

NEW JERSEY
Court of Errors and Appeals.

HENRY J. OVERMANN,
Plaintiff in Error.

vs.

HOBOKEN CITY BANK,
Def't in Error.

*Writ of Error to
Supreme Court.*

STEPHEN B. RANSOM, *Att'y for Pl'ff in Error.*
J. HARVEY LYONS, *Att'y for Def't in Error.*

This is an action of Assumpsit commenced by the plaintiff in error against the defendant in error, in the Supreme Court of this State, by summons returnable July 30, A. D. 1861.

DECLARATION.

The declaration contains Five Counts, viz. :

FIRST COUNT.—For that whereas, certain persons doing business under the firm name of André Brothers, on the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and fifty-nine, at Hoboken

to say at the City of Hudson, in the county of Hudson, and within the jurisdiction of this court, made their certain draft or cheque in writing, commonly called a check on a bank, under and by their said firm name of André Brothers, and directed the same to the defendant, and thereby then and there required the defendant to pay to the plaintiff twenty-seven hundred and thirty dollars, and the defendant then and there accepted the same, and then and there promised to pay the same, according to the tenor and effect thereof and of its acceptance thereof.

SECOND COUNT.—And also for that whereas, the said persons doing business under the said firm name of Andre Brothers heretofore, to wit: On the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and fifty-nine, at the City of New York, in the State of New York, that is to say at the City of Hudson aforesaid, and within the jurisdiction aforesaid, by their said firm name of André Brothers, made their certain other
20 check or order in writing, dated the day and year aforesaid, and directed the same to the said defendant, and thereby required the said defendant to pay to the order of the said plaintiff the sum of twenty-seven hundred and thirty dollars, and then and there delivered the said last-mentioned check or order, to the plaintiff, who afterwards, to wit, on the thirty-first day of October in the year last aforesaid, the thirtieth day of October, in the year last aforesaid, being Sunday, to wit, at the City of New York aforesaid, that is to say, at the City of Hudson aforesaid, according to a cer-
30 tain usage and custom of a certain voluntary association of banks, banking institutions and individuals, called the Clearing House of the City of New York, in the State of New York, of which association the said plaintiff and defendant were then members, and to which custom and usage the said plaintiff and defendant were bound to conform in their transactions with each other, and upon the strength of which custom and usage the said plaintiff received the said last mentioned check or order from the said André Brothers, and paid them a valuable consideration for the same, which usage and custom is as

follows, that is to say: that all drafts, checks and orders drawn upon any one of the said banks, banking institutions or individuals so associated together under the said name of the Clearing House of the City of New York, or doing business or making their exchanges through the said Clearing House, sent for payment through the said Clearing House, to, and received by the said bank, banking institution or individual on whom the same was drawn, should, in case of non-acceptance or non-payment by the said bank, banking institution or individual on whom the same was drawn, 10 be returned by the said bank, banking institution or individual so receiving the same, to the bank, banking institution or individual, sending the same for payment as aforesaid, on the same day on which the same should be so received by the said bank, banking institution or individual on which the same was drawn, or at the farthest on the morning of the day after the said receipt of the same by the said bank, banking institution or individual on whom the same was drawn, before the commencement of business hours of that day, to wit, before the hour of ten in the forenoon of that day; or in de- 20 fault thereof that the said bank, banking institution or individual thus failing to return such draft, check or order as aforesaid, should be deemed and held to have accepted the same, and should be liable to pay the amount thereof to the holder of the same, whether the same bank, banking institution or individual, on which the said draft, check or order had been drawn, had funds of the drawer of the said draft, check or order, sufficient to pay the same or not; sent the said check or order through the said Clearing House to the said defendant, who then and there, to wit, on 30 the said thirty-first day of October, in the year last aforesaid, to wit, at the city of Hudson aforesaid, received the same into its possession; yet the said defendant did not return the said last mentioned check or order to the said plaintiff, either on the said thirty-first day of October in the year last aforesaid, the day the same was received as aforesaid by the said defendant, or on the next day thereafter, at or before the commencement of business hours, to wit: at or before the hour of ten in the forenoon of that day, or at any other time on that day; and hath not paid the said 40

sum of money in the said last mentioned check or order specified, or any part thereof to the said plaintiff although often requested so to do; but on the contrary thereof, the said defendant returned the said last mentioned check or order in its possession for a long space of time, to wit: from the said thirty-first day of October in the year last aforesaid, the day the said defendant retained the same as aforesaid until and upon the second day of November in the year last aforesaid, without giving the said plaintiff any
 10 notice whatever that the said defendant did not intend to pay the said last mentioned check or order. By means whereof, and according to the said usage and custom of the said Clearing House aforesaid, the said defendant then and there accepted the said last mentioned check or order, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the amount of the said last mentioned check or order when it should be thereunto afterwards requested. And being so liable, the said defendant, in consideration
 20 thereof undertook and then and there faithfully promised the said plaintiff to pay him the amount of the said last mentioned check or order, when the said defendant should be thereunto afterwards requested.

THIRD COUNT.—And also, for that whereas the said persons doing business under the said firm name of “André Brothers” heretofore, to wit: on the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and fifty-nine, at the City of New York aforesaid, that
 30 is to say at the city of Hudson aforesaid, and within the jurisdiction aforesaid by their said firm name of André Brothers, made their certain other check or order in writing, dated the day and year last aforesaid, and directed the same to the said defendant and thereby requested the said defendant to pay to the order of the said plaintiff the sum of twenty-seven hundred and thirty dollars, and then and there delivered the said last mentioned check or order to the plaintiff. And the said plaintiff in fact further saith, that at and before the time of the making of the said
 40 last mentioned check or order, there existed and still doth

exist in the City of New York; in the State of New York,
 a certain voluntary association of banks, banking institu-
 tions and individuals, known by the name of the Clearing
 House of the City of New York, established for the pur-
 pose of facilitating exchanges and collections between its
 members and all other banks, banking institutions and indi-
 viduals in the City of New York and elsewhere, for whom
 any of its members might transact business, through the
 agency of the said association, which association of banks,
 banking institutions and individuals had before that time 10
 adopted for the government of all its members and others
 who transacted business through their agency at the said
 Clearing House, certain rules, usages and customs to which
 all banks, banking institutions and individuals belonging
 to the said association, or transacting business through its
 agency were bound to conform. Among which rules,
 usages and customs was the following, to wit: That all
 drafts, checks and orders drawn upon any bank, banking
 institution or individuals doing business, or making ex-
 changes or collections through the said Clearing House, 20
 sent through the said Clearing House to, and received by the
 said bank, banking institution or individual on whom the
 same was drawn, should in case of non-acceptance or non-
 payment, by the said bank, banking institution or indivi-
 dual on whom the same was drawn, be returned by the
 said bank, banking institution or individual so receiving
 the same, to the bank, banking institution or individual,
 sending the same for acceptance or payment as aforesaid,
 on the same day on which the same should be received
 by the said bank, banking institution or individual on 30
 which the same was drawn, or at the furthest early on the
 morning of the day after the said receipt of the same by
 the said bank, banking institution or individual on which
 the same was drawn before the commencement of business
 hours of that day, to wit: before the hour of ten in the
 forenoon of that day, or in default thereof that the said
 bank, banking institution or individual, thus failing to re-
 turn such draft, check or order as aforesaid, should be
 deemed and held to have accepted the same and should be
 liable to pay the amount thereof to the holder of the same, 40

whether the said bank, banking institution or individual, on which said draft, check or order had been drawn, had funds of the drawer of the said draft, check or order, sufficient to pay the same or not. And the said plaintiff in fact further saith that before and at the time of the making of the said last mentioned check or order, and for a long time afterwards, to wit: from thence hitherto the Bank of Commerce, a banking institution duly incorporated under the laws of the State of New York, doing business in the
10 City of New York, in the State of New York, was and still is a member of the said voluntary association of banks, banking institutions and individuals, called the Clearing House of the City of New York, and then was the agent of the plaintiff for the purpose of sending through the said Clearing House all drafts, checks and orders belonging to the said plaintiff, to the banks, banking institutions and individuals upon whom the same might be drawn for acceptance and payment, according to the rules, usages and customs of the said association, by means of which
20 said agency of the said Bank of Commerce, the said plaintiff became and was entitled to the benefit of all the rules, usages and customs of the said Clearing House, and to which rules, usages and customs the said plaintiff was bound to conform. And the plaintiff in fact further saith, that before and at the time of the making of the last mentioned check or order, and for a long time afterwards, to wit: from thence hitherto the "Ocean Bank," a banking institution duly incorporated under the laws of the State of New York, and doing business in the City of New York in
30 the said State of New York, was and still is a member of the said association, called the Clearing House of the City of New York, and then was and has since been the agent of the defendant in the City of New York, to receive for the defendant at the said Clearing House in the City of New York aforesaid, all drafts, checks and orders drawn on the said defendant, and sent to the said Clearing House, and send the same to the defendant for acceptance and payment, according to the rules, usages and customs of the said Clearing House. By means of which said agency of the
40 said Ocean Bank, the said defendant became and was and

still is entitled to the benefit of all the said rules, usages
 and customs of the said Clearing House, and was and still
 is bound to conform to the same. And the said plaintiff in
 fact further saith, that he, relying upon the said usage and
 custom of the said Clearing House hereinbefore set forth,
 and upon the obligation of the said defendant to conform
 thereto, and be bound thereby, and in consideration there-
 of, received the said last mentioned check or order from the
 said André Brothers, and paid them a valuable considera-
 tion for the same, to wit: the said sum of twenty-seven 10
 hundred and thirty dollars, and afterwards, to wit: on the
 said twenty-ninth day of October in the year last aforesaid,
 at the City of New York aforesaid, to wit: at the City of
 Hudson aforesaid, delivered the said last mentioned check
 or order to the said Bank of Commerce, the agent of the
 plaintiff as aforesaid, for the purpose of having the same
 sent to the said defendant through the said Clearing House
 for acceptance and payment according to the rules, usages
 and customs of the said Clearing House; which said last
 mentioned check or order the said Bank of Commerce af- 20
 terwards, to wit: on the thirty-first day of October in the
 year last aforesaid, the thirtieth day of October in the year
 last aforesaid, being Sunday, sent to the said Clearing
 House where the same was on the said thirty-first day of
 October in the year last aforesaid, received by the said
 Ocean Bank, the agent of the defendant as aforesaid, for
 the said defendant, and by the said Ocean Bank delivered
 to the said defendant on the same thirty-first day of Octo-
 ber, in the year last aforesaid, to wit, at the City of Hud-
 son aforesaid, and the said defendant then and there, to wit: 30
 on the said thirty-first day of October, in the year last
 aforesaid, to wit: at the City of Hudson aforesaid, received
 the said last mentioned check or order from its said agent,
 the Ocean Bank and took the same into its possession.
 Yet the said defendant did not return the said last mention-
 ed check or order either to the said Bank of Commerce, the
 agent of the said plaintiff, or to the said plaintiff, either
 on the said thirty-first day of October in the year last afore-
 said, the day the same was received as aforesaid by the
 said defendant or on the next day thereafter, at or before the 40

