New Jersey Court of Errors and Appeals

DENNIS GALLAGHER, *Complainant-Respondent,* *v.* LEMBECK & BETZ EAGLE BREWING COMPANY, *Defendant-Appellant.*	On Appeal.

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BRIEF OF RESPONDENT.

Facts.

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In 1893 the respondent, Dennis Gallagher, was operating a number of saloons in the City of Jersey City. Lembeck & Betz Eagle Brewing Company, the complainant, desired to open a saloon at the corner of Washington and Montgomery Street, in Jersey City, and requested Gallagher to operate the same. The Brewing Company agreed to fit up the saloon at a cost of $16,000, which they did do, selecting elaborate fixtures—the bar containing a panel with their trade mark in the center thereof. The Brewing Company later on represented to Gallagher that inasmuch as he was receiving the benefit of the fixtures he should pay a part of the cost of installation, and Gallagher did pay to the Brewing Company $4,000.

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In 1895 the Brewing Company suggested to Gallagher that in order to have their books appear correct, and to insure the sale of their beer by the respondent Gallagher, that he give a chat-

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tel mortgage for $12,000. This Gallagher refused to do. He finally did agree to execute a promissory note for that amount, upon the agreement that it would not be presented for payment or discount, and that he would not be called upon to pay the same so long as he sold their products exclusively, and should he discontinue business in the premises he would then return said fixtures to the Brewing Company. Relying on these rep-
10 resentations Gallagher executed the note in question.

The note was renewed in 1901 to avoid the statute of limitations, and again renewed in 1907. No part of the principal of said note was ever paid, and no interest was ever paid thereon.

In 1909 the building in which Gallagher carried on the business was demolished to make way for a new building, now the Union Trust Company of Jersey City. The complainant being com-
20 pelled to vacate said premises returned said fixtures and demanded a return of the note. The note was not surrendered to him, and on May 14, 1914, just before the same would have been outlawed, the appellant began suit thereon in the Hudson County Circuit Court. The respondent as defendant in the Circuit Court filed an answer setting up all the above facts. The plaintiff in the action at the Hudson Circuit served notice on a motion to strike out the answer of the de-
30 fendant under rules 57 and 58 of the court rules, and on March 17, 1915 the Circuit Court filed an opinion on said motion wherein he decided that the defense sought to be interposed by the defendant was of an equitable nature, and did not present a legal defense, and that the plaintiff was entitled to an order striking out said answer and to an order for judgment final.

Immediately thereafter the defendant at law filed his bill in the Court of Chancery, filed a bond
40 for double the amount of the judgment, as re-

quired by law, and in said bill set up the proceedings at the Circuit, and prayed for an injunction restraining further proceedings at the Circuit. An order to show cause was granted restraining said proceedings.

The Brewing Company then served notice of a motion to strike out the bill of complaint as filed by the complainant in the court of Chancery. This notice came on for hearing before Vice Chancellor Lewis and was denied. The order denying the motion to strike out is now the subject of appeal before this Court. 10

The motion to strike out the complainant's bill and the grounds of appeal now before this Court attack the said bill on the following grounds.

(1) Complainant had adequate remedy at law.

(2) Res adjudicata by reason of the judgment of the Hudson Circuit Court.

(3) Laches. 20

(4) Election of remedy, the complainant having submitted to the jurisdiction of the Circuit Court, could not withdraw therefrom.

I.

Complainant's Equitable Remedy.

The complainant prays in his bill (1) that said note be reformed so as to express the true intention and meaning of the parties; (2) that if it appears that the complainant carried out the terms of said agreement that said note by decree of this court be cancelled and destroyed; and (3) an injunction restraining the defendant from proceeding with its action at law. 30

The appellant contends that the oral agreement alleged by a complainant-respondent constituted a delivery upon a condition precedent, and that as such it was a defense and admissible at law, and cites section 16 of the Negotiable Instruments law on page 587 of the laws of 1902. 40

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto; as between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under authority of the party making, drawing, accepting, or endorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not
10 for the purpose of transferring the property in the instrument."

The respondent contends, however, that when the condition of delivery also includes a fraud in the consideration, we then have such a fraud that a court of law cannot deal with.

"It is true that the note was given as a part of a transaction with a color of consideration, so that it is highly probable, if not
20 certain, that no defence can be made to it at law, but it is still true that the complainant did not owe the defendant any such sum of money."

O'Brien v. Paterson Brewing and Malting Co., 69 N. J. Eq., 128.

Fraud in the execution could be shown at law, but fraud in the consideration could only be shown in a court of equity.

"Whether a release tainted by fraud can be
30 set aside and declared void in a court of law, or whether the assistance of a court of equity is necessary, depends upon the nature of the fraud. Where the fraud is practiced in the execution of the instrument—as where it is misread to the releasor, or where there is a surreptitious substitution of one paper for another, or where a party is tricked into signing an instrument which he did not intend to execute, or where advantage is taken of the mental or physical condition of the releasor—in
40 all such cases a court of law may take cog-

nizance of the fraud on the ground that the legal existence of the instrument is in question. The question is, whether the writing in the form of a release has acquired original validity as a contract, and is a legal question.

"But where the releasor knows the character of the instrument he signs, and intends when he signs and delivers it that it shall have the effect and purpose which the law imputes to it, but there is fraud in the representations used to induce him to agree to a settlement of his claims—such as false statements as to the nature and value of the consideration, or as to the extent of his injuries—in all such cases the instrument must be held valid in a court of law, and relief from its effect must be sought in a court of equity."

> 24 Am. & Eng. Encyc. of Law, 318 ("Release and Discharge").

And see

> *Connor v. Dundee Chemical Works,* 21 Vr. 257;
> *Waln v. Waln,* 53 N. J. L., 429;
> *Fivey v. Penn. R. R. Co.,* 66 N. J. L., 23-24;
> *Zdancewicz v. Burlington Co. Trac. Co.,* 77 N. J. L., 10;
> *Rogers v. Colt,* 1 Zab. 18, 704;
> *Stryker v. Vanderbilt,* 1 Dutcher, 482;
> *Hudson v. Inhabitants of Winslow,* 60 Vr. 437.

There is nothing in the section of the statute quoted to indicate that it was the intention of the statute to exclude the well known and time-honored jurisdiction of courts of equity to deal with questions of fraud, or to take away from said court its power of reformation or cancellation of written instruments on the ground of fraud.

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II.

The proceedings at the Circuit Court and their effect on the rights of the complainant to secure equitable relief.

In answer to the complaint of the Brewing Company filed in the Hudson Circuit to recover the
10 face of said note, to wit, $12,000, and accrued interest, the defendant Gallagher sought to file an answer setting up the facts enumerated in the bill subsequently filed by him in the Court of Chancery. On motion to strike out Gallagher's answer it was argued by Gallagher's counsel that his defenses were legal, and the contrary was argued by the Brewing Company that his defenses were equitable. That his defense was equitable seems proven by the words of counsel for the
20 Brewing Company in the brief submitted to the Circuit Court.

> "It is hardly necessary to go outside of this State to find decisions respecting the rule of admission of such evidence. Since the case of *O'Brien v. Paterson Brewing and Malting Company,* 69 N. J. Eq., 117, carefully reviews the leading cases, including many of those above referred to, and lays down the rule followed by our courts, under the ruling of this case such a defense as proposed by the defendant is purely an equitable one, if a defense at
30 all."

The trial judge adopted this view of the plaintiff in the action at law, and in his opinion, said:

> "Plaintiff by affidavit proof presented a prima facie case as required by said rules (referring to rules 57 and 58 of the Practice Act). Defendant replied by affidavit proof *presenting a defense not maintainable in law, but clearly analogous to the case presented in*
40 *O'Brien v. Paterson Brewing and Malting*

Company. The defense presented to be sustained required parol proof of a contemporaneous parol promise on the part of the payees of the note, the plaintiff, that the defendant should not be called upon to pay the note in violation of the rules of evidence which excludes parol evidence to contradict the terms of written instruments.

"Therefore the answer should be stricken out and plaintiff should have rule for judgment final."

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At this point there were but two courses left open to Gallagher. He could appeal from the ruling in the Circuit, or he could file a bill in equity. The respondent Gallagher is not in the position of one who has chosen a court of concurrent jurisdiction in which to litigate his claim. He is the defendant and being summoned to a court of law he then, to the best of his ability, endeavors to sustain his defense in that court, and when that court closes its door to him is he not justified in accepting that ruling and pursuing his remedy in a court of equity as indicated by the trial judge? We admit that the respondent could not speculate on the outcome of the Circuit Court, and being aggrieved at its decision then apply to the court of equity. This would in effect be appealing from a decision at law to the court of equity, which of course is not admissible.

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Prior to the Practice Act of 1912 a rule striking out a sham plea was not reviewable. It would seem, however, that by section 15 of said act that a right of appeal now exists.

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"Subject to rules, any frivolous or sham defense to the whole or to any part of the complaint may be struck out; or, if it appear probable that the defense is frivolous or sham, defendant may be allowed to defend on terms. Defendant, after final judgment, may appeal from any order made against him under this section."

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Section 15, Practice Act of 1912. But the respondent contends that he is not bound in law to further test the jurisdiction of a court at law.

In the case of *Monmouth County Electric Company v. Township of Eatontown,* in which case a bill was filed restraining the defendant from proceeding from entering final judgment against the complainant in the Monmouth Circuit upon the finding of the judge of that court *who tried*
10 *the cause by consent without a jury,* and from issuing execution or taking any action or proceeding for recovering the amount found due by the court, the court refused to take jurisdiction because all of the facts had been presented to the trial court. The court however, says:

> "Nor is this a case where the equitable estoppel has been erroneously excluded from consideration by the law court in the mistaken belief that such defense was cog-
> 20 nizable only in equity. In such case the party *whose equitable estoppel has been erroneously disregarded in the law court is not obliged to take a writ of error,* but may come into a court of equity to have his equitable estoppel recognized and tried, and thereupon the inability of the law court to take cognizance of the equitable estoppel will be deemed res adjudicata between the parties."
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> 74 N. J. Eq., 579.
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> 30 "A defendant to an action at law, who, by pleading therein, has submitted himself to the jurisdiction of the common law tribunal does not thereby forfeit his claim to relief in equity.
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> "Though the equities of the bill be all denied, the court will, in its discretion, hold the injunction till the hearing."
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> *Simon v. Townsend,* 27 N. J. Eq., 302;
> *Phillips v. Pullen,* 45 N. J. Eq., 157.
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> "Where a defendant, in an action at law,
> 40 offers to prove an estoppel in pais against

the plaintiff, and the offer is overruled by the trial court, on the ground that the defense is not cognizable in such action, and the defendant takes no exception but acquiesces in such ruling as the law of the case, he is not estopped from filing a bill in a court of equity setting up the same facts, to enjoin the enforcement of a judgment obtained against him, in the said action.

