company, and the other is note dated February 3, 1911, for \$10,000 on demand, made by the Grove Straw Hat Manufacturing Company to W. K. Grove? A. Yes.

Q. You made the affidavit to the proof of claim for the bank, didn't you? A. Yes.

Q. Now, does that refresh your memory so as to enable you to state that at the time the proof was made, May 13, 1915, the bank held those two notes upon which the Grove Straw Hat Manufacturing Company was liable as maker, aggregating \$45,000? A. They must have, yes.

Q. That demand note dated in 1911 for \$10,000 is the same debt which you have been testifying to as later represented by this \$10,000 demand note of W. K. Grove, isn't it? A. Presumably, Yes.

The Court: Let that be offered in evidence.

Mr. Enright: I offer in evidence certified copy of proof of debt and power of attorney of Second National Bank filed in the United States District Court in the matter of Grove

Straw Hat Manufacturing Company, bankrupt, filed May 18, 1917, the affidavit being made by A. N. Terbell.

Marked Exhibit E 1.

Q. (By the Court) Can you explain to me how the banks can claim under that in the bankruptcy proceeding that it is holder of these notes as collateral, that the holders of the notes the owners of the notes can recover a full dividend on the notes, and you say you have no security; and now in this proceeding claim either you have security on the notes in the shape of this mortgage or that the notes were merely collateral? A. My counsel had that in charge; I can't fathom that. 10

Q. (By the Court) You realize that it is absolutely inconsistent, the two positions are absolutely inconsistent? A. Yes. 20

Q. Now, in these bankruptcy proceedings you recall, do you not, that there was a composition with the creditors? A. I don't know that.

Q. Well, in some way don't you know that the assets of the Grove Straw Hat Manufacturing Company got out of the hands of the bankruptcy trustee and into the hands of Mr. Eberhard representing your bank and a man named Fitzmaurice representing another creditor named Burnett Brothers? A. I thought they were the trustees in the bankruptcy. 30

Q. You know the liquidation was made through Mr. Eberhard and Mr. Fitzmaurice, don't you? A. Trustees.

Q. Yes, and the funds of that liquidation were deposited in your bank, weren't they? A. Yes.

Q. And then divided fifty fifty between yourself and Burnett Brothers? A. I can't testify to that.

Q. Wasn't that the agreement? A. I don't know. 40

Q. In finally closing up your claim against the hat company don't you know that there was an agreement between yourselves and Burnett as to how the assets were to be divided and applied? A. I don't know of any such agreement, no, sir.

10 Q. On your direct testimony you have sworn to the amount which you say is now due on that mortgage, which is less than the amount sworn to, the amount sworn to being less than \$45,000? A. Yes.

Q. Where did you get the credits from which you allowed in your calculation? A. Dividends from the bankruptcy proceedings.

Q. And that thing which you call dividend is not what you split of the moneys which came into your bank through the liquidation of the assets by Mr. Eberhard and Mr. Fitzmaurice? A. I wouldn't
20 call it our split; it is what we got, what we received.

Q. You knew when money came into your bank to the credit of Eberhard and Fitzmaurice, trustees, that your bank had an interest in that as a creditor, didn't you? A. Why, naturally, yes.

Q. Have you given credit on this note for the full proportion of that money which it was agreed between yourselves and Burnett to divide? A. We gave credit for what we received in money.

30 Q. Who did you receive it from? A. Eberhard and Fitzmaurice, trustees.

Q. Wasn't it part of that liquidation agreement that whatever Eberhard and Fitzmaurice recovered out of the property was to be deposited in your bank pending the division? A. I don't know of any such agreement.

Q. Now, after the bankruptcy you made still another change in the form of this loan, didn't you? A. Yes.

40 Q. Did you surrender the notes which you held

on the Grove Straw Hat Manufacturing Company?
A. We did.

Q. Who did you give it to? A. I supposed that
went to the trustees in the bankruptcy; who the
proper authorities were to receive that after the
thing was wound up I don't know; I can't swear
who personally received them; they went to the
proper people whoever they were to receive them
after. 10

Q. Well, the transaction was closed up under
your direction, wasn't it, your personal direction?
A. Yes.

Q. And you gave to somebody every note which
you then had in the bank upon which the Grove
Straw Hat Manufacturing Company was liable?
A. Yes.

Q. Your don't now recall who you gave it up to? 20
A. No, sir, the proper people, whoever they were;
I don't recall.

Q. Then you took some new notes, didn't you?
A. Yes, because Grove had not been released from
the old notes personally.

Examined by the Court:

Q. Physically? A. Physically took new notes, yes

Q. Made by whom? A. W. K. Grove. 30

Q. Individually? A. Yes, sir.

Q. To his own order? A. Yes.

Q. Endorsed by him? A. Yes.

Q. For how much? A. I don't know.

Q. The difference between the \$45,000 and the
amount you received in bankruptcy? A. Yes.

Q. Then I suppose that note went through the
bank and was discounted? A. They were payable
on demand, yes. These are the notes we have now,
his own notes. 40

Q. Which one of these notes represents the transaction we are talking about? A. The three of them totalled up represents the difference of what was due and what was received.

Q. I suppose that was interest? A. The interest made a difference.

10 Q. There is one note dated July 28, 1913, that is, the old demand note? A. The old original note.

Q. The old demand note, I say. Then new note dated December 29, 1915, "Pay W. K. Grove to the order of himself" for \$30,000, on which it bears endorsement "Paid \$5750 on the 5-9-16"; and another note dated December 9, 1916, \$2940.68, made by C. H. Wharton, to the order of William K. Grove. Now, let me see your discount ledger or your demand loan book showing the advances made on that note? A. Understanding, your Honor, the
20 ten was already on.

Q. The ten has not been changed. In cash book No. 43, under date December 31, 1915, on the debit side appears the entry, "Demand loan, William K. Grove, \$30,000," and underneath appears "Claims, warrants and judgments, trustees, Grove Straw Hat Mfg. Co., \$2540.71?" A. This day, December 31, 1915, Mr. Grove had not given us Mr. Wharton's note so to close the transaction up and balance put
30 it in claims, warrants and judgments and held it two days to balance up the account, and received the note two days later, as it appears. We wanted to close our books December 31 and clean this thing up.

Q. I don't think it very material where it appears; it did appear in the same form as this \$30,000 note? A. Yes.

Q. Tell me what happened to the money that you realized on this \$30,000 note, what it was used for?
40

Mr. Enright: You mean what was done with the \$30,000, how it was posted?

The Court: Where did this \$30,000 that was loaned to Mr. Grove, as far as the books show, on December 29, where did that go.

A. Here it is, \$35,000, bills discount; it wiped out the bills discount, \$35,000. 10

Q. You are now referring to the entry under date of December 31, 1915, on the credit side of the cash book, reading as follows? A. "Bills discounted, No. 6366, \$35,000."

Q. Is that 6366— A. The Grove Straw Hat Company's note was put in.

Q. So that that note of \$35,000 so far as your books are concerned appears as fully paid? A. Yes. Do you want me to balance it up for you? 20

Q. No. It appears somewhere in your system of books that that note of \$30,000 of the straw hat company has been paid? A. Physically, yes.

Q. Do you carry a suspended date expense account? A. No, sir.

Q. Is there anything in your books to show that you hold, for these notes you now hold no collateral of any nature or description? A. No, sir.

Q. So the only evidence that the bond and mortgage was collateral to these notes or collateral to the mortgage, or which way you want to put them, is the fact that you have in your possession the bond and mortgage? A. So understood between Mr. Grove and ourselves. 30

Further Cross Examination.

Q. Have you since made any effort to collect those notes of Mr. Grove? A. Why, we would have 40

foreclosed the mortgage if it had not started to be foreclosed.

10 Q. The present suit was started in the spring of 1917. In the interval between the getting of these notes and December, 1915, and the spring of 1917 you made no effort whatever to collect this debt, did you? A. The interest was paid promptly; we did not try to collect it; Mr. Grove begged us not to foreclose the mortgage, said it would ruin him, so we held off.

Q. You say the interest was paid; you mean the interest on the notes, don't you? A. Corresponding to the interest on the mortgage, yes.

Q. There was no interest either charged or paid on the mortgage as such, is there?

20 The Court: The mortgage appears on the books of the bank as not having been paid.

Re-direct Examination by Mr. Lichtenstein.

Mr. Lichtenstein. The three notes referred to and read in the record by the Court are offered in evidence.

Marked Exhibits C 4, C 5 and C 6.

30 Q. Mr. Terbell, as I understand the situation, that prior to July 28—

Mr. Enright: Right at that point I object to that form of re-direct examination for counsel to state what he understands, which is certainly the most suggestive form of examination that possibly can be made.

The Court: I will overrule that question.

40 Q. Prior to July 28, 1913, what notes did your bank hold of the Grove Straw Hat Company?

The Court: I overrule that. That has been gone into; unless you want to show that there was something else.

Mr. Lichtenstein: If your Honor understands that situation I don't want to go into it.

The Court: I understand the situation; 10
you are not before a jury.

Q. At the time of this mortgage transaction on July 28 will you tell us as near as you can recall the entire conversation that was had between you and Mr. Grove with reference to his giving this mortgage to you? A. Well, we had had—

Mr. Enright: I think I ought to object on behalf of the tire company at any rate, upon the ground that it is parol testimony tending to vary a written instrument. 20

The Court: I admit it.

Q. You understand my question? A. Yes, I understand it. Mr. Grove knew previous to that date that we desired our money, and he came that day and suggested or offered, he told us he would give us a mortgage on his house at West Orange if we would loan him the \$45,000 and told us there was a first mortgage on the house of \$10,000, told us that the place cost him \$75,000 and he had expected to have an opportunity to sell the vacant land alongside of the house for probably about \$20,000. As there was nothing else in sight we naturally took the security, and he understood with us— 30

Mr. Enright: I object to testimony of that form, what was understood.

Q. You can't state what was understood without stating what was actually said, as near as you can recall? A. I recall Mr. Grove stated that he would give us this mortgage of \$45,000 as security for his liability to the bank now or at any future time.

10 Q. And did you at that time agree to advance him the money? A. We did.

Q. Did he at that time agree to give you anything else other than the mortgage as security for this loan that you were going to give him? A. He agreed to give us his note for \$10,000 and the company's note for \$35,000 which they would hand to him as evidence of having paid their note.

20 Q. And was there any understanding with you at that time by him as to how you were to hold these two notes that he was to give you at the time he was to give you this mortgage?

Mr. Enright: I object to that. The question is was there any understanding?

The Court: What was said.

30 Q. What did he say to you? A. He told Mr. Grove we would take those notes and hold them in addition to the mortgage as security for the loan advanced to him.

Q. And was there anything said between you at that time as to the name in which the mortgage was to be made? A. Yes.

Q. Just tell us what was said? A. We told him we wanted the mortgage drawn in my name as representative of the bank and I would immediately assign it to the bank, which was the customary proceeding.

40 Q. Did he on the 28th of July, 1913, deliver to you for the bank the bond and mortgage which has

just been offered in evidence in this case and marked I suppose D 1 and D 2? A. He did.

Q. And did he on the same day deliver to you a note for \$35,000 made by the Grove Straw Hat Works endorsed by him? A. He did.

Q. And did he also at the same time deliver to you a \$10,000 demand note made by him to his own order? A. He did. 10

Q. The note which has been offered in evidence here and marked C 4, dated July 28, 1913, made by William K. Grove to his own order, is that the original \$10,000 note which was given to you at the time the bond and mortgage were given to you? A. It is.

Q. And the \$35,000 note which was given to you at the same time, that was the note which you said in your testimony was removed from time to time, turned into a time note and renewed from time to time? A. Yes. 20

Q. And finally used in the bankruptcy proceedings? A. Yes.

Q. When you received this bond and mortgage from Mr. Grove on the 28th of July, 1913, what did you do with it, before recording it where did you put it? A. Put it in the bank's security box.

Q. And what did you do with the notes, \$35,000 note and \$10,000 note? A. Placed it in the same place. 30

Q. And is that the box in which you keep the securities of the bank? A. It is.

Q. Collateral securities? A. Collateral securities?

Q. And after the mortgage was returned from record what did you do with it? A. Well, after it was recorded, you mean?

Q. Yes, after it was returned from the record where was it placed? A. Why, placed in the bank's safe where we keep securities. 40

Q. Now, the bond of \$45,000 which Mr. Grove gave, which accompanied the mortgage, where did you put that when you received it on July 28th?

A. In the security box.

Q. And how long did that bond remain in the security box? A. It has remained there ever since.

10 Q. It is there now?

The Court: Until it was produced.

Q. And the mortgage after its recording, after it was returned to you and placed in the security box was it taken out of there at any time up to the bringing of this action? A. No, sir.

Q. Do you have an examining committee that goes over the securities from time to time in connection with your bank? A. Yes.

20 Q. And this bond and mortgage and those notes were they examined by this committee from time to time as they went over the securities of the bank? A. They would have to be.

Q. They would have to be? A. Yes.

Q. Now, when the bond and mortgage were given to you it appears that it was dated on the 28th and recorded on the 29th, the same day; according to your books it appears that the check for \$45,000 which the cashier gave to Mr. Grove was dated on the 30th. Why was the check not given to him on the 28th, but given to him on the 30th? A. The mortgage was not recorded at that time.

30 Q. It also appears from your books that an entry was made at the time you gave him this check for \$45,000 showing that it was loaned to him and that you took as security the mortgage in question for \$45,000 on his Orange property? A. Yes.

40

Q. And your attention was called to an entry under date of January 8, 1914, on the opposite side of the sheet, and as I recall it you said it was a balancing entry or bookkeeping entry, I don't recall which you said. A. I think I used the expression, "Balancing entry."

Q. Yes. It also appears that on January 8, 1914, that the bank took from Mr. Grove or received from Mr. Grove a time note made by the Grove Straw Hat Works and endorsed by Grove for \$35,000; you recall that? A. Yes. 10

Q. That note was received on the same day that the entry was made opposite your mortgage account? A. Yes.

Q. Now, when Mr. Grove gave you the note of the Grove Straw Hat Works for \$35,000 on January 8, 1915, did the bank loan Mr. Grove \$35,000 on that note? A. No, sir. 20

Q. On January 8, when you made this entry?

The Court: In other words, the books of the bank are at default.

Mr. Lichtenstein: No, I don't think so; I will explain that.

Q. At the time that you entered up this \$45,000 entry opposite the mortgage account to make up that \$45,000 did Mr. Grove give you a new note or did you take this sum—was that represented by this sum of \$10,000 on demand which you have produced in court here? A. The same \$10,000 note. 30

Q. Now, then it appears from your discount records and books that on January 8th there is a record or an entry that you discounted a \$35,000 note, and it also appears that on January 8th you discounted a \$10,000 note, which are the same notes which I have referred to, namely, the \$35,000 note, 40

which was dated January 8th, and made on time, and the old demand note of Mr. Grove. Now, as a matter of fact, were those notes discounted at that time on January 8th, and did Mr. Grove receive \$45,000? A. It passed through the process of discount; Mr. Grove did not receive any credit from them.

10 Q. (By the Court) And the proceeds, as in the other case, did not come through his account? A. No, sir.

Q. Your purpose you said in taking a time note instead of allowing the old demand note to run was because you had some doubt in your mind about holding the endorser responsible on the demand note? A. Yes.

20 Q. Did you have a conversation with Mr. Grove about giving you a different note from the one which you held for \$35,000? A. We asked him to bring us time note and take away the demand note.

Q. And what was your purpose in taking the time note for \$35,000? A. To avoid a chance of releasing endorsers on the demand note.

30 Q. Was there any understanding between you and Mr. Grove that the taking of this \$35,000 time note was to be payment of your mortgage or to be paid on account of your mortgage?

Mr. Enright: I object to "understanding."
Objection sustained.

Q. Did you at that time have any conversation with him as to whether the taking of this note was to be applied on account of your mortgage? A. No, sir.

40 Q. Did you have any understanding with him

that it was to be applied on account of your mortgage? A. No, sir.

Q. Did you have any understanding with him at that time—

Mr. Enright: I object to what his understanding was.

10

The Court: Did you have any discussion as to the mortgage at all.

A. At that time?

Q. (By the Court) Yes, was the mortgage mentioned? A. Not to my knowledge.

Q. (By the Court) There was no discussion as to the mortgage? A. No.

Q. (By the Court) You had no discussion as I understand, with Mr. Grove or with Mrs. Grove, with respect to the mortgage, except the discussion which you had which resulted in the giving of the mortgage originally, is that right? A. Up to that time, yes.

20

Q. (By the Court) Or subsequent, you hadn't at any time? A. Yes, we often mentioned it to him.

Q. (By the Court) No discussion as to what it was for, or anything of that kind? A. Yes, he often said to me, "You have a mortgage, what are you worrying about?"

30

Q. When did he say that to you? A. Oh, in the year 1915.

Q. (By the Court) Up to and for some time beyond January 8, 1914, there was no discussion in respect to this mortgage whatever, is that right? A. That is right.

Q. What did you tell him you wanted this \$35,000 time note for when he gave it to you on

40

January 8, 1914? A. To take the place of any collateral of the demand note we had been holding.

10 Q. Now, when you received this loan and the entry was made in the books opposite the mortgage account of \$45,000, will you explain to the Court, please, what the purpose in making that entry opposite the mortgage account was made for?

Mr. Enright: I object to his testifying as to what the purpose was. It seems to me the purpose is to be deduced from the transaction.

The Court: I do not overrule it on that ground, but I overrule it on the ground that he has already gone into it.

20

Q. When you received this \$35,000 time note ordinarily where would you carry it or how would you carry it? A. Well, I don't think your question is quite understandable.

Q. I mean in your ordinary course of bookkeeping when you received this \$35,000 note where would you have to make the entry? A. It depends on what you did with it.

30 Q. Well, what did you do with it? A. It passed through the discount register.

Q. Was there anything for you to do other than what you did do? A. No, sir.

Q. When you made this entry opposite the mortgage account was it the intention of the bank to consider that mortgage as being paid?

Objected to on the ground that the intention of the bank is incompetent.

The Court: Let it stand.

40

Q. When you received this note for \$35,000 and took the other \$10,000 demand note which you already held, and these entries were made opposite the mortgage account was there any intention on your part or the part of the bank to consider that mortgage as having been paid by that entry?

10

Objected to.

The Court: I will let it stand.

A. No.

Q. (By the Court) Was it your intention to deceive the bank examiners? A. I wouldn't call it deception exactly.

Q. (By the Court) Why isn't it? Either that mortgage was out of the mortgage account or it was in? If it was out, it was paid; if it was in, it was not paid.

20

Mr. Lichtenstein: That does not necessarily follow.

Q. Is this a double entry system of bookkeeping?
A. Yes.

Q. When this entry was made opposite the mortgage account did you return the bond and mortgage to Mr.—

30

The Court: No; I won't permit that.

Q. Did you ever tell Mr. Grove that you would return that mortgage to him at any time after it was executed and delivered to you? A. No, sir.

Q. Did he ever ask you for the return of that bond and mortgage after it was executed? A. No, sir.

40

Q. After this entry was made on January 8, 1914, how did you hold or for what purpose did you hold this bond and mortgage and the new notes that were received by you?

10

Objected to on the ground that it is incompetent to testify as to the purpose of the thing; the purpose must be deduced from the acts.

The Court: I will permit it.

Q. (By the Court) What was the purpose of your holding the mortgage after it was marked up on the books of the bank? A. As collateral against Mr. Grove's loan.

Q. Made when? A. Made July 28, 1913.

20

Mr. Enright: That answer shows how unfair the question is; whether it is held as collateral or some other way must be the result of an agreement.

30

Q. Now, when this time loan or time note of January 8, 1915, came due you stated that it was renewed. Did you have any conversation with Mr. Grove at the time that these new notes, renewal notes were given of the Grove Straw Hat works? A. Well, we told him we were still holding the mortgage as security for his endorsement. Of course, it was referred to between us—always has been.

Q. After January 8, 1914, did you at any time demand payment of that mortgage from him? A. No, sir.

40

Q. From Mr. Grove? A. No, sir; we did threaten foreclosure one time; do you call that demanding payment?

Q. (By Mr. Enright) Were you in any doubt that that was the demand of payment when you threatened foreclosure? A. I thought he meant the notes, meant the time the note came due he might have demanded payment of the note.

Q. And at that time what did he say to you?

10

Mr. Enright: What time?

Q. When you threatened to foreclose the mortgage?

Mr. Enright: What was the date?

Q. I don't know what date it was. When was it? A. When they began to have trouble in the company; I don't know the exact date.

20

Q. What year was that in? A. 1915.

Q. And when did Mr. Grove disappear, do you remember? A. I don't know; it was this year, 1917.

Q. That was before this foreclosure suit started? A. The first mortgage foreclosure, before it started?

Q. Yes. A. I am not positive about that.

Q. Now, under date of January 8 there is an entry in your cash book of \$10,000. Did you on that day loan Mr. Grove any \$10,000?

30

Mr. Enright: I object to that as calling for a conclusion.

The Court: I will permit it.

Q. Did you? A. No, sir.

Q. What is the purpose of the entry in the cash book of \$10,000?

40

Mr. Enright: That is objected to as incompetent.

The Court: I admit it.

10 A. It is to get the note on our books and put the mortgage back in the collateral, take the mortgage off the books and put the note on, that is the idea.

Q. (By the Court) Let me ask you this. The mortgage, the mortgage account, the Grove account shows on January 8, 1914, the reception by the bank of \$45,000 from some source balancing that account. As a matter of bookkeeping. Now, there is another book of the bank, is there not, daily cash receipts, or something of that kind, which ought to show that \$45,000? A. Yes, the journal.

20 Q. (By the Court) Let me see the journal. A. Cash book No. 37, January 8, 1914, shows the following mortgage account, William K. Grove, \$45,000."

Q. (By the Court) That means the receipt by the bank of \$45,000, does it not? A. Physically, yes.

Q. (By the Court) That goes into your cash assets, cash receipts for the day? A. Yes, that is right.

30 Q. (By the Court) And of course it goes out of that account by the loan on the note? A. Yes.

Q. Were those entries, that \$10,000 entry and \$35,000 entry, any more than bookkeeping entries?

Mr. Enright: I object to that as calling for a conclusion.

The Court: I will permit it.

A. No, sir.

Q. Well, do those entries taken by themselves, that is, the physical appearance of those entries taken by themselves show the true situation that existed? A. No, sir.

Q. Now, why was it necessary to make those entires in that way, that is, to show the \$10,000 entry as of January 8 and also \$35,000 entry of January 8 of \$35,000 when you did not give any cash for them? A. Well, made a loan to William K. Grove of \$45,000, made a loan in June 28, 1913, to William K. Grove \$45,000, took bond and mortgage on his property in West Orange, took two notes, one of \$10,000 of his and one of \$35,000 of the company. That loan was evidenced on our books by the \$45,000 mortgage up to January 8, 1914. Now, you take that mortgage out of your books, you have got to put something in, have got to have some actual thing on your books representing that loan.

The Court: What is the use of going into that? I understand it, from the time of the entry.

Q. On January 8, 1914, how did you hold the mortgage and the bond and these notes that were given to you at that time? A. All security for the loan made June 28, 1913.

Mr. Southard: I object.

The Court: I will permit it.

Q. The book which is marked demand loans No. 3, does this book contain all the demand notes whether they are held as collateral or not? A. Yes, sir.

Recess.

Q. During the period that you held this bond and mortgage did you look after the insurance of the property? A. We did.

Q. And did you from time to time speak to Mr. Grove about the insurance? A. I did.

Q. Who was it that negotiated the insurance?

10 A. I think they are brokers by the name of Henry M. Strong & Son.

Q. Who was it that spoke to Strong & Son for the purpose of getting the policies? A. Mr. Grove.

Q. Can you recall from memory when it was that you spoke to Mr. Grove about getting the insurance or placing the insurance on the property?

A. In the first place we required the insurance as soon as the mortgage was given.

20 Q. But after that insurance had expired or was about to expire? A. Before the expiration of the policies I spoke to him to have the policies renewed.

Q. And I show you a letter dated June 19, 1914, addressed to A. N. Terbell, on the letterhead of Henry M. Strong & Son, and I ask you whether that refreshes your memory as to the time when you spoke to Grove about negotiating the insurance so that you would get it? A. Just previous to that time.

30 Q. Do you recall the receipt of this letter from Strong & Company enclosing a policy? A. Yes.

Q. And was it a policy covering the property mentioned in your mortgage? A. Yes.

Q. I show you another letter dated July 27, 1915, addressed to you. Does that refresh your memory as to when you spoke to Mr. Grove again about placing insurance upon the property for you? A. Yes.

Q. And how soon or how long before July 27

would you say it was about? A. Oh, probably ten or fifteen days.

Q. And did you receive with this letter a policy of insurance covering the property in question?

A. Yes.

Q. Both of these letters state that the policy—

10

Mr. Enright: I object to what the letters state; they are offered; they speak for themselves.

Letters offered in evidence and marked Exhibits C7 and C8.

Q. The one of June 19, 1914, reads—

The Court: Never mind.

Q. Attached to the letter of June 19, Exhibit C 8, is a carbon copy of letter; is that the letter that you wrote in response to the one that you received? A. Yes.

20

Q. And in this letter you state, "We beg to acknowledge receipt of yours—"

Mr. Enright: It speaks for itself.

Q. Enclosing two policies on the property of William K. Grove aggregating \$36,000; did you return the old policy? A. Yes, sir.

30

Q. Attached to Exhibit C 7, which is the letter of Strong & Son, dated July 27, there is attached a carbon copy of letter; did you write that letter? A. Yes.

Q. And in this letter you state, among other things, "Enclosed please find two expiring ones, but they are not the same numbers that you stated in your letter." Did you return the old policies? A. Yes.

40

Q. I show you two policies of insurance, both of which appear on the endorsement, which expired May 23, 1917, and I ask you whether these are later policies that you received covering the property in question? A. Yes, sir.

10 Q. And I show you two policies which have endorsed on the back "Expiration of May 23, 1918," and ask you whether you received those, all these policies since the time they were sent to you? A. Yes.

Q. Who sent those last four policies to you? A. Henry M. Strong & Son.

Q. Who paid the premium on the previous policies that were sent to you in June, 1914, and July, 1915? A. Mr. Grove, to the best of my knowledge.

20 Q. (By Mr. Enright) You don't know anything about it except you did not and the bank did not pay them? A. I am not positive; I didn't pay them; I paid the last ones I know.

Q. (By the Court) Did you pay those that expired May 27, 1917? How many years did you pay? A. I can't be positive how many years I paid; my impression is Mr. Grove paid up to the last time.

Q. Up to the last set of policies? A. Yes.

Mr. Lichtenstein: I offer the four policies.

30 Mr. Enright: I think I will object to what his impression is. He does not know as a matter of fact. It is somewhat of an issue here who made the payment on account of this property, Mr. or Mrs. Grove. He don't know which one paid it.

Q. (By Mr. Enright) The policies where the bank paid the premium are those written April 17, 1917? A. Yes.

40

Q. Mr. Terbell, do you recall the bank taking up tax sale of this very property, tax sale certificate of this property? A. Yes.

Q. And I show you a certificate of sale for unpaid taxes by the Town of West Orange to Harrington Company, dated January 22, 1917. Did the bank redeem or at least take this certificate by assignment, purchase it? A. Yes, sir. 10

Q. I show you an assignment and power of attorney dated February 28, 1917, purporting to be signed by the Harrington Company, to Allen N. Terbell, and ask you whether that arrangement was made for the purchase of this certificate by the bank? A. It was, yes.

Q. And the bank paid the money mentioned in this certificate? A. It did.

Q. Together with the costs and interest? A. It did. 20

Both papers offered in evidence and marked Exhibits C 9 and C 10.

Mr. Lichtenstein: I desire to offer in evidence all the records of the bank to which reference was made during the course of the direct and cross examination.

The Court: I will not permit them to be marked in evidence. Whatever is material can be put in the record; they may be referred to counsel on either side. 30

Mr. Terbell, your attention is directed to this proof of claim marked exhibit E 1 in the bankruptcy proceedings of the Grove Straw Hat Manufacturing Company, and the Court calls your attention to the fact that there was a statement in this affidavit reading that you had no security for 40

said debt. Now, the debt referred to and which is described in the schedule annexed to it is the note for \$35,000 dated March 11, 1915, made by The Grove Straw Hat Manufacturing Company to William K. Grove; and the other one was a \$10,000 note dated February 3, 1911, to William K. Grove.

10 Now, when you made this affidavit did you consider that you held any security for these particular notes?

Mr. Enright: I object to the question, what he considered.

The Court: I will permit it, but it won't make any impression on my mind.

20 Q. When you made this affidavit do you recall this language in there or did you pay any attention to it? A. Not particularly.

Further Cross Examination by Mr. Enright.

Q. By the way, at the time this mortgage was taken what was the limit which your bank could loan to any one customer? A. About \$40,000; \$40,000.

Q. Was it as much as that? A. Yes.

30 Q. Now, you stated in giving your explanation of the circumstances under which this mortgage was given that Mr. Grove came into the bank and offered to give you a mortgage on this property. Is it not true that there were several conferences preceding the giving of the mortgage in which you demanded the mortgage and there was some opposition to it? A. My recollection is that we demanded payment and a mortgage was offered.

Q. Do you recall a visit from Mr. Lucius H.

Beers of the firm of Lord, Day & Lord, representing Mrs. Grove? A. I do not; a lawyer called; I don't know that he represented Mrs. Grove.

Q. Don't you remember getting Mr. Eberhard to come into the conference? A. He may have been there.

Q. Don't that sort of bring the picture back to your mind? A. I know we held such a meeting, yes. 10

Q. And this mortgage was the outgrowth of a conference between yourself and Mr. Beers and Mr. Grove and Mr. Eberhard, wasn't it? A. The mortgage was the result of a conference at that meeting, yes; I can't swear just who was present.

Q. So this did not come as an offer from Mr. Grove out of the clear sky at all, did it? A. After we demanded payment, yes. 20

Q. Don't you recall in this conference there was considerable discussion as to the affairs, Mr. Grove's affairs and the affairs of the Grove Straw Hat Manufacturing Company? A. There may have been.

Q. And wasn't there a conference as to what disposition was to be made of moneys due to certain New York banks? A. No, sir.

Q. You don't recall that either? A. No, I am sure that was not mentioned. 30

Q. (By the Court) Who did Mr. Beers represent? A. Mr. Grove.

Q. Are you sure about that? A. To the best of my knowledge, yes.

Q. Didn't he represent Mrs. Grove? A. Mrs. Grove's name was not mentioned to my knowledge.

Q. (By the Court) You did not know Mrs. Grove had or claimed to have any interest in this property? A. I did not. 40

Q. Don't you remember that was talked about when Mr. Beers came there and took this matter up with Mr. Eberhard, and yourself? A. I don't remember any mention of Mrs. Grove at all.

Q. You are pretty hazy on that whole interview, aren't you? A. I am not with regard to Mrs.
10 Grove.

Q. First you told us this mortgage was offered by Mr. Grove in an offhand sort of way after you demanded payment of it. Now you do recall that there were preceding conferences participated in by the lawyers, don't you? A. There was one meeting that I know of, not any more.

Q. And you were demanding payment of this debt of the Hat Company secured by Mr. Grove's endorsement, weren't you? A. We were.

20 Q. And were you not discussing in those conferences what resources Mr. Grove had? A. Naturally.

Q. And the ownership of this house at West Orange came up for discussion in that conference, didn't it? A. It may have.

Q. Well, isn't that your best recollection as it comes back to you now? A. Mr. Grove represented he owned the house, he always has represented that; we never knew Mrs. Grove in the matter at all.

30 Q. There was some representation about the ownership of the house in this conference in which Mr. Beers participated? A. I don't think so; we knew Mr. Grove owned the house; Mrs. Grove's name was not mentioned to the best of my knowledge, never was brought in so far as the bank was concerned.

Q. Was there more than one conference of this sort? A. I don't think so, not with a lawyer.

40 Q. Don't you know Mr. Beers was the family

lawyer of the Bradley family? A. He represented Mr. Grove at that time.

Q. Well, at other times don't you know he represented the family of Mr. Grove's wife? A. I couldn't say as to that; I was not interested in that part of it.

Q. Do you remember whether there was anybody else in that conference or not? A. Not to my knowledge. 10

Q. And it was in that conference which Mr. Eberhard and Mr. Beers took part that it was agreed, as you say, that the notes should be held as collateral security for the mortgage, is that right? A. What notes do you refer to?

Q. I refer to the notes given July 28, 1913. A. To the best of my knowledge, yes.

Q. Now you say you demanded payment; did you intimate that if you did not get it you would bring a suit against the Hat Company or Mr. Grove? A. I don't recall the exact language of the demand; that would be an actual supposition. 20

Q. Now, I asked you whether you remember the terms under which the assets of the Hat Company were finally liquidated and I think you didn't know anything about that? A. I knew they were placed in the hands of Eberhard and Fitzmaurice as trustees. 30

Q. Now I show you what that purports to be your signature annexed to an affidavit annexed to the answer and interrogatories; that is your signature, isn't it? A. Yes.

Q. And you swore to that affidavit August 30, 1917? A. Yes.

Mr. Enright: I offer in evidence interrogatory 32 and the answer to it, which in-

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terrogatory and answer are as follows:
"State whether such liquidation (referring to the liquidation of the Grove Straw Hat Manufacturing Company) was conducted under or pursuant to a written agreement between said bank or anyone acting for it, and said firm of George R. Burnett & Son or any one acting for it, or any other creditor, and, if so, state the date of said agreement, the parties thereto, whether or not the original or copy of said agreement is in your possession, or in the possession and control of said bank; if so, annex a true copy thereof to your answer." The answer being: "Answer to 32nd interrogatory. Yes, copy annexed." And I offer the annexed copy, being in the form of a letter dated June 23, 1915, addressed to Grove Straw Hat Manufacturing Company, Hoboken, N. J.

20

Mr. Lichtenstein: Signed by whom?

Mr. Enright: In your answer it is not signed by anybody, but presumably by Mr. Eberhard and Mr. Fitzmaurice.

The Court: Any objection to this being marked?

30

Mr. Lichtenstein: No objection.

Marked Exhibit C-11.

Q. Now, I call your attention to the answer made by you to certain interrogatories proposed on behalf of Mrs. Grove which answer purports to be verified September 6, 1917; is that your signature to the affidavit? A. Yes.

40

Q. And I call your attention to your answer No. 15: "William K. Grove and his attorney, and the

attorney of his wife Mary B. Grove, as represented to Allen N. Terbell, being Messrs. Lord, Day & Lord, together with their family attorney and others, were present, and they proposed, as they had settled with other creditors of William K. Grove by securing them, they were about to go into some other operations with some other people, upon the bank giving William K. Grove the amount of \$45,000 to settle past obligations, William K. Grove was to execute a bond and mortgage which was to be held as collateral security for all his endorsements to the amount of \$45,000; afterwards a note of \$35,000 was given at the request of William K. Grove by the Grove Straw Hat Manufacturing Company and \$10,000 demand note made by William K. Grove. The matter was put before the directors and Allen N. Terbell and Rudolph S. Rab, the president of the bank, were given instructions to make such arrangements as would secure the bank for the amount of money loaned William K. Grove." Do you recall swearing to that answer? A. I must have.

Q. Now, with that before you do you still say that in this conference the name of Mrs. Grove was not mentioned? A. I must have forgotten it then; that was not my recollection.

Q. Do you still say that you did not know in this conference that Lord, Day & Lord were there representing Mrs. Mary B. Grove? A. I can't say it now if I signed to the contrary.

Q. So you would change your testimony to that extent at any rate? A. I would have to.

Q. And only because you have to? A. I won't say that.

Re-direct Examination by Mr. Lichtenstein:

Q. As a matter of fact, Mr. Terbell, have you any present recollection of this firm of Lord, Day & Lord, or whoever it was, that represented Mrs. Grove at this conference? A. I have not, no, sir.

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Re-cross Examination by Mr. Enright:

Q. At this time Mr. Frederick N. Eberhard was the counsel of the bank, wasn't he? A. Yes.

Q. And one of the directors? A. Yes.

Q. Was he a member of any of the committees? A. We had no formal committee at that time; he was not a member of the discount committee at that time.

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Q. (By Mr. Lichtenstein) Was Mr. Eberhard counsel for the bank in 1913? A. The bank had no regularly appointed counsel at that time; he handled some of our affairs.

Q. (By the Court) In this particular instance he was acting for the bank, wasn't he? A. It so states.

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RUDOLPH F. RABE, sworn.

Direct Examination by Mr. Lichtenstein:

Q. You know William K. Grove? A. Yes, very well.

Q. You don't know Mrs. Grove, do you, ever see her? A. I never met the lady in my life.

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Q. Do you recall any conversation that you had with William K. Grove after the making of the mortgage for \$45,000 which is in question in this

case? A. Periodically, yes; I can't give you the dates.

Q. Can you tell us about when your first conversation was after making that mortgage? A. They were usually on the occasion of renewing notes when I met him at the bank.

Q. Do you recall any conversation with Mr. 10
Grove about the time when you held certain demand notes, one of \$35,000 and one of \$10,000, and having them converted into time notes?

Objected to.

The Court: I will permit it.

A. That may have been during my absence on my vacation.

Q. I am asking you whether you had any conversation with him with reference to the giving of 20
any note? A. Oh, before that time, yes, before I went.

Q. Before what time? A. Before the time when we took the mortgage.

Q. I am speaking of the time after the giving of the mortgage? A. After the giving of the mortgage, oh, yes, repeatedly.

Q. Can you recall any of the conversations you had with him? A. It was urging him to make an 30
effort to pay something on account, reduce the indebtedness, and repeatedly referred to the mortgage on these occasions.

Q. In what way? A. Well, I said we did not want to be obliged to foreclose against him, and he said no, he wouldn't like that, because the property was worth a great deal of money, and particularly the vacant property he said was worth very much money now, and the house had cost, 40

I forget what he said, he told me, I think that the whole cost was \$75,000, something near that.

Q. How often did you have these conversations with him? A. Well, periodically; I have stated generally about every three or four months.

10 Q. Do you recall a conversation with him about tax sale of the property? A. Well, that was the last talk I had with Mr. Grove and that was during the winter; it came to my knowledge either over the wire or by letter from a firm of Newark lawyer, I think, asking whether we held a second mortgage on the property of William K. Grove, if so, must inform us there had been a sale for taxes, and I then sent for Mr. Grove and he called and I said "Mr. Grove, what is this about the taxes, there has been a sale of your property"; he said
20 "There has been?" I said "Yes, and you must take up that tax sale at once." and he said he had no money, and he begged me to do it, and I recall endeavored to get into touch with the people who held this tax title, a firm of contractors at the head of Montgomery Street, I think, but I couldn't over the wire, and I took a trip myself there, at Mr. Grove's request, he begged me to attend to that; I did so, and obtained an assignment of the tax sale from a Mr. Harrington, I think; I gave
30 the bank's check.

Q. During these conversations that you had from the time of the giving of the mortgage was there any conversation that you ever had with Mr. Grove in which it was ever stated that this mortgage had been paid? A. On the contrary, constant, all the time referred to the mortgage as being active and requesting me not to sell not to foreclose that mortgage, as the property was very valuable, it was his home.

Q. You are the president of the bank? A. I am.

Q. And you were the president of the bank at the time of the giving of this mortgage? A. I was.

Q. And are you active in the affairs of the bank? A. Well, the details are left of course to the cashier and the committees and clerks. 10

Q. Do you as president of the bank act with any of the committees who investigate securities and examine securities which you hold as collateral, from time to time? A. Yes; I did not this; I didn't look into the value of this property.

Q. I mean the question of the value; I mean the actual, physical securities. A. Yes.

Q. And during all the time from the time this mortgage was given up to the present time has this bond and mortgage been in your collateral box? A. All the time. 20

Q. And was it at any time considered other than as collateral held by you? A. It was not.

Mr. Enright: I object to that part of the question which inquires into how it was considered.

The Court: I will permit it.

Q. What was this bond and mortgage held by you for? A. It was held as collateral security to the indebtedness of Mr. Grove. 30

Q. Was that security ever given by the bank? A. Never.

Q. Mr. Rabe, do you recall a lady calling you up upon the 'phone and talking to you about the taxes on this property subsequent—talking to you about the taxes on this property? A. A lady?

Q. Yes. A. I don't recall it, except the lady in the office of these directors. 40

Mary B. Grove—Direct Examination.

Q. I don't mean that. Do you recall any lady calling you up about the taxes? A. No.

No Cross Examination.

Mr. Lichtenstein: That is our case.

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MARY B. GROVE, sworn.

Direct Examination by Mr. Enright:

Q. You are one of the defendants in this suit?

A. I am.

Q. And the wife of William K. Grove? A. I am.

20 Q. Is Mr. Grove in this vicinity at the present time? A. No, he is not.

Q. Do you recall the time when this mortgage was given to the bank? A. Yes, I do.

Q. Do you recall the time when this property was purchased? A. No, I don't; it was several years before the house was built.

Q. Do you recall the fact of the purchase of the property? A. Yes; it was purchased to be given to me as a gift.

30 Q. Who arranged for the purchase of the property? A. Mr. Grove did the purchasing.

Q. And he did the bargaining, did he? A. Yes.

Q. And did any of your money go in to the purchase of the land? A. No, it did not.

Q. At that time was there any building on the land at all? A. There was not.

Q. About what time of the year was the purchase made, if you recall? A. Mr. Enright, I don't know, because Mr. Grove purchased the property and then informed me that he had purchased the

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property and was going to give it to me; it was property that I had liked very much.

Q. At that time you hadn't any home of your own, had you? A. No, we rented.

Q. You were renting? A. Yes.

Q. And what was the purpose of this purchase?

A. To build a home; I wanted to build.

10

Q. Do you remember about what season of the year it was when this talk took place as to the gift of the property? A. It was shortly before Christmas.

Q. What brings that back to your recollection? A. Because it was to have been given to me as a Christmas gift.

Q. Had you ever had any real estate experience before that time? A. I never had any business experience.

20

Q. And do you recall that you had ever seen a deed? A. I never had to my knowledge.

Q. Without pretending to be impertinent, how old were you at that time? A. I was twenty. You mean at the time the house was purchased, the property purchased?

Q. Yes. A. I don't know; I was twenty when I was married.

Q. For the purpose of certainty, is there any objection to stating on the record just when this property was purchased?

30

Mr. Lichtenstein: Not at all. The property was acquired under two deeds, one made by Frank Kewing and wife to William K. Grove, dated October 28, 1909, recorded November 3, 1909. The other being the deed from Walter D. Osborne and wife to William K. Grove, dated November 23, 1909, recorded December 1, 1909.

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Q. You say you were twenty when you were married. When were you married? A. 1907.

Q. How long after the purchase of this property was it when building operations began? A. I will have to think. We commenced building in 1911; the fall of 1911, and the house was not completed until the summer of 1912.

Q. Did you have a separate estate—an income of your own? A. Entirely.

Q. Now, before beginning the building operations was there any further talk between your husband and yourself as to the title of this land?

Mr. Lichtenstein: I object to that question as far as the Second National Bank is concerned; conversations between this lady and her husband are not binding upon this defendant.

The Court: I will admit it.

Q. (Question read). A. Only that the land was promised to me; had been purchased for me and was to be deeded to me at once—was given for Christmas.

Q. That was the first talk, around Christmas time. Now, I am taking your mind back to about the time when you began the building operations. A. That was afterwards.

Q. And was there any talk then about the ownership of the land? A. I can't remember at just that time; I supposed that land was mine.

Q. If not at just about that time, will you say whether after the first conversation around Christmas time there were later conversations as to the title? A. Yes, sir.

Q. Now, will you tell us what they were? A.

Mr. Enright, I don't know the real conversation, but I supposed that the land was mine.

Q. Well, what led you to suppose that? A. Because I had been told it was bought for me and that it would be given to me, this was after Christmas, but the deeds had been drawn placing the property in my name.

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Q. Who told you that? A. Mr. Grove.

Q. And was that your state of mind at the time the building operations commenced? A. Yes, it was.

Q. Do you recall the placing of the Nesler mortgage? A. I don't remember; that was done I think before.

Q. That is the \$10,000 mortgage? A. Yes, the first mortgage.

Q. You remember joining in that title? A. Yes, I remember signing a paper; it was to have been paid off though right away and cleared.

20

Q. Who was to pay it off? A. Mr. Grove expected to pay it off; said he would.

Q. Who did he say that to? A. To me.

Q. And was that the time the mortgage was executed by you? A. The next mortgage, yes.

Q. That is what I am talking about now entirely? A. Yes.

Q. Did he state what he wanted the mortgage for? A. He said he wanted the money for a short time and would pay it off very shortly.

30

Q. And you thereupon joined in the mortgage with him? A. Yes.

Q. Now, coming along to the undertaking of the building operations, were you very active in that; the planning of the house and that sort of thing? A. I planned it entirely.

Q. Was there any understanding between Mr.

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Grove and yourself upon what each said to the other as to whose money was to pay for the house?

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Mr. Lichtenstein: I object to the question upon two grounds. First, upon the ground that any such conversation would not be binding upon the Second National Bank; secondly, upon the ground that we ought to have the conversation, if it is admitted, and not what her understanding was from something that was said.

The Court: The second ground is well taken. State what was said, if she can remember; if she cannot remember get the substance of it in the last analysis according to her understanding.

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Q. Can you tell us what was said between Mr. Grove and yourself, and if you cannot remember exactly what was said, the substance of it, concerning the manner in which this house was to be paid for? A. I was to build the house; I wanted to build it with my money, as the land stood in my name; Mr. Grove gave me the property and I was to build the house, as I did.

30

Q. Now, following that, you knew about the hiring of the architect? A. Yes.

Q. And the letting of the contract with the contractor for the house, did you? A. Well, I didn't let that personally.

Q. You knew it was done, did you? A. Oh, yes.

Q. Who handled the details of this business? A. Mr. Grove handled them.

Adjourned until ten o'clock to-morrow morning.

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IN CHANCERY OF NEW JERSEY.

Between

CHARLES F. NESLER,
Complainant,
and

WILLIAM K. GROVE, et als.,
Defendants.

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Continuation of examination pursuant to adjournment at Chancery Chambers, Jersey City, New Jersey, on November 16, 1917, in the presence of the Court and counsel as before.

MARY B. GROVE, resumed.

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Further Direct Examination by Mr. Enright:

Q. Whose money paid for the building of this house and the garage? A. My money.

Q. Where did you have your money deposited at that time? A. I had a good sized account in the Second National Bank in Hoboken.

Q. I show you a pass book of the Second National Bank of Hoboken, in account with Mary B. Grove; is that the pass book of that account? A. Yes, that was the account I used for money deposited to build the house on. 30

Q. Now, this pass book appears to run from February 8, 1911 to June 16, 1913; that covered the period of building, didn't it? A. Yes, it did.

Pass book offered in evidence and marked Exhibit E-2.

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Q. From what source did the deposits in this account come, Mrs. Grove? A. Well, they came from dividends that I received from interest that I had.

Q. In what company? A. In the Denver Chemical Company.

10 Q. Was Mr. Grove ever connected with that company in any way? A. In no way at all.

Q. Your interest in that company was an inheritance from your father, wasn't it? A. Yes, it was.

Q. Now, looking over these deposits, there are two items of slightly under ten thousand dollars each; did they come from dividends? A. No; they came from New York City bonds that I sold.

20 Q. And were those bonds your personal estate? A. They were, in my deposit box.

Q. Did your husband ever have any interest in those bonds? A. None at all; they came to me with my estate.

Q. (By the Court) Did all the moneys represented by that book form part of your separate estate? A. Yes, your honor, they were.

The Court: Why go any further than that?

30 Q. Have you looked through your check books and cancelled checks for the purpose of picking out the items which represent the payments made out of this account for the building of this house and garage? A. Yes, I have.

Q. Is this typewritten paper a correct tabulation of the checks, giving the check numbers, the payees and the totals? A. I guess it is; I gave the checks to Mr. Young and I expect he had them

made; I gave these checks to Mr. Young and I think this has been made.

Q. At any rate, you have got the checks here, haven't you? A. Yes, I have.

Mr. Enright: And subject to correction I offer this tabulation in evidence as a tabulation of the checks. 10

Marked Exhibit E3.

The total amount shown on this tabulation is \$47,453.34.

Q. (By the Court) Was that all expended in the building of this house? A. In the building and the ground.

Q. (By the Court) In the construction work? A. Yes, it was, your honor. 20

Q. (By the Court) And did your husband spend any moneys in the construction work? A. None at all.

Q. And after the completion of this building you and your husband moved in there and have made your home there? A. Yes, Mr. Enright, we have.

Q. Up to the present time? A. Yes.

Mr. Enright: I offer in evidence, deed from William K. Grove and Mary B. Grove, his wife, to Herbert M. Bradley, dated March 8, 1917, recorded March 23, 1917, conveying the property in question. Also deed from Herbert M. Bradley, unmarried, to Mary B. Grove, of the same date. 30

Marked Exhibit E-4 and E-5.

Q. Now, about the time Mr. Grove left did you cause inquiry to be made about the status of this 40

property? A. Well, I tried to find out from time to time.

Q. And in connection with that did you cause it to be insured against fire loss? A. At the time Mr. Grove left?

Q. Yes. A. Yes, I did.

10 Q. Are these three policies the policies you took out at that time? A. Yes, they are, Mr. Enright.

20 Mr. Enright: I offer in evidence three fire insurance policies, St. Paul Fire & Marine Insurance Company, insuring Mary B. Grove \$5,000, dated May 29, 1917; German American Insurance Company, insuring Mary B. Grove, as owner, for \$35,000, May 5, 1917; and Hartford Fire Insurance Company, insuring Mary B. Grove for \$5,000, dated May 29, 1917.

Marked Exhibits E-6, E-7 and E-8.

Mr. Lichtenstein: I object to these policies going in, first upon the ground that they are of no binding force or effect as evidence against the defendant, the Second National Bank, and, secondly, upon the ground it appears they were made out after the suit started.

30 The Court: They will be admitted.

Cross Examination by Mr. Lichtenstein:

Q. Did you have any other account, Mrs. Grove, other than the one in the Second National Bank?

A. Yes, I had other accounts.

Q. And in what banks did you have accounts?

A. I had accounts in the Corn Exchange Bank of New York City.

40

Q. And any other bank? A. I had accounts at one time in the Greenwich Bank.

Q. I mean during the years 1911 and 1912? A. I don't remember whether it was closed then or not.

Q. During the time you were constructing the Building, as you say, what banks did you deal with? A. I dealt with the Second National Bank of Hoboken for the payments of these checks. 10

Q. What other banks were you dealing with at that time? A. With the Corn Exchange Bank.

Q. Did you draw any checks of the Corn Exchange Bank for any part of the cost of the construction of this building? A. I think not, but I may have.

Q. You are not certain? A. Not certain?

Q. Have you your checks here? 20

The Court: What difference does it make?

Q. Some of the checks which you have offered here are signed Mary B. Grove and others are signed William K. Grove. A. Yes.

Q. The checks signed "William K. Grove, special Account," that is the signature, all of these are the signatures of your husband, they are not your signatures? A. They are. 30

Q. The Special account checks, do you know anything about the account of your husband? A. They were signed on my account; Mr. Grove had drawing privilege on this account for signing checks for the payments on the house.

Q. Do you know what moneys William K. Grove, your husband, had in this special account of his own, you don't know that? A. I know the money I deposited in this bank; Mr. Grove had another account of his own in the Hoboken bank. 40

Q. You don't know what moneys your husband deposited in this account? A. I couldn't swear to it.

Q. What was the purpose of this special account?

A. Simply to give him privilege to draw these checks to pay, to make the payments on the house.

10 Q. The contracts for the construction of this building were not signed by you, were they? A. To the contractor?

Q. Yes. A. No; by Mr. Grove.

Q. I notice the first check that you presented here, dated December 30, 1912, is to the order of William K. Grove. Have you any personal recollection what that check for \$5,000 was given for?

A. Yes, it was to be turned over for the payment of the house.

20 Q. How do you recollect that? A. It was written in my check book on the stub, it was written at the time.

Q. Have you got your check book here? A. Yes, I have; I think it was the first payment made.

Q. And when did you first start to build? A. I don't remember the exact date, in 1911, I think it was February.

30 Q. Didn't you make any payment before, if you started to build in February, didn't you make any payment prior to December of that year? A. I don't remember.

Q. How can you tell then, if you started to build in February how can you say that this is the first payment you made when the first payment was made according to this check in December? A. I don't say that is, I don't remember the exact date.

Q. (By the Court) When did you first ascertain in that this house was not in your name? A. After the failure of the Grove Straw Hat Company?

I think it was 1916, I don't remember the exact date. I think it was 1916, I don't remember the exact date.

Q. (By the Court) That was before Mr. Grove left, of course? A. Yes, sir; Mr. Grove left this year.

Q. (By the Court) How did you come to execute the mortgage that was made to the Second National Bank? A. Mr. Grove came home one day and asked me if I would sign this mortgage, sign the mortgage on the house; he said that the bank wanted security and it was all that I had to give at that time and I signed it within an hour after he came home and asked me to. 10

Q. (By the Court) Did he tell you what it was for? A. He said it was to secure a note that the bank held. 20

Q. (By the Court) of what? A. \$35,000 Grove Straw Hat Company note, and \$10,000 personal note.

Q. (By the Court) Of his? A. Of his.

Q. (By the Court) Did you know that those specific notes were in the bank at that time? A. I didn't know until after the failure; I didn't know anything about his business dealings.

Q. At the time he asked you to sign the mortgage did he specify this \$35,000 indebtedness and \$10,000 indebtedness? A. He said he had those notes in the bank. 30

Q. (By the Court) Did you think at that time that the property was in your name? A. I had thought so, and I asked him; I thought after that time, I thought that was the reason I had to sign the mortgage because it stood in my name; not until later until his last failure did I know that it was not. 40

Q. (By the Court) Did anybody after that ever talk to you about using this mortgage to secure any other indebtedness? A. No.

Q. (By the Court) Did you know anything about the change of the note? A. No, your honor, I didn't know anything about his business dealings; I gave it to help him at that time.

Q. (By the Court) Mr. Grove never told you anything about that, after the change in the way the notes were being held? A. No, your honor, nothing.

Q. (By the Court) Did you ever come in personal contact with any of the officers of the bank? A. I had never seen them, no.

Q. Shortly before your husband came to you with the mortgage you knew that he was indebted not only to the Second National Bank but was also indebted to other banks in New York, did you not? A. Yes.

Q. And you and your husband at that time were paying up these obligations, were you not? A. My husband was not paying them; I raised money.

Q. Yes, you were raising money to pay up these obligations, that is right, isn't it? A. I raised money to help him.

Q. And there were banks in New York to which he was indebted and you raised money and paid off those obligations? A. I did.

Mr. Enright: Do you mean Mr. Grove personally or the Straw Hat Company?

Mr. Lichtenstein: Obligations of your husband.

A. They were obligations of the business.

Q. Obligations of the business on which he was liable? A. I suppose he was, he was president.

Q. You also knew that he was personally liable as endorser on those notes on obligations of the Straw Hat Company? A. I didn't know how the notes stood at all.

Q. And you paid off a considerable sum of money in New York? A. I did.

Q. And you also knew that he was indebted to the Second National Bank on his personal obligation and obligation on which he was endorser of the Straw Hat Company? A. I knew he was indebted; I didn't know how the notes stood at that time. 10

Q. You didn't know how the notes stood just at that time? A. I knew when I gave the mortgage.

Q. And he wanted to pay off those obligations too, didn't he? A. He told me the amount that was necessary at the time that I raised the money. 20

Q. He told you the amount that was necessary to do what, to pay off what? A. To pay off the indebtedness.

Q. And did he tell you how much was necessary to pay off the Second National Bank? A. He didn't mention about paying that off at that time.

Q. Now then he came to you with the mortgage; did you sign it in your house or go— A. I signed it in an office.

Q. You went to an office to sign it? A. Yes. 30

Q. And you knew it was a mortgage? A. I did.

Q. Do you remember when the taxes came due on this property that it was about to be sold for taxes? A. When do you mean?

Q. You remember it was sold for taxes? A. I don't know anything about those dealings.

Q. You learned about it, did you not? A. I learned afterwards.

Q. Yes. What was your telephone number when you lived in your own home? A. "Orange 2748." 40

Q. You telephoned to Mr. Eberhard, did you not?

A. I didn't telephone from there to Mr. Eberhard.

Q. Where did you telephone from? A. Telephone from New York City to Mr. Eberhard's office to talk with Mr. Grove.

10 Q. And you telephoned to Mr. Eberhard about the taxes, did you not? A. I don't remember mentioning that; I asked him, I told Mr. Eberhard that I would like to have some statement of things, some understanding.

Q. Did you not telephone to Mr. Eberhard and ask him to pay the taxes on the property? A. Never.

Q. Didn't you tell him that the taxes were due and ask him to pay the taxes? A. I never asked him to pay the taxes.

20 Q. Did you not tell him that the taxes were due, you wanted him to pay them, and did he not say to you that they would not advance any more money? A. I said I never said I wanted him to pay the taxes.

Q. Before your husband went away to China it was then that he made these two deeds that have just been offered in evidence? A. Yes.

Q. Ultimately covering to you? A. The date is on them I believe.

30 Q. And how long before he left were these deeds made? A. Mr. Grove left the 9th of March and the date is on the deed.

Q. The deeds are dated March 8; so he left the next day. You had these deeds prepared, did you? A. Prepared in what way?

Q. I mean you ordered them prepared, went to somebody to have them prepared? A. Mr. Grove I believe had them prepared.

40 Q. And can't you remember whether you did? A. Well, I didn't do it.

Q. (By the Court) Mr. Bradley is a lawyer, isn't he? A. Mr. Bradley? No, he is not.

Q. Where did you sign the deed? A. I signed the deed in my house.

Q. And who was present at the time of the signing of those deeds? A. Mr. Bigelow.

Q. Who is Mr. Bigelow? A. Mr. Bigelow is a lawyer of the firm of Young, Bigelow & Fayerweather, and Mr. Bradley I think. 10

Q. Mr. Bradley is your brother? A. My brother. That is all that I remember.

Re-direct Examination by Mr. Enright:

Q. To the best of your knowledge did anybody deposit any moneys in this account in the Second National other than yourself? A. I am quite sure not, it is not shown in the pass book. 20

Q. (By the Court) Did you have in that account of your own money any excess of this amount which you expended on the house? A. Yes, your honor; I deposited in there my dividends, my monthly dividends, very large ones.