commencement of business hours, to wit: at or before the hour of ten in the forenoon of that day, or at any other time on that day; but on the contrary thereof the said defendant retained the said last mentioned check or order in its possession for a long space of time after it so received the same as aforesaid, to wit: from the said thirty-first day of October in the year last aforesaid, the day the said defendant received the same as aforesaid, until and upon the second day of November in the year last aforesaid, without giving either the said Bank of Commerce, the agent of the plaintiff, or the said plaintiff any notice whatever that the said defendant would not pay the said last mentioned check or order; by reason whereof and according to the said usage and custom of the said Clearing House hereinbefore set forth, the said defendant then and there accepted the said last mentioned check or order, and then and there became liable to pay the amount of the same to the plaintiff when it should be thereunto afterwards requested. And being so liable, the said defendant, in consideration thereof undertook, and then and there faithfully promised the said plaintiff to pay him the amount of the said last mentioned check or order when it should be thereunto afterwards requested.

FOURTH COUNT.—And also for that whereas heretofore to wit: on the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and fifty-nine, at the City of New York, that is to say at the City of Hudson aforesaid and within the jurisdiction aforesaid, the said defendant, in consideration that the said plaintiff would, at the special instance and request of the said defendant, purchase of the said persons doing business under the said firm name of André Brothers, their certain other check or order made by them in writing, bearing date the day and year last aforesaid, and directed to the said defendant, thereby then and there requiring the said defendant to pay to the said plaintiff the sum of twenty-seven hundred and thirty dollars, and send the said last mentioned check or order to the said defendants through a certain voluntary association of banks, banking institutions and individuals, called the

Clearing House of the City of New York, undertook and then and there faithfully promised the said plaintiff to accept the last mentioned check or order, and pay the plaintiff the amount thereof or return the same to the plaintiff on the same day upon which the said defendant should receive the same, or on the next day following before or at the commencement of banking hours, to wit: before or at the hour of ten in the forenoon of that day. And the said plaintiff avers that he, confiding in the said last mentioned promise and undertaking of the said defendant, did afterwards, to wit: at the City of New York aforesaid, that is to say, at the City of Hudson aforesaid, purchase the said last mentioned check or order of the said André Brothers, and pay therefor the sum of twenty-seven hundred and thirty dollars, and did afterwards, to wit: on the thirty-first day of October in the year last aforesaid, the thirtieth day of October in the year last aforesaid being Sunday, duly send the said last mentioned check or order to the said defendant through the said Clearing House of the City of New York, whereof the said defendant afterwards, to wit: on 20 the day and year last aforesaid at the City of Hudson aforesaid had notice; and although the said last mentioned check or order was then and there, to wit: on the said thirty-first day of October in the year last aforesaid duly received by the said defendant and taken into its possession; yet the said defendant, not regarding its said last mentioned promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not nor hath he yet paid the amount of the said last mentioned check or order or any part thereof to the said plaintiff, 30 although often requested so to do, and did not return the said last mentioned check or order to the said plaintiff on the said thirty-first day of October in the year last aforesaid, the day on which the said last mentioned check or order was received by the defendant as aforesaid, nor on the next day following, before or at the commencement of banking hours, to wit: before or at the hour of ten in the forenoon of that day, or at any other time during that day; but therein wholly failed and made default; and on the contrary thereof retained the said last mentioned check or 40

order in its possession, without giving any notice whatever to the said plaintiff, that it would not accept and pay the same for a long space of time, to wit: from the said thirty-first day of October in the year last aforesaid, the day it received the same, until and upon the second day of November in the year last aforesaid. And the plaintiff avers, that after the said last mentioned check or order was received and taken possession of by the said defendant, and while the said defendant retained the same in its possession, and before the said defendant had given the plaintiff any notice whatever that it would not pay the said checks and after the expiration of the time within which the said defendant undertook and promised the said plaintiff to return to him the said plaintiff the said last mentioned check or order, in case the said defendant should not accept and pay the same as aforesaid, to wit: on the said first day of November in the year last aforesaid, at the hour of three o'clock in the afternoon of that day, the said André Brothers, the makers of the said last mentioned check or order, failed and became insolvent, and wholly unable to pay the said last mentioned check or order to the plaintiff, and from thence hitherto hath remained and continued insolvent and wholly unable to pay the said last mentioned check or order to the plaintiff, and the said plaintiff hath been since the said failure of the said André Brothers wholly unable and still is unable to collect the amount of the said check or any part thereof from the said André Brothers, of all which the said defendant afterwards, to wit: on the day and year last aforesaid, to wit: at the City of Hudson aforesaid had notice. By reason of which said several premises the whole of the said sum of money in the said last mentioned check or order specified, to wit: the sum of twenty-seven hundred and thirty dollars still remains due and unpaid to the plaintiff, to wit: at the City of Hudson aforesaid, and the said defendant by reason of its breach of its said undertaking and promise as aforesaid become and was and still is liable to pay to the said plaintiff the amount of the said last mentioned check or order.

FIFTH COUNT.—The fifth count is for goods sold and delivered; for work and labor and materials; for money lent; for money paid; for money had and received by defendant for use of plaintiff; on account stated, and for interest.

PLEA.—The plea is *non assumpsit*.

This cause was tried at the May term, 1863, of the Hudson Circuit, and a verdict rendered for the defendant, on which final judgment has been entered.

On the trial of this cause before the Circuit Court of the County of Hudson, the following bills of Exception were 10 allowed and sealed.

SUPREME COURT OF NEW JERSEY, }
HUDSON CIRCUIT COURT, }
MAY TERM, 1863. }

HENRY J. OVERMANN,

vs.

HOBOKEN CITY BANK,

In Case.

Bills of Exception.

Be it remembered, that on the twelfth day of May, in the year of our Lord one thousand eight hundred and sixty-three, before Elias B. Dayton Ogden, Esq., one of the Associate Justices of the Supreme Court of Judicature of the State of New Jersey, at a Circuit Court, holden at the city of Hudson, in and for the county of Hudson, came on to be tried, the issue joined in manner aforesaid, according to the form of the statute in such case made and provided, upon the pleadings aforesaid, (*pro ut the same*) at which day, before the said justice came, as well the said Henry

J. Overmann, as the said "Hoboken City Bank," by their respective attorneys aforesaid; and the jurors of the jury aforesaid, whereof mention is within made, being called likewise, came, and were sworn to try the issue in manner aforesaid joined; and thereupon to maintain the said issue on his part, the said *Henry J. Overmann* offered himself as a witness, and was sworn, and testified as follows, viz :

I reside in the city of New York; I am the plaintiff in this suit; I knew a firm of the name of André Brothers; 10 they were tobacco dealers; I have known them eight or ten years; I was never in their establishment; I do not know who the partners were; I knew Charles André personally; he managed the business. (Witness being shown check marked Exhibit A. said): The signature to this check is the signature of the firm of André Brothers, written by Charles André; I own the check; I gave my check for it on the Bank of Commerce; I got it of Mr. Hollander, a bill broker, and friend of Mr. André; I got it on the 29th 20 October, 1859; it was Saturday; I got it in the morning about eleven o'clock; I gave him a check for a large amount; this was paid. (Witness being shown another check, said): This is the check I gave for the check marked A.; the check I gave him was for \$3,175 16-100; he gave me his check of \$445 16-100, which was paid; I deposited the \$2,730 check in the Bank of Commerce the same morning I got it, and soon after I got it.

Question.—Why did you make this exchange?

Objected to by defendants Attorney, and allowed.

Answer.—I did it several times, and he with me, with 30 the same kind of checks, and which had always been paid; I made this change of checks with Mr. Hollander to oblige him; he had done it several times, and these checks had always been paid; I next heard from the check on Wednesday, November 2d, 1859, about eleven o'clock; they sent me word from the Bank of Commerce that they wanted to see me; the cashier of Bank of Commerce, Mr. Vail, told me the check was not good, that it was returned; then I insisted upon it that the Hoboken City Bank, or the Ocean Bank, was bound to pay the check, as it did not come back 40 in time; Mr. Vail said I should pay "Bank of Commerce"

the amount of the check, as they were not in fault; Mr. Vail then sent a note to the Ocean Bank, and I heard that it had been paid, and I went to see Mr. Vail again, and he sent me to the Ocean Bank, and got a note that it was paid; I got the note delivered to me back from the bank; I paid the money then to Mr. Vail; I gave him a check for it the same day; I paid it because I had a deal of business there; I did so with the understanding that the Bank of Commerce was to repay me the money if they succeeded in getting it from Hoboken City Bank or Ocean 10 Bank; Mr. Vail sent it back to Ocean Bank; a few days after I went to Ocean Bank to see about it; André Brothers failed on Tuesday afternoon, November 1st, 1859; I deposited another check of \$3,180 of André Brothers, on Hoboken City Bank, on Monday, October 31st, 1859; both checks came back the same day, viz: November 2d, 1859; the last one was protested; the other was not; I endorsed them both.