* * * * *

"In this posture of the case, we think that there were two courses of conduct left open to the defendant. He could take an exception to the ruling of the court, and, upon a judgment against him, test the accuracy of said ruling by a writ of error. By such action he would undoubtedly be estopped from litigating the same question anew in another court.

"But we think he could also accept the ruling of the trial court as the law of the case, and acquiesce in the correctness of the doctrine thus laid down, namely, that the defense thus offered was one not cognizable by a court of law in such an action. This the defendant did in the present case.

"Now, when the latter course of conduct is adopted, we think the better rule to be, that a defendant is not estopped from invoking the aid of a court of equity in establishing the equitable defense which has been thus overruled in a court of law. We think he had the right to accept the law laid down in the trial of the first cause as the law of that case.

"In respect to the case made by the bill on the facts, it is sufficient to say that the facts stated therein justified the court of chancery in making the decree overruling the demurrer."

Borcherling v. Ruckelshaus, 49 N. J. Eq., 340.

"Where an equitable defense to an action fails only because it was not cognizable in the law court, such result will be no bar, to the

action of a court of equity, in applying such equitable remedy to the relief of a defendant by enjoining the collection of the judgment recovered in such action.

"Such a defendant is not required to first test the accuracy of the ruling of the law court by writ of error before proceeding in equity. He may accept the ruling of the law court and pursue his remedy at once in the court of equity."

10 *Headley v. Leavitt,* 65 N. J. Eq., 748; 15 Cyc., 265-267.

III.

Striking out the defendant's answer was not a hearing on the merits.

This point is raised at this time because it was contended by the appellant that this matter was decided on its merits in the circuit, and therefore under the ruling of *Monmouth County Electric* 20 *Co. v. Eatontown,* 74 N. J. Eq., 578, above quoted, that equity will not take jurisdiction of the said matter. In that case, however, it appears that the case was tried by consent of the parties before a judge without a jury, and that the grounds for equitable relief on a bill subsequently filed to restrain proceedings under the judgment, was based largely upon errors of the trial judge during the course of the trial, which of 30 course were not reviewable in a court of equity, the court saying:

"It is unnecessary to point out that this court will not review the decisions of the law court in regard to that matter."

By a reference to the opinion of the Judge at the Circuit in the case at bar, it will be seen that he had before him rules 57 and 58 of the Practice Act of 1912.

40 "When an answer is filed in an action

brought to recover a debt or liquidated demand arising—

"(a) Upon contract express or implied, sealed or not sealed; or,

"(b) Upon a judgment for a stated sum; or,

"(c) Upon a statute;

the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, *unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend.*" 10

Rule 57 Practice Act of 1912.

And the respondent contends that under this rule the opinion of the trial judge was that the defendant Gallagher had not shown such facts as may be deemed *by the judge hearing the motion suffcient to entitle him to defend.*"

The appellant urges that the motion to strike 20 out goes to the merits of the complaint, and judgment entered on an order to strike out is final and conclusive as if rendered upon proof of the facts, and cites in support of this contention *Brennan v. Berlin Iron Bridge Co.*, 71 Conn., 490. But a reference to this case will show that the facts are entirely different. In this case a demurrer was filed to a petition, which demurrer was sustained and subsequently a second complaint was filed in the same court on practically 30 the same facts, and the court ruled that the petitioner should have appealed from the ruling sustaining the first demurrer.

This reasoning of course is clear when we consider that the demurrer admits the facts to be true and again filing a petition in the same court was merely seeking a repetition of the same cause of action, which as between the parties would have been res adjudicata by reason of the 40 previous demurrer.

It is plainly to be seen that were the facts taken as true in the Gallagher case at bar, they would manifestly have been a complete answer to the action on the note. It therefore appears that the only interpretation of the opinion of the trial judge is that he deemed the defense equitable and therefore not admissible in the action at law, and we contend that the question of passing upon the merits of the controversy, as
10 to their truth or falsity, was never in the mind of the trial judge.

IV.

The matter is not *res adjudicata.*

If the rule striking out Gallagher's answer in the Circuit Court was a determination on the merits, then the question would arise as to whether or not the matter was res adjudicata between the
20 parties. The respondent contends that he never had his day in court and that the defense raised by his answer in the Circuit Court was never passed upon.

See opinion of Circuit Court Judge, page 12 of the case.

Judgment not binding unless the Court had jurisdiction.

23 Cyc., 1222.

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A judgment is not conclusive on any point or question; nor the action having been at law, of a claim or a defense which would be cognizable only in equity.

23 Cyc., 1317;
Featherstone v. Bethywski, 75 Ill., App., 59.

"A judgment on the merits in a court of law will be conclusive upon the parties as

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to all issues litigated and adjudged, in any subsequent proceedings between them in a court of equity, except as to claims or defenses which were of a purely equitable character, and therefore not properly cognizable at law."

23 Cyc., 1222;
Phillips v. Pullen, 45 Eq., 830.

"A court of equity not only has power, but it is its duty to set aside a judgment obtained through fraud, accident or mistake, where the defeated party has no remedy at law." 10

Sanford v. White, 132 Fed., 531.

V.

Equity has jurisdiction.

The court of equity has at least concurrent jurisdiction of the allegations set up in the respondent's bill, and as to the powers of reformation and cancellation prayed for in the respondent's bill, arising out of fraud in the consideration of said note, equity has exclusive jurisdiction. 20

See cases above cited.

Equity possesses general jurisdiction in cases of fraud as well as in cases where the legal remedy is clear, admitted and complete.

Anderson v. Eggers, 63 Eq., 264. 30

Where a court of equity gives a better remedy an action at law will be restrained.

Heywood v. Jarvis, 27 Eq., 247.

Where it is doubtful if a remedy at law is complete equity will grant relief.

Dawson v. Leschziner, 72 Eq., 1.

In the case of *Henninger v. Heald,* 51 N. J. Eq., page 75, Vice Chancellor Bird cites the case of *Hughes v. United States,* 4 Wall., 232, which says: 40

"It appeared that one Sewell had commenced a suit respecting his rights under a patent, which was carried on through various stages, but that the suit was dismissed before final hearing upon the merits for want of jurisdiction and want of proper parties, and also because of defective statements as to cause of action. The Court said: 'It requires no argument to show that judgments like these are no bar to the present suit. In order that a judgment may constitute a bar to another suit, 10 it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceedings, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.' *Wells Res Adjudicata,* Sec. 455, etc.; *Bigelow v. Winsor,* 1 Gray, 301."

20 "Where the Court in the first suit had not power to receive material evidence, which evidence if admitted may have led to a different result, which evidence is admissible in the second suit, the judgment of the first suit is not a bar to the second."

Duchess of Kingston's case, 2 Smith's leading cases;
Riker v. Hooper, 35 Vt., 457.

We cite the case of *O'Brien v. Paterson Brew-* 30 *ing & Malting Company,* 69 N. J. Eq., page 117, quite fully because the action of the trial judge of the Circuit seems to have been based on the ruling of Vice Chancellor Pitney in the *O'Brien* case, as the trial judge states in his opinion:

"The defendant replied by affidavit proof and presented a defense not maintainable in law, but clearly analogous to the case presented in O'Brien v. Paterson Malting & Brewing Company."

40 In the *O'Brien* case the complainant sought an

injunction restraining an action at law upon a promissory note given under practically the same conditions as in this case, which were: that defendant Brewing Company had installed two or three saloon keepers in a saloon at 101 Hudson Street, Jersey City, who had been unsuccessful, finally prevailed upon complainant O'Brien to take over the business at said place and to sell their beers exclusively, whereupon O'Brien paid $275 to the saloon keeper then in the premises 10 and gave a note for $2902.65 payable on demand to the Brewing Company, secured by a chattel mortgage upon the fixtures of the saloon; complainant then failing to live up to his agreement to sell product of the defendant, upon the ground that the product did not appeal to the tastes of his customers, the Brewing Company sought to take judgment upon the note; the action in Chancery being brought to restrain such law proceedings, the Vice Chancellor said: 20

> "I stop here to say by way of explanation that this practice of brewers of beers owning the fixtures of beer saloons—holding a chattel mortgage thereon—when they do not hold the title to the same, and sometimes having a long lease therewith, is very common—the object being to enable the brewer to compel the saloon keeper to purchase his beer from the brewer, and so long as he does that and keeps up a good trade by selling a good deal of beer and paying for it, it is well understood among saloon keepers that the mortgage and the debt 30 which is secured will not be enforced. * * * The practice of brewers either owning or controlling under a chattel mortgage the fixtures in a beer saloon, and using such control for the purpose of making sale of their beer, is so well known as to be almost a matter of common knowledge. * * * Against any relief is urged the time honored rule that parol evidence cannot be used to vary or contradict the terms of a written contract. Without stopping at this moment to enumerate and classify 40

the numerous exceptions to that rule, especially in a Court of Equity, it is sufficient to say that the evidence so relied upon does not tend to vary the terms of the contract. There is no contention that the complainant did not understand that he was signing an absolute promissory note in favor of the defendant, payable one day after date, and negotiable in its terms. *What he does contend is that it never had any binding effect upon him in equity.* To show this by parol is no more a
10 breach of the rule invoked than it is to prove that an absolute deed is given as a mortgage, or that a promissory note is given by the maker to the payee without consideration and as an accommodation to the latter, or that it was given for a consideration that had wholly failed or was a mere gift."

The principle in this *O'Brien* case was followed in the case of *Sloss Sheffield Steel & Iron Co. v. Aetna Life Insurance Co.,* 70 At. Rep., 384, where the Court (Howell, V. C.) says:
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"The bill alleged that the parties agreed upon the terms of a contract and that these terms were not inserted in the document that was delivered. This is denied by the answer and this is made an issue as to what the contract is. Parol evidence is admissible on this class of issues, for the plain reason that in most cases no other evidence exists. To deprive the Court of the benefit of the parol evidence on an issue as to what the contract is, would be to destroy its jurisdiction to reform
30 contracts and to avoid them for fraud or mistake,"

and then cites the remarks of Vice Chancellor Pitney in the *O'Brien* case, supra.