Q. (By the Court) Was it understood between your husband and yourself that you should pay the expenses of building this house? A. When Mr. Grove gave me the property I said I would like to build a house; Mr. Grove didn't have money enough to build the house that he wished to. 30

Q. (By the Court) And this special account that has been referred to is this account? A. That private account.

Q. (By the Court) Any other account called special account? Only termed special account because he had the power to draw on it, that is all? A. His checks are written "Special account," but not mine. 40

Q. Were your interests looked after by any lawyer in the negotiations with the bank, Second National Bank, about the time of the giving of this mortgage? A. Mr. Beers of Lord, Day & Lord.

Q. Was he the family lawyer for you and your family? A. Mr. Beers had settled our estate, my
10 father's estate.

Re-cross Examination by Mr. Lichtenstein:

Q. Do I understand Mr. Beers represented you at the time of these negotiations with the bank?

A. Mr. Beers was acting for both Mr. Grove and me.

Q. And you entrusted him with things that were done at that time? A. What things?

Q. I mean the transaction of this business? A.
20 Mr. Groves business, yes.

Q. Yes, for you? A. Well, I don't think there was much done for me in the transaction.

Q. You had him represent you at this conference, did you? A. At the bank?

Q. Yes. A. Yes, Mr. Beers was representing me.

Q. You said at the time this house was built that your husband did not have the money to build if he wanted to. Your husband was a man of
30 considerable means, was he not? A. He had a good business.

Q. This Straw Hat business was very large business? A. But that does not mean money.

Q. He did have this large business? A. Yes.

Q. That was a very good business, wasn't it? A. It was at that time.

Q. A business from which he earned a great deal of money, a business from which he earned a
40 large sum of money? A. He never earned a large

sum of money for himself; the business was a good business.

Q. Didn't he make about \$90,000 at the time that he married you? A. He never made that in his business. You mean \$90,000 velvet?

Q. Yes. A. Never to my knowledge in his business.

10

Q. What was it, if it was not velvet, this \$90,000 that you are speaking about? A. I never knew of his making \$90,000.

Q. He was drawing a large salary, too, was he not? A. \$10,000 a year.

Q. And had been drawing that for a number of years? A. When you live on that you can't save very much to build on.

Q. He was drawing large dividends from this organization, was he not? A. No dividends, except his salary.

20

Q. He also speculated considerably, did he not? A. I believe he speculated some; I don't know very much about his affairs in that line.

Q. Didn't you know of his speculating and making a large amount of money? A. I knew afterwards, after this trouble, that he had speculated and lost.

Mr. Enright: I offer in evidence certified copy of the following records from the bankruptcy proceedings against the Grove Straw Hat Manufacturing Company in the United States District Court, Southern District of New York, namely, offer of composition, acceptance of composition, signed, among other things, by the Second National Bank of Hoboken by F. N. Eberhard, attorney, for \$45,000; waiver of payment of fees

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by the attorneys, etc. Waiver of dividend, signed by Burnett & Son and Second National Bank of Hoboken by A. N. Terbell, vice-president.

Marked Exhibit E-9.

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I offer in evidence like certified copy of an order in the same proceedings confirming the composition, showing the Second National Bank in Schedule B annexed as entitled to dividend on a claim of \$45,000. Marked Exhibit E-10.

HARRY B. JAMES sworn.

20

Direct Examination by Mr. Enright:

Mr. Enright: I will offer in evidence certified copy of the record of an attachment suit brought by the Globe Tire Company against William K. Grove, showing a writ of attachment issued March 21, 1917, affidavit endorsed \$1,854.29 and showing the subsequent proceedings, resulting in a final judgment entered October 15, 1917, for \$18,162.16.

30

Marked Exhibit E-11.

Q. Where do you live? A. New York City.

Q. Whereabouts in New York City? A. 106 Central Park, West.

Q. And what is your business? A. Contractor. In this case it is rubber business.

Q. Not in this case specially—just tell us what your businesses are. A. I am in the boat business, ferry business and lighterage business.

40

Q. And what companies are you connected with?
A. Interstate Lighterage and Transportation Company.

Q. What is your office there? A. Treasurer. Brooklyn-Manhattan Ferry Company; Dykeman Street and Englewood Ferry Corporation.

Q. What is your office there? A. Treasurer. 10
Globe Rubber Tire Manufacturing Company, president. Railroad Steel Drawing Corporation, president. Now, there are a number of little ones, you don't want to bother with those.

Q. In other words, it is pretty hard for you to answer in one question what your business is?
A. Yes.

Q. Where is your office? A. Pier 11, North River.

Q. I don't think you have mentioned the Globe 20
Tire Company, the present complainant? A. No, I didn't; I was treasurer of that.

Q. That is a selling company for the Globe Rubber Tire Manufacturing Company, of which you are president? A. Yes.

Q. Were either of these Globe Companies customers of the Second National Bank before February 3, 1916? A. Both of them.

Q. And have they been for very long? A. Yes, 30
for some time.

Q. And was any of your other companies customers of the Second National? A. Most of them.

Q. Both depositors and borrowers? A. Yes.

Q. Were you personally acquainted with Mr. Terbell, the cashier of the Second National? A. Yes.

Q. And how long had that acquaintance continued? A. I think probably eight or ten years.

Q. During that time had you or companies 40

with which you were connected been customers?
A. Yes.

Q. Of the Second National? A. Yes.

Q. Were you acquainted with Mr. Eberhard?
A. Yes.

Q. How long had that acquaintance continued?

10 A. About the same period?

Q. In what connection do you know Mr. Eberhard, your acquaintance a personal one, I mean, or business acquaintance? A. I met Mr. Eberhard principally in connection with a real estate transaction one time.

Q. Well, in connection with your dealing with the bank, as a customer of the bank, had you before February 3, 1916, come in contact with Mr. Eberhard? A. Yes.

20 Q. Whom do you do your business at the bank with principally? A. Mr. Terbell.

Q. When did you first hear of Mr. Grove? A. Through Mr. Terbell.

Q. About when? A. I would say about two years ago.

Q. Where were you at the time? A. In the Second National Bank.

Q. Were you there on bank business? A. Yes.

Q. In connection with the affairs of some of your
30 companies? A. Yes.

Q. Just tell us what Mr. Terbell said to you about Mr. Grove?

Mr. Lichtenstein: I object to that as being entirely immaterial. What difference does that make?

The Court: What was the date?

Mr. Enright: He stated about two years ago. I fix the date absolutely.

Q. Was this before the Globe Tire Company ever entered into any business relations with Mr. Grove? A. Yes.

Q. How long before? A. Why, I think only the course of a few months, I don't just remember, just a short time; very short time.

Q. You have not charged your mind with dates? 10
A. No.

Q. Did that interview which you have not yet told us about, did that interview result in the establishing of the business relations between the Globe Tire Company and Mr. Grove? A. Yes.

Mr. Lichtenstein: I object to that.

Q. Now, will you state what Mr. Terbell said to you at that time respecting Mr. Grove? 20

Mr. Lichtenstein: I object to that.

The Court: What is the theory of that?

Mr. Enright: The theory is that the bank by reason of the fact that they introduced Mr. Grove to the tire company and recommended him for credit, and in that recommendation failed to disclose anything about their holding this indebtedness against him, or holding this mortgage against him, although they referred to the property, this West Orange property, as belonging to Mr. Grove— 30

The Court: I see your point. Did this conversation take place after this mortgage was given?

Mr. Enright: It did.

The Court: I will admit it.

Q. (Question read). A. Mr. Terbell asked if we have a vacancy in the tire company. I told 40

him that the man that had charge of the Newark territory was far from satisfactory and we would like to get a good man, provided he answered two qualities, that is, whether he was financially able to back the proposition and, second, if he could get the orders. Mr. Terbell assured me that Mr. Grove owned a beautiful piece of property in Orange, New Jersey, and had a host of friends and undoubtedly could get the business.

10

Q. Did he say anything about whether Mr. Grove owed the bank money or not? A. No, sir.

Q. Did he say anything about whether the bank held a mortgage on his property? A. No, sir.

Q. What did you say after Mr. Terbell made this statement to you? A. I told him I would talk it over with Mr. Hall and would let him know.

20

Q. Who was Mr. Hall? A. He was president of the Globe Tire Company.

Q. When next did you hear from Mr. Grove? A. I think it was the following day Mr. Terbell gave him a card of introduction to me.

Q. And did Mr. Grove appear at your office? A. He did.

Q. Bearing this card from Mr. Terbell? A. Yes.

Q. What took place there? A. I talked with him for about half an hour and referred him to Mr.

30

Hall.

Q. And then Mr. Grove left your office? A. Yes.

Q. Did you communicate with Mr. Hall? A. I did.

Q. Did you communicate to Mr. Hall anything about this conversation with Mr. Terbell? A. I did.

Q. What did you tell him? A. I told him from what Mr. Terbell had told me I was satisfied he

40

would make good and that he was financially able to take care of the proposition.

Q. Did you tell Mr. Hall what Mr. Terbell had told you? A. I did.

Q. As you have given it to us here? A. Yes.

Q. Was that before, do you know whether this communication you had with Mr. Hall was before the time that Mr. Grove came to Mr. Hall following Mr. Grove's call on you? A. I am sure Mr. Hall never met Mr. Grove until I telephoned him. 10

The Court: The conversation was after the mortgage had been marked paid by the bank, wasn't it?

Mr. Enright: Yes.

Q. This day you were over in the bank when you met Mr. Terbell did you see Mr. Eberhard? A. I did. 20

Q. The same day? A. The same day.

Q. Whereabouts? A. In the hall, I was leaving the bank.

Q. Did Mr. Eberhard say anything to you about Mr. Grove? A. He did.

Q. What did he say? A. He asked me what the chances were for giving him a place, and I asked him what he thought of him financially. He said, "James, he has got \$150,000 worth of gilt-edged bonds across the street," also mentioned about his beautiful home in Orange that he owned. 30

Q. Did he say anything about his owing the bank money? A. No, sir.

Q. Or about the bank holding a mortgage on his property? A. No, sir.

Q. Do you know whether following this interview which you had with Mr. Terbell and Mr. Eberhard, and following the call you had from Mr. 40

Grove, whether a contract was entered into between the Globe Tire Company and Mr. Grove? A. It was.

Q. How soon after? A. I couldn't say exactly, it was only a short time.

10 Q. Did you personally execute that contract on behalf of your company? A. Mr. Hall executed it.

Q. Mr. Hall executed it; you knew about the execution of it? A. Yes, sir.

Q. And the contract was executed after these conversations you have told us about? A. Yes.

Q. To what extent did these conversations with Mr. Terbell and Mr. Eberhard influence you or influence the Globe Tire Company in making this contract?

20 Mr. Lichtenstein: I object to the question on the ground that it is in no wise binding upon this defendant, the Second National Bank.

The Court: I will permit it.

A. That had altogether to do with our giving him the contract.

By the Court:

30 Q. Did you ever have any other conference with Mr. Eberhard or Mr. Terbell with respect to Grove? A. From time to time, yes; I usually go to the bank about once a month.

Q. (By the Court) Did they ever mention the fact that Grove owed the bank money or that they held a mortgage on his property? A. Never.

Q. (By the Court) Did they know that you had entered into a contract with him? A. Yes.

40 Q. (By the Court) How soon after the contract was entered into did they know about it? A. Just

within a very few days, if I recall, I telephoned Mr. Terbell.

Q. (By the Court) Told him you had entered into a contract? A. Yes, sir.

Q. (By the Court) Nothing was said then about their holding a mortgage on his property? A. No, sir.

Q. Do you know where Mr. Grove opened up his business bank account in connection with this tire business? A. I do not.

10

Mr. Enright: Will you admit Mr. Grove opened up his business account in this tire business with the Second National?

Mr. Lichtenstein: There isn't any tire company account in the bank.

Mr. Enright: I will prove it some other way.

20

Q. In this talk you had with Mr. Hall in which you told him what was said by Mr. Terbell and Mr. Eberhard to you did you say anything to Mr. Hall about your view on the desirability of entering into a contract with Mr. Grove? A. I did.

Q. What did you tell him? A. I told him, I recalled our bad experience with the man we had, with this man, and the information I had received it certainly ought to make a big improvement.

30

Q. I mean did you say anything to Mr. Hall as to your desire in having a contract made with Mr. Grove? A. I did.

Q. And what was it? A. Due to our relations with Mr. Terbell and Mr. Eberhard.

Q. Did you tell him whether you wanted the contract made with Grove or not? A. I told him I favored it, yes.

40

Cross Examination by Mr. Lichtenstein:

Q. You were associated in business with a Mr. Sanford, were you not? A. Yes, sir.

Q. And Mr. Sanford is a director in this bank, the Second National Bank? A. Yes.

10 Q. And that is how you came to deal with the Second National Bank, through Mr. Sanford? A. Originally, yes.

Q. And it was through Mr. Sanford, your friend and associate, you came to the bank and continued to deal with the bank? A. Yes.

Q. And through your dealings you became acquainted with Mr. Terbell and also Mr. Eberhard? A. Yes.

20 Q. And your connection with Mr. Eberhard was because of some real estate transaction? A. Yes.

Q. Had nothing to do with the bank in any way? A. Had nothing to do with the bank?

Q. And when you spoke to Mr. Terbell did you ask him whether he knew anybody that would fit the business? A. No, sir.

30 Q. How did you come to talk about Grove? A. We were discussing the tire company in general; I think about that time we had borrowed quite a little from them; I think at that time we had borrowed quite a little money from Mr. Terbell.

Q. How did you come to talk about Mr. Grove? A. Mr. Terbell mentioned Mr. Grove.

Q. He didn't know that you wanted a man, did he? A. No.

Q. Did you tell him that you wanted a man? A. No.

40 Q. Can you tell me how you started to talk about Grove? A. I presume we were talking about the tire company and Mr. Terbell having a personal interest in Mr. Grove mentioned his name.

Q. What did he say about Mr. Grove, the personal interest he had in Mr. Grove? A. Only that he had a young man that wanted to get some good company and wanted to know if we could use him in the tire company.

Q. And what did you say? A. I said we had a branch at Newark which was not being properly run and we would like to get a desirable man for the place. 10

Q. This was the branch to which you sent or consigned goods? A. No, we did not consign.

Q. What did you do? A. He takes it there as a distributor.

Q. You wanted a man to take charge of that branch of yours at Newark? A. Yes.

Q. What did he say about Grove personally, what sort of man was he? A. He said he owned a beautiful home in Orange, New Jersey, was financially able to take care of it, and could get the business. 20

Q. And could get the business? A. Yes.

Q. Tell you he was a man that was well liked? A. No doubt he did, and said he belonged to the Four Hundred.

Q. And I think you said that Mr. Terbell told you he had good friends that could back him up? A. I did. 30

Q. How long did Grove do business with you? A. I don't just recall offhand; I would say about a year and a half.

Q. And what was the total amount of business that you did with him during that year and a half? A. I don't know.

Q. Eh? A. I don't know.

Q. Well, approximately how much? A. It would be just guesswork and there is no reason for my guessing. 40

Q. You have some knowledge?

Mr. Enright: We have got the account here; we will prove the whole thing.

10 Q. Now, you say that you met Mr. Eberhard; was that on the same day? A. The same day.

Q. Happened to meet him in the hall? A. Yes.

Q. As you were going out? A. Yes.

Q. And you asked him whether he knew Grove?

A. Yes.

Q. He said he did know him? A. He did.

Q. And told you that he was a nice young man?

A. Yes.

Q. That he liked him? A. Yes.

20 Q. You wanted to know whether he was good for \$10,000, did you not? A. I don't think I specified any amount; I don't remember asking about any special amount.

Q. Will you say that you did not say to Mr. Eberhard whether he thought he was good for \$10,000?

A. No, I asked him if he was financially able to take up a proposition like that.

Q. Will you say that you did not say to Mr. Eberhard or ask Mr. Eberhard whether he thought he was good for \$10,000 credit? A. I will say I did
30 not.

Q. What was the amount of the contract that you made with him? A. I don't recall.

Q. Have you got the contract here?

Mr. Enright: Yes; we will prove it; we will prove it by another witness.

Mr. Lichtenstein: If you have it I will ask for the production of it so that I may examine the witness about it.

The Court: You call for it and it is marked in evidence.

Marked Exhibit E 12.

Q. Was there only one contract made with Mr. Grove, do you know? A. That is all I remember.

Q. I call your attention to the fact that the contract which has been marked Exhibit E 12 was made on February 3, 1916; how long before that date would you say it was that you had this conversation with Mr. Terbell? A. I would say just a few days. 10

Q. Now, do you remember Mr. Eberhard on the occasion of your speaking to him saying to you that Grove had told him that he had some New York City bonds? A. I didn't say that.

Q. Do you remember his talking about some New York City bonds? A. I answered the question. 20

Q. I asked you do you remember his talking about some New York City bonds? A. No, sir.

JOSEPH P. HALL, sworn:

Direct Examination by Mr. Enright.

Q. Where do you live? A. East Orange, New Jersey. 30

Q. You were president of the Globe Tire Company? A. Yes.

Q. In February, 1916, and still are, aren't you? A. Yes.

Q. Whereabouts is the office of the Globe Company. A. 1853 Broadway, New York City.

Q. Did you have any acquaintance with Mr.

Grove before the receipt of a communication from Mr. James purporting to report a talk with Mr. Terbell and Mr. Eberhard? A. No, sir.

Q. I show you contract made between the Globe Tire Company and William K. Grove, marked Exhibit 12, you signed that on behalf of the Globe Company? A. That is my signature, yes.

Q. How long was that signed after you had this talk with Mr. James? A. Very shortly.

Q. Well, a matter of— A. Few days, possibly a week.

Q. What did Mr. James tell you as to his talk with Mr. Terbell and Mr. Eberhard?

Mr. Lichtenstein: I object to that on the ground that it does not bind the Second National Bank, because it is hearsay, and, further, upon the ground that under no circumstances could it be binding upon the Second National Bank.

The Court: That doesn't mean anything, the last part of your objection.

Mr. Lichtenstein. It is hearsay.

Q. (Question read).

The Court: I overrule the objection.

A. He told me of meeting Mr. Terbell and Mr. Eberhard a few days before, and what they told him.

Q. What was that? A. Told me that Mr. Terbell had told him that Mr. Grove was a type of a man that we were looking for as a distributor in New-ark, and that Mr. Eberhard had advised him of his financial responsibility.

Q. Did he say anything about what Mr. Terbell had said about his financial responsibility? A. Yes, he said that Mr. Terbell had advised him that his financial responsibility was above question, that he owned a fine piece of property in West Orange, that it was worth probably sixty or seventy thousand dollars, no question about him financially. 10

Q. Did Mr. James then say anything to you about his judgment as to entering into business relations with Mr. Grove?

Mr. Lichtenstein: I object to any statement that Mr. James may have made to the witness as to what his judgment was on the ground that it does not bind the Second National Bank. 20

The Court: I will admit it and deal with its competency later.

Q. (Question read). A. He recommended that we do it.

Q. And following that conversation did you execute this contract on behalf of the Globe Tire Company? I did.

Q. Did Mr. James know that you were going to do it before it was done? A. He did. 30

Q. To what extent did this information which Mr. James communicated to you as coming from Mr. Terbell influence you in making this contract? A. It decided it.

Q. Would you have made the contract without that? A. No, sir.

Q. Have you produced here the ledger account of W. K. Grove showing sales made to him under this contract and payments? A. Yes, sir. 40

Q. Your company runs its ledger on the loose leaf system? A. Yes.

Q. And these are the leaves? A. Yes, to the best of my knowledge.

10 Mr. Enright: Running from February, 1916 to January, 1917, I offer that account in evidence.

Marked Exhibit E 13.

Q. The balance on that account was the cost of the action for which the judgment was procured in this case, was it? A. Yes.

Cross Examination by Mr. Lichtenstein:

20 Q. Your sheets Exhibit E 13 show that from the time you first commenced to ship him goods, on February 1, 1916, to and including December 30, 1916, amounted to \$74,276.96? A. The figures say that, yes.

Q. And from January 2 to January 20, several thousand dollars more? A. I don't know anything more than what the books show.

30 Q. Did you make any contract other than the one which was dated February 3, 1916? A. Not that I know of.

Q. With Mr. Grove? A. I don't remember of any.

ALLEN W. CORWIN, sworn.

Direct Examination by Mr. Enright:

40 Q. Did you have a conversation with Mr. Eberhard in 1917, in which he told you the amount

realized by himself and Mr. Fitzmaurice out of the liquidation of the assets of the Straw Hat Company? A. Not in 1917.

Q. When was it? A. 1916.

Q. Did you make a memorandum of it at the time? A. I did.

Q. Will you state the amount which he said had been realized from the liquidation of the personal property? A. \$17,025. 10

Q. At the time of this conversation did he not tell you whether a contract had been made for the sale of real estate? A. He did.

Q. Had the contract been closed yet according to his statement? A. It had not.

Q. Did he state what the contract price was? A. He did.

Q. How much? A. \$55,000. 20

Q. Did he tell you the amount of the mortgage? A. He did, \$39,700.

Q. And did he give you the amount of equity which would be received by the trustee? A. He did, \$15,300.

No Cross Examination.

Mr. Enright: We rest. Mrs. Grove wishes to correct her testimony as to when she ascertained this title was not in her name; she said it was at the time of the last failure, and upon reflection she thinks it was the time that she calls the failure when this mortgage was given. If you want to accept that as a correction on the record it would not be necessary to recall her. 30

MARY B. GROVE, recalled.

Direct Examination by Mr. Enright.

Q. Do you desire to correct your testimony in any particular? A. Yes, I do.

10 Q. What is it? A. I thought the first time Mr. Grove was in difficulty, in trouble, I called that a failure, because it would have been so if it had not been for my raising money.

Q. In what particular do you wish to correct your testimony? A. That I gave the mortgage after the first difficulty.

Q. Did you know in connection with that first difficulty that the title stood in your husband's name? A. Not until afterwards.

20 Q. Not until afterwards? A. No, but I thought that Judge Lane might get the wrong impression.

Q.(By the Court) When was it that you first knew that the record title was not in your name? A. 1913 was not the first difficulty.

Q. (By the Court) That was when the mortgage was given? A. Yes, sir.

30 Q. (By the Court) Why was it that you did not insist upon title being put in your name then, when you found it was not? A. I asked to have it put in my name at once.

Q. (By the Court) What were you told? A. That it would be done.

Q. (By the Court) Did you think it had been done? A. I thought it had been done; I was told it had been done.

Q. (By the Court) Do you know anything about the way of transferring real estate? A. No, I do not, your honor.

Cross Examination by Mr. Lichtenstein:

Q. As I understand you now, when you were raising money to pay off the indebtedness of your husband prior to July 28, 1913, you at that time learned that the title was not in you but was in your husband? A. I learned it afterwards, after 10 1913.

Q. You mean you learned it, as I understood from your counsel— A. After these difficulties had arisen.

Q. And before you signed the mortgage? A. Just at the time I signed the mortgage.

Q. You knew then at the time you signed the mortgage the title was not in you but in your husband's name? A. Yes.

Q. Then he promised after you signed the mortgage that he was going to put the title in your name? A. He had told me before it was in my name. 20

Q. But you found out and knew at the time you signed the mortgage the title was not in your name? A. Yes, he told me then.

ALLEN N. TERBELL, recalled.

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Direct Examination by Mr. Lichtenstein:

Q. Mr. Terbell, on January 8, 1914, when the entries that were testified to yesterday were made in the bank books with reference to the \$35,000 time note, and the old ten thousand dollar demand note, was either the thirty five thousand dollar note or the ten thousand dollar note credited to the account of the Grove Straw Hat Works or Grove personally? A. No, sir. 40

Q. There was no credit placed at all to their personal account? A. No, sir.

Q. Well, as a matter of bookkeeping, in order to get the thing straightened out you had to give credit somewhere, did you not? A. Yes.

10 Q. And where did you make the entry, credit entry? A. An account we call transient discounts.

Q. Now, under the heading of the month of January, what entry is there of the thirty five thousand dollar note, what is the entry? A. \$35,000.

Q. There are cross entries under the month of January, \$35,000 on the credit side and \$35,000 on the debit side, is there? A. Yes, we were settling up the notes.

20 Mr. Enright: It is Grove in the right hand column and Grove Straw Hat Company in the left hand column.

A. Yes.

Q. Why was it that you did not credit the Grove Straw Hat works credit of \$35,000 to the personal account of the Grove Straw Hat Works? A. Well, because that thirty-five thousand dollar note was held as collateral security.

30 By the Court:

Q. That is not the real reason, is it? All of these notes appear here in what you would call a balance ledger are not notes which are held as collateral are they? A. No.

By the Court:

40 Q. It is the practice of your bank in some instances where you are discounting one note to take

the place of other notes not to put it through the personal account of the bearer at all? A. If a man had no account in the bank it would go through here also.

Q. Where a man has an account and the note is discounted do you credit his personal account with the amount of the discount? A. Yes.

10

By the Court:

Q. Even if the discount is for the purpose of a cross entry where it immediately goes out and goes back to the bank to take care of an old note? A. Yes.

Q. Where a man has already had a note discounted and another note is given by him to take the place of that note, do you rediscount the second note? A. Yes.

20

Q. And is the amount credited to his personal account? A. Yes.

Q. Now, in this case do you always where a note is discounted to take the place of an old note, do you always place to the credit of the individuals? A. If it had been to his credit previously it would go to his credit again.

Q. In this case what was the purpose of your putting this thirty-five thousand dollar transaction through the transient discount book? A. It was not a loan to the Straw Hat Manufacturing Company, merely settling up that collateral note on the books and removing the mortgage from the books; it is hard for you people to understand that situation, but a bank man understands why those entries were made.

30

Q. Does this entry in the transient account indicate that no money was advanced on this note? A. Yes, because there is debit and credit.

40

Q. And the ten thousand dollar note was that entered through the transient? A. That being a demand note, wouldn't go in here; you people don't understand bank bookkeeping.

10 Q. To you, as a banker and understanding banking books, what does this entry of thirty-five thousand dollars here indicate? A. It indicates that the note was placed on our book but did not go to that concern's credit.

Q. (By the Court): Or to any one's credit? A. No, the bank now holds it as security, that is all, for the old loan.

Q. (By the Court): It went to the bank's credit? A. Practically the bank's credit.

20 Q. To a person familiar with the system of keeping bank books or books of account, and a banker, does the entry for \$35,000 in this transient account and the other entries in your books which were testified to, indicate that the mortgage was paid or not?

Mr. Enright: I object.

Q. Your custom? A. Would not indicate the mortgage was paid.

30 Q. (By the Court): Wouldn't indicate anything about the mortgage, would it? There is no connection between this and a mortgage, so far as this book is concerned? A. So far as the entry in that book is concerned, no, sir.

Q. This, taken in connection with the other entries that were testified to yesterday, does that indicate whether it was intended to be a payment of the mortgage or not?

40 Mr. Enright: I object. This is not proper examination; it is leading; he is his own

witness; he puts the answer right in his mouth.

The Court: I will permit him to answer.

A. It showed us the mortgage was not in any sense considered cancelled or paid, but considered as still held as security.

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Q. (By the Court): I still do not appreciate the significance of this book from what has been said.

A. This account is supposed to be balanced every day.

Q. (By the Court): How does this balance? A. If you came in and wanted to borrow money, we discount a note for you, and that note, you are not a customer of the bank, that note would go through this account; we are setting up that note on the books, and removing the mortgage from the books; the notes are the physical showing for the loan accompanied by the mortgage. Now, this is the only account we could put it through; we could not credit the account, as it was not a loan to them; the loan had been made to Mr. Grove a year or two previous, and would not credit the money twice.

20

Q. (By the Court): If I went to your bank and wanted you to discount a note for me for \$500, and had no account, would that note go through this account? A. Yes.

30

Q. (By the Court): Where would it show? A. It would show here (indicating).

Q. (By the Court): On which side first? A. This side, right hand side.

Q. (By the Court): Right hand side first? A. Yes.

Q. (By the Court): And is this the only book of the bank, except the discount ledger, that it would show in? A. It would show in the liability ledger, tickler.

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Q. (By the Court): And when it was paid out?

A. It would be marked in the tickler, that wouldn't affect us at all; this has nothing to do with the payment of the note.

10 Q. (By the Court): What is the significance, then, of the left hand side? A. You have got to have debit and credit; if I get your cash or a check we would take it out of here, make our ledgers balance.

Q. (By the Court): Then the two entries are made simultaneously? A. Yes; merely a matter of bookkeeping, that is all, to keep our accounts straight, keep our books straight.

20 Q. If a person had an account and came to the bank to discount a note and it were discounted, it would be placed to his personal credit and not in this transient account? A. Yes.

Q. The Grove Straw Hat Works at the time this entry of \$35,000 was made had an account with the bank? A. Yes.

Q. And Grove personally had an account with the bank? A. Yes. If it had been credited to them it would have gone through our account.

30 Q. If you had actually credited their personal account you would have given a double credit, would you not? A. It would have been here and there, too (indicating), yes.

Q. And it was for the purpose of avoiding a double credit that it had to go through this transient account, is that not right? A. Yes.

Q. (By the Court): It would not have shown any more of a double credit than a note, a renewal note discounted always shows double credit? A. A renewal note don't show double credit because it is charged out the same day.

40 Q. (By the Court): And this could have been charged out the same day, too, couldn't it, \$35,000

could have been deposited and check drawn to the Grove Straw Hat Company to the order of the bank for \$35,000?

Mr. Lichtenstein: That was not what was done.

Q. (By the Court): That could have been done?

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A. Could have been done, yes.

Q. (By the Court): These two entries, \$35,000 on the left hand side and \$35,000 on the right hand side, put in this book on the same day? A. Yes, sir.

Q. (By the Court): And red line drawn across them? A. He might not have drawn a line that day, he might have drawn it afterwards.

Q. (By the Court) There is no balance carried over in this book at all, is there? A. Little sundry items.

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Q. (By the Court): It really amounts to nothing but memoranda? A. It should close itself every day, automatically it is closed every day.

Q. You knew Mr. James? A. Yes.

Q. And do you recall his speaking to you or you speaking to him about Mr. Grove? A. I recall a conversation.

Q. Will you just tell us what that conversation was? A. Personally I like Mr. Grove, he is a nice chap, a good fellow, and I felt sorry for him; he was in business trouble, I liked to get something for him to do; I knew Mr. James was not satisfied with the Newark agent, Mr. Sandford was trying to get his nephew in there.

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Q. Mr. Sandford was one of your directors? A. Yes; Mr. James did not want Mr. Sandford's nephew in there very much; I said to James "I have got a good man for you, he is a good business

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man, he is able to get the Public Service Tire business for you; I think he has got good friends to back him up;" I made no recommendation about his financial responsibility, in fact I don't do those sort of things as a rule.

10 Q. Just tell us what you said to him? A. What I have.

Q. Was there anything else you said that you recall? A. No, sir.

Q. Did he ask you anything about the financial responsibility of Grove? A. Not to my knowledge.

Q. Did he say anything to you about wanting to extend credit to Grove? A. No, sir.

Q. Do you know how they did business? A. I didn't at that time know.

20 Q. Mr. Terbell, was there any money received by the Second National Bank on account of this mortgage, other than the nine thousand and some odd dollars that you testified to yesterday? A. No, sir.

Cross Examination by Mr. Enright:

Q. Now you have told us everything that occurred in this conversation between Mr. James and yourself to the best of your recollection? A. Yes.

30 Q. You say the bank never received more than the nine thousand dollars you testified to yesterday? A. The amount testified to.

Q. Do you know what disposition Mr. Eberhard and Mr. Fitzmaurice made of the money which they realized on the liquidation of the Straw Hat Company's assets? A. Not of record I don't know.

Q. Has the bank ever received from Mr. Eberhard and Mr. Fitzmaurice an accounting of what they realized out of the liquidation of these assets? A. I couldn't say that without looking it up.

Q. The amount which they received in the liquidation was all deposited in an account in your bank, wasn't it? A. I can't say about that; I mean there was an account there, but whether they put all the money in there or not I have no knowledge of that; I presume so.

Q. They were supposed to put it there, weren't they? A. That is up to them, I don't know; I have no control of it; they could put it where they pleased, may have had two or three accounts for all I know. 10

Q. They have finally disposed of all the assets, haven't they? A. You will have to ask them about that; I presume they have.

Q. They were your trustees; what steps have you taken to find out whether you got all the money you should out of it? A. They were not our trustees. 20

By the Court:

Q. They were your trustees, they were bank trustees under that agreement, written agreement there, under which they became your trustees, not the trustees in bankruptcy at all, but your trustees. What steps did you take to find out whether they finally accounted for all the money received out of this liquidation? A. That was up to Mr. Eberhard. 30

Q. Have you got a written accounting from them? A. Not to my knowledge, no, sir.

Q. Do you know how much money they received out of the personal assets? A. No, I don't; it is a matter of record, I don't know the amount.

Q. Record of whom? A. Record with them; they must have the report.

Q. Isn't it a matter of record with the bank? A. The bank had received those two items, that is all I know. 40

Q. You understood that when the bank through these trustees, the bank and Burnett through these trustees took over all these assets, the assets were to be credited on something, weren't they? A. Whatever came to us, yes.

10 Q. Now you have taken no steps to find out how much was realized out of those assets? A. That is left in the hands of Mr. Eberhard; he is one of our directors and was one of the trustees; we have taken his word for it, and it is all right.

Q. So you don't know anything about how this credit of \$9,750 was made up, do you? A. Received from the trustees; I don't know the details about it, no.

Q. Didn't you receive more than that? A. No.

20 Q. Haven't you received one item of \$6,750? A. What we received netted \$4,000 at that time.

Q. What do you mean netted, what did you deduct from? A. I don't know what they paid out; I guess they paid the lawyer's fees; their report will show all those details.

Q. I am trying to find out. A. Ask them for their report; that will show the whole thing up.

30 FREDERICK N. EBERHARD, sworn.

Direct Examination by Mr. Lichtenstein:

Q. Do you know Mr. James? A. Yes.

Q. And you don't know Mrs. Grove personally, do you? Did you ever see her before you saw her in court here? A. No.

Q. She speaks of a telephone conversation that she had with you on one occasion; do you recall

that telephone conversation? A. I recall the conversation over the telephone.

Q. Did she at that time ask you to pay some taxes? A. She asked me to pay the tax bill, tax collector there, and asked me if I was going to pay the taxes, and I said Mr. Rab had that in charge, he had already paid one, and I expected he would pay the other if it was advisable. 10

Q. Was there anything else said between you and her over the 'phone at that time? A. No. It was very short; she just merely asked me about the taxes; there was one tax sale had been taken up, that was in Mr. Rab's hands, and this was the second tax sale.

Q. Did she tell you why she wanted you to pay the taxes? A. She said the bank was interested, that was it, the bank was interested, and there is somebody here, I don't know who, I couldn't understand just who, somebody here wants the tax sale: "Are you going to take care of them"; I said, "Mr. Rab has already taken care of one, and I believe if he thought it advisable he would take care of the second," and likely he would. 20

Q. Mr. James says that on one occasion shortly before—

Mr. Enright: I object to that method of examination; it starts out narrating to this witness what somebody else said. 30

The Court: Bring his mind to the question.

Q. Do you recall Mr. James meeting you in the hallway of your building on any occasion? A. I have met him a number of times.

Q. At which time Mr. Grove was discussed with

you? A. Mr. Grove was discussed with me, but I don't know as it was in the hallway at any time.

Q. Do you remember Mr. James speaking to you about Mr. Grove or asking you about Mr. Grove?

A. I do.

10 Q. Was there only one occasion when he did that? A. No, there was more than one.

Q. Do you remember the first time he spoke to you about Mr. Grove? A. Yes.

Q. Do you recall the conversation that took place at that time? A. Yes, that is generally.

20 Q. Just tell us what it was? A. Mr. James said he was about to take William K. Grove in as an agent at Newark, New Jersey, and he wanted to know of me what kind of a man he was, and I went all over Mr. Grove as to the kind of man he was; I said he was a first class man, he was a good agent, and would be a good agent, that he was well acquainted throughout the country, the Oranges, and out that way, and that he would make a first class salesman, but he was a careless business man in keeping his accounts, had little regard for money; he then asked me if he was good for either, I don't know whether it was ten or twenty thousand dollars, if I thought he was good, and I said, 30 "From what I have seen of Grove, notwithstanding he has had trouble, I think that Grove will make ten or twenty thousand dollars good at any time, and I think he is good for ten thousand or twenty thousand dollars." I am pretty positive the contract, he said then the contract, the amount of goods that he would buy would possibly amount to \$20,000 at one time.

Q. Did you during the course of that conversation, or any other conversation, ever tell Mr. James that Grove had \$150,000 worth of bonds across the

street, guilt edged, \$150,000 of any kind of bonds?

A. I may have said something about Grove representing that he had an interest in some bonds and stock of his wife, \$150,000.

Q. Did you ever mention any such figure? A. No.

Q. (By the Court): Did you mention the West Orange property? A. Did I ever mention the West Orange property to him? 10

Q. (By the Court): Yes. A. Not that I remember.

Q. Did Grove ever tell you that he had some bonds? A. Yes, Grove spoke of having bonds, and it was in 1915, I think it was, or just prior to having a receiver appointed for the Grove Manufacturing Company, and he was anxious about our money in the bank, and I asked him if he couldn't pay on account and reduce that mortgage at least to \$65,000, which he had from time to time said he would; he then told me that he had stocks and bonds, I don't know the amount, but quite considerable, I think it was twenty-five or thirty thousand dollars, ten thousand dollars of which he tried to have released by his wife, that hereafter that any release of any of his property that he would have to consult her before there would be any release of any of his properties; I said. "Are they yours"; he said, "Yes, they are mine, and I own them, but you know I have been going on, and she wants me to get in some good business whereby I will make money." 20 30

Q. When you spoke to Mr. James and mentioned something about bonds did you tell him anything other than what Grove had told you? A. No.

Q. Whatever you said to Mr. James about bonds, did you believe those statements to be true? A.

Yes, I generally believed Grove; Grove up to that time had done nothing for me not to believe him.

Q. Did you make any statement to Mr. James with reference to Grove's that you did not honestly believe to be true at the time? A. No, I had no reason to do it.

10 Q. You were fond of this man Grove, were you not? A. Well, I liked him, yes, he was a nice, good all around man.

Q. Kind of a man that pretty near everybody was fond of that came in contact with him? A. Yes.

Q. Now, Mr. Eberhard, since Mr. Hall has been on the stand you have been asked to get a copy of the statement. A. Yes, I tried to get copy of that statement; Mr. Fitzmaurice took whole charge of
20 this matter and drew the checks, received the moneys and deposited the moneys and I acted merely as signing checks.

Q. Mr. Fitzmaurice was your co-trustee? A. My co-trustee.

Q. And he is in New York? A. He is in New York.

Q. You tried to get some records from him here a short time ago, did you not? A. I have been trying to get records and was there day before yesterday trying to get records.
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Q. Did you succeed in getting money? A. No, sir.

Q. What reason does he give for not giving them to you? A. He says he hasn't time.

Q. Was there a statement made up of your trusteeship? A. There was a statement made at the time Mr. Fitzmaurice finally went through his account, whatever balance there was in the bank, and we divided it up.

Q. (By the Court) : Does he live in New York or in New Jersey? A. He lives in New York.

Q. You say that he had the books, did he? A. I mean the records, whatever records there were? A. He has all the books of the Grove Straw Hat Company and everything that there was.

Q. Who has whatever records there are of this trusteeship? A. He has all the records. 10

Q. Have you among any of your papers a copy of the account that was rendered? A. I had a copy of the account, and I think I can find that; I looked for it yesterday, and have been looking for it; I did have a copy of the account, and that copy of the account I think was submitted to Mr. Turbell at the time.

Q. Now, do you remember the amount of money, I mean outside of this account, this is not absolutely accurate, but you try to look for your account, can you tell us from memory how much money was turned over to the Second National Bank of the money realized under this trusteeship? 20

Mr. Enright: I object to that as immaterial.

Q. How much was turned over to the bank, do you know of your own knowledge? A. No, I couldn't tell. 30

Q. It has been stated that it was \$9,750. Is it approximately that now, as you recall it? A. That was less expenses.

Q. The real asset that was, was it not? A. Yes.

Q. Of the Straw Hat Company? A. Yes.

Cross Examination by Mr. Enright:

10 Q. You say that you told Mr. James that Mr. Grove was good for ten or twenty thousand dollars? A. I said from the representations made to me by Mr. Grove that I thought he was good for ten or twenty thousand dollars, and Mr. James asked me, he said "Eberhard, would you trust him for ten thousand dollars?" I think that was the way he put it, "because my account would run twenty thousand dollars." I said, "Yes, I would trust him with ten thousand dollars."

Q. And James told you that in this business he was contemplating, it might be necessary to extend twenty thousand dollars credit to him? A. Yes.

20 Q. And the conversation concerned whether or not he was a good credit risk for \$20,000, didn't it? A. The conversation concerned Grove generally as to his ability, and together with whether he would pay or not.

Q. And whether he was a safe man to take on in a business which might involve \$20,000 credit? And whether he was a safe man to take on in business, taking Grove in consideration? A. Yes.

30 Q. And taking in consideration, the credit might run to \$20,000? A. Yes.

Q. And you told him you thought he was? A. I am positive that I made this statement, that I would think he was good for \$10,000, and I says, "Will your account run more than \$10,000 put up in cash at any one time."

40 Q. Didn't you tell him you thought he was all right to take on that line of business? A. I told him I thought he would be a good man, and told him his weaknesses, yes.

Q. Did you think that Grove was worth \$20,000 at that time? A. Did I think he was worth that?

Q. Yes. A. Yes, I did think he was worth \$20,000.

Q. You were the attorney all through these bankruptcy proceedings, weren't you? A. I was the attorney of record. No, I was not. I think Sam Heyman was the actual attorney in this matter; I refused to be the attorney in this matter, I wanted to steer clear of it I could at that time. 10

Q. The first move made in the 1915 troubles of the Hat Company was the appointment of a receiver in the Court of Chancery of New Jersey, wasn't it? A. Yes, that was made by me.

Q. And Mr. Grove was the complainant and you appeared as his solicitor of record? A. I did, yes. 20

Q. And then Burnett & Company, who were large creditors, were very much displeased at that move, weren't they? A. Burnett & Company were displeased at that move, yes.

Q. Then they forced the bankruptcy in New York, didn't they? A. Yes.

Q. Then you got Heyman to work with you in New York, didn't you? A. I dropped practically out of the thing, I said, "Here, Heyman, you take charge of this matter, I don't want to have anything to do with it." 30

Q. You dropped practically out of it, except to the extent you became trustee, and did all the liquidating of the assets? A. I did that; Grove came in and said, "If you don't come in and look out for my interest, Fitzmaurice will get away with everything"; that was the reason why I went in there for him.

Q. You took Heyman in because he practices more in the bankruptcy court, didn't you? A. I 40

didn't take Heyman in, I told Mr. Heyman the circumstances. "Now," I said, "The Second National Bank is willing to let you come into this matter, Grove wants you; you go on; I want to get out of it."

10 Q. You understood that that liquidation of the assets when this arrangement was finally put through that Fitzmaurice and you was to do it together on even splits, that that was to wipe out the debt of the Hat Company to the bank? A. No, the arrangement was I was to possibly get fifty-fifty out of Fitzmaurice; Fitzmaurice claimed eighty-four thousand.

Q. And the bank claimed forty-five thousand? A. No; we claimed forty-five thousand of Mr. Grove and Mr. Grove said, "Here, you get all you
20 can out of that and apply it to my account."

Q. Now, Mr. Eberhard, have I got to show you the sworn proof of claim in the bankruptcy proceeding to remind you that the bank there proved on one note of the Hat Company of \$35,000 and another note of the Hat Company of \$10,000? A. I know about that; you need not go over that, yes.

Q. So in the bankruptcy proceedings the bank was claiming as a creditor of the Hat Company
30 \$45,000, wasn't it? A. We was not going to file a claim at all.

Q. But you did it? A. Yes, we did it for him.

Q. And it was sworn that it was done for the bank; it was really done for Grove's benefit? A. It was done for Grove's benefit, yes.

Q. And if Grove had not desired the bank to file this proof of claim, the bank would not have done it? A. We would have held on our mortgage.

Q. The only reason the bank filed this proof of claim in the bankruptcy proceeding, according to your testimony, was to accommodate Mr. Grove?

A. To help Grove out, yes.

By the Court:

10

Q. That is pretty near being fraud on the bankrupt court, isn't it? A. I don't know as it is.

Q. Why not? A. The company owed Grove so much money.

Q. You claim they are on notes as the original creditor? A. That may be very true, but at that time when that was claimed—

By the Court:

20

Q. And you also put in proof of claim, sworn to, that you did not have any collateral? A. That may have been overlooked, that collateral end of it, because of the fact between Grove and Fitzmaurice, Fitzmaurice and Grove were at logger heads, and he wanted to get this in in some shape, and there was a possibility that we signed that claim off that way; I don't say there was any fraud or any indication of fraud.

Q. I don't say there was any intent of doing fraud— A. It was a matter to compel Fitzmaurice to come in and surrender, and Grove was persistent in that particular, and he asked us to do all we could to compel him to surrender, because Fitzmaurice had claimed \$84,000 of indebtedness.

30

Q. Why didn't you give a note to Grove and let Grove prove it? A. We didn't do it that way, that is all.

40

Recess.

Q. You had been informed even before the giving of the mortgage about the state of the indebtedness owed by Grove and the Hat Company to the bank, hadn't you? A. No.

10 Q. Didn't you know anything about that? A. No.

Q. Didn't you know that this \$10,000 represented money loaned to the Hat Company? A. At what time?

Q. I mean originally. A. Originally I didn't know until I was informed afterwards.

Q. Didn't you know that this \$10,000-note made by the Hat Company which you proved in the bankruptcy proceedings represented money which
20 went into the Hat Company? A. Which Grove put in the Hat Company; I believe it had, I didn't know that.

Q. That was your understanding of the situation? A. That is I thought it had.

Q. You knew that your bank could not loan to any one customer the full amount of \$45,000, didn't you? A. Yes, on their individual paper.

Q. And wasn't that the reason for splitting this thing up in to the \$35,000 of notes made by the
30 Hat Company and then his demand note of \$10,000? A. I don't know anything about it at all.

Q. Weren't you so informed by bank officials when you came into the matter representing the bank? A. No, not that I know of.

Q. At any rate, you knew that this \$10,000-note made by the Hat Company was the same item of indebtedness also covered by the \$10,000 personal note of W. K. Grove, you knew that, didn't you?
40 A. In fact I didn't know anything about Grove's

matters until I advised the appointment of a receiver for the Grove Straw Hat Company, that is the first time.

Q. The first time you knew anything about his matters? A. Yes.

Q. Don't you remember sitting in on the conference back in 1913 when the mortgage was given? A. I never sat in any conference in 1913. 10

Q. Didn't you see Mr. Beers at that time? A. Not at that time.

Q. Are you sure about that? A. I feel sure about it.

Q. You drew this \$45,000 mortgage, didn't you? A. I did not.

Q. Now, I call your attention to the fact that this bond and mortgage are both drawn on blanks with the endorsement of your professional card on the outside? A. Yes. 20

Q. Do you still say that you did not know anything about the giving of the mortgage? A. Yes.

Q. Do you still say that you were not consulted about this claim of the bank against Grove at the time the mortgage was given? A. Yes.

Q. I think you have said that you did not have any conference with Mr. Beers? A. I don't remember seeing Mr. Beers in 1913, or anybody connected with this matter; I don't remember it; I was not attorney of the bank at that time. 30

Q. Weren't you director of the bank? A. I believe I was; I believe I was director.

Q. But you were not the attorney for the bank in this transaction? A. No; I don't remember ever being consulted about this matter at all in 1913.

Q. By anybody? A. At that time, not at that time, no. 1913, I am referring to. 40

Q. Did you represent anybody in connection with the giving of this mortgage at the time it was given? A. No.

Q. You simply had no connection with that matter at all on behalf of anybody? A. I don't remember having any connection with the matter at all at that time.

Q. And you first became cognizant of this claim of the bank against the Hat Company and Grove about the time of the appointment of the receiver in Chancery, is that right? A. No; this Grove claim had been gone over after that time, and Mr. Rab had gone over it with the president of the bank; he spoke of the Grove claim and I spoke to Grove about it prior to 1915.

Q. Well, now, I want to get you to fix to the best of your recollection the first time following the giving of the mortgage, which is dated July 28, 1913, when you personally became familiar with the claim? A. It was not long before, some time before Mr. Grove had the receiver appointed and the claims generally against Grove and the Grove Straw Hat Company came up.

Q. Wasn't the receiver appointed because the bank insisted on having a receiver appointed? A. No. I advised Grove then it would be better to have a receiver appointed than to go into bankruptcy.

Q. Didn't you advise the bank that the best thing for them to do in protection of their claim was to have the company put in the hands of a receiver? A. No, I did not.

Q. In applying for this receiver, you were looking after the interests primarily of the bank, weren't you? A. I was not.

Q. Were you looking after the interests of Mr.

Grove primarily? A. I was looking after Mr. Grove's interest then.

Q. Primarily? A. Yes.

Q. And whatever effect that might have upon the interest of the bank was a secondary matter with you, was it? A. Yes.

Q. Well now, in preparing the bill for a receiver, you become familiar with Mr. Grove's affairs, didn't you? A. I did. 10

Q. Did you have any talk with him about the repayment of this sum of money to the bank? A. Yes; I then asked him to pay ten thousand dollars on account at least, and he said, "What are you afraid of? That mortgage is good and you know it is good, you have a mortgage."

Q. In making that request of him you were speaking for the bank and not as his attorney? A. No, and that was done before we knew that the Grove Straw Hat Manufacturing Company was in as bad shape as they were, and during that time it continued along, continual talk for a number of months prior to that appointment of that receiver. 20

Q. When was the time that you asked him to pay \$10,000 on account? A. It was about that time.

Q. About the time the bill for a receiver was filed? A. No, it was prior to that. 30

Q. About how long prior? A. I can't tell.

Q. A week? A. Oh, no, it was more than a week; this matter had been going on for months, three or four months before that receiver was appointed.

Q. I am trying to get you to tell your best recollection as to when you asked for the \$10,000 payment? A. I knew at the time that Mr. Grove's Grove Straw Hat Company were in bad shape, he 40

had not made any payments; he had agreed to make payments to the bank; he spoke to me about dividing up his property and making a sale.

10 Q. And by his property you are talking about the property of the Straw Hat Company? A. No, I am not; I am talking about the property that he held at Orange, for the purpose of releasing part of it, and see if we could not apply \$10,000 of that money, and he get \$15,000 for three hundred feet, which was vacant, I think it is three or four hundred feet which is vacant; I had never seen the property; I don't know anything about it; and we talked over those things generally for a long while; and we talked about the Grove Straw Hat Company; he wanted to know what to do, what to do with Fitzmaurice, what we would do, and
20 my idea of having that receivership appointed was he had a fear Fitzmaurice would get the best of him.

Q. Fitzmaurice represented Burnett? A. He represented Burnett.

Q. You had the same fear, didn't you? A. No.

Q. You didn't think so? A. No, not upon their assurance, and everybody assured me that the mortgage was good at that time.

30 Q. Now, when you asked him for this \$10,000 did you do that at your own instance or because the bank wanted that payment made? A. The bank wanted that payment made I think at that time.

Q. Who told you that? A. I think Mr. Terbell.

Q. And when you demanded the payment of \$10,000 you were carrying out the instruction you from Mr. Terbell, weren't you? A. I did not demand payment; yes, I requested payment, I told him he ought to reduce this liability and get it
40 down to \$35,000, and he said he would.

Q. He didn't make the payment, did he? A. He did not.

Q. Didn't he tell you he couldn't make the payment? A. No; no, he didn't tell me he couldn't make the payment.

Q. Wasn't he to make the payment—

10

The Court: Is there any use going into that? He couldn't make it and they knew he couldn't. There is no question about that.

Mr. Enright: If that is the fact; this witness does not put it that way.

The Court: The other evidence in the case shows it.

Q. After this first demand for \$10,000 did you keep on making demands for payment, or requests, as you put it? A. Yes, there was demand made after, and I think a threatened foreclosure, just after the 15th, after the receivership; I think that was in 1915, I have forgotten the day. 20

Q. For the purpose of the record, the bill for receiver appears to have been filed April 12, 1915, the record of this court, and it was after that? A. Yes.

Q. That you say foreclosure was threatened? A. Yes; he was behind in his interest then. 30

Q. You never made any move to carry out that threat, did you? A. Not when he paid up his interest, no.

Q. You had asked for something on account of the principal, had you? A. Asked for something on account of the principal.

Q. When was it he told you he had \$30,000 of bonds? A. That was about the time of those bankruptcy proceedings. 40

Q. Well, before or after the bankruptcy proceedings? A. May have been after, I am not sure about that, it may have been after, and it may have been before, it was around that time.

10 Q. Did you suggest to him that he had better apply some of this thirty-thousand dollar bonds to the payment of this debt? A. I did; better have have his house cleaned up, clean up the mortgage on his house, I told him that.

Q. He didn't make any move to do it, did he? A. No, apparently not.

Q. Didn't you know he couldn't do it? A. I didn't know he couldn't do it.

20 Q. How long before this talk you had with Mr. James was it that Mr. Grove told you that he had \$30,000 of bonds? A. Well, sometime before.

Q. Well, a couple of months? A. Oh, no, it was just about around at the time of the bankruptcy proceedings.

Q. Nearly two years before? A. Yes.

Q. And during those two years you had been trying to reduce this debt to the bank without success, hadn't you? A. Well, we hadn't been very urgent with it, other than keeping his interest paid; we insisted on that.

30 Q. Other than liquidating all the assets of his business and applying those to the loan, you had not done anything to collect the debt, is that it? A. No.

Q. Did you ask him where these bonds were? A. Yes, I think I did; I think he said he had \$20,000 in New York City bonds and \$10,000 in Northern Pacific Preferred, that is my impression.

40 Q. And having that knowledge you made no effort on the part of the bank to have this applied

to the reduction of your debt? A. I tried to have him apply that money, and he told me then that he had done so many foolish things he would have to get his wife's consent; I said, "Why don't you get it and clean up your house"; I often spoke to him about that "Instead of having those bonds around you would be better off, and pay less interest." 10

Q. Now in December of 1915, you knew that the bank surrendered all the old notes, did it, and took some new notes from Grove, didn't you? A. I did not.

Q. Didn't know anything about that? A. No.

Q. Didn't know anything about the taking of the \$30,000 note? A. No.

Q. When you had this talk with James you knew, however, that there was this large debt due, didn't you? A. I knew there was \$55,000 worth of mortgages on his property, \$10,000 held by first mortgage and \$45,000 by second, I had been told that. 20

Q. Your acquaintance with Mr. Grove was really very casual, wasn't it? A. With Mr. Grove?

Q. Yes. A. Why, no.

Q. Your acquaintance with him was in a business way, wasn't it? A. Business way.

Q. It was not social acquaintance? A. No. 30

Q. Now, when you had this talk with James, didn't you have in mind that it would be a good thing to have Grove put in a business where he would have a chance to make good? A. Why, no, other than this, Grove asked me previous to seeing Mr. James if the rubber business was a good business, rubber tire business, and I said, "If you are careful you ought to make money in it, it is a good agency"; and he says, "I have an opportunity," Mr. 40

James had offered him this opportunity. "Well," I says, "you ought to make good at that."

Q. You were anxious to see him make good, weren't you? A. I was anxious, yes, in a friendly way, to see him make good.

10 Q. If he had made good he would pay these debts to the bank, that was your expectation? A. I didn't have that in view.

Q. You didn't have that in view? A. No, I did not.

Q. That never occurred to you? A. That did not occur to me to make good to the bank; I always thought the bank was good, safe.

20 Q. It never occurred to you to tell James anything about the mortgage, did it? A. Why, there was no reason for me telling James about the mortgage at that time.

Q. No reason other than that James was about to go into business with him and extend credit for \$30,000? A. Yes.

Q. You did not consider that a reason? A. No, I did not.

30 Q. You did not consider the existence of a mortgage of \$45,000 on this property had any bearing on Mr. Grove's desirability as a business risk, did you? A. No, not what I have heard about Grove generally from the business public, and Grove himself, I didn't think that \$10,000 or \$20,000, credit of that amount was any too much for him.

Q. And you didn't think that \$45,000 second mortgage on this house impaired his right to seek credit at all, did you? A. I didn't think that it impaired it to the extent that he couldn't get ten or twenty thousand dollars credit, together with what he had.

40 Q. You knew it impaired it to the extent of

\$45,000, didn't you? A. I knew there was \$45,000 there, yes.

Q. You knew that that mortgage impaired his credit to the extent of \$45,000, didn't you? A. I didn't consider it.

Q. You wouldn't consider it so? A. No.

10

By the Court:

Q. This was after the wreck of the Grove Hat Company? A. Yes, sir.

Q. All of the assets of the Grove Straw Hat Company were liquidated and turned into money by you and Fitzmaurice before you had this talk with James? A. Yes, sir.

Q. Both real estate and personal property? A. Yes.

20

Q. Now in the bankruptcy proceedings, don't you know that the assets of the Grove Company were listed real estate \$70,000? A. Yes.

Q. Mortgages against that \$39,700? A. Yes.

Q. And machinery and plant \$43,000, you knew that? A. Well, that sheet you are reading from, I can't remember those things, you know.

Q. Well, approximately that is right? A. Yes, there were large assets against his liabilities at the time apparently.

30

Q. And beside that there was some merchandise on hand. A. Yes, there was a large amount of merchandise on hand.

Q. Large amount of merchandise on hand? A. Yes, there was.

Q. Now before you filed this bill for receiver in chancery, the bank had an audit made of the affairs of the hat company, didn't they? A. They may have had.

40

Q. Well, I show you a certified copy of the bill of complaint which you filed as solicitor in a case, attached to it being what purports to be an audit, do you recognize that? A. Is that a certified copy of my bill of complaint? I believe there was an audit made by some auditors in New York, and I guess I
10 filed that with my bill.

Q. Now, does what purports to be a copy of the audit annexed to that bill refresh your memory as to what the assets of the hat company were at the time you put it in the hands of a receiver as appears by the audit? A. As appears by the audit, yes. I generally assumed that he was insolvent at the time because of a whole lot of ancient stuff there that would not bring anything in the market, the machinery was ancient, and tools were ancient,
20 and the material was of that character, and I figures the whole matter up and concluded they were insolvent at the time.

Copy of the audit as annexed to the certified copy of the bill of complaint offered in evidence.

Marked Exhibit E-14.

Q. In this talk you had with Mr. James you told him about Mr. Grove's standing up in Orange, didn't you? A. No.
30

Q. Didn't say anything about that? A. I didn't you anything about his standing in Orange at all, other than I heard he was pretty well liked; in fact I never seen or knew where he lived exactly; I sometimes used to get it mixed with Montclair, and didn't know where Grove lived at that time, and used to think it was Montclair instead of Orange; I don't remember ever mentioning Orange to him.