And being cross-examined, said: The name of H. J. Overmann in this check is in Mr. Hollander's hand-writing; 20 he put my name in because I gave him the money for it; he is a bill-broker; I know Mr. Raider; I have known him eight or nine years; he is a tobacco broker; the check of \$2,730 has been out of my possession in Mr. Hollander's hands; he had a suit against Mr. Raider and Mr. André; he borrowed this check from me; I got it back from him after he had used it; that suit was against Mr. Raider, I don't know that Morris Hollander brought a suit on this check; I was subpoenaed as a witness; (being shown a paper *pro ut the same*); it is my signature; it was given in 30 court while that trial was going on; Mr. Dyatt wrote that order and I signed it; he wanted to borrow the checks; Dyatt was attorney for Mr. Raider. There was no consideration passed from Mr. Hollander to me when the check was handed over; Mr. Hollander gave me the check of \$3,180; it was not given to take up that check of \$2,730; I paid the \$3,180 check to the Bank of Commerce; I first learned on Tuesday afternoon that André Brothers had failed; I learned it from Mr. Hollander; I sued the Hoboken City Bank in the city of New York; that suit was 40

broken off; it was on trial; it was not stopped by my request; I do not remember which suit was brought first, mine or Hollander's; I don't remember whether Hollander's suit was brought first or not; I had cashed the checks of Andre Brothers for several months, always through Mr. Hollander, never individually with Andre Brothers; I got no consideration for thus cashing them. I took them on the strength of Mr. Hollander, and knowing that they were good; I had cashed other checks for Mr. Hollander; he
 10 was a friend of mine; he used to sell my checks and drafts; I never had any from him that were not good until this one.

Being re-examined in chief, the witness further says:—
 Mr. Hopper was at that time the notary of the Ocean Bank; at the time of Hollander's trial this check exhibit A, was in the hands of Mr. Journegan, Mr. Hollander's Attorney; I got the notice of protest of the \$3,180 check through the mail the same day I got the check; if Hollander sued Raider, he did it without my authority; Hollander paid
 20 me the \$3,180 check.

The deposition of Henry T. Vail, another witness on the part of the plaintiff, sworn and examined *de bene esse* before William H. Armstrong, Esquire, a commissioner for the State of New Jersey residing in the State of New York, on the 21st and 22d days of April, A. D., 1863, was read as follows, viz:

Henry T. Vail, sworn and deposed as follows:

I reside in the city of New York, and am cashier of the Bank of Commerce, and have been such for ten or twelve
 30 years.

Q. Is the Bank of Commerce a member of the Clearing House?

A. It is.

Q. Is the Ocean Bank also a member of the Clearing House?

A. It is.

Q. Will you describe the Clearing House, its organization, and its purpose?

A. It is an Association of the Banks of the city of New
 40 York for the purpose of a convenient place for making their

exchanges with each other, and a daily settlement of the balances resulting from such exchanges.

Q. Is it a voluntary Association, or incorporated?

A. Voluntary, and is not incorporated.

Q. In what way are the exchanges made through the Clearing House?

A. The deposits made in each bank of this city are every day at the close of business, made up into separate packages for each of the other banks, which packages contain the checks upon such banks respectively, their circulating notes, and those redeemed by them. For the purpose of making exchanges, these packages are the next morning sent to the Clearing House, and there distributed at 10 o'clock; the packages so distributed are received by the Clearing House clerk of each bank respectively, who takes the packages to their respective banks, where they are received at from half past ten to eleven o'clock, and examined for the purpose of ascertaining if made up correctly, if the checks are good, &c.

Q. Who are the officers of the Clearing House?

20

A. There is but one officer, a manager, Mr. Lyman, who has employed under him several clerks.

Q. When the packages come back from the Clearing House, and are examined, in case there are any checks on your bank not good, what is the custom of the banks and of the Clearing House with regard to such checks?

A. The Clearing House has nothing to do with them; we return them direct to the bank from whom they were received through the exchanges, and the practice is so to return them before three o'clock, which we always endeavor to do; but at times with banks located at a distance, they are not reached until after that hour.

Q. Are they always sent back the same afternoon?

A. By the Bank of Commerce they are always, but I find at times exceptions to this rule on the part of other banks, who return such checks to us through the exchanges the next morning.

Q. Do you ever receive them later than the next morning through the exchanges?

A. We do not.

40

Q. Is not that the rule and custom of the banks associated together in the Clearing House?

A. We have no formally adopted rules, but it is the rule by universal practice.

Q. In case a check protested or not good, comes back to the bank which sent it through the exchanges, to the bank on which it was drawn, later than the next morning after it was sent to the Clearing House, is or not the bank upon which it was drawn, liable to pay that check by the universal custom of the banks connected with the Clearing House?

(Question objected to by Mr. Lyons as being a question of law to be determined by the court.)

A. That is a question which I would have to refer to a court of law.

Q. In case a check deposited in your bank upon another bank in the city which they returned as not good, should not be sent back to you on the morning after you sent it with your exchanges to the Clearing House, would you receive it if afterwards sent, or would you hold the Bank upon which it was drawn as liable to pay it?

(The same objection interposed by Mr. Lyon as to the last preceding question.)

A. I should not receive it and refund them the amount without the consent of the party who deposited it with us.

Q. Is not that the general custom of the banks of this city?

A. I believe it is.

Q. How long has it been the custom?

30 A. During the whole time of my connection with banking, upwards of twenty years.

Q. Do you know, sir, whether the Ocean Bank was, in 1859, the agent of the Hoboken City Bank for the purpose of redeeming their circulating notes, drafts and checks upon the said Bank in the city of New York?

A. They were then the agents of the Hoboken City Bank, checks upon which were sent through the exchanges to the Ocean Bank.

Q. Look at that check marked "Exhibit A, on the part

of the plaintiff." Was that check deposited in your bank by Mr. Overmann, the plaintiff, and if so, when?

A. I do not know as to this check, but one of the same parties, on the same bank, and for the same amount, appears to have been deposited with us by Overmann on Saturday, October 29th, 1859; I do not receive deposits or pay money; that is done by the teller of the bank.

Q. Was the check of which you speak sent with your exchanges to the Ocean Bank through the Clearing House, and if so, when? 10

A. It was in the exchanges of Monday morning, October 31st, 1859.

Q. Was it sent back to your bank marked "no funds," or not good, and if so, when?

A. It was, in the exchanges of Wednesday morning, November 2, 1859.

Q. Did you refund the money for that check to the Ocean Bank?

A. Not at that time.

Q. Why not? 20

A. Because on the day previous Mr. Overmann had called upon me, stating that the check would not be paid, or probably would not, as the makers of it had failed, and that he did not desire to receive the check back from me, and that if not returned to me in proper season by the Ocean Bank, he did not wish me to receive it from them.

Q. Was not Mr. Overmann's object in calling on Tuesday to ascertain if the check was back?

A. I do not know what his special object was; he at that time asked me if it had been returned, and was told 30 that it had not.

Q. Do you not remember his asking you on that occasion, if the check should not have been returned by that time, if it was not good?

(Question objected to by Mr. Lyons, as being of a conversation with Overmann, which is not evidence.)

A. I do not recollect; think it quite probable that he may have so asked me.

Q. What course did you take with this check when it did come back to you? 40

A. I addressed a note to Mr. Handy, cashier of the Ocean Bank, to which I received a reply, and in the meantime retained the check in my possession; upon the receipt of his reply, I sent to Mr. Overmann, asking repayment for the check.

Q. Did Mr. Overmann repay you for the check?

A. He did, upon the next day.

Q. Did you repay the Ocean Bank?

A. We did.

10 Q. Being shown check marked "Exhibit B, on the part of the plaintiff," the witness is asked, "Is that the check which Overmann gave you to pay the check marked "Exhibit A?"

A. It is.

Q. Did Mr. Overmann at that time keep an account in the Bank of Commerce?

A. He did.

Q. Do you remember Mr. Overmann giving you a check for \$3,180 to take up a check of André Brothers, on the
20 Hoboken City Bank, which came back marked "no funds" on the same day check marked Exhibit A came back?

A. I do.

Q. Can you tell when that check was deposited with you, when it went to the Clearing House, and when it came back to you; I mean the check of André Brothers for \$3,180.

(Objected to, as the check has nothing to do with this controversy. Objection by Mr. Lyons.)

A. I do not remember in regard to its deposit, and
30 being sent through the Clearing House; it was returned to us during bank hours, and not through the exchanges, but at this time I do not recollect the date.

The check of André Brothers for \$3,180, above referred to, is offered in evidence, and marked "Exhibit C, for the plaintiff."

Q. When Mr. Overmann gave you his check to take up the \$2,730 check on the Hoboken City Bank, did you put it among the general banking papers, or did he leave it with you for the purpose of enabling you to see whether

you could not make the Ocean Bank or the Hoboken City Bank pay the check?

A. I first had it certified by our Teller, and charged to Mr. Overmann's account, then placed it among the papers of the bank in my possession, telling Mr. Overmann I would so retain it for a short time, and that if the Ocean Bank or Hoboken City Bank should find they had been guilty of latches in the matter and decide to pay the check of André Brothers, I would then of course repay him. The check of André Brothers for \$2,730 was in the meantime left 10 with me by Overmann; a while after, on the Ocean Bank advising me that they should not repay it or allow it, I then handed to them this identical check of H. J. Overmann on the Bank of Commerce, marked Exhibit B.

Q. When Mr. Overmann gave you the check marked Exhibit B, was it not understood between you and Mr. Overmann that you were not to use the check unless the Ocean Bank refused to settle without a lawsuit.

(Objected to by Mr. Lyons as not evidence.)

A. It was not; there was no understanding; the pay-20 ment was an unqualified one, and the proposition to retain the check was a voluntary one on my part.

Direct examination closed.

Cross-examination by Mr. Lyons for defendant.

Q. Assuming that the \$2,730 check was sent by the Ocean Bank to the Hoboken City Bank on the 31st day of October, 1859, and returned to the Ocean Bank on the 1st of November in that year for want of funds to pay at Ho-30 boken City Bank, can you say that that is an unusual course in mercantile usage with reference to a check drawn on a bank out of New York city?

A. I cannot.

Q. Did you, on your investigation of the course of the check in question determine that the Ocean Bank or Hoboken City Bank had been guilty of latches in their dealing with this check?

A. I did not.

Q. Is the Hoboken City Bank a member of the Clearing House?

A. It is not.

Q. Do you know the particular arrangement, if any, which existed between the Hoboken City Bank and the Ocean Bank?

A. I do not.

Q. Has the Clearing House introduced any new rule of mercantile usage as to exchanges by the medium of checks, 10 and the liability of parties to checks?