In the case of *Wilbur v. Jones* (Court of Errors and Appeals, decided 1912), 80 N. J. Eq., page 521, at page 523, the Court affirms the opinion of Vice Chancellor Walker, wherein he repeats the statement of the law as set forth in the *O'Brien* case by Vice Chancellor Pitney and set forth above.
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In the case of *Wirtz v. Guthrie,* 81 N. J. Eq., p. 271, at p. 279, decided by Vice Chancellor Emory, the Court said:

"The question whether the agreement of which reformation is sought is executory or has been executed is the vital matter as to denying the protection of the statute. If by mutual mistake the executed agreement is contrary to the previous parol agreement of the parties, the party who had received the benefit of the mistake and insists upon holding this benefit under an executed contract, commits a fraud by so insisting, and relief against mistakes thus resulting in fraud are not within the protection of the statute of frauds, any more than frauds against the statute of other kinds. Relief against the statute in the whole class of cases involving part performance of parol contracts, or of parol variation of written contracts, is expressly based on this ground of preventing the accomplishment of fraud, and this is one of the requirements for relief,"

and cites the *O'Brien* case, supra.

In the case of *Oakridge Co. v. Toole,* 82 Eq., 541, decided by Vice Chancellor Lewis, Nov. 1, 1913, the Court holds:

"1. Where the parties to an agreement stipulated at the time it was made that it was to have no binding effect upon them, such an agreement, though executed, was of no force and effect at law or in equity.

"2. Parol evidence is admissible in equity to show for what purpose a written agreement to repurchase land was executed,"

citing *O'Brien v. Paterson Brewing Co.*

The respondent therefore contends that by virtue of the ruling in the *O'Brien* case which has been approved by the Court of Errors and Appeals, and followed in a number of suits in the Court of Chancery, the respondent is entitled to a hearing on his bill in a court of equity. If the *O'Brien*

case was sufficient to oust the respondent from the jurisdiction of the Circuit Court, it would seem that it should be sufficient law to establish the respondent's right in a court of equity. All the respondent seeks in this case is his day in court. Should this Court decide that the order of Vice Chancellor Lewis refusing to strike out the respondent's bill of complaint was erroneous, the respondent would be without relief either in law or 10 equity, he having given a bond of $33,000 as required by the Chancery rules, to indemnify the appellant by reason of the injunction restraining the appellant from proceeding with his judgment at law, and unless this Court sustains the Court of Chancery, or holds the bill of complaint pending an appeal in the court of law, if such could be taken, the defendant-respondent would be called upon to pay the judgment as provided in his said bond, without ever having his defense passed upon.

20 We contend that there was no error in the ruling of the Vice Chancellor refusing to strike out the respondent's bill of complaint.

Respectfully submitted,

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Between

DENNIS GALLAGHER,
Complainant-Respondent,
against
LEMBECK & BETZ EAGLE BREWING COMPANY,
Defendant-Appellant.

On Appeal. 10

BRIEF OF APPELLANT.

The bill of complaint in this action was filed to restrain the defendant from collecting the amount due upon a judgment recovered by it in the Hudson County Circuit Court against the complainant upon complainant's promissory note. 20

The salient points of the bill are:

1. That at defendant's solicitation, complainant opened a saloon furnished by defendant at a cost of $16,000, the lease of the premises being signed by the defendant and standing in its name;

2. That afterwards complainant, because defendant represented to him that he was receiving part of the profits, paid defendant $4,000 on account of the cost of the furnishings; 30

3. That at defendant's suggestion, in order to have defendant's books "appear correct," and to assure the sale of defendant's beers in the saloon, complainant gave defendant his note for $12,000, being the amount spent by defendant for the furnishings;

4. That before the note was made and delivered, 40

defendant agreed that no attempt would be made to collect the note so long as complainant continued to sell defendant's product and so long as he, on discontinuing the business, returned the furnishings to defendant, whereupon the note would be cancelled and destroyed as though never made;

5. That complainant relied on the representations and was induced thereby to make and deliver the note and several renewals thereof;

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6. That the note was not presented for payment and subsequently, in 1909, complainant discontinued business and returned the fixtures and demanded the note;

7. That defendant failed to comply with the demand and May 14, 1914, began suit on the note in the Hudson County Circuit Court;

8. That complainant filed an answer setting up all of these allegations;

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9. That the circuit judge, in an opinion dated March 17, 1915, decided that while complainant had an equitable defense to the action on the note, the answer presented no legal question which could be decided in a court of law and awarded judgment for defendant;

10. That (as appears from a copy of the opinion of the circuit judge annexed to the bill) complainant filed an answer presenting a defense

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which in the opinion of the circuit judge was not maintainable in law, and, motion for that purpose having been made, should be struck out; that subsequent to the motion and before the court passed thereon, complainant, on notice to this defendant, abandoned his answer in the law suit and moved for leave to file an amended answer under which he contended (1) a condition precedent to the delivery of the note, (2) that said note was obtained by fraud, (3) payment and sat-

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isfaction of the note by delivery of the fixtures

and furnishings; that the court, after considering the proofs presented in accordance with the rules of practice by both parties upon both motions, found that the proofs of this defendant made more positive and certain its right to recover the judgment while none were presented by complainant of facts deemed by the court sufficient to entitle him to defend; that therefore the answer was struck out, leave to file the proposed amended answer was denied and judgment was awarded this defendant. 10

None of the questions involved are complicated or difficult, but are simple and direct and arise between the original parties to the contract.

Briefly stated, defendant-appellant contends that the Circuit Court has jurisdiction of the subject matter of the cause and that its judgment is a final judgment upon the merits of the case and is res judicata between the parties; but that if the Circuit Court had no jurisdiction, the complainant has been guilty of laches in the enforcement of his equitable rights in submitting to the jurisdiction of the law court and neglecting to file his bill in this court until after judgment had been entered against him in the law court upon the merits of the case. 20

Of course, if the law court had no jurisdiction of the subject matter, then its judgment is not res judicata between the parties. 30

Because of the failure of the bill to state in explicit terms whether complainant intends to rely upon a conditional delivery of the note for the relief prayed, or whether he intends to show a contemporaneous agreement made at the time of the delivery of the note, the bill is here considered from the several points of view.

The first view of the subject is that the defense sought to be made in the law suit was cognizable and maintainable in the law suit in this (1) that 40

the note of complainant was made and delivered upon a condition precedent—that upon the happening of an event it was to be cancelled and destroyed as though never made (Paragraph 3 of the Bill); (2) that the making and delivery of the note was procured through fraud and false representations or that it was fraudulently appropriated to a use for which it was not intended (Paragraph 3 of the Bill); (3) that either there was no consideration for the making of the note or that
10 there was a partial or complete failure of consideration; (in other words, complainant says he gave the note that defendant's books might appear correct; that he received nothing for the note; that having returned the goods, no obligation to pay the note came into being;) (4) that (if the note was effective as an obligation) it was satisfied by the delivery of goods to the defendant in pursuance of an oral agreement respecting the satis-
20 faction of the note.

All of these contentions present well known, time honored defenses at law and the discussion under Point I is made having in mind the legal defenses interposed in the original law suit.

POINT I.

It appears upon the face of the bill that the defenses to the law suit sought to be interposed by complainant were
30 maintainable, if at all, in law, hence the bill shows no ground for equitable relief in this cause.

A. (a) *Delivery upon condition precedent;* (b) *Fraud;* (c) *Failure of consideration;* (d) *Payment.*

The defenses alleged to have been set out in the complainant's answer in the law suit were cognizable and available in the law suit for the following
40 reasons:

a. *Evidence of the making and delivery upon a condition precedent and a failure of the contingency is admissible in defense of an action at law upon a written instrument.*

There was to be no liability on the note, no attempt was to be made to collect it and it was to be cancelled *as though never made,* unless complainant neglected to sell defendant's product, or, on discontinuing business, failed to return the fixtures (Paragraph 3 of Bill). 10

> "Every contract on a negotiable instrument is incomplete and revocable, until delivery of the instrument *for the purpose of giving effect thereto;* as between immediate parties and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under authority of the party making, drawing, accepting or endorsing, as the case may be; and, in such case, the delivery *may be shown to have been conditional or for a special purpose only,* 20 and not for the purpose of transferring the property in the instrument" (Comp. Stat., Sec. 16, p. 3737; P. L. 1902, p. 587).

> "As between the immediate parties to a promissory note, its real character may always be shown. If the payee sues upon it, it may be proved that the note was really given for his accommodation."

> *Peoples Bank v. Schepflin,* 73 N. J. L., 29-35. 30

The bill charges that while complainant sold defendant's products, the note should not be presented for payment, nor discounted, and upon a discontinuance of business and a return of the fixtures, the note would be—not satisfied or paid by the return of the fixtures—not returned to the complainant—but destroyed and cancelled as though never made. In other words, the note was not to come into being as a binding contract until the happening of an event. This is an allegation 40

of the making and delivery of the note upon a condition precedent. A discussion of the rule is had in *O'Brien v. Paterson Brewing & Malting Co.*, 69 N. J. Eq., 117-134, with a citation of the decisions from other states in which the elements of conditional delivery are discussed. (The rule is cautiously applied and evidence of the conditional delivery required to be clear and convincing.)

Hence this defense might have been offered in
10 the law court and proven, had the court been convinced of the truth of the facts alleged.

b. *Fraud in the making of a note, or the fraudulent appropriation of the note to a use for which is was not intended, is a defense to an action at law on the note.*

Chaddock v. Vanness, 35 N. J. L., 517.

Complainant charges that he relied upon the representations which defendant made and re-
20 fused to abide by and was induced thereby to make and deliver the note (Paragraph 4 of the Bill), and that the renewals were made on the same conditions (Paragraph 5).

Fraud and false representations inducing the making of a promissory note as defenses to an action at law between the parties to a note, are too well known to admit of comment here. A fraudulent misappropriation of the note to a use for which it was not intended is a defense between
30 the original parties.

Chaddock v. Vanness, supra.

c. *Failure or want of consideration may be proven as a defense to an action at law upon a promissory note.*

Comp. Stat., Sec. 28, p. 3738; P. L. 1902, p. 589.

The complaint shows that the whole considera-
40 tion for which complainant gave the note was the

possible failure of complainant to sell defendant's products in the saloon and to return the furnishings on the closing of business at the saloon; that this consideration was wanting or wholly failed since complainant sold defendant's product and, on closing business, returned the goods.

d. *Payment, or satisfaction of the note, is a legal defense.*

The bill alleges that the complainant, in pursuance of his agreement, returned the fixtures to the defendant. While the note, in terms, provides for the payment of a certain sum of money, yet if the payee accepts payment in some other manner, he cannot thereafter deny such payment.