Q. You knew he lived in Orange? A. I knew he out on the D., L. & W. somewheres or other, and I never got the Oranges right, south, east, north or west, there is North Orange, East Orange and South Orange, and I got them all twisted; I don't know as I ever talked to him that way; I may have said the Oranges.

10

Q. You told him he lived out there? A. Yes.

Q. You told him he had a lot of friends? A. From the friends he introduced me to and from the people I see I knew he had a lot of friends.

Q. Told him he lived in a nice house out there, didn't you? A. I did not; I don't ever remember mentioning a nice house to Mr. James.

Q. You knew that he lived in a very nice house, didn't you? A. I didn't know anything about it, I have never seen it. I should judge by the appraised value of it that it was a nice house.

20

Q. You didn't say anything about that to James? A. No.

Q. You are sure about that? A. I am pretty positive of that.

Q. All you told him about was the \$30,000 bond that you had never seen, and you didn't say anything about the house on which you knew the bank had a mortgage? A. No, I didn't say anything about it, and I am rather hazy about that bond business, whether I seen them or not.

30

Q. I think you are hazy all right on that subject.

Mr. Lichtenstein: Whether you saw them or not?

A. Whether I saw them or not; he had a package there he presented, and I am not sure whether they were these particular bonds or not.

40

Re-direct Examination by Mr. Lichtenstein:

Q. Your attention was called to the professional card of your own on the back of the bond and mortgage. Your office is in the same building as the Second National Bank is in? A. Yes.

10 Q. Mr. Rab is a lawyer, is he not, in this State and of New York? A. Yes.

Q. And he is president of the bank? A. Yes, sir.

Q. And he attends to a great many of the affairs of the bank? A. Yes.

Q. And let me ask you whether any of this typewriting is any of the typewriting of your office? A. My office said it was not; I asked them.

Q. Did you ever draw this mortgage in your office or give instructions in your office to draw it?

20 A. I never remember seeing the mortgage until it was given.

Q. Mr. Rab, is he in the habit of sending for blanks to your office? A. Yes.

Q. For how many years has he been in the habit of doing that? A. A number of years, a long time, ever since he has been president of the bank I guess, and I have been in the building.

Re-cross Examination by Mr. Enright:

30 Q. Did you have anything to do with the assignment of this mortgage from Mr. Terbell to the bank? A. Likely, yes, I always do.

Q. Have you any recollection about that? A. I have no particular recollection about it, but I always assign the mortgages before Terbell goes home every night.

40 Q. I understood you to say you didn't know anything about this mortgage until months afterwards

about the time of the receivership. A. I didn't know anything about this mortgage other than I may have assigned the mortgage; Mr. Terbell requested me to assign the mortgage, and if it had been brought to my attention I would have had it done right then and there.

Q. I show you the assignment which is in evidence here, D-3, the professional card on the back is your regular professional card? A. Yes. 10

Q. Drawn on your blank? A. Yes.

Q. And that is your signature as subscribing witness, isn't it? A. Yes.

Q. And you took the acknowledgment, didn't you? A. As of that day, yes.

Q. The 30th of July? A. Yes.

Q. Did you take the acknowledgment on that day? A. I am positive I took it upon that day, because the rule is that Mr. Terbell is not to go home at night where he has any papers in his possession that belongs to the bank without being assigned to the bank. 20

Q. When were, to the best of your recollection, the words typewritten in the assignment specifying the book and page of record? A. When the mortgage came back.

Q. So the assignment was executed in blank and those things inserted afterwards? A. No, the assignments are inserted without the libre and page in, and when they are recorded they come back and are placed in; I have done that. 30

Q. Did you have the charge of having this mortgage recorded? A. It may have been recorded through my office, I don't know; all papers go through my office.

Q. Then you must have known about the giving of the mortgage at the time it was given, if it went 40

through your office for record? A. No, I wouldn't know anything about it; I may have given it to one of my clerks, and I paid in the regular course of business that bill, I wouldn't know anything about it.

10 By the Court:

Q. How did it come to go through your office if you were not counsel for the bank? I understood you to say you were not counsel for the bank? A. I was not at that time.

By the Court:

20 Q. How did these papers happen to go through your office? A. That was customary; Mr. Marnell and a number of others acted through the bank at that time; Mr. Rab would give it to anybody that came along.

Mr. Lichtenstein: That is all we have.

Adjourned until Tuesday, November 20, 1917, at Chancery Chambers, Newark, N. J.

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November 20, 1917.

Between
CHARLES F. NESLER,
Complainant,
and

WILLIAM K. GROVE et al.,
Defendants.

10

Continuation of examination pursuant to adjournment on November 20, 1917, at Chancery Chambers, Newark, New Jersey, in the presence of the Court and counsel as before.

20

LUCIUS H. BEERS, sworn.

Direct Examination by Mr. Enright:

Q. You are a counsellor at law of the State of New York? A. Yes.

Q. And member of the firm of Lord, Day & Lord?
A. I am.

Q. Of 49 Wall street, New York City? A. Yes, 30
sir.

Q. Had your firm been counsel to the Bradley estate and to Mrs. Grove as an heir of that estate prior to July 28, 1913? A. Yes.

Q. How long about? A. I can't recall the dates, but several years.

Q. Did you represent Mrs. Grove in the settlement of that estate? A. I represented them all in a way, except the executor.

40

Q. Do you recall being consulted about the affairs of the Grove Straw Hat Company in the summer of 1913? A. I do.

10 Q. Have you refreshed your memory by reference to your office register as to the date when you were first consulted? A. I have referred to that register, and it was a date early in June; I have not at hand a memorandum of the date, but it was early in June of that year.

Q. Had you or your firm been attorneys for the Grove Straw Hat Manufacturing Company before that time? A. Not before then, no.

Q. And what was the occasion of your coming into that situation? A. Mr. Grove consulted us with reference to a situation which had arisen rather suddenly in the affairs of the company.

20 Q. I mean the introduction came through your representation of the Bradley family? A. Yes; I had met Mr. Grove in connection with the affairs of the Bradley estate a great many times, but not in connection with his own affairs.

Q. That is, his wife's family? A. Yes.

Q. And in that connection did you acquire information from him as to the indebtedness of the straw hat company? A. In connection with that.

30 Q. In connection with his conference with you in the summer of 1913? A. I did.

Q. And did you learn of an indebtedness to the Second National Bank of Hoboken? A. I did.

Q. Prior to this time did you have knowledge as to the circumstances under which the West Orange house in which the Groves lived had been acquired? A. Prior to that time?

Q. Yes. A. I don't think so.

40 Q. Well, when Mr. Grove called upon you were you informed anything about it? A. I was. In

that connection, your Honor, can it appear on the record that Mrs. Grove consents to my testimony with reference to these things? We are rather strict in New York State about that?

The Court: We are strict here, too. She is here without making any objection. 10

A. Your Honor will note that?

The Court: Yes.

Q. What did he tell you as to whose money had gone into the building of the West Orange house, if anything?

Mr. Lichtenstein: I object to that upon the ground that it cannot in any wise bind the Second National Bank. 20

The Court: I will admit it.

Mr. Enright: Merely introductory.

Q. (Question read.) A. He told me it had been built with Mrs. Grove's money.

Q. Did he tell you how the title stood? A. Yes; title to the land?

Q. Yes, and what did he tell you about that? A. The title was in his name. 30

Q. Now, did you have a conference with any of the officials of the Second National Bank relative to their claim against the straw hat company, and, if so, are you able to fix the date of the first conference by reference to your office register or otherwise? A. I did have such a conferenc in company with Mr. Grove and I think with Mr. Bradley; I won't be sure about that, though; I cannot fix the date without reference to the office records; I 40

will refer to them. The first conference appears from my office records was on July 1st, 1913.

Q. And with what officials of the bank was that conference had? A. I could not recall from my memory, but referring to my office register this states, "Confernce at Second National Bank at
10 Hoboken in A. M. with cashier, Mr. Grove and Mr. Bradley."

Q. Prior to this date had you had conferences with other creditors of the straw hat company? A. Yes.

Q. And had you had some investigation made of the financial situation of the hat company? A. I had it made by accountants.

Q. This conference at the Second National Bank was on what date? A. On July 1, 1913.

20 Q. Following that did you write a letter to Mrs. Grove giving her a general report of the situation?

Mr. Lichtenstein: I object to that as being entirely incompetent, irrelevant and immaterial and cannot in any wise bind the defendant, The Second National Bank.

The Court: I will permit it.

A. I wrote Mrs. Grove on the following day.
30 Q. July 2nd? A. July 2nd.

Q. Have you got your office copy of that letter? A. I have the carbon print of that letter.

Q. That is a contemporaneous record made of your office files, wasn't it? A. It is a mechanical copy of the letter which I sent.

Q. Will you refer to that letter and state what you informed Mrs. Grove as to her position with respect to the moneys she had advanced either for the company or in building the house?

Mr. Lichtenstein: I object to that upon the same ground, if the Court please, and further upon the ground that any advice Mr. Beers gave Mrs. Grove is absolutely not binding upon the Second National Bank in view of the subsequent conduct of Mrs. Grove.

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The Court: I will admit it.

Q. (Question read.) A. Does your question relate to the whole letter?

Q. I am asking you now, directing your attention to that particular subject matter; I don't know that the entire letter would be permitted as relevant? A. The whole letter relates to the general situation; it is a little difficult for me to—

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The Court: Do you want to put the letter in?

Mr. Enright: Yes.

The Court: Let it be marked.

Mr. Lichtenstein: I presume my objection stands.

The Court: It stands to all the testimony.

Marked Exhibit E 15.

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Q. Now, in this letter on the second page you said, "you also have given a guarantee to the Honover Bank for \$25,000 and have invested a much larger sum in the house which still stands in Mr. Grove's name." That recital as to the investment in the house and the manner in which the title stood, from what source did you receive the information which you sum up in that statement? A. My best recollection is that it was from Mr.

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Grove; most of my information on those subjects was received from him.

10 Q. Then calling your attention to the sentence at the bottom of the second page, "My plan is that this be immediately used," referring to the proceeds of the loan, "to buy up and dispose of the note held by the Hanover Bank, and I hope that under the plans which I have discussed with Mr. Grove and your brother the business can be continued in such way that in the course of a few months the Second National Bank will consent to having the West Orange house conveyed to you." Does that recall to your mind that there had been some sort of preceding discussion as to the vesting of legal title to the house in Mrs. Grove? Was that one of the things that was involved in this general situation?

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Mr. Lichtenstein: I object. I think, if the Court please, this is most important and a crucial part of the case, I think that the witness ought to be permitted to testify without—

The Court: Do you think Mr. Beers will testify differently whether he is led or not?

30 Mr. Lichtenstein: No, I don't, but I think the question should be put in such shape—

Q. (Question read.) A. That was one of the things which was involved in this general situation and had been discussed, the question of the possibility of having the title to the Orange property then transferred to Mrs. Grove.

Q. Now, following this letter of July 2, did you have a further conference with any of the bank officials? A. It appears from my office register

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that on July 11th I had a conference by telephone with the cashier of the Second National Bank, who my office record reads says "Matters will remain in the present situation until statement made."

Q. Following that was there anything? A. My office register for the 23rd of July contains this entry, "Attended at Second National Bank, Hoboken, conference with Vice President of bank. Mr. Britton, bank's counsel, the cashier, and Mr. Grove, discussed financial situation. Bank asks for mortgage on Orange property." 10

Q. Did you participate in the final execution and delivery of the bond and mortgage? A. I don't recall that I had anything to do with the delivery of it. I knew that a bond and mortgage was given and I think I wrote Mrs. Grove about it, but the delivery I think was made,—well, I didn't make it, I don't know who made it. 20

Q. When did you write Mrs. Grove about it? A. July 28.

Q. Have you a copy of that letter? A. I have.

Mr. Enright: I offer that letter in evidence.

Mr. Lichtenstein: The same objection.

The Court: Let it be marked.

Marked Exhibit E 16. 30

Q. Calling your attention to this last letter and a statement therein, "In consideration for the giving of this mortgage the bank is willing to wait for any reasonable period for the payment of the notes, otherwise they will press for payment at once." Does that refresh your mind as to whether in these conferences you have testified to at the 40

bank, either one or both, the bank had been pressing for payment? A. Yes, the bank had been pressing for payment; I don't recall, I can't recall the words that were said, but there was a pressure for payment.

10 Q. That was the substance of it? A. That was the substance of it.

No cross examination.

FREDERICK N. EBERHARD, recalled.

Direct Examination by Mr. Lichtenstein:

20 Q. Mr. Eberhard, you have located a copy of the account, have you, of yourself and Mr. Fitzmaurice, trustees? A. Yes.

Q. And is this the account? A. That is the account Mr. Fitzmaurice furnished me.

Q. This is prepared by Mr. Fitzmaurice, was it? A. Yes.

Q. And send to you sometime ago? A. It was sent to me last week, I think the final section, it was sent in sections.

30 Mr. Lichtenstein: I offer the entire account in evidence.

Marked Exhibit D 4.

Q. Does this account show all the moneys received and all moneys expended and the amount of moneys turned over to the Second National Bank?

A. Yes, in so far as the trusteeship is concerned.

40 Q. I notice by this account that there was turned over to the Second National Bank on December

29, 1915, \$4000, and on May 9, 1916, \$6750, making a total of \$10,750, whereas the credit that was given by the bank on the indebtedness was \$9750. Can you tell us how the other thousand dollars is accounted for? A. The thousand dollars was paid to Mr. Heyman Samuel Heyman.

Q. That is, of the firm of Heyman & Heyman? 10
A. Yes.

Q. And who do they represent? A. Grove.

Q. And at whose request was this thousand dollars paid to Heyman & Heyman? A. Mr. Grove.

Q. They were the attorneys in this proceeding for the recovery of whatever moneys could be recovered from the Grove straw hat works in the bankruptcy proceedings? A. Yes.

Examined by Mr. Enright: 20

Q. Did Heyman & Heyman represent the bank?
A. No, that is, they represented the bank?

Q. At Grove's request, that is, the matters were taken up for Mr. Grove for the purpose of getting what moneys he could to apply to his indebtedness to the bank, but in these bankruptcy proceedings do you mean to say that Heyman & Heyman did not represent the bank? A. They apparently represented the bank, but it was really for the purpose of helping Grove. 30

Q. And who retained Heyman & Heyman? A. I don't believe there was a retaining fee, I don't know.

Q. Well, didn't you hire them? A. I didn't hire them.

Q. Didn't you pick them out as the attorneys?
A. I was asked who were good bankruptcy attorneys and I picked Mr. Heyman, Yes. 40

Q. And you went to see Mr. Heyman, didn't you? A. After that I saw him quite frequently, yes.

Q. You saw him the first time and made the original arrangements with him, didn't you? A. I don't think I did.

10 Q. Oh, now, Mr. Eberhard? A. Well, I don't think I did. I think Mr. Grove went directly from my office asking me to appear there, and I says, "I don't want to appear there, I don't want to have anything more to do with that matter; you better have bankruptcy attorneys and take charge of this affair." He went directly from my office and telephoned Mr. Heyman. I asked him to take, Mr. Grove was calling and asked him if he wouldn't take charge of his affairs, and Mr. Grove went there himself; that is the way I think it occurred.

20 Q. After having a conference with you about the whole situation? A. Yes, I knew the whole situation.

Q. Have you deducted anything for your own services out of these proceeds? A. Only as trustee.

Q. (By Mr. Lichtenstein) Out of the proceeds you are asked? A. Out of the proceeds, I think there was some disbursements paid me.

30 Q. Weren't you paid something for services? A. I don't believe I was, I don't remember being paid for services.

Q. Did you have any interest in this fee of \$1,000 paid to Mr. Heyman? A. I had no interest in Mr. Heyman's fee.

Q. You did not get any part of it? A. I did not get any part of that.

40 Q. When was this account made up? A. That account was first made up when you served me with notice to produce that particular account.

Q. That was shortly before the day set for trial last September, wasn't it? A. I don't know about last September, and he furnished me with part of that account, and then it was only recently that I got the balance of it, and that other statement I found night before last, or three or four nights ago, the final statement.

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Q. And up to this time, that is, up to the time you found this final statement the accounts of Mr. Fitzmaurice and yourself had never been made up, had they? A. No, they had not been made up. Oh, yes, Mr. Fitzmaurice had made that up some time ago, made a full account, a full statement of the whole of this affair and I went over it with him.

Q. Why don't you produce that then? A. I don't have a copy of it; Mr. Fitzmaurice took it away with him; I didn't have anything in my office or any account until I was furnished with that.

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Q. Did you ask Mr. Fitzmaurice to produce the original account? A. No, I asked him for a copy.

Q. When was the original account made up? A. The original account was made up just after the receipt of the money from the sale of the property, I believe about a month afterwards.

Q. Made up in separate detached form, was it? A. No, it was made up in pencil account, if I remember it right, and submitted to me.

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Q. And then what was done with it? A. Mr. Fitzmaurice took the account away and he then called at my office and there was some dispute and I submitted the account to Mr. Terbell, I think, showing the amount of disbursements under that dispute; what the dispute was I have forgotten.

Q. The bank did not think it had received

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enough, is that it? A. Yes, I think that was it, or something of that kind.

Q. Was a copy of that account left with Mr. Terbell? A. A copy of the account was not left with Mr. Terbell, no. I have not got copy of the account, and Mr. Terbell has asked me for copy
10 of the account and I have asked Mr. Fitzmaurice, and the only time I received an account was the other statement, and there was one sheet furnished me first off by Mr. Fitzmaurice; I had quite a job getting any account from Mr. Fitzmaurice; he refused to have anything to do with it or to bother himself with it; but there was a pencil account, and we went over it, Mr. Terbell and I went over the figures and there was some dispute as to the amount of money.

20 Q. How did you settle that dispute? A. How did I settle the dispute? I don't know how it was settled.

Q. So you have told us all that you know about the accounting of Mr. Fitzmaurice and yourself as trustees of this property, have you? A. I have told all that I can remember. The whole matter appears there as it was and I went over it since then, I had went over it very carefully, and I recall we went all through those transactions; I had
30 charge of all the transactions and he kept the books.

Q. When you went over this account you didn't have the books before you, did you? A. No, I didn't, but I can remember pretty nearly everything that transpired there, it was only a question of the sale of the property.

Q. (By the Court) Who attended to the liquidation of the assets? A. Mr. Fitzmaurice.

Q. (By the Court) Did you have anything to
40 do with it? A. I had the sale of them.

Q. (By the Court) All of them? A. Yes; the assets were auctioned off in my office, that is, personal property, we had an auction sale in my office and auctioned them off in my office after getting all the parties interested and notifying everybody throughout the country in advertising we had a sale made in my office and it was sold at auction to the highest bidder at the office. 10

Q. (By the Court) How was the real estate sold? A. The real estate was sold through an agent by the name of Carey to a laundry company.

Q. There was a good deal of material on hand, wasn't there, stock? A. Yes, quite a good deal of it.

Q. Who was that sold to? A. I have forgotten the name of the man it was sold to; I remember the sale, and the figures I gave you are right, it was \$17,000, I thought it was \$15,000, but it was \$17,000. 20

Q. Any of the stock sold to Burnett? A. Any of the stock sold to Burnett? No.

Q. Are you sure about that? A. Pretty sure about that.

Q. What is that? A. I don't remember Burnett taking any of the stock. Oh, yes, he did, he took some of the machines, six or seven machines were sent by Mr. Fitzmaurice up in the country I believe to another factory. 30

Q. Another factory controlled by Burnett & Company? A. Yes.

Q. Well, now, Burnett & Company, they are dealers in straw braids, aren't they? A. Straw braids and straw hats.

Q. There was a large stock of merchandise on hand that had to be liquidated, wasn't there? A. There was. 40

Q. Wasn't that liquidated through Burnett & Company? A. No; no.

10 Q. What? A. No. The way it was done was this, just as I said, we wrote every manufacturer, at least I did, I took charge of that, I wrote every man that was in the straw business, getting a list of their names throughout the country, and all the auctioneers that are interested, and asked for a price; that went on from day to day, and the price set by Fitzmaurice was \$22,000, he thought that was worth \$22,000; I had no idea of the real value. There was an inventory taken and appraised by one of his men, Mr. Burnett.

20 Q. Do you remember the amount of that inventory and appraisal? A. I do not, but the price fixed by Mr. Fitzmaurice was \$20,000 to get for that, the contents of the factory with the exception of a few things that went out, machines. As I say, I wrote throughout the country asking for a bid on to it, and I was unable to get a bid for more than \$9,700, that was the highest bid that I got from any of the parties, and they were mostly people in the auction business, people that bought up places for the purpose of selling. Mr. Fitzmaurice then asked me it wouldn't be a good idea to have them go there and bid and let it go at that, 30 and I said I thought that would be the best way, if we had an offer of \$9,700, that was it; and then I invited them to my office, these people, by letter, and Mr. Fitzmaurice brought over two men who were apparently competitors and bitter competitors, and the bid from the outsiders amounted to a little over \$12,000, and these two competitors which had come over from New York held out against one another until it was over \$17,000, and Mr. Fitzmaurice, I told him I didn't think I would

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get any more and he said, "Let it go" and we let it go at that; that is the way it was done.

Q. There were two elements, those that you have defined as outsiders? A. Yes.

Q. And these two that came over from Fitzmaurice were insiders, I suppose? A. No, I shouldn't think by the way they acted they were. 10

Q. You distinguished them from outsiders? A. The way I distinguished them from outsiders, they came over from Fitzmaurice; they were not the people I had written to, I didn't know these people at all by writing to them, by corresponding with them, and they were the ones that bid on this property, and we thought we did mighty well.

Q. Wasn't there a lot of merchandise over in Burnett's place that had to be liquidated? A. Not that I know of. 20

Q. All the stuff that had been manufactured and shipped out of the factory over to Burnett? A. No, I don't know anything about any stuff that was over there; there was an indebtedness, an account.

Q. There was a lot of stuff on which Mr. Burnett had made advances, wasn't there? A. There was a lot of stuff which Burnett & Company claimed as their own, either by purchase or advances, I don't know which. 30

Q. Well, it ran up into a good many thousands of dollars, didn't it? A. Well, I don't know what it ran up into; I just took the books generally and I said it did amount to \$20,000, but I don't know that to be a fact.

Q. That is something else you are talking about now? A. I am talking about these goods in particular that you speak of which were consigned to them which I wanted to force them to bring in as 40

part of the bankrupt's account, or estate, and I insisted upon that being brought in. They insisted on keeping me out. Mr. Heyman took the position that they had these goods and they should be brought in. We finally dropped that and agreed that they would agree; I had been informed that
10 if they allowed our side to come in at fifty cents with them, they having claimed eighty odd thousand and we having claimed forty thousand, and make that agreement which we entered into and allow me to come in there as trustee, which Mr. Grove insisted upon having his trustee, he wouldn't trust Fitzmaurice.

Q. He wanted you? A. Yes, he said Fitzmaurice was the cause of all his troubles and he wanted me to watch Fitzmaurice.

20 Q. Now, this item of merchandise which Burnett had in their control in some way, didn't it run up to as much as a hundred thousand dollars?
A. No.

Q. What? A. No, not as I know of.

Q. Eighty thousand dollars? A. They claimed to have advanced eighty odd thousand dollars, as I remember it.

Q. And then you claimed they had merchandise to cover, didn't you? A. I claimed that they had
30 \$20,000 of the merchandise which should be part of the bankrupt estate and that they had no right to hold that as they did, in other words, it belonged to the bankrupt concern.

Q. Are you quite sure that the amounts did not run up far in excess of those you are giving? A. They may have run up far in excess of that, but I did know the exact amount, the \$20,000 of the properties which I wanted turned over, I only generally assumed that it was so from the state-

ment I got from Grove; the best I could get I had no evidence of it at all.

Re-direct Examination by Mr. Lichtenstein:

Q. Mr. Grove was around during all of these negotiations that you had with Mr. Heyman? A. Yes. 10

Q. And the negotiations that you were having with Mr. Fitzmaurice with reference to these consigned goods? A. Mr. Grove was with me a number of times and was with Mr. Heyman mostly, I think, but I was called every once in a while to go to New York by both Mr. Grove and by Mr. Heyman.

Q. That was before your trusteeship? A. That was before my trusteeship. Mr. Fitzmaurice and Mr. Grove did not speak to each other, nor would they have anything—they seemed to be enemies. 20

Q. Burnett & Company through Fitzmaurice had a claim, practically claimed eighty odd thousand dollars against the hat company, that is right, isn't it? A. It may have been more, it was a large figure, it run over eighty thousand dollars; I had in my mind it was eighty thousand now, but since Mr. Enright has called my attention to it I think it was a great deal more than that, I can't remember. 30

Q. And the bank claimed something around forty thousand dollars? A. About forty thousand dollars.

Q. And it was through Mr. Fitzmaurice that the straw hat company was put into bankruptcy in New York?

The Court: Haven't you gone all over that?

Mr. Lichtenstein: No. 40

Q. Burnett put the company into bankruptcy?

A. Yes, Burnett put it in bankruptcy.

Q. And Fitzmaurice was connected with Burnett & Company?

10 The Court: I am going to overrule that question. That is already in evidence many times, you won't make it any stronger to repeat it.

Q. The discussions that took place to which Mr. Enright referred between you and Mr. Fitzmaurice with reference to any goods that Fitzmaurice claimed belonged to him, did those discussions take place before your trusteeship or after your trusteeship? A. Before my trusteeship; that was what brought my trusteeship about; Mr. Fitzmaurice wouldn't consent to my trusteeship.

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Q. And was Mr. Grove a party to those discussions? A. Mr. Grove was a party to this extent, that he was near by all the time and after we had got Mr. Grove's idea of it we would go to Fitzmaurice, you know they were not together, Mr. Fitzmaurice or Grove were never together, and talk the matter over.

Q. Was Mr. Grove about or did he take part in the advertising of this property, the real estate and personal property, for sale? A. No, he had nothing to do with that.

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Q. When I say taking part, was he about, did you have conferences with him from time to time?

A. He gave me a list of the straw hat people and the different concerns which would probably bring about the best price, and he also did a good deal of running himself to see if he couldn't bring about good prices for the stuff, throughout New York, and I think one concern in Boston he had.

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Q. And did you and your co-trustee sell all of the personal property that came to your possession as trustees? A. Yes.

Q. And all the real estate that came to your possession as trustees for sale? A. Yes.

Q. Did Mr. Grove know of the prices that this property was bringing? A. Mr. Grove was at the sale the day the property was sold. 10

Q. In your office? A. In my office, and Mr. Fitzmaurice tried to put him out, and I insisted on having him in, and we had quite a wrangle there in the office between Fitzmaurice, myself and Grove.

Q. You were not on friendly terms with Mr. Fitzmaurice, were you, even though you were a co-trustee? A. Well, no, I wasn't friendly because of his manner. 20

Q. And after this sale took place and the account and the moneys were turned over to the bank you recall the interrogatories being served and my asking you to go to Mr. Fitzmaurice and try to get his books? A. Yes.

Q. Did you go over and try to get those books? A. Yes.

Q. What did he tell you?

Objected to.

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Q. Did you get them? A. No.

Q. Did he consent to giving them to you? A. He did afterwards; it was hard.

Q. When you saw the books did he consent to giving you the books? A. No; he never allowed me to get the books; he said he would keep the books himself and take charge of it in such manner as he saw fit.

Q. And when the account was gone over and the balance struck and the balance given to the Second 40

10 National Bank, which they were entitled to, did Mr. Grove know of those proceedings? A. Mr. Grove knew all about that and knew just exactly what I was doing every step; and, by the way, I think he asked me if I was interested in the fee; I think I did get a fee out of that matter from either one party or the other, I ain't sure about that; Mr. Terbell could tell better about it than I could.

Q. When you say a fee out of it do you mean out of the thousand dollars? A. There was some arrangement whereby I was to be paid for services I rendered there, yes.

Q. Was that paid out of the thousand dollars do you know? A. I am not sure about that, whether it was paid out of that thousand dollars or not.

All rest.

Statement of Joseph P. Hall.

30 Supplementing the testimony given by me in the suit of Nesler vs. Grove, I wish to say that at the time that I executed and closed the contract between the Globe Tire Company and W. K. Grove, referred to in the testimony, Ex. E, I had no knowledge, information, belief or suspicion that W. K. Grove was indebted to the Second National Bank or that the Second National Bank, directly or indirectly, held a mortgage upon the property which Mr. James said Mr. Terbell had told him Mr. Grove owned at Orange, N. J., or that anybody held a mortgage upon that property, nor did I ever have any such knowledge, information, belief or suspicion until after the indebtedness of Mr. Grove to the tire company for sales made under this contract had been contracted.

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JOSEPH P. HALL.

Statement of Harry B. James.

Supplementing the testimony given by me in the suit of Nesler vs. Grove, I wish to say that at the time that I recommended the making of the contract between the Globe Tire Company and W. K. Grove, referred to in the testimony, I had no knowledge, information, belief or suspicion that W. K. Grove was indebted to the Second National Bank or that the Second National Bank, directly or indirectly, held a mortgage upon the property which Mr. Terbell had told me Mr. Grove owned at Orange, N. J., or that anybody held a mortgage upon that property, nor did I ever have any such knowledge, information, belief or suspicion until after the indebtedness of Mr. Grove to the tire company for sales made under this contract had been contracted.

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HARRY B. JAMES.

It is stipulated by counsel that above statements may be added to the record in lieu of recalling the witnesses, it being understood that the statements refer to actual notice only and do not exclude such constructive notice as may be imputed as a matter of law from the fact that the mortgage referred to was a matter of public record.

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F. N. EBERHARD,
By MILLER & LICHTENSTEIN.
McDERMOTT & ENRIGHT.

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IN CHANCERY OF NEW JERSEY.

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CHARLES F. NESLER,
Complainant,

vs.

WILLIAM K. GROVE, et als.,
Defendants.

On Bill, etc.,
Final Decree.

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This cause coming on to be heard in the presence of Archibald F. Slingerland, of counsel with complaint, Robert H. Southard and William M. Seufert, of counsel with defendant Mary B. Grove, Frederick N. Eberhard and Julius Lichtenstein, of counsel for defendant Second National Bank of Hoboken and Allen N. Terbell, and John M. Enright, of counsel with defendant Globe Tire Company, upon the bill of the complainant and the answers and counterclaims of the defendants against each other, and proofs, and it appearing to the Court that there is due to the complainant Charles F. Nesler upon his bond and mortgage set forth in the bill of complaint \$11,171.67, and that said mortgage is first in registry and execution and is entitled to priority of payment to all other parties to this suit and is a first lien upon the mortgaged premises;

and it further appearing that the defendant Mary B. Grove was the equitable owner of the mortgaged premises on and prior to July 28, 1913, and from thence continued until March 8, 1917, when legal title was conveyed to her; that William K. Grove was the holder of the legal title to the mortgaged premises on and prior to July 28, 1913, and

from thence until March 8, 1917, when legal title thereto was conveyed to Mary B. Grove, but that Mary B. Grove was throughout the time aforesaid the equitable owner thereof;

and it further appearing that the mortgage executed by William K. Grove and Mary B. Grove, his wife, to Allen N. Terbell, dated July 28, 1913, and purporting to secure the sum of \$45,000, was executed and delivered to said Terbell as the representative of Second National Bank of Hoboken, and that said mortgage thereafter was assigned by said Allen N. Terbell to Second National Bank of Hoboken by written assignment dated July 30, 1913, as yet unrecorded, and "that said bank and said Terbell are chargeable with notice of the equitable interest of Mary B. Grove therein;" 10

and it further appearing that said last mentioned mortgage and the bond secured thereby were executed and delivered to said Terbell and assigned to said bank as collateral security for a certain indebtedness of Grove Straw Hat Manufacturing Company, body corporate, amounting to \$45,000; 20

and it appearing that thereafter said bank did release said Grove Straw Hat Manufacturing Company from liability upon its said indebtedness, without the consent or knowledge of Mary B. Grove; 30

and it further appearing that Globe Tire Company did attach the mortgaged premises under a writ of attachment issued out of the Essex County Circuit Court on March 21st, 1917, and did thereafter, under date of October 15, 1917, secure judgment in said attachment suit against the defendant William K. Grove for the sum of \$18,162.16, and that Globe Tire Company was induced to extend the credit to William K. Grove upon which 40

said judgment was founded, by reason of representations of said bank and its duly authorized representative, that said William K. Grove was the owner of said premises, without disclosure of the fact of the mortgage held by said bank thereon;

10 and it appearing that said credit was extended upon faith of the ownership of said premises by said William K. Grove, in ignorance of the existence of the lien of the mortgage of said bank thereon, as well as of the equitable interest of Mary B. Grove therein;

20 and it further appearing that said bank is estopped from now asserting any claim under its mortgage as against Globe Tire Company and that the judgment of the Globe Tire Company is a lien upon said premises next in priority after the lien of the complainant's mortgage and entitled to be next paid out of the proceeds of sale of the mortgaged property;

and it further appearing that it is necessary and advisable that the whole of the mortgaged premises should be sold to raise and pay the moneys so due as aforesaid;

30 and it further appearing that Second National Bank of Hoboken has paid tax liens upon said mortgaged premises amounting to \$1,051.59, which were a first and prior lien thereon, and is entitled to be subrogated to the lien thereof, with interest thereon from March 8, 1917, at the rate of six per cent.;

and it further appearing that said bank has caused the buildings upon the mortgaged premises to be insured against loss by fire, and on July 17, 1917, paid a premium for such insurance amounting to \$85.35, which insurance enured to the benefit of the owner of said property, thereby entitling said

bank to a lien for said premium, subsequent, however, to the lien of the mortgage of complainant and the judgment of Globe Tire Company,

IT IS thereupon on this 13th day of September, 1918, by Edwin Robert Walker, Chancellor of the State of New Jersey,

ORDERED, ADJUDGED AND DECREED, 10
and the said Chancellor doth, by virtue of the power and authority of this Court, order, adjudge and decree "that the mortgage aforesaid executed by William K. Grove and Mary B. Grove, his wife, to Allen N. Terbell, dated July 28, 1913, and purporting to secure the sum of \$45,000, is subordinate in lien upon said premises, or upon any interest therein, to the lien of the judgment of Globe Tire Company aforesaid," "and that said bank is estopped from asserting any claim under said mortgage as a prior lien to the lien of said judgment;" 20
and further that the aforesaid mortgage now held by said bank is unenforcible against the interest of Mary B. Grove as aforesaid in the mortgaged premises; further that the parties aforesaid have liens upon the mortgaged premises for the amounts and in the priority above specified, and that unless said amounts be paid to the parties respectively entitled thereto forthwith, then that said mortgaged premises be sold to raise and satisfy the several 30
sums of money due to said parties respectively, that is to say:

In the first place to the defendant Second National Bank of Hoboken the sum of \$1,147.11, together with lawful interest thereon from the date hereof.

In the second place to the complainant Charles F. Nesler the sum of \$11,171.67, together with lawful interest thereon from the date hereof, together with his costs to be taxed. 40

“In the third place to the defendant Globe Tire Company the sum of \$19,155.09, with interest thereon from the date hereof, together with its costs to be taxed.”

10 In the fourth place to the Second National Bank of Hoboken, the sum of \$91.27, together with the sum of \$50 to be taxed as its costs;

and “that a writ of fieri facias do issue for that purpose out of this Court, directed to the Sheriff of the County of Essex, commanding him to make sale according to law of the said mortgaged premises, and that out of the money arising from such sale he pay to the complainant or his solicitors said debt, interest and costs, and also to the aforesaid defendants or their solicitors their said debts, interest and costs, in manner aforesaid; and in
20 case more money should be raised by said sale than shall be sufficient to answer such several payments, that such surplus be brought into this Court to abide the further order of the Court unless otherwise previously disposed of by the order of this Court, and that the said Sheriff make return without delay of his proceedings by virtue of the said writ.

And it is further ORDERED, ADJUDGED
30 AND DECREED that the said defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises when sold as aforesaid by virtue of this writ.

And it is further ORDERED, ADJUDGED
AND DECREED that a counsel fee of \$500.00 be allowed and paid to the counsel of the defendant Globe Tire Company, and that the same be included
40

in its taxed bill of costs and collected with the other items of said bill.

Respectfully advised,

MERRITT LANE,
Vice-Chancellor. 10

Exhibit C-2.

1. Bond of William K. Grove to Charles F. Nesler, for \$20,000, bearing date February 1st, 1910, due February 1st, 1913, with interest at the rate of six per cent. per annum, payable semi-annually.

Exhibit C-3. 20

2. Mortgage William K. Grove and Mary B. Grove, his wife, to Charles F. Nesler, dated February 1st, 1910, recorded on the 15th day of February, 1910, in Book H25 of Mortgages, at pages 200-204.

Exhibit C-4.

\$10,000 Hoboken, N. J., July 28, 1913. 30

On Demand after date I promise to pay to the order of Myself, Ten thousand 00/100 Dollars at the Second National Bank of Hoboken.

With interest 6%. Value received.

No. Due

WM. K. GROVE.

(Endorsed)

WM. K. GROVE. 40

Exhibit C-5.

\$2540.68/100

Hoboken, N. J., Dec. 29, 1915.

On Demand after date I promise to pay to the order of Wm. K. Grove, Twenty-five hundred and forty 68/100 Dollars at the Second National Bank of Hoboken.

10

Value received with interest.

No. Due

C. H. WHARTON.

(Endorsed)

WM. K. GROVE.

(Stamps)

20

Exhibit C-6.

\$30,000.00/100

Hoboken, N. J., Dec. 29th, 1915.

On Demand after date I promise to pay to the order of Myself Thirty-thousand, with interest Dollars at the Second National Bank of Hoboken.

30

Value received.

No. Due

WM. K. GROVE.

(Endorsed)

WM. K. GROVE.

Paid \$5750.00, 5/9/16.

(Stamps)

40

Exhibit C-7.**HENRY M. STRONG & SON**

Established 1854

Buyers of all kinds of
Insurance for the assured.
Insurance Engineering

Eighty-one Fulton Street

10

New York, July 27/15.

Mr. A. N. Terbell,
Second National Bank Bldg.,
Hoboken, N. J.

Dear Sir:

As per the request of Mr. Grove, we herewith 20
enclose you original policies in the German Amer-
ican Insurance Co. covering the frame garage to
the amount of \$5000 and the dwelling to the
amount of \$31,000 replacing policies for like
amount issued for a period of three years from
May 23rd.

Will you kindly return to us policies which you
have, Nos. 188320 and 188321 for cancellation, and
substitute the enclosed policies in place of same.

By so doing you will greatly oblige, 30

Yours respectfully,

H. M. STRONG & SON,
Per WM. E. STRONG.

WES/H.

40

July 31, 1915.

Henry M. Strong,
81 Fulton St.,
New York City.

Gentlemen:

10 We have received your order of July 27th inclosing two insurance policies aggregating \$36000.00 on the property of Mr. Grove of West Orange.

Inclosed please find two expiring ones but they are not the same numbers that you stated in the letter.

Very truly yours,

A. N. TERBELL.

20

Exhibit C-8.

HENRY M. STRONG & SON
BUYERS OF INSURANCE FOR THE ASSURED
81-83 FULTON STREET

New York, June 19/14.

Mr. A. N. Terbell,
2nd National Bank,
Hoboken, N. J.

30

Dear Sir:

Re: WM. K. GROVE—West Orange, N. J.

Ger. Amer.—182074—\$5000
“ “ 182078—\$31,000

Enclosed please find the above mentioned policies covering the building and garage of Wm. K. Grove, on which we have had the loss made pay-

40

able to "A. N. Terbell, as first mortgagee, as his interest may appear," as per request of Mr. Grove of recent date.

Trusting same will prove satisfactory, we remain,

Yours respectfully,

H. M. STRONG & SON,
Per W. E. S.

10

WES/H.

June 23, 1914.

Henry M. Strong & Son,
New York City.

Gentlemen:

20

We beg to acknowledge receipt of yours of June 19th enclosing two policies on the property of W. K. Grove, West Orange, N. J., aggregating \$36,000.

Very truly yours,

A. N. TERBELL,
Cashier.

30

Exhibit C-9.

Certificate of sale for unpaid taxes of lots 23, 29, 33 and 37, of the Town of West Orange, County of Essex, State of New Jersey, purchased by Harrington Co., a corporation on the 22nd day of January, 1917, for the taxes for the year 1914.

40

Exhibit C-10.

Assignment of said certificate of sale to Allen N. Terbell on the 28th day of February, 1917.

Exhibit D-1.

10

THIS INDENTURE, made the twenty-eighth day of July, in the year of our Lord One Thousand Nine Hundred and Thirteen.

BETWEEN William K. Grove and Mary B. Grove, his wife, of the Town of West Orange, in the County of Hudson and State of New Jersey, of the first part;

20 AND Allen N. Terbell of the City of Newark in the County of Essex and State of New Jersey, party of the second part;

30 WHEREAS, the said William K. Grove is justly indebted to the said party of the second part, in the sum of forty-five thousand (\$45,000.00) Dollars, lawful money of the United States of America, secured to be paid by his certain bond or obligation, bearing even date with these presents, in the penal sum of ninety thousand (\$90,000.00) Dollars lawful money as aforesaid conditioned for the payment of the said first-mentioned sum of forty-five thousand (\$45,000) Dollars, lawful money as aforesaid, to the said party of the second part, his executors, administrators or assigns on the twenty-eighth day of July, which will be in the year One Thousand Nine Hundred and Sixteen (1916) and interest thereon, to be computed from the day of the date hereof at and after the rate of six (6%) per cent. per annum, and to be paid every four (4) months;

40

AND IT IS THEREBY EXPRESSLY AGREED that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest, or any part thereof remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of ninety days then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of forty-five thousand (\$45,000.00) dollars, with all arrearage of interest thereon, shall, at the option of the said party of the second part, or his legal representatives, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding; as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

NOW THIS INDENTURE WITNESSETH, that the said parties of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to them

10

20

30

40

in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever,

ALL those lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Town of West Orange in the County of Essex and State of New Jersey, FIRST TRACT: BEGINNING on the North-easterly corner of Northfield and Gregory Avenues running thence along said Gregory Avenue North twenty-five degrees two minutes East four hundred feet to lot No. 15 and land of Walter D. Osborne and thence along that land and lot No. 15 South sixty-five degrees thirty minutes East two hundred and ninety and thirty-five one hundredths feet to land conveyed by Frank Koewing and wife to the Golf Land Company of Essex County by deed dated February 1, 1909, and recorded in the Essex County Register's Office in book R 44 of deeds for Essex County on page 240; and thence along that land South twenty-four degrees forty-three minutes West four hundred feet to Northfield Avenue; and thence along the Northerly side thereof North sixty-five degrees thirty minutes West two hundred and ninety two and fifty-one hundredths feet to Gregory Avenue and the point or place of beginning. Together with all the right, title and interest of the party of the first part, in and to the streets or avenues lying in front of the above described premises. • BEING the same premises conveyed to the said William K. Grove by

Frank Koewing and Jessie E., his wife, by deed dated October 28th, 1909, and recorded in the Register's office of the County of Essex, in book A 46 of deeds for said County, on page 315, SUBJECT to the covenants and restrictions contained in deed from John B. Gardner, et al., Trustees, &c., to Benjamin H. Hutton recorded in book R 14 of deeds for Essex County, page 501 and in deed from Charles G. Landon, et al., Executors, &c., to Charles Gordon Hutton, et al., recorded in book M 24 page 419. 10

SECOND TRACT: Beginning at the corner formed by the intersection of the Westerly line of Gregory Avenue, with the Southerly line of a private right of way known as Hutton Avenue; running thence South, twenty-five degrees two minutes West along said Westerly line of Gregory Avenue four hundred and seven feet to line of land now or formerly belonging to Frank Koewing; thence along said Koewing's line South sixty-five degrees thirty minutes East two hundred and ninety-three feet, thence North twenty six degrees fifty four minutes East four hundred and five and sixty-four one hundredths feet to the Southerly line of Hutton Avenue; thence along said Southerly line of Hutton Avenue, North sixty-five degrees eleven minutes West three hundred and six and nineteen one hundredths feet to the place of beginning. Being part of lot No. 16 and part of lot No. 15 on map entitled "Map of Hutton Park, Orange, N. J., surveyed by Mead & Taylor, under the direction of William B. Hutton, C. E., 35 Broadway, N. Y., December, 1888," together with the soil to the middle of said avenue and private right of way and right of way over said private way; subject to the covenants and restrictions contained in deed from Adolph Francois Rene de Portes and wife to Wal- 20 30 40

10 ter D. Osborne, et al., recorded in book C 38 of deeds for Essex County, page 414. BEING the same premises conveyed to the said William K. Grove by Walter D. Osborne and wife by deed dated November 23, 1909, and recorded in the Register's office of the County of Essex, in book L 46 of deeds for said County, page 164. SUBJECT
also to the covenants and restrictions contained in said last mentioned deed.

20 TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. AND ALSO, all the estate, right, title, interest, dower, right of dower, property, possession, claim and demand
30 whatsoever as well in law as in equity, of the said parties of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: TO HAVE AND TO HOLD the above granted and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his, her and their own proper use, benefit and behoof forever. PROVIDED ALWAYS, and these presents are upon
this express condition, that if the said parties of
30 the first part, their heirs, executors or administrators, shall well and truly pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted,
40 shall cease, determine and be void.

AND the said William K. Grove for himself, his heirs, executors and administrators, does covenant and agree to pay unto the said party of the second part, his heirs, executors, administrators or assigns, the said sum of money and interest, as mentioned above and expressed in the conditions of the said bond.

10

AND IT IS ALSO AGREED, by and between the parties to these presents, that the said parties of the first part, shall and will keep the buildings erected, and to be erected, upon the lands above conveyed, insured against loss or damage by fire, by insurers, and in an amount approved by the said party of the second part, his executors, administrators or assigns, and assign the policy and certificates thereof to the said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, payable on demand, with interest at the rate of six (6) per cent. per annum, from the time of payment of such premium or premiums.

20

AND THE SAID William K. Grove, the owner of the lands above described for himself, his heirs and assigns, does further covenant and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, that he, she or they will pay in full, all taxes levied, or to be levied, upon the lands embraced in this mortgage, and will not claim any credit on, or make any deduction from the interest or principal hereby secured by reason of the payment of any taxes so levied, or to be levied, during the continuance

30

40

of the lien of this mortgage, and upon the breach of this covenant or any part thereof, this mortgage may become and be due and payable immediately, at the option of the said party of the second part hereto.

10 IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

WILLIAM K. GROVE. (Seal.)
MARY B. GROVE. (Seal.)

Signed, sealed and delivered
in the presence of
ALBERT E. ROBINSON.

20 (Seal.)

State of New Jersey, } ss.:
County of Essex,

30 BE IT REMEMBERED, that on this twenty-eighth day of July, in the year of our Lord One Thousand Nine Hundred and Thirteen before me, the subscriber, a Commissioner of Deeds, personally appeared, William K. Grove and Mary B. Grove, his wife, who, I am satisfied, are the mortgagors mentioned in the within Instrument to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed; and the said Mary B. Grove, being by me privately examined, separate and apart
40 from her said husband, further acknowledged that

she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

ALBERT E. ROBINSON,
Commissioner of Deeds for
New Jersey. 10

Endorsements:

MORTGAGE.

WILLIAM K. GROVE, et ux,

to

ALLEN N. TERBELL.

20

Dated, July 28th, 1913.

Received in the Register's Office of the County of Essex, N. J., on the 29th day of July, A. D. 1913, at 11:27 A. M., and recorded in Book I 31 of Mortgages for said County, on pages 586-589.

THOMAS P. ALWORTH, 30
Register.

Received

Register's Office,

July 29, 11.27 A. M., 1913.

Law Office of
F. N. Eberhard
Hoboken N J

Second Nat. Bank Building

40

Exhibit D-2.

KNOW ALL MEN BY THESE PRESENTS:
That I, William K. Grove, of the town of West
Orange, in the County of Essex and State of New
Jersey, am held and firmly bound unto Allen N.
Terbell, of the City of Newark, in the County of
Essex and State of New Jersey in the penal sum
10 of ninety thousand (\$90,000.00) dollars lawful
money of the United States of America, to be paid
to the said Allen N. Terbell, his executors, admin-
istrators or assigns: FOR WHICH PAYMENT
well and truly to be made, I bind myself, my heirs,
executors and administrators, severally, jointly
and firmly by these presents. Sealed with my seal.
Dated the twenty-eighth day of July One Thou-
sand Nine Hundred and Thirteen.

20 THE CONDITION of the above obligation is
such that if the above bounden William K. Grove,
his heirs, executors or administrators, shall well
and truly pay, or cause to be paid, unto the above
named Allen N. Terbell, his executors, adminis-
trators or assigns, the just and full sum of forty-
five thousand (\$45,000.00) dollars on the twenty-
eighth day of July which will be in the year One
Thousand Nine Hundred and Sixteen, and the in-
30 terest thereon, to be computed from the day of
the date hereof at and after the rate of six per
cent. per annum, and to be paid every four (4)
months; without any fraud or other delay, then
the above Obligation to be Void, otherwise to re-
main in full force and virtue.

AND IT IS HEREBY EXPRESSLY
AGREED, that should any default be made in the
payment of the said interest, or of any part there-
of, on any day whereon the same is made payable
40

as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said interest or any part thereof remain unpaid and in arrear for the space of thirty dys, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of ninety days then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of forty-five thousand (\$45,000.00) dollars with all arrearage of interest thereon, shall, at the option of the said Allen N. Terbell or his legal representatives, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

WILLIAM K. GROVE. (L. S.)

Signed, Sealed and Delivered
in the Presence of

ALBERT E. ROBINSON.

BOND.

WILLIAM K. GROVE,
TO
ALLEN N. TERBELL.

Amount, \$45,000.00

Date, July 28th, 1913

Due, July 28th, 1916

Interest Payable semi-annl'y, 6%

Exhibit D-3.

KNOW ALL MEN BY THESE PRESENTS:
That I, Allen N. Terbell, of the City of Newark, in
the County of Essex and State of New Jersey, party
of the first part, in consideration of the sum of
one dollar and other lawful money of the United
States of America, to me in hand paid by the
10 Second National Bank of Hoboken, Hudson
County, New Jersey party of the second part, at
or before the ensealing and delivery of these
presents, the receipt whereof is hereby acknowl-
edged, have granted, bargained, sold, assigned,
transferred and set over, and by these presents do
grant, bargain, sell, assign, transfer and set
over unto the said party of the second part, its
successors or Assigns a certain Indenture of Mort-
20 gage bearing date the twenty-eighth day of July,
One Thousand nine Hundred, thirteen made by Wil-
liam K. Grove and wife on lands in West Orange,
Essex County, New Jersey to secure the payment
of the sum of forty-five thousand (\$45,000.00) dol-
lars which mortgage is recorded in the Register's
office of the County of Essex in Book 131 of Mort-
gages, pages 586-589.

TOGETHER with the bond or obligation therein
described, and the money due and to grow due
thereon, with the interest. TO HAVE AND TO
30 HOLD, the same unto the said party of the second
part, its successors or assigns forever subject only
to the proviso in the said Indenture of Mortgage
mentioned: AND I do hereby make, constitute,
and appoint the said party of the second part, my
true and lawful attorney, irrevocable, in my name,
or otherwise, but at its proper costs and charges,
to have, use and take all lawful ways and means

40

for the recovery of all the said money and interest;
and in case of payment, to discharge the same as
fully as I might or could do if these presents were
not made: AND I do hereby covenant, promise
and agree, to and with the said party of the second
part, that there is now due and owing upon the
said Bond and Mortgage the sum of forty-five thou- 10
sand (\$45,000.00) dollars and interest thereon at
and after the rate of six per cent. per annum and
to be paid semi-annually;

IN WITNESS WHEREOF, I have hereunto
set my hand and seal the thirtieth day of July in
the year of Our Lord One Thousand Nine Hundred
and thirteen.

ALLEN N. TERBELL.

Signed, sealed and delivered 20
in the presence of
F. N. EBERHARD,

State of New Jersey, } ss.:
County of Hudson,

BE IT REMEMBERED, That on this 30th day
of July, in the year of our Lord One Thousand
Nine Hundred thirteen, before me, the subscriber,
a Master in Chancery of the State of New Jersey, 30
personally appeared, Allen N. Terbell, who I am
satisfied, is the assignor in the within Deed of As-
signment named; and I having first made known to
him the contents thereof, he did hereby acknowl-
edge that he signed, sealed and delivered the same
as his voluntary act and deed, for the uses and pur-
poses therein expressed.

FRED N. EBERHARD,
Master in Chancery of New Jersey.

This instrument was not recorded. 40

Exhibit E-1.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF NEW JERSEY.

10

In the Matter
of
GROVE STRAW HAT MANUFACTURING COMPANY,
Bankrupt.

In Bankruptcy
Proof of Debt
and Power of
Attorney.

20

At Hoboken City, in the District of
, on the 13th day of May, A. D. 1915,
came Second National Bank of Hoboken, in the
County of , in said District of
, and made oath and says that he is a
creditor herein;

If Partnership (a member of the firm of.....
.....; composed of deponent and
.....

30

If Corporation (Treasurer of the Second Na-
tional Bank, a corporation incorporated by and
under the laws of the State of Congress and carry-
ing on business at City of Hoboken in the County
of Hudson and the State of New Jersey, and that
he is duly authorized to make this proof); that the
said the Grove Straw Hat Manu-
facturing Company against whom a petition for
adjudication of bankruptcy has been filed, was at
and before the filing of said petition, and still is,
justly and truly indebted to said,

40

in the sum of \$45,000, that the consideration of said debt is as follows:

Goods sold and delivered to said bankrupt at his special instance and request

a statement of said account is hereto annexed; that no part of said debt has been paid; that no note has been given therefor, except as herein set forth; that there are no set-offs or counterclaims to the same; that no judgment has been recovered thereon; and that this deponent has not, nor has said nor has any person by order, or to this deponent's knowledge or belief, for use, had or received any manner of security for said debt whatever. 10

A. N. Terbell

If Corporation, Treasurer signs his own name. 20

If Partnership, partner signs his own name.

(Corporate Seal)

Sworn to and subscribed before me this
13th day of May, 1915.

W. C. RUE,
Notary Public, N. J.
(Notarial Seal)

To FREDERICK N. EDWARD, or REPRESENTATIVE: 30

The undersigned, of the City of Hoboken, in the County of Hudson, and State of New Jersey, a creditor of the above-named bankrupt, does hereby authorize you to attend the meeting or meetings of creditors of the bankrupt advertised or directed to be held at a Court of Bankruptcy or at such other place and time as may be appointed by the Court 40

for holding such meeting or meetings, or any adjournment or adjournments thereof that may be held, and then and there from time to time and as often as there may be occasion, for said creditor and in said creditor's name, to vote for or against any proposal or resolution that may be then submitted under the act to establish a uniform system of bankruptcy throughout the United States, approved July 1st, 1898, and in the choice of trustee or trustees of the estate of said bankrupt and to accept such appointment of trustees, and with like powers to attend and to vote at any meeting or meetings of creditors or sitting or sittings of the Court which may be held therein for any purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of the said creditor's debt, and to receive payments of dividends and money due said creditor under any composition, or for the declaration of dividend or for any other purpose in said creditor's interest whatsoever.

IN WITNESS WHEREOF, the said creditor, Second National Bank of the City of Hoboken, N. J. has hereunto set its hand and seal this 13th day of May, 1915.

A. N. TERBELL Cash.
(Corporate Seal)

Signed, sealed and delivered
in the presence of

.....,
Witness.

Acknowledged before me this 13th day of May, 1915.

(Notarial Seal)
(Stamp)

W. C. RUE,
Notary Public, N. J.

ENDORSED:—No. 12—UNITED STATES DISTRICT COURT, District of New Jersey—IN THE MATTER OF GROVE HAT M. CO., Bankrupt—PROOF OF DEBT AND POWER OF ATTORNEY OF 2 Nat. Bk. of Hob. \$45,000—Filed in the office of Macgrane Coxe, Referee in Bankruptcy, May 18, 1915—HEYMAN & HEYMAN, Counsellors at Law, 15 Exchange Place, Jersey City, N. J. 10

\$35,000. Hoboken, N. J. March 11, 1915.

Thirty days after date we promise to pay to the order of Wm. K. Grove Thirty-five thousand 00/100 Dollars at the Second National Bank, Hoboken, N. J.

Value received

Grove Straw Hat Mfg. Co., 20
Due April 10/15. W. K. Grove, Pres.

(Endorsed on back) Wm. K. Grove—Grove Straw Hat Mfg. Co. Wm. K. Grove, Pres.

\$10,000. Hoboken, N. J., Feb. 3rd, 1911.

On demand we promise to pay to the order of W. K. Grove Ten Thousand 00/100 Dollars at Second National Bank of Hoboken, N. J.

Value received with interest.

No. Due 30

Grove Straw Hat Mfg. Co.,
W. K. Grove, Pres.

(Endorsed on back) Wm. K. Grove

Duly certified by

ALEX. GILCRIST, JR.,
Clerk.

40

Exhibit E-2.

Pass book of Mary B. Grove with the Second National Bank of Hoboken, showing deposits beginning with February 8th, 1911, and extending down into June, 1913, showing numerous deposits to credit of Mary B. Grove aggregating \$65,000.00 dollars.

10

Exhibit E-3.

CHECKS OF MARY B. GROVE FOR HOUSE PAYMENTS IN
RE GROVE MATTER.

	1911		Order of	Amt.
	Dec. 30	#5	W. K. Grove, first payment on house signed Mary B. Grove	\$5,000.00
20	1912			
	Feb. 28	#14	W. K. Grove, house payments (voucher missing)	9,700.00
	Apr. 12	#18	North-Eastern Con. Co., 1st pay- ment on garage. Wm. K. Grove, Sp. Acct.	2,850.00
	12	#19	Chas. C. Owen Company, for trees, etc., Wm. K. Grove, Sp. Acct.	700.00
	22	#20	North Eastern Con. Co., Wm. K. Grove; Sp. Act.	3,500.00
30	May 7		North Eastern Construction Co., payment on house, Wm. K. Grove, Sp. Acct.	3,500.00
	18	#25	North Eastern Con. Co., ctft. Nos. 114-116, extras, 452.67 and 871.32, Wm. K. Grove, Sp. Acct.	1,323.99
	25	#26	Donato Fusco, grading and roads on acct., Wm. K. Grove, Sp. Acct.	1,000.00

40

Exhibits.