A. It has not.

Paper shown witness marked "Exhibit No. 1, for defendant," and he is asked,

Q. What is that?

A. A copy of the Constitution of the New York Clearing House.

Q. When you say that the Ocean Bank was the agent of the Hoboken City Bank for redeeming their circulating notes, drafts and checks, on the Hoboken City Bank, do 20 you mean that they redeemed checks on the Hoboken City Bank without sending first to the Hoboken City Bank for acceptance?

A. I have not stated that they were the agent of the Hoboken City Bank for such purpose, not knowing what their arrangements were; but only that the Ocean Bank had notified us that we might put in their exchanges the circulating notes of and checks upon the Hoboken City Bank.

Q. Did you expect from such notification that the Ocean 30 Bank would pay a check drawn upon the Hoboken City Bank unless they first sent it to the Hoboken City Bank for acceptance?

(Objected to by Mr. Ransom for the plaintiff.)

A. Not at all.

Q. Do you remember the date when Mr. Overman first mentioned to you that he apprehended that the check for \$2,730 would not be paid?

A. It was on Tuesday, November 1st.

Direct examination resumed.

Q. You stated on your cross-examination that you did not on your investigation of this \$2,730 check determine that either the Hoboken City Bank or the Ocean Bank had been guilty of latches ; did you come to any determination on that question ?

A. None whatever, except that there was no latches on the part of the Bank of Commerce.

HENRY F. VAIL.

Examination taken, subscribed } 10
and sworn before me, on the }
days above mentioned.

WM. H. ARMSTRONG.

Com. for New Jersey.

Deposition of George W. Duer, another witness on the part of the plaintiff, taken *de bene esse*, on the 27th day of April, A. D, 1863, before William H. Armstrong, a Commissioner for the State of New Jersey, residing in the City of New York, was read as follows : 20

George W. Duer.

Q. Where do you reside?

A. New Brighton, Staten Island.

Q. Are you Cashier of the Bank of the State of New York ?

A. I am.

Q. Is your bank a member of the Clearing House of the City of New York ?

A. It is.

Q. What is the custom of the banks of New York, connected with the Clearing House, in reference to checks drawn upon any such banks and sent through the Clearing House for payment, in case they are not good ? 30

(Objected to, as that the custom of the New York banks can not affect the defendants.)

A. To return them to the bank from which they are received.

Q. Within what time ?

A. The day they are received ; any time before three o'clock of that day. 40

Q. In case they are not so returned, do you hold the Bank upon which they are drawn liable to pay them?

A. We should make a claim to that effect. In case the bank was at a considerable distance, checks have sometimes been returned through the exchanges, not reaching the bank until the next day.

Q. At what time next day?

A. It might reach the bank at ten o'clock, and not be examined by the Teller until 12 M., or 1 P. M., depending 10 upon the amount of business to be done.

Q. Had your bank, in 1859, any checks drawn by André Brothers upon the Hoboken City Bank, which were returned "no funds?"

A. We had.

Q. How were they sent to the Hoboken City Bank by your bank?

A. Through the Clearing House to the Ocean Bank.

Q. Do you remember the day on which the checks were sent?

20 (Objection in that evidence in regard to those checks does not affect the check in question.)

A. I do not.

Q. Do you recollect how long after they were sent to the Clearing House it was before they were returned to your bank?

A. Not the precise time.

Q. Was it the next day or the day after?

A. It was certainly not the next day, and I am not certain that it was the day after.

30 Q. Do you remember the failure of André Brothers?

A. I remember hearing of it at the time.

Q. Did those checks of which you speak come back the day after the makers failed?

A. I don't know the day they failed.

Q. Did the Hoboken City Bank pay those checks?

A. Not to the Bank of the State of New York.

Q. Who did pay the Bank of the State of New York?

A. The Ocean Bank.

40 *Cross examined:*

Q. If a depositor in your bank deposits a check drawn

upon a bank out of the State of New York, what is the usual mode of transmitting that check for acceptance?

A. If any of the city banks have notified us that they would receive checks on any of the out of town banks, through the exchanges, we send them in that way, if not, to some out of town correspondent.

Q. When you send to such out of town correspondent, do you send by messenger or by mail?

A. We send by mail. Sometimes the Brooklyn banks send messengers over to us, but we do not send messengers 10 to the Brooklyn banks, not as a regular business thing.

Q. Those checks that were paid by the Ocean Bank, to which you refer, do you know whether they were paid because André Brothers had funds at the Hoboken Bank to meet them?

A. I don't know.

GEORGE W. DUER.

Sworn and taken before me, this, }
27th day of April, A. D. 1863. }

WM. H. ARMSTRONG,

20

Com. for New Jersey.

The deposition of Parker Handy, taken *de bene esse*, before William H. Armstrong, Esq., Commissioner for New Jersey, residing in New York, on the part of the plaintiff, was read as follows :

Parker Handy being duly sworn doth depose and say :

Q. Where do you reside?

A. In New York.

Q. Were you in October and November, 1859, Cashier 30 of the Ocean Bank of the City of New York?

A. I was.

Q. Was the Ocean Bank at that time the agent of the Hoboken City Bank?

A. They were.

Q. For what purpose?

A. For redemption of their notes.

Q. Anything else?

A. We redeemed their checks which came to us through the Clearing House.

Q. Did you give notice to that effect to the other banks of the city.

A. We did; we sent them a printed circular. (Witness being shown a paper marked "Exhibit D," identified it as one of the circulars referred to by him, and which he says, was got up by him, revised and printed at his suggestion.)

Q. Was the Ocean Bank at that time a member of the Clearing House?

10 A. It was.

Q. What was the usage and custom of the banks connected with the Clearing House, with regard to checks which were not good, which were received through the Clearing House, as to the time of their return to the banks that sent them?

A. Checks on the city banks were returned the same day direct to the banks. In case of checks not good on the Hoboken City Bank, they would be returned the next day through the Clearing House; the same rule did not apply
20 to out of town banks, as to the city banks.

Q. ("Exhibit A," on the part of plaintiff, shown to witness). Do you know anything about that check?

A. I do not know anything definitely about that check, except that I do know there were some checks of André Brothers on the Hoboken City Bank that were returned to us from the Hoboken City Bank as not good.

Q. Do you remember having a correspondence with Mr. Vail, Cashier of the Bank of Commerce, in reference to one of those checks?

30 (Objected to, unless the correspondence is produced.)

A. I remember that there were some of those checks (check or checks) coming to us through the Bank of Commerce; I do not remember whether there was one or more, but I remember that the Bank of Commerce and the Bank of the State of New York had some; as to the matter of correspondence, I do not now remember about.

Q. Do you remember the Bank of Commerce claiming that one of those checks of which you speak, had come back too late?

A. I think there was some such claim; the particulars I do not remember.

Q. Do you remember that Mr. Overmann, the plaintiff in this suit, was the payee of that check?

A. I do not remember. I remember Mr. Overmann calling to see me once or twice on the subject about the time the checks were returned to us as not good.

Q. Do you remember telling Mr. Overmann, that your bank had paid the Bank of Commerce the amount of the check of which he spoke?

10

A. I do not remember having told him so; I do remember having said to him that I thought the check or checks were paid, but I found myself mistaken, as soon after the interview I found the check or checks returned to us from the Hoboken City Bank as not paid; there were some checks returned to us from the Hoboken City Bank, which I supposed had been paid, but I found myself mistaken.

Q. Did the Hoboken City Bank pay your Bank the checks which had been sent to you by the Bank of the State of New York, of which Mr. Duer spoke in his examination?

A. I think not; I think it was not paid when I left the Bank.

Q. Was the Ocean Bank out the amount of those checks when you left?

A. I think they were, part of them, or all, I don't remember.

Q. When did you leave the bank?

A. I resigned my position as Cashier June 1st, 1860.

Q. Do you remember Mr. Vail sending that check (Ex-30 Exhibit B., on the part of plaintiff, shown) to your bank, to meet this check of André Brothers, in favor of Overmann.

A. I remember Mr. Vail sending some check, but cannot identify this as the check.

Cross examined:

Q. When you speak of the Ocean Bank being an agent for redeeming checks drawn upon the Hoboken City Bank, were not such checks first transmitted to Hoboken to ascer-

tain whether they were good before your bank redeemed them?

A. The checks or drafts on the Hoboken City Bank principally came to us through the Clearing House, and we paid the banks sending them to us, through the Clearing House the same day, and the Messenger from the Hoboken City Bank would call at the Ocean Bank for their exchanges — either their checks or notes — usually between the hours of twelve and one o'clock, and if the exchanges were not
10 ready, would wait until they were, which was usually before one o'clock. These exchanges we charged directly to the account of the Hoboken City Bank, and the Hoboken City Bank returned to us any checks or drafts on them, that were not good, which checks or drafts the Ocean Bank returned through the Clearing House, the next day, to such banks as sent them.

Q. The checks that were not good, did not they come to the Ocean Bank, from the Hoboken City Bank, in the exchanges of the next day?

20 A. Not usually.

Q. Did the messenger of the Hoboken City Bank, after he took his exchanges from the Ocean Bank, about one o'clock, to Hoboken, return from Hoboken the same day, usually?

A. It is my impression that he did, if there were any checks that were not good.

Q. Did the Ocean Bank pay the checks drawn on the Hoboken City Bank before ascertaining whether the account of the drawer of the check at the Hoboken City Bank
30 was good?

A. We did, but reserved the right to return them, if not good, as the circular states, (Exhibit D).

Q. When such checks, which were not good, were returned, did the Ocean Bank ask payment of the bank from which such checks originally came, to balance the credit given therefor?

A. We returned the checks or drafts "not good," through the same channel by which we received them, to-wit: the Clearing House, placing the amount as so much money on

the list or statement sent to the Clearing House for settlement.

Q. Did you then receive from the Bank from which such check was originally sent to the Clearing House, credit for the check returned "not good?"