> "In defense of an action upon a promissory note *when it is between the parties to the note,* and where the object is to show that the note has been satisfied, evidence is admissible to show that *contemporaneously with the making of the paper,* it was agreed between the parties to it that merchandise should be taken in satisfaction of the amount to become due, *coupled with proof that the merchandise was delivered,* according to the agreement."
>
> *Buchanon v. Adams,* 49 N. J. L., 636.

In the case above cited, it was objected that the testimony offered was inadmissible, but the opinion of the chancellor, dealing with the question, finding no error "manifest in the record," states:

> "The testimony objected to was to the effect that Buckingham, contemporaneously with the giving of the note, agreed with the defendant that lumber would be taken in payment of it, and that the note would not be negotiated. This testimony, supplemented by proof that *such agreement was executed,* on the part of the defendants, by the delivery of more than sufficient lumber to pay the note, was admitted for the purpose of showing that the lumber was in fact received in payment and satisfaction of the note and not for the pur-

pose of varying the terms of the written promise to pay" (p. 637).

If the right to equitable relief depends upon the proof of (a) a delivery of the note upon a condition precedent, or (b) fraud in the procuring or a misappropriation of the note, or (c) failure or want of consideration, or (d) payment or satisfaction of the note, then, as shown, the legal remedy is clear.

10 B. (a) *Conditional delivery by contemporaneous oral agreement.*

But if complainant means to contend that the facts alleged do not constitute the defenses above reviewed, then it must be concluded that either he means to vary the terms of the written instrument by oral testimony or to show that the making and delivery of the note was not the whole agreement between the complainant and defendant and that in the interpretation of the contract the real in-
20 tention of the parties as expressed in the whole of their agreement should be effectuated. Equity will not permit the terms of the written instrument to be varied in this case any more than will the law; but the true view of the situation is that the making and delivery of the instrument did not constitute the whole agreement between the parties and upon this ground alone will equity here act to enforce the real agreement. *And equity will act,*
30 *in such a case, only if the parties are so situated that the defense cannot be interposed in the law suit or if the defense has not been so interposed.*

The note was not negotiated and the parties stand in the position in which they stood at the time of the making of the agreement. In this situation, the defense can be interposed in the law suit. And the bill states that it was so interposed.

The admissibility of parol evidence in relation to commercial paper is fully considered by the
40 opinion of Mr. Justice Depue in the Court of Errors and Appeals in *Chaddock v. Vanness,* 35

N. J. L., 517, and the principles there laid down are applicable to this case although the statutes relating to commercial paper have changed the effect of endorsements. Vanness, the payee of the note, sought to hold Chaddock liable on it either as a guarantor, maker or first endorser. The facts proved were that one Woodward made the note for a precedent debt due from him to Vanness. Chaddock consented to be security on the note and sat down and drew the note and Woodward signed it. Then Chaddock turned the note over and put his name on the back of it and handed it to the claimant. Upon these facts the judge found that Chaddock put his name on the note as surety for Woodward and not as a second endorser to enable Vanness to get the note discounted at the bank. 10

> "The ground upon which this evidence was objected to was, that it changed the written contract which arose from the note, and the endorsement of it by the parties whose names were written on the back. The argument was that the note, when produced, established a contract, whereby the defendant became the second endorser of the note, and that no legal evidence could be received to vary the legal effect of that contract of endorsement and fix the defendant with a liability thereon in any other relation. It is insisted the admission of this evidence was in violation of the rule of law that parol evidence is inadmissible to alter or vary a contract which is in writing. 20 30
>
> "The principle just stated is an inflexible rule of evidence. If it applies to the circumstances of this case, and to the subject matter of this litigation as between these parties, this court must give effect to it.
>
> "Parol evidence may undoubtedly be given of the circumstances under which a note or its endorsement was made in order to show a want or failure of consideration or illegality in the transaction or to present the defense of a fraudulent appropriation of the note to a 40

> purpose for which it was not intended, or to establish a contemporaneous agreement as to the mode of payment which has been executed in satisfaction of the debt" (p. 520). * * *
>
> "As between endorsee and his endorser * * * parol evidence is competent to show that the endorsement * * * *was upon a consideration which was conditional and not performed*" (p. 520).

The defenses alleged to have been presented to the law court constituted legal defenses to the
10
action, and, evidence tending to establish them having been presented to the court as shown by the opinion of the court attached to the bill, it must be presumed that the law court held that such defense was not established. If the law court so held, equity will not review that decision.

Monmouth Co. Electric Co. v. Township of Eatontown, 74 N. J. Eq., 578-579.

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POINT II.

Complainant has an adequate remedy at law by appeal from the judgment of the Circuit Court.

As shown hereafter, complainant has a right of appeal from the judgment of the Circuit Court striking out the answers and awarding judgment.

POINT III.

30

Complainant was justly indebted to defendant for $12,000, for which he gave his note.

Granting for the argument that complainant had no remedy at law, under the ruling laid down in this court, complainant was legally indebted to defendant at the time he made and delivered the note.

40
Complainant went into a business of which he was then owner and from which he derived the

profits (Paragraph 3 of the Bill). The furnishings required and installed for use in that business cost $16,000, of which sum complainant afterwards paid defendant $4,000 (Paragraph 2 of Bill). He subsequently gave his note of $12,000 for the balance to the defendant upon a renewal of which suit was brought.

The case is analogous in this respect to that of *O'Brien v. Paterson Brewing & Malting Co.,* 69 N. J. Eq., 117, in which O'Brien, the complainant, signed a chattel mortgage for a sum of money in excess of the value of the chattels mortgaged, which sum he never received. The court said: 10

> "Now, to the extent of the value of the fixtures as they stood for the purpose of the use that was being made of them, the complainant became justly indebted to the defendant, and the question is whether, under the circumstances, having signed his note under the express pledge that it would not be enforced, it is equitable and just that it should be enforced (p. 129). 20
>
> "And if it appears that they (the fixtures) were worth for that purpose, more than $500, I will give the complainant relief upon condition that he pay the defendant the excess over $500" (p. 137).

In other words, complainant must pay *in money* the amount he actually received *in value,* to wit, the value of the fixtures, which, in this case, is the amount for which the note was signed.

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POINT IV.

Complainant elected to submit to the jurisdiction of the law court and he will not now be heard to complain.

Complainant elected to submit to the jurisdiction of the Circuit Court, and having drawn the fire of the Circuit Court and having been disappointed thereat, now seeks to relitigate the whole
10 matter in equity.

He filed an answer in the law court setting forth all the things charged in the bill (Paragraph 10 of Bill).

If the matters alleged constitute an equitable defense, two courses lay open to the complainant upon the commencement of the law suit on the note, if he intended to rely upon his equitable defenses. He might have filed his bill in equity
20 setting up his alleged equitable rights, or he might have applied to the judge of the law court to transfer the cause to equity. He elected to file his answer setting up a legal defense to the action, thereby submitting himself to the jurisdiction of the law court and he cannot now be heard to complain of the judgment of that court. His position is plainly that of one who speculated on the outcome in the court of original jurisdiction before going into another jurisdiction to have the original
30 action restrained. Even if there was substance to the points raised, he cannot, at this late date, equitably ask for any consideration of them at the hands of this court.

Bigelow v. Old Dominion, 74 N. J. Eq., 457-520.

"To allow a removal after such a trial (demurrer to complaint setting up facts) would be to permit 'a party to experiment on his case in the state court, and, if he met with
40 unexpected difficulties, stop the proceedings

and take the suit to another tribunal.' This, as was said in Removal Cases, 100 U. S., 473, could not have been the intent of Congress."

Alley v. Nott, 111 U. S., 476.

"A court of equity does not interfere with judgments at law unless complainant has an equitable defense of which he could not avail himself at law *because it did not amount to a legal defense,* or had a good defense at law which he was prevented of availing himself of by fraud or accident, *unmixed with negligence of himself or his agent.* 10

"He, plaintiff, owed no duty to his adversaries except the opportunity of defense. That they have enjoyed, if not improved, and if it has not been as available as it would have been in case they had limited themselves, as they claim their opponent should have been, to the special contract which they now insist was binding upon both him and them, it was, as found in this record in part, at least, '*because their counsel had undue confidence in legal defenses against the entire demand and therefore did not apprehend the full importance of the interests of his clients of being prepared with proof of the special agreement.*' 20 That agreement they sought to avoid on the ground that it was illegal and immoral to contract for any compensation for the services rendered, and having deliberately staked their case upon that single issue, they seek to impute to their adversary the responsibility of their mistake."

Embury v. Palmer, 107 U. S., 3-11, 15. 30

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POINT V.

Complainant has been guilty of laches in pursuing his alleged equitable rights.

This defendant contends that in failing to come into equity for six months after the law suit was started and in waiting until the law court rendered a decision upon the proofs offered by him, 10 complainant has been guilty of such laches as bars him from relief now, if, originally, he were entitled to any.

POINT VI.

The bill shows that the matters in controversy are res judicata between the parties.

Complainant filed his answer in the law suit 20 setting up as a defense to the action at law, all of the matters charged in the bill. The defense was struck out and final judgment awarded the defendant, Lembeck & Betz Eagle Brewing Company. (Paragraph 10 of the Bill.)

The motion to strike out a defense goes to the merits of the controversy, that is, the truth or falsity of the facts alleged, and, of necessity, the judge must examine into them and pass upon 30 them before they are submitted to a jury, and judgment entered on his order is as final and conclusive as if judgment had been rendered upon proof of their truth.

Brennan vs. Berlin Iron Bridge Co., 71 Conn. 490.

There is nothing new in the practice in striking out sham or false pleadings, and entering judgment as though no plea were filed. Our prac- 40 tice is laid down in rules 57 and 58 of the Prac-

tice Act (Ch. 231, P. L. 1912; Sup. Ct. Rules 80 and 81;) as follows:

"57. When an answer is filed in an action brought to recover a debt or liquidated demand arising (a) upon contract express or implied, sealed or not sealed, * * * the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant, by affidavit or other proof shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend. 10

"58. The motion to strike out shall be made upon affidavit of the plaintiff or that of any other person cognizant of the facts, verifying the cause of action and stating the amount claimed and his belief that there is no defense to the action."

and in Section 15 of the Practice Act of 1912 as follows:

20

"15. Subject to rules, any frivolous or sham defense to the whole or any part of the complaint may be struck out, or if it appears probable that the defense is frivolous or sham, defendant may be allowed to defend on terms. *Defendant, after final judgment may appeal from any order made against him under this section.*"

These sections are a re-enactment of sections 110 and 111 of the Practice Act of 1903.