June 8	#27	Donato Fusco, grading, Wm. K. Grove, Sp. Acct.	700.00	
10	#28	North Eastern Con. Co., payment on garage, Wm. K. Grove, Sp. Acct.	2,350.00	
July 6	#33	Donato Fusco, Wm. K. Grove, Sp. Acct.	1,000.00	10
12	#38	Robert Griffen Co. (no check stub), Wm. K. Grove, Sp. Acct.	500.00	
12	#35	North Eastern Con. Co., \$3,300, 4th payment on house \$1,148.50, extras, Wm. K. Grove, Sp. Acct.	4,448.50	
12	#36	A. T. Remich, Wm. K. Grove, Sp. Acct.	600.00	
12	#37	J. B. McCoy, electric fixtures, Wm. K. Grove, Sp. Acct.	600.00	
12	#38	Orange Screen Co., Wm. K. Grove, Sp. Acct.	395.00	20
12	#39	The Browe Co., for electric fixtures, Wm. K. Grove, Sp. Acct.	131.40	
27	#40	Donato Fusco, Wm. K. Grove, Sp. Acct.	700.00	
Aug. 3	#41	Donato Fusco, Wm. K. Grove, Sp. Acct.	400.00	
20		J. B. McCoy & Son, electric fixtures, Wm. K. Grove, Sp. Acct.	555.90	
24	#44	Stumpp & Walter Co., grass seeds, Wm. K. Grove, Sp. Acct.	131.25	30
24	#45	Orange Screen Co., Wm. K. Grove, Sp. Acct.	32.00	
24	#46	Robert Griffen Co., Wm. K. Grove, Sp. Act.	535.30	
24	#47	Donato Fusco, grading, Wm. K. Grove, Sp. Acct.	200.00	
1913			\$40,853.34	
Jan. 11	#161	Corn Exchange Bank	6,600.00	40
			\$47,453.34	

Exhibit E-9.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

10

In the Matter

of

GROVE STRAW HAT MFG. COM-
PANY, a corporation,
Bankrupt.

Offer of
Composition.

20

To the Honorable Macgrane Coxe, Referee in
Bankruptcy for the Southern District of New
York:

The petition of Grove Straw Hat Mfg. Com-
pany, a corporation, respectfully shows:

30

That a petition in bankruptcy was filed against
it in this cause and an order entered adjudicating
it a bankrupt; that thereafter an order of reference
was made in this cause to your Honor as Referee;
it does hereby offer a composition of fifteen per
cent. of the claims of its creditors allowed or to be
allowed, except those entitled to priority in this
proceeding, to be paid in cash.

WHEREFORE your petitioner prays that a
meeting of its creditors be called for the purpose
of considering said offer of composition.

GROVE STRAW HAT MFG. CO.,
Petitioner.

WM. K. GROVE, Pres.

40

United States of America, }
District of New Jersey, } ss.:
County of Hudson, }

William K. Grove, being duly sworn according to law, on his oath deposes and says he is president of the Grove Straw Hat Mfg. Company, a corporation, the bankrupt named in the foregoing petition; that he has read the same and knows the contents thereof, and the same is true. 10

WM. K. GROVE.

Sworn to and subscribed before me this
28th day of May, 1915.

THOMAS F. FARRELL,
Notary Public
of New Jersey. 20
(Notarial Seal)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter	}	Acceptance of Composition.
of		
GROVE STRAW HAT MFG. CO., Bankrupt.		

We, the undersigned creditors of above named bankrupt, do hereby accept the offer of composition of 15% heretofore made by said bankrupt.

July 2, 1915. 40

	Name of Creditor.	Amount.
	Hoboken Box Company, by J. J. Cuyler, Atty.	\$318.20
	Robert Muller & Co., by J. J. Cuyler, Atty.	402.52
10	R. Cinelli & Sons, Inc., by J. J. Cuyler, Atty.	130.50
	J. S. Plummer & Co., by J. J. Cuyler, Atty.	359.60
	Geo. S. Bracker Mfg. Co., by J. J. Cuyler, Atty.	99.90
	D. P. Winne Co., by J. J. Cuyler, Atty.	30.80
	George B. Burnett & Son, by Townsend & Guiterman	77,061.94
	Public Service Electric Co., Joseph F. Crater, Assignee, Joseph F. Crater.	199.55
20	Jagels & Bellis, Joseph F. Crater, Assignee, Joseph F. Crater.	197.55
	L. F. Dommerich & Company, Joseph F. Crater, Assignee, Joseph F. Crater	21.25
	Western Union Telegraph Co., Joseph F. Crater, Assignee, Joseph F. Crater	3.00
	R. H. Cooney Co., Joseph F. Crater, Assignee, Joseph F. Crater.	538.69
30	Mulligan & Higgins Glue Co., E. H. Babbitt, Assignee, Townsend & Guiterman	76.40
	Adams Mfg. Co., E. H. Babbitt, Assignee, Townsend & Guiterman.	193.11

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of
GROVE STRAW HAT MFG. CO.,
Bankrupt.

Acceptance of
Composition. 10

We, the undersigned creditors of the above
named bankrupt, do hereby accept the offer of com-
position heretofore made by said bankrupt.

July 2, 1915.

20

Name of Creditor.	Amount.
Lord, Day & Lord, per C. J. Quick....	\$2,357.44
The Second National Bank of Hoboken, by F. N. Eberhard, Atty.	45,000.00
Wm. K. Grove	700.00
Burton Bros. & Co., by Townsend & Guiterman, Charles Biggs, As- signee	242.68

ENDORSED:—United States District Court, 30
Southern District of New York—In the Mat-
ter of Grove Straw Hat Manufacturing Com-
pany, Bankrupt—Acceptance of Composition
—Filed in the office of Macgrane Cox, Ref-
eree in Bankruptcy, Jul. 2, 1915.

40

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

10

In the Matter

of

GROVE STRAW HAT MFG. COM-
PANY,
Bankrupt.

} Waiver.

20

We, the undersigned, Trustees in the above en-
titled matter, attorney for the Petitioning Creditors,
and attorney for the Bankrupt, do hereby waive
the payment of all fees, commissions and disburse-
ments in this proceeding, and consent to the con-
firmation of a composition without further notice.

Dated, July 6th, 1915.

LEO OPPENHEIMER,

Trustee.

30

FOSTER & CUNNINGHAM,
Attorneys for Petitioning Creditors.

FREDERICK W. SPERLING,
Attorney for Bankrupt.

40

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

In the Matter	}	Waiver.	10
of			
GROVE STRAW HAT MFG. COM- PANY,			
Bankrupt.			

We, the undersigned, creditors of the Grove Straw Hat Mfg. Company, the above named bankrupt, do hereby waive the payment to us of any dividend in the above entitled matter and consent to the entry of an order confirming the composition offered herein, and to the entry of an order directing the Trustee to turn over all assets to the bankrupt without any further notice to us, and without any payment to us of any money whatsoever in this matter. 20

Dated, July 6th, 1915.

GEO. B. BURNETT & SON.
E. R. FITZ MAURICE, Secy.

Acknowledged before me at New York City, July 7th, 1915. 30

HARRY WANDMACHER,
Commissioner of Deeds,
City of New York,

Residing in Borough of Brooklyn.

Certs. filed: N. Y. Co. Clerk No. 116; N. Y. Co. Register No. 16946; Kings Co. Clerk No. 60; Kings Co. Reg. No. 6091; Bronx Co. Clerk No. 62; Bronx Co. Reg. No. 6057.

Com. expires Apl., 1916.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

10	In the Matter	}	Waiver.
	of		
	GROVE STRAW HAT MFG. COM-		
	PANY, Bankrupt.		

20 We, the undersigned, creditors of the Grove Straw Hat Mfg. Company, the above named bankrupt, do hereby waive the payment to us of any dividend in the above entitled matter and consent to the entry of an order confirming the composition offered herein, and to the entry of an order directing the Trustee to turn over all assets to the Bankrupt without any further notice to us, and without any payment to us of any money whatsoever in this matter.

Dated, July 6th, 1915.

30 SECOND NATIONAL BANK OF HOBOKEN,
N. J.
(Corporate Seal) by A. N. TERBELL,
Vice-Pres.

Attest:

PHILIP STEPHEN,
Asst. Cashier.

Acknowledged before me at Hoboken, Hudson
County, New Jersey, July 7th, 1915.

40 Duly attested.

Exhibit E-10.

IN THE DISTRICT COURT OF THE UNITED
STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of
GROVE STRAW HAT MFG. CO.,
Bankrupt.

In Bankruptcy.
Offer Confirming
Composition.

10

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to Bankruptcy;

20

30

It is therefore on this 21st day of July, 1915, hereby ordered that the said composition be, and it hereby is, confirmed, and it is further

ORDERED that the distribution of the moneys deposited in these proceedings, shall be made by the

40

trustee herein, by checks drawn and signed by him and countersigned by Macgrane Coxe, Esq., the Referee in charge of this case, as follows:

10 (1) That he first pay the claims of creditors entitled to priority, as fixed by Schedule "D," hereto annexed and made a part of this order.

(2) That he pay the costs of these proceedings in the sums named in the schedule hereto annexed and marked Schedule "A," which is hereby made a part of this order.

20 (3) That he pay 15% of the several claims of general creditors whose claims have been scheduled, filed or proved in accordance with the schedule hereto attached and marked Schedule "B," which schedule is hereby made a part of this order.

(4) That he pay 15% of the several claims of general creditors whose claims have been scheduled but not filed, in accordance with the schedule hereto attached and marked Schedule "C," which said schedule is hereby made a part of this order.

30 (5) To pay the balance remaining on deposit, after the payment of the above mentioned claims to said bankrupt or his attorney.

LEARNED HAND,
U. S. D. J.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

In the Matter	}	In Bankruptcy. No. 21524.	10
of			
GROVE STRAW HAT MANUFACTUR- ING Co.,			
Bankrupt.			

SCHEDULE "A."

Referee's Indemnity	31.60	20
" filing fees	5.50	
" commissions	141.54	
Bill of F. C. McCarrick, Stenographer	28.90	
A. S. Reis, Clerical services to Trustee	25.00	
Correct :		

MACGRANE COXE,
Referee in Bankruptcy.

30

40

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

10	In the Matter of GROVE STRAW HAT MANUFACTUR- ING Co., Bankrupt.	In Bankruptcy. No. 21524.
----	--	--------------------------------------

SCHEDULE "B."

	Name	Amount	15% Composi- tion
20	L. F. Dommerick & Co., As- signed to Joseph F. Crater	\$21.25	3.19
	Lord, Day & Lord, P/A Allen E. Foster	2,357.44	353.62
	Adams Mfg. Co., P/A Heyman & Heyman Assigned to E. H. Babbitt	193.11	28.97
30	Burton Bros. & Co., P/A Rosenberg, Levis & Ball, Assigned to Charles Biggs	250.18	37.53
	H. Ray Paige	5,491.05	823.66
	George S. Bracker Mfg. Co., P/A Foster & Cunningham	99.90	14.98
	Wm. K. Grove, P/A Heyman & Heyman	700.00	105.00
	J. S. Plummer & Co., P/A Heyman & Heyman	359.60	53.94
40	Hoboken Box Company,		

233
Exhibits.

P/A Heyman & Heyman	318.20	47.73	
R. Cinelli & Sons, Inc.,			
P/A Heyman & Heyman	130.50	19.57	
Sec. Natl. Bank of Hoboken,			
P/A Heyman & Heyman	45,000.00	6,750.00	
(Waived)			
Jagels & Bellis,			10
P/A Frederick N. Edward,			
Assigned to Joseph F.			
Crater	197.50	29.62	
Robert Muller & Co.,			
P/A Foster & Cunningham	402.52	60.38	
Mulligan & Higgins Glue			
Mfg. Co., Assigned to E. H.			
Babbitt	76.40	11.46	
George B. Burnett & Son,			
P/A Einstein, Townsend			20
& Guiterman	86,977.18	13,046.58	
(Waived)			
D. P. Winne Co.	30.80	4.62	
Public Service Electric Co.,			
Assigned to Joseph F.			
Crater	171.80	25.77	
Public Service Gas Co.....	18.90	2.83	
R. H. Comey Co.,			
P/A Lowther, Smith &			
Russell, Assigned to			30
Joseph F. Crater	1,338.16	200.72	
(Waived)			
The Western Union Com-			
pany, Assigned to Jos. F.			
Crater	3.00	.45	

\$144,137.49 21,620.62

Correct:

MACGRANE COXE,
Referee in Bankruptcy. 40

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

10

In the Matter
of
GROVE STRAW HAT MANUFACTUR-
ING Co.,
Bankrupt.

In Bankruptcy,
No. 21524.

SCHEDULE "C."

CLAIMS SCHEDULED BUT NOT FILED.

20

Name (Secured Creditors)	Amount	Composi- tion
Mrs. B. Algeo	\$24,000.00	3,600.00
H. Brittan	15,700.00	2,355.00
	\$39,700.00	5,955.00

Correct:

30

MACGRANE COXE,
Referee in Bankruptcy.

40

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

In the Matter	}	In Bankruptcy. No. 21524.	10
of			
GROVE STRAW HAT MANUFACTUR- ING Co.,			
Bankrupt.			

SCHEDULE "D."

LIST OF CLAIMS FILED IN PRIORITY.

Name	Amount	20
City of New York	\$208.36	
Charles F. Badger	183.33	
Elmer M. Downs	183.33	
Henry C. Brinkman	81.30	
Eustice Collins	75.79	
(Expunged, Notice of Motion Attached)		
	\$732.11	

Correct:

30

MACGRANE COXE,
Referee in Bankruptcy.

Duly certified.

Exhibit E-11.

Certified copy of record of attachment suit, Globe
Tire Company vs. William K. Grove, for the sum
of \$36,000.00, issued out of the Circuit Court of 40

Essex County, State of New Jersey, on the 21st day of March, 1917, returnable on the 3rd day of April, 1917, together with a certified copy of return to the same; also certified copy of the complaint. Complaint avers dealings between the plaintiff and defendant upon running account since April 3, 1916, and demands judgment of \$17,752.29, also answer and counterclaim in said action by William K. Grove, also reply to answer and counterclaim by the Globe Tire Company, also interlocutory order for summary judgment for part of the amount claimed of \$10,467.33. Order of summary judgment in the case of Globe Tire Company, Plaintiff, vs. William K. Grove, Defendant, in the Essex County Circuit Court, for the sum of \$18,162.16, which amount included the amount of the judgment theretofore entered upon part of plaintiff's claim, under date of August 13, 1917.

Exhibit E-12.

THIS AGREEMENT made this 3rd day of February, 1916, by and between the GLOBE TIRE COMPANY INC., of New York, N. Y., hereinafter known as the Seller, party of the first part,

AND

WILLIAM K. GROVE, of West Orange, N. J., hereinafter known as the Buyer, party of the second part,

That for and in consideration of the understandings and agreements hereinafter contained, and of an initial order amounting to dollars,

the Seller agrees to sell to the Buyer Automobile Tires and Tubes in accordance with the terms and conditions hereinafter specified; and the Buyer agrees to purchase the Seller's Tires and Tubes exclusively;

That the prices are to be those quoted by the Seller in their current price list, it being understood that, owing to changes from time to time in manufacturing costs, the list prices and discounts are subject to change, of which notice will be given by the Seller in writing; and the new price list will then become effective; 10

That should the Seller reduce their selling list prices, a credit will be allowed for the difference in the invoice net prices for such unsold quantities as may have been purchased during the preceding thirty days; 20

That discounts will be allowed from the current price list of 20-12½-5-5%. Payments to be made by the 10th of the second month following date of shipments less 5% cash discount;

That when payments in cash amounting to Fifty Thousand Dollars (\$50,000) are received from the Buyer on orders accepted within one year by the Seller, the Seller will give the Buyer a Merchandise Credit amounting to two and one-half per cent. (2½%) on the total net purchases for that year; 30

That deliveries are to be F. O. B. Trenton, N. J. or New York, N. Y., at the option of the Seller, with freight allowed to Newark, N. J. on shipments weighing over one hundred (100) lbs., the freight receipts to be returned to the Seller for credit; and freight rate equivalent to be allowed on express shipments weighing over one hundred

(100) lbs. No credit allowance to be made for either freight or express shipments when the weight is less than 100 lbs. Deliveries are contingent upon strikes, fire, accident, or other delay unavoidable or beyond the reasonable control of either party.

- 10 That the Seller hereby grants to the Buyer the exclusive right to sell Globe Tires and Tubes in the following territory: The Counties of Morris, Warren, Sussex, Passaic, Bergen, Essex, Union, Middlesex, Somerset, Hunterdon, Hudson, in the State of New Jersey.

That the Buyer will assume all adjustments on Tires and Tubes, for which an additional discount of $2\frac{1}{2}\%$ on the net sales will be allowed.

- 20 Should the Buyer fail to make any payment according to the terms of this Agreement, the Seller may, at his option, cancel said Agreement or refuse to deliver further shipments until the account is settled to the satisfaction of the Seller; otherwise, this Agreement to continue in force for one year, but may be terminated at any time by either party on thirty days written notice to the other party.

- 30 All previous conditions or agreements between the parties hereto, either verbal or written, are hereby abrogated and cancelled; and no changes or modifications shall be binding on the part of the Seller unless in writing signed by an Executive Officer of the GLOBE TIRE COMPANY INC., this constituting the entire Agreement between the parties hereto.

THIS AGREEMENT to be come effective when signed by an Executive Officer of the GLOBE TIRE COMPANY INC., of New York.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands this 3rd day of February, 1916.

GLOBE TIRE COMPANY INC., Seller,
By JOSEPH P. HALL, Pres.,
WM. K. GROVE, Buyer. 10

In the presence of
J. W. BOGARDUS.

Exhibit E-13.

Original ledger account of Globe Tire Company with William K. Grove, beginning with February 1st, 1916, showing the debits and credits of the account, extending over a period down to March 31st, 1917, the first sheet showing debits up to the 24th day of February, 1916, of \$2,638.82 and credits of \$86.77; second sheet, beginning with February 28th, 1916, and ending March 13th, 1916, the total of debits of \$5,201.06 and on this sheet is shown a credit of the amount brought forward from previous sheet of \$112.16; third sheet, beginning with March 13th, 1916, and ending April 8th, 1916, showing debits with the amount forwarded from previous sheet, of \$11,143.83, and amount of credits \$3,764.03, which included the amount forwarded from previous sheets; page 4, beginning with April 7th, 1916, and ending April 29th, 1916, showing debts of \$14,149.82, which amount includes the amount forwarded from previous sheets, and the amount of credits shown on this sheet is \$9,574.61, 40

- which includes the amount of credits forwarded from former sheets; sheet number 5, beginning with April 29th, 1916, and ending May 22nd, 1916, showing debits of \$17,218.92. This includes amount forwarded from previous sheets, credits on this sheet show \$12,463.92, including amount forwarded from former sheets; the sheet numbered 6, beginning with May 23rd, 1916, and ending June 7th, 1916, shows a total of debits of \$19,948.90 and credits of \$14,523.30, both include debits and credits forwarded from former sheets; sheet No. 7, beginning with June 8th, 1916, down to June 17th, 1916, showing debits of \$22,113.57, and credits as forwarded from previous sheets \$14,523.30; sheet number 8, beginning June 19th, 1916, and ending July 7th, 1916, shows debits of \$26,028.16 and credits of \$17,341.15, both include amounts forwarded from previous sheets; sheet No. 9, beginning July 7th, 1916, down to and including July 21st, 1916, debits \$27,221.65 and credits \$17,341.15, both including amounts forwarded from previous sheets; sheet No. 10, commencing with July 19th, 1916, and ending August 4th, 1916, shows debits of \$29,138.15 and credits of \$24,118.94, both including amounts forwarded from previous sheets; sheet No. 11, beginning with August 4th, 1916, down to August 15th, 1916, shows debits of \$31,186.83 credits of \$24,134.56, both including amounts forwarded from previous sheets; sheet number 12, commencing August 16th, 1916, and ending August 30th, 1916, shows debits of \$34,466.80 and credits of \$24,166.51, both including amounts forwarded from previous sheets; sheet number 13, commencing August 30th, 1916, and ending September 9th, 1916, shows debits of \$38,317.56, and credits of \$28,583.95, both includ-

ing amounts forwarded from previous sheets; sheet No. 14, commencing September 9th, 1916, and ending September 18th, 1916, shows debits of \$42,495.96 and credits of \$28,583.95, both including amounts forwarded from previous sheets; sheet No. 15, commencing September 19th, 1916, ending September 29th, 1916, shows debits of \$47,988.85 and credits of \$28,583.95, both covering amounts forwarded from previous sheets; sheet No. 16, beginning with September 29th, 1916, down to and including October 11th, 1916, shows debits of \$53,440.71 and credits of \$34,461.19, both include amounts forwarded from previous sheets; page 17, which commences with October 12th, 1916, and covers down to and including November 11th, 1916, shows a debit of \$60,092.52 and credits of \$37,845.47, both including amounts brought down from previous sheets; page 18, which commences with November 13th, 1916, and down to and including December 30th, 1916, shows debits of \$74,276.96, and credits of \$53,877.20; sheet number 18, commencing on January 1st, shows that from such time up to the end of that year that W. K. Grove was indebted to the Globe Tire Company in the sum of \$20,399.76, and on January 2nd, 1917, commencing with this balance of debits of \$20,399.76, there was added up to January 20th an additional sum making the total debits up to January 20th, 1917, of \$22,991.82 and the credits beginning with January 1st, 1917, down to March 31st, 1917, were \$5,411.43.

Some of the above summaries include credits representing promissory notes given by William K. Grove to Globe Tire Company; it also include debts charging said notes back to the account when not paid.

Copy of Exhibit E-14.**GROVE STRAW HAT MANUFACTURING CO.
BALANCE SHEET.**

As at February 27, 1915.

Assets		Liabilities	
	Cash in Bank	\$195.98	Accounts Payable \$9468.58
10	Cash in Drawer	100.00	Wages 1439.31
	Aldrich Hat Co.	2.50	Notes Payable 52500.00
	Geo. B. Burnett Son		Geo. B. Burnett Son
	Sales a/c	78227.44	Advance a/c 164989.36
	Consign a/c	18505.66	W. K. Grove 700.00
	Gatti McQuade	34.66	Mortgage on Real
	Gotthold & Co.	401.76	Estate 39700.00
	Inventory Feb. 27,		Reserve Inventory 1470.38
	1915	37138.05	Capital Stock 150000.00
	Real Estate	51000.00	
20	Improvements to Bldg.	19307.98	
	Mchy & Fixtures	43977.63	
	Good Will	18500.00	
	Profit & Loss	152875.97	
		420267.63	420267.63

BALANCE SHEET MARCH 31, 1915.

30 With the exception of the Inventory which is now being taken, a substitution of the figures given below for those of the same accounts in the Balance Sheet of Feb. 27, 1915, and using the other figures of the Feb. Balance Sheet as they stand will give practically the figures of the Balance Sheet of March 31, 1915.

Assets		Liabilities	
	Geo. B. Burnett & Son		Accounts Payable \$3399.18
	Sales a/c	\$90927.38	Wages Payable 0.00
	Consign a/c	19830.51	Notes Payable 50000.00
			Geo. B. Burnett & Son,
10			Advance a/c 177904.56

Exhibit E-15.

New York, July 2, 1913.

Dear Mrs. Grove:

The affairs of the Grove Straw Hat Company, which Mr. Grove and your brother have been discussing with me for the last month, would make a long story, but as you are now about to put \$50,000 into that business, I think it better for me to explain briefly my theory of the situation. 10

The examination of the affairs of the Hat Company made by the accountants, together with the information which Mr. Grove gives us, indicates that money has been lost within the last two years—partly by unprofitable extensions of the business, partly by unnecessarily extravagant methods of doing business, and partly by the defalcations of the bookkeeper. It also appears that the value of the good will of the Company and of its factory and machinery amounts to a great deal, but while these are very valuable so long as the Company continues in business, they would be sacrificed and might bring little if business were now to be discontinued. 20

With some people the present situation would involve the alternatives either of putting in more money, or of allowing the business to go through bankruptcy. But knowing your personal attitude toward such matters, I feel that if the business were stopped and bankruptcy allowed, as it would, you would sooner or later insist on paying Mr. Grove's debts, so that you would in the end not only have the burden of this to carry, but would lose the large sum now represented by the good will, the factory, stock, etc., which can be made to yield a valuable return if the business goes on. 30

40

10 You also have given a guaranty to the Hanover Bank for \$25,000, and have invested a much larger sum in the house, which still stands in Mr. Gove's name, and these amounts would probably be irretrievably lost in the event of discontinuing the business, and bankruptcy. Under the circumstances, therefore, I have felt that there was really no alternative than to accept what were the best methods and terms by which you could raise money on your Denver Company stock.

20 As you know, you have borrowed from Dr. Sheets, \$50,000, under an arrangement by which in three or four years, that loan is to be paid off by the Denver Company dividends, aside from any other source of income. My plan is that this be immediately used to buy up and dispose of the notes held by the Hanover Bank, and I hope that under the plans which I have discussed with Mr. Grove and your brother, the business can be continued in such a way that in the course of a few months the Second National Bank will consent to having the West Orange house conveyed to you. If this can be done, without legal complications, you will then have extinguished the debt to the Hanover, and will be the owner of your house.

30 There are risks and uncertainties connected with the business of the Hat Company, or with any other business of that nature, but I think the experience of the last few months will tend to diminish these risks, and if Mr. Grove and those who help him will do a business which keeps as close to shore as possible, and which tries at every point to curtail expenses and diminish debts, I hope and think that the business can be put on a profitable basis, as it seems to have been up to within the last two years.

I hope you will excuse a typewritten letter from a very busy man. These matters I have discussed in a somewhat cold business way, but I do not fail to recognize the high sense of honor with which you and your brother have met this emergency.

Faithfully yours,

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L. H. BEERS.

Mrs. William K. Grove,
Hutton Park,
West Orange, N. J.

LHB/MG.

Exhibit E-16.

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July 28, 1913.

Dear Mrs. Grove:

As Mr. Grove has no doubt reported to you, the Second National Bank of Hoboken, as a condition to not immediately pressing for payment of their notes amounting to \$45,000, have demanded a mortgage for that amount on the West Orange property. Mr. Grove is the maker of one of these notes and is the endorser of the others, so, as the West Orange property stands in his name, the bank could now reach that property if it were to enforce the notes. It follows from this that for Mr. Grove now to give a mortgage on the property to the bank, does not materially change the situation so far as you and he are concerned; that is, you are not giv-

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ing them a mortgage on anything which they could not already reach by their claim if disposed to do so.

10 In consideration for the giving of this mortgage, the bank is willing to wait for any reasonable period for payment of the notes; otherwise, they will press for payment at once.

Under these circumstances, I advise the making of such a bond and mortgage and Mr. Grove has shown me a bond and mortgage prepared by the bank for the purpose.

20 The bond is to be signed by him but it will be necessary for you to join in the mortgage in order to release your dower in the property. The fact that you join in the mortgage does not make you liable on the bond. It merely means that if the bond is not ultimately paid, they can foreclose the mortgage and cut off both the interest that Mr. Grove has in the property and the interest which you have in it, but they cannot recover anything further from you under the bond and mortgage. For any deficiency they would have to look to the maker of the bond; that is, to Mr. Grove.

Very truly yours,

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L. H. BEERS.

Mrs. William K. Grove,
West Orange, N. J.

LHB/M

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July 28, 1913.

Dear Mrs. Grove:

As Mr. Grove has no doubt reported to you, the Second National Bank of Hoboken, as a condition to not immediately pressing for payment of their notes amounting to \$45,000, have demanded a mortgage for that amount on the West Orange property. Mr. Grove is the maker of one of these notes and is the endorser of the others, so, as the West Orange property stands in his name, the bank could now reach that property if it were to enforce the notes. It follows from this that for Mr. Grove now to give a mortgage on the property to the bank, does not materially change the situation so far as you and he are concerned; that is, you are not giving them a mortgage on anything which they could not already reach by their claim if disposed to do so.

In consideration for the giving of this mortgage, the bank is willing to wait for any reasonable period for payment of the notes; otherwise, they will press for payment at once.

Under these circumstances, I advise the making of such a bond and mortgage and Mr. Grove has shown me a bond and mortgage prepared by the bank for the purpose.

The bond is to be signed by him but it will be necessary for you to join in the mortgage in order to release your dower in the property. The fact that you join in the mortgage does not make you liable on the bond. It merely means that if the bond is not ultimately paid, they can foreclose the mortgage and cut off both the interest that Mr. Grove has in the property and the interest which you have

in it, but they cannot recover anything further from you under the bond and mortgage. For any deficiency they would have to look to the maker of the bond; that is, to Mr. Grove.

Very truly yours,

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L. H. BEERS.

Mrs. William K. Grove,
West Orange, N. J.

LHB/M

New York, July 2, 1913.

Dear Mrs. Grove:

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1. The affairs of the Grove Straw Hat Company, which Mr. Grove and your brother have been discussing with me for the last month, would make a long story, but as you are now about to put \$50,000 into that business, I think it better for me to explain briefly my theory of the situation.

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2. The examination of the affairs of the Hat Company made by the accountants, together with the information which Mr. Grove gives us, indicates that money has been lost within the last two years—partly by unprofitable extensions of the business, partly by unnecessarily extravagant methods of doing business, and partly by the defalcations of the bookkeeper. It also appears that the value of the good will of the Company and of its factory and machinery amounts to a great deal, but while these are very valuable so long as the Company continues in business, they would be sacrificed and might bring little if business were now to be discontinued.

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3. With some people the present situation would involve the alternatives either of putting in more money, or of allowing the business to go through bankruptcy. But knowing your personal attitude toward such matters, I feel that if the business were stopped and bankruptcy allowed, as it would, you would sooner or later insist on paying Mr. Grove's debts, so that you would in the end not only have the burden of this to carry, but would lose the large sum now represented by the good will, the factory, stock, etc., which can be made to yield a valuable return if the business goes on. You also have given a guaranty to the Hanover Bank for \$25,000 and have invested a much larger sum in the house, which still stands in Mr. Grove's name, and these amounts would probably be irretrievably lost in the event of discontinuing the business, and bankruptcy. Under the circumstances, therefore, I have felt that there was really no alternative than to accept what were the best methods and terms by which you could raise money on your Denver Company stock.

4. As you know, you have borrowed from Dr. Sheets, \$50,000 under an arrangement by which in three or four years, that loan is to be paid off by the Denver Company dividends, aside from any other source of income. My plan is that this be immediately used to buy up and dispose of the notes held by the Hanover Bank, and I hope that under the plans which I have discussed with Mr. Grove and your brother, the business can be continued in such a way that in the course of a few months the Second National Bank will consent to having the West Orange house conveyed to you. If this can be done, without legal complications, you will then

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have extinguished the debt to the Hanover, and will be the owner of your house.

10 5. There are risks and uncertainties connected with the business of the Hat Company, or with any other business of that nature, but I think the experience of the last few months will tend to diminish those risks, and if Mr. Grove and those who help him will do a business which keeps as close to shore as possible, and which tries at every point to curtail expenses and diminish debts, I hope and think that the business can be put on a profitable basis, as it seems to have been up to within the last two years.

20 6. I hope you will excuse a typewritten letter from a very busy man. These matters I have discussed in a somewhat cold business way, but I do not fail to recognize the high sense of honor with which you and your brother have met this emergency.

Faithfully yours,

L. H. BEERS.

30 Mrs. William K. Grove,
 Hutton Park,
 West Orange, N. J.

LHB/MG.

IN CHANCERY OF NEW JERSEY.

Between

CHARLES F. NESLER,
Complainant,

vs.

WILLIAM K. GROVE, et als.,
Defendants.On Bill to
Foreclose.
Notice of Appeal.

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The defendants, Second National Bank of Hoboken, and Allen N. Terbell hereby appeal from the following parts of the final decree, made in the above stated cause, and the whole and every part thereof, which decree as follows:

"That the mortgage aforesaid executed by William K. Grove and Mary B. Grove, his wife, to Allen N. Terbell, dated July 21, 1913, and purporting to secure the sum of \$45,000, in subordinate in lien upon said premises, or upon any interest therein, to the lien of the judgment of Globe Tire Company aforesaid, and that said Bank is estopped from asserting any claim under said mortgage as a prior lien to the lien of said judgment; and, further, that the aforesaid mortgage now held by said Bank is unenforcible against the interest of Mary B. Grove as aforesaid in the mortgaged premises; further, that the parties aforesaid have liens upon the mortgaged premises for the amounts and in the priority above specified, and that unless said amounts be paid to the parties respectively entitled thereto forthwith, then that said mortgaged premises be sold to raise and satisfy the several sums of money due to said parties respectively, that is to say":

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"In the third place to the defendant Globe Tire Company the sum of \$19,155.09, with interest thereon from the date hereof, together with its costs to be taxed."

10 "That a writ of fieri facias do issue for that purpose out of this Court, directed to the Sheriff of the County of Essex, commanding him to make sale according to law of the said mortgaged premises, and that out of the money arising from such sale he pay to the complainant or his solicitors said debt, interest and costs, and also to the aforesaid defendants or their solicitors their said debts, interest and costs, in manner aforesaid; and in case
20 more money should be raised by said sale than shall be sufficient to answer such several payments, that such surplus be brought into this Court to abide the further order of the Court, unless otherwise previously disposed of by the order of this Court, and that the said Sheriff make return without delay of his proceedings by virtue of said writ."

30 "And it is further ORDERED, ADJUDGED AND DECREED that the said defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises when sold as aforesaid by virtue of this writ."

"And it is further ORDERED, ADJUDGED AND DECREED that a counsel fee of \$500.00 be allowed and paid to the counsel of the defendant, Globe Tire Company, and that the same be included in its taxed bill of costs and collected with the other items of said bill."

To the Court of Errors and Appeals in the last resort in all causes.

Dated, September 20, 1918.

FRED'K N. EBERHARD,
Solicitor for Complainant, 10
Second National Bank of Hoboken.

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

JOHN I. WELLER,
of Counsel.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

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Between

CHARLES F. NESLER,
Complainant,
and

WILLIAM K. GROVE et als.,
Defendants.

On Appeal from
Chancery.
Petition on Appeal.

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To the Honorable The Court of Errors and Appeals
in the Last Resort in all Causes:

The petition of the Second National Bank of Hoboken, a corporation, and Allen N. Terbell, the appellants in the above stated cause, respectfully shows that they find themselves aggrieved by the final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the 13th day of September, 40

1918, wherein the said Charles F. Nesler was complainant and William K. Grove, Mary B. Grove, Second National Bank of Hoboken, Allen N. Terbell and Globe Tire Company, a corporation, were defendants in this respect, to wit:

10 That the decree adjudges that the mortgage executed by William K. Grove and Mary B. Grove, his wife, to Allen N. Terbell, dated July 28th, 1913, securing the sum of \$45,000, is subordinate in lien upon said premises, or upon any interest therein, to the lien of the judgment of the Globe Tire Company; and that said Bank is estopped from asserting any claim under said mortgage as a prior lien to the lien of said judgment; and wherein it decrees and adjudges that the aforesaid mortgage, now
20 held by the Second National Bank, is unenforceable against the interest of Mary B. Grove in the mortgaged premises, and that the decree adjudges that the Globe Tire Company's judgment lien of \$19,155.09 shall have the third place in the priority of liens; and that the decree adjudges that a counsel fee of \$500 be allowed and paid to the counsel of the defendant, Globe Tire Company, and that the same be included in its taxed bill of costs and collected with the other items of said bill.

30 And your petitioners humbly appeal from that part of the said decree which adjudges and decrees as aforesaid, and from the whole and every part thereof, upon the ground that the same is erroneous for that, as appears by the proof in said cause, the said mortgage, made by William K. Grove and Mary B. Grove as aforesaid (which mortgage is now held by the said Second National Bank), was executed, delivered and recorded at a time long prior to the date of the recovery of any judgment by the said Globe Tire Company, and at a time

long prior to the creation of any lien or claim of the said Globe Tire Company; and that the said Second National Bank of Hoboken made no representations as to the financial standing of William K. Grove; and that no false representations were made by any of its officers or agents; and that whatever statements were made by any of its officers or agents could not be imputed to said Bank; and that nothing was said or done, or omitted to be said or done, by the said Bank, or its duly authorized officers or agents, which in any way estops the said Bank from asserting and claiming its said mortgage as a prior lien to the claim of the Globe Tire Company; that whatever statements or representations were made by said Allen N. Terbell and Frederick N. Eberhardt were not binding on, or imputable to, the said Bank.

And for the said decree adjudges that the said mortgage, now held by the said Second National Bank, is unenforceable against the interest of Mary B. Grove in the mortgaged premises; is erroneous for that, as appears by the proof in said cause, Mary B. Grove was not the equitable owner of said premises on the 28th day of July, 1913, or at any other time; that the only interest the said Mary B. Grove had in the premises was an inchoate right of dower; and that she fully and specifically released said right of dower by joining in the said mortgage with her husband, and she is now estopped from setting up any interest in said property in conflict with such right of dower; and that, under the proofs, if said Mary B. Grove had an equitable interest in said property, she mortgaged the same to the said Bank; and that the said bond and mortgage, as appears by the proofs, was never paid, released or discharged; that the primary ob-

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ligation is, and was, the bond and mortgage, and the notes, as appears by the proofs in said cause, were purely collateral thereto; and that any change in the form of the collateral did not affect the original obligation; and hence, if Mrs. Grove was a surety, she was, as such, not released by any
10 change in the form of the collateral security; and, as appears by the proofs in said cause, said Mary B. Grove had no recorded interest in said premises at the date of the execution and delivery of said mortgage, and any pretended oral gift to her by her husband of the property described in said mortgage prior thereto was void and in derogation of the statute of frauds; and, as appears by the proofs in said cause, she did not inform the said Bank, or Allen N. Terbell, or any of the duly authorized
20 officers or agents of said Bank, at or prior to the execution of said mortgage, that she was, or claimed to be, the equitable owner, or had any interest therein, other than her dower interest; and, as appears by the proofs in said cause, that neither the said Bank nor Mr. Terbell had any knowledge, notice or information that she had, or claimed to have, any equitable interest therein; and that, under the proofs, even if the alteration of the note of \$35,000 constituted a discharge of that amount
30 as against Mary B. Grove, there is no proof that the \$10,000 note, originally given, was in any way altered, changed, renewed or surrendered, and hence the decree adjudging that the whole sum of \$45,000 had been discharged by the said renewal of the notes, has no support in the proof given, and is contrary thereto; and for that the decree adjudges that the Globe Tire Company have the third place in the priority of liens is erroneous in that it appears by the proofs that the said Second Na-
40 tional Bank's mortgage of \$45,000 should have been

adjudged the third place in priority of liens; and that wherein the decree adjudges a fee of \$500 to the counsel of the Globe Tire Company, and that the same be included in the taxed bill of costs and collected with the other items of said bill, is erroneous for, under the proofs, a counsel fee to the Globe Tire Company should have been denied. 10

Your petitioners therefore pray that the said decree of said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden; and that your petitioners may have such relief in the premises as to this honorable Court may seem meet.

FREDERICK N. EBERHARD,
Solicitor for Appellant.

JOHN I. WELLER, 20
of Counsel with Appellant.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

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CHARLES F. NESLER,
Complainant-Appellee,

vs.

MARY B. GROVE, et als.,
Defendants-Appellees,

and

SECOND NATIONAL BANK and AL-
LEN N. TERBELL,
Defendants-Appellants.

} Answer to
Petition of
Appeal.

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The answer of Globe Tire Company to the pe-
tition of appeal of Second National Bank of
Hoboken and Allen N. Terbell:

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This respondent not acknowledging all or any
of the matters contained in said petition of appeal
to be true, for answer thereto says and admits that
a final decree was made and entered in the Court
of Chancery as alleged in the petition, but as to the
form and substance thereof, this respondent prays
reference thereto when the same shall be produced.

This respondent is advised and believes that said
decree is agreeable to equity and prays that the
same may be affirmed with costs.

McDERMOTT & ENRIGHT,
Solicitors and of Counsel with
Defendant-Respondent Globe Tire Company.

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27403

IN CHANCERY OF NEW JERSEY.

August 8th, 1918.

Between

CHARLES F. NESLER,
Complainant,
and

WILLIAM K. GROVE et als.,
Defendants.

On Bill &c.

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Conclusions.

MESSRS. DAY, DAY, SMITH & SLINGERLAND (Mr.
Archibald F. Slingerland), for complainant.

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MESSRS. McDERMOTT & ENRIGHT (Mr. John M. En-
right), for Globe Tire Company.

MESSRS. YOUNG, BIGELOW & FAYERWEATHER, for
Mary B. Grove (Mr. Robert H. Southard and
Mr. William M. Seufert, counsel).

MR. FREDERICK N. EBERHARD (Mr. Julius Lichten-
stein, counsel) for Second National Bank of
Hoboken.

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LANE, V. C.

The determination of this case has been with-
held an unreasonable length of time but the fault
is not wholly that of the Court. At the conclusion
of the hearing counsel were permitted to submit
briefs. After waiting such a length of time as that
the case became extremely cold, briefs were filed
aggregating some 150 pages. It is difficult to take

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it up now in the midst of other work which has in the meantime intervened.

10 The litigated issues concern the validity of a mortgage of \$45,000 executed by William K. Grove and Mary B. Grove, his wife, to Allen N. Terbell, dated July 28, 1913, and recorded July 29th, 1913, now claimed to be held by the Second National Bank of Hoboken by assignment dated July 30th, 1913, unrecorded, as against Mary B. Grove and the Globe Tire Company.

20 The rights of Mary B. Grove will be first considered. Grove Straw Hat Manufacturing Company during the months of June and July, 1913, was financially involved; the Second National Bank of Hoboken held a demand note of the Hat Co., dated February 3rd, 1911, for \$10,000 a demand not of W. K. Grove dated
30 for \$10,000, several time notes made by the Hat Co., to Grove and endorsed by him aggregating \$35,000. The line of credit dated back a number of years and the bank in view of the involved condition of the Hat Co., insisted that something should be done. On July 28th, 1913, the mortgage in question was executed to Terbell securing a bond for \$45,000, payable in three years. On July 28th, an account was opened in the general ledger of the bank under the head of Mortgage Account as follows: "W. K. Grove, West Orange property, July 28, 1914, \$45,000." All the notes held by the bank, except the demand note of the Hat Co., dated February 3, 1911, for \$10,000., were marked paid and surrendered and new notes were taken as follows: Demand note William K. Grove \$10,000; demand note made by the Hat Co., endorsed by Grove, \$10,000. A cashier's check was drawn to the order of Grove for \$45,000 deposited to

Grove's personal account and the proceeds immediately checked back to the bank. This \$45,000 cashier's check was charged to the Mortgage Account and the check of Grove was credited to Loan Account. The notes taken at the same time as the mortgage did not appear upon any of the books of the bank until January 8, 1914. On that date the Hat Co., at the bank's request, replaced its \$35,000 demand note with a time note, same amount. The books of the bank show that this \$35,000 demand note was discounted; that the demand note dated July 28th, 1913, for \$10,000, made by Grove was then put through the Loan Account. The proceeds of the discount and the loan were credited to the Mortgage Account which was closed. Since January 8th, 1914, the mortgage together with the bond accompanying it, although in the physical custody of the officials of the bank, is not referred to in any wise in any of its books. The time note of the Hat Co., for \$35,000, was renewed from time to time until December 29th, 1915. On December 29th, 1915, the bank surrendered all of the notes of the Hat Co. to Grove, taking from him his demand note dated December 29th, 1915, for \$30,000 and a demand note of C. H. Wharton, endorsed by Grove, for \$2,540.68. The books of the bank show that the proceeds of these two demand notes were used to liquidate the indebtedness of the Hat Co. In May, 1915, the Hat Co. was adjudged bankrupt by the United States District Court for the Southern District of New York. On May 18th, 1915, the bank filed proof of claim in the bankruptcy proceedings as an unsecured creditor, in the sum of \$45,000. Copies of the notes were annexed to the proof of claim. They are a time note for \$35,000 dated March 11th,

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- 1915, made by the Hat Co., to Grove and endorsed by him (this note is a renewal of the note given January 8th, 1914, the proceeds of which were used in liquidation of the Mortgage Account), and a demand note dated February 3rd, 1911, made by the Hat Co., to Grove for \$10,000 which was one of the notes held by the bank at the time of the mortgage transaction and not surrendered by it. Why this note was not surrendered does not appear. Its place at that time, so far as the bank was concerned, was taken by the demand note of Grove for \$10,000, which went through the Loan Account on January 8th, 1914, and which is still held by the bank. This proof of claim was made in the name of the bank by Terbell, its cashier, vice-president and practical manager and contains an affidavit that the bank had not received any security for the debt. If the bond and mortgage were at that time held by the bank as valid obligations there is no doubt but that the statement in the affidavit was false. The claim of the bank as an unsecured creditor was objected to by Burnett & Company, another creditor, on the ground that the bank did hold security, and the claim of Burnett & Company was objected to by the bank upon a ground immaterial in this case.
- On June 3rd, 1915, a secret agreement was entered into in the bankruptcy proceedings between the Bank, Burnett & Company, the Hat Co., E. R. Fitzmaurice (Burnett's representative) and F. N. Eberhard (the bank's representative) to the effect that the Bank and Burnett were to mutually withdraw objections to each other's claims; that the bankrupt should offer a fifteen per cent. composition to creditors, to which the Bank and Burnett would consent and waive payment of

dividends; that the bankrupt upon a composition should immediately transfer all assets to Fitzmaurice and Eberhard as trustee; that Burnett and the Bank should furnish the money necessary to pay the cost of the composition and administration; that the proceeds of liquidation through Eberhard and Fitzmaurice should be equally divided between the Bank and Burnett. On July 2nd, 1915, the bankrupt offered composition of fifteen per cent; the Second National Bank signed the consent as creditor for \$45,000. On July 21st, 1915, composition was confirmed; the schedule of debts without priority showed debts aggregating \$144,137.49. During 1915 and 1916 Eberhard and Fitzmaurice liquidated the assets of the Hat Co. Certain amounts were paid to the Bank reducing the debt of the Hat Co. to it to the amount of \$32,540.68, in liquidation of which it took from Grove his note of December 29th, 1915, for \$30,000 and the note of Wharton endorsed by Grove for \$2,540.68. It then had and still has Grove's demand note made July 28th, 1913, for \$10,000.

On March 8th, 1917, Grove and wife conveyed the premises in question to Herbert N. Bradley and the latter conveyed to Mary B. Grove, both conveyances being recorded March 23rd, 1917.

On March 9th, 1917, Grove left his home and his whereabouts cannot be discovered.

On April 28th, 1917, this suit to foreclose was commenced by Nessler, the holder of the first mortgage on the West Orange property and there were made defendants William K. Grove, Mary B. Grove, Allen N. Terbell and the Globe Tire Company. Mary B. Grove filed an answer and counterclaim against Terbell and the bank, bringing in the latter by subpoena, setting up that the equitable title

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of the property was in her and that the mortgage in the hands of the bank was unenforcible as against her estate in the land.

- 10 Is the bond and mortgage in the hands of the bank an enforcible obligation against William K. Grove? It is extremely difficult to get at the real transaction of the parties because in any aspect of the case upon any theory advanced by the bank it must be conceded that the books of the bank do not disclose the real transaction. In its original answer the bank set up that the mortgage was given to secure a prior indebtedness due from Grove as endorser on notes of the Hat Co. for \$45,000 and that at the time of the making thereof the Hat Co. was solvent and had sufficient assets to pay its notes as well as other debts and obligations, and that the bank refrained from collecting its notes on the strength of the mortgage. On the day of the trial, Terbell and the Bank filed amended answers to the effect that the bond and mortgage were given to evidence an original indebtedness then created by Grove; that the notes then delivered were taken as collateral to the bond and mortgage, that from the time of the taking of the bond and mortgage the transaction has remained a Mortgage Loan, that the entry in the books of January 8th, 1914, indicating payment of the mortgage and the discount of the notes and all the subsequent entries were mere matters of internal bookkeeping and are to be given no force or effect, that the bank still holds the bond as the primary obligation with the mortgage securing it, and that the notes now held by it are collateral to the mortgage. I am unable to agree with any such contention. It is significant that the answer originally filed by the Bank was prepared by
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Eberhard, who, the testimony discloses, had intimate knowledge of the transactions as they occurred, was a party to them, and it is fair to assume that he set forth in the original pleading of the bank his version of the real transaction. The amended answer presents a complete change of front on the part of the bank and has for its sole foundation the fact that the bank entered the transaction of July 28th, 1913, as a direct loan upon bond and mortgage. Irrespective now of whether in fact there was actually a loan made on July 28th, 1913, upon the bond and mortgage, or whether the bond and mortgage were always collateral, it seems to me to be clear that at the present time the bond and mortgage must be considered, if legally held by the bank, to be held as collateral; that the primary obligations are the notes of July 28th, 1913, made by Grove for \$10,000 and the notes given December 29, 1915. Why the bank did not on July 28th, 1913, discount or make loans on the note of Grove for \$10,000 and the note of the Hat Co. for \$35,000 and take the bond and mortgage as collateral, it is hard to determine. The bank is a national bank and was at the time without authority to make loans on real estate. The only possible justification for the bank making the loan on the real estate would be a claim that in essence it was a taking over of the property in satisfaction of the pre-existing debt. Under the banking laws, the bank might in order to liquidate a pre-existing debt take over property and hold it for purposes of liquidation. It is inconceivable that the bank officials should have, at the time this transaction was put through, intended that it should remain a loan on real estate for any considerable space of time. It would inevitably

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create trouble with the banking department. The subsequent events indicate that there was no such intention. There is but one reason that I can conceive of which would have induced the bank to have acted in the manner it did. If it had knowledge that the equitable title of this property was
10 in Mrs. Grove, or that she had a substantial interest in the property, then it might have gone through the form of advancing the money directly upon the bond and mortgage rather than making a loan upon the notes for fear that if it took the bond and mortgage as security either for the pre-existing indebtedness of Grove or for loans made upon new notes at the time, Mrs. Grove might escape upon the ground that she was acting as surety for her husband. Whether she could escape
20 is immaterial. It is conceivable that the bank intended to put the transaction in such form as that there could be no possibility of escape. This is pure surmise but it fits in with facts hereafter to be noted indicating knowledge on the part of the bank of the interest of Mrs. Grove.

The transaction of January 8th, 1914, at which time the new time note of the Hat Co. was discounted and the demand note of Grove was put through the Loan Account, was unquestionably induced by the desire of the bank to have the situation represented as loans upon paper recognized
30 by the banking department as proper. The time has come when it appeared that to longer carry the loan as a mortgage loan would be dangerous. The Bank desired first, to carry the loan in a manner approved by the banking department; second, to carry the loan as a live asset. The mere fact that no credit was given in the individual accounts of the Hat Co. and of Grove for the moneys real-

ized upon the discount and the loan, and that the moneys used to liquidate the mortgage account were not checked out of these individual accounts, and that in this respect the ordinary procedure on discount and loan was not followed, cannot, I think, in view of other circumstances, be considered as conclusive proof that the transaction was a mere matter of internal bookkeeping and intended to have no actual force or effect. The moneys which were advanced upon the discount and the loan were credited to what is called transient account. They were then charged to transient account and credited to the mortgage account. This transient account is used in cases where the persons involved have no accounts in the bank, and I think in any case where the moneys dealt with ultimately do not go without the bank and where it is more convenient than any other process.

The situation on January 8th, 1914, was this: On the books of the bank it appeared that there was a loan of \$45,000 made upon bond and mortgage. It was desired that the form of this loan on the books of the Bank should be changed so that the amount due, to wit, \$45,000, would be represented by the time note of the Hat Co. and the demand note of Grove, and thus as matter of fact, as I see it, the true nature of the transaction be set up. This could be readily accomplished by charging to discount and to loan account the moneys represented by the time and demand notes and crediting the proceeds to mortgage account. Inasmuch as the money never was to leave the bank, either of two processes might be used, the proceeds of the notes might be credited to the individual accounts of the makers and then checked out of these individual accounts and credited to the mortgage ac-

count, or the proceeds might be entered in the transient account on both the debit and credit side. This latter process would obviate several bookkeeping items and the necessity of the drawing of checks and would at no time leave the funds in the control of the makers of the note. This course was adopted. It was unusual but so was the whole transaction. Against this being considered as proof that all of the entries were mere matter of bookkeeping is the fact that if this were so, the bank was deceiving the banking authorities and the fact that the bank has since January 8th, 1914, treated the notes as the primary obligations to the extent even of proving upon them as primary obligations in the bankruptcy proceedings of the Hat Co. When the time note of the Hat Co. for \$35,000 matured, it was renewed and credit was given to the Hat Co. of the proceeds of the discount of the renewal note in the ordinary manner. The contention that the notes dated July 28th, 1913, were taken as collateral to the bond and mortgage is farfetched. It is inconceivable that the Bank would take as collateral to a bond made by Grove a demand note made by him for the same amount. The notes dated July 28th, 1913, were taken so that they might at any time be put through the books of the Bank so as to show that they were the primary obligations. If any entry on the books of the Bank is to be disregarded, it is the entry which indicated that the loan made on July 28th, 1913, was a loan upon real estate. Terbell testified in one part of his examination that what Grove agreed to do was to give the mortgage as security for his liability to the Bank then or at any further time.

In the case of Hudspeth vs. Denton, 82 Eq., 281, affirmed 82 Eq., 363, an attempt was made to

show that, although the bank in that case put through its books a note made by one Hogencamp for \$35,000 and the proceeds thereof were credited upon prior existing indebtedness for which collateral put up by accommodation makers was pledged, yet that the matter was merely one of bookkeeping and the real transaction was that the Hogencamp 10
note was taken as collateral; although the proof was more persuasive than that in the case at bar, yet the Court held that the bank could not be permitted to disregard the entries in its books and that the accommodation makers of the collateral held by the bank for the pre-existing indebtedness were discharged, notwithstanding the fact that no injury was shown to have been occasioned to them, and notwithstanding that all of the collateral was 20
actually retained by the bank. See page 750. The appeal in that case was particularly directed to this conclusion of the Court, but the decree was affirmed, four Judges dissenting. It seems to me that the right of the bank to enforce the bond and mortgage must rest upon an agreement, express or implied, made by Grove, that the bond and mortgage should be held for the present indebtedness which is represented by the note of Grove for \$30,000, the note of Wharton for \$2,500.68 and the note 30
of Grove for \$10,000.

On January 8th, 1914, when the note of the Hat Co. was discounted and the loan made on the note of Grove, and the mortgage account closed, the bond and mortgage were not surrendered to Grove, but were retained by the Bank. The bank officials testify distinctly that all of the acts thereafter performed by them were performed with the knowledge of Grove and that on several occasions when the Bank demanded payment from Grove it was 40

met with the assertion that it need not fear as it still held the bond and mortgage. The insurance was made payable to the Bank, the taxes were looked after by it. While there is no proof of an express agreement between the Bank and Grove that the bond and mortgage should be held as collateral for the indebtedness as it now exists, yet in the absence of the testimony of Grove, *I can reach no other conclusion but that the facts indicate* that as between the Bank and Grove it was always considered *that the bond and mortgage were held as collateral for the indebtedness* in whatever form it might exist.

This being so, the question remains as to whether the mortgage is enforceable as against the rights of Mrs. Grove.

20 Mrs. Grove contends that at the time the mortgage was given she was the equitable owner of the property in question. In December, 1909, Grove purchased with his own money the tract of land upon which a building was subsequently built. It was desired by his wife as a building site; he told his wife that it was to be a Christmas gift to her. At the time of the execution of the first mortgage in February, 1910, Grove asked his wife to sign the mortgage stating that he was temporarily embarrassed and would repay the loan in a short time and clear the property. In the fall of 1911 Grove again told his wife that the property was hers and she thereupon arranged to build the house and garage with monies from her separate estate. During 1911 and 1912 the house and garage were built and the property improved with Mrs. Grove's money at a total cost of \$47,453.34. It is true as indicated by counsel for the bank that the testimony with respect to the oral gift comes

solely from the mouth of Mrs. Grove, and that it is therefore to be scrutinized with the utmost care. It is a demonstrated fact that the improvements upon the property were all made with the money of Mrs. Grove. She had a large independent income. She was very young and very inexperienced in business. Business details were distasteful to her. I had the opportunity of hearing her testify and was impressed with the fact that she was endeavoring to tell the truth. I have no doubt whatever but that when this property was purchased it was intended that it should be a gift to her. It was contemplated that improvements should be made which would cost approximately the amount of money that they did. Either it must have been considered, if the legal situation be taken into account, that the land was a gift to her from her husband or that the moneys invested by her were a gift to her husband. I think the monies were invested by her in the firm belief that the property was hers no matter in whose name the deed stood. The parties were not dealing at arms' length. They were husband and wife and living together harmoniously. She went on and made the improvements firmly believing that the property was hers and paying no attention to the legal situation. Either her husband actually intended to deed the property to her or he was guilty of fraud toward her. The elements are present which would warrant a court of equity in enforcing the oral gift. *Young vs. Young*, 45 N. J. E., page 27; cited with approval Court of Errors and Appeals; *Duval vs. Duval*, 56 N. J. E., at page 385; *Atlantic City Railroad Co. vs. Johnson*, 72 N. J. E., 332; *Neale vs. Neale*, 9 Wallace, page 1, 19 L. Ed., 590; *Townsend vs. Vanderweker*, 160 U. S., 171; 40 L. Ed.,

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383, 387; Freeman vs. Freeman, 43 N. Y., 36; Lobdell vs. Lobdell, 36 N. Y., page 327; Seymour vs. Delancy, 3 Cow., 445. The jealousy with which the courts guard a wife's separate estate against the claim of a husband's creditors is illustrated by Carpenter vs. Carpenter, 27 N. J. E., 502; Kinsey vs. Filler, 64 N. J. E., 367.

Did the bank have notice of such facts as required it before changing the form of the indebtedness as it did to secure the consent of Mrs. Grove?

Terbell was the cashier and practical manager of the bank and with Eberhard, its attorney, had complete charge of this transaction. Under the circumstances, notice to Terbell or Eberhard is notice to the Bank. Both knew that Mrs. Grove had independent means and that she was assisting her husband. She had advanced considerable monies, some \$50,000 to satisfy certain New York banks. The Bank realized that Grove was in financial difficulties, pressed for payment and was informed by Grove that the only security that he could give was the house in West Orange. Prior to the giving of the mortgage there were several conferences between the officials of the bank, Grove and Mrs. Grove's brother and Mr. Beers of a New York law firm who represented Mrs. Grove. *There is no direct evidence that at any one of these conferences Mrs. Grove's interest in the property was brought to the attention of the officials of the bank.* Mr. Beers, the wife's attorney, was called for the wife. His testimony is limited to such information as he can now gather from his records and from letters which he wrote at or about the time. While the statements in the letters which he wrote to Mrs. Grove are not binding upon the bank yet they are evidential

to show the knowledge that he had at the time of the conferences. The letters demonstrate that he knew of the investment by Mrs. Grove of a large sum in the permanent improvements; that as between Grove and Mrs. Grove the property was to be conveyed to her; that Mrs. Grove had prior to July 28th, 1913, expended a large sum out of her separate estate to liquidate the debts of her husband. There was more than one conference between Beers and the officials of the Bank and he testified that one of the things which was involved in the general situation and which was discussed was the question of the possibility of having title to the Orange property then transferred to Mrs. Grove. It was not until July 23rd that the Bank asked for the mortgage on the Orange property which was the only thing left in sight. Immediately after the conference participated in by Terbell, Grove, Bradley (Mrs. Grove's brother) and Beers, Beers wrote a letter to Mrs. Grove in which he expressed the hope that the business might be conducted in such a way as that in the course of a few months the Bank would consent to having the West Orange house conveyed to her.