A. Yes, we received pay at the Clearing House; it went to our credit at the Clearing House.

Q. Did the check (Exhibit B., on the part of the plaintiff,) drawn by H. J. Overmann, pay the Ocean Bank for the credit given to the Bank of Commerce, on account of 10 the check of André Brothers, dated October 29th, 1859, for \$2,730, being "Exhibit A," on the part of the plaintiff?

A. I don't remember.

Q. Do you remember the course which this check, "Exhibit A," took?

A. I don't remember anything definite in relation to this check.

Q. You have spoken of some claim made by the Bank of Commerce, on account of some unpaid check drawn by André Brothers; do you know whether the Bank of Commerce, after investigation, abandoned such claim?

A. I don't remember anything in relation to the particulars.

Q. When you say that the Ocean Bank were out on account of some checks, do you mean that the Ocean Bank sustained any loss at all, on account of the check "Exhibit A," for \$2,730?

A. The checks returned to the Ocean Bank, as "not good," were, I think, some of them, paid before I left the bank; that is my impression, and the balance remained 30 charged to the account of the Hoboken City Bank, on the books of the Ocean Bank, which was unsettled when I left the bank.

Q. (Repeated).

A. I don't remember anything as to any particular check or checks. I don't know that the Ocean Bank sustained any loss during my connection with the bank.

Q. Do you know whether check "Exhibit A," occasioned any loss to the Ocean Bank?

A. I do not.

Q. Who took charge of the exchanges between the Ocean Bank and the Hoboken City Bank in the month of October, 1859.

A. I think the third Teller, Mr. Hartshorn. The Exchanges from the Hoboken City Bank were brought to the Third Teller of the Ocean Bank, whose name was Hartshorn, and he received the same, examined and counted the same.

Q. What did Hartshorn do with them?

A. He handed them over to the Receiving Teller.

10 Q. What did the Receiving Teller do with them?

A. He distributed them to the pigeon holes or drawers of the respective Banks belonging to the Clearing House.

Q. What was then done with them?

A. They were then sealed up with other funds, notes, checks, &c., and taken to the Clearing House, and then distributed by the Porter to the messengers of the Banks that we had Exchanges upon.

Q. What was then done with them?

A. I suppose they were taken by the messengers of the 20 several Banks that were represented to the Banks they represented.

Q. Is that the way the Exchanges were made between the Hoboken City Bank and the Ocean Bank?

A. The exchanges between the Hoboken City Bank and the Ocean Bank were made by them sending a messenger with the package which he delivered to the third Teller and would wait and receive any of their notes or drafts on them coming to the Ocean Bank through the Clearing House on the same day.

30 Q. That messenger, what did he do with the package which he received from the Ocean Bank?

A. I suppose he took it to the Hoboken City Bank.

Q. About what time each day did he leave the Ocean Bank to go to the Hoboken City Bank?

A. I think from 12 to 1 o'clock; not later than one usually.

Q. Was it not then his usual practice to come again to the Ocean Bank on the following day and not sooner?

A. It was his usual practice to come the next day with 40 his exchanges, and I suppose it was his usual practice to re-

turn the checks not good on the same day that he received them.

Q. Have you any personal knowledge of checks not good being returned the same day from the Hoboken City Bank, and can you name any such checks?

A. I have no recollection of any checks being returned not good except these in question.

Q. Then the only usage that you know of in relation to the return of checks not good on the same day by the Hoboken City Bank is confined to the checks of André Broth-10
ers, drawn some time in the month of October, 1859?

A. This case was called to my notice in consequence of the circumstances, and I found that formerly the Hoboken City Bank did return checks not good on the same day; but for a short period prior to this they had been returning them with their exchanges on the next day.

Q. Do you know at whose request such checks not good were so returned to the Ocean Bank on the next day with the exchanges?

A. I do not.

20

Q. Do you know whether it was a matter of complaint by some officer or clerk of the Ocean Bank that checks not good were returned on the same day by the Hoboken City Bank to the Ocean Bank?

A. I do not; there was no one authorized to make any such complaint if it was made.

Cross examination closed.

Direct resumed.

Q. Did you not give the Hoboken City Bank instruc-30
tions in writing, or verbal, to return checks not good on the same day that they received them from your Bank as their agent.

(If in writing objected to unless produced.)

A. I have no recollection.

PARKER HANDY.

Sworn, taken and subscribed
before me this 27th day of
April, A. D. 1863. }

WM. H. ARMSTRONG, Commissioner for New Jersey.

The plaintiff read in evidence the following described papers, viz:

1. Check drawn by André Brothers on Hoboken City Bank in favor of H. J. Overmann, payable to his order for \$2,730, Dated Oct. 29th, 1859. Marked Exhibit A on part of plaintiff (Pro at the same.) *See Appendix, No. I.*
2. Check drawn by H. J. Overmann on Bank of Commerce in New York, payable to Bank of Commerce or bearer for \$2,730, Dated New York, November 3, 1859. Marked 10 Exhibit B, on part of plaintiff, (Pro at the same.) *See Appendix No. II.*
3. Check drawn by André Brothers on Hoboken City Bank, payable to order of H. J. Overmann for \$3,180, Dated October 31st, 1859. Marked Exhibit C on part of plaintiff (Pro at the same.) *See Appendix No. III.*
4. Circular signed by Parker Handy, Cashier, Dated Ocean Bank, May 5th, 1857, giving notice that the circulating bills of Hoboken City Bank and drafts on the same would be redeemed at Ocean Bank. Marked Exhibit D on 20 part of plaintiff (Pro at the same.) *See Appendix No. IV.*
5. Check drawn by M. Hollander on Bank of the State of New York, payable to H. J. Overmann or order for \$445 16, dated New York, Oct. 29th, 1859. (Pro at the same.) *See Appendix No. V.*
6. Check drawn by H. J. Overmann, on Bank of Commerce in New York, payable to M. Rader or order, for \$3,175 16-100. Dated New York, October 29th, 1859. (Pro at the same.) *See Appendix No. VI.*
7. Notice of protest of \$3,180 check of André Brothers, 30 sent to H. J. Overmann by John Hopper, Notary, dated November 2d, 1859. (Pro at the same.) *See Appendix No. VII.*

Benjamin S. Taylor, another witness produced and sworn on the part of the plaintiff, testified as follows: I reside at Hoboken; I am President of "Hoboken City Bank;" I have been President since its organization, about six years; Joseph H. Johnson is Cashier; has been about three and a half years; he was Cashier in October, 1859; I am ac- 40 quainted with the officers of the Ocean Bank in the city of

New York; the Ocean Bank has been our deposit bank since our organization—our exchange bank; they received checks through the exchanges in New York and forwarded them to us; they redeemed our circulation and sent our checks to us, and at the commencement of our business we returned those not good the same day in the afternoon; that was the first arrangement; after a while the Ocean Bank complained that it interfered with their business; it was late in the afternoon before we could get our checks back again, and they requested us to return them next day 10 with the exchanges; we followed this direction for a long time afterwards; we made the arrangement with the President and Cashier; Mr. Martin was the President, Mr. Handy the Cashier; I don't recollect how long we followed that arrangement; it was nine or twelve months before the difficulty growing out of the check in this suit that we sent them next day with the exchanges; we made no arrangement; our arrangement was in shape of instructions from them; our only arrangement with the Ocean Bank on that subject was in the nature of instructions from them to us; 20 these instructions were all verbal; no written arrangement or instructions whatever; when we commenced business the officers of the Ocean Bank said they wished us to return checks not good the same afternoon; it was the Exchange Clerk in the Ocean Bank that requested us not to return them till next day with the exchanges; he made the request to our messenger; I knew nothing about such request except through our messenger; when this request was made I did not see the President to learn whether it was so or not; we did not make the change at once; we 30 did it gradually along; I often told the President and Cashier of the Ocean Bank if we were doing anything wrong we wished to know it; they said we were doing as well as could be expected; I can't name the time I told them this; I told them a number of times; we did not make the change immediately after the request was first made, and then they found a great deal of fault with us for continuing the practice of returning them the same afternoon, and we then returned the checks not good with our exchanges the next morning, and had been doing so for some nine or twelve 40

months prior to the time this check of André Brothers was returned ; I very probably may have given as a reason for asking instructions, that we were young and unacquainted with the business, and often asked them if we were doing everything right and straight, and they invariably said we were doing everything as well as we could. I can't remember the time, but they told me so a number of times ; I know this firm of André Brothers ; I do not know the names of the partners ; Charles André was the active man ; that
 10 firm kept an account in our bank for several years, from the first year of our existence ; they kept not a very large account ; their daily deposit would probably average \$100 or \$500 ; they keep a small account there yet ; (Being shown the \$2,730 check, Exhibit A, says), I can't say as to that check ; I have no marks upon it ; I think the words "*no funds*" is in Mr. Johnson's, our Cashier's handwriting ; I think it is his ; I know his handwriting ; I remember of hearing of the failure of André ; I think it was on Monday before the check reached our bank ; they had perhaps less
 20 than \$100 when that check reached us ; I don't recollect how many checks there were of André Brothers that came along with this one ; there were three checks spoken of by the Bank of the State of New York ; they were all sent back with our exchanges the next day, between twelve and one o'clock ; we did not send them the same afternoon, for the reasons I have told you, because we were requested not to do so ; we have not paid the checks to the Bank of the State of New York ; I think they are paid by other parties ; they are not charged to us by the Ocean Bank ; I
 30 had nothing to do with the payment of these checks ; they are not charged to us in the books or exchanges ; I proposed to Mr. Johnson to send those checks back that same afternoon ; Mr. Johnson said the Ocean Bank did not want to receive them the same afternoon ; it was late in the afternoon when we received them ; it was after two o'clock ; we settle with the Ocean Bank every week ; it takes the best part of half an hour to go over to the Ocean Bank ; the next day we sent it, about half past twelve o'clock, with our exchanges ; I did not in the meantime see André
 40 Brothers ; two o'clock is not an unusual hour for our mes-

senger to get back to the bank; whatever we sent that day went to the Clearing House the next morning, and if we had sent it earlier it would not have gone to the Clearing House before that time; at that time we did not send earlier; I don't know that we ever sent over in the morning before ten o'clock; it was so late in the afternoon to send any thing back, that it was an inconvenience to the Ocean Bank that they did not like; at that time we did not send earlier; we never sent over before business hours; the close of business hours in New York is three o'clock, 10 I think the \$3,180 check came to our bank on Tuesday; that was returned with our exchanges on Wednesday; I am sure we did not send that back by a messenger; we did not write to the Ocean Bank anything about it; we make a deposit check which we send with the exchanges, the same as an individual does; checks not good are so marked and returned, and we get credit for it; we marked these checks "not good," or "no funds;" I do not know the name of the clerk who told our messenger not to return the checks not good until next day; I do not know him by 20 sight; it was the Receiving Teller in the bank that told him; I can't say that the Cashier or President knew that we had made any change in our mode of doing business; it was the Receiving Teller in the Ocean Bank who told our messenger not to return the checks not good until the next morning with our exchanges; he is the person whose business it is to receive exchanges; I don't know anything, of my own knowledge, about it; I inquired frequently of the President and Cashier if we were doing everything in proper order, after we made the change; I did not inform 30 them of this change except in general terms; as near as I recollect anything about it, it was nine or ten months, or a year, before this transaction that we changed our mode of sending back checks not good; we had not many depositors doing business in New York—ten or a dozen perhaps; we had not a great many checks that came from New York that were not good; we had them occasionally; I never knew any checks but these being sent back not good, that the makers did not provide for; I knew that the Ocean Bank was a member of the Clearing House and made their 40

exchanges there; when we made this arrangement with them I knew the general mode of doing business through the Clearing House; I understood the principles upon which business was done there.