Says Chitty, in his treatise on pleading, Vol. 1, p. 541, 8th Edition, 12th American Ed.; 30

"Sham pleading, that is, the pleading of a matter known by the party to be false for the purpose of delay or other unworthy object, has always been considered a very culpable abuse of justice and has often been censured and set aside with costs.

An example of such a case is here given: "In debt on a judgment, the defendant pleaded a release destroyed by accident. Upon affidavit that the plea was false, the court allowed 40

> the plaintiff to sign a judgment as for want of plea. (*Smith v. Hardy,* 8 Bing. 435.)
>
> "It is, of course, in general, the sole province of the jury to decide upon the truth or falsity of a mere matter of FACT pleaded by a defendant. But there are many instances in which a plea may be so palpably and manifestly untrue, that the court will assume that IT IS SO, or will, on an affidavit, THAT IT IS FALSE, permit the plaintiff to sign a judgment as for want of a plea and make the defendant or his attorney pay the cost occasioned by the plea, with costs of the application."

10

Our courts have decided that this practice is not an invasion of the right to a trial by jury.

In *Coykendall v. Robinson,* 39 N. J. L., 98, the court says:

> "The question discussed in this case is whether the court below had power to strike out, as a sham plea the general issue, accompanied by the statutory affidavit. * * *
>
> "The plaintiff in error insists that the striking out of the plea is an invasion of the right of trial by jury and that it violates that provision in our state constitution which declares that 'the right of trial by jury shall remain inviolate.'
>
> "Section 133 of the Practice Act (Rev. p. 868) is not in terms an infringement of this constitutional provision. It is limited in its exercise to frivolous pleas—that is, pleas manifestly immaterial or inapplicable to the case—and sham pleas, which are false pleas. In these cases, the defendant has failed to set up a legal defense. He has presented no issue to be tried by a jury, there existing, in fact, nothing to try. It is struck out as a sham plea, and therefore, in this argument, it must be conceded to be a false plea. * *
>
> "The one hundred and thirty-third section of our practice act confers no new power. At law, the judges repeatedly exercised in a great variety of cases the power to strike out sham pleas. This rule was applied to the general issue as well as to other pleas where it appears to be a sham plea. * * *

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30

40

"It is clear that the right which the defendant had at common law to have the issue of fact tried by a jury, was subject and subordinate to the power of the court to strike out a false plea.

"This practice having been fully established in the common law, no invasion was committed of the right of jury trial by enacting it in the form of a statute, notwithstanding the exercise of the right to strike out, jury trial is preserved and upheld inviolate as it existed when the constitution was adopted. * * * 10

"While this power can be clearly maintained, it should be exercised with care and not extended beyond its just limits. The inquiry is simply whether there is in truth, any question of fact to try, and if not, if the defense is a mere pretense, it should be summarily swept away.

"When a defendant on a rule to show cause why his plea be not striken out, or, on application by him to set aside a judgment entered over his plea, shows by his own affidavit or by 20 other testimony that he has a defense stating specifically the grounds of it, a question of fact is presented to be passed upon and he cannot be deprived of the benefit of a trial in the ordinary mode. In that event a case for striking out does not exist and if he is denied a trial by jury, *he will be entitled to review the action of the court by which his legal rights are impaired.*

"The order of the judge which is brought up in this case declares that the plea stricken 30 out is a sham plea. *The finding of the Judge must be assumed to be true until the contrary appears,* and therefore, no error was committed in striking it from the record."

Until the practice act of 1912, a rule striking out a sham plea was not reviewable on error.

Mershon v. Castree, 28 Vr. 484.

But the practice act of 1912, gives the right of appeal from any order which may be made. 40

Judge Campbell held that on motion to strike

out the answers of complainant and for rule for judgment final under rules 57 and 58 of the Practice Act, defendant, by affidavit proof, first presented a case not cognizable in law, but analogous to the case presented in *O'Brien v. Paterson Brewing & Malting Co.*, 69 N. J. Eq. 117, and subsequently presented a proposed amended answer setting up the defenses alleged in the bill but that complainant's proofs were not sufficient 10 under the rules to support the amended answer, (Case, pp. 12-13) and leave to file same was accordingly denied.

Therefore, the law judgment was upon the merits of the case and so appears by the bill of complaint.

The allegations in the bill are in conflict as shown by the following excerpts therefrom which are placed in parallel colums to show that the claims for relief are based upon allegations of fact 20 which admittedly do not exist and to show that the bill lacks that certainty which is required by equity.

Excerpt from Par. 10

"In an opinion handed down by the Honorable Luther A. Campbell, Judge of said Court, dated March 17, 1915, said judge decided that 30 while your orator had an equitable defense to said action upon said note, the *answer filed by your orator* presented no legal question which could be decided in a court of law.

(Case, p. 5, l. 10.)

Excerpt from Opinion.

"The initial motion was, on the 25th day of September, 1914, made by plaintiff, on notice, to strike out the answer of the defendant, and for a rule for judgment final under rules 57 and 58 of the Practice Act.

"*Plaintiff*, by affidavit proof *presented a prima facie case* as required by said rules. Defendant replied by *affidavit proof* presenting a *defense* not maintainable in law, but clearly analogous to the case presented by 40 *O'Brien v. Paterson Brewing & Malting Co.*,

69 N. J. E. 117. The de-
fense presented to the
sustained required parol
proof of a comtemporan-
eous parol promise on
the part of the payee of
the note, the plaintiff,
that the defenda't should
not be called upon to
pay the note, in viola-
tion of the rule which
excludes parol evidence 10
to contradict the terms
of written instruments.
Therefore, the answer
should be stricken out
and plaintiff should have
rule for judgment final.
(Case p. 12, l.10.)

In other words, Judge Campbell did not consider the defense *admissible under the pleadings as filed,* as alleged, but considered the *facts pro-* 20 *posed to be proven* by the defendant, and decided, either erroneously or correctly, that they did not constitute a defense in the law court.

Had the complainant rested there, so far as the proceedings in the law court were concerned, and filed his bill in this court, his claim to right to relief would rest upon more solid foundation, for he then might claim that his equitable rights had been erroneously excluded from consideration 30 by the law court (although this does not appear to this defendant to be the case). But he should still have been confronted by the fact that the Circuit Judge had struck out the answer because the *proofs presented* did not sustain the allegations of the answer, which constitutes a final determination by a court having jurisdiction of the matters presented by the pleadings upon the merits of the case.

However, complainant did not rest there. He 40

abandoned his first defense and moved, on notice, for leave to file an amended answer and filed affidavits to prove the truth of the facts alleged in the proposed answer. These allegations are those of the bill of complaint. The affidavits filed form part of the record of the case in the circuit court. What those allegations were and what the proofs showed are apparent on the face of the bill and opinion forming a part of the bill but again the facts alleged by paragraph 10 of the bill are in conflict with the finding of the court:

10

Excerpts from Paragraph 10.

"Your orator further shows *that he filed an answer setting forth the above mentioned facts* in the Hudson County Circuit Court wherein said action against him was started, and that in an opinion handed down * * * said judge decided that while your orator had an equitable defense to said action, the *answer filed by your orator presented no legal question which could be decided in a court of law and therefore he struck out the answer* of your orator and awarded judgment for the plaintiff.

(Case, p. 5, l. 8)

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30

Excerpt from Opinion.

"Subsequent to the foregoing motion and before the court passed thereon, defendant, on notice to plaintiff, moved * * * for leave to file an amended answer.

"Under said proposed answer defendant contended first, a *condition precedent to the delivery of the note,* namely, that the note should not be effective unless defendant failed to redeliver certain fixtures and furnishings; second that *said note was obtained by fraud;* third, *payment and satisfaction of the note by delivery of the fixtures and furnishings.* * *

"*I am considering the proofs* presented by both parties on both motions.

"The *proofs of plaintiff* presented on the motion to *amend have strengthened and made more positive and certain its right to recover.*

40

> "The position of the defendant did not change. He was still under obligation to present to the court by affidavit or other proofs *such facts as will be deemed* sufficient to entitle him to defend.
>
> "His *proofs* are not so satisfactory as to the first, second and third contentions under his proposed answer. * *
> (Case, pp. 13-14.)

10

In other words, the answer setting up the facts alleged in the bill was never filed. Leave to file it was denied because the defendant did not present to the court such proofs as were deemed sufficient to entitle him to defend.

The concluding paragraph of the opinion:

20

> "The proposed answer does not, in my judgment, present a legal defense to the action, and leave to file same is accordingly denied."

if read in conjunction with that part of the opinion above cited, is clearly erroneous, since it holds that proof of a conditional delivery of a promissory note, the procuring of a note by fraud, and payment and satisfaction of a note does not constitute a legal defense to an action on the note. Read in the light of the discussion by Judge Campbell of the answer, the proposed amended answer and the proofs of the plaintiff and defendant, the words, "the proposed amended answer does not * * * present a legal defense to the action," can only mean that there was no legal defense because there was no defense (*Coykendall v. Robinson,* 39 N. J. L., 98). If Judge Campbell did mean that proof of such defenses could not be introduced under the proposed answer, and

30

40

if proven, would not constitute a legal defense to the action, he was in error and his decision should be reviewed by the Appellate Court, but cannot be reviewed by this court in this proceeding.

This defendant calls the attention of the court to the fact that while complainant has set out in full the opinion of the law judge, he has omitted to set forth the order striking out the answer of the complainant.

10 But the opinion shows that the defense was struck out under Rules 57 and 58 because it was sham and not because the defendant had an equitable defense which might not be heard in the law court.

Judge Campbell was not passing upon any such question and that question was not raised by the motion to strike out under Rules 57 and 58. He was passing upon the truth or falsity of the defenses offered. He decided they were false. He 20 could have struck out the answer on no other ground.

Stripped of all its embellishments, the bill of complaint shows that the defendant secured a judgment in the law court against complainant to which suit complainant had pleaded a perfect legal defense which the law court struck out after a hearing. If that be true, the only remedy is by appeal. Equity will not review the action of the 30 circuit judge.

This defendant contends that it should not be obliged to answer a bill upon the face of which appears conflicting statements as to the proceedings in the law court; which is so indefinite as to leave in doubt the question of whether complainant intends to rely upon an alleged conditional delivery of the note or a contemporaneous agreement relating to its satisfaction. Defendant contends that it is entitled to the strongest presumption 40 that the judgment was rendered upon the

merits of the case until the bill shows conclusively, by setting out the pleadings in the law suit, the opinion and the final order, that the defense proposed was equitable and not cognizable in the law court; and to the presumption that the defense was struck out and judgment awarded because the defense was found to be sham or frivolous until complainant shows to the contrary by setting out fully and fairly the order made by the law court. The decision of the court can be determined only by the orders it makes, and when complainant alleges that the answer was struck out and judgment awarded and does not recite the order striking out and awarding judgment, he has not come into this court in such a manner as to entitle him to be heard and to compel the defendant to answer. If defendant be compelled to answer, he must set up that which complainant, in good conscience, should have set up.