Terbell denied that any notice was given to the Bank of the interest of Mrs. Grove. But in considering the effect of this denial it must be kept in mind that on the stand he testified that Mrs. Grove's name was not mentioned at the conference and it was not until his attention was drawn to an interrogatory which he had answered in which he had said "William K. Grove and his attorney and the attorney of his wife, Mary B. Grove, as represented to Allen N. Terbell, being Messrs. Lord, Day & Lord, together with their family at-

torney and others, were present and they proposed as they had settled with other creditors of William K. Grove by securing them, (and) they were about to go into some other operations with some other people, upon the Bank giving William K. Grove the amount of \$45,000 to settle past obligations, William K. Grove was to execute a bond and mortgage which was to be held as collateral security for his endorsements to the amount of \$45,000," that he finally admitted that he must have known that Beers was there at the conference representing Mrs. Grove. Terbell admits knowing that Mrs. Grove had assisted her husband in his financial difficulties and that his wife and the West Orange property were Grove's last resort. It is not contended or conceivable that Beers representing the wife and Bradley, her brother, were present merely because she had an inchoate right of dower in the West Orange property. It is clear from the testimony that the financial situation was discussed at the several conferences in detail.

I am unable to reach a conclusion that at these conferences the actual interest of Mrs. Grove was not discussed. The Bank knew that before it could secure this bond mortgage it was necessary that there should be not only a conference with the representatives of Grove but a conference with the representatives of Mrs. Grove; that she was so vitally interested that in reality it was her consent and not that of her husband which was required. It was not necessary that the Bank should know that Mrs. Grove had the equitable title to the property and was entitled to the legal title. It was sufficient that it had knowledge of facts sufficient to inform it that before a change in the nature of the indebtedness to which the bond and

mortgage were collateral was made her consent was required.

Of such facts it had knowledge. There is no contention that either Mrs. Grove or her representatives was ever consulted with respect to the change in the nature of the indebtedness nor is there any contention or evidence that Grove was authorized to act as agent for his wife. On the contrary, Mrs. Grove in the negotiations with the Bank was represented by independent counsel and by her brother not by her husband. *If the bond and mortgage were held as collateral, as I find them to be, and if Mrs. Grove had the equitable title to the property, as I find she had, then she was in the position of a surety or guarantor and the change in the nature of the indebtedness without her consent releases her.* McFillen vs. Hoffman, 35 N. J. E., 364, at page 366, affirmed on rehearing, 42 N. J. E., 144, at page 145; Peoples Insurance Co. vs. MacDonald (Ohio, 1882), (D.C.), 7 Weekly Law Bulletin, 53; Post vs. Losey, 111 Ind., 74, 12 N. E., 121; White vs. Smith, 174 Mo., 186, 73 S. W., 610; Albion Bank vs. Burns, 46 N. Y., 170; Gahn vs. Niemcewicz, 11 Wend., 312; Fleming vs. Borden, 127 N. C., 214, 37 S. E., 219; 53 L. R. A., 316. That the Bank has so dealt with the principal indebtedness as represented by the note of the Hat Co. for \$35,000 discounted January 8th, 1914, and has so changed its character as that a surety would be released, I think, can admit of no question.

The only evidence as to the purpose for which the mortgage was given so far as Mrs. Grove is concerned comes from her mouth. She says that the mortgage was given for the purpose of securing the then existing indebtedness of the Hat Co. to the Bank for which Grove was responsible.

There is no evidence from which the Court can find that she agreed that it might be used for any other purpose. Here again the case is somewhat similar in its facts to Hudspeth vs. Denton, supra.

10 So far as the primary indebtedness was represented by the demand note of Grove given July 28, 1913, at the time the mortgage was given and upon which by the books of the Bank it appears a loan was made January 8, 1914, there appears to have been no change. For so much as may be due upon this note the Bank is entitled to enforce the mortgage as against Mrs. Grove.

20 The result is that the mortgage must be held to be unenforcible in the hands of the Bank as against the interests of Mrs. Grove in the property except to the extent due on the note given by Grove dated July 28, 1913.

With respect to the *claim of the Globe Tire Company*.

30 On February 3rd, 1916, the Globe Tire Company entered into a contract with Grove under which Grove became the agent or distributor for the Tire Co. in Essex. The contract called for an extension of considerable credit to Grove. On March 21st, 1917, after Grove left, the Tire Co. issued an attachment against Grove as an absconding debtor for the sum of \$18,054.29 and caused the premises in question to be seized under the attachment. On October 15, 1917, the Tire Co. recovered final judgment against Grove for \$18,162.16. The Tire Co. insists that it was induced to enter into the contract with Grove and extend credit to him upon the faith of statements made by representatives of the Bank in January and February, 1916, to the effect that Grove was financially responsible and that he owned the prop-
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Conclusions.

erty in West Orange; that the representatives of the Bank at the time of making the statement did not disclose that the property in West Orange was encumbered by \$55,000 of mortgages, \$45,000 of which was held by the Bank; that the representations were false to the knowledge of the officers of the Bank and that as a result the Bank is now estopped from setting up its mortgage as against the Tire Co. 10

A consideration of the testimony of Harry B. James, treasurer of the Tire Co., Joseph P. Hall, president of that concern, and Allen N. Terbell, cashier, vice president and practical manager of the Bank, and Frederick N. Eberhard, its attorney, leads me to the conclusion that the true version of the transaction between the officers of the Bank and the Tire Co., with respect to Grove is found in the testimony of James. He testified that in January or February, 1916, Terbell asked him if he had a vacancy in the Tire Co., that he told Terbell that the man who had charge of the Newark territory was far from satisfactory and that they would like to get a man provided he answered two qualities, that is, he must be financially able to back the proposition and he must be able to get the orders. That Terbell assured him that Grove owned a beautiful piece of property in Orange, N. J., and had a host of friends and undoubtedly could get the business. That Terbell said nothing about Grove owing the Bank money and nothing about whether the Bank held a mortgage on his property. That he told Terbell that he would talk the matter over with Hall, president of the Tire Co., and let him know. That Grove appeared at the office of the Tire Co. the following day with a card of introduction from Terbell. That the state- 20 30 40

ments made by Terbell to him he communicated to Hall and that as a result of these statements the contract with Grove was entered into. That after the contract was entered into with Grove he telephoned Terbell advising him of such fact. On cross examination James said that Terbell told
10 him that Grove owned a beautiful home in Orange, New Jersey, and was financially able to take care of it and could get the business. Terbell admits bringing Grove to the attention of James but denies that he made any representation as to his financial responsibility. The testimony of James with respect to the conversation between Eberhard, attorney for the Bank, and himself went in without objection. Although it may be that the statements made by Eberhard are not binding upon the Bank,
20 yet the testimony of James with respect to the conversation had with him taken in connection with the testimony of Eberhard is important in considering whether the testimony of James or Terbell discloses the actual conversation between them. Eberhard admits that the financial condition of Grove was discussed and that he made statements indicating his belief that Grove was entitled to ten or twenty thousand dollars credit. True, he says he does not remember mentioning the West Orange
30 property. Upon the whole, I am convinced that James testified correctly to what took place between Terbell and himself; that the West Orange property was mentioned by Terbell and that it was brought to the attention of James by Terbell for the purpose of demonstrating the financial responsibility of Grove. I am convinced that James and Hall, for the Tire Co., acted upon the representations of Terbell; they both so testify.

Unless the Bank is permitted to enforce its

mortgage against the West Orange property, the existence of which was not disclosed at the time the representations were made, the Tire Co. will not (disregarding now any equities between Mrs. Grove and the Tire Co.) suffer loss. The West Orange property referred to by Terbell as being owned by Grove will be made to respond to Grove's indebtedness to the Tire Co. 10

It seems to me that the Bank must be held responsible for the statements made by Terbell, who was its cashier, vice-president and practical manager. To him was entrusted the conduct of the Grove transaction. Grove was indebted to the Bank on notes to the extent of over \$40,000. The Hat Co. had just gone through bankruptcy. The Bank knew that the personal resources of Grove had been exhausted excluding now the West Orange property; that his wife already had been compelled to come to his rescue with her separate estate and that he was out of employment. It was to the interest of the Bank that Grove should be placed in a situation where he might find it possible to liquidate his indebtedness. The act of Terbell in recommending Grove was not induced wholly by Terbell's personal interest in Grove. The Tire Co. to which the recommendation was made was and had been for several years a customer of the Bank. 20 30

It was due to a large extent to this fact that it took the recommendation of Terbell. The Tire Co. in so doing looked upon Terbell not as an individual, but as the representative of the Bank, and of this fact Terbell had knowledge. I think the case is within the doctrine of *Stewart vs. Wright*, Circuit Court of Appeals, 8th Circuit, 147 Fed., 321; *Merchants National Bank vs. State National Bank*, 77 U. S., 604, at page 650, 19 L. Ed., 40

- 1008, at page 1020; *Bank vs. Graham*, 100 U. S., 699, at page 702, 25 L. Ed., 750, at page 751; *Cragie vs. Hadley*, 99 N. Y., 131; *Zabriskie vs. Cleveland*, 61 U. S., at page 401, 16 L. Ed., 488, at page 498; *Barwick vs. English Joint Stock Bank*, L. R. (2 Ex.), 259; cited with approval in *Keen vs. James*, 39 N. J. E., 527, at pages 541 and 543, Court of Errors and Appeals, Dixon, J.; also in *Brokaw vs. N. J. R. R. & Transportation Co.*, 32 N. J. L., 329, at page 330, Depue, J.; *Fishkill Savings Institution vs. National Bank*, 80 N. Y., page 162; *Holden vs. N. Y. & Erie Bank*, 72 N. Y., 286; *Trenton Banking Co. vs. Woodruff*, 2 N. J. E., page 117, at page 128; *Dock & Elizabethtown &c. Co.*, 34 N. J. L., 312, at page 317; *Bodine vs. Bird* (N. J. Errors and Appeals) 82 Atl. Rep., 901; *Fifth Ward Savings Bank vs. First National Bank*, 48 N. J. L., 513, at page 526; *Carr vs. National Bank &c. of Watertown*, 167 N. Y., 375, 60 N. E., 649. The case of *Taylor vs. Commercial Bank*, 174 N. Y., 181, cited by counsel for the Bank is distinguishable from the case sub judice. In that case the Court held that the cashier acted beyond his authority and was not engaged in the business of the Bank. I have found the contrary. *First National Bank vs. Marshall & I. Bank*, 83 Fed., 725, is distinguishable upon the same ground. In both of the last cited cases the representations alleged to have been made were made voluntarily by the cashiers to strangers. In the case at bar, the representations were made to a customer of the Bank. It must also be kept in mind that the mortgage was originally made to Terbell and that the Bank's interest was evidenced by an unrecorded assignment. I think that it must be held that the Bank is responsible.

That the representations were of material facts I think can admit of no question. That they were acted upon by the Tire Co. I have held. I think that the statement that Grove was the owner of a beautiful house in West Orange made in connection with the other statements was false in effect. It is true that the legal title to the beautiful house in West Orange was in Grove's name. The Bank, however, held upon that property a \$45,000 mortgage upon which some \$10,000 had been paid, subject to a first mortgage of \$10,000 to its knowledge. The Hat Co. had gone through bankruptcy. Grove, to the knowledge of the Bank, had exhausted his financial means; his wife had been compelled to come to his rescue; he had nothing except the West Orange property. It seems to me to be clear that when the Bank as an inducement to the Tire Co. to extend credit to Grove represented as proof of his financial standing his ownership of the West Orange property it was its duty to disclose the fact that it held a mortgage for a very large amount upon this property and not having disclosed it, it is now estopped from asserting its mortgage as against the Tire Co. The true ground of equitable estoppel is stated by Vice Chancellor Pitney in *Sumner vs. Seaton*, 47 N. J. E., 103, at page 120, as follows: " * * * I conceive (it) to be that the party in reliance upon the existence of a certain state of facts has so changed his position that he cannot be restored to his former position and will suffer serious loss if the facts prove to be different from what he supposed them to be; and the estoppel arises against the party who is responsible for his action on such mistaken belief, and it operates to prevent him from asserting the contrary." In *Ruckelschaus vs. Oehme*, 48 N. J.

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E., 436, at page 443, V. C. Pitney quotes Beasley, C. J., in *Campbell vs. Nicholas*, 4 Vr. 81, 88, as follows: "For it is to be remembered that the principle of estoppel applies as well to cases of unintentional deceptions as to designed and actual frauds."

- 10 The suppression of the truth by one bound to disclose it is as good a ground for an equitable estoppel as a false suggestion. *Torey vs. Buck*, 1 Green's Ch., 366; cited in *Ricketts vs. Tompkins*, 74 N. J. E., at page 300 and in *Keen vs. James* (Court of Errors and Appeals) 39 N. J. E. at page 542; *Crane vs. Conklin*, Saxon, 346; *Snyder vs. Findley*, Coxe, 78. That the Tire Co. might have by an inspection of the records discovered the existence of the mortgage cannot affect the situation. Sumner vs. Seaton, 47 N. J. E., 103, Pitney, V. C. cited in *Clement vs. Young*, McShea Amusement Co. (Court of Errors and Appeals) 70 N. J. E., at page 683, and in *Bridgewater vs. Ocean City* (Backes, V. C.) 85 N. J. E., 387.
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- While the words used by Terbell may have been literally true, yet having assumed to impart information about the general financial responsibility of Grove it was his duty to disclose the whole truth. His suppression of the fact that the Bank
- 30 held this mortgage made his entire statement false in effect. The statement was made by Terbell after the transaction of January 8, 1914, at which date the mortgage account had been closed and the mortgage, so far as the books were concerned, apparently paid. It may be that at the time the statement was made Terbell did not consider the mortgage as a live obligation in the hands of the Bank. In any event, the Bank is estopped from asserting its mortgage as against the claim of the Tire Co.

Memorandum.

Counsel for Mrs. Grove and the Tire Co. have not argued the equities as between themselves. Unless I am at once notified I will advise a decree which will provide, first, for the payment of the first mortgage, and second, for the payment to the Tire Co. of the amount due under its attachment, and third, for the payment to the Bank of the amount due on the demand note of Grove, date July 28, 1913, upon which a loan was made January 8th, 1914. 10

Settle decree on two days' notice.

Memorandum.

IN CHANCERY OF NEW JERSEY.

September 13th, 1918.

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Between

CHARLES F. NESLER,
Complainant,
and

WILLIAM K. GROVE et als.,
Defendants.

On Bill, etc.

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MESSRS. DAY, DAY, SMITH & SLINGERLAND (Mr. Archibald F. Clingerland), for complainant,
MESSRS. McDERMOTT & ENRIGHT (Mr. John M. Enright), for Globe Tire Company.

MESSRS. YOUNG, BIGELOW & FAYERWEATHER (Mr. Robert H. Southard and Mr. William M. Seufert, counsel), for Mary B. Grove.

MR. FREDERICK N. EBERHARD (Mr. Julius Lichtenstein, counsel), for Second National Bank of Hoboken.

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LANE, V.-C. (orally) :

10 It seems to me that the primary obligation at all times was the obligation of the Hat Company for \$45,000. That the reason why the indebtedness was split up into a \$35,000 note of the Hat Com-
pany and a \$10,000 note of Grove was to enable the Bank to make the advance of \$45,000 to one customer without violating the letter of the bank-
ing law. That the reason why the note of Feb-
20 uary, 1911, which was retained by the Bank at the time the mortgage was given, was not put upon the books of the Bank in January, 1914, instead of the \$10,000 Grove note was in order that the books might show an advance to two customers rather than one. When the Bank proved the 1911
note for \$10,000 in bankruptcy it treated it as a primary obligation on the part of the Hat Com-
pany. The Bank knew that Mrs. Grove was an accommodation mortgagor and that she gave the property as security for an indebtedness of the Hat
Company to the extent of \$45,000. When the Bank therefore proved its claim in bankruptcy on the Hat Company's 1911 \$10,000 note and so acted
30 in the bankruptcy proceedings as to discharge the Hat Company, I am inclined to think that it so altered the relation of the parties as to discharge the mortgage even as to this \$10,000 Grove note, which is still in existence. I think the situation is different from that of a case in which a bank holds collateral given by different parties, to one indebtedness, in which event it would have the right to resort to any one of the collaterals it held. Here Mrs. Grove was entitled to keep the Hat Com-
pany liable upon the principal indebtedness. The Bank voluntarily altered the situation through the

*Replication of Mary B. Grove to the Amended
Answer of Second National Bank of Hoboken.*

bankruptcy proceedings and discharged the principal debtor without notice to Mrs. Grove. I am inclined to think that the \$10,000 note transaction must be treated the same as the \$35,000 note transaction. I think that in my original conclusions I was led astray because of the fact that so far as the books of the Bank are concerned and the papers, the \$10,000 note does not seem to have gone through any change, whereas, in fact, it has. 10

I will change my conclusions to that extent. The mortgage will not be held valid as to the \$10,000 note. The mortgage will, of course, be held valid as to such amounts as may have been advanced by the Bank for insurance premiums and taxes.

I will allow a counsel fee of \$250 to the mortgagee; a counsel fee of \$500 to the counsel for the Globe Tire Company to be included in the taxed costs, and \$50 costs to the Bank. 20

**Replication of Mary B. Grove to the
Amended Answer of Second National Bank of Hoboken, New Jersey.**

IN CHANCERY OF NEW JERSEY.

Between

CHARLES F. NESLER,

Complainant,

and

WILLIAM K. GROVE et al.,

Defendants.

On Bill, etc.

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This defendant, Mary B. Grove, by way of reply to the amended answer of the Second National 40

*Replication of Mary B. Grove to the Amended
Answer of Second National Bank of Hoboken.*

Bank of Hoboken, New Jersey, a defendant therein, says:

10 1. She repeats all the allegations contained in her amended answer and counterclaim, heretofore filed in this matter, as fully as though said allegations were herein set forth.

20 2. With reference to paragraphs 6 and 7 of said Bank's amended answer, this defendant says, that upon the notes aggregating \$45,000, referred to in said paragraphs and made on or before July 28, 1913, said William K. Grove was obligated as endorser or otherwise only for the accommodation of the Grove Straw Hat Manufacturing Company, the principal debtor, and not otherwise, to the Second National Bank of Hoboken, New Jersey, and that said indebtedness of said company to said bank as principal debtor as evidenced by said notes, is the indebtedness of \$45,000 "evidenced by certain promissory notes" mentioned in said paragraphs, and is the principal debt alleged to have been secured by said bond and mortgage, and that subsequent to July 28, 1913, and subsequent to the execution and delivery of said mortgage, and subsequent to the alleged loan and advance to William K. Grove, alleged in said paragraphs, said notes were canceled, surrendered and delivered up, and new notes, differing in various particulars as to time of payment, amounts and parties were executed and delivered in their place, in extension, substitution and renewal and in lieu of the said original notes, and that in consideration thereof and by virtue thereof, the said principal debt, namely, said notes, was altered, varied and extended by

*Replication of Mary B. Grove to the Amended
Answer of Second National Bank of Hoboken.*

valid enforceable agreements for valuable consideration between the holder of said bond and mortgage and the principal debtors as to which principal debt and debtors, this defendant and her separate estate in said mortgaged premises were surety, to the knowledge of said holder; and that, in consideration of the turning over, by secret arrangement, to said holder or to some one in trust for said holder, parts of the assets of the said principal debtor, the Grove Straw Hat Manufacturing Company, the holder of said bond and mortgage, not by compulsion of law but voluntarily, released and discharged the said company from the said indebtedness, waived its dividend in bankruptcy, and consented, in writing, as one of the necessary consenting creditors to the discharge of said company in bankruptcy, all with knowledge of this defendant's suretyship aforesaid; that said alterations, variations, extensions and said secret arrangement, waiver and discharge of said principal debt were made without the consent of this defendant, Mary B. Grove, and without her knowledge and that by virtue thereof, this defendant and her lands and estate therein are discharged and released and the said bond and mortgage held by said Terbell or said bank as security for said indebtedness are likewise discharged.

That subsequent to the execution and delivery of said bond and mortgage and before the filing of the bill in this suit, the said sum of \$45,000, alleged to be secured by said bond and mortgage, was paid in full by the said principal debtors, the Grove Straw Hat Manufacturing Company or William K. Grove or one of them to the holder of said bond and mortgage, and the said mortgage was thereby fully

Amended Answer and Counterclaim Mary B. Grove.

paid, satisfied and discharged, and that nothing is due or owing thereon.

10 This defendant denies that the said bond and mortgage or either of them were given by her nor as she is informed and believes and therefore avers, by the said William K. Grove for a loan to him of \$45,000, or any other sum as alleged in said amended answer, and further she is informed and believes and therefore denies that any such loan and advance was made.

3. As to the other allegations contained in said amended answer, this defendant says that she has no knowledge or information thereof sufficient to form a belief.

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YOUNG, BIGELOW & FAYERWEATHER,
Solicitors for the Defendant, Mary B. Grove.

**Amended Answer and Counter-claim.
Mary B. Grove.**

IN CHANCERY OF NEW JERSEY.

30	Between CHARLES F. NESLER, Complainant, and WILLIAM K. GROVE and others, Defendants.	}	On Bill, &c.,
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40 The amended answer of the defendant Mary B. Grove to the bill of complaint of Charles F. Nes-

Amended Answer and Counterclaim Mary B. Grove.

ler and the counterclaim of said Mary B. Grove against the defendants Allen N. Terbell and Globe Tire Company and Second National Bank of Hoboken, a third party.

This defendant, who resides in West Orange, New Jersey, says that:

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1. Paragraphs One, Two and Three are admitted.

2. Defendant admits that with her husband, William K. Grove, on July 28, 1913, she executed a certain mortgage to Allen K. Terbell, which mortgage was recorded in the Register's Office of Essex County in Book I 31 of Mortgages, 586, as set forth in paragraph Four of said bill. Said mortgage is void as against this defendant for the reasons hereinafter stated in her counterclaim.

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3. Paragraphs Five, Six and Seven are admitted.

4. This defendant admits that on March 21, 1917, at the suit of the Globe Tire Company, writ of attachment issued against the said William K. Grove, as in paragraph Eight set forth. Said Globe Tire Company has no lien upon or interest in said mortgaged premises or any portion thereof for the reasons hereinafter stated in this defendant's counterclaim.

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5. Paragraphs Nine, Ten and Eleven are admitted.

By way of counterclaim against the defendant Allen N. Terbell and Globe Tire Company and Second National Bank of Hoboken, N. J., a third party, this defendant says:

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Amended Answer and Counterclaim Mary B. Grove.

10 1. She is a married woman, and her husband's name is William K. Grove; she married her said husband on or about April 23rd, 1907, and lived with him continuously thereafter until March 10, 1917, when her said husband removed to the Republic of China where he now resides. This defendant, at the time of her said marriage, was an infant of the age of eighteen years; she has never been engaged in business and is entirely without business experience or training.

20 2. Said William K. Grove purchased the premises described in paragraph Three of complainant's bill of complaint, in the months of October and November, 1909. Shortly thereafter, and on or about Christmas Day, December 25, 1909, he told this defendant that he then gave her the said lands and premises. This defendant, relying thereon, and well believing that she was the owner of said premises, did in the year 1910 improve the same by the erection thereon of a dwelling house and a private garage. She spent and laid out in and by said improvements, out of her own separate estate, the sum of \$50,000 or thereabouts, no part of which sum was given to her by her said husband.

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3. Shortly before March 8, 1917, this defendant was informed by her said husband that according to the strict rules of the common law, the title to said premises and the improvements erected thereon was in him and not in her, and that it so appeared upon the records of the Register of Essex County. This defendant thereupon caused a deed of conveyance for said premises to be drawn and

*Amended Answer and Counterclaim Mary B.
Grove.*

executed and delivered by her and her said husband to one Herbert N. Bradley, and another deed to be drawn and executed and delivered by the said Herbert N. Bradley to this defendant; said last mentioned deeds were recorded in the Register's Office of Essex County on March 23, 1917. 10

4. On or about July 28, 1913, this defendant, at the request of her said husband, with him, did sign and seal a mortgage to Allen N. Terbell, one of the defendants to this counterclaim, said mortgage recites that the said William K. Grove is justly indebted to the said Terbell in the sum of \$45,000 secured to be paid by his certain bond or obligation of even date with said mortgage, and that said mortgage is given for the better securing of the sum of money mentioned in the condition of the said bond or obligation with the interest thereon according to the true intent and meaning thereof, as by the said mortgage or a copy of the record thereof may more fully appear. 20

5. This defendant has no knowledge or information sufficient to form a belief as to whether or not her said husband did in fact make and deliver any bond or obligation to the said Allen N. Terbell; neither this defendant nor her said husband were at the date of the said mortgage, or at any time since then indebted to said Terbell in the sum of \$45,000 or any other sum. Said mortgage is absolutely void as to this defendant. 30

6. This defendant is informed, that the said Terbell was, at the date of the said mortgage, the cashier of said Second National Bank of Hoboken; 40

*Amended Answer and Counterclaim Mary B.
Grove.*

that her said husband was then already obligated to said Bank as endorser or otherwise, secondarily, and for the accommodation of the Grove Straw Hat Manufacturing Company, a corporation, in the sum of \$45,000 or thereabouts, then already owing
10 by said company to said bank as evidenced by certain promissory notes then existing, and that said mortgage was made and delivered to secure said sum due as aforesaid from said Company to said Bank, and that subsequent to July 28, 1913, and subsequent to the execution and delivery of said mortgage, said notes were cancelled, surrendered and delivered up, and new notes, differing in various particulars as to time of payment, amounts and parties were executed and delivered
20 in their place, in extension, substitution and renewal and in lieu of the said original notes, and that in consideration thereof and by virtue thereof, the said principal debt, namely, said notes, was altered, varied and extended by valid enforceable agreements for valuable consideration between the holder of said bond and mortgage and the principal debtors as to which principal debt and debtors, this defendant and her separate estate in said mortgage premises were surety, to the
30 knowledge of said holder; and that, in consideration of the turning over, by secret arrangement, to said holder or to some one in trust for said holder, parts of the assets of the said principal debtor, the Grove Straw Hat Manufacturing Company, the holder of said bond and mortgage, not by compulsion of law but voluntarily, released and discharged the said company from the said indebtedness, waived its dividend in bankruptcy, and consented,
40 in writing, as one of the necessary consenting cred-

Amended Answer and Counterclaim Mary B. Grove.

itors to the discharge of said company in bankruptcy, all with knowledge of this defendant's suretyship, aforesaid; that said alterations, variations, extensions and said secret arrangement, waiver and discharge of said principal debt were made without the consent of this defendant, Mary B. Grove, and without her knowledge and that by virtue thereof, this defendant and her lands and estate therein are discharged and released, and the said bond and mortgage held by said Terbell or said bank as security for said indebtedness are likewise discharged. 10

That subsequent to the execution and delivery of said bond and mortgage and before the filing of the bill in this suit, the said sum of \$45,000 alleged to be secured by said bond and mortgage, was paid in full by the said principal debtors, the Grove Straw Hat Manufacturing Company or William K. Grove or one of them to the holder of said bond and mortgage, and the said mortgage was thereby fully paid, satisfied and discharged, and that nothing is due or owing thereon. 20

7. Said Bank did not pay or satisfy to this defendant or her said husband, any money or consideration whatever for said mortgage. 30

8. On or about March 21, 1917, Globe Fire Company sued out a writ of attachment against said William K. Grove as in the eighth paragraph of complainant's bill of complaint is mentioned. By virtue thereof, the Sheriff of Essex County did attach part of the above mentioned lands and premises and said Globe Tire Company claims to have some lien upon or interest in said premises. None 40

*Amended Answer and Counterclaim Mary B.
Grove.*

of said lands and premises were, however, the property of said William K. Grove, and this defendant denies that said attachment is a lien upon said premises or any part thereof, or that said Globe Tire Company has any interest therein.

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This defendant therefore prays:

1. That said Allen N. Terbell, Globe Tire Company and Second National Bank of Hoboken may answer this counterclaim and each statement herein made.

2. That said Terbell may be decreed to deliver up for cancellation the said mortgage held by him, and that the same may be cancelled.

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3. That the said Second National Bank of Hoboken may be decreed to have no interest in or lien upon said lands and premises by virtue of said mortgage or otherwise.

4. That said Globe Tire Company may be decreed to have no interest in or lien upon said lands and premises by virtue of said writ of attachment or otherwise, and may be restrained by the decree of this Court from asserting any such lien or interest or interfering with this defendant's title and possession to and of said premises.

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5. That a writ of subpoena may issue commanding said Second National Bank of Hoboken to answer this counterclaim and to abide by such decree as this Court may make in the premises.

YOUNG, BIGELOW & FAYERWEATHER

Solicitors and Counsel,
with Defendant Mary B. Grove.

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**Reply of Second National Bank and
Allen N. Terbell to the Amended
Answer and Counterclaim of
Mary B. Grove.**

IN CHANCERY OF NEW JERSEY

Between CHARLES F. NESLER, Complainant, and WILLIAM K. GROVE and others, Defendants.	}	On Bill, etc.
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Allen N. Terbell and the Second National Bank
say :

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1. They admit the allegations of paragraph 1, excepting they have no knowledge, information or belief as to whether Mary B. Grove had ever been engaged in business or that the said Mary B. Grove was without business experience or training, and, for want of such information or belief, they deny the same.

2. They admit that William K. Grove purchased the premises described in paragraph 3 of complainant's bill of complaint in the months of October and November, 1909, but they have no knowledge, information or belief that the said William K. Grove then gave the said lands and premises to his wife, and, for want of such information, knowledge or belief, they deny the same; and they deny that the said Mary B. Grove relied upon or believed that she was the owner of the said premises, or that any improvements put upon the said premises, such as the dwelling house and private garage, were

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Reply of Second National Bank and Allen N. Terbell to the Amended Answer and Counter-claim of Mary B. Grove.

10 erected thereon by her upon the belief that she was the owner of said premises; and they have no knowledge, information or belief as to the sum of money expended by her on the improvement of said property, and, for want of such information, they deny that she expended \$50,000., or any other sum, in the erection of a dwelling house or garage.

3. They have no knowledge, information or belief as to any statements made by the husband to the wife relative to the title of the premises mortgaged, and, for want of such information, knowledge or belief, they deny the same. They admit, however, that the two deeds alleged in paragraph 3 of the counter-claim were recorded.

20 4. They admit paragraph 4.

5. They deny that the said William K. Grove was not, at the date of the execution of said mortgage to the said Second National Bank, indebted to the said Second National Bank; they allege that the said mortgage was made to said Terbell as the agent of the said Bank; all of which was well known to the said William K. Grove and Mary B. Grove; and they deny that the said mortgage is void, but allege the truth to be that it is valid and
30 enforceable.

6. They deny that the said bond and mortgage so given by said Grove and his wife to the Second National Bank was ever paid cancelled, or surrendered; and they deny that the said mortgage so executed by Mary B. Grove jointly with her husband was made to secure the payment of any obligation or notes other than the bond, as mentioned and described in the said mortgage, and deny that there
40 has ever been any extension, substitution or renewal of the said bond, and deny that the said Second

Reply of Second National Bank and Allen N. Terbell to the Amended Answer and Counter-claim of Mary B. Grove.

National Bank or Allen N. Terbell, or any one else representing the bank, knew that said Mary B. Grove was surety in said mortgage, or that the said bank, or any one representing it, knew that the said Mary B. Grove was the owner of any equitable interest, or any other interest, in said property; and deny that the said bank, or Allen N. Terbell, or any one representing said bank, by secret arrangement, or otherwise, or at all, turned over any of the assets of the said Grove Straw Hat Manufacturing Company, but they allege the truth to be that the said Second National Bank did regularly present to the trustee of the bankrupt's estate of the Grove Straw Hat Manufacturing Company its claim against said bankrupt company; that it held at the time of the bankruptcy of the said company certain collateral securities by separate instruments; that it was required under the law to present those claims and that whatever was done in presenting the said claims to the bankrupt's estate, it did pursuant to law and at all times without any knowledge on the part of the bank, or any of its officers, that Mary B. Grove was a surety; and they deny that any alterations, variations, extensions or secret arrangements constituted a waiver or discharge of the bond or mortgage, and deny that any and all action taken by the Second National Bank against the bankrupt estate of the Grove Straw Hat Manufacturing Company was without the knowledge of Mary B. Grove; and deny that the said bond and mortgage made by said Mary B. Grove and William K. Grove have been discharged or in any way affected or altered by the proceedings taken by the said Second National Bank

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Reply of Second National Bank and Allen N. Terbell to the Amended Answer and Counter-claim of Mary B. Grove.

10 against the bankrupt estate of the Grove Straw Hat Manufacturing Company; and deny that the said bond and mortgage have been paid in full, or at all, by the said Grove Straw Hat Manufacturing Company or William K. Grove, or any one else; and deny that the said mortgage has been paid, satisfied or discharged, or that there is nothing due or owing thereon, but they allege the truth to be that the said bond and mortgage are now in full force and effect, no payment whatever having been made and no discharge or release has ever been made thereof.

20 7. They deny that the said bond and mortgage were not supported by a good and full consideration, but allege the truth to be that at the time of the execution of said bond and mortgage a loan was made to the said William K. Grove in the full sum of \$45,000.

30 8. They deny that the said Globe Tire Company has any right, title or interest in said estate superior to the right of the said Second National Bank, but allege the truth to be that whatever interest, right or claim said Globe Tire Company has in said property is subject and subordinate to the mortgage and bond of the Second National Bank.

Wherefore the Second National Bank and Allen N. Terbell pray that the counter-claim be denied.

FREDERICK N. EBERHARDT,
WELLER & LICHTENSTEIN,
Solicitors for Defendants Second
National Bank of Hoboken and
Allen N. Terbell.

New Jersey Court of Errors and Appeals 10

Between

CHARLES F. NESLOR,
Complainant-Respondent,

and

WILLIAM K. GROVE et als.,
Defendants-Appellants.

On Bill, etc.

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BRIEF OF SECOND NATIONAL BANK OF HOBOKEN, DEFENDANT- APPELLANT.

This was an action brought by Charles F. Neslor, as complainant, against William K. Grove, Mary B. Grove, Allen N. Terbell, and the Globe Tire Company, to foreclose his mortgage, bearing date February 1st, 1910; and to the bill of complaint Mary B. Grove answered admitting the due execution of the mortgage, and prayed by way of counter-claim that Allen N. Terbell, The Second National Bank of Hoboken and the Globe Tire Company answer, and that said Terbell be decreed to deliver up for cancellation the said mortgage held by him, and that the said Second National Bank be decreed to have no interest or lien upon the said lands, and that the said Globe Tire Company be decreed to have no interest in or lien upon the

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said lands and premises by virtue of their writ of attachment.

The Globe Tire Company, answering, set out that they had attached the property and claimed that its attachment was a prior lien to the mortgage made to Allen N. Terbell and is a prior lien to the interest or estate claimed by Mary B. Grove.

10 The Second National Bank and Allen N. Terbell, answering, admitted that the mortgage of Charles F. Neslor was a first mortgage upon said property, but that their mortgage interest was superior to the attachment lien of the Globe Tire Company and to any and all interests claimed by Mrs. Grove, and that the mortgage, while made to Allen N. Terbell, was made to him as the agent for the Second National Bank.

20 The Vice-Chancellor filed two opinions. In the first filed by him he held that the mortgage of Charles F. Neslor was a first mortgage upon the property; that Mary B. Grove was the equitable owner of said property; and that by the alteration in the security held by the Second National Bank the bank released its mortgage lien to the extent of \$35,000, but held that the \$10,000 of its \$45,000 security was not released as there had been no alteration in the \$10,000 note. The Vice-Chancellor also held that the attachment lien of the Globe
30 Tire Company, by reason of certain statements made by Mr. Terbell, the cashier of the Second National Bank, should supersede the lien of the Second National Bank.

At the final hearing before the Vice-Chancellor he altered his former opinion, in effect wiping out the lien of the Second National Bank to the extent of \$10,000, and held that the \$10,000 note transaction must be treated the same as the \$35,000
40 note transaction.

The history of the mortgage between the Second National Bank of Hoboken, as mortgagee, and William K. Grove, and his wife, Mary B. Grove, mortgagors, may be briefly stated as follows:

William K. Grove purchased, with his own money, the mortgaged premises in November, 1909, the title to the same being taken in his own name. Some time prior to the execution of the Second National Bank mortgage in question, the Grove Company, of which William K. Grove was an officer, was indebted to the bank in the sum of \$35,000 on notes made by it and endorsed by Grove personally. Grove was also indebted to the bank in the sum of \$10,000, on his individual note. These notes were renewed from time to time, until the bank asked that the notes be "cleaned up" as had been the custom theretofore to do at least annually (page 52). After conference with Mr. Grove, it was arranged that the bank would loan Grove personally \$45,000 which he was to use to take up the company's \$35,000 note and his own \$10,000 note, and as evidence of this debt he was to execute a bond to be secured by a mortgage in the sum of \$45,000, on his property in West Orange, N. J. (pages 47 and 54). Thereupon, on the 28th of July, 1914, the bond and mortgage in question, in usual form, were executed, Mrs. Grove joining only in the mortgage. The mortgage was placed on record July 29th and a cashier's check was drawn to the order of William K. Grove for \$45,000, which check was endorsed by Grove and placed to his personal credit. On the same day Grove drew his personal check to the Bank for \$45,000 for the purpose of taking up the notes upon which he was directly and indirectly liable as above stated (page 56). All this appears by the books of the bank, as does also the fact that on the day Grove gave

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his check, the \$35,000 and \$10,000 notes were marked paid (page 60) and returned to him. On the day the mortgage was executed an entry was made in the general ledger under the heading of "Mortgage Account," "W. K. Grove, West Orange property, July 28, 1914, \$45,000." During the conference relative to the granting of the \$45,000 loan and the giving of a mortgage, the bank asked for additional security from Grove, and Grove agreed to give the bank a note of the Grove Straw Hat Works, endorsed by him, for \$35,000, and also give a note made by himself in the sum of \$10,000 (pages 54, 55, 87 and 88). Grove having paid the indebtedness of the Grove Company was entitled to receive a note from the Grove Company for a similar amount. Accordingly, Grove deposited with the bank a note of the company for \$35,000, endorsed by him, and his personal note for \$10,000 both payable on demand. These notes were taken, received and held by the bank as *additional collateral security* for the payment of the indebtedness of \$45,000 loaned to Grove on bond and mortgage to take up the old notes, as above stated (pages 55, 62, 78 and 79).

These additional collateral demand notes were never entered upon the books of the bank (page 55), because they were considered as collateral only, but were placed in the security box with the bond and mortgage (pages 79 and 80), in which box the bond, mortgage and said \$10,000 demand note have remained ever since, in their original form.

On January 8, 1914, within six months after the execution of the mortgage and the delivery of the demand notes, Mr. Terbell, the bank cashier, asked Mr. Grove to bring, him a \$35,000 time note of the Grove Company to take the place of the \$35,000 de-

mand note which it then held, endorsed by Grove. His reason for making this request was to avoid releasing Grove as an endorser on this demand note, as Mr. Terbell says on page 82, the bank did not wish to carry the Grove Company demand note as such any longer because of the endorsement (page 62).

He apparently had in mind Section 71 of the Negotiable Instruments Laws of 1902, page 596, which provides that, where an instrument is payable on demand, presentment must be made within a reasonable time after its issue. Grove, accordingly, brought the bank a time note of the Grove Company for \$35,000, dated January 8, 1914. On the same day a credit of \$45,000. was made in the Journal "Grove mortgage account" (pages 61-62). 10

On January 8th, the \$35,000 time note and the Grove \$10,000 demand note, which were being held as additional collateral to the mortgage, but not on the books, were set up on the books, and the mortgage, so far as the bank's books are concerned, did not further appear of record, but was held by the bank in the same manner as these notes had been theretofore held from its record, as above stated. 20

On January 8th, 1914, the Grove Company, and Grove individually, had accounts with the bank, but their individual accounts were not credited with \$45,000. or any other sum (pages 81-82). This note transaction, so far as the books are concerned, was entirely unlike the \$45,000 loan made to Grove on the mortgage, where credit for that amount was given to Grove personally on the books of the company. 30

No credit was given for these notes to either of the parties. As a matter of bookkeeping and for the purpose of setting up the notes, they were run through what is called the "Transient Discounts" (page 140). No credit was given to the Grove Com- 40

pany for the \$35,000. note, because it was held as additional collateral security (page 240). The "Transient Discount" record is only made in cases where a person had no account with the bank, but where there is an account and a note is discounted it is always placed to the credit of the individual (pages 140-141). This latter note transaction not
 10 being a loan but still being held as additional collateral and for the purpose of setting upon the books, it was necessary to make the entry somewhere and hence balancing entries were made among "Transient Discounts" and in this case, according to the testimony (page 141), it indicated that no money was advanced on the note. Thereafter the \$35,000 time note was renewed from time to time until 1915 when Grove Company went into bankruptcy and the bank realized about \$9,000
 20 from the estate, credit for which is given on the mortgage indebtedness. Since then the bank has held the bond and mortgage and the \$10,000 demand note of Grove as security for the payment of its original loan on the mortgage.

Mrs. Grove defends, as against the mortgage of the Second National Bank, claiming:

1. That the mortgage must be considered paid by reason of the various entries in the books of the Bank.
- 30 2. That by reason of the acceptance by the Bank of the \$35,000 time note of January 8th, 1914, to take the place the \$35,000, the demand note of July 28th, 1913, the mortgage security joined in by her was lost.

(3) That she held an equitable title to the property, hence her mortgage under the doctrine that she was a surety was discharged.

- (4) That she is either the equitable owner of the property in question, or has an interest in the
 40 property which is paramount to that of the bank,

and this for the reason that several years prior to the execution of the bank mortgage she had a conversation with her husband, he being the owner of the fee to the land in question, during the course of which he either stated that he purchased the property for her, or that he gave it to her as a Christmas present, or that it was hers, or that he would deed the property to her, or that he had in fact deeded the property to her, and that relying upon these, or some of these statements. she expended \$48,000 in the the erection of a building upon the land. Her claim to a paramount interest is based upon the theory of *notice of such interest to the bank*. 10

It is denied on behalf of the bank, that she has made out any such claim as is contended for by her, or that it ever had notice of any such claim.

The Glove Tire Company sets up the same claims urged by Mrs. Grove, and in addition thereto, that the mortgage must be subordinated to a subsequent judgment held by it against Grove by reason of certain statements alleged to have been made by Mr. Terbell, the cashier of the Bank, as to the financial responsibility of Grove, as a result of which credit was extended to Grove to the detriment of the Tire Company, and that the Bank is bound by these alleged statements. 20

POINT I. 30

The bond was the primary obligations and was never altered or paid. The notes taken by the bank were collateral securities and any alteration or change in the collateral did not affect the primary obligation.

It is not claimed that the bond was paid with so much cash, the only evidence relied upon to indi- 40

cate payment is the entry in the books of the bank and the conduct of the parties relative to the mortgage.

Mrs. Grove insists that, through the fiction of words and figures, there is presented the anomaly of payment without payment having been made or even intended.

10 The burden of showing proof of payment rests upon those who say that payment has been made.

The original transaction, resulting in the making of the mortgage, was a loan of \$45,000 advanced to Grove at the time of the making of the mortgage.

20 (Page 47) "Q. What was the transaction that led to the giving of this mortgage? A. Why, we loaned W. K. Grove \$45,000 and took a bond and mortgage; that was a new loan at the time, July 28, 1913; we gave him our cashier's check for \$45,000, and deposited it to his personal account. He then proceeds to say that this was a new transaction and the mortgage was given to secure the payment of the bond."

30 Just prior to the giving of the mortgage there had been a conference with Grove relative to his "cleaning up" his outstanding obligations to the bank.

(Page 52) "A. Well, those lines are cleaned up every year; we wanted that line cleaned up as usual. Q. How long had this line been running? A. Referring to that season at least, they were cleaned up every season."

40 On page 53 witness says that he had heard that New York banks were being paid up and a request

was made that Grove clean up his line, at the end of the season.

(Page 54) This loan was in the usual course of business to evidence a new loan.

“A. I think the result of the conference was that if we would loan him this money he would take care of these obligations; that is all the security he had to offer, was to give us a mortgage on his property.” 10

(Page 77) “A. Yes, I understand it. Mr. Grove knew previous to that date that we desired our money, and he came that day and suggested or offered, he told us he would give us a mortgage on his house at West Orange if we would loan him the \$45,000 * * *”

(Page 56) (By the Court): “Q. Then the evidence of the indebtedness of Grove was merely the possession by your bank of this bond and mortgage? A. Yes.” 20

(Page 56) A cashier's check was drawn to the order of Grove for \$45,000 and deposited to his individual credit, as appears by a transcript of his account and the books of the bank. Grove drew his individual check for \$45,000, which check was used to pay off the existing obligation of \$45,000 upon which he was directly or indirectly responsible. 30

(Page 60) The books show that the old notes were marked paid, they having been returned to Grove.

(Page 61) An account was opened up in the general ledger entitled “Mortgage Account” in which an entry was made “W. K. Grove, West Orange property, July 28, 1914, \$45,000.” It is

with reference to a subsequent entry made on the credit side of this account that it is contended that the mortgage should be considered paid.

10 “Q. That is on the debit side of the account and indicates a mortgage loan taken by the bank at that time? A. A loan secured by mortgage, yes.”

It is not an uncommon but rather the custom and usual thing in banking circles to require a customer to clean up his account at least once a year. This applies particularly in that class of cases where advances are made to carry over a customer during certain periods of the year in order to enable a customer to transact business.

20 We also know, and can take notice of the fact, that it is the general practice where a note comes due and the customer desires to renew it or pay it off, for the bank to require the customer to make his check for the amount due, making him a new loan if necessary, as the case may be, for the purpose of enabling the payment to be made in whole or in part. This is exactly what was done in the case before us, excepting that instead of the loan being made on a note it was made on a bond secured by a mortgage.

30 At the time the mortgage was negotiated there was an understanding between the parties that he was to give additional security for the payment of this new indebtedness.

(Page 54) “Q. Did you ask him for any other security? A. Yes, naturally.

Q. And he said this was all the security he could offer? A. Except the note of the company and his own note.”

(Page 55) "Q. What was your oral agreement with him? A. If he paid the note of the company, the company gave their note in return, he put it up with us as additional collateral.

Q. Additional collateral to the mortgage?

A. The mortgage, yes, and accompanied by his own note of \$10,000.

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Q. Didn't you consider the mortgage was sufficient security for the debt? A. As I say, banks take all the security they can get."

(Page 78) The witness states Grove agreed to give his \$10,000 note and the \$35,000 note of the company which they gave him, because he had paid its debt to the bank as security in addition to the mortgage.

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(Page 78) "A. We told Mr. Grove we would take those notes and hold them in addition to the mortgage as security for the loan advanced to him."

On page 140, when asked why the Grove Straw Hat Works did not receive credit for the \$35,000 note made on January 8th to take the place of the old \$35,000 note, witness answered: "Well, because that \$35,000 note was held as collateral security."

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(Page 79) When the mortgage was entered up on the books, as above indicated, the \$10,000 and \$35,000 notes were held in the collateral security box and possession of the bank.

(Page 55) No entry was made of these notes in the books at the time they were taken.

That the bank held these notes is, of course, nowhere denied, and that they were given to the bank to be held as security for whatever they were

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worth can also not be denied. Possibly if the bookkeeper had been a little more careful and instead of making the short notation in his journal, above recited, had stated that the loan was made on the bond and secured by the mortgage and that the notes were held as further security no question as to payment would possibly arise by reason of the entries and subsequent conduct of the parties. Apparently the bookkeeper, working machine like (as they often do) and considering the mortgage the evidence of the debt, did not consider it proper to set up or refer to the notes fearing that he would be setting up two assets instead of one.

On January 8th, the bank then holding the bond, mortgage and two notes, Mr. Terbell asked Grove to give him a note for \$35,000 to take the place of the \$35,000 demand note (page 82).

On the same day, although the bank had only received a note of \$35,000, the \$45,000 entry was made in the mortgage account, and it is by reason of this entry that it is claimed there is an indication of an intent on the part of the bank to consider the taking of the \$35,000 note as payment on the mortgage obligation.

No one testified that such was the intention; no one testified that there was an understanding between Grove and the bank that the note was to be taken as payment. The whole theory of the defense is an assumption, and we respectfully submit that the uncontradicted proofs clearly indicate that the purpose of the bank in taking the note and making the entries was at all times to hold the bond, mortgage and notes as security for the payment of the indebtedness and that there never was any intention by either Grove or the bank that the taking of the note of January 8th, or the making of the entries should in anywise be considered as payment or as relinquishing the mortgage security. There

was no reason for the bank, once having this mortgage security, to give it up when it received nothing of substance in return. The mortgage was taken in the first instance because it was the best security it could obtain. It did not wish to rely upon the Grove Company note, nor the Grove individual endorsement, and for that reason took the mortgage and at the same time took the Company's note and Grove's note as further security for whatever they were worth. These things we must consider in order to determine why the bank should indulge in the foolhardy thing contended for by Mrs. Grove, viz., to give up the only real security it had without getting a penny's worth of value in return, because they already held Grove's note and the Grove Company note for the one which was held clearly gave them no additional advantage. Great stress was laid upon the various entries which took the form of a formal discount of the new \$35,000 note and the old \$10,000 note, but if we bear in mind the fact that it was the desire of the bank to set up the notes on their books which they considered as being held as security, instead of the mortgage security, and to hold the mortgage security in the box in the same manner as they had theretofore held the notes as security, it is plain to understand why it was necessary to make these bookkeeping entries. These bookkeeping discount entries the bookkeeper considered necessary to be made. Possibly a more skillful bookkeeper, or had it been known that any question would be made as to payment, might have made the entries in some form or other which would not have permitted the slightest doubt to arise, but the bank should not be held responsible for formal entries in its books which, if considered strictly, might be construed as having an effect which was never intended.

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(Page 81) "Q. Now when Mr. Grove gave you the note of the Grove Straw Hat Works for \$35,000 on January 8, 1915, did the bank loan Mr. Grove \$35,000 on that note? A. No, sir."

10 (Pages 81-82) Mr. Terbell's attention was called to the discount records under date of January 8th, wherein the entries of the \$35,000 January 8th note and the old \$10,000 note appear, and was asked whether the notes in question were in fact discounted, and if Mr. Grove received the money, and his answer was:

"A. It passed through the process of discount; Mr. Grove did not receive any credit from them."

20 (Page 82) By the Court: "Q. And the proceeds, as in the other case, did not come through his account? A. No, sir."

30 It will be recalled that the original \$45,000 mortgage transaction passed through the books as a regular discount, and the proceeds placed to the credit of Grove's personal account, and the Court here calls attention to the distinction in the discount procedure between that transaction, wherein credit was given, and in this transaction, where no credit was given, clearly showing that it was nothing but a series of bookkeeping entries.

(Page 82) "Q. Your purpose you said in taking a time note instead of allowing the old demand note to run was because you had some doubt in your mind about holding the endorser responsible on the demand note? A. Yes."

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The witness had previously stated on page 30, that around January 8th, not wishing to carry the Grove Company demand note any longer because of the liability to lose the endorser, he requested the new note. He also states (page 50) that the bank examiners do not encourage the making of mortgage loans, "but they don't make any fuss if you do take them, if you do take them, take all the security you can get." 10

Again, it appears that National Banks do not favor the appearance of mortgages as securities on their books, but they are held among securities off the books.

(Page 65) "A. We don't enter mortgage securities in the National Banks under mortgage securities."

And on page 66:

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"A. If we enter a mortgage the examiner reports 'real estate loan,' and we have numerous correspondence with the Secretary of the Treasury. No National Bank enters mortgages. The examiner don't say we can't take it."

"(By the Court): Q. The Examiner don't object to your taking mortgage as collateral to a note where the note is properly endorsed? A. No; but he reports to Washington and Washington continually hammers you to have that cleaned up, so the bank keeps them in the safe and says nothing." 30

When asked whether the examiner would rather see a note without security than a note with a real estate mortgage as security the witness answered, no, but there would be less inquiry and less criticism. 40

"A. That is the idea; every National Bank in the country takes mortgages, keeps them in their safe, don't make entry in their books."

This he knows from an experience of thirty years in the banking business.

10 Coming back to the question of the bookkeeping entries which had the appearance of discount entries, the witness says, page 137, that inasmuch as there was no credit placed to the personal account of the Grove Company or Grove, there had to be some entries made somewhere, and, therefore, the entries were made among "transient discounts," in which account cross debit and credit entries were made.

20 When the witness was asked why personal credit was not given to the Grove Company, the answer was:

(Page 140) "A. Well, because that \$35,000 note was held as collateral security."

(Page 141) "Q. Where a man has an account and the note is discounted, you credit his personal account with the amount of the discount? A. Yes.

30 Q. (By the Court) Even if the discount is for the purpose of a cross entry where it immediately goes out and goes back to the bank to take care of an old note? A. Yes.

Q. Where a man has already had a note discounted, and another note is given by him to take the place of that note, do you re-discount the second note? A. Yes.

Q. And is the amount credited to his personal account? A. Yes.

40 Q. In this case what was the purpose of your putting this \$35,000 transaction through the

transient discount book? A. It was not a loan to the Straw Hat Manufacturing Company merely setting up that collateral note off the books, and removing the mortgage from the books; it is hard for you people to understand that situation, but a bank man understands why those entries were made.

Q. Does this entry in the transient account indicate that any money was advanced on this note? A. Yes, because there is debit and credit." 10

(Page 140) "Q. To you, as a banker and understanding bank books, what does this entry of \$35,000 here indicate? A. It indicates that the note was placed on your books but did not go to that concern's credit.

Q. (By the Court) Or to anyone's credit? A. No; the bank now holds it as security, that is all, for the old loan." 20

When asked whether the entries to him, as a banker or familiar with banking books, would indicate that the mortgage was considered paid, the answer is:

(Page 143) "A. It showed to us the mortgage was not in any sense considered cancelled or paid, but considered as still held as security." 30

(Page 144) The entries were merely a matter of bookkeeping, and that is all, to keep the bank accounts straight.

These excerpts from the testimony are but a few which indicate that the so-called "discount entries" were merely matters of form for the purpose of carrying out the idea which the bookkeeper had in mind. 40

(Page 68) The entries in the books are made by clerks.

Mr. Terbell's attention was called to the so-called "balancing entry" in the mortgage account.

10 (Pages 61-62) "This entry on the credit side, 'January 8th, \$45,000,' closed the account, didn't it?

A. It didn't pay the mortgage.

Q. I ask you whether that didn't close the account? A. It closed up that entry, yes.

Q. It closed the mortgage account, didn't it? A. So far as it referred to this property? No, it didn't close the mortgage account.

20 Q. You did not close the mortgage account because of what? A. Because we still carried the mortgage; we changed the form when we carried that loan in our books, and that was all.

Q. It was taken out of the mortgage account, wasn't it? A. Carried in different form."

(Page 63) When asked where the bank got the \$45,000 to make the balancing entry, witness said:

30 "A. \$35,000 endorsed by William K. Grove took his demand note for \$10,000, put his demand note on our books as collateral and \$35,000 note, and held the mortgage off to one side because the department does not like us to hold mortgages on our books."

Witness explains, page 63, that there could have been no new discount intended because:

"A. They already had credit."

40 "A. Grove had had credit, additionally (originally). We didn't give him new credit; the loan was not paid, it was the same old loan."

(Page 82) There was no understanding between Grove and the bank that the taking of the \$35,000 note on January 8th was to be applied on account of the mortgage; and that it was never considered as having been taken in payment of the mortgage, is evident by the recognition of its existence by Grove as appears throughout the testimony and his constant reference to it in conversations with the bank officials as hereinafter appears under the heading which analyzes the testimony indicating recognition of the mortgage liability by Grove. 10

Whatever the appearance of the "physical" entries may indicate, the intention of the bank officials was at all times to hold the mortgage as security for the loan, and the notes as additional security.

In addition to the testimony above referred to showing intent on the part of the bank and the bookkeepers, the following appears: 20

(Page 85) When asked whether the entries in the mortgage account were made with the intention of considering the mortgage paid, the answer was, "No."

Mr. Grove was never informed that the mortgage was cancelled or would be returned to him when he gave the note.

(Page 86) He never asked for the bond or mortgage after it was executed. 30

(Page 86) "By the Court: Q. What was the purpose of your holding the mortgage after it was marked up on the books of the bank?

A. As collateral against Mr. Grove's loan.

Q. Made when? A. Made July 28, 1913."

(Page 86) When the January 8th note was renewed from time to time, Grove was informed that the mortgage was held as security, and it was always so referred to between the parties. 40

(Page 87) After January 8th they threatened foreclosure. This was in 1915.

10 (Page 87) "Q. What is the purpose of the entry in the cash book of \$10,000? A. It is to get the note on our books, and put the mortgage back in the collateral, take the mortgage off the books and put the note on; that is the idea."

(Page 88) The entry of the \$10,000 and \$35,000 notes were "mere bookkeeping entries."

"Q. Well, do these entries taken by themselves, that is, the physical appearance of these entries taken by themselves, show the true situation that existed? A. No, sir."

20 And when asked (page 89) why it was necessary to make these entries in that way, he answers, that inasmuch as the mortgage was on the books, and it was the intention to take the mortgage out of the books, it was necessary to put something in its place of record. And then (page 89):

30 "Q. On January 8th, 1914, how did you hold the mortgage and the bond and these notes that were given to you at this time? A. All security for the loan made June 28th, 1913."

Asked whether the entries as testified to indicated whether it was intended to be a payment of the mortgage or not, the answer was:

40 (Page 89) "A. It showed to us the mortgage was not in any sense considered cancelled or paid, but considered as still held as security."

Although it is asserted, that the bank, by reason of the entries and the taking of the note considered the mortgage paid, we find that their conduct with reference to their interest in the mortgage property continued, for on pages and 90 we find that from the time the mortgage was made the bank looked after the insurance to the property; they spoke to Grove about it; Grove negotiated the insurance with Strong & Son. The Bank, upon renewals being required, spoke to Grove about placing it for them. 10

Letters have been introduced in evidence, which show that Strong & Son wrote to the Bank upon the expiration of policies enclosing the policies, and stating that they had been placed at the request of Mrs. Grove. This was after Mr. Terbell had spoken to them about it. The Bank replied to these letters of Strong & Son, and at all times kept the policies alive, which policies indicated that Grove was the owner and loss was made payable to the Bank as mortgagee. These letters were written on June 19th, 1914, and July 27th, 1915. 20

(Page 93) Grove neglected to pay the taxes on his property. A Martin Act sale followed and the Bank, to protect its interest, took an assignment of the certificate of sale.