And being cross-examined, said: On the 29th day of October, 1859, the day this check of plaintiff's was dated, André Brothers had not money enough to their credit in our bank to pay this check, and from that day until it was returned there was not at any time money enough to pay it
 10 in our bank; we caused no checks of André Brothers to be protested; our mode of giving notice was by marking the words "*no funds*" and returning them through the exchanges; we never had any one protested except by special request; there is no mark on the check to show that it had been deposited with any other than the Ocean Bank, or that it came through any other source; this mode of giving notice, by returning checks marked "not good," existed since the organization of our bank; the notice is by returned check; if we had a check deposited with us on a bank in
 20 Sussex county, we would send it with our exchanges to the Ocean Bank, and they would forward it to their correspondent for collection; the messenger was a messenger to carry the exchanges between the Hoboken City Bank and Ocean Bank; if the holders wanted it protested they would present it themselves or send us notice; some of the New York banks have requested us to protest all checks which are not good; but that is recently; when we received and returned this check I had no knowledge of the existence of such a man as Mr. Overmann, except as his name appeared
 30 on the check; there was nothing on this check except Mr. Overmann's endorsement to indicate that it was to be deposited in any particular bank; this check was treated precisely the same by our bank as other checks when there were no funds to meet them; the messenger got back about two o'clock, sometimes half past two o'clock; it could not be returned before three o'clock; it takes some time to arrange and examine these checks; sometimes we would be busy, and it would take nearly all the time to the close of banking hours to do this; the Ocean Bank was the first and only
 40 bank selected by us as a depository in the city of New York;

there was no specific or written arrangement between us ; we acted under the instructions of the Ocean Bank solely ; we being new beginners, we asked the Ocean Bank to give us instruction ; we followed such instructions strictly ; none of our exchanges went directly from us to the Clearing House, only through the Ocean Bank ; we never heard a word of complaint, except you call this a complaint.

And being again re-examined in chief, said : After this transaction we continued the same practice of marking checks not good ; we now make up our deposits in the afternoon and send them over the next morning about half past nine o'clock, but we do that for our own convenience ; we have followed this practice for over a year past ; the messenger goes over again about eleven o'clock for our exchanges, and gets back about half past eleven ; we send him twice a day.

The plaintiff having rested his cause, the defendant, in support of the issue on his part, called as a witness,

20

Maximilian Rader, who, being duly sworn, did testify as follows : I reside at No. 174 West Fourteenth street, in the city of New York ; I am a tobacco broker ; my place of business is at 92 Wall street ; I have been in that business twenty-five years ; I know André Brothers and Morris Hollander ; I had transactions with André Brothers, and indirectly with Morris Hollander, as their agent, prior to October 29th, 1859 ; I had advanced a large amount of money to André Brothers, in their business ; I received securities and evidences for it ; notes received in their business, and, after their store was burned out, an assignment of their insurance policies, I lent them money on call ; I received for such loans their checks and checks of other persons, in payment back ; I recollect of a suit being brought upon this check by Overmann, in the United States Circuit Court, in New York ; I was there as a witness ; Morris Hollander sued me on the identical check in the Supreme Court of New York ; I had notice of suit against myself when I was summoned as a witness in the other case ; Both suits were going on at the same time.

40

And being cross-examined, said : (Being shown the \$2,730 check,) That is the identical check on which I was sued ; I was not sworn as a witness in the Circuit Court ; I never had this check before it was negotiated ; I never saw it before it came into court. I did not pass this check to Mr. Hollander ; I am in no way liable to him upon it ; I handed Mr. Hollander another check of \$2,472 at the request of Mr. André ; that is the only check that I passed to Mr. Hollander of André Brothers at any time ; I wish to so
 10 far correct a statement I have made ; I now recollect that I did see that check before it came into court ; I do know a good deal about the history of that check ; I saw the check before it came into court ; it was offered to me for sale by Abert Horn and Charles André on two separate occasions ; Horn had it with one of \$3,175.16 of H. J. Overmann on Bank of Commerce, and one of Hollander for \$1,000, and one for \$445.16 ; I know the checks, I can recognize them ; I know about putting these checks in circulation ; the first time I saw the \$2,730 check was in December,
 20 1859 ; that was the first time he offered to sell it to me ; I knew Mr. André had given Mr. Hollander some checks to raise money for me, and I supposed this was one of them ; Mr. Hollander raised for André Brothers, and paid to me on the 29th day of October, 1859, of money which André owed me, \$6,300 for my own account ; he gave me \$7,600 in all ; I had the policy on the store of André Brothers which was burnt, there was collected on it \$17,000 in all ; it was all received before the 29th October, 1859 ; André Brothers were then still largely in my debt ; I did not stop
 30 business at that time ; I went on business to Philadelphia for three days ; Mr. Hollander paid me the check of Mr. Overmann for for \$3,175 17, which I had certified, Morris Hollander's check to my order for \$1,824 84, making \$5,000, and in the afternoon he gave me his check for \$2,600 ; I paid André \$1,300 ; both Hollander and Overmann claimed this identical check as their own, at the time the suit against me and the Hoboken Bank were progressing in the city of New York.

40 *Simeon Broadmeadow*, another witness produced and sworn on the part of the defendant testified as follows :

In the year 1859, I was a clerk in the Hoboken City Bank; I was clerk from the opening of the bank down to last April; about October, 1859, I took the exchanges to the Ocean Bank and returned them; in October, 1859, I left Hoboken between half past twelve and one o'clock, to go to the Ocean Bank; I would reach the Ocean Bank from one to a quarter past one, sometimes half past one to two o'clock; once in a while it would be later than two, not often; that was the only time I made a visit to New York; this visit with the exchanges; the practice had been in existence between nine and twelve months of going only once; I don't remember how long it was continued this way; I should judge it was changed very shortly after this occurrence; originally I took checks back in the afternoon; the practice of taking them back in the afternoon was stopped, because the exchange clerk at the Ocean Bank told me to stop; I was not informed that it was by direction of Cashier; it was John Hartshorn who told me; he was exchange clerk; he told me more than once to stop this practice; it was discontinued in consequence of the exchange clerk telling me to stop it; I was outside of the counter in the Ocean Bank at the exchange clerk's desk when he told me; I knew the President and Cashier of the Ocean Bank; they knew me.

And being cross-examined, said: After this transaction I would sometimes take checks not good back on the same afternoon, and sometimes the next morning before nine o'clock; we commenced sending in the afternoon immediately after these checks of André Brothers were returned; I took back checks immediately after I got to the Hoboken City Bank, and the checks were ascertained not good; I usually arrived with the exchanges at Hoboken City Bank at from two to a quarter past two o'clock; it took about ten minutes to look over the checks; and if any were not good I took them back immediately, and usually arrived at the Ocean Bank about three or a quarter past three o'clock; we followed this practice till about a year ago, then I commenced going in the morning before nine o'clock.

Maxmilian Rader, being recalled on the part of the defendant, said:

Mr. Overmann asked me to settle this suit with him; I went to Mr. Overmann to get him to persuade Mr. Hollander not to press the suit against me; I told him that there could not be two different owners to the same check at the same time, and that either he or Hollander must perjure themselves; that was since the suit of Hollander against me; Overmann said I had better go and settle with Hollander myself, as I could do it better.

And being cross-examined, said: That was previous to
 10 the commencement of the suit by Overmann against the Hoboken City Bank in New York; it was the commencement of 1860; Hollander sued me on three checks in one suit, among which checks was this very identical check for \$2,730 now in suit here; Overmann and myself were on friendly terms, and I did not want to see him or Hollander either perjure themselves; I went to Mr. Overmann about this check; I knew Mr. Overmann had commenced a suit against the "Hoboken City Bank," but the trial had not come on; I claim that check of \$2,730 as my property; I sub-
 20 poenaed Mr. Overmann as a witness for me in the suit brought by Hollander against me; Overmann begged of me not to call him on the stand as a witness; and for the purpose of inducing me not to so call him, he gave me this order in writing; (witness here produced an order signed by Overmann, which was read in evidence, pro at the same. *See Appendix No. VIII.*) which authorized me to go to Mr. Journegan, his attorney in New York, in the suit against the Hoboken City Bank, and get this check for \$2,730, and I got possession of the check under it, and so
 30 did not call on Mr. Overmann as a witness; and I then took both the order and the check to the court room and handed them to my counsel; I called again in a short time upon my counsel for the check, and was surprised to find that he had given it up again to Mr. Journegan, at Journegan's request, to use for the purpose of trying to get his fees out of Overmann; Mr. Overmann was present at the trial of Hollander; my trial took place in April, 1861; Mr. Overmann's trial took place several months after; I am not mistaken; I am positive; he gave those papers up to me on
 40 condition that I would not call him as a witness.