It is respectfully submitted that the bill of complaint should be struck out.

D. Eugene Blankenhorn,
Attorney for and of counsel
with Defendant-Appellant

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INDEX.

Amended Bill of Complaint 1
Notice of Motion 14
Order 18
Notice of Appeal 19
Petition 20
Answer to Petition of Appeal 25

Amended Bill of Complaint.

(Filed, December 6, 1915.)

IN CHANCERY OF NEW JERSEY.

To the HON. EDWIN ROBERT WALKER,

Chancellor of the State of New Jersey: 10

Humbly complaining showeth unto your Honor, your orator, DENNIS GALLAGHER, residing at Jersey City, in the County of Hudson and State of New Jersey.

That many years prior to Eighteen Hundred and Ninety-three and subsequent thereto, your orator was in the liquor business in the City of Jersey City, in the County of Hudson and State of New Jersey, and occupied several retail places with 20 saloons therein, and had built up quite a trade and reputation in such business. That in or about the year Eighteen Hundred and Ninety-three Henry Lembeck, then managing director and President of the Lembeck & Betz Eagle Brewing Company, and one Henry Kellers, an officer of said Company, represented to your orator that they would like to have him open a saloon at the southwest corner of Washington and Montgomery Streets, at Jersey City aforesaid, and sell the 30 products of said Lembeck & Betz Eagle Brewing Company therein, and that the said Lembeck & Betz Eagle Brewing Company would supply moneys necessary to properly fit out and furnish said premises for the purposes aforesaid. That such negotiations were had; that said Lembeck & Betz Eagle Brewing Company and its officers aforesaid obtained a lease upon the premises hereinabove mentioned for a period of five years, with 40

the privilege of renewing the same for a further period of five years; and upon investigation it was found that it was necessary to expend the sum of Sixteen thousand dollars ($16,000) in fitting up the said premises with fixtures, mirrors, etc., for the purpose aforesaid. That such proceedings were had; that said fixtures and furnishings were purchased by and installed under the direction of 10 the said Henry Lembeck and Henry Kellers, officers of the said Lembeck & Betz Eagle Brewing Company as aforesaid, and said saloon business was opened up at said premises; that said fixtures and furnishings bore the trademark of the said Lembeck & Betz Eagle Brewing Company. That your orator purchased from the said Lembeck & Betz Eagle Brewing Company beers, ales, etc., and sold the same in said business. That subsequently the said Henry Lembeck or Henry 20 Kellers represented to your orator that they had put a large sum of money in said fixtures and furnishings, and that they thought inasmuch as your orator was obtaining a portion of the advantage derived from such fixtures he should bear a portion thereof; that after much argument your orator agreed to pay Four thousand dollars ($4000.) on account thereof.

2. Your orator further shows that subsequently 30 he paid to the said Lembeck & Betz Eagle Brewing Company the sum of Four thousand dollars ($4000.), being the amount to be paid by him on account of the fixtures and furnishings installed in said premises.

3. Your orator further shows that subsequently the said Henry Lembeck or Henry Kellers represented to your orator that in order to have its books appear correct, and in order to secure the sale by your orator of the beers, ales, etc., of the 40 said Lembeck & Betz Eagle Brewing Company,

your orator should give to him some sort of agreement or paper which would assure to said Lembeck & Betz Eagle Brewing Company the sale by your orator of its products during the time your orator carried on his business in said premises, and suggested to your orator that he should give to it a promissory note for Twelve thousand dollars ($12,000.), being equal to the expense of said Lembeck & Betz Eagle Brewing Company in **10** the fixtures or furnishings of said premises, representing to your orator at the time that said note would not be presented for payment nor discounted, and no attempt be made to collect the same, and he would never be called upon to pay it if your orator sold the products of said Lembeck & Betz Eagle Brewing Company in said premises aforesaid, during the time he continued business therein, and upon the discontinuance by your orator of business therein would return to said **20** Lembeck & Betz Eagle Brewing Company the fixtures and furnishings installed in said premises, said note would be destroyed and cancelled as though never made.

4. Your orator further shows that relying on the representations of said Lembeck & Betz Eagle Brewing Company so made as aforesaid, your orator, induced thereby, signed a promissory note for the sum of Twelve thousand dollars ($12,000), **30** payable on demand and dated about July, 1895, to the said Lembeck & Betz Eagle Brewing Company, and handed the same over to it or its representatives.

5. Your orator further shows that he continued the said business in the premises aforesaid from the year Eighteen hundred and ninety-three until May first, Nineteen hundred and nine, during all of which time the lease of said premises stood in the name of said Lembeck & Betz Eagle Brewing **40**

Company, except for the last year, wherein your orator obtained a lease from the new owner of the building, the same having been sold. That during all of said time your orator sold the products of the said Lembeck & Betz Eagle Brewing Company as he had agreed to. That during said time your orator (under the same conditions) renewed the note on the first of July, Nineteen hundred and 10 one, and again, the last renewal being by note dated July eleventh, Nineteen hundred and seven, payable on demand to the order of Lembeck & Betz Eagle Brewing Company at 173 Ninth Street, Jersey City, New Jersey, the place of payment being the brewery of the said Lembeck & Betz Eagle Brewing Company.

6. Your orator further shows that during the lifetime of the said Henry Kellers (who died in 1900) and during the lifetime of said Henry Lem- 20 beck (who died in 1904) no demand was made upon him to pay said note, nor was the same discounted or presented for payment.

7. Your orator further shows that in the year Nineteen hundred and nine the building wherein said business was conducted was sold and afterwards torn down and the Union Trust Company building erected on the same premises, whereupon your orator was compelled to discontinue business 30 at said premises.

8. Your orator further shows that upon discontinuing business at said premises, in pursuance with his agreement with said Lembeck & Betz Brewing Company, he returned to the said Lembeck & Betz Eagle Brewing Company the fixtures and furnishings in said premises and demanded the said note.

9. Your orator further shows that instead of complying with said demand, the said Lembeck & 40 Betz Eagle Brewing Company on or about the

fourteenth day of May, Nineteen hundred and fourteen, commenced an action in the Hudson County Circuit Court against your orator based upon a promissory note for Twelve thousand dollars ($12,000), dated July 11, 1907, payable in one year from date.

10. Your orator further shows that he filed an answer setting forth the above mentioned facts in the Hudson County Circuit Court wherein said action against him was started, and that in an opinion handed down by the Honorable Luther A. Campbell, Judge of said Court, dated March seventeenth, Nineteen hundred and fifteen, said Judge decided that while your orator had an equitable defense to said action upon said note, the answer filed by your orator presented no legal question which could be decided in a court of law, and therefore struck out the answer of your orator, and awarded judgment for the plaintiff. That if execution be issued upon the said judgment and levy made upon the property of your orator, and the same exposed for sale, great injustice will be done your orator, and irreparable damage inflicted upon him. That your orator has no adequate remedy at and by the rules of the common law, but can only have relief in this Court where matters of this nature are particularly cognizable and relievable.

Your orator therefore prays that the said contract or note may be reformed so as to express the true intent and meaning of the parties, and that all proceedings upon the said judgment so recovered in the Hudson County Circuit Court by the said Lembeck & Betz Eagle Brewing Company against your orator may be stayed until the determination of this cause, and that should your orator be found to have carried out the terms of said agreement by him to be carried out that said

note be by decree of this Honorable Court cancelled and destroyed, and said judgment vacated, and that said defendant, its representatives, successors and assigns be barred and prohibited from in any way or manner attempting to collect the said note or the amount represented thereby, from your orator, or his representatives.

To the end, therefore, that the said Lembeck & 10 Betz Eagle Brewing Company may, without oath, full, true and perfect answer make to all and singular the matters and things aforesaid, as if they were here again repeated, and that the said Lembeck & Betz Eagle Brewing Company may set forth and discover the circumstances under which the said promissory note (the original note) was executed, and the true terms and conditions of the agreement so entered into between it and your orator, and that it may be enjoined from further 20 proceeding upon the said judgment recovered in the said Hudson County Circuit Court against your orator, and that your orator may have such other and further relief in the premises as may be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator not only the State's writ of injunction issuing out of and under the seal of this Honorable Court, to be directed to 30 the said Lembeck & Betz Eagle Brewing Company, its representatives and attorneys, commanding it and them, and each of them, to desist and refrain from further proceeding upon the judgment recovered in the Hudson County Circuit Court of the State of New Jersey on March 17, 1915, against your orator until the further order of this Court, but also the State's writ of subpoena issuing out of and under the seal of this Court, to de directed to the said Lembeck & Betz Eagle Brewing Com- 40 pany commanding it on a certain day and under a

certain penalty therein to be expressed to be and appear before this Honorable Court, and then and there to answer the premises and to stand to, abide by and perform such order and decree therein as the Court shall deem proper.

And your orator as in duty bound will ever pray, etc.

EDWARDS & SMITH, 10
Solicitors for and of Counsel
with Complainant.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

DENNIS GALLAGHER, of full age, being duly sworn according to law, on his oath says, that he is the complainant in the foregoing bill of complaint; that he resides in Jersey City, Hudson 20 County, New Jersey, and has resided there for many years last past. That for some years prior to 1893, deponent conducted a saloon and liquor business in Jersey City and had several places in said City. That he had, by reason of industry and attention, built up a large trade in said business, a good part of which consisted of railroad employees from the various railroads in said City, who at that time were paid by check. That in deponent's business, deponent cashed the checks 30 of said railroad employees and paid them the money thereon.