(Page 93) This was done at the request of Mr. Grove in a conversation had with Senator Rabe, the president of the Bank. 30

(Page 101) On the occasion of the renewal of the notes given after January 8th Mr. Rabe frequently had conversations with Grove relative to the mortgage, and threatened foreclosure.

(Page 101) "Q. How often did you have these conversations with him? A. Well, periodically. I have stated generally about every three or four months." 40

(Page 102) It was never suggested by Grove that the mortgage was paid or considered paid.

10 “A. On the contrary, constant, all the time, referred to the mortgage as being active, and requesting me not to sell and not to foreclose that mortgage, as the property was very valuable. It was his home.”

(Page 103) Senator Rabe was active in the affairs of the bank, and was on committees which examined securities held as collateral by the bank from time to time.

20 (Page 103) “Q. And during all the time, from the time this mortgage was given up to the present, has this bond and mortgage been in your collateral box? A. All the time.”

(Page 103) “Q. What was this bond and mortgage held by you for? A. It was held as collateral security to the indebtedness of Mr. Grove.

Q. Was that security ever given up by the bank? A. Never.”

30 “Collateral security means either a separate obligation attached to a contract to guarantee its performance or it may mean a transfer of property or other contract to insure the performance of the principal agreement.”

Hale vs. Burlington, 13 Fed., 203.

40 “Collateral, in its common use, means additional subsidiary security given to sure the principal obligation. It is a separate obligation. Such collateral security stands by the side of the principal promise as an additional

or cumulative means for securing the payment of the debt. It is collateral to the original indebtedness."

Moffat vs. Corning, 14 Colo., 104.

"Collateral security is an article of value or evidence of debt, delivered by a debtor to a creditor not in payment of the debt, but as a concurrent security for another debt, whether antecedent or newly created, and is designed to increase the facilities of the creditor to procure the principal debt, which it is given to secure." 10

McCormack vs. Falls City, 57 Fed., 107.

"It is a familiar principle of law that where security is received as additional or collateral security of a pre-existing debt, it works neither a discharge, extinguishment or merger of the primary obligation." 20

21 Ruling Case Law, 1053.

This rule has been followed in this state in the case of Hutchison vs. Schwatsweller, 31 N. J. E., 205. The Court said:

"Simply accepting the mortgagor's notes did not pay the debt nor discharge the lien of the mortgages, nor did the subsequent surrender of the notes for the last mortgage have that effect. Nor will the taking of a second security, of equal degree with the first for the same debt, by operation of law extinguish the first. The proposition is indeed elementary

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that the mere act of taking a new security from the same party upon the same property did not merge or extinguish a prior one. A debt is not honestly extinguished until it is paid in cash or its equivalent. Nor can a security be considered released or surrendered where no payment has been made, until some act or word of the creditor is proved, clearly manifesting an intention of relinquishing or foregoing his right. The authorities render it clear that unless it has been satisfactorily shown that the defendant intended by the acceptance of the last security to give up the lien of her first, the first remains in full vigor. The case is barren of all evidence of such purpose."

20 In the case of *Shippman vs. Lord*, 58 Eq., 380, a creditor held security for the payment of his debt and thereafter had a settlement with the debtor and the amount of indebtedness was determined and the debtor executed to the creditor promissory notes for the amount and the creditor gave the debtor a receipt which recited that in consideration of the notes and their payment he thereby relinquished and discharged all claims he had against the debtor. It was contended by defendants 30 (1) that the notes had been paid in full and (2) that their security had been released and extinguished. Both contentions the Court denied and at page 385 Vice Chancellor Stevens said:

"The rule of law is that security cannot be considered released or surrendered where no payment has been made until some act or word of the creditor is proved, clearly manifesting

an intention of relinquishing or foregoing his right."

The positive testimony of a creditor may be sufficient in itself to show non-payment.

Magie vs. Bradley, 54 Eq., 326.

The case of Swain vs. Fraser, 35 Eq., 326, was an action to foreclose a mortgage given to secure payment of a bond. The bill charged that the bond was endorsed with various receipts for payment thereon, which payments were stated not to have been of money, as shown by receipts but by the notes of the obligors, and that the notes had never been paid, and that the sum due under bond was in fact unpaid. But it was claimed by the obligors that the notes were in fact accepted as actual payments in discharge of the bond. The Court, Magie, J., at page 330, said:

"The receipts, though prima facie evidence of payment and acquittance of debt, are always open to explanation and contradiction of any kind of appropriate evidence. * * * It is no less undoubted law that an estoppel against the enforcement of an obligation will not arise upon receipts untruthfully acknowledging satisfaction thereof, unless it appear that the person claiming the estoppel has been induced by knowledge of such receipts, to place himself in a position, or to adopt a course of conduct which would render it inequitable to enforce against him the obligation thus apparently satisfied."

Mrs. Grove contends that the taking of the \$35,000 note of January 8th, and the subsequent book

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entries, constituted payment of the indebtedness, and hence released the mortgage security. But we understand the law of New Jersey to be that the discharge or satisfaction of a debt by giving of a promissory note will not discharge the claims unless the note is paid, or the creditor agrees to accept it as payment.

10 In *Freeholders vs. Thomas*, 20 Eq., 39, Chancellor Zabriskie said it was well settled that a note, either of the debtor or a third person, received for a debt, is not payment, if not itself paid, *except in cases where it is positively agreed to be received in payment.*

And in *Swain vs. Frazier*, 35 Eq., page 331, the Court held that the acceptance of a promissory note of a debtor for his pre-existing debt did not operate as a discharge or satisfaction of the debt unless the creditor agree that such should be its effect.

In *Dodson vs. Taylor*, 56 N. J. L., page 16, the Court said:

30 “Looking at the whole instrument, it is clear that the plaintiffs were to accept the new notes to be given by the parties of the second part, not in lieu of our suspension of the old notes, *but in addition to them, as a further security,* and that the parties of the second part trusted, not to any legal change in the rights and remedies of the plaintiffs on the old notes, but to such indulgence as creditors are likely to exercise when they feel assured of ultimate payment. The case seems on all fours with *Firemen’s Insurance Co. vs. Wilkinson*, 8 Stew. Eq., 160, and must be decided in accordance with that precedent. This contract did not discharge the defendants.”

"Where a note secured by mortgage is taken up at or before its maturity and a new note substituted, the mortgage continues as security for the debt in new form, unless the intention of the parties was otherwise, and this is so although the old note was marked paid."

27 Cyc., 1410-1411.

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The production of a mortgage or bond which it secures, by one showing title thereof, with no indorsement on the papers or any other marks upon them to indicate payment raises a presumption that the debt remains unpaid.

27 Cyc., 1399.

So we insist here that as the transaction was over notes not mentioned or described in the mortgage (the mortgage being given to secure the payment of a bond) that the presumption of law is that the notes were separate and distinct from the obligation secured by the mortgage to the bank. This conclusion becomes well-nigh conclusive when we consider that the bond and mortgage remained in the bank's possession, and that after the transaction over the notes, the mortgage security was still recognized by all the parties to it.

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No testimony is offered that there was any change of conduct to indicate that the bank's mortgage had been paid.

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In *Conlon vs. Hornstra*, 82 N. J. L., 355, it was held that a bond for the payment of money in the hands of the obligee raises the presumption that the indebtedness had not been paid.

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*BOOK ENTRIES MAY BE EXPLAINED BY
PAROL EVIDENCE.*

10 "The entry in an account book, made in the press of business, does not rise to the dignity of a contract so as to require the interposition of a court of equity to correct a mistake that may have occurred through the carelessness or ignorance of the bookkeeper; and hence, upon principle, entries made in such books ought to be corrected, if necessary, to make them comport with the facts which should have been recorded in the first instance."

10 Rul. Case Law, 1029.

20 This rule was applied in *Humphreys vs. Dauser*, 32 Eq., 220, where it was held that endorsements on mortgage notes could be explained by parol evidence.

In *Mitchell vs. Doyle*, 225 Fed., 440, the Court said:

30 "The bookkeeper creates nothing: his methods, figures and records must yield to proven and established facts, and hence neither the government nor the corporation under the Corporation Tax Law was bound by the valuation at which property is carried on the books of a corporation. Book entries, generally, are mere admissions and may always be explained, and such entries are ordinarily never primary evidence but secondary."

So it was held in *Cowdery vs. McChesney*, 124 Cal., 263, that the testimony of witnesses having knowledge of the facts constitutes the primary

evidence of the facts and that books of account become merely secondary evidence of the fact which the entries purport to show. To the same effect is *Christmas vs Pearson*, 100 Iowa, 634.

The Vice-Chancellor cites the case of *Hudspeth vs. Denton*, 82 Eq., 281, affirmed in 82 Eq., 361, upon the effect of book entries as binding upon the bank. The facts in that case upon the particular point are meagre; but it should be said at the outset that there the burden rested upon the bank; here the burden rests upon Mrs. Grove, for she claims to be a surety and that, by reason of a change or alteration in the form of indebtedness, she is released from her obligation as surety. As we have shown elsewhere in this brief, the cases uniformly hold that the burden rests upon her, who seeks to be relieved of her obligation as surety, to show either that there was payment of the obligation or that there was such an alteration in the obligation as to relieve her as surety. And it is further to be noted that Vice-Chancellor Garrison remarks (page 296) :

“There is no testimony of any value, if there is any at all, which shows that at the time there was any agreement between the parties and the bank that the mortgages of Hanford and Denton to Hogencamp and of Denton to Hogencamp were to be collateral to the two notes which Shaw then gave.”

In this case we have the positive testimony of the cashier and the president of the bank that these notes were held as the collateral security, and we have here, as was not present in the *Hudspeth* case, a clear condition of facts which sustains the contention of the bank. There is present in this case no element of fraud as seems to have been present

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in the Hudspeth case. Here all the testimony comes from the bank and its books. Mr. Grove, the only person who could have confirmed or denied the facts, as claimed by the bank, was absent at the time of the trial; whereas, in the Hudspeth case (*supra*), there were numerous witnesses who contradicted the bank entries. The position of the Vice-Chancellor in the Hudspeth case as to the book entries may have been correct under the evidence of that case, but we submit that book entries are not the primary evidence but that the knowledge of the persons familiar with the exact conditions is the best evidence. In this case, all of the testimony of every one who had anything to do with the transaction is clear and explicit that the primary obligation was the bond and mortgage, and we submit to allow vagaries and inferences to upset the uncontradicted testimony would be a grave error.

POINT 2.

Even admitting that there was a change in the securities, as Mrs. Grove contends, the bank had no notice of her equitable interest so as to require it to secure her consent before altering the security.

It is to be noted at the outset that the mortgage to the Second National Bank, from the effect of which Mrs. Grove is seeking to be released, has a clear and unambiguous statement in it as to the ownership of the property. At page 209, state of case, we read—"And the said William K. Grove, THE OWNER OF THE LANDS ABOVE DESCRIBED * * *"; and there is nothing whatever in the mortgage which indicates, or suggests,

any interest that Mrs. Grove has in the property. The parties described in the mortgage are William K. Grove and Mary B. Grove, his wife. We then are dealing with an instrument which, on its face, shows nothing of the relation which Mrs. Grove bears to or has in the property, excepting that of the wife of the owner of the property.

In the brief filed by Mr. Enright, in the lower court, he states he does not regard the matter of notice to the bank of Mrs. Grove's equitable interest in the property as vital. But the Vice-Chancellor apparently did not agree with this contention, and we, surely do not. It seems to us to be elemental that the bank must have had notice of this interest now claimed by Mrs. Grove. 10

As is said in the case of Kighen vs. Fuller, 14 N. J. E., 419, extending the time of payment to the principal will not discharge the surety where the relation of principal and surety does not appear on the face of the contract and it is not alleged or proved that such relation was indicated to the creditor at the time of such extension. This case was affirmed in 15 N. J. Eq., 501. 20

And in a later case (Pintard vs. Davis, 20 N. J. L., 205) it was held that where a creditor gives time to the principal, the surety cannot avail himself of that defence unless it appear upon the face of the instrument that he is surety. 30

The Vice-Chancellor, in his opinion, below says:

"There is no direct evidence that at any of these conferences Mr. Grove's interest in the property was brought to the attention of the officials of the bank."

He then proceeds to discuss the conferences held with Mr. Beers at that time representing Mrs. 40

Grove, and closes the discussion with the statement—"I am unable to reach a conclusion that at this conference the actual interest of Mrs. Grove was not discussed."

10 We ask, with all deference to the learned Vice-Chancellor, upon what law he could thus make this important finding. It is elemental in the law of evidence that a presumption may not be based upon another presumption; as is said in 10 Ruling Case Law, page 870:

20 "It is a well established rule that a presumption can be legally indulged only when the facts from which the presumption arises are proved by direct evidence; when that one presumption cannot be deduced from another. To hold that a fact inferred or presumed at once becomes an established fact for the purpose of serving as a basis for further inference or presumption, will be to spin out the chain of presumptions into the regions of the based conjecture."

30 This rule was applied in the case of *Manning vs. Insurance Company*, 100 U. S., 693, where it was held that a presumption that insurance premiums had been paid over by insurance agents to the company could not be based on a presumption that the premiums were paid to the agents. And in the case of *United States vs. Ross*, 92 U. S. 281, the court said: "Whenever circumstantial evidence is relied upon to prove a fact, the circumstance must be proved and not themselves be presumed."

40 Professor Pomeroy, in Vol. 2 Eq. Juris., Sec. 666, in discussing the reason for the rule that notice to an agent is notice to the principal, shows

that the reason for this rule rests upon the presumption that the agent actually communicated to his principal the facts learned or known by the agent.

And the editor in 2 Corp. Juris., 862, states the reason for the rule that notice to an agent is notice to his principal as follows:

"The rule is generally rested upon the principle that it is the duty of the agent to disclose to his principal all material facts coming to his knowledge, and upon the *presumption* that he has discharged that duty."

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And Justice Bradley, speaking for the U. S. Supreme Court in Harrington vs. U. S., 11 Wall, 356, said at page 367:

"The general rule that a principal is bound by the knowledge of his agent is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject matter of the negotiations, and the *presumption* that he will perform that duty."

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The Vice-Chancellor *presumed* the bank had notice because he *presumes* Mr. Beers told the officials of the bank that Mrs. Grove had an equitable interest in the property. Such a finding violates the law, we think, as much as the basis for such a finding strains our credulity.

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But let us examine, briefly, into the question of notice of an equitable interest. Professor Pomeroy, in Vol. 2 of Equity Jurisprudence, Section 592, makes these preliminary observations:

"I am quite prepared to say that I think the Court would expect to find that those who al-

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10 leged that the trustee had knowledge of the encumbrance had made it out, not by any evidence of casual conversations, much less by any proof of what would be only constructive notice, but proof that the mind of the trustee had in some way been brought to an intelligent apprehension of the nature of the encumbrance which is upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust. If it can be shown that in any way a trustee had got knowledge of that kind—knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—
 20 there I think the end is attained, and that there has been fixed upon the conscience of the trustee, and, through that, upon the trust fund, a security against its being parted with in any way that would be inconsistent with the encumbrance which has been created."

30 Here Professor Pomeroy lays down what seems to us to be a fundamental principal in the law of notice of an equitable interest—that it must be such a notice of such material facts as would put an ordinary man of business on notice. We ask, in all fairness, is there anything in the whole record before us that suggests, even remotely, that the bank had notice that Mrs. Grove had any interest in this property? We have not found it.

 Again, the same author, in Section 603, remarks:

 "Of course, the knowledge here spoken of must be something more than the mental con-

dition produced by rumors, casual conversations and the like. * * * It must appear that the mind of the party charged with the knowledge has been brought thereby to an intelligent apprehension of the nature of the prior fact, interest, claim or right."

In the case of *Asbury Park B. & L. Assn. vs. Sheppard*, 50 Atl. Rep., 65, Vice-Chancellor Stevens, in discussing the notice to the president of a bank, held that while the bank president had knowledge of the existence of an unrecorded mortgage on property on which the building association accepted mortgages thereafter, and this information had not been imparted to any other officer, and it was not shown to have been present in his mind when he voted to approve the loan, the association would not be deemed to have had notice of the prior mortgage. 10 20

On page 66, Vice-Chancellor Stevens remarks:

"There is no doubt whatever that where the information acquired in the course of a previous transaction, to which the corporation is a stranger, is not present to the director's mind, it does not affect the company. Hence it must be held in this case that the association is not affected with notice." 30

In the case of *First National Bank vs. Christopher*, 40 N. J. L., 435, Justice Depew held that a bank, in discounting a note, was not chargeable with the knowledge of illegality or want of consideration acquired by one of its directors in other than his official capacity.

So it is apparent that the courts hold the law of notice in very narrow and limited channels. 40

It is not contended that she had an interest of record. On the contrary, the absolute fee stood in the name of her husband.

10 From Mrs. Grove's testimony it appears that no part of her money went towards the purchase of the land. After its purchase her husband promised to give it to her as a gift, and, supposing the land was hers, she expended the moneys in question in the construction of a home for the use of herself and husband. She testifies to the conversations had between herself and her husband, and this under objection. It was admitted for one reason only, namely, that the Court might find as a matter of law what interest she had in the property as between herself and her husband, providing, however, notice of such interest was brought to the knowledge of the bank.

20 The only attempt at proving knowledge must be gathered from the testimony of Mr. Beers. His firm had been counsel to the Bradley Estate and to Mrs. Grove prior to 1913. In June, 1913, he had been consulted by Mr. Grove with reference to the affairs of the Grove Straw Hat Co. (page 174). By reason of this conference he acquired information from Grove as to the indebtedness of the Company to the bank. He was told by Grove that the house was built with Mrs. Grove's money, and
30 that the title to the land was in his name (page 175).

With this knowledge (which, by the way, shows absolutely no interest by way of lien, equitable interest, or otherwise, in Mrs. Grove, he having no knowledge of any agreement between Mrs. Grove and her husband that the title was to be placed in her name in the manner testified to by her), he is asked whether he had a conference with any of the officials of the bank "relative to their claim

against the Straw Hat Co.," and his reply is that he had such a conference on July 1st, 1913, not from recollection, but from an examination of his office records in which was stated, "Conference at Second National Bank at Hoboken, in A. M. with cashier, Mr. Grove and Mr. Bradley" (page 176). Following this conference relative to the claim of the bank against the Straw Hat Co., the only matter spoken of by Mr. Beers as having been the subject of the conference, he is asked, under objection:

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"Q. Following that did you write a letter to Mrs. Grove, giving her a general report of of the situation?" and he replied: "A. I wrote Mrs. Grove on the following day."

This letter was introduced over objection, and the witness's attention called to several excerpts therefrom. These excerpts were: "You also have given a guaranty to the Hanover Bank for \$75,000, and have invested a much larger sum in the house which still stands in Mr. Grove's name;" and "My plan is that this be immediately used to buy up and dispose of the notes held by the Hanover Bank, and I hope that under the plans *which I have discussed with Mr. Grove and your brother*, the business can be continued in such a way that in the course of a few months the Second National Bank will consent to having the West Orange house conveyed to you." (Italics are ours.) Up to this point a mere cursory examination of the form of the questions indicates that *counsel studiously avoided asking the witness whether he had ever had any conversation with any of the officials of the bank with reference to any interest claimed by Mrs. Grove in the property*, or with reference to any other statement contained in this letter of July 2nd,

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so that up to this point it is not contended that there is the remotest piece of evidence of any knowledge on the part of the bank, so far as Mr. Beers' oral testimony is concerned, of any interest claim by Mrs. Grove. There had been discussions between Mr. Grove and Mr. Beers about steps being taken to vest the legal title to the house in Mrs. Grove, but never with any official of the bank.

The witness testifies that his office register shows that on July 11th he had a conversation with the cashier by telephone, and that his records contain the entry—"Matters will remain in the present situation until statement made." No attempt is made to explain this entry. He further testifies that his office register for July 23rd (five days prior to the execution of the mortgage) shows: "Attended the Second National Bank, Hoboken, conference with Vice-president of Bank, Mr. Britton, bank's accountant, the cashier and Mr. Grove, discussed financial situation. Bank asks for mortgage on Orange property." No question is asked of, nor explanations made by, the witness relative to this entry.

Five days after this conference and on July 28th, the date of the mortgage in question, witness wrote Mrs. Grove a letter, which was offered under objection, and his attention was called to his statement in the matter to the effect that the bank was pressing for payment, and asked if from these statements he could refresh his memory as to whether at the conference the bank had been pressing for payment, and he replied he could not recall, but that the substance of it was that there was pressure for payment. This ended his entire examination.

This question of notice, in the opinion of counsel for Mrs. Grove, was all important. Mr. Beers is

a lawyer. He had his records. Counsel was familiar with his records and failed to ask this witness whether there ever was a conversation between him and any official of the bank during the course of which Mrs. Grove's alleged interest was ever discussed; nor was he even asked whether from an examination of his letters he could refresh his memory and state whether her interest was the subject of any discussion between him and the bank. One inference only can be drawn from such silence.

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There being no evidence from the lips of Mr. Beers of knowledge on the part of the bank, an effort was made, on argument, to supply the knowledge by resorting to these letters written by Mr. Beers to Mrs. Grove. To use the language of counsel in his argument: "From Mr. Beers' testimony we can reconstruct the situation as it was;" "Can it be doubted from his (Beers') letters that it was at least mentioned that it was her house;" "There is an atmosphere suggested by the letters;" "There is a prophecy of Mr. Beers in his letters to Mrs. Grove."

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In the first place, we deny that under any principle of law could these letters be used as evidence against the bank. No basis was laid for their introduction. Mr. Beers was the attorney for Mrs. Grove and hence they would, at best, be self-serving statements. They contained nothing but conclusions based upon no proven existing facts. Their introduction and attempted use precluded cross-examination, and if admissible under the circumstances in this case, would rob the defendant of that right.

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But even conceding the admissibility of these letters not by the wildest stretch of imagination can it be said that by "reconstruction," "atmosphere," "prophecy," or otherwise, during the course

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of the several conferences by Mr. Beers with the bank relative to the affairs of the Grove Straw Hat Works, as testified to by him, the bank was informed that Mrs. Grove had been made a gift of this property by her husband, or that he had promised to give the property to her and had failed to do so, or that he had ever informed her that the title stood in her name, or that he ever induced her to invest \$48,000 or any other sum in the construction of the building upon any such representation or promise. Yes, not even that Mrs. Grove had invested a dollar therein, giving her either a legal or equitable interest in the property. Equity will not GUESS \$45,000 out of the possession of the bank into the possession of Mrs. Grove, who, according to Mr. Beers' letter of July 2nd, possesses a "high sense of honor," upon such flimsy arguments. Nowhere in these letters is there a statement that any conference was had with the bank relative to any alleged interest of Mrs. Grove in this property. The letters would indicate the contrary.

The letter of July 2nd (page 243) starts out with a statement that the affairs of the Grove Straw Hat Co., *which Mrs. Grove and her brother* had been discussing for a month, would make a long story, and the writer thinks it would be better to "explain briefly *my theory* of the situation." He then speaks of the examination of the affairs of the Straw Hat Co. by accountants for him, together with information which Mr. Grove gave him indicated why the business had not been a paying proposition. He then discussed the alternatives of either putting more money in the business or putting it into bankruptcy, and knowing her personal attitude towards such matters, namely, that she "would sooner or

later insist on paying Mr. Grove's debts," he suggests methods by which she should raise money on her stock holdings. By way of recital in summing up his theory of the situation, he speaks of her having "*invested*" a large sum in the house. After calling her attention to a loan which had been made to her of \$50,000, he then sets forth "my plan is that this be immediately used to buy up and dispose of the notes held by the Hanover Bank and I hope that *under the plans which I have discussed with Mr. Grove and your brother*, the business can be continued in such a way that in the course of a few months the Second National Bank will consent to have the West Orange house conveyed to you. If this can be done without legal complications, you will then have extinguished the debt to the Hanover Bank and will be the owner of your house." It is from language such as this, plans of the attorney, plans discussed not with the bank, but with Grove and her brother, plans that they had in mind, which, if they could put through, and a mortgage could be given to the bank, that thereafter Grove could convey the title to his wife, which otherwise could not be done in the opinion of counsel "without legal complications," that it is argued the bank had knowledge of the now asserted claim of Mrs. Grove.

The letter of July 28th (page 245) starts out by saying that the bank demanded a mortgage on the property, and then goes on to say that the giving of a mortgage would "not materially change the situation so far as you and he are concerned; that is, you are not giving them a mortgage on anything which they could not already reach by their claim if disposed to do so." There is no suggestion by, or idea in the mind of, the writer

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that Mrs. Grove had any legal or equitable claim which she could assert against this property so far as the bank is concerned. He advises the making of the "bond and mortgage as prepared by the company for the purpose." "The bond is to be signed by him, but it will be necessary for you to join in the mortgage *in order to release your dower* in property. The fact that you joined the mortgage does not make you liable on the bond. It merely means that if the bond *is not ultimately paid*, they can foreclose the mortgage and cut off both the interest that Mr. Grove has in the property *and the interest which you have in it.*"

The burden of proving knowledge is, of course, upon Mrs. Grove. Knowledge which may have the effect of wiping out this mortgage should be positive and absolutely convincing.

As opposed to the inference which it is desired to draw from these letters, we have the direct and positive proof of Mr. Terbell who states that Mr. Beers, in so far as he knew, never represented Mrs. Grove (page 95); that he represented Mr. Grove; that Mrs. Grove's name was not mentioned to his knowledge (page 95).

By the Court:

"Q. You did not know Mrs. Grove, had, or claimed to have, any interest in this property?
A. I did not" (page 95).

"A. Mr. Grove represented he owned the house, he always has represented that; we never knew Mrs. Grove in the matter at all.

Q. There was some representation about the ownership of the house in this conference in which Mr. Beers participated? A. I do not think so; we knew Mr. Grove owned the house;

Mrs. Grove's name was not mentioned to the best of my knowledge, never was brought in so far as the bank was concerned" (page 96).

"It is universally recognized that presumptions must give place when in conflict with clear, distinct and convincing proof."

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10 Rul. Case Law, 868.

Elliott, in his work on evidence, says:

"A presumption operates to relieve a party in whose favor it operates from going forward in argument or evidence, and serves the purpose of a *prima facie* case until the other party has gone forward with his evidence; but, in itself, it is not evidence and involves no rule as to the weight of evidence necessary to meet it."

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Elliott on Evidence, Section 93.

"The ordinary function of most so-called presumptions is that as it relates to the law of evidence to cast upon the party against whom the presumption works the duty of going forward with evidence; and when that duty is performed, the presumption is *functus officio*."

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Thayer on Evidence, 339-346;

Chamberlain on Evidence, 1021-1085.

"The weight of authority is against regarding presumption as evidence."

Jones' Evidence, Sec. 10.

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Wigmore, in his work on evidence, says:

10 "If the opponent does offer evidence to the contrary presumption disappears as a rule of law and the case is in the jury's hands, free from any rule. It is, therefore, a fallacy to attribute an artificial probative force to a presumption."

In 9 Encyclopedia of Evidence, 885, the editor says:

20 "Since the function of presumptions, logically considered, is merely to impose the burden of going forward with the evidence upon the party against whom it operates, when contrary evidence is adduced the presumption disappears. * * * A presumption is, therefore, not evidence."

In Elliott on Evidence, Vol. 1, Section 93, the author says:

30 "It is sometimes said that presumption will tip the scale when the evidence is balanced; but, in truth, nothing tips the scale but evidence; and presumption, being a legal rule or a legal conclusion, is not evidence."

We submit that these presumptions and inferences as to notice cannot be relied on in the face of such positive uncontradicted testimony of Mr. Terbell—"We never heard of Mrs. Grove in the matter at all."

POINT 3.

Mrs. Grove is estopped from asserting any claim or interest paramount to that of the bank mortgage.

Even though it be admitted that the bank had notice of some claim of Mrs. Grove in the property, in June or early July, the joining by her in the mortgage on July 28th works a complete estoppel as against her of every interest she had. 10

It is to be recalled that the mortgage joined in by the wife was in the usual form, and recites that the parties of the first part "Have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, alien, release, convey and confirm unto the party of the second part * * *," the premises in question, "Being the same premises conveyed to the said William K. Grove * * *," and further "And also all the estate, right, title, interest, dower, right of dower, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances." And further, "And the said William K. Grove, the owner of the lands above described * * * ." 20 30

An estoppel may be said to arise when a person executes some legal instrument, or is concerned in or does some act, either of record or in pais, which will preclude her from averring anything to the contrary; or, as Lord Coke strikingly puts it, "It is called an estoppel or conclusion because a man's own act or acceptance stoppeth or closeth his mouth to allege or plead the truth." (Co. Lit. 352-A.) 40

A person is estopped to assert a lien where by his acts he has induced another to so act upon the belief that the lien does not exist, where the latter would be prejudiced by its enforcement.

25 Cyc. 673.

- 10: This principle was applied in the case of Walker vs. Brown, 165 U. S., page 654, where one had a lien upon certain bonds but delivered them to a debtor and agreed that they should not be returned, or the value thereof, until any claim the latter might have should be paid, and it was held that the original lien-holder could not affect the lien on the bonds.

Justice White (now Chief Justice) said (page 665) :

- 20: "Having stipulated for retaining the bonds as long as Walker's debt existed, the agreement proceeds to dedicate the property thus retained exclusively to the payment of Walker's debt."

- 30: In Krauth vs. Thiel, 45 N. J. E., 407, Chancellor McGill held in an action to establish a resulting trust that a wife in whose favor a resulting trust could be established in land, the title to which was in the husband, with knowledge of the equity to which she was entitled to, or supposing the legal title of the land to be jointly in herself and husband, voluntarily joins in a conveyance of that land with her husband, that she could not thereafter, as against the grantee, establish a resulting trust in the land.

In discussing the facts in the case at page 410, the Chancellor said :

"(The wife) * * * after having acquiesced for several years in her daughter's title to the property in question without intimation that she had any claim upon it * * * she is not sustained by any documentary proofs."

And at page 412:

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"She then conveyed whatever interest or right she had in the Fourth Street property to Louis Mohl, and this was done voluntarily and with knowledge that she had an interest in the land beyond a mere inchoate right of dower. She states that until shortly before the bill was filed in this suit she supposed the title was in the name of her husband and herself. Such a conveyance as she made to Louis Mohl effectually cuts off any equity she may have had and defeats her present suit."

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"If the wife joins with her husband in a mortgage of lands in which she has an equitable estate, she is estopped to deny the title of the mortgage."

10 Rul. Case Law, 740.

In Jennings vs. Dixey, 36 Eq., 490, it was held that one who by his renunciation or disclaimer of a right of title has induced another to believe and act thereon, is estopped afterwards to assert any such right or title.

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Where a wife joins in an instrument of general conveyance with husband, ordinarily the entire interests of the wife, as well as the husband, are conveyed. And if the wife has any separate interests which she wishes to reserve, she must expressly

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reserve them or they will pass under the conveyance.

Larison vs. Dills, 32 Atl., 1059 (N. J. Eq.).

10 It was held that the mere fact that the name of the wife was placed after that of her husband in naming the party in the first part of the deed in which she appeared as one of the parties conveying all interest in the property, was insufficient to restrict the conveyance by her to a mere waiver of her right of dower.

Lake Erie R. Co. vs. Witham, 155 Ill., 514.

20 We submit most earnestly that the effect of this mortgage was to convey each and every interest and right of title that either of them had in the property; and that both are estopped to assert any other or different right than that purported to be conveyed, and are estopped from declaring that any debt or note not mentioned in the mortgage is secured.

30 A mortgage purporting to be made by husband and wife binds the wife's interests, and it was held not competent to show by parol evidence what the mortgagee said to her as to the effect of her execution of the mortgage, for the purpose of showing she released only her inchoate right of dower.

Snyder vs. Ash, 51 N. Y. Supp., 772.

40 It was held in City National Bank vs. Hamilton, 34 Eq., 158, where it was claimed that the husband purchased the lands with the separate estate of the wife and took title in his own name, and the wife permitted the title to so stand in her husband's name, and he held himself out to the world that he

was the owner, and contracted debts on the strength of such ownership, that she could not afterwards, by taking title to herself, withdraw the property from the reach of creditors, and thus defeat their claims. This decision was rendered in a creditors' suit to set aside the transfer by the husband to the wife as a fraud upon the creditors.

An agreement, however, with a person who holds a prior lien or equitable interest will defeat its priority. This rule was followed where a mortgagee agreed to keep his mortgage off the record to enable the mortgagee to borrow money by giving a first mortgage, and it was held that such an agreement was effective and enforceable. 10

Hendrickson vs. Wooley, 39 Eq., 307.

So here is there not an implied agreement clearly proved where Mrs. Grove claiming a prior equitable interest thereafter, and while she has not acquired the legal title she mortgages it to the bank with a recital that her husband is the owner. 20

So we urgently maintain that whatever title or interest Mrs. Grove had at or preceding the date of the mortgage, she has by her act in joining with her husband, fully and legally released it.

The parties to a mortgage are estopped on equitable principles to deny the recitals and assertions of title therein contained. And the mortgagor is estopped to set up an outstanding title as against the mortgagee, or to deny that his title to the premises is not such as the mortgage asserts and purports to convey. 30

27 Cyc., 1153-1154.

In Union Dime Sav. Bank vs. Wilniot, 94 N. Y., at page 227, the Court said that it was settled that

the mortgagors were estopped to deny that plaintiff's mortgage was valid, and that as they were estopped their assignee holding under them was also estopped.

To the same effect see Teeft vs. Munson, 57 N. Y., 97.

10 In Den vs. Vauness, 10 N. J. L., 102, the Court held that a mortgagor would not be permitted to dispute a title derived under the mortgage, nor allege anything in opposition to the claim founded upon it, and that he could not set up an outstanding title in another in opposition to his mortgage.

POINT 4.

Whatever right Mrs. Grove had to complain has been lost by her laches.

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The record shows that at or about the time the mortgaged property was acquired, Mrs. Grove had a talk with her husband in which he made some general statement to her that the property was to be hers, but no deed was given; that some four or five months thereafter Mr. Grove and his wife executed a mortgage on this property to the complainant Nester in this action. She must have known then that she had no deed. In the fall of 30 1911, a year after the property had been, as she testifies, promised to her, a deed to her had been prepared, so she says her husband stated. No deed was offered in evidence but at least the record shows that at that time this unsophisticated and inexperienced young wife heard the word "deed." Of course, she had never heard of such a word before! In June (or July). 1913, Mrs. Grove was informed that the property still stood in her husband's name. This information reached

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her prior to the mortgage she thereafter joined in to the Second National Bank. She thus allowed *three full years* to elapse, after she had been promised this property, without having secured a deed. Shall we say that up to this period she did not know that a deed was required? Let us admit that up to a very short period before she executed the Second National Bank mortgage she did not know that a deed was required. But about this time conditions were becoming very much involved. We have in the record the letter from Mr. Beers to her, telling her in detail the condition of the title and what was needed to perfect it. With this knowledge then impressed upon her, she executed the mortgage to the Second National Bank and thereafter allows the title to remain in *her husband* without in any way attempting to perfect the gift or to show to the world that she had any equitable interest or claim. It would have been a simple—easy—thing to have recorded her claim of \$50,000 expended on the property, either by mortgage, lien or deed. She lets the title remain and signs a mortgage thereon in the usual form, covering whatever interest, legal or equitable, she might own.

Equity will not allow one claiming an equitable lien (and she can claim no other or greater interest) for \$50,000 to sit supinely by, joining in mortgaging the property to others for large sums without proclaiming to the world, in some manner, the interest she claims, where no search, however diligent or painstaking, could reveal to those dealing with the property that she has or claims any interest.

“It is a general principle that nothing can call forth the Court of Chancery into activity but conscience, good faith and reasonable dil-

igence. Where they are wanting, the court is passive and does nothing."

Sullivan vs. Portland, 94 U. S., 806.

This rule has been followed in a large number of cases in this state.

10 In Vanduyne vs. Vanduyne, 16 N. J. E., 93, a proceeding to set aside a sheriff's sale when, at the time the sale was made, no intimation was given that the sale would be contested and the complainant waited until the time when the purchaser was entitled to demand his deed, and the Court held that when the party seeking relief had been guilty of laches in the pursuit of his remedy, the court would not interfere.

20 And in a foreclosure suit, Shipman vs. Cook, 16 N. J. E., 251, it was held that gross laches and long delay on the part of the complainant in prosecuting his suit was unjust and oppressive to the defendant, and was a strong circumstance against the justice of his claim.

30 Here the laches of defendant in aserting her equitable lien, or in recording any evidence that she held any such claim, may work a positive injury to the bank's mortgage by its dealing with the record owner. Mrs. Grove allowed the record of the title to tell the world that Mr. Grove was the owner of the property, with all that such notice imparted, for many years without imparting to the world any notice whatever that she owned or claimed to own any interest therein. To allow her now, since the departure of her husband for parts unknown, to step in and set up an interest in the property under such circumstances works a great injustice to the bank. We earnestly insist that such conduct on the part of Mrs. Grove amounts

to more than mere passive assent—it constitutes an acquiescence or active assent.

The United States Supreme Court, speaking through Mr. Justice White in *Gildersleeve vs. New Mexico M. Co.*, 161 U. S., 573, held that the acquiescence by heirs in the possession of a mine and the privileges connected therewith, without exhibiting any intention to assert their supposed rights, constituted such gross negligence as to debar them from asserting any interest in the property. 10

2 Pomeroy's Equity Jurisprudence, Sections 686 and 687, says:

“It is sufficient if he refrained from disclosing his claim and suffered a third person to deal with the property as his own, or to acquire an interest in or lien upon it. He will not be permitted to set up or enforce his interest in preference to that obtained by the person whom he has suffered to be misled by his silence. The rule extends to gross negligence which is tantamount, in its effect, to fraud. An equity otherwise equal, or even prior in point of time, may, through the gross laches of its holder, be postponed to a subsequent interest which another person was enabled to acquire by means of such negligence.” 20

POINT 5. 30

Mrs. Grove, by knowingly permitting the title to remain on the records in her husband's name, did thereby clothe him with apparent authority to extend the time of payment without her knowledge.

A surety who clothes the principal with apparent “authority” to arrange for an extension of time 40

has no just cause to complain, though she was not in fact cognizant that an extension of time had been made.

21 Rul. Case Law, 1023.

10 This sound principal in the law of suretyship has been aptly applied in *Moody vs. Stubbs*, 94 Kan., 250, 146 Pac., 346, where a husband and wife executed a deed upon property owned by the wife and she intrusted the deed to her husband to be delivered as security for note executed by him to the grantee, and the husband, without her knowledge, delivered it under an arrangement made by him with the grantee that the note was to be renewed from time to time, and the Court held that extensions of time of payment of the debt, made in pursuance of such an arrangement, but without
20 the knowledge of the wife, did not work a release of her property.

This rule has often applied where a blank deed has been filled up and delivered by the person in whose hands it is placed, in violation of his instruction (37 L. R. A. [N. S.] 326, and note).

The reasoning seems to be more persuasive where a surety, claiming to be the owner of property, allows the same to remain on the record in the name of another. Here Mrs. Grove allowed
30 the title of the property to remain on the records in Mr. Grove's name and she permitted this for several years. She herself admits, and the records in this case show, that in such a condition of title she permitted her husband to execute two mortgages upon this property.

We submit that by her conduct in thus knowingly giving to the world notice, by the record, her acts and silence, that the property stood in the

husband's name she clothed her husband with the apparent authority to extend the time of payment of the mortgage without her knowledge.

In the case of *Briggs vs. Jones* (L. R. 10 Eq., 92), A, a mortgagee of a leasehold estate, having the lease in his possession, loaned it to the mortgagor for the purpose of enabling him to obtain a further loan upon its security, but told the mortgagor to inform the person of whom he should borrow the money that he had a prior lien. The mortgagor borrowed the sum from his bankers and deposited the lease with them as security, without informing them of A's mortgage. It was held that as A's gross negligence had enabled the mortgagor to perpetuate the fraud, his mortgage must be postponed to the lien of the bankers.

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POINT 6.

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Mrs. Grove is estopped from asserting that the mortgage was given as security for the \$35,000 note of July 28th.

The mortgage recites that William K. Grove is indebted in the sum of \$45,000. "Secured to be paid by his certain bond or obligation bearing even date with these presents"; "Conditioned for the payment of the first mentioned sum of \$45,000.

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* * * on the 28th day of July * * * 1916." And further, "That the said parties of the first part, for the better securing the payment of the said sum of money mentioned in the condition of this bond, or obligation, with the interest thereon, according to the true intent and meaning thereof * * *."

It is contended for Mrs. Grove that when the bank took the \$35,000 note on January 8th, that so

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far as she is concerned, the taking of the note constituted such a substitution of the evidence of the debt as would amount to a payment of the debt, secured by the mortgage, and hence a discharge of the mortgage.

10 The bank denies that the notes of July 28th, were the primary evidence of the debt, or evidence of the debt under any circumstances. The bond was evidence of the debt, and it is so recited in the mortgage. Mrs. Grove had no connection whatsoever with, nor can she claim any contractual relationship by reason of the \$35,000 note of January 8th. This was purely a transaction between the bank and Mr. Grove, and again indicates that it could under no circumstances, be anything less than additional collateral.

20 Under these circumstances, and by reason of the recitals in the mortgage, Mrs. Grove is estopped from asserting that the mortgage was given as security for anything other than that recited, namely, that it was security for the payment of the bond, and not security for the payment of the notes. The thought that necessarily follows is, that whatever dealings were had between the bank and Mr. Grove, in the exchange of these collateral securities, it could not in anywise affect the mortgage or the bond so far as Mrs. Grove is concerned. Could the bank, in opposition to the recitals of the mortgage, insist that the mortgage covered the notes? We think not. Surely, if the bank would be estopped under those circumstances to assert that the mortgage was given as security for notes, it must work equally so with the mortgagor. The object and purpose of a written instrument is to make that which the parties have in mind at the time of the making thereof, definite and certain. And it is for the purpose of preventing just such an assertion as is made by Mrs. Grove that we have

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the principle of law, that the terms of a written instrument should not be varied by oral proof.

As between Mr. Grove and the bank the original debt always remained due, and the mortgage between them was never intended, considered or treated as paid.

There is not a scintilla of evidence that Mr. Grove did not intend and act at all times as mortgagor. On the contrary, the evidence is clear and explicit to the effect that not only the bank but Mr. Grove, at all times, considered the mortgage unpaid and a valid and existing lien against his premises for his debt to the bank. 10

Mr. Terbell, on page 69, says that at the time of the bankruptcy proceedings in 1915, Grove requested him to prove in bankruptcy the \$35,000 Grove Company note which he deposited with the bank as additional collateral security, and also another note for \$10,000 for which amount the company was indebted to him, in order that the bank might realize whatever it could on these notes to be applied on his mortgage loan. 20

The notes given on January 8, 1914, were understood between Mr. Grove and the bank to be held by the bank as collateral security to the mortgage (pages 75-76). "The interest was paid promptly; we did not try to collect it; Mr. Grove begged not to foreclose the mortgage, said it would ruin him so we held off." 30

"Q. Did you have any understanding with him that it was to be applied on account of your mortgage (Referring to the \$35,000 not of January 8th)? A. No, sir."

The witness then goes on to state that the mortgage was not even mentioned during the negotiations for securing this note (page 82). Subse-

quently, during conversations with Grove, when the obligation was referred to he answered:

“A. Yes, he often said to me ‘You have a mortgage, what are you worrying about.’”

This was in the year 1915 (page 83). On the same page:

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“Q. What did you tell him you wanted this \$35,000 time note for when he gave it to you on January 8, 1914? A. To take the place of any collateral of the demand note we had been holding.”

Senator Rabe says that periodically he talked to Grove about the mortgage, usually on the occasion of the notes being renewed (pages 100-10):

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“Q. Can you recall any of the conversations you had with him? A. It was * * * urging him to make an effort to pay something on account, reduce the indebtedness and repeatedly referred to the mortgage on these occasions.

Q. In what way? A. Well, I said we didn’t want to be obliged to foreclose against him, and he said, No, he would not like that because the property was worth a great deal of money* * *” (page 101).

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This was after January 8, 1914:

“Q. How often did you have these conversations with him? A. Well periodically; I have stated generally about every three or four months.”

Again, Grove’s property had been sold for non-payment of taxes. Mr. Rabe, as president of the

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bank, learned of this sale. Grove was sent for, informed of the tax sale and requested to take it up at once. We told Mr. Rabe he had no money and begged him to do it for him (page 102).

"Q. During these conversations that you had from the time of the giving of the mortgage, was there any conversation that you ever had with Mr. Grove in which it was ever stated that this mortgage had been paid? A. On the contrary constantly, all the time referred to the mortgage as being active and requesting me not to sell, not to foreclose that mortgage, as the property was very valuable, it was the home" (page 102).

The bond and mortgage were always kept in the security box of the bank and examined as a mortgage by the bank officials, from time to time (page 103).

Since the making of the mortgage it has at all times the making in the name of Grove, as owner, with loss payable to the Second National Bank, as mortgagee. The insurance was always negotiated by Mr. Grove personally with Strong & Son, of New York. Policies were always sent to the bank direct, at the request of Mr Grove, and never was the property insured in the name of the wife until she procured this to be done after suit was started. That the policies were procured by Mr. Grove with the interest of the Second National Bank stated, as aforesaid, appears from the testimony on page 90, the policies which were offered in evidence and the letters of Strong & Son and the replies thereto by the bank. Surely, it cannot be said that under these circumstances Mr. Grove ever considered the mortgage other than an existing obligation.

POINT 7.

There was no consideration for the cancellation of the mortgage to the extent of \$10,000.

10 "An agreement between the creditor and principal debtor, changing the nature of the contract to the prejudice of the surety, must, in order to discharge the latter, be an agreement having a sufficient consideration and binding in law on the parties."

21 Rul. Case Law, 1005.

The rule was applied in the case of M'Lemore vs. Powell, 12 Wheat. (U. S.), 726.

20 Mr. Justice Storey, delivering the opinion of the Court, held that an agreement between the creditor and principal debtor for delay, or otherwise changing the nature of a bill of exchange, to the prejudice of the surety, in order to discharge the latter must be an agreement having a sufficient consideration and binding in law upon the parties. He said, at page 557:

30 "An agreement without consideration is utterly void and does not suspend for a moment the rights of any of the parties. In the present case the jury having found that there was no consideration for the terms to delay the suit and, consequently, the plaintiffs were at liberty immediately to have enforced their remedy against all the parties.

And in the case of Bell vs. Martin, 18 N. J. L., 167, Chief Justice Hornblower said (page 170), in discussing the release of the surety on a note:

"It must be a binding agreement and must, therefore, be made upon a good and valuable consideration."

Even though it be admitted that the giving of the note of January 8th, for \$35,000 can be considered as a payment on account of the original indebtedness of \$45,000 there is an absolute lack of consideration for the cancellation or release of the mortgage debt to the extent of \$10,000. The fact that a book entry was made opposite the "Mortgage Account" of \$45,000, without the receipt of \$45,000, could not be considered payment. This in itself would intimate that the bank never intended to cancel the mortgage or to consider it paid. 10

Why should the bank, holding a good security against the real estate for Grove's personal obligation and the obligation of the Grove Company for \$35,000, give up its security on the land without getting something in return? 20

POINT 8.

The release of Mrs. Grove's mortgage was not affected by the alteration or change in form of the notes. 30

"It is a well established rule that where sureties are bound by separate instruments, a release of one will not discharge the other."

21 Rul. Case Law, 1051.

This principle has been sustained in numerous cases from the different states of the Union. (Clymer vs. State, 59 Ind. App. 364; Wanamaker 40

vs. Powers, 93 N. Y. S. 19; Wanamaker vs Powers, 186 N. Y. 562; Jamison vs. Cosby, 11 Humph. [Tenn.] 273; Commonwealth vs. Berry, 95 Ky. 443).

In Clymer vs. State, supra, it was said:

10 "It is further argued that the release of Ziba Little as surety on the original bond, as shown in the special finding, operated as a release of this appellant from the bond upon the theory that they were co-sureties and the release of one discharged all co-sureties. Appellant's contention would have much force if the parties had signed the same bond, but since they did not the discharge of Little did not release appellant."

20 It should be noted that the bankruptcy of the Grove Straw Hat Company will not in any way affect a discharge or release of Mrs. Grove's obligation, for it is well established that where two or more persons become sureties the right of contribution may be lost by the bankruptcy of the other, and this contingency must be presumed to be present in the minds of the sureties when they assume their obligation. (Davis vs. Van Buren, 72 N. Y., 587; Risley vs. Brown, 67 N. Y., 160).

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POINT 9.

The alleged gift in itself by Mr. Grove to his wife was illegal and inoperative for any purpose.

40 Mrs. Grove testified that her husband, after having purchased the property with his own funds, orally agreed to give it to her (page 104). The promise was made direct to her.

It was early decided in New Jersey that the Married Women's Act confers no power on the wife to take real or personal property by direct gift from her husband (*Dilts vs. Stevenson*, 17 N. J. Eq., 407). Chancellor Green, on page 413, said:

"The act for the better securing the property of a married woman confers no power on the wife to take real or personal property directly by gift from her husband. * * * It was not designed to confer upon her the power of acquiring her husband's property but to protect her own. * * * But even in equity, where a widow seeks to establish a gift from her husband in his lifetime, she must adduce evidence beyond suspicion, and nothing else will do than a clear, irrevocable gift either to some person as trustee or by some clear or distinct act of his by which to divest himself of the property and to engage to hold it as trustee for the separate use of his wife."

This case was cited with approval by V. C. Garrison in *Frietze vs. Roth*, 67 Eq., 530.

Section 14 of the Married Women's Act provides in part as follows:

"Nor shall anything herein enable the husband or wife to contract * * * with each other."

So we confidently assert that the bare gift from a husband direct to his wife, which in this case was a promise made by Mr. Grove to Mrs. Grove, is of itself a nullity.

POINT 10.

The burden is upon Mrs. Grove to show that the extension of time was without her consent.

10 The record is silent as to whether Mrs. Grove consented to the transactions in January, 1914, which she claims worked a discharge of her liability as surety. Nothing is in the record to show whether she knew of that transaction or not.

The cases seem to be unanimous in holding that the burden rests upon the surety to show that the extension was granted without her consent (21 Rul. Case Law, 1024).

In *State Bank vs. Mut. Tel. Co.*, 123 Minn., 314, the Court said:

20 “* * * but, conceding that Beggs and Murray were sureties, as they claim, and that this fact was known to plaintiff, it was nevertheless incumbent upon them to prove that the extension was made without their consent. There is no presumption that such is the fact.”

POINT 11.

30 **Mrs. Grove at best has no other interest than as the owner of an equitable lien, and her subsequent conduct constituted a clear waiver of her right to claim a lien.**

An equitable lien arises where a party, innocently and in good faith, but under a mistake as to the condition of the title, renders services, makes improvements, or incurs expenses that are perman-

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ently beneficial to another's property (25 Cyc., 667).

This principal was applied in Haggerty vs. McKenna, 25 Eq., page 48, where a husband had died seized of real estate, leaving a widow and an infant daughter. The widow thereafter married and her second husband assumed from her having administered on her former husband's estate that she was the owner of real estate, and he thereafter paid off a mortgage. Upon the death of the mother the stepdaughter brought an action of ejectment against the second husband to obtain possession of the premises, and the Court declared that the money paid in satisfaction of the mortgage constituted an equitable lien on the land. 10

This principle was also later applied in Back vs. Black, 30 N. J. Eq., 215, where a wife had expended her money on the lands of her husband in improving the dwelling. 20

So the bank insists that if the story of the wife is to be taken as true, she has no equitable interest in the property other than such as equity recognizes *as a lien*.

A constructive trust, does not arise for it is well established that such a trust must arise before or at the time the legal title to the property is acquired (39 Cyc., 176).

In Krauth vs. Thiele, 45 N. J. Eq., 407, the Court said (page 409): 30

"A resulting trust arises by operation of law from contemporaneous circumstances. * * * It must arise at the instant the deed is taken and the legal title is vested in the grantee."

To the same effect

Read vs. Huff, 40 N. J. Eq., 234. 40

She then had no estate in the land requiring a conveyance, and her conduct in signing the mortgage, and in allowing the title to remain in her husband for years after the date she claims to have acquired the lien, constituted a waiver of any lien she may have had therein.

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POINT 12.

The signing of a mortgage by one who is simply the owner of an equitable lien does not constitute such holder a surety.

20 Mrs. Grove claims that she is a surety by reason of the fact that at the time she mortgaged the property she had an equitable estate. We think we have shown elsewhere in this brief that whatever interest Mrs. Grove had was that of an equitable lienholder, and nothing more. Believing that we have shown conclusively that she is a lienholder if she has not lost such lien, we are now concerned with the question: Is the relation of principal and surety established where a woman joins with her husband in a mortgage upon property in which she has only the interest of a lienholder? We insist that a mortgage on property upon which she only holds
30 a right to a lien, does not create the relation of principal and surety.

In courts of equity the term lien connotes a charge or encumbrance on the thing where there is no *jus in rem* nor *jus ad rem*. (Pack vs. Jenness, 7 Howard's [U. S.] 612.)

An unperfected right to a lien in property does not rise to that dignity to entitle it to be designated an estate in property. We are here concerned fully

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with that suretyship known as real, as distinguished from personal suretyship (See 32 Cyc., 22). Mrs. Grove, not having signed the bond, but only the mortgage, thereby made any interest she had in the property subject to the terms of the mortgage. If, therefore, she had no interest in the property, there was no suretyship established. The very validity of the relationship of principal and surety here depends upon the existence of a property right. The difference between the interest of an equitable lien-holder and the interest of the owner of a constructive trust estate (or the estate of dower) is that which determines the insufficiency of the one to create the relationship of surety, whereas the interest of dower (or the owner of a constructive trust) creates such a relation. The legal relation of suretyship with which we are concerned here is dependent upon something more than a mere right to assert a lien. In the case of a dower interest the wife has, by statute, an interest in the property which vests in her immediately at the marriage. So in the case of a constructive trust it must arise, as we have elsewhere shown, at the time the title is vested in the legal owner. There is such an interest in the property by reason of a past act in the paying the money to the legal owner to secure an equitable title. In both the dower interest and the constructive trust relation there is comprehended a completed, perfected inchoate estate, but a mere right to a lien may or may not ever be asserted, and here it was never asserted. In the one case we are dealing with a fact—a condition; in the other case we are dealing with a possibility.

The law nowhere transforms a bare possibility of the future assertion of a right into an estate where there has been no estate relation established either by force of statute or by act of the claimant.

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Admitting, then, that the bank had knowledge that Mrs. Grove had a right to a lien, a knowledge that she had expended money in the building of a house upon the mortgaged property, the legal title to which stood in her husband's name, we earnestly insist that the knowledge of such a right does not require the bank, before the alteration in the form of security, to be mindful of the fact that Mrs. Grove might in the future assert such a claim.

It must not be overlooked that in discussing this point we are concerned primarily with what effect notice of such interest gives. We are not here concerned with the establishment of the dis-establishment of a relation.

It has been held that notice of a contract, void under the statute of frauds, does not bind a subsequent purchaser. (Van Cloostere vs. Lobin, 149 Ill., 588.)

Notice of a contract, void as against public policy, was held not binding on subsequent purchasers.

The Vice-Chancellor cites the case of McFillin vs. Hoffmann, 35 N. J. Eq., 364; but we submit that the McFillin case has no bearing upon the point. That was a case in which the defendant and his wife were the owners in fee of two separate and different pieces of property, the wife owning one part and the husband the other. The husband and wife jointly executed a mortgage upon both pieces of property, and upon the foreclosure of the mortgage Chancellor Runyon held, and all that he held was, that the wife was principal so far as the money borrowed on the mortgage had been applied to the erection of the house on her lot, and a reference was ordered to ascertain how much of the money secured by the mortgage was expended in improving her property. That case stands for nothing more.

POINT 13.

The filing in the bankruptcy proceeding of a proof of claim against the Grove Straw Hat Company was consistent with, and not contrary to, the true situation.

The Vice-Chancellor, in his amended opinion in speaking of another \$10,000 note not heretofore referred to and which up to the filing of the proof in bankruptcy was held by Grove personally, says: 10

“When the bank proved the 1911 note for \$10,000 in bankruptcy, it treated it as a primary obligation on the part of the Hat Company.”

The learned Vice-Chancellor has misconceived the relation of the securities. We maintain, as we attempted to show at the trial of this action, that the filing in the bankruptcy proceeding of the proof of claim was not only not inconsistent with the true situation, but it was perfectly consistent and the only course that could have been taken under the circumstances. The notes of the Grove Straw Hat Company were merely held as collateral or cumulative security to the original mortgage loan of \$45,000. Upon the bankruptcy of a surety, the bankruptcy act provides that the same shall be presented for payment (Bankruptcy Act, Sec. 57). 20 30

(Page 69.) Mr. Terbell says:

“A. My impression is he requested us to put in the claim and get what we could out of the bankruptcy, and apply it on his loan; he had given us that on this collateral by collateral 40

of his mortgage loan; they owed him that money.

Q. Do you mean to say whatever you did in the bankruptcy proceedings was at the request of Mr. Grove? A. Yes; he had left that note with us as collateral practically; it is mortgage loan, we had the mortgage."

- 10 The claim (page 70) refers to two notes; one for \$35,000, dated March 11, 1915, made by the Grove Straw Hat Manufacturing Company to William K. Grove and endorsed by Grove; and the other for \$10,000, made between the same parties, dated February 3, 1911; and it should be noted that the \$10,000 note is not the \$10,000 note made by Grove personally and given to the bank on July 28th, 1913, which we have heretofore been referring to and which is still held by the bank, but a note
- 20 given by the Grove Company to Grove and given to the bank, as we contend, as a further collateral, about the time the proof in bankruptcy was to be filed with the request on the part of Grove that both of these claims be asserted against the Grove Company estate, in order that he, Grove, might realize as much as possible on the obligation of the Grove Company to him, in order that the proceeds might be used to reduce his mortgage obligation to the bank.
- 30 The confusing question and answer on page 71 that the note referred to in the proof of claim is the same note which had been testified to, and the qualified answer, presumably "Yes," will be seen to be incorrect by inspection of both notes, which are in evidence, and also from the previous answer appearing on page 70:

"A. Yes, of course this \$10,000 was the *note that Mr. Grove held himself*; the company owed him \$45,000."