The evidence on both sides being closed, the Court charged the jury, among other things, as follows :

“ Gentlemen of the Jury :

If a case can be made calling for the application of strict law, well established and supported by testimony, it is the one before you, whereby in the language of the Chief Justice in the opinion upon it which has been read before you, it is attempted to make the defendant liable by mere force of an usage to pay the check of a drawer without any funds 10 of his in their hands.

The plaintiff resided in New York, took the check there on Saturday morning, and instead of going over to the bank at Hoboken on that day, or on Monday, he deposited it in the Bank of Commerce for collection to oblige the broker through whom he obtained it.

By the course of exchanges it reached the Bank at Hoboken on Monday afternoon, and was returned to New York on Tuesday, marked “*not good.*” It appears that the drawers account was good for only about \$100 at the time. 20

There was no written or verbal acceptance of the check or any promise by the defendants to pay it. The legal liability of the defendants is put upon the fact that the check was not returned to New York by them on Monday afternoon or Tuesday morning before ten o'clock. It has been insisted that the usage of the Clearing House takes the case out of the scope of the usual commercial law rule.

The Chief Justice has heretofore in this case disposed of the usage relied upon, by ruling that it could bind no party or bank that was not a member of “The Clearing House.” 30 Neither of these parties are members.

The Ocean Bank, by their Teller, in charge of the exchanges directed that the checks not good should not be returned till next day, then in the ordinary package.

Whether delay in returning checks is tantamount to acceptance depends on the circumstances of each case.

There has no loss been shown to have resulted from delay in this case. Overmann knew on Tuesday before the check came back to him, that it would not be paid. He then

could have applied to the drawers for additional security if he meant to rely on them for payment.

The Hoboken Bank were not agents of the plaintiff.

He employed the Bank of Commerce to collect this check, and they employed the Ocean Bank.

If the Ocean Bank or the Bank of Commerce had a right of action against the Hoboken Bank for neglect, such right could not be transferred to the plaintiff, so as to give him a right of action in the present form.

10 This suit is on an alleged contract, an action of assumpsit.

No privity of contract between these parties has been shown to exist, nor are there sufficient facts shown, if all the testimony of the plaintiff is credited to raise a privity of contract in law.

The plaintiff, by his counsel, asked the Court to charge the jury as follows, viz.:

1st. That when the check in question was received at
20 the Hoboken City Bank, on the afternoon of Monday, October 31st, 1859, and the bank determined not to pay it, they should have sent it back to the Ocean Bank the same afternoon, or next morning before ten o'clock, with notice of its dishonor, pursuant to their arrangement with the Ocean Bank, and their failure to do so makes the Hoboken City Bank liable to the holder for the amount of the check.

2d. That if you are satisfied from the evidence it was the custom and usage of the banks of New York connected with the Clearing House, to return all checks not good the
30 same day on which they were sent to the Clearing House, or early the next morning, at or before business hours, through the exchanges, the arrangement between the Hoboken City Bank and the Ocean Bank, by which the Hoboken City Bank undertook to return checks drawn on the latter, which should prove not good, to the Ocean Bank on the same afternoon they were received by the Hoboken City Bank, or early next morning before business hours, and the notice given by the Ocean Bank, the agent of the Hoboken City Bank to all other banks, that such checks would
40 be returned through the exchanges, amounted in law to an

undertaking on the part of the Hoboken City Bank with the holders of such checks sent to them for acceptance and payment, to return them in case they were not good to their agent the Ocean Bank, the same day they were received, or next morning before business hours, so they could be sent with the exchanges of that bank to the Clearing House that morning, and received by the bank originally sending the same, at the commencement of business hours the same day.

3d. That the notice given by the Ocean Bank to the other 10 banks of the city of New York, that the checks on the Hoboken City Bank received in the exchanges "not good," would be returned through the same channel, made it incumbent in law upon the Hoboken City Bank to return such checks to the Ocean Bank in time to enable the latter bank to return them through the exchanges to the banks sending them the next morning after they were sent, in accordance with the rules and usages of the banks of the city of New York connected with the Clearing House.

4th. That the notice given by the Ocean Bank to the 20 other banks of the city of New York, that they would redeem the drafts on the Hoboken City Bank, and that they would send back through the exchanges those not good, bound the Ocean Bank to send such checks back the next morning after they received them, in accordance with the usage and custom of the banks connected with the Clearing House, and the Hoboken City Bank having retained the check in question beyond the time limited by their arrangement with the Ocean Bank, so as to put it out of the power of the Ocean Bank to comply with the custom and usage of 30 the banks connected with the Clearing House, and with their said notice, is guilty of laches, and is liable to pay the plaintiff the amount of the said check.

5th. That the detention of the check in question from the afternoon of Monday, the 31st October, 1859, till the afternoon of Tuesday, November 1st, 1859, under the circumstances of this case, amounted to an acceptance of the check by the Hoboken City Bank, and rendered them liable to the plaintiff for the amount of said check.

The Court having declined to charge the jury as above requested, the plaintiff, by his counsel, excepted to such ruling of the Court, and prayed that this, his bill of exceptions, might be sealed; and it is sealed accordingly.

[SEAL.]

The plaintiff by his counsel excepted to all that part of the charge of the court which charged:

10 1st. That Mr. Overmann could have gone to Hoboken on Saturday afternoon, the day he received the check or on Monday, and presented it at the bank and ascertained that there was funds there to meet it.

2d. Also, to all that part of the said charge which held that there was no acceptance of the check by the Hoboken City Bank in the commercial sense of that term, and that there was no act done by the Hoboken City Bank by which they undertook to pay the check.

3d. Also, to all that part of the said charge which held
20 that the Hoboken City Bank and Mr. Overmann, being neither of them members of the New York Clearing House, are not bound by its rules.

4th. Also, to all that part of the said charge which held that the Teller of the Ocean Bank was the agent of the bank, and when he requested the messenger of the Hoboken City Bank not to return checks not good the same day they were received by the Hoboken City Bank, but to return them the next day with the exchanges, the Ocean Bank were bound by such action of their Teller, and that, therefore, if the jury
30 believed the testimony, the custom at that time was, that such checks should be sent back by the Hoboken City Bank to the Ocean Bank the next day after they were received with the exchanges, and that, therefore, there was no proof that the Hoboken City Bank were derelict in duty, according to their course of dealing with the Ocean Bank.

5th. Also, to all that part of the said charge in which the Court told the jury "that there was not a particle of proof that Mr. Overman had sustained one cent of loss by this check not being sent back by the Hoboken City Bank on
40 Monday.

6th. Also, to all that part of the said charge which held "that the Hoboken City Bank were not the agents of the plaintiff; that they dealt with the Ocean Bank; that the plaintiff employed the Bank of Commerce as his agent to collect this check, therefore, if the Ocean Bank has a right of action against the Hoboken City Bank the plaintiff cannot avail himself of that, he can derive no benefit from the agreement between the Ocean Bank and the Hoboken City Bank; there is no actual privity of contract between the plaintiff and the Hoboken City Bank; and that the evidence 10 does not raise a privity of contract in law between them."

And the plaintiff, by his counsel, prayed that this bill of exceptions might be sealed; and it is sealed accordingly.

E. B. DAYTON OGDEN,

Justice, &c.

[SEAL.]

On the return of the Writ of Error, the plaintiff in error assigned errors as follows:

20

NEW JERSEY COURT OF ERRORS AND APPEALS,

OF THE TERM OF MARCH,

In the year of our Lord one thousand eight hundred and sixty-four.

HENRY J. OVERMANN,

Plaintiff in Error.

vs.

HOBOKEN CITY BANK,

Defendant in Error.

Assignment of 30

Errors.

Afterwards, that is to say, on the fifteenth day of March, in the year of our Lord one thousand eight hundred and sixty-four, before the Judges of the Court of Errors and Appeals of the State of New Jersey, at Trenton, comes the 40

said Henry J. Overmann, by Stephen B. Ransom, his attorney, and says, that in the record and proceedings, and in giving the judgment aforesaid, there is manifest error in this, to wit: That on the trial of the said cause, the said Henry J. Overmann, by his counsel, asked the Court to charge the jury, "that when the check in question was received at the Hoboken City Bank, on the afternoon of Monday, October 31st, 1859, and the bank determined not to pay it, they should have sent it back to the Ocean Bank
10 the same afternoon, or next morning before ten o'clock, with notice of its dishonor, pursuant to their arrangement with the Ocean Bank; and their failure to do so makes the Hoboken City Bank liable to the holder for the amount of the check," which the Court declined to do; whereas, by the law of the land the said Court ought to have so charged the jury; therefore, in that there is manifest error. And also, there is error in this, to wit: That on the trial of the said cause the said Henry J. Overmann, by his counsel, asked the Court to charge the jury, "that if you are satisfied from
20 the evidence it was the custom and usage of the banks of New York connected with the Clearing House to return all checks not good the same day on which they were sent to the Clearing House, or early next morning, at or before business hours, through the exchanges, the arrangement between the Hoboken City Bank and the Ocean Bank, by which the Hoboken City Bank undertook to return checks drawn on the latter, which should prove not good, to the Ocean Bank on the same afternoon they were received by the Hoboken City Bank, or early the next morning, before
30 business hours; and the notice given by the Ocean Bank, the agent of the Hoboken City Bank, to all other banks, that such checks would be returned through the exchanges, amounted in law to an undertaking on the part of the Hoboken City Bank with the holders of such checks sent to them for acceptance and payment, to return them in case they were not good to their agent, the Ocean Bank, the same day they were received, or next morning, before business hours, so they could be sent with the exchanges of that bank to the Clearing House, and received by the bank ori-
40 ginally sending the same, at the commencement of business