That in the year 1893, Henry Lembeck and Henry Kellers, then the President and Treasurer respectively of the Lembeck & Betz Brewing Company, afterwards the Lembeck & Betz Eagle Brewing Company, came to deponent and represented to him that they intended to open a saloon in Jersey City, which they desired to be the best and most expensively fitted up place of its kind in the 40 city, and that they desired him to operate and

manage it, knowing that he had a large following in the business, and that they intended to open the same at the southwest corner of Washington and Montgomery Streets, in Jersey City; that they, the said Brewing Company, would pay for the furnishings and fittings of said business and place deponent in charge thereof, provided deponent would sell the product and output of the said
10 Brewing Company exclusively. That deponent and the said Henry Lembeck and Henry Kellers examined the said premises and deponent agreed to the proposition of the said Brewing Company through its representatives. That then such proceedings were had, that a lease upon the said premises for five years, with an option of renewal, was taken in the name of the Lembeck & Betz Brewing Company or the Lembeck & Betz Eagle Brewing Company, and that contracts for the fur-
20 nishings of said place were entered into by said Lembeck & Betz Eagle Brewing Company and the designs or carvings of the panels of said furnishings were selected by the said Brewing Company and an eagle, the symbol or trade mark of said company, was placed upon said paneling. That it was found that to properly fix or furnish said place according to the ideas and desires of the said Brewing Company, the sum of Sixteen thou-
30 sand dollars ($16,000) would have to be expended. That said company, through its representatives, represented to deponent that all of said expense would be furnished and borne by the said Brewing Company. That eventually the said place was fitted up according to the desires of said Henry Lembeck and Henry Kellers, and deponent was installed therein and conducted said business; that subsequently the said Henry Lembeck and Henry Kellers represented to deponent that inasmuch as
40 he was obtaining a good share of the benefits of said place, that they thought he should bear a part of the expense in said furnishing, and after some

argument and conversation relative thereto, deponent finally agreed to pay the sum of Four thousand dollars ($4,000.) toward the expense of furnishing said place, and subsequently did pay over to the said Lembeck & Betz Eagle Brewing Company the said sum of Four thousand dollars ($4,000).

Deponent further says that subsequently, and in or about the year 1895, the said defendant, through its representatives, represented to deponent that they had on their books charged as an item of expense, the sum of Twelve thousand Dollars ($12,000.), representing the furnishings of said place, and that in order to insure the continued sale of their products by deponent, and to have their books in proper shape, they thought deponent should enter into an agreement with them or give them some sort of an obligation for the said sum of Twelve thousand dollars ($12,000), which obligation would not be enforced, provided deponent continued to sell the output of their brewery exclusively as long as he continued business in said premises, and upon his so discontinuing business therein, should he return to them the fixtures in said place, such obligation should be destroyed and cancelled.

Deponent declined to give to them any chattel mortgage or obligation which would in any manner require recording or become known, and after a great deal of conversation and arguments the said representatives of said defendant stated that he should give them a promissory note for said sum of Twelve thousand Dollars ($12,000), payable on demand. That said note would be held by them in the safe of said defendant, would never be presented for discount or payment, and no attempt be made to collect the same, and he could never be called upon to pay it, and that should deponent continue to sell their product in said

premises until he discontinued business therein and should on said discontinuance return to said defendant the fixtures in said premises, said note would be destroyed and cancelled as though the same had never been made. That upon said representations to said deponent, deponent in or about July, 1895, signed a promissory note, payable to said Lembeck & Betz Eagle Brewing Company, on
10 demand, for the sum of Twelve thousand Dollars ($12,000).

That deponent continued in said place of business and continued to sell the output of the said defendant, Lembeck & Betz Eagle Brewing Company, and in July, 1901, the said promissory note was renewed by him and said renewal handed to the said defendant, Lembeck & Betz Eagle Brewing Company, or its representatives; that in the meantime, the said note was never presented for
20 payment nor discounted by the said Lembeck & Betz Eagle Brewing Company, nor was deponent ever asked to pay the same or claim made upon him for the amount thereof. That subsequent to July, 1901, deponent continued on with said business at said place until July, 1907, and in the meantime continued to sell the product of the said Lembeck & Betz Eagle Brewing Company, and that in said July, 1907, deponent again executed a
30 renewal of said promissory note for the sum of Twelve thousand Dollars ($12,000), payable to the said Lembeck & Betz Eagle Brewing Company, and that each of said renewals were simply for the purpose of keeping the said note alive and to prevent the same becoming barred by the statute of limitations. That up to the signing of said renewal note in 1907, the same was never presented for payment or demand made thereupon, or was the same discounted in any bank by the said Lem-
40 beck & Betz Eagle Brewing Company. That after the signing of the said renewal note in 1907, depo-

nent continued said business in said premises until the year 1909, when the said premises were sold to the Hudson & Manhattan Tunnel Company and subsequently were sold by them and the building torn down, and the building now known as the Union Trust Company of New Jersey erected upon the site; that upon the demolition of said building, deponent was forced to discontinue business therein, and that at said time he notified the said defendant that said fixtures were at its disposal and subsequently returned the said fixtures to said defendant and placed the same in one of the buildings owned by it, and demanded the return to him of the note and the renewals thereof, so made by him as aforesaid. That said note was never delivered to him nor was he called upon to pay the same until at the time, or a short time prior thereto, that suit was commenced against him by said Lembeck & Betz Eagle Brewing Company in the Hudson County Circuit Court, based upon said note for Twelve thousand Dollars ($12,000), and demanded judgment for that amount, with interest from July, 1907. That deponent instructed his counsel to file an answer to the complaint issued in said suit, and that such an answer was filed, and deponent is informed and believes that on March 17, an opinion was handed down by the Honorable Luther A. Campbell, Judge of said Circuit Court, deciding that although deponent had an equitable defense to said action, there was no question of law presented which could be determined in his favor in a court of law, and ordered the answer filed by him taken out and judgment entered for the plaintiff.

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DENNIS GALLAGHER.

Sworn and subscribed to before me this 6th day of December, Nineteen hundred and fifteen.

William G. McLaughlin,
Notary Public of New Jersey.

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HUDSON COUNTY CIRCUIT COURT.

LEMBECK & BETZ EAGLE BREWING COMPANY, *vs.* DENNIS GALLAGHER.	On Motion to Strike Out Answers, &c. On Motion to Amend Answers.

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D. EUGENE BLANKENHORN, ESQ., Attorney for Plaintiff.

EDWARDS & SMITH, ESQS., Attorneys for Defendant.

CONCLUSIONS (Campbell, J.).

The initial motion was on the 25th day of September, 1914, made by the plaintiff, upon notice. to strike out the answers of the defendant
20 and for a rule for judgment final, under Rules 57 and 58 of the Practice Act.

Plaintiff by affidavit proof presented a prima facie case as required by said rules.

Defendant replied by affidavit proof presenting a defense not maintainable in law, but clearly analogous to the case presented in *O'Brien v. Paterson Malting & Brewing Co.,* 69 N. J. E., 117. The defense presented to be sustained required
30 parol proof of a contemporaneous parol promise on the part of the payees of the note, the plaintiff, that the defendant should not be called upon to pay the note, in violation of the rule of evidence which excludes parol evidence to contradict the terms of written instruments.

Therefore the answer should be stricken out and plaintiff should have rule for judgment final.

Subsequent to the foregoing motion and before the Court passed thereon, defendant, on notice to
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plaintiff, moved on October 30, 1914, for leave to file an amended answer.

Under said proposed answers defendant contended first, a condition precedent to the delivery of the note—namely, that the note should not be effective unless defendant failed to re-deliver certain fixtures and furnishings; second, that said note was obtained by fraud; third, payment and satisfaction of the note by delivery of the fixtures and furnishings, and fourth, that by way of counterclaim defendant was entitled to recoup the sum of $12,000 and interest as damages for the breach of contract on part of the plaintiff to purchase such fixtures at the sum of $12,000.

Both plaintiff and defendant have submitted affidavits.

Under the circumstances the motion to amend should be treated as if made concurrently with the motion to strike out, and I am considering the proofs presented by both parties on both motions.

The proofs of plaintiff presented on the motion to amend have strengthened and made more positive and certain its right to recover.

The position of the defendant did not change. He was still under the obligation to present to the Court, by affidavit or other proofs, such facts as will be deemed sufficient to entitle him to defend.

His proofs are not so satisfactory as to the first, second and third contentions under his proposed answer.

His counterclaim has as its basis a parol agreement to sell goods and chattels at the sum of $12,000, without the payment of any part of the purchase price of any sum in earnest or delivery and acceptance of any part of the goods—all opposed to the Statute of Frauds, Com. Stats. 2615, Sec. 6, and Sale of Goods, Act. Com. Stats. 4648, Sec. 4.

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The proposed answer does not in my judgment present a legal defense to the action, and leave to file same is accordingly denied. Plaintiff is entitled to an order striking out original answer and to an order for judgment final.

Dated, March 17, 1915.

Notice of Motion.

(Filed, February 6, 1916.)

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IN CHANCERY OF NEW JERSEY.

Between:

DENNIS GALLAGHER,

Complainant,

and

LEMBECK & BETZ EAGLE BREWING COMPANY,

Defendant.

On Bill, &c. Notice.

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PLEASE TAKE NOTICE that on Monday, the thirteenth day of December, next, at the Chancery Chambers in Jersey City, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, I shall apply to the Chancellor of this State for an order dismissing the bill of complaint filed in this cause upon the following grounds:

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1. The bill does not make out a cause entitling the complainant to equitable relief.

2. The bill does not make out a cause entitling the complainant to equitable relief but sets out a controversy cognizable and available in a court of law because it alleges that the promissory note made by complainant, a reformation, cancellation and destruction of which is prayed by the bill of complaint, was made and delivered by the complainant to the defendant upon

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a condition precedent that the said note would not be presented for payment nor discounted nor any demand made to collect the same if the complainant sold the products of the defendant in the premises described in the bill of complaint during the time complainant continued in business therein and upon the discontinuance by complainant of business therein, if the complainant returned the fixtures and furnishings installed in said premises as described in said bill, said note should be destroyed and cancelled as though never made; that complainant subsequently renewed said note upon the same conditions; that complainant upon discontinuing business at said premises, in pursuance of said condition precedent, returned to defendant the fixtures and furnishings and demanded said note and that defendant did not comply with such demand but brought suit upon said note.

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3. The bill does not make out a cause entitling the complainant to equitable relief but sets out a controversy cognizable and available in a court of law because it alleges that the promissory note made by complainant, a reformation, cancellation and destruction of which is prayed by the bill of complaint, was not delivered by the complainant to the defendant for the purpose of giving effect thereto but that such delivery was conditional or for a special purpose only and not for the purpose of transferring the property in the said instrument; and that the said promissory note remains in the hands of the immediate parties thereto; and that said note was delivered only for the purpose of securing the return of the chattels mentioned in the bill; and that said chattels were returned.

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4. The bill does not make out a cause entitling complainant to equitable relief but sets out a controversy cognizable and available in a court of law because it alleges that the promissory note made

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by complainant, a reformation, cancellation and destruction of which is prayed by the bill of complaint, was made and delivered by the complainant to the defendant upon a condition and for a special purpose only and not for the purpose of transferring the property in the instrument, and was fraudulently misappropriated by the said defendant to a use for which it was not intended.