(Page 72) When the bank realized the moneys coming from the Straw Hat Company estate, these notes made by the company to Grove and handed by Grove to the bank for the purpose of being realized upon, were turned over to the authorities entitled to them, and credit given on the mortgage obligation for the amount realized.

The \$35,000 note of the Grove Company having been held by the bank as part collateral security for the payment of its mortgage obligation, and the other \$10,000 note made to Grove being handed by him to the bank for the same purpose, it cannot, under any circumstances, be said that the mortgage was held as security for those notes.

The obligation under the notes was that of the Grove Company. No security had ever been given by the Grove Company for these notes. The mortgage was given as security for the debt of Grove, and was held to secure that debt, and none other. Hence, the affidavit was correct.

The Vice-Chancellor says:

"That the bank has so dealt with the principle indebtedness as represented by the note of the Hat Company, for \$35,000, discounted June 8th, 1914, and has so changed its character as that a surety would be released, I think can admit of no question."

We submit that this statement has no basis in the record. It was insisted by the bank, at the trial of this action, that the \$35,000 note of the Hat Company was held as security, and not otherwise; that the primary obligation was the \$45,000 bond given in July, 1913; and that this bond had never been altered or affected. If this contention be true, it was not only proper, but it was absolutely neces-

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sary, that upon the bankruptcy of the Hat Company that this \$35,000 security should be presented to the bankrupt's estate; but to say that by so doing the liability of Mrs. Grove on her \$45,000 mortgage has been altered, is a misconstruction and, further, is not supported by any of the evidence in this case.

10 The Vice-Chancellor further states:

“The only evidence as to the purpose for which the mortgage was given, so far as Mrs. Grove is concerned, comes from her mouth. She says that the mortgage was given for the purpose of securing the then existing indebtedness of the Hat Company to the bank, for which Grove was responsible.”

20 We had always thought that the mortgage itself was the best evidence to explain the purpose and scope for which it was given and, where the principle of suretyship is involved, practically the only evidence admissible. The question involved in this point has to do with the claim made by Mrs. Grove that she is a surety only—a situation we earnestly deny—and they insist that such is her position. In the construction of such surety contracts we are bound, as they are bound, by the strictest rule of construction; for it has long been established that the relation of principal and surety, the surety ordinarily receiving nothing, should be strictly construed. Could it be maintained in this case that where an unambiguous and definite mortgage is given to secure a bond for \$45,000, that we could say, if the conditions were reversed, that this mortgage was given to secure two other notes ante-dating the bond some two years? We think not.

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POINT 14.

The mortgage of the bank cannot be subordinated to the claim of the Globe Tire Company because of statements made by its cashier, recommending Mr. Grove for a position with the Globe Tire Company.

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It is insisted that the bank is liable for the statements made to the officers of the Globe Tire Company relative to the financial standing of Mr. Grove. That is to say, that because of the statements made by its officers, the bank should be penalized by allowing the Globe Tire Company's claim to supersede the security of the bank. Upon what theory such a course is to be allowed is not clear, but we submit that the cases are conclusive that the bank is not liable for any such statements as claimed to have been made in this case.

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The case of Taylor vs. Commercial Bank, 174 N. Y., 181, was an action brought for the misrepresentations of the financial standing of a customer of the bank. The customer was at the time of the representation a debtor of the bank to the extent of \$15,000; he had been recently burned out and was practically insolvent. The cashier recommended that the plaintiff take the customer's note for \$5,000; and the Court of Appeals said:

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"The only ground upon which a recovery could be had, even against the cashier, is that the statement that the note would be good was material; that it was made with a knowledge of its falsity and with intent that it should be acted upon, and was not a mere expression of opinion. In other words, the plaintiff was bound to prove, as to this statement,

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representation, falsity, scienter, deception and resultant injury to the plaintiff.

10 "If we assume, which we do not decide, that the representations were sufficient to render the cashier personally liable, still the serious question in this case is, whether the bank is liable for the statements made by its cashier. Obviously, when the representations were made, the cashier was not engaged in the transaction of the business of the bank. *It is equally clear, as we shall see later, that it is no part of the duty of a bank cashier to make representations as to the responsibility of its customers or others.* In this case Light-house referred the plaintiff to the bank to inquire as to his responsibility. The plaintiff called upon the cashier, made the inquiry, and was told by him the business in which Light-house was engaged; that he had a contract with the Government which was all right and had been removed; that the note would be good, and he would get his pay." * * *

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30 "There was no evidence in this case which would have justified a finding that the defendant's cashier had any authority to perform any duties other than those which inhered in the office. Nor was there any evidence whatsoever that any unusual method had been adopted by the bank for the transaction of its business, which would include any authority upon the part of the cashier to bind the bank by representations as to the responsibility of its customers." * * *

40 "The respondent contends that the defendant was liable for the fraud of its cashier upon the principal that where a party receives and retains the fruits or product of a fraud, it

imposes a liability therefor, although such person may be innocent of personal participation in the wrong" * * *.

"Obviously, that principal has no application to the case at bar, as it is practically undisputed that the bank received nothing from the property of Lighthouse. Nor did it receive any advantage by reason of the sale to Lighthouse of the goods in question" * * *. 10

"It is further urged that the liability of a principal for the unauthorized fraud of another includes a case where, although the principal did not profit, he might possibly have profited by the wrongful and unauthorized act. We have found no authority sustaining any such doctrine."

"Even without eliminating from our consideration the incompetent testimony of the acts and declarations of the employees of the bank when not engaged in the transaction of the business of the latter, there is practically no evidence which would justify a jury in finding that the cashier was acting for or on behalf of the defendant in making the representations which are the subject of this action. It is true that when the cashier made such representations Lighthouse was indebted to the bank for more than fifteen thousand dollars, yet, as we have already seen, no duty was imposed upon the cashier, as such, to communicate to a person inquiring as to the responsibility of a customer, the actual situation of his account at the bank. Nor is it within the line of the duty of a cashier to disclose the condition of the account of the customers of a bank whenever inquiry is made as to their responsibility." 20 30

10 In First Nat. Bank vs. Marshall & I. Bank, 83, Fed., 725, it appears that a customer of defendant bank made application of plaintiff bank for a loan and plaintiff thereupon wrote the cashier of defendant bank as follows: "Will you be kind enough to give us what information you can in regard to the character and financial standing of L. T. Hale." To this letter the cashier of defendant bank wrote: "Would say Mr. Hale has a fine reputation as a competent, careful and industrious business man. He has had no bad or expensive habits, but always gives his business the closest attention, and is very careful in his expenses. As near as I can judge he has invested in his business about \$40,000 above his indebtedness." It appeared that a few days prior to the date when the answer was written, Mr. Hale was indebted to defendant bank in some \$18,000, and had assigned to the bank certain contracts and bill of sale, and was practically insolvent.

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Upon a foreclosure of a mortgage by the defendant bank against Hale, the plaintiff sought to have a decree postponing the lien held by the defendant bank to their mortgage.

The Circuit Court of Appeals, consisting of Judges Taft, Lurton and Clark, said:

30 "In considering this letter and its effect, it becomes necessary to first determine whether it is to be treated as the letter of the bank and affecting it as such. * * * We are clearly of the opinion that Dunham (cashier) cannot be regarded as acting for or as the agent of the bank in writing this letter. The acts and declarations of a cashier of a bank are binding on the bank, and affect it only when the cashier is in the discharge of his duty. * * *

It is not insisted that there is any express authority conferred upon Dunham, cashier, to make voluntary answers of this kind to other banks, although the practise is very common from the nature of the case. It is well understood to be a mere favor or courtesy, * * * and not being a duty belonging to his position. There is no implied authority from the bank to do so." 10

In *U. S. vs. City Bank*, 62 U. S., 356, the Court held, that a letter written by the cashier of a bank, that the bearer was authorized to contract on behalf of the bank, did not come within his duties or authority as cashier.

In *Lieberman vs. First National Bank*, 8 Del. Ch. 519, 455 At. Rep., 901, the Court held, that statements made by the cashier of a bank without authority, for the purpose of inducing a person to become a surety on the bond of a teller, will not bind the bank so as to relieve the surety if the statements are not true. 20

It cannot be claimed, we submit, that there was any false information given by Mr. Terbell, the cashier, or by Mr. Eberhard. But even if it be thought there were false statements, the cases are numerous that false statements made by the cashier are not binding on the bank where no principle of agency was involved. (*Metropolis Bank vs. Jones*, 8 Pet. [U. S.], 12; *U. S. Bank vs. Dunn*, 6 Pet. [U. S.], 51; *Etting vs. Com. Bnk.*, 7 Rob. [Lo.], 459; *Merchants Bank vs. Marine Bank*, 3 Gill [Md.], 46; and *Harrisburg Bank vs. Tyler*, 3 Watts & S. [Pa.], 373.) 30

It is to be noted that there was nothing pending before the bank at the time of these alleged statements in which the bank was in any way interested. 40

A friendly act of a cashier in securing for a customer of the bank a position cannot by any strained construction be held to be the act of the bank.

10 But admitting in the face of these strong authorities that the cashier was acting within the course of his employment and the bank might be liable for the representations of its cashier, we deny most earnestly that there is in this case any semblance of misrepresentation or fraud.

The testimony relied upon to show alleges false representations made by Mr. Terbell are as follows:

(Mr. James):

20 (Page 125) "A. Mr. Terbell asked if we had a vacancy in the Tire Company. I told him that the man that had charge of the Newark territory was far from satisfactory, and we would like to get a good man provided he answered two qualifications, that is, whether he was financially able to back the proposition, and, second, if he could get the orders. Mr. Terbell assured me that Mr. Grove owned a beautiful piece of property in Orange, New Jersey, and had a host of friends and undoubtedly could get the business.

30 Q. Did he say anything about whether Mr. Grove owed the bank money or not? A. No, sir.

Q. Did he say anything about whether the bank held a mortgage on his property? A. No, sir."

After this alleged conversation, he reported to Mr. Hall, who subsequently hired Mr. Grove, as follows:

40 "A. I told him from what Mr. Terbell had told me, I was satisfied he would make good,

and that he was financially able to take care of the proposition."

That Mr. Grove "owned a beautiful piece of property in Orange, New Jersey" is nowhere denied. Nowhere in the record is there evidence of the cost of the land, or its value. There is proof, however, that he made statements to the bank officials (page 101) that the cost of the property was upwards of \$75,000, and that the vacant part of the land which was not built upon, was worth very much more than at the time he purchased it; that the vacant portion was worth \$20,000 (page 101).

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So far as the record is concerned, this property may be worth a hundred thousand dollars, or more.

That Grove "had a host of friends" is nowhere denied; and that he could undoubtedly "get the business" was the purest kind of an expression of opinion, for which, under any cannon or law, could the bank be held responsible? And, is there any testimony here that he did not get the business, or that it is claimed by the Tire Company that he did not? It is apparent that the cause of the trouble was, not that he did not do the business, but rather that he did too much business.

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This meagre piece of evidence as to the alleged representations can in nowise be considered as containing the well-known essential elements necessary to make out a case of fraud, and it is upon this theory, and this theory alone, that the Tire Company can contend that it is entitled to relief.

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It was argued that it was the duty of the cashier to inform the Tire Company that the bank held a \$45,000 mortgage upon which about \$10,000 had been paid. No such duty rested upon the bank under the authorities above cited. The property, to the knowledge of the bank, being worth upwards

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10 of \$75,000, it does not follow that any fraud was, under the circumstances, contemplated. Even if a duty was owed to the Tire Company to make such disclosure, it will be recalled that one of the qualifications mentioned by Mr. James was, that the person should be financially able to back the proposition. To what extent the proposition was to be backed, whether for \$100 or \$1000., nowhere appears. Nor is there anything to indicate that Mr. Terbell was informed as to the extent of the backing required, and without such proof, we contend no liability could attach.

We further contend that whatever the statements and representations of Mr. Terbell may have been, that the Tire Company did not act upon them, but rather, that they acted upon the conclusion that Mr. James came to after his conference with Mr. Terbell.

20 (Pages 125-126) The Globe Tire Company's entire claim is based upon the uncorroborated testimony of Mr. James, and as against this testimony we have the statement of Mr. Terbell, giving his version of the conversation, and in which he denies that there was any talk about the financial responsibility of Grove, and that he made no recommendation as to his financial responsibility.

In *Leggett vs. N. J. Bkg. Co.*, 1 N. J. Eq., 541, the Chancellor said, at page 553:

30 "Corporations, like natural persons, are bound only by the acts and contracts of their agents done and made within the scope of their authority (citing cases)."

Ruling Case Law, 451:

40 "The declarations and admissions of a cashier, within the scope of his ordinary duties, are binding upon the bank. * * *

However, a cashier can bind his bank only by declarations in the scope of his ordinary duties."

The United States Supreme Court, in the case of Bank of U. S. vs. Dunn, 6 Peters, 51, held that a statement by a cashier to a person about to become an endorser on a note offered for discount, that he will incur no risk by becoming such endorser, is not binding on the bank. 10

In 7 Corp. Juris, 529, the editor says:

"Declarations, representations or admissions of an officer, made in the usual course of business, bind his bank, provided * * * they are something more than incidental or casual remarks and do not relate to transactions which are past and ended; but is it otherwise as to a declaration which is not made in an official capacity or is clearly not within the capacity of the officer or agent by whom it is made." 20

The learned Vice-Chancellor has found that the representations made by Mr. Terbell, the cashier for the bank, in recommending a customer (Mr. Grove) for a position, bound the bank.

We submit that this rule, as well as the reason, is unsound in principal and unfounded in fact. The bank, or any other corporation, cannot be bound by any recommendations or statements made by its agents or officers, which statements were not made in connection with any of the affairs of the bank. Especially is this true of statements made by the cashier to secure a customer of the bank a position. It was one prompted, no doubt, by a spirit of friendliness to Mr. Grove, a matter wholly outside his duty as cashier. To hold that by doing so the bank's mortgage is to be dis- 30 40

charged and a later lien given effect, it seems to us, is unsound in law.

10 We have cited, at considerable length, the case of Taylor vs. Commercial Bank, 174 N. Y., 181, which, we submit, with the other decision in the Federal Reports (First Nat. Bank vs. Marshall, 83 Fed., 725), is conclusive and clearly against the position taken by the Vice-Chancellor. He attempts to distinguish these cases and says, speaking of the Taylor case:

“In that case the court held that the cashier acted beyond his authority and was not engaged in the business of the bank. I have found to the contrary.”

20 There are no facts in the case to support his conclusion. We submit that the facts in the Taylor case, and in the First National Bank case (supra), are parallel with the condition shown in this case. The Vice-Chancellor distinguishes the First National Bank case upon the ground that the representations were made to one not a customer of the bank. We know of no rule making a statement by a cashier to a customer of bank any more important than when made to a person who is not a customer of the bank. The relation of
30 bank customer in no way involves the idea that a customer is entitled when talking to the cashier on a matter wholly foreign to his duties, to a superior right of information or a higher degree of honesty. None of the cases cited by the Vice-Chancellor support his opinion. They do not involve the question of statements made by officers of a bank outside of and not in connection with anything then pending before the bank. The doctrine of estoppel that he wishes to invoke is not
40 applicable, in the first place, because the principal,

the Second National Bank, made no representations, and, in the second place, the statements made by its cashier in a matter wholly foreign to the business of the bank and outside the scope of the cashier's duty, and cannot, we confidently assert, create an estoppel, and, lastly, the statements were true. It is to be noted that at the time these statements were made by Mr. Terbell, there was no deal pending between the bank and the Tire Company. A national bank is not an employment agency. It is not a part of the function of any national bank, so far as we know, to be engaged in the securing of positions for persons whether those persons are customers of the bank or not. 10

Much has been said about the duty of Mr. Terbell to have disclosed the existence of the bank's mortgage on the real estate.

The legal duty to speak or act rests wholly upon the relationship then existing between the parties. Upon what principle can it be said that a man who seeks to secure for a friend a position there rests a duty compelling him to divulge all of the indebtedness of the friend? In the law of contracts the rule is established that mere failure to disclose facts is not such fraud as will entitle the other party to avoid the contract where the relationship of the parties is not such as calls for the fullest disclosure, and the relationship which demands such disclosure arises only where it is fiduciary. This is the rule between contracting parties. 20 30

13 C. J., 383-384.

There is here present no contract relation. One party recommends to another a third party as a desirable employee, and forsooth the recommending party fails to state that the person recommended is a mortgagor, he, at the time of his recom- 40

mendation, being a cashier of a bank, the bank's mortgage is to be forfeited so that the person to whom the recommendation was made might collect a judgment it has against the employee. This is exactly what happened here. It seems impossible that from such a condition, any legal duty upon the recommending party can be based.

- 10 Professor Pomeroy, in Vol. 2 Equity Jurisprudence, Section 902, discusses when the duty to disclose exists, and says:

20 "Concealment becomes fraudulent only when it is the duty of the party having knowledge of the facts to discover them to the other, and this brings back the question: When does such duty rest upon either party to any transaction? All the instances in which the duty exists, and in which a concealment is therefore fraudulent, may be reduced to three distinct classes: which are (1) where, wholly independent of the nature or object of the contract, there is a fiduciary relation existing; (2) where it appears that either one or each of the parties, in entering into a contract or other transaction, expressly reposes a trust and confidence in the other; and (3) where the very contract or transaction itself is intrinsically fiduciary."

30

Neither of these grounds, we insist, applies to the situation here.

In the leading English case of *Fox vs. MacReth*, 2 Cox, 320, Lord Thurlough discusses the doctrine of the duty to disclose, and says:

40 "Suppose A, knowing of a mine on the estate of B, knowing at the same time that B was ignorant of it, should treat and contract

with B for the purchase of the estate at only half its real value by reason of not disclosing to B the fact of the existence of the mine. Can a court of equity set aside the bargain? The answer must be 'No.' But why is it impossible, not because the one party is not aware of the unreasonable advantage taken by the other of this knowledge, but because there is no contract existing between them by which one party is bound to disclose to the other the circumstances which have come within his knowledge? * * * It is, therefore, not only necessary that great advantage should be taken in such a contract and that such an advantage should arise from superiority of skill or information, but is also necessary to show some obligation binding the party to make such a disclosure."

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20

In the much cited case of *Keen vs. James*, 39 Eq., 527, Justice Dixon discusses the question of when the duty to disclose exists, and he clearly shows that equity imposes a duty to reveal when the relation between the parties is either that of a contract relation or a fiduciary capacity relation. In that case the question arose between the purchaser and the seller of corporate stock

In the case of *Conover vs. Wardell*, 22 Eq., 492, which was an action for specific performance of a contract for the sale of land, where it was claimed that the agent of the vendor had misrepresented that certain lands had been sold, the Court said (page 498):

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"It is not every concealment, even of facts material to the interest of the parties, which will entitle him to the interposition of a court of equity. The case must amount to a sup-

40

pression of facts which one party under the circumstances is bound in conscience and duty, to disclose to the other party and in respect to which he cannot be silent."

10 So it appears from all the cases that we have been able to read that whenever the point has arisen there has always been between the parties a status either of that of a contract relation or a fiduciary capacity, and we insist that such a status must be established before it can be claimed that there was any duty on the part of Mr. Terbell to state that Mr. Grove was a mortgagor of the bank. Surely, no such relation has been shown in this case.

20 The Statutes relating to National Bank, §5136 Revised Statutes in no way empowers or authorizes the bank to engage in the business of securing employment for any one. The scope of a cashier's duty is of necessity limited to the scope of the bank's powers. If the bank had no authority to seek employment for former customers, the cashier surely had none.

The case of *United States vs. City Bank*, 21 How. 356, is regarded, we believe, as the leading case in the United States defining the powers of a cashier of a bank. In that case it was said:

30 "The court defines the cashier of the bank to be an executive officer by whom its debts are received and paid, and its securities taken and transferred; and the acts, to be binding upon the bank, must be done within the course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills and other choses in action to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly or

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through the subordinate officers of the bank, all moneys and notes of the bank; delivers all discounted notes and other security when they have been paid; draws checks to withdraw the funds of the bank where they have been deposited; and, as the executive officer of the bank, transacts most of its business. Nor has it ever been decided that a cashier could purchase or sell the property, or create an agency of any kind, for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary.” 10

In *Crawford vs. Boston Store M. Co.*, 67 Mo. App., 39, the Court said:

“The duties of the cashier of a bank, as commonly understood, did not warrant representations on his part as to the solvency or credit of business corporations who are indebted to the bank. His powers are strictly executive and ministerial.” 20

SUMMARY.

The Second National Bank in conclusion briefly reiterates its principal claims, and states that the evidence shows: 30

1. That the bond signed by Grove, and the mortgage executed to secure that bond signed by both Mr. and Mrs. Grove on the 28th day of July, 1913, is the primary obligation; and that the bond has never been paid or altered.

2. That the bank had never the slightest intimation that Mrs. Grove owned or claimed to own any interest in the property mortgaged, either legal or 40

equitable, and hence it was under no duty to secure her consent in changing the form of the obligation.

3. That Mrs. Grove has, by joining in the mortgage with her husband, relinquished all rights or estates she then had.

10 4. That she is estopped both by deed and *in pais* from now claiming any interest or estate in said mortgaged property superior to the rights of the bank.

5. That the only interest she had in the said property was a right to an equitable lien, and that said right of lien was waived, and her own laches has destroyed any claim she may have had to such lien.

6. That the right to an equitable lien is not an equitable estate, and is not sufficient of itself to create the relation of suretyship.

20 7. That the statements made by the cashier of the bank to the officers of the Globe Tire Company relative to Mr. Grove were wholly outside the cashier's scope of duty and were not binding upon the bank.

The judgment below should be reversed.

30 FREDERICK N. EBERHARD,
Solicitor for Defendant-Appellant,
Second National Bank of Hoboken,
and Allen N. Terbell.

JULIUS LICHTENSTEIN,
of Counsel.

New Jersey Court of Errors and Appeals.

BETWEEN

CHARLES F. NESLER,
Complainant-Respondent,

AND

WILLIAM K. GROVE, MARY B.
GROVE, his wife, and GLOBE
TIRE COMPANY,
Defendants-Respondents,

AND

ALLEN N. TERBELL and THE SEC-
OND NATIONAL BANK OF HOBOK-
KEN, N. J.,
Defendants-Appellants.

On Appeal
from
Chancery
on Bill, &c.

BRIEF FOR MARY B. GROVE, DE- FENDANT-RESPONDENT.

This suit was begun by bill filed April 28, 1917, by the complainant, Charles F. Nesler, to foreclose a \$10,000 mortgage made to him by defendants William K. Grove and wife, dated February 1, 1910.

The *bill* made Allen N. Terbell a defendant because of a later mortgage of \$45,000, on record to him made by said Grove and wife, dated July 28, 1913, and recorded July 29, 1913.

The bill also made the Globe Tire Company a defendant because of an attachment by it on March 21, 1917, for \$18,054.29 against the said William K. Grove as an absconding debtor.

The *bill* also made defendants the said mortgagors, William K. Grove, and Mary B. Grove, his wife, to whom a deed conveying the mortgaged premises dated March 8, 1917, had been recorded on March 23, 1917, from Herbert N. Bradley, her brother, to whom said William K. Grove had conveyed the same by deed made and recorded at the same time.

The complainant Nesler's claim is not disputed and the contest involved in this appeal is as to the \$45,000 mortgage only and is wholly between the defendants against each other, its enforceability being denied by Mary B. Grove and and Globe Tire Co., defendants-respondents.

The defendant Mary B. Grove filed a *counter-claim* against Terbell alleging that there never had been any debt to Terbell and no consideration to either herself or her husband and asserting her equitable ownership of the mortgaged premises by oral gift from her husband in consideration of her building a house thereon, in reliance upon which, with the further assurance that the property had been conveyed to her accordingly, she entered and spent some \$50,000 from her own separate estate in building the house and asserting her legal title by the deeds from her husband through her brother of March 8, 1917, above mentioned and that the said mortgage was void and unenforceable against her and should be canceled and that the Second National Bank of Hoboken (of which the said Terbell was Cashier) should be decreed to have no interest in or lien upon said mortgaged premises. The bank was made a defendant by subpoena.

To the counterclaim of Mary B. Grove, the bank filed an *answer* in which it was not denied that there had never been any debt to Terbell or consideration to either Mrs. Grove or her husband, and in which it was admitted "*that no money was paid to said William K. Grove or unto the said Mary B. Grove upon the execution and delivery of the mortgage, except the One Dollar mentioned therein, as the consideration therefor which was paid by this defendant*" (the bank) and in which it was further alleged that "on and prior to said July 28, 1913, said William K. Grove was indebted to the bank in the sum of \$45,000 as an endorser on certain notes made by the Grove Straw Hat Manufacturing Company", of which he was President, and that the said bond and mortgage were then given to Terbell as the agent of the bank "in order to secure said endorsements." (Which is a lawful transaction

Similar answers likewise prepared by the bank's solicitor who was and is one of the directors of the bank and had participated in the transactions and sworn to by Terbell, its Cashier, were filed to interrogatories.

The *replication* of Mary B. Grove asserted that the said mortgage had been released and discharged by the alteration of the debt evidenced by said Hat Company notes and endorsements.

Similar assertions were made in the *counterclaim* and *reply* filed by the Globe Tire Company and the *answers* of the Bank and Terbell.

Confronted with that situation, the bank at the beginning of the hearing put in a whole new set of *amended answers* and *replications* prepared by new counsel who had not participated in the transactions themselves, setting up a brand new theory to the effect that the bond and mortgage were the principal debt and that the Hat Company notes

a Nat^l Bank. §
U.S. Rev St.)

Which is a transaction forbidden to
a Nat^l Bank § 5137. U.S. Rev St.)

were merely additional collateral security, and that therefore the bond and mortgage were not discharged by the alterations and surrender of the notes and the voluntary release of the Hat Company.

The statement of facts as to the rights of Mary B. Grove and the \$45,000 mortgage in the brief of the appellant Bank is based upon the books and testimony of witnesses produced by the Bank found by the Vice-Chancellor to not be in accordance with the facts.

In short what was proved at the hearing and found by the Vice-Chancellor to be the fact was that a situation existed which is all too common in every day life.—A young, inexperienced and confiding wife investing her own money in the improvement of real estate resting in her husband's assurances that it was her own but the legal title to which actually stood in the husband's name and pledging her own property for her husband's business without thought or understanding of forms and that her interests had been prejudiced by various shifts by the creditor and husband without consulting her and in disregard of her known rights as a particularly helpless sort of surety.

The Vice-Chancellor found that Mrs. Grove spent some \$47,453.34 of her own money deposited by her in her own account in the Second National Bank itself in improving the mortgaged premises in the assurance that the property was hers and concluded that in equity it was hers (Concl. p. 270, 271).

The Vice-Chancellor further found that "the Bank knew that Mrs. Grove was an accommodation mortgagor and that she gave the property as security for an indebtedness of the Hat Company to the extent of \$45,000." (Concl. p. 284.)

The Vice-Chancellor further found that at the time the mortgage was given that \$45,000 indebtedness consisted of notes to that amount made by the Hat Company and indorsed by William K. Grove and that an additional \$10,000 note made by William K. Grove personally was entered on the books of the bank instead of one of the \$10,000 Hat Company notes merely to avoid the appearance of an excess loan to one customer (Concl. p. 260, 284).

The Vice-Chancellor further found that the Bank had not only renewed the notes, changed their form as to time and demand, canceled and surrendered them, and taken notes from other parties in place of them, but had procured the discharge of the Hat Company (for whom Mrs. Grove's mortgaged property was surety) by a collusive composition and liquidation of the Hat Company assets, all without Mrs. Grove's consent or even knowledge (Concl. 275, line 30 and line 3-11 and p. 284).

The notes held by the Bank on and prior to July 28th, 1913, when the mortgage was given were as follows:

No. 3081, dated July 1, 1913, due Aug. 1, 1913, \$5,000 made by the Hat Company and endorsed by Grove.	
No. 3125, dated July 5, 1913, due Aug. 4, 1913, \$5,000 made by the Hat Company and endorsed by Grove.	
No. 3217, dated July 16, 1913, due Aug. 15, 1913, \$5,000 made by the Hat Company and endorsed by Grove.	
No. 3362, dated July 21, 1913, due Aug. 20, 1913, \$10,000 made by the Hat Company and endorsed by Grove.	
No. 3518, dated July 26, 1913, due Sept. 26, 1913, \$10,000 made by the Hat Company and endorsed by Grove.	
Demand note dated Feb. 3 1911, \$10,000 made by the Hat Company and endorsed by Grove.	
	\$45,000
No. 3038, dated July 1, 1913, due July 31, 1913, \$10,000 made by William K. Grove, alone.	
Total	\$55,000

(See Terbell's testimony, page 61 and the notes themselves.)

(The note referred to in the Conclusions (page 260) as "a demand note of William K. Grove dated for \$10,000" is obviously the time note No. 3038, dated July 1, 1913, due July 31, 1913, for \$10,000 made by William K. Grove alone (supra), whereas it was not until the mortgage was given that the \$10,000 demand note of July 28th, 1913, was made by William K. Grove).

The line of credit dated back a number of years and the bank in view of the involved condition of the Hat Company insisted that something should be done. On July 28, 1913, the mortgage in question was executed to Terbell securing the bond for \$45,000. payable in three years (Concl. page 260, Suppl. Concl., 284).

As hereinafter explained, the notes now held by the bank growing out of the above indebtedness are the 3 notes of \$10,000, \$2540.68, and \$30,000 made by Wm. K. Grove, C. H. Wharton and Wm. K. Grove respectively (Exhs. C-4, C-5, C-6, pp. 199, 200).

On May 18, 1915, the \$45,000 debt to the bank which it proved against the Hat Company in bankruptcy consisted of the two notes annexed to its proof of claim, sworn to by the Bank's Cashier, Terbell, namely:

(1) The previously mentioned \$10,000 demand note dated February 3rd, 1911, made by Grove Straw Hat Mfg. Co. and endorsed by William K. Grove. (Concl. p. 260, line 17, and p. 262, line 1-10.)

(2) A \$35,000 time note dated March 11th, 1915, likewise made by the Hat Co. and endorsed by Wm. K. Grove, payable 30 days after date.

(Bank's Proof of Claim, Exch. E-1, p. 216-219 on p. 219.)

On July 21st, 1915, the Hat Co. composition in bankruptcy procured under the secret arrange-

ment between the Bank and Burnett & Sons was confirmed and the liquidation of the assets of the Hat Co. taken over by them was carried on. (Concl. p. 262, 263, Exh. E-9, E-10, pp. 222-235.)

And on December 29th, 1915, the bank surrendered all the notes made by the Hat Co. (p. 72, l. 40).

The notes now asserted by the Bank to be held by it for the balance of said \$45,000 debt are three, namely:

(1) The previously mentioned \$10,000 demand note dated July 28th, 1913, made by Wm. K. Grove (Exh. C-4, p. 199).

(2) A \$2,540.68 demand note dated December 29th, 1915, made by C. H. Wharton and endorsed by William K. Grove (Exhibit C-5, p. 200).

(3) A \$30,000 demand note dated December 29th, 1915, made by William K. Grove with the endorsement "Paid, \$5750.00 5/9/16" (Exhibit C-6, p. 200).

In the Hat Company composition in bankruptcy engineered by the Bank and Burnett & Son (both of whom signed the necessary written consent) their claims were \$45,000 and \$86,977.18 each, aggregating \$131,977.18 out of a total of \$144,137.49; filed (there being only \$12,160.31 claims filed other than the Bank and Burnett & Son).

Upon payment of the items mentioned in the secret agreement (amounting to about \$9,068.15) all the assets of the Hat Company were to be divided 50-50 between the Bank and Burnett & Son.

The assets of the Hat Company appear from the receivership bill in chancery filed by Mr. Eberhard just before the bankruptcy to have been \$248,891.66 (after deducting the items of "Good Will" and "Profit and Loss") (See Exh. E-14, p. 242). The

Bank's original answer to the counterclaim of Mrs. Grove credited only \$5,750 as received by the Bank out of those assets but the original answer to the Globe Tire Company counterclaim acknowledged \$9,750 as did its amended answers and replications put in at the beginning of the hearing. And the Bank's attorney and director, Mr. Eberhard, who was one of the liquidators, testified at the hearing that he got some payments out of the proceeds for services, disbursements, etc. (p. 182), and that the Bank actually received \$10,750 but only credited \$9,750 because it paid \$1,000 to Heyman & Heyman (p. 181) (the attorneys who appeared for the Bank in the Hat Company bankruptcy proceedings in New York (p. 219, l. 10)). He first said he got no fees out of it himself (p. 182, lines 30-40)—then said he thought he did (p. 192). What the Bank really did or ought to have gotten can now only be surmised.

POINT I.

As the debt to Terbell described in the bond and mortgage is admittedly not the debt which the mortgage was given to secure, the burden is on the bank to prove its right to now enforce the mortgage for some other debt.

It is admitted and obviously true, that William K. Grove did not owe Allen N. Terbell any debt nor did he owe any debt to anybody not due for three years nor with interest due exactly every four months, as stated in the bond and mortgage.

Interest payments to the bank were always made on and according to the notes which were not all four month notes and never on the bond and mortgage, though the Cashier, Terbell, as usual, not entirely accurate, said the interest paid on the notes was "Corresponding to the interest on the mortgage" (p. 76, and see the thirty-day \$35,000 note of March 1, 1915, in proof of claim, Exh. E-1, p. 219).

As the bank in the case of the bond and mortgage as was its practice throughout these transactions, exacted false and misleading documents the burden is on it to prove a real right.

See *Freytag v. Hoeland*, 23 N. J. Eq. (8 C. E. Gr.) 36, 40, 41.

At page 40, Zabriskie, Ch., said:

"If the contest was about the fact whether the deed was intended as security, the burden of proof would be upon Freytag, and his oath against that of Hoeland would not be sufficient to change a deed absolute on its face into a mortgage. But Hoeland, by the allegations of his answer and in his testimony, admits that the deed was given as security. And when a mortgagee admits that he required an absolute deed as security for a debt, without any recital to show what the debt was, it would seem right that if the burden of proof is thrown on either party that he should assume it."

And see *Boney v. Williams*, 55 N. J. Eq. (10 Dick.) 691, 700.

POINT II.

Mary B. Grove was the equitable owner of the mortgaged premises, under the oral gift from her husband of the land in consideration of her building with her own money a house in which she has ever since resided and was entitled to have the legal title conveyed to her and she became the legal owner by the conveyances from her husband to her brother to her of March 8, 1917, both recorded 23 March, 1917.

A parol "gift" of land followed by entry and valuable improvements by the donee in reliance constitutes the donee the owner in equity and will be specifically enforced.

20 Cyc. p. 1201.

29 Cyc. 1658.

Young v. Young, 45 N. J. Eq. (18 Stew.) 27.

Duvale v. Duvale, 56 N. J. Eq. (11 Dick.) 385.

Atlantic City R.R. v. Johnson, 72 N. J. Eq. (2 Buch.) 332.

Neale v. Neale, 77 U. S. (9 Wall.) 1, 19 L. Ed. 590.

Townsend v. Vanderwerker, 160 U. S. 171, 40 L. Ed. 383, 387.

Seymour v. Delancy, 3 Cowen, 445.

Lobdell v. Lobdell, 36 N. Y. 327.

Freeman v. Freeman, 43 N. Y. 36.

In *Neale v. Neale*, 77 U. S. (9 Wall.) 1, (*supra*), the Court said at page 9:

“And equity protects a parol gift of land, equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property. And this is particularly true, where the donor stipulates that the expenditure shall be made, and by doing this makes it the consideration or condition of the gift.”

POINT III.

The property of Mary B. Grove mortgaged for the debt of another was in the position of surety and was released by the alteration of the indebtedness and by the surrender of the evidence of the indebtedness and by the discharge of the primary debtor voluntarily by the creditor.

(1) Property pledged for the debt of another than its owner is in the position of a surety.

1 Brandt Surety & Guar. (3rd Ed.), Sec. 43 (and cases cited).

McFillen v. Hoffman, 35 N. J. Eq. 364, 366 affd. on rehearing, 42 *id.* 144, 145.

In re *Theo. C. E. Blanchard*, 253 Fed. (U. S. D. Ct., N. J.) 758, 764.

In *McFillen v. Hoffman*, 42 N. J. Eq. 144 (*supra*), the Court said at page 145:

“A wife who joins with her husband in a mortgage of her own property to secure his debt or the payment of money loaned to him, is the surety merely of her husband and is entitled to all the rights and privileges of a surety.”

In re Theo. C. E. Blanchard (*supra*), the Court said, p. 764:

“As the evidence fails to establish that the stock was loaned to the sons personally, there is presented a situation where it appears that stock belonging to the claimant was loaned by her, at the request of her sons, and used by them as representing the company, with her consent, for the express purpose of enabling the Brick Company to borrow money on its note or notes; the latter being also indorsed by the sons for the same purpose. The stock was, therefore, surety for the payment of the note, for it is well settled that, when property is pledged by an owner to answer for the debt or default of another, it occupies the position of a surety.”

(2) The alteration of the indebtedness by extension of time, change in parties or nature of debt or otherwise or release or discharge of the debtor without the consent of the surety, discharges the surety or the surety's property.

32 Cyc. 195, 155, Notes 12 and 13;
O'Mara v. Nugent, 37 N. J. Eq. (10 Stew.) 326, 330;
McFillen v. Hoffman, 35 N. J. Eq. (8 Stew.) 364, 366, *affd.* on rehearing, 42 *id.*, 15 *id.* 144, 145;
Peoples Insurance Co. v. McDonald (Ohio decisions 1882) 7 Weekly Law Bulletin 53;
Albion Bank v. Burns, 46 N. Y. 170.

The rule is that the burden is on the creditor to show that the surety actually consented to the alteration except where the surety is active in procuring the alteration.

32 Cyc. 159, Note 86.

There is no evidence that Mrs. Grove had any knowledge but mere knowledge without objection is not consent.

32 Cyc. 162.

(3) The discharge of the debtor in bankruptcy brought about not by mere operation of law but by even a statutory composition effected and aided by the voluntary act of the creditor under the bankruptcy, likewise releases the surety.

Here it has been pointed out that the bank not only signed the consent as one of the necessary majority of creditors in number and amount without which the composition in the Hat Company bankruptcy could not have been effectuated, but it actively brought about the composition resulting in the discharge by secret collusion with the other largest creditor in fraud of the Bankruptcy Act. Under such circumstances the general rule that the voluntary release of the principal debtor discharges the surety applies (and not the exception that the surety is not released where the discharge of the principal debtor occurs, by mere compulsion of law).

32 Cyc. 154 and Note 3;

Ordinary v. Dean, 44 N. J. L. (15 Vr.) 64, 68;

Collier on Bankruptcy (11th Ed. 1917) p. 416 and notes 3, 4 6 and 7 (citing int. al. in re McDonald Fed. cas. 8753; *Matter of Harry Benedict*, 18 A. B. R. 604).

In 32 Cyc., 154 it is said:

“The general rule is that the release of the principal debtor, without the consent of the surety, releases the surety, as where the

release arises out of a composition agreement (3)" (Citing in Note 3 int. al. *Ordinary v. Dean*, 44 N. J. L. (15 Vr.) 64, 68).

In *Collier on Bankruptcy* (supra) as to Section 16 of the present bankruptcy act of 1898 which provides that the liability of sureties shall not be altered by the discharge of the bankrupt, it is said; page 416:

"It was well settled under the former law that the principles thus stated apply only to a discharge in bankruptcy and not to any act of the parties effecting a release * * * The reported cases under that law are thus as applicable now as then. Under the present law it is held that where the discharge is effected by the consent of the creditor as by a composition the debtor may also be discharged (7)"

"(7. *Matter of Benedict*, Ref. N. Y.) 18 Am. B. R. 604, holding that an indorser of a note made by the bankrupt would be discharged under such circumstances."

Matter of Benedict (supra) was an application to expunge claims against a bankrupt as endorser of notes on the ground that the holders of the notes had consented voluntarily to a composition by the maker of the notes, who had also gone through bankruptcy, thereby under general principles of equity, releasing the endorser who did not consent although he was in the position of a surety. The Court said, page 605:

"The consent of the party secondarily liable, was not obtained in this case. The consent given by these creditors, in combination with others, being a condition absolutely essential to enable the principal debtor to obtain its release through composition proceedings would, it appears to me, clearly dis-

charge the liability of the surety, unless section 16 of the bankruptcy law prevents. This reads as follows:

'The liability of a person who is a co-debtor with or guarantor, or in any manner a surety for a bankrupt, shall not be altered by the discharge of such bankrupt.'

The section does not provide that such liability shall not be altered by the conduct of the creditor whenever such conduct operates to impair the rights of the surety. The section, by its terms, in no manner bears upon the effect of that conduct of the party which by the general law and the New York Statute, alike, and upon equitable principles, has always operated to relieve the surety. The section would thus mean that where a 'discharge' has been obtained, and the principal debtor is thereby relieved, by the simple operation of the law itself, and without the aid or act of the creditor, the liability of the surety shall not be affected.

Second, that while through a 'composition' the principal debtor is as completely relieved from his personal liability as he would be by a 'discharge,' yet such relief is obtained in a different manner. Relief under composition cannot be obtained without the co-operation of the creditors. The active consent of the necessary number of creditors is a condition precedent. Without this active co-operation on the part of the creditors the liability of the principal debtor would remain undischarged and the remedies of the surety unimpaired."

Page 608:

"I conclude that the claims in question should be expunged and disallowed and so decide and direct."

(4) The bank had notice of Mrs. Grove's interest in the mortgaged premises so that her rights as surety could not be disregarded with impunity without her consent.

In addition to the circumstances pointed out in the Vice-Chancellor's conclusions (pages 272, 275) it will be remembered that the bank knew when the mortgage was given that Grove had no other security to give but the house (page 54, lines 18 and 19) and that to get that mortgage it was necessary that Mrs. Grove's interest should be consulted by conferences between the bank officials and her brother, Mr. Bradley and her own family attorney, Mr. Beers, of the firm of Lord, Day & Lord (p. 98, 99), although the cashier first tried to deny that Mrs. Grove's name was ever mentioned (p. 96, line 33, 35).

And Mr. Eberhard (the Bank's attorney in the bankruptcy, p. 217, l. 30) gave the curious testimony that *before the bankruptcy*, William K. Grove told him

“that hereafter that any release of any of his property that he would have to consult her (his wife) before there would be any release of any of his properties;” even though he “owned” them * * * (p. 151, lines 20-34).

AS TO THE BRIEF FOR THE SECOND NATIONAL BANK, DEFENDANT-APPELLANT:

Points 1 and 2 of Appellant's brief are simply based on the assumption of the truth of appellant's books, papers and witnesses, which the Vice-Chancellor as pointed out circumstantially in his conclusions found to be false and untrustworthy and are fully covered in his opinion. For instance, the statement on page 44 of the Appellant's brief that presumptions and inferences cannot be relied on in the face of positive, uncontradicted testimony of Mr. Terbell. “We never heard of Mrs. Grove in the matter at all”

(see Mr. Terbell's sworn answer to Interrogatory No. 15 referred to in the Vice-Chancellor's conclusions in which he stated that he had conferred about the matter at a formal conference with their family lawyer who was represented to Mr. Terbell as Mrs. Grove's attorney (Concl. p. 273, 274). Terbell's testimony pp. 98, 99, in which he said as to the testimony quoted in Appellant's brief:

"Q. Do you still say that you did not know in this conference that Lord, Day & Lord were there representing Mrs. Mary K. Grove?

A. I can't say it now if I signed to the contrary.

Q. So you would change your testimony to that extent at any rate?

A. I would have to."

As to Points 3, 4, 5 and 6 of the Appellant's brief, setting up estoppel and laches and so on, it need only be said that it takes mighty strong evidence of active misrepresentation, fraud and bad faith on the part of a married woman to estop her as to her rights in her separate estate being used for the benefit of her husband and his creditors of which there is not the slightest evidence, suspicion or even allegation in this case.

See *Carpenter v. Carpenter*, 27 N. J. Eq. (12 C. E. Gr.) 502.

Kinsey v. Fillen, 64 id.

which are cited by the Vice-Chancellor in his conclusions (p. 272), and that these points were not pleaded or in any way raised or contended in the court below and the effort to now base an estoppel upon the covenant made by her husband in the mortgage prepared by the bank (though Mr. Eberhard tried to deny it until his name was pointed out on the stationery of the originals and his signature to the certificate of acknowledg-

ment on the assignment) to which document, admittedly false to some extent, the bank after conferences with her lawyers exacted her signature as a condition to desist from breaking up her husband's business and giving time for the Hat Company's obligations.

As to Point 7 of Appellant's brief we do not see its application to this case. As to the discharge of the surety mortgagor by the release by the bank of the bankrupt in bankruptcy of the \$45,000 Hat Company notes to it, including the \$10,000 Hat Company note involving the collusive composition and release with the principal debtor as to the whole \$45,000, and the actual physical surrender by the bankrupt of all the Hat Company notes admitted by its Cashier, Terbell, are covered in Point III of our brief. No consideration was necessary under those circumstances, but the bank did get the consideration through its collusive agreement by which it got joint possession of the \$248,000 assets of the Hat Company which would appear to be some consideration for the surrender of the \$10,000 security.

Point 8 of the Appellant's brief is obviously based upon the false assumptions that the notes were collateral to the bond and mortgage and that Mary B. Grove and the Hat Company were co-sureties for her husband, whereas she was unquestionably a surety as to both her husband and the Hat Company, whichever one be deemed the principal debtor. That Mrs. Grove's property was discharged see Point III of our brief (4).

Point 9 of Appellant's brief. As to the married woman's act, it was not pleaded nor suggested in the court below. The point fails to distinguish between the executory gifts to volunteers, the performance of which might not be enforced and

executed irrevocable gifts followed by entry, possession and valuable consideration.

As to Point 10 of Appellant's brief, it not only appears as a matter of fact that Mrs. Grove did not consent but that she did not even know anything about the transactions, which she claims to have discharged her property as surety (the most important of which were in the bankruptcy proceedings which commenced in 1915 though the same is true as to transactions in January, 1914, and referred to by appellant.)

In our Point III (2) it is pointed out that the cases are not "unanimous" as stated by Appellant in holding that the burden rests on the surety to show the negative lack of consent, but are to the contrary and go so far as to hold that mere knowledge without objection by the surety is not sufficient to excuse the creditor unless of course a surety was active in bringing about the act which he afterwards in bad faith asserts as a discharge.

Point II of the Appellant's brief is covered by Point I of our brief in which it is demonstrated that Mrs. Grove was in equity the owner and not merely a lienor.

The cases cited by Appellant are cases of implied loans and advances and not of express oral gifts executed and followed by the improvement and continuous occupation of the premises by the donee.

Point 12 of the Appellant's brief is based upon the erroneous assumption that Mrs. Grove was merely a lienor.

The case of *McFillen v. Hoffman*, 35 N. J. Eq. 364, discussed on page 68 of Appellant's brief went up to the Court of Errors and Appeals in 42 N. J. Eq. 144. The significance of that case is

that the rights of the husband's execution creditor were subordinated to the latent equity of the wife as surety, except as to the amount of the mortgage money expended in improving her property without anything to indicate that the creditor knew of her equity.

The particular act affecting the wife as surety in that case was the release by the mortgagee of part of the lands of the principal debtor, the husband, an act which releases a surety *pro tanto* but not *in toto*.

As to *Point 13* of the Appellant's brief: This again is based upon the erroneous assumptions that the notes were collateral to the mortgage and that the Hat Company and Mrs. Grove were co-sureties for her husband, and upon the testimony of the bank's witnesses found by the Vice-Chancellor to be incorrect. The \$10,000 note referred to in the quotation from Mr. Terbell on page 69 of Appellant's brief as having been received by the bank from Mr. Grove at the time of the bankruptcy in 1915 to prove for him happens to be the Hat Co. note of February 3, 1911, which the bank held prior to the mortgage of July 28, 1913, and did not then surrender. (Concl. p. 260, lines 18 and 19, line 34 and supplemental conclusions p. 284 and 285).

The bond and mortgage were consistently asserted by the bank officials to be collateral to the notes at all times before the final hearing. Then after the employment of new counsel the witnesses all swore to the contrary, at least at every opportunity on which they thought of it they said that the notes were collateral to the mortgage. But Mr. Rabe, the President of the bank, whose testimony is referred to by Appellant's counsel, had not learned his lesson very well, for all that he

said was that the bond and mortgage were "collateral security to the indebtedness of Mr. Grove" and kept in the "collateral box." That testimony is entirely consistent with the fact that the indebtedness of Mr. Grove in question was his indebtedness as indorser on the notes made by the Hat Company and he said nothing whatever anywhere in his testimony about any personal loan to Mr. Grove nor loan on mortgage nor that the notes were collateral to the bond and mortgage (p. 103). While even Mr. Terbell, the Cashier, sometimes forgot his lesson and lapsed into his former practice of truthfully describing the mortgage as security for the indebtedness evidenced by the endorsed notes of the Hat Company as the principal debt (See page 86) :

"Q. Now when this time loan or time note of January 8, 1915, came due you stated that it was renewed. Did you have any conversation with Mr. Grove at the time that these new notes, renewal notes were given of the Grove Straw Hat Works?

A. Well we told him *we were still holding the mortgage as security for his endorsements*. Of course it was referred to between us—*always* has been."

The Final Decree Should Be Affirmed.

Respectfully submitted,
YOUNG, BIGELOW & FAYERWEATHER,
Solicitors for Mary B. Grove,
Defendant-Respondent.

STUART A. YOUNG,
WILLIAM M. SEUFERT,
ROBERT H. SOUTHARD,
Of Counsel.

New Jersey Court of Errors and Appeals

CHARLES F. NESLER,

Complainant,

vs.

WILLIAM K. GROVE, *et als.*,

Defendants.

Brief for Defendant-Respondent Globe Tire Company.

Complainant's bill prays the foreclosure of a first mortgage covering premises at West Orange, Essex County, N. J., executed by William K. Grove and Mary B. Grove, his wife, to complainant Nesler, dated February 1, 1910, securing payment of \$10,000.

The bill alleges that under date of July 28th, 1913, said William K. Grove and Mary B. Grove, his wife, executed a second mortgage covering said premises to Allen N. Terbell, for \$45,000; that under date of March 8th, 1917, said Grove and wife conveyed said premises to Herbert N. Bradley (who is the brother of Mrs. Grove) and on the same day, said Bradley conveyed the premises to Mary B. Grove, both of which deeds were recorded March 23, 1917; that under date of March 21, 1917, Globe Tire Company sued out a writ of attachment against William K. Grove for \$36,000. (Judgment was subsequently recovered in this attachment suit, October 15, 1917, for \$18,162.16.)

The defendants named in the complaint are William K. Grove, Mary B. Grove, Allen N. Terbell and Globe Tire Company.

No question whatever is raised by any party concerning complainant's mortgage.

Defendant William K. Grove absconded March 9th, 1917, and is said to have been ever since in China.

No defense has been interposed by or for him.

Mary B. Grove filed a counterclaim (page 7) against defendant Allen N. Terbell, and also against Second National Bank of Hoboken, brought in by her as a new party, setting up an oral gift from her husband of the mortgaged premises,

then unimproved, and the subsequent improvement thereof by her at large expense out of her separate estate, in reliance thereon, and that the subsequent deed to her through her brother Herbert N. Bradley, was for the purpose of vesting legal title in her; that neither she nor her husband were indebted to said Terbell at any time; that Mr. Grove was, however, indebted to the Second National Bank of Hoboken at the time of the Terbell mortgage, upon promissory notes. Mrs. Grove also filed a counterclaim against the Globe Tire Co. averring that she was the owner of said premises at the time of the attachment issued by Globe Tire Company, and that W. K. Grove was not such owner.

Globe Tire Company filed an answer and counterclaim (page 12) against defendant Terbell, alleging that neither William K. Grove or Mary B. Grove were indebted to Allen N. Terbell at the time of the mortgage to him; that the consideration of the mortgage, if any, was the securing of an alleged indebtedness owed by a corporation known as Grove Straw Hat Manufacturing Company to Second National Bank of Hoboken, for which neither of the parties were liable and that thereafter said indebtedness was fully paid, satisfied and discharged.

The counterclaim of the Tire Company against Mrs. Grove alleges that the conveyance to her through Mr. Bradley was made for the purpose of hindering, delaying and defrauding the Tire Company, and, therefore, void.

The Second National Bank (brought in as a new party to answer the counterclaim of Mary B. Grove) answered, averring (p. 18):

"On and prior to the said July 28th, 1913, said William K. Grove was indebted to this defendant in the sum of \$45,000, as an endorser on certain notes made by the Grove Straw Hat Manufacturing Co., a corporation of the State of New York, of which corporation the said William K. Grove was president (and the said defendant Mary B. Grove was a large stockholder), and in order to secure the said endorsement said William K. Grove executed and delivered to the said defendant Allen N. Terbell" the \$45,000 bond and mortgage above referred to; "that said Allen N. Terbell was then the cashier and agent for the defendant Second National Bank of Hoboken and acted in its behalf in the taking of said mortgage." That thereafter, on or about July 30, 1913, said Terbell assigned said bond and mortgage to the bank (the assignment was never recorded).

Said answer further avers (p. 20) "that at the time of the making of said mortgage the said Grove Straw Hat

Manufacturing Company was solvent and had sufficient assets to pay the notes made by it and endorsed by William K. Grove and to pay its other debts and obligations."

That the bank refrained from pressing payment of said notice in reliance upon said bond and mortgage, and that thereafter, on April 15, 1915, the Hat Company was adjudged bankrupt and the bank received \$5,750 "as its dividend or *pro rata* share of the assets of said corporation; that no money was paid by this defendant to said William K. Grove or unto the said Mary B. Grove upon the execution and delivery of said bond and mortgage except the one dollar mentioned therein as the consideration therefor."

(There is absolutely no evidence in the case that Mrs. Grove was a stockholder in the Hat Company and no attempt was made to prove that allegation of above answer.)

Defendant Terbell filed an answer to the counterclaim of Globe Tire Company (p. 21), in substantially identical language above recited; that said mortgage was given to secure the prior obligation of William K. Grove as endorser of the notes of the Hat Company held by the bank and that Terbell was the cashier and agent for the bank in taking said mortgage and thereafter assigned the same to the bank.

The above pleadings filed on behalf of Terbell and the Second National Bank were prepared and filed by Frederick N. Eberhard, who was the attorney for the bank, who actively participated in the negotiations which led up to the execution of the bond and mortgage, as well as in all the subsequent transactions of the bank with respect thereto.

Thereafter associate counsel was brought in for the purpose of trial, and on the day of trial additional and amended pleadings were filed by him (p. 44).

These pleadings consisted of answer of Allen N. Terbell to counterclaim of Mary B. Grove (p. 24); amended answer of Allen N. Terbell to the counterclaim of Globe Tire Co. (p. 27); answer of Second National Bank to counterclaim of Mary B. Grove (p. 34); and replication and answer of Second National Bank to the counterclaim of Globe Tire Company (p. 38).

In substance, these pleadings aver that the Terbell bond and mortgage were given to secure a loan of money made concurrently by the bank to William K. Grove; and deny that the consideration of the mortgage was the securing of an antecedent indebtedness owed by the Straw Hat Company to the bank, as averred by the bank in its original pleadings.

The Tire Company replied to the last mentioned answers of Terbell and the bank (p. 30), averring, in substance, that it was induced to extend credit to William K. Grove, resulting in the attachment and judgment above stated, through the introduction and recommendation of the bank, acting through its authorized agents, including said Terbell; that at the time thereof the Tire Company was a customer of the bank; that the bank, acting through said agent, in order to induce the Tire Company to extend credit, represented said Grove to be financially responsible and the owner of the premises in question, intending thereby that he was the owner free of incumbrances, and that in reliance thereon the Tire Company extended the credit in question; that the bank and said Terbell concealed from the Tire Company the existence of the aforesaid mortgage, as well as the indebtedness of Grove to the bank; that the representations were untrue; that in fact the liens, including the bank's mortgage, exceeded the value of the property; that William K. Grove is insolvent and that the bank and Terbell are both estopped from enforcing said mortgage as a prior lien to the judgment of the Tire Company.

Priority is claimed for the Globe Tire Company because of two entirely distinct equities, either one of which entitles it to a lien prior to all other liens and equities, excepting only the admitted first mortgage lien of complainant Nesler, and a tax lien.

The first of these equities results from the proof that Mrs. Grove was the equitable owner of the premises at the time of the Terbell mortgage and joined in that mortgage to Terbell for the purpose of giving collateral security to the bank for the indebtedness of the Hat Company or the liability of Mr. Grove as endorser of the indebtedness of the Hat Company; that at all times the Hat Company was the principal debtor and that subsequently the bank released and discharged the Hat Company from the principal debt, thereby releasing the surety, *i e.*, discharging Mrs. Grove's equitable title from the Terbell mortgage; that Mrs. Grove is, however, estopped from asserting her equitable title against the Tire Company, thus resulting in a lien in the Tire Company, prior both to the Terbell mortgage and the Mary B. Grove equitable title.

The equity secondly treated is invoked against the bank and Terbell in case their mortgage be sustained in whole or part against Mrs. Grove, and arises upon proof that they induced the Tire Company to extend credit by concealing the existence

of their mortgage and falsely representing, in substance, that the property was clear of encumbrances, thus making it inequitable for them now to assert their encumbrance.

In order to simplify the issues tried, as far as possible, no question was raised between the Tire Company and Mrs. Grove respecting the right of the Tire Company to priority over her equitable title, and no such question is raised upon this appeal.

It is conceded, we understand, that upon the establishment of equitable title to the premises in Mrs. Grove, the Tire Company shall have a lien thereon.

On the above issues, the Vice-Chancellor found all the material facts substantially as alleged by the Tire Company and Mrs. Grove and the marshalling of these facts in the conclusions of the Court makes an elaborate brief on the part of respondent unnecessary.

We shall therefore confine ourselves to a short traverse of the points made by appellant, without attempting to traverse exhaustively the printed argument of appellant's voluminous brief.

Summary of facts relating to the equitable title of Mrs. Grove and the mortgage thereof to Mr. Terbell or the bank.

The land in question, without any building improvements thereon, was purchased by Mr. Grove shortly before the Christmas holidays of 1909, and he made an oral Christmas gift thereof to his wife, as a building site for their future home (pp. 104, 105). Mrs. Grove was wholly inexperienced in business and then twenty-two years of age (pp. 105, 106).

In February, 1910, Mr. Grove asked his wife to join in the mortgage held by complainant Nesler, stating he was temporarily embarrassed and would repay the loan in a short time and clear the property (p. 107).

Subsequently it was agreed between husband and wife that Mrs. Grove should build the home with her own money because the land stood in Mrs. Grove's name (p. 108). The proof is conclusive that Mrs. Grove had a considerable separate estate, inherited from her father, and that she did, in fact, erect a dwelling and garage upon the property during 1911 and 1912, and paid the entire cost thereof out of her separate estate, to the amount of \$47,453.34 (p. 111).