hours the same day," which the Court declined to do ; whereas, by the law of the land, the Court ought to have so charged the jury ; therefore, in that there is manifest error. Also, there is error in this, to wit : That on the trial of the said cause, the said Henry J. Overmann, by his counsel, asked the Court to charge the jury, " that the notice given by the Ocean Bank to the other banks of the city of New York, that the checks on the Hoboken City Bank received in the exchanges "*not good*," would be returned through the same channel, made it incumbent, in law, upon the 10 Hoboken City Bank to return such checks to the Ocean Bank in time to enable the latter bank to return them through the exchanges to the banks sending them, the next morning after they were sent, in accordance with the rules and usages of the banks of the city of New York connected with the Clearing House," which the Court declined to do ; whereas, by the law of the land, the Court ought to have so charged the jury ; therefore, in this there is manifest error. Also, there is error in this, to wit : That on the trial of the said cause, the said Henry J. Overmann, by his counsel, 20 asked the Court to charge the jury, " that the detention of the check in question from the afternoon of Monday, the 31st October, 1859, till the afternoon of Tuesday, November 1st, 1859, under the circumstances of this case, amounted to an acceptance of the check by the Hoboken City Bank, and renders them liable to the plaintiff for the amount of said check," which the Court declined to do ; whereas, by the law of the land, the said Court ought to have so charged the jury ; therefore, in that there is manifest error. Also, there is error in this, to wit : That on the trial of the said 30 cause, the said Henry J. Overmann, by his counsel, asked the Court to charge the jury, " that the notice given by the Ocean Bank to the other banks of the city of New York, that they would redeem the drafts on the Hoboken City Bank, and that they would send back through the exchanges those not good, bound the Ocean Bank to send such checks back the next morning after they received them, in accordance with the usage and custom of the banks connected with the Clearing House, and the Hoboken City Bank having retained the check in question beyond the time limited 40

by their arrangement with the Ocean Bank, so as to put it out of the power of the Ocean Bank to comply with the custom and usage of the banks connected with the Clearing House, and with their said notice, is guilty of laches, and is liable to pay the plaintiff the amount of the said check," which the Court declined to do; whereas, by the law of the land, the Court ought to have so charged the jury; therefore, in that there is manifest error. Also, there is error in this: That on the trial of the said cause the Court charged

10 the jury, "that Mr. Overmann could have gone to Hoboken on Saturday afternoon, the day he received the check, or on Monday, and presented it at the bank, and ascertained that there were no funds there to meet it;" whereas, by the law of the land, the said Overmann was not required to present the said check at the Hoboken City Bank himself, but had a right to deposit it in the Bank of Commerce for collection; and it was the duty of the Hoboken City Bank to send it back on the day it received the same, or the next morning before ten o'clock; and the failure of said bank to

20 do so makes it liable to pay the said check to said Henry J. Overmann; therefore, in that there is manifest error. Also, there is error in this, to wit: That on the trial of the said cause the Court charged the jury that there was no acceptance of the check by the Hoboken City Bank, in the commercial sense of that term, and that there was no act done by the Hoboken City Bank by which they undertook to pay the check; whereas, by the law of the land, the neglect of the Hoboken City Bank to send the check back to the Ocean Bank on the day the said Hoboken City Bank

30 received the same, or the next day before ten o'clock, amounted, in law, to an acceptance of the said check by the Hoboken City Bank, and made the said bank liable to pay the same to the legal holder thereof; therefore, in that there is manifest error. Also, there is error in this, to wit: That on the trial of the said cause the Court charged the jury, "that the Hoboken City Bank and Mr. Overmann, being neither of them members of the New York Clearing House, are not bound by its rules;" whereas, by the law of the land, the said Henry J. Overmann and the Hoboken City

40 Bank having transacted their business through the said

Clearing House, were both bound to conform to the rules of the said Clearing House, and were entitled to all their benefits ;" therefore, in that there is manifest error. Also, there is error in this, to wit : That on the trial of the said cause the Court charged the jury, that the Teller of the Ocean Bank was the agent of the bank, and when he requested the messenger of the Hoboken City Bank to not return checks not good the same day they were received by the Hoboken City Bank, but to return them the next day with the exchanges, the Ocean Bank were bound by such action of 10 their Teller, and that, therefore, if the jury believed the testimony, the custom at that time was that such checks should be sent back by the Hoboken City Bank to the Ocean Bank the next day after they were received, with the exchanges, and that, therefore, there was no proof that the Hoboken City Bank were derelict in duty, according to their course of dealing with the Ocean Bank ; whereas, by the law of the land, the Teller of the said Ocean Bank had no authority to change the arrangement that had been made between the Ocean Bank and the Hoboken City Bank, and 20 the Ocean Bank was not bound by such action of their Teller, and the Hoboken City Bank was bound to send the said check back the same day it received it, or the next morning before ten o'clock ; therefore, in that there is manifest error. Also, there is error in this, to wit : That on the trial of the said cause the Court charged the jury, that there was not a particle of proof that Mr. Overmann had sustained one cent of loss by this check not being sent back by the Hoboken City Bank on Monday ; whereas there was proof that the said Henry J. Overmann had sustained loss to the amount 30 of the said check by reason of its not being sent back by the Hoboken City Bank on the day it received the same or the next day before ten o'clock, which should have been submitted to the jury ; therefore, in that there is manifest error. Also, there is error in this, to wit : That on the trial of the said cause the Court charged the jury, that the Hoboken City Bank were not the agents of the plaintiff ; that they dealt with the Ocean Bank, that the plaintiff employed the Bank of Commerce as his agent to collect this check , therefore, if the Ocean Bank has a right of action against 40

the Hoboken City Bank, the plaintiff cannot avail himself of that; he can derive no benefit from the agreement between the Ocean Bank and the Hoboken City Bank; there is no actual privity of contract between the plaintiff and the Hoboken City Bank, and the evidence does not raise a privity of contract in law between them; whereas, by the law of the land, the said Henry J. Overmann is entitled to the full benefit of the agreement between the Ocean Bank and the Hoboken City Bank; and the evidence does raise a
 10 privity of contract in law between the said Henry J. Overmann and the said Hoboken City Bank; therefore, in that there is manifest error. And also, there is error in this, to wit: That the judgment aforesaid, by the record aforesaid, appears to have been given for the said Hoboken City Bank against the said Henry J. Overmann; whereas, by the law of the land, the said judgment ought to have been given for the said Henry J. Overmann against the said Hoboken City Bank; therefore, in that there is manifest error. And the
 20 said Henry J. Overmann prays that the judgment aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled, and altogether holden for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

STEPHEN R. RANSOM, *Attorney,*
For and of Counsel with Plaintiff in Error.

The defendant in error has filed the common joinder in error.

APPENDIX.

PLAINTIFF'S EXHIBITS.

No. I.

EXHIBIT A.

"No. 448.

Hoboken, N. J., Oct. 29, 1859.

[*No funds.*]

HOBOKEN CITY BANK,

Pay to the order of H. J. Overmann, Twenty-seven
Hundred Thirty 00-100 Dollars.

\$2,730 00-100.

ANDRE BROTHERS."

(Endorsed,)

"For Deposit.

H. J. OVERMANN."

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No. II.

EXHIBIT B.

"No. —.

New York, November 3, 1859.

BANK OF COMMERCE IN NEW YORK,

Pay to Bank of Commerce, or bearer, Twenty-seven Hun-
dred and Thirty Dollars.

\$2,730.

H. J. OVERMANN."

(Endorsed,)

"Paid at the Ocean Bank. 26."

No. III.

EXHIBIT C.

André Brothers. "No. 454. *Hoboken, N. J., Oct. 31, 1859.*
 [No funds.] HOBOKEN CITY BANK,
 Pay to the order of Hy. J. Overmann, Esq., Thirty-
 one Hundred Eighty 00-100 Dollars.
 \$3,180 00. ANDRE BROTHERS."
 (Endorsed,) H. J. OVERMANN."
 "For deposit."

No. IV.

EXHIBIT D.

"On and after this day, the Circulating Bills of the HOBOKEN CITY BANK, and Drafts on the same, will be redeemed at this Bank.

"The Checks on that Bank received in the exchanges 'not good,' will be returned through the same channel.

"PARKER HANDY, Cashier.

"OCEAN BANK, May 5th, 1857."

No. V.

EXHIBIT E.

"No. —. *New York, 29th Oct'r, 1859.*
 BANK OF THE STATE OF NEW YORK,
 Pay to H. J. Overmann, or order, Four Hundred Forty-five 16-100 Dollars.
 \$445 16-100. M. HOLLANDER."
 (Endorsed,) H. J. OVERMANN."
 "For Deposit."

No. VI.

EXHIBIT F.

No. 1,024.

New York, Oct. 26, 1859.

BANK OF COMMERCE IN NEW YORK,

Pay to M. Rader, Esq., or order, Thirty-one Hundred
and Seventy-five 16-100 Dollars.

\$3,175 16,

H. J. OVERMANN.

(Endorsed,)

M. RADER.

No. VII.

EXHIBIT G.

"New York, Nov. 2, 1859.

"Please take notice, that a check drawn by André
Brothers on Hoboken City Bank, for \$3,180 Dollars,
dated October 31, 1859, payable to your order, endorsed by 10
you, is PROTESTED FOR NON-PAYMENT, and the holders look
to you for the payment thereof.

JOHN HOPPER,
Notary and Attorney.

To H. J. OVERMANN."

NEW JERSEY COURT OF ERRORS AND APPEALS

ALANSON TRASK, CHAS. D. BIGELOW, and WALTER D. BIGELOW, PLAINTIFFS, vs. THE STATE OF NEW JERSEY, DEFENDANT.

In error to the Court of the State of New Jersey.

State of the Case.
Filed July 5, 1881.

This was an action of assumpsit brought by the State of New Jersey (defendant in error) against Alanson Trask, Charles D. Bigelow, and Walter D. Bigelow (the plaintiffs in error), by a writ of assumpsit, issued out of the Supreme Court, docketed March 11th, 1881, and returnable April 1st, 1881. The declaration contains the common count for goods sold and delivered, with and without interest, and a count for rent and advanced, &c. The plea was assumpsit.

Afterwards, on the 21st June, 1881, the parties agreed upon the following state of the case, to-wit:

Between Court of New Jersey.

The State of New Jersey, vs. Alanson Trask and others.

It is agreed between the parties in this action that it shall be deemed and considered that the issue joined between the parties came regularly on to be tried before the Circuit Court in and for the county of Mercer, at the April term thereof, in the year of our Lord one thousand eight hundred and sixty-two, at the place aforesaid. That it is admitted that it was fully proved on the part of the plaintiffs, that the said plaintiffs at the instance and request of the defendants had furnished them with the labor of two hundred and fifty persons and upwards at the State Prison