During all this time, Mr. Grove was the President and General Manager of a New York corporation known as Grove

Straw Hat Manufacturing Co., having a manufacturing plant at Hoboken, N. J.

This corporation had an established line of credit with several New York banks, and also a line of credit with the Second National Bank of Hoboken for \$45,000.

This indebtedness to the Hoboken Bank had existed for several years (p. 52) and was then evidenced by time notes made by the Hat Company and endorsed by Mr. Grove, aggregating \$35,000, which notes regularly appeared upon the books of the bank; also by a demand note for \$10,000 made by the Hat Company and endorsed by Grove, dated February 3, 1911, which did not appear upon the books of the bank. The bank also held a demand note made by W. K. Grove for \$10,000, which appeared on the books of the bank as a loan to Mr. Grove.

This latter note covered the same indebtedness as represented by the demand note of the Hat Company for \$10,000, dated February 3, 1911, *i. e.*, the bank held \$55,000 of notes for \$45,000 of indebtedness (p. 70).

The explanation is that the bank could not lawfully loan \$45,000 to any one customer (p. 158). It nevertheless took notes for the full \$45,000 from the Hat Company, which was the original debtor, all of which notes Mr. Grove personally endorsed, and, in addition, took a personal note from Mr. Grove for \$10,000, which it put on its books as a separate loan to deceive the bank examiners.

In June of 1913, the financial affairs of the Hat Company were in a bad way, due to the demand made by the New York banks for the payment of their notes.

Mr. Grove thereupon consulted Mr. Lucius H. Beers, a partner in the New York law firm of Lord, Day & Lord, who were counsel for his wife's family in the settlement of her father's estate (p. 173). Mr. Beers was never previously consulted respecting Mr. Grove's personal or business affairs (p. 174). Mr. Beers was acting for Mrs. Grove in the matter (p. 120).

Mrs. Grove's brother, Mr. Bradley, was at the same time brought in the conferences (p. 176).

Mr. Grove then informed Mr. Beers that the title to the West Orange property stood in his name but that his wife's money had been used in making the improvements (p. 175).

About the same time, Mr. Grove informed his wife that the title still stood in his name (p. 139). Prior to that she was of the belief that the title had been conveyed to her, as above stated (p. 139).

Mrs. Grove was apparently willing to help her husband meet his difficulties and Mr. Beers arranged for a loan of \$50,000, by pledging her separate estate (other than the house) which was used to purchase the notes of the Hat Company held by the New York banks (Ex. E-15, p. 243).

Apparently the Hoboken bank had not then demanded payment, and it seems to have been assumed at that time that the Hoboken bank would be lenient.

Mr. Beers is a man of many affairs and does not pretend to have accurate recollection, independent of his records. These show a conference at the bank with the cashier (Mr. Terbell), Mr. Grove and Mr. Bradley, July 1, 1913. Following this, on the next day, he reported the situation to Mrs. Grove in a letter (Ex. E-15, p. 243).

In this he expresses the opinion that the business of the Hat Company can be made to pay and recites her guaranty to the Hanover Bank for \$25,000, and that she has

“invested a much larger sum in the house, which still stands in Mr. Grove’s name, and these amounts would probably be irretrievably lost in the event of discontinuing the business, and bankruptcy.”

He recommends that \$50,000, which she had arranged to borrow on stocks belonging to her

“be immediately used to buy up and dispose of the notes held by the Hanover Bank, and I hope that under the plans which I have discussed with Mr. Grove and your brother the business can be continued in such a way that in the course of a few months *the Second National Bank will consent to having the West Orange house conveyed to you*. If this can be done without legal complications you will then have extinguished the debt to the Hanover and will be the owner of your house.”

The letter concludes with a commendation of the

“high sense of honor with which you and your brother have met this emergency.”

Mr. Beers says that there had been a preceding discussion as to the vesting of legal title to the house in Mrs. Grove, and that that was one of the things which was involved in the general situation (p. 178). Obviously, this refers to the discussion at the bank on the preceding day.

Later, on July 11th, Mr. Beers conferred by telephone with the cashier of the Second National Bank (Mr. Terbell), who stated that matters "will remain in the present situation until statement made" (p. 179). This evidently refers to an anticipated financial statement of the Hat Company.

The next occurrence was a conference at the bank on July 23rd, between Mr. Beers, a Mr. Britten, the vice-president and cashier of the bank (Mr. Terbell), the bank's counsel (obviously referring to Mr. Eberhard, notwithstanding the latter's denial) and Mr. Grove (p. 179).

Mr. Beers' register reads: "Discussed financial situation. Bank asks for mortgage on Orange property" (p. 179).

Following this a bond and mortgage was prepared by some one connected with the bank. Mr. Eberhard denies that he prepared it or had any knowledge of it, but both bond and mortgage were filled in on printed blanks bearing Mr. Eberhard's professional card, and were forwarded to Mr. Beers, who transmitted them to Mrs. Grove for examination, with a letter of explanation (p. 179, Ex. E-16, p. 245).

In this letter, Mr. Beers states that the bank

"as a condition to not immediately pressing for payment of their notes amounting to \$45,000, have demanded a mortgage for that amount on the West Orange property. Mr. Grove is the maker of one of these notes and is the endorser of the others; so, as the West Orange property stands in his name, the bank could now reach that property if it were to enforce the notes. It follows from this that for Mr. Grove now to give a mortgage on the property to the bank does not materially change the situation so far as you and he are concerned; that is, you are not giving them a mortgage on anything which they could not already reach by their claim if disposed to do so.

In consideration for the giving of this mortgage *the bank is willing to wait for any reasonable period for payment of the notes; otherwise, they will press for payment at once.*"

Mr. Grove, in requesting his wife to join in the mortgage, informed her that it was to secure the existing indebtedness on which he was then liable (p. 115).

Mr. Beers, having thus arranged for the adjustment with the bank, did not participate in the details of execution.

Mr. Grove delivered the executed bond and mortgage to the bank and the mortgage was immediately recorded by Mr. Eberhard, or through his office, and a formal assignment from the

mortgagee, Mr. Terbell, to the bank was drawn up by Mr. Eberhard and witnessed by him, but never recorded (p. 171).

Notwithstanding these facts, Mr. Eberhard denies any recollection of having participated in the negotiations and denies any knowledge of the mortgage until sometime in 1915.

The bank handled the transaction on its books by giving a cashier's check to Mr. Grove for \$45,000, which was immediately endorsed and credited to his account and a check for the same amount immediately drawn by him to cover the notes then held by the bank.

The bank then surrendered the time notes of the Hat Company, endorsed by Grove, aggregating \$35,000, and the personal demand note of Grove for \$10,000, retaining, however, the demand note of the Hat Company, dated February 3, 1911, for \$10,000. The Hat Company immediately executed a new demand note for \$35,000, and Mr. Grove executed a new demand note for \$10,000, both of which were endorsed by Mr. Grove and delivered to the bank.

The bank immediately opened a so-called mortgage account, which was debited with the same amount, \$45,000, but did not make any entry of any of the notes on any of its books.

The net result of the transaction was that the bank held promissory notes of precisely the same amount and with precisely the same parties obligated as theretofore, and, in addition, held the bond and mortgage in question.

Mr. Terbell on the stand denied that he knew Mr. Beers in the transaction as the representative of Mrs. Grove or that Mrs. Grove's name was in any way mentioned in the negotiations. This evidence, however, was thoroughly discredited by Mr. Terbell's answer to an interrogatory proposed a considerable time before the trial, in which he says that "William K. Grove and his attorney, and the attorney of his wife, Mary B. Grove, as represented to Allen N. Terbell, being Messrs. Lord, Day & Lord, together with their family attorney and others were present" at the time of the arrangements for the mortgage security, and that the proposal was that "William K. Grove was to execute a bond and mortgage which was to be held as collateral security for all his endorsements to the amount of \$45,000" (p. 99).

When confronted with this affidavit he thereupon changed his testimony by admitting that the name of Mrs. Grove was mentioned at this conference and that he knew that Lord, Day & Lord were there representing her (p. 99).

He also admits that Mr. Eberhard then represented the bank in the transaction (p. 100).

On January 8, 1914, the bank had Mr. Grove procure a time note from the Hat Company for \$35,000 in replacement of the demand note for that amount and then discounted the time note, together with the personal demand note of Mr. Grove, and used the proceeds to close the mortgage account.

From the time of this transaction the bond and mortgage completely disappeared from the books of the bank and in its place the two notes above mentioned were carried as ordinary unsecured commercial paper. The bond and mortgage did not even appear in the bank's record of collateral, although it was retained physically in the bank's vaults.

Mr. Terbell, in substance, says that the purpose of the transaction was to deceive the bank examiners who objected to real estate security (p. 85).

At this time, the bank admits, by its answer, that the Hat Company was amply solvent and able to pay all its debts, including the notes of the bank (p. 207).

The time note of the Hat Company, given January 8, 1914, was renewed from time to time, until 1915, without the knowledge or consent of Mrs. Grove.

In 1915, the Hat Company became insolvent and a receiver was appointed by the Court of Chancery.

A controversy then arose between Mr. Grove and the bank, on one side, and Burnett & Company, who were very large creditors of the Hat Company, on the other. Burnett & Company caused the Hat Company to be put in bankruptcy, and the bank proved a claim, sworn to by Mr. Terbell, for \$45,000, based upon the original demand note of February 3, 1911, for \$10,000, and the renewal of the note for \$35,000.

Mr. Terbell proved this claim as *wholly unsecured*.

Burnett & Co. likewise proved an unsecured claim for over \$80,000.

Burnett objected to the claim of the bank on the ground that the bank held the mortgage in question as security. The bank objected to the Burnett claim on the ground that Burnett held security, and, also, had received preferential payments.

Thereupon, Burnett & Company, the bank and the Hat Company entered into a secret agreement, whereby it was agreed that the objections to the claims of Burnett & Co. and the bank should be mutually withdrawn; that a composition should

be offered to creditors at the rate of fifteen cents on the dollar; that the bank and Burnett should waive payment of their percentage of the composition, and would each advance, in equal sums, the money necessary to put through the composition; that the bankrupt upon being restored to its assets would immediately transfer them to Mr. Eberhard, representing the bank, and Mr. Fitzmaurice, representing Burnett & Co., who should liquidate them and divide the proceeds equally between Burnett & Co. and the bank. (This agreement is not printed in the case and a copy is therefor annexed hereto.)

This agreement was actually put into effect and after liquidation of the assets, the old notes of the Hat Company were surrendered by the bank, and Mr. Grove immediately gave a new note for \$30,000 and endorsed a note of one C. H. Wharton for \$2,540.68.

All of this was done without the knowledge or consent of Mrs. Grove (p. 116).

POINT I.

Mrs. Grove was in fact the equitable owner of the mortgaged premises.

Under this head there is little to be added to the conclusions of the Court.

The case is well within the principles laid down in *Young v. Young*, 45 N. J. Eq., p. 27, where a father informed his son that he had purchased a farm for him and that if the son would live on the farm and cultivate it, that the father would give him the farm when he was done with it. The son complied, but the father afterward conveyed to another.

Held that the heir of the deceased son had the right to compel specific performance of the agreement to convey.

In *Atlantic City R. R. v. Johanson*, 72 N. J. Eq., 332, the owner of the fee in a highway made an oral offer to a railroad company, permitting the laying of its tracks in the highway. The railroad company acted thereon, changed its route and laid its tracks. A subsequent grantee for value recovered a judgment in ejectment against the railroad company.

The Court of Chancery enjoined the enforcement of this judgment upon the ground that the parol agreement had been acted upon and the railroad company had made expenditures in reli-

ance thereon, and that the subsequent purchaser was effected with notice, due to the actual occupation of the highway by the railroad.

The general rule is stated in *Cyc.*, citing many cases, as follows:

“According to the better doctrine, a parol gift of land, accompanied by the possession by the donee, will be enforced in equity as a valid gift, where the donee has been induced by the promise of the gift to make valuable improvements on the land of a permanent nature, and to such an extent as to render a revocation of the gift unjust, inequitable and a fraud upon the donee.” 20 *Cyc.*, p. 1201.

“A parol gift of land from a parent to a child, properly executed by possession and improvements, is valid.” Vol. 29 *Cyc.*, p. 1658, citing cases.

In *Neale v. Neale*, 9 Wallace, p. 1; 19 L. E., 590, held:

“And equity protects a parol gift of land, equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property.”

Followed in *Townsend v. Vanderwerker*, 160 U. S., 171; 40 L. E., 383, 387.

In *Freeman v. Freeman*, 43 N. Y., 36, it is said:

“The question then is whether a parol promise by one owning lands to give the same to another will be enforced in equity when the promisee has been induced by the promise to go into possession, and, with the knowledge of the promiser, make comparatively large expenditures in permanent improvements upon the land. * * * Expenditures made upon permanent improvements upon land with the knowledge of the owner, induced by his promise made to the party making the expenditure, to give the land to such party, constitute in equity a consideration for the promise (citing cases). The statute of frauds has no bearing upon the case.”

Lobdell v. Lobdell, 36 N. Y., 327.

Seymour v. Delancey, 3 Cow., 445.

Shephard v. Bivin, 9 Gill., 32.

POINT II.

The finding of fact that the bond and mortgage were given as collateral security for the antecedent debt of the Hat Manufacturing Co. is sustained by the evidence.

Appellant lays the stress of his argument upon the contention that the bond was the primary obligation evidencing a contemporaneous loan of \$45,000, secured by the mortgage in

question, and that the demand notes for the same amount delivered at the same time were by way of collateral security.

This theory is plainly an afterthought, asserted for the first time on the day of trial, and is not supported by any of the established facts.

The incontrovertible fact is that the transaction was different from that stated in the bond.

The bond recites that William K. Grove is indebted to *Allen N. Terbell* in the sum of \$45,000, payable in three years, with interest at 6%, payable every four months.

No one contends that Mr. Grove was indebted to Mr. Terbell in any amount.

Mr. Terbell and the bank contend that Mr. Terbell took the mortgage in his own name, but as the agent and representative of the bank, and that the mortgage is to be sustained by reason of the relations between Terbell and the bank.

Appellant's elaborate argument that Mrs. Grove is estopped by the mortgage executed by her, to deny the contract as set forth in the mortgage (and bond) is not pertinent, since it must be admitted by all that the contract recited in the mortgage, viz., an indebtedness payable to *Mr. Terbell*, never had any existence.

The real contract between the parties must, in any event, be determined by recourse to extraneous evidence.

Appellant's present theory of a contemporaneous loan of money, secured by bond and mortgage, is not supported by any of the facts.

This national bank at the time was not authorized by its charter to make such a loan, although permitted to take real estate security in order to protect an antecedent indebtedness.

Mrs. Grove was induced to execute the mortgage upon the representation of Mr. Grove that it was to secure an antecedent indebtedness (p. 115).

The letter from her attorney Mr. Beers, to her, advising the execution of the mortgage, states that the bank:

"as a condition to not immediately pressing for payment of their notes amounting to \$45,000, have demanded a mortgage for that amount on the West Orange property.
* * * In consideration for the giving of this mortgage the bank is willing to wait for any reasonable period for payment of the notes; otherwise, they will press for payment at once." (Ex. E. 16, p. 245.)

In answer to an interrogatory, Mr. Terbell swore that the bond and mortgage was to be held "as collateral security for all his endorsements to the amount of \$45,000" (p. 99).

The original answer of the bank states, that at the time of the mortgage, Mr. Grove was indebted to the bank in the sum of \$45,000 as an endorser on notes of the Hat Manufacturing Co., and that the bond and mortgage in question was executed "*in order to secure the said endorsements*" (pp. 18, 19), and that in reliance upon said bond and mortgage the bank "did not press payment of said notes or any of them" (p. 20, line 30).

Furthermore, the contention that the notes were taken as collateral to the bond, is negated by the observation that one of the notes is a demand note made by Mr. Grove, without any endorser.

Appellant must, necessarily, contend that Mr. Grove gave his unsecured, unendorsed demand note as collateral to his bond, under seal, payable in three years.

Again, the bank never charged or credited interest on the bond or to the so-called mortgage account, notwithstanding that interest was payable, according to the terms of the bond, every four months.

The bank did, however, charge and receive interest upon the notes, according to their tenor (p. 76).

We submit that the finding of the Court that the principal debt at all times was a debt of the Straw Hat Company for \$45,000, as set forth in the original answer of the bank prepared by Mr. Eberhard, who had contemporaneous knowledge of the transaction, and that this principal debt was evidenced by the \$10,000 demand note of the Hat Company dated February 3, 1911, and (after renewals) by the \$35,000 note, dated March 11th, 1915, as proved by the bank in the bankruptcy proceedings; and that the bond and mortgage were given to secure this principal indebtedness of the Hat Company and the endorsement thereof by Mr. Grove, is supported by the evidence.

The testimony of Mr. Terbell to the contrary is not only inherently improbable, in view of the documentary proofs, but Mr. Terbell is discredited as a witness by the testimony given by him in direct conflict with his oath supporting an answer to an interrogatory, tendered at a time before the appellant's theory of defense was changed.

POINT III.

The act of the bank in closing the mortgage account as though paid January 8, 1914, and thereafter carrying the notes upon its books as live obligations, signifies either (a) that the mortgage was then paid; or (b) that the anomalous bookkeeping situation was changed to meet the facts, namely, that the notes were the principal obligation.

(a) In support of the first hypothesis, it will be recalled that prior to June, 1913, the Hat Company was prosperous and enjoyed a large banking credit, both with New York banks and the Hoboken bank.

Its paper was freely discounted without security.

The trouble in June, 1913, was precipitated by calling the New York loans.

The affairs of the Hat Company were thoroughly investigated at that time. The bank then knew that Mr. Grove was without financial responsibility, and that after Mrs. Grove had raised the money for the New York banks the only thing remaining was the Orange property.

In view of the investigation made by the bank of the whole situation at that time, the original answer filed by the bank in this suit, setting up that the Straw Hat Company was then solvent and able to pay its debts, is to be taken as more than a technical admission.

The plan of all concerned was, obviously, to tide this solvent company over a period of embarrassment resulting from the sudden withdrawal of its banking credit.

The company did, in fact, weather the storm, and we think this explains the fact that the bank on January 8, 1914, preferred to cancel the mortgage, so far as its books were concerned, and reinstate the notes upon its books as ordinary unsecured commercial paper. The bank examiners undoubtedly criticized this item as a second mortgage real estate loan at the time of closing the books for the year, and the bank undoubtedly, and with deliberation, procured the new time note from the Hat Company in order to liquidate the mortgage debt on its books and carry the same as an ordinary commercial discount, as prior to June, 1913.

This cannot be viewed as the mistaken act of a bookkeeper, since the transaction was unusual and the entries were made under the personal direction of Mr. Terbell (p.).

The explanation now offered that the time note was requested in order to avoid releasing Mr. Grove as endorser on the demand note is, obviously, fallacious.

The bank knew that Mr. Grove was financially irresponsible, and, in any event, the bank held his personal bond for the entire amount.

If, after cancelling the mortgage loan on its books, the bank had intended to carry it as security in any form, there is no reason apparent why some record should not have been made of it upon the book where the bank listed its collateral.

Mr. Terbell's testimony that it was not the practice to list real estate mortgage collateral in this book is negated by the fact that the book shows instances of the entry of such collateral (p. 68).

Furthermore, it is to be observed that the bank, although obviously endeavoring to reduce the indebtedness, after participating in the winding up of Mr. Grove's business, refrained from making any claim upon the mortgage until after Mr. Grove absconded, and no one was left who could controvert the assertions of the bank officials.

It seems strange indeed that the bank did not call the mortgage and send notice thereof to Mrs. Grove, while her husband was still living with her, if such a demand was tenable.

The situation has many of the aspects dealt with by this Court in the case of *Hudspeth v. Denton*, 82 N. J. Eq., 281; aff'd 82 N. J. Eq., 363.

POINT IV.

Mrs. Grove's mortgage is to be treated as a surety for the payment of the principal indebtedness as it existed at the time of the giving of the mortgage, namely, the principal indebtedness of the Hat Company upon which Mr. Grove was liable as endorser.

If the mortgage was paid by the discount of the notes on January 8, 1914, discussion under this head is unnecessary.

If not so paid the liability of the mortgage, on any tenable theory of fact, cannot be other than that of a surety.

In *McFillan v. Hoffman*, 35 N. J. Eq., 364, certain lands were vested in a husband and adjoining lands were vested in his wife. Both joined in a mortgage covering the entire tract, securing a

joint bond. The proceeds were partly used for the benefit of each property. The mortgagee released part of the husband's lands without payment, and thereafter assigned the mortgage for value.

Held that the value of the husband's land released was to be deemed a payment on his part of the mortgage debt, and that except for the amount of the mortgage money which went into the wife's land, her equity was superior to that of her husband's execution creditor, the Court saying, p. 366:

"And it is settled law that where a wife pledges her separate estate for her husband's debt she is entitled to the ordinary rights and privileges of a surety."

This was affirmed on rehearing, 42 N. J. Eq., 144, the Court saying, at p. 145:

"As before stated, the release was given without consideration and without her knowledge or consent. The company knew that she held the relation of a surety for her husband in the matter. A wife who joins with her husband in a mortgage of her own property, to secure his debt or the payment of money loaned to him, is the surety merely of her husband, and is entitled to all the rights and privileges of a surety." (Citing cases.) "To the extent of the value of the property released, the debt must, in this case, as between the creditor and the surety, be held to be paid."

In *Bank of Albion v. Burns*, 46 N. Y. 170, a husband was indebted to the bank and delivered to the bank his own bond secured by mortgage executed by himself and wife, covering lands vested in the wife. At the same time he delivered another bond and mortgage covering his own property, both mortgages being collateral security for his indebtedness to the bank.

Thereafter the bank surrendered to the husband, without payment, the mortgage covering his own property, but retained the mortgage covering the wife's property, and from time to time renewed the original loans without the knowledge of the wife.

The bank dealt solely with the husband and believed the mortgaged property belonged to him, although the wife's title appeared of record.

The Court says:

"The fact that the president of the bank * * * had no actual knowledge of the ownership by Mrs. Burns of the mortgaged premises, and the resulting relationship

of principal and surety between Burns, the debtor to the bank, and his wife * * * is not material. * * * One who takes a conveyance of real property from the rightful owner must be regarded as taking in subordination to the true title and with full knowledge of it, so far as it appears upon record. * * * The property of the wife having been mortgaged to secure the debt of her husband, she occupied the position of a surety, with all the rights, legal and equitable, incident to that relation. * * * An extension of the time of payment, without the assent of the surety, is such a dealing as operates to discharge the surety, the law presuming injury to the surety from such extension."

In the present case, although the title to the land stood in the name of Mr. Grove, the Vice-Chancellor found as a fact that the bank officials had knowledge, or were put upon notice, that Mrs. Grove had an equity therein.

Admittedly, the bank officials knew that the Hat Company could not meet its obligations and that Mrs. Grove had pledged her private fortune to raise money to pay the New York banks.

They knew that Mr. Grove was without resources. Mr. Terbell admits that the Orange property was all that was left in sight (p. 54).

The chief negotiator in the events which lead up to the mortgage was Mr. Beers, who participated in the capacity of personal attorney for Mrs. Grove, to the knowledge of Mr. Terbell, though he at first denied it. The equitable interest of Mrs. Grove was known to Mr. Beers, and Mr. Beers was conducting the negotiations with a view to having the bank consent to vesting the legal title in Mrs. Grove, *i. e.*, confirming her equitable title by a legal title.

In *Bank of Albion v. Burns*, 46 N. Y., 170, *supra*, it was further contended that the wife's mortgage, purporting to secure the husband's bond, should, nevertheless, be held as security for all debts, present or future, held by the bank against the husband. The Court said that in any event

"* * * such effect cannot be given to the security, without some competent evidence that such was the intent of the mortgagor. * * * The claim of the plaintiff to hold the mortgage as a continuing guaranty rests upon a supposed agency of the husband to act for and bind the wife, the only evidence of such agency, or its extent, being the possession of the mortgage by the husband. The agency to be inferred from the possession of the mortgage must have respect to and be limited by the terms of that instrument. It cannot be extended by im-

plication. The most that can be inferred is that the husband had authority to bind the property of the wife by the delivery of the mortgage to the plaintiff for the sum named, payable at the times and in the manner specified in the bond to which it was collateral; that is, to deliver the mortgage as a valid instrument, to take effect according to its terms. * * * It was not an unlimited power of attorney, a pledge of her property for an unlimited amount, or for the payment of a debt at any time in the future. * * *

No injustice will therefore be done the plaintiff by regarding this mortgage as a security for the then existing debt to the amount of \$2,000; for if not a security in that form and to that extent, it never became a valid instrument for any purpose. * * * the referee has found an extension of the time of payment by repeated renewals of the obligations. This operated as a release of the surety and discharge of the mortgage."

The following cases also hold that a mortgage given by a wife is discharged by an extension of time for payment of the principal debt without her consent:

Post v. Losey, 111 Ind., p. 74; 12 N. E., 121;

White v. Smith, 174 Mo., 186; 73 S. W., 610;

Gahn v. Niemewicz, 11 Wend., 312;

Fleming v. Borden, 127 N. C., 214; 37 S. E., 219; 53 L. R. A., 316.

In *Peoples Ins. Co. v. McDonald* (Ohio, 1882) (D. C.), 7 Weekly Law Bulletin, 53, a mortgage was given on a married woman's property to secure her husband's note, which note was given to raise money to pay the debt of a corporation in which the husband was interested. The note and mortgage were used for several years as collateral to the corporate note. The latter note was renewed without the consent of the wife and was finally marked paid and a different note with other parties was executed in place of it, the creditor continuing to hold the mortgage as collateral to the substituted note. Held that the wife's mortgage was released by the substitution.

POINT V.

The surety has been discharged:

(a) By extending the time for payment by the acceptance of renewal notes for the \$35,000 indebtedness;

(b) By the actual surrender of the \$35,000 note and the \$10,000 note (dated February 3, 1911) of the Hat Company;

(c) By participating with Burnett Brothers in the fraudulent composition in bankruptcy.

(a) It is incontrovertible that the \$35,000 demand note of the Hat Company delivered contemporaneously with the mortgage, was called January 8, 1914, and a time note then submitted therefor. This time note was, in turn, paid upon maturity by the discount of another time note in the same amount, and the process repeated at intervals of a few months until the insolvency of the Hat Company in 1915.

Thus, there has been a clear extension of the time for the payment of that part of the principal indebtedness.

(b) The Vice-Chancellor found as a fact that the original demand note of the Hat Company for \$10,000, dated February 3, 1911, was at all times held by the bank, although not carried on its books, and proved by the bank in the bankruptcy proceedings as the owner thereof.

This note, together with the Hat Company's note for \$35,000, were actually *surrendered* by the bank as part of the arrangement for winding up the affairs of the Hat Company (p. 73).

In any view of the facts, Mrs. Grove was entitled to be subrogated to these notes of the Hat Company, upon payment of her mortgage.

The destruction of this right of subrogation by surrender and cancellation of the claim against the Hat Company, releases the surety.

(c) The acts of the bank in the bankruptcy proceedings certainly operate to discharge any claim which the bank might otherwise have against Mrs. Grove, or her property.

Certainly Mrs. Grove was entitled at the time of the bankruptcy, to have the bankruptcy proceedings conducted according to law and to have the bank refrain from acts which would impair the claim against the Hat Company to which she was entitled to be subrogated.

Burnett Brothers and the bank were the principal creditors of the Hat Company and, together, held far more than a ma-

jority of the claims in amount (p. 233). The bank asserted facts against Burnett Brothers, which, if true, would have resulted in disallowing their claim as filed, and also in recovering preferential payments from them, thereby increasing the estate.

Mrs. Grove, as subrogee, was entitled to have these contentions tried out, or at any rate not abandoned without her consent. Nevertheless, the bank entered into a secret agreement with Burnett, for their mutual advantage, whereby they combined for the purpose of bringing about a composition and consequent discharge of the bankrupt, upon condition that the assets be divided between them equally. This method of liquidation was carried out with the result that assets of the value of \$248,891.66 (Ex. E-14) were liquidated for about \$20,000. There is no evidence to show what produced this enormous shrinkage, nor is there any evidence that the assets produced all that they were reasonably worth.

The trustees created under the secret agreement have never fully accounted to their principals, viz: Burnett Brothers and the bank, and it cannot now be known what would have been the result of a liquidation in bankruptcy, according to law.

This secret agreement for composition, providing for unequal benefits to favored creditors, was itself a fraud on the Bankruptcy Act.

Zavello v. Reeves, 227 U. S., 625.

Crossley v. Moore, 40 N. J. Law, 27.

Feldman v. Gamble, 26 N. J. Eq., 494.

Jacobs v. Siff, 27 A. B. R., 189.

Forsyth on Compositions, 105.

Even had there been no secret agreement to bring about the bankruptcy composition, the act of the bank in joining in a consent to a composition, operated to bring about the discharge of the bankrupt principal, in derogation of the rights of the surety.

A composition cannot take place in bankruptcy without the assent in writing of a majority in number and amount of the unsecured creditors. Bankruptcy Act, par. 12b.

A composition was impossible except for this agreement between Burnett and the bank, under which they agreed to withdraw objections to each other's claim and join in a consent to the composition.

In 3 *Remington on Bankruptcy*, supp. 1910, sec. 2350, p. 708, it is said:

"However, it is altogether likely that if the creditor is one of those whose consent went to make up the requisite majority entitling the bankrupt to file his petition for confirmation, the surety will be released, for in that instance his own voluntary consent has contributed to the discharge."

Citing in re *Benedict*, 18 A. B. R., 604.

POINT VI.

The bank is estopped from asserting its mortgage, as against the Globe Tire Company, because of the representations made by the agent of the bank to the Tire Company in inducing the extension of credit to Mr. Grove by the Tire Company.

The decree of the Court of Chancery avoiding the mortgage as a lien on the equitable title of Mrs. Grove, still leaves mortgage enforceable against whatever interest Mr. Grove has or may have by way of curtesy.

It is therefore of practical importance in any event to determine whether the bank can enforce its mortgage as against the Tire Company. The Vice-Chancellor found as facts in substance that Mr. Terbell, acting on behalf of the bank and in furtherance of its interest in strengthening the loan to Mr. Grove, induced the Tire Company to extend credit to Mr. Grove by representing that he was financially responsible and was the owner of the West Orange property (implying thereby that said premises were free and clear), concealing the existence of the debt due to the bank and the mortgages against the property and the insolvency of Mr. Grove; and that the bank by reason of such representations is estopped from now asserting its mortgage as against the Tire Company. The evidence amply supports these conclusions of fact.

At the time the bank took the mortgage in June, 1913, there can be no doubt it discovered that Mr. Grove, its endorser, was financially irresponsible.

After the bankruptcy of the Straw Hat Company, in 1915, Mr. Grove was left without an occupation. The bank's attorney, Mr. Eberhard, according to his testimony, made unsuccessful efforts to have Mr. Grove reduce his loan (pp. 161, 162, 163). Mr. Eberhard says that when Mr. Grove told him, as a proof of his

solvency, that he owned stocks and bonds worth \$25,000 or \$30,000, Mr. Eberhard urged him to use \$10,000 of this amount to reduce his loan to the bank, but that Grove was unable to do so because he said he could make no disposition of these bonds without his wife's consent (p. 151).

The necessary inference from the testimony of Mr. Eberhard on this head is that in the interval following the bankruptcy of the Straw Hat Company he, as the bank's attorney, was endeavoring to collect or reduce Grove's debt to the bank, and ascertained that Grove had nothing out of which to pay, except bonds belonging to his wife which he could not touch without her consent. For some curious reason no attempt was made to call or foreclose the mortgage.

The Tire Company, in February, 1916, and for a number of years prior thereto, was a customer of the bank, maintaining deposits and discounts with it (p. 123). Harry B. James was the treasurer of the Tire Company and in active contact with Mr. Terbell, representing the bank, in the transaction of their business (p. 124). A number of other corporations controlled by Mr. James were also customers of the bank (pp. 123, 124).

Shortly prior to February 3, 1916, Mr. James visited the bank for the transaction of banking business with Mr. Terbell (p. 124). In the course of that conversation Mr. Terbell asked if there was a vacancy in the Tire Company and Mr. James replied that the man then in charge of the Newark territory was not satisfactory and he would like to get a good man, "provided he answered two qualities, that is, whether he was financially able to back the proposition and, second, if he is able to get the orders." Mr. Terbell thereupon recommended Mr. Grove and "assured me that Mr. Grove owned a beautiful piece of property in Orange, New Jersey, and had a host of friends and undoubtedly could get the business" (p. 126, l. 10).

The following appeared on cross examination:

"Q How did you come to talk about Mr. Grove? A We were discussing the Tire Company in general; I think about that time we had borrowed quite a little from them; I think at that time we had borrowed quite a little money from Mr. Terbell" (p. 130, line 30).

Mr. Terbell said "Only that he had a young man who wanted to get some good company and wanted to know if we could use him in the Tire Company" (p. 131). *

* * * "Q What did he say about Grove personally, what sort of a man was he? A He said he owned a beautiful home in Orange, New Jersey, was financially able to take care of it, and could get the business."

The following day Mr. Grove appeared at Mr. James' office with a card of introduction from Mr. Terbell (p. 126). Mr. James then directed Mr. Grove to see Mr. Hall, the president of the company, and in the meantime telephoned Mr. Hall and informed him of the information and recommendation from Mr. Terbell and recommended that a contract be made with Grove as distributor in the Newark district.

The representations made by Mr. Terbell decided the contract made by the Tire Company, and this contract would not have been made without such representations (p. 135, l. 35). Within a very few days after making the contract Mr. James telephoned to Mr. Terbell and informed him that the contract had been made (p. 129). This contract provides for the sale of tires to Grove upon credit, and the judgment of the Tire Company involved in this suit is for a debt arising out of that contract (p. 136).

The officers of the Tire Company were not informed of the indebtedness due to the bank or of the fact that the bank held the mortgage in suit, or that anybody held a mortgage on the Grove property, and the officers of the Tire Company had no knowledge, information, belief or suspicion of such facts until after Mr. Grove's indebtedness to the Tire Company had been contracted (pp. 192, 193). Mr. Terbell admits that he had a conversation with Mr. James respecting the employment of Mr. Grove. He said:

"Personally I like Mr. Grove, he is a nice chap, a good fellow, and I felt sorry for him; *he was in business trouble*; I liked to get something for him to do; I knew Mr. James was not satisfied with the Newark agent, Mr. Sanford was trying to get his nephew in there; * * * I said to James 'I have got a good man for you, he is a good business man, he is able to get the Public Service Tire business for you; I think he has good friends to back him up'; I made no recommendation about his financial responsibility; in fact, I don't do those sort of things *as a rule*."

Mr. James further testified that as he was leaving the bank on the above occasion he met Mr. Eberhard, whom he had previously come in contact with in connection with his dealing with the bank (p. 124, l. 15), and Mr. Eberhard asked him what the chances were for giving Mr. Grove a place, and "I asked him what I thought of him financially. He said, 'James, he has got \$150,000 worth of gilt-edged bonds across the street,'

also mentioned about the beautiful home that he owned." Mr. Eberhard said nothing about Grove's debt to the bank or the mortgage held by the bank (p. 127, l. 30).

Mr. Eberhard also admits having a conversation with Mr. James in which he recommended Mr. Grove. Mr. Eberhard testifies:

"Mr. James said he was about to take William K. Grove in as an agent at Newark, New Jersey, and he wanted to know of me what kind of a man he was, and I went all over Mr. Grove as to the kind of man he was; I said he was a *first-class man*, he was a good agent, * * * and that he would make a first-class salesman, but he was a careless business man in keeping his accounts, had little regard for money; he then asked me if he was good for either, I don't know whether it was ten or twenty thousand dollars, if I thought he was good, and I said: 'From what I have seen of Grove, notwithstanding he has had trouble, I think that Grove will make ten or twenty thousand dollars good at any time. * * * I am pretty positive the contract, he said then the contract, the amount of goods that he would buy would possibly amount to \$20,000 at one time (p. 150).

Q Did you during the course of that conversation, or any other conversation, ever tell Mr. James that Grove had \$150,000 worth of bonds across the street, gilt edged, \$150,000 of any kind of bonds? A I may have said something about Grove representing that he had an interest in some bonds and stock of his wife, \$150,000 (p. 151).
* * *

Q Did you mention the West Orange property? A *Not that I remember*" (p. 151, line 10).

Mr. Eberhard says that Mr. James told him that the credit might run to \$20,000 and "the conversation concerned Grove generally as to his ability, and together with whether he would pay or not," and whether he was a safe man to take on in a business which might involve \$20,000 credit (p. 154).

While the testimony shows that the contract was based on the representations of Mr. Terbell, the admitted subsequent conversation with Mr. Eberhard on the same day is strongly corroborative of the fact that Mr. James was considering a business relation which would involve an extension of credit of \$20,000, and shows that the bank people who were actively in charge of the endeavors to collect the Grove account, actively recommended Mr. Grove to the Tire Company for credit and concealed the fact of the large indebtedness to the bank and their unsuccessful efforts to reduce or collect it.

Mr. Eberhard's admitted statement respecting the \$150,000 of bonds claimed by Mr. Grove as a basis of credit, is amazing in view of his admission that he had been unable to get Mr. Grove to use the alleged bonds in reduction of his debt to the bank because of the interest which Grove said his wife had therein.

The evidence establishes the fact that the bank was concerned for its debt; that it had collected everything possible from the Straw Hat Company; that Grove had placed all of his business affairs in the hands of the bank's attorney (doubtless as the result of pressure from the bank); that the bank's attorney had made unsuccessful efforts to collect the debt and that Grove was without resources; that for some reason the bank was unwilling or unable to assert its mortgage; that the Tire Company was at the time a large borrower at the bank and under obligations to the bank; that Mr. Terbell was the vice-president, cashier and practical manager (pp. 46, 47) of the bank and one of its directors, and the man with whom Mr. James transacted all of his business with the bank, and the man who acted for the bank throughout the Grove transaction, including the taking of the mortgage in his own name and the execution of the power of attorney in the name of the bank to represent it in the bankruptcy proceedings (Ex. E-1, p. 217).

We think it clear that the action of Mr. Terbell was not in any sense personal, but was induced altogether by his desire to further the recovery of the bank's debt against Grove by placing him in a business where he would have an opportunity to re-establish himself.

Furthermore it is clear that the recommendation was made to the Tire Company as a customer of the bank, then under heavy obligations as a borrower, and therefore inclined to heed any suggestion from the bank.

The bank in its brief chiefly relies on *Taylor v. Commercial Bank*, 174 N. Y., 181, and *First National Bank v. Marshall, &c., Bank*, 83 Fed., 725, both of which cases were considered by the Vice-Chancellor and distinguished upon the ground that the cashier in those cases was not engaged in the business of the bank, whereas he found the fact to the contrary in the present case.

There is a further distinction observable in that those cases were actions at law to recover damages for deceit, whereas the

present case invokes the principle of estoppel in equity to assert a lien to the prejudice of a third person who has acted upon the false representation.

The Tire Company is not suing for damages resulting from deceit, but the bank is asking, in this Court, equitable relief against the Tire Company, through the foreclosure of its mortgage, and the Tire Company defends by the assertion of an equity estopping the bank from such equitable relief against it.

That there is a distinction between actions at law and suits in equity based upon false representations is pointed out by V. C. Stevens in *Straus v. Norris*, 77 N. J. Eq., p. 33.

"It has also been decided that where a representation false in fact has been made, there is this difference between actions at law and suits in equity. At law, to maintain an action of deceit, the representation must (*inter alia*) be shown to be not only false in fact but false to the knowledge of the person making it; in other words, fraudulent. (Citing cases.) Equity will relieve if the representation be false in fact, though no conscious fraud be perpetrated."

"A corporation may be estopped equally with an individual." *Bigelow on Estoppel*, p. 618, 6th Ed.

In *Steward v. Wright*, 147 Fed. Rep., p. 321, C. C. A., 8th Cir., the measure of liability of a banking corporation for the fraudulent acts of its officers in facilitating the operations of a band of swindlers and giving them credit standing, is discussed by Judge Hook (p. 327).

"There is no difficulty in the legal aspect of the case, so far as the bank is concerned. A wealth of ancient precedent may be found in the common law declaring an almost complete immunity of corporations from liability for the torts of their officers and agents, and its influence may also be discerned in some of the earlier decisions of this country. The *rationale* of the doctrine was that such intangible and impersonal beings, existing only in contemplation of law, and without intelligence and corporeal form, could be guilty of no wrong that implied an evil intent or malicious motive. But all this has been discarded for more than a half a century, and the rule now prevailing is that in respect of liability for the tortious acts of its controlling officers and agents there is no substantial difference between a corporation and a natural person, even in cases in which fraud or malicious intent in fact must be proved."

The opinion then cites a wealth of authority in support of the proposition.

In *Merchants National Bank v. State National Bank*, 77 U. S., 604; 19 L. E., 1008, the Court dealt with a purchase of gold made by a cashier outside of the banking house, paid for with the check of a customer certified by the cashier outside of the banking house. Dealing with the defense of *ultra vires*, the Court says (p. 1018):

“If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is *estopped* to deny them. * * * Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application. (Citing cases.)

Corporations are liable for the acts of their servants while engaged in the business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances. (Citing cases.)

Estoppel in pais presupposes an error or a fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another. (Citing cases.) Smith was the cashier of the State Bank. As such he approached the Merchants Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and, as the case appears in the record, upon the plainest principles of justice the loss should fall upon the defendant. * * * (p. 1020). The cashier is the executive officer through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts and receives and transfers its commercial securities. * * * The directors may limit this authority as they deem proper, but this would not affect those to whom the limitation was unknown.”

In *Bank v. Graham*, 100 U. S., 699; 25 L. E., p. 750, the bank was held liable for the negligent loss of bonds accepted for safe-keeping for a customer. It was contended that the acceptance of such a responsibility was *ultra vires*. Justice Swayne says:

“Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. * * *

An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel.”

In New Jersey it is established that a corporation may be held in punitive damages for libel and the malice of the agent attributed to the corporation.

McDermott v. Evening Journal Assn., 44 N. J. Law, p. 430;

Hoboken Printing Co. v. Kahn, 59 N. J. Law, 218.

In *West Jersey & Seashore R. R. Co. v. Welsh*, 62 N. J. Law, 655, it is said that the agent has implied authority to do whatever is necessary for the protection of the master's property entrusted to him and that the corporate master is liable for the torts of its agents and that the only question is one of agency.

(In the case *sub judice*, Mr. Terbell unquestionably was the agent of the bank, with full powers for handling the claim against Grove, and the representation in question was made for the purpose of establishing Grove in business and thereby facilitating the collection of the bank's claim against Grove.)

In *Nevada Bank v. Portland National Bank*, 59 Fed. Rep., 338, the defendant bank had a mercantile customer who was very heavily indebted to it. The cashier of defendant bank recommended this customer to plaintiff bank for credit. The recommendation failed to disclose the indebtedness to defendant and also made statements alleged to have been misleading or untrue (p. 340).

"The defendants contend that the defendant bank, which is a national bank, had not the power to assume a liability for its own error or mistake in certifying to the financial standing of a customer seeking credit at another bank. It must be conceded that it had not the power to assume such liability *ex contractu*, but in the case of a tort committed by the bank or its officers a different principle is applied. In such a case it is the rule that the corporation is liable for the negligence or other tort of its agents and servants, *even when performing acts that are ultra vires*. * * * (p. 343). In banking corporations most instruments in writing issued or endorsed by the bank are signed by the cashier. The letters of the bank, in its usual correspondence about business, are often, if not generally, signed by him. In *Morse on Banks and Banking* (section 162) it is said that it is the special duty of the cashier to conduct the correspondence of the bank. * * * The question is not free from doubt, but I am inclined to the view that in a document of this kind, written under the circumstances detailed in the complaint, the signature of the cashier is the signature of the bank. It may be conceded that the bank would have the power to

sign the letters in a different way. It can only append its signature, however, by some officer or agent, and the usual agent or officer to sign a written instrument is the cashier."

In *Cragie v. Hadley*, 99 N. Y., p. 131, action was brought to recover deposits with an insolvent bank, on the theory that insolvency was known to certain of its officers.

Judge Andrews says:

"A corporation may be in a legal sense guilty of a fraud. As a merely legal entity it can have no will and cannot act at all, but in its relations to the public it is represented by its officers and agents, and their fraud in the course of the corporate dealings is in law the fraud of the corporation. * * * But the general rule is well established that notice to an agent of a bank, or other corporation intrusted with the management of its business, or of a particular branch of its business, is notice to the corporation, in transactions conducted by such agent, acting for the corporation, within the scope of his authority, whether the knowledge of such agent was acquired in the course of the particular dealing or in some prior occasion."

In *Zabriskie v. Cleveland &c. Co.*, 64 U. S., 381; 16 L. E., 488, the Court says (p. 498, L. E.):

"A corporation quite as much as an individual is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements and then defeat the calculations and claims their own conduct had superinduced."

Barwick v. English Joint Stock Bank, L. R. (2 Ex.), 259, is strongly in point. The manager of defendant bank, in order to induce plaintiff to sell oats to the bank's customer on credit, so as to enable the customer to carry out a government contract, guaranteed to plaintiff that the customer's check on the bank in plaintiff's favor should be paid on receipt of the government money, in priority to any other payment "except to this bank." The customer was then indebted to the bank in a large sum of money but the manager did not disclose the fact of this indebtedness and plaintiff made no inquiry. Plaintiff sued the bank for false representation. Held that the bank was liable for the fraud of the agent. This was concurred in by all of the judges of the Court of Exchequer as within settled principle and adjudged cases, and was later cited with approval in *Mackay v. Commercial Bank of New Brunswick*, L. R. (5 P. C.) 394.

Both of these cases hold that an action of deceit may be maintained against a corporation in respect of the fraud of its agent.

This case (*Barwick v. Bank*) is cited with approval in *Keen v. James*, 39 N. J. Eq., 527, at pages 541 and 543, E. & A., Dixon, J.; also in *Brokaw v. N. J. R. R. & Transportation Co.*, 32 N. J. Law, 328, at page 330, Depue, J.

(In the latter case Justice Depue declares the general principle that a corporation is liable for deceit and fraudulent representations.)

In *Fishkill Savings Institution v. National Bank*, 80 N. Y., p. 162, the same individual was treasurer of a savings bank and cashier of a national bank. He misappropriated bonds of the savings bank for the benefit of the national bank. Held that the savings bank was entitled to recover the full value of the securities from the national bank, and was not limited to the amount of benefit realized by the latter.

"They (decisions) establish that a corporation is liable for the consequences of its wrongful acts and omissions and for the acts of its agents while engaged in the business of their agency to the same extent and under the same circumstances as natural persons. They illustrate the familiar principle that (a principal) is responsible *civilliter* for all acts done by him (the agent) in the course of his employment, and bound by his fraud whether he concurred in it or not. For acts wholly foreign to the business in which the agent is engaged the principal is not bound. But that cannot be extrinsic to his employment which is adopted *as a means of accomplishing the object of his agency*. * * * He was the general manager of the bank; he was to see to its finances and look to and maintain its credit. Without these there could be no corporate existence. To secure and perpetrate this was the *end* pointed out; the *means* were left to his discretion. In such a case the principal is bound not only as to the *end* but the *means* also. * * * It is true he had no authority to commit a fraudulent act. None to take the bonds from the plaintiff. But he had authority to transact the business with the banking firm in the course of which he disposed of the bonds for the benefit of the defendant, and in prosecuting its business."

In *Holden v. N. Y. & Erie Bank*, 72 N. Y., 286, the president and manager of a bank was also executor of an estate. He sold stock in the bank which was worthless, to himself as executor and transferred a deposit in the bank, belonging

to the estate to himself individually as payment for the stock. The Court held that this transaction made the bank liable to the estate for its loss, saying:

“The subject matter of his agency was the conduct and direction of the affairs of this bank.”

The authority of a bank cashier to bind the bank is practically that of a general agent.

In *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq., pp. 117-128, Chancellor Pennington says:

“A notice to a cashier is notice to a bank. This must be the rule, otherwise it will be impossible to get on in the ordinary course of business. There is no officer so directly intrusted with its concerns, especially the details of business, as the cashier. He is the authorized agent of the company *for all the purposes within the sphere of their business.*”

Affirmed May, 1842.

The above statement is approved by Justice Depue in *Dock v. Elizabethtown, &c., Co.*, 34 N. J. Law, 312-317; also in *Bodine v. Bird* (N. J. Errors and Appeals), 82 Atl. Rep., p. 901, where the manager of a bank altered the date of one of its notes without authority.

Held that the bank was chargeable with the knowledge of the manager of his own unauthorized act and the note was avoided.

The Court there expressly refers to the cashier or manager of a bank as a general agent, saying:

“There is a distinction between the authority of a special and of a general agent, which does not depend upon the number of transactions in which the agent is authorized to represent the principal, but upon the scope of his authority so to do in the given transaction. The true distinction (citing *Manchester B. & L. Assn. v. Allee*, 80 Atl., 466) is ‘between the authority to perform a particular act in a particular way, and the authority to perform all acts connected with a particular employment.’ In the transaction under review the manager was, as thus defined, the *general agent of the bank*; and hence all acts performed by him strictly in connection with the particular employment in which he was put forward to represent the bank, and done in supposed furtherance of its interests, were binding upon it, whether or not they were beneficial to it, or whether through the negligence of the agent or his ignorance of the legal effects of his acts, they were, in fact, injurious. The mistake or negligence of such an agent is in law the mistake or negligence of the principal.
* * * There is no rule of law by which an agent represents his principal only so long as his acts are beneficial

and performed without negligence, but ceases to represent him when the acts he performs as agent are negligently performed or turn out to be the reverse of beneficial to the principal. One who claims the beneficial results of a general agency cannot disavow the untoward results of the negligent acts of his own agent in the identical transaction."

In *Candy v. Globe Rubber Co.*, 37 N. J. Eq., 175, the casual statement of the treasurer of a manufacturing company respecting the company's business was held sufficient to entitle the creditor to rescind a sale on the ground of fraud.

See also *Story on Agency*, 9th Ed., par. 452, declaring the rule that the principal is liable for the frauds, deceits, concealments, &c., of his agent in the course of his employment, even though not authorized or forbidden.

"In every such case the principal holds out his agent as competent and fit to be trusted, and thereby in effect he warrants his fidelity and good conduct in all matters within the scope of the agency."

See also *Benedict v. Guardian Trust Co.*, 58 App. Div., 302; also reported 91 App. Div., 103.

Suppressio veri is as good ground for setting aside a conveyance as *suggestio falsi*.

Torey v. Buck, 1 Green's Ch., 366;

Crane v. Conklin, Saxon, 346;

Snyder v. Bindley, Coxe, 78.

In *Sumner v. Seaton*, 47 N. J. Eq., 103, Vice-Chancellor Pitney says (p. 120):

"The true ground of equitable estoppel I conceive to be that the party in reliance upon the existence of a certain state of facts has so changed his position that he cannot be restored to his former position and will suffer serious loss if the facts prove to be different from what he supposed them to be; and the estoppel arises against the party who is responsible for his action on such mistaken belief, and it operates to prevent him from asserting the contrary."

In *Ruckelschaus v. Oehme*, 48 N. J. Eq., 436, at p. 443, Vice-Chancellor Pitney quotes Beasley, C. J., in *Campbell v. Nichols*, 4 Vr., 81-88:

"For it is to be remembered that the principle of estoppel applies as well to cases of unintentional deceptions as to designed and actual frauds."

In *Cecil National Bank v. Watsontown Bank*, 105 U. S., p. 217; 26 L. E., 1039, defendant was incorporated under a statute which provided that no stockholder might transfer his stock while indebted to the bank. A stockholder, while indebted, assigned his stock certificate to plaintiff bank as collateral security for another loan. The latter bank forwarded the certificate to the *cashier* of defendant, requesting that a new certificate be issued, and asking what the stock was worth. Defendant's cashier replied that he would forward a new certificate after the reorganization then about to occur, and stated that he thought he could find a purchaser for the stock, and requested plaintiff to fix a price. *He did not disclose that the stockholder was indebted to defendant bank and that the latter had a lien on the stock.* Before the certificate was actually transferred the stockholder failed and defendant bank asserted its lien.

Held that the conduct of the defendant "raises an equity against it which is superior to its legal right to insist upon a lien on account of the debt."

When plaintiff applied to defendant for a transfer of the stock:

"If the appellee had intended to insist on its legal rights and assert its lien, that was the proper time to do it; for it then, at least, had notice of the interest and the claim of the appellants. If it had done so promptly the latter might still have had an opportunity to obtain other security, or to enforce by other means their claims against their debtors, who, although in default, do not appear to have been as yet *in extremis*. * * * and, having induced them to alter their condition by reliance upon assurances, which were equivalent to a declaration that it had no adverse claim, the appellee cannot now be permitted to assert a lien, lost by its own laches, and the enforcement of which would operate as a fraud."

In *Carr v. National Bank, &c., of Watertown*, 167 N. Y., 375; 60 N. E., 649, plaintiff entrusted moneys to the president and manager of defendant bank upon his undertaking to invest them in sound and safe securities. The money was deposited in the bank, and thereafter the president used it in purchasing certain bonds then owned by the bank, stating, however, that "he had gotten them expressly for her." He did not disclose that the bonds were purchased from the bank.

"The appellant argues that what Sherman did was his individual act, for which it should not be held responsible; and, further, that, as it could not, being a national bank,

engage in the business of buying and selling securities, its officers could not subject it to any liability by reason of such transactions, * * * whatever the limitations upon its powers, they cannot interfere with the just operation of the rule in equity which forbids a principal from reaping any benefit from the wrongful act of his agent. No such extraordinary immunity was conferred upon national banks. * * * She (plaintiff) asks to be restored to the possession of her property, of which she was unfairly deprived to the defendant's advantage through its agent's misconduct, and upon the plainest principles of equity she was entitled to her judgment."

In *Erie Railroad v. D., L. & W.*, 21 N. J. Equity, 283, complainant claimed the exclusive right to build a railroad from Paterson to Hoboken, and alleged that defendant's act in building a substantially parallel line violated its rights.

Chief Justice Beasley, sitting for the Chancellor, held that complainant was estopped by its silence in permitting the parallel line to be built at great cost without protest.

In *Sumner v. Seaton*, 47 N. J. Eq., 103, Vice-Chancellor Pitney collects many interesting authorities dealing with the application of the doctrine of estoppel arising from silence.

In *Borden v. Hutchinson*, 49 Atlantic Rep., 1088, Gray, V. C., a judgment creditor conducted an auction sale of land as agent for the owner and made public announcement of the amount due upon a mortgage on the property, but said nothing about his judgment.

Held that he was estopped thereafter to assert the judgment against the property, even though the lien could readily have been ascertained from an examination of the records.

In *Bacon v. Harris*, 62 Fed. Rep., 99, Shiras, District Judge, a merchant being indebted to a State bank, gave it a mortgage and bill of sale, which were withheld from the record through an understanding between the debtor and the president and cashier of the bank, so as not to impair the debtor's credit. Complainant gave credit in ignorance of the indebtedness and lien of the bank.

(P. 102.) "According to the general principles that sustain the doctrine of estoppel by conduct, it seems clear that a creditor who unites with his debtor in concealing the fact of the indebtedness to him and of the existence of a mortgage or bill of sale to secure the same, this being done to give the debtor a credit which he could not have if the truth were known, and to enable the debtor to obtain on credit money or property from third parties, may be

estopped from asserting his claim or lien when such estoppel is necessary to protect innocent third parties from being defrauded out of the collection of the debts due them, and which were created in the belief that no lien or indebtedness existed in favor of the party sought to be estopped."

(P. 105.) "The inequity chargeable against the bank is that it aided the debtor in concealing his real condition and in obtaining a false credit, thereby misleading others and inducing them to extend a credit which would not have been given had the truth not been concealed."

The fact that the condition of ownership might be disclosed by an examination of the public records does not prevent an estoppel if the other elements exist.

Sumner v. Seaton, 47 N. J. Eq., 103.

The decree should be affirmed.

McDERMOTT & ENRIGHT,
Of Counsel with Globe Tire Co.

EXHIBIT C. 11.

June 23, 1915.

Grove Straw Hat Mfg. Co.,
Hoboken, N. J.

Gentlemen:

In consideration of the transfer of all the property of your company to Edward R. Fitzmaurice and Frederick N. Eberhard, as trustees, we agree as follows:

1. George B. Burnett & Son will advance all money necessary to pay all of the merchandise creditors of your company the dividend on composition in the bankruptcy proceeding now pending against it; this money shall be paid by George B. Burnett & Son out of their own pocket, and they shall not be reimbursed for such outlay.

2. The moneys necessary to pay all of the expenses incurred in the said bankruptcy proceeding, and the receiver's fee in the Chancery proceeding, and the claims of creditors other than merchandise creditors, shall be advanced in equal shares by George B. Burnett & Son and the Second National Bank of Hoboken.

3. The trustees are to liquidate the assets transferred to them, and use their best endeavors to obtain the highest prices

therefor, and the fund realized from such sale is to be distributed as follows:

4. There shall first be paid to George B. Burnett & Son and the Second National Bank of Hoboken, the respective amounts advanced by each to put through the composition in bankruptcy, except the moneys paid by George B. Burnett & Son for the dividends of the merchandise creditors, which is not to be paid back to them.

5. The trustees shall each receive for their services a commission equal to that paid to trustees in bankruptcy.

6. George B. Burnett & Son and the Second National Bank of Hoboken are to file waivers with the referee in bankruptcy, so as to avoid the necessity of depositing any money for them on the composition.

7. The consent of both trustees shall be necessary for each and every sale of any and all of the assets, and all action taken shall be upon the consent of both trustees.

8. The proceeds of the sale after making the payments above set forth are to be divided equally between George B. Burnett & Son and the Second National Bank of Hoboken, share and share alike; and for the purpose of this distribution the claim of George B. Burnett & Son against the Grove Straw Hat Mfg. Co. shall be considered as of the same amount as that of the Second National Bank of Hoboken.

9. All proceeds of sale and all moneys coming into the hands of the trustees are to be deposited in a joint bank account, subject to be withdrawn by checks requiring the signature of both trustees.

10. The expenses of administration above mentioned are as follows: For the Chancery receiver, \$200 fee and \$25. disbursements; for Foster and Cunningham, attorneys for the petitioning creditors, \$250. and disbursements for filing petition; for Frederick R. Sperling for filing schedules, \$50.; in addition thereto the commissions of Leo Oppenheimer, trustee and Macgrane Coxe, referee, and some slight disbursements for stenographer's minutes and the other charges of the referee, and also the trustee's bond and some incidental disbursements he may have had.

Yours very truly,

SH/M

Southern

Cambridge