10 5. The bill does not make out a cause entitling complainant to equitable relief but sets out a controversy cognizable and available in a court of law because it alleges that the promissory note made by complainant, a reformation, cancellation and destruction of which is prayed by the bill of complaint, has been paid.

6. It appears upon the face of the bill that the matters and things complained of therein have 20 been adjudicated upon between the complainant and defendant in a court of competent jurisdiction.

7. It appears upon the face of the bill that the matters and things complained of therein have been adjudicated upon between the complainant and defendant in the Hudson County Circuit Court, wherein suit was brought by the defendant on the promissory note described in the bill of complaint, in which suit complainant, as the de- 30 fendant therein, filed his answer, setting up as his defense to said action on said promissory note the matters complained of in the bill and claimed therein to entitle said complainant to the relief prayed for; that the answer of complainant in said law suit was, after consideration by the said Hudson County Circuit Court, struck out and final judgment awarded to the defendant herein, the plaintiff in said law suit.

40 8. It appears upon the face of the bill that the complainant has an adequate remedy at law for the matters complained of therein because it appears

that said complainant, as the defendant in said law suit in the Hudson County Circuit Court, might appeal from the judgment of said Court mentioned in the bill of complaint.

9. It appears unexplained upon the face of the bill that the complainant has not asserted and demanded his alleged remedial rights with diligence and without delay because it appears thereon that in the year 1909, complainant in pursuance of the alleged agreement, returned the fixtures and furnishings described in the bill of complaint and became entitled to the cancellation and destruction of the said note; that on or about May 14, 1914, defendant commenced suit upon said promissory note described in the bill of complaint, in the Hudson County Circuit Court, in which suit complainant filed his answer, setting up as his defense to said suit the matters set forth in the bill of complaint claimed therein to entitle said complainant to the relief prayed for in the bill; that on March 17, 1915, the answer of complainant was struck out and judgment awarded the defendant in this cause, the plaintiff in said law suit; that from the year 1909 until after the entry of final judgment, on March 17, 1915, in said law suit in the Hudson County Circuit Court complainant failed and neglected to assert and demand his alleged remedial rights in this court.

10. It appears unexplained upon the face of the bill that the complainant has not asserted and demanded his alleged remedial rights with diligence and without delay, because it appears upon the face of the bill that the complainant submitted to and acquiesced in the jurisdiction of the Hudson County Circuit Court as to the matters in controversy between the complainant and defendant, complained of in the bill of complaint and claimed therein to entitle said complainant to the relief prayed for in the bill, and waived any right which

he might have had to obtain the relief prayed for in this court.

Respectfully,

D. EUGENE BLANKENHORN,
Solicitor of Defendant.

To:
Messrs. Edwards & Smith,
Solicitors of Complainant,
1 Exchange Place,
10 Jersey City, N. J.

Order.

(Filed, January 7, 1916.)

IN CHANCERY OF NEW JERSEY.

Between:

DENNIS GALLAGHER,

20 *Complainant,*

and

LEMBECK & BETZ EAGLE BREWING COMPANY,

Defendant.

On Bill, &c.
Order.

This matter being opened to the Court by D. EUGENE BLANKENHORN, solicitor for and of counsel with the defendant, and RAYMOND DAWSON, of 30 Edwards & Smith, solicitors of complainant, and it appearing that a notice of motion to dismiss the bill of complaint filed herein was duly served upon the complainant, and the court having heard the argument of counsel thereon, and the complainant having asked leave to amend his said bill, and leave to amend having been given to the said complainant, and the said amended bill having been filed and served upon the defendant, and the defendant having served notice of a motion to 40 dismiss said amended bill of complaint, and the

Court having heard the argument of counsel thereon;

It is, thereupon, on this sixth day of January, 1916, ORDERED that the said motion be and the same is hereby denied.

E. R. WALKER,
C.

Respectfully advised,
VIVIAN M. LEWIS,
V. C.

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Notice of Appeal.

(Filed, February 6, 1916.)

IN CHANCERY OF NEW JERSEY.

Between:	
DENNIS GALLAGHER, *Complainant,*	On Bill, &c.
and	Notice of Appeal.
LEMBECK & BETZ EAGLE BREWING COMPANY, *Defendant.*	

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The Lembeck & Betz Eagle Brewing Company, the defendant in the above entitled cause, hereby appeals from the order made in this court in the above entitled cause on the 6th day of January, 1916, denying the motion to strike out the bill of complaint filed therein; and from every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

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Dated, January 10, 1916.

D. EUGENE BLANKENHORN,
Solicitor of Appellant.

I conceive there is good cause for appeal in the above stated cause.

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D. EUGENE BLANKENHORN,
Of Counsel with Appellant.

Petition.

(Filed, March 11, 1916.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between:

DENNIS GALLAGHER,

Complainant-Respondent,

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and

LEMBECK & BETZ EAGLE BREWING COMPANY,

Defendant-Appellant.

On Appeal. Petition.

To the Honorable, the Court of Errors and Appeals in the last resort in all causes:

The petition of the Lembeck & Betz Eagle Brew-
20 ing Company, the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by an order and decree made in the above cause, in the Court of Chancery by his Honor EDWIN ROBERT WALKER, Chancellor, bearing date the sixth day of January, Nineteen hundred and sixteen, in this respect, to wit:

That the said order and decree adjudges that the motion, made by your petitioner to strike out and dismiss the bill of complaint filed in the said
30 cause upon the ground that it does not make out or state a cause entitling the said complainant to a decree, be denied, and your petitioner appeals from the whole of the said order and decree upon the following grounds, to wit:

1. The bill does not make out a cause entitling the complainant to equitable relief.

2. The bill does not make out a cause entitling the complainant to equitable relief but sets out a

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controversy cognizable and available in a court of law because it alleges that the promissory note made by complainant, a reformation, cancellation and destruction of which is prayed by the bill of complaint, was made and delivered by the complainant to the defendant upon a condition precedent that the said note would not be presented for payment nor discounted nor any demand made to collect the same if the complainant sold the products of the defendant in the premises described in the bill of complaint during the time complainant continued in business therein and upon the discontinuance by complainant of business therein, if the complainant returned the fixtures and furnishings installed in said premises as described in said bill, said note should be destroyed and cancelled as though never made; that complainant subsequently renewed said note upon the same conditions; that complainant upon discontinuing business at said premises, in pursuance of said condition precedent, returned to the defendant the fixtures and furnishings and demanded said note and that defendant did not comply with such demand but brought suit upon said note.

3. The bill does not make out a cause entitling the complainant to equitable relief but sets out a controversy cognizable and available in a court of law because it alleges that the promissory note made by complainant, a reformation, cancellation and destruction of which is prayed by the bill of complaint, was not delivered by the complainant to the defendant for the purpose of giving effect thereto but that such delivery was conditional or for a special purpose only and not for the purpose of transferring the property in the said instrument; and that the said promissory note remains in the hands of the immediate parties thereto; and that said note was delivered only for the purpose

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of securing the return of the chattels mentioned in the bill; and that said chattels were returned.

4. The bill does not make out a cause entitling complainant to equitable relief but sets out a controversy cognizable and available in a court of law because it alleges that the promissory note made by complainant, a reformation, cancellation and destruction of which is prayed by the bill of complaint, was made and delivered by the complainant to the defendant upon a condition and for a special purpose only and not for the purpose of transferring the property in the instrument, and was fraudulently misappropriated by the said defendant to a use for which it was not intended.

5. The bill does not make out a cause entitling complainant to equitable relief but sets out a controversy cognizable and available in a court of law because it alleges that the promissory note made by complainant, a reformation, cancellation and destruction of which is prayed by the bill of complaint, has been paid.

6. It appears upon the face of the bill that the matters and things complained of therein have been adjudicated upon between the complainant and defendant in a court of competent jurisdiction.

7. It appears upon the face of the bill that the matters and things complained of therein have been adjudicated upon between the complainant and defendant in the Hudson County Circuit Court wherein suit was brought by the defendant on the promissory note described in the bill of complaint, in which suit complainant, as the defendant therein, filed his answer setting up as his defense to said action on said promissory note the matters complained of in the bill and claimed therein to entitle said complainant to the relief prayed for; that the answer of complainant in

said law suit was, after consideration by the said Hudson County Circuit Court, struck out and final judgment awarded to the defendant herein, the plaintiff in said law suit.

8. It appears upon the face of the bill that the complainant has an adequate remedy at law for the matters complained of therein because it appears that said complainant, as the defendant in said law suit in the Hudson County Circuit Court, might appeal from the judgment of said Court mentioned in the bill of complaint.

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9. It appears unexplained upon the face of the bill that the complainant has not asserted and demanded his alleged remedial rights with diligence and without delay because it appears thereon that in the year 1909 complainant, in pursuance of the alleged agreement, returned the fixtures and furnishings described in the bill of complaint and became entitled to the cancellation and destruction of the said note; that on or about May 14, 1914, defendant commenced suit upon said promissory note described in the bill of complaint, in the Hudson County Circuit Court, in which suit complainant filed his answer, setting up as his defense to said suit the matters set forth in the bill of complaint claimed therein to entitle said complainant to the relief prayed for in the bill; that on March 17, 1915, the answer of complainant was struck out and judgment awarded the defendant in this cause, the plaintiff in said law suit; that from the year 1909 until after the entry of final judgment, on March 17, 1915, in said law suit in the Hudson County Circuit Court complainant failed and neglected to assert and demand his alleged remedial rights in this court.

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10. It appears unexplained upon the face of the bill that the complainant has not asserted and demanded his alleged remedial rights with diligence

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and without delay because it appears upon the face of the bill that the complainant submitted to and acquiesced in the jurisdiction of the Hudson County Circuit Court as to the matters in controversy between the complainant and defendant, complained in the bill of complaint and claimed therein to entitle said complainant to the relief prayed for in the bill and waived any right which 10 he might have had to obtain the relief prayed for in this court.

And that the said defendant is not bound to answer the said bill of complaint and that the said order and decree is erroneous for that the Court of Chancery should have by its order and decree dismissed the complainant's bill.

Your petitioner therefore prays that the said order and decree of the said Chancellor may be 20 wholly reversed, set aside and for nothing holden, and that your petitioner may have such further relief in the premises as shall be equitable and just.

D. Eugene Blankenhorn,
Solicitor for and of Counsel
with Appellant.

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Answer to Petition of Appeal.

(Filed, February 16, 1916.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between:

DENNIS GALLAGHER,
Complainant-Respondent,
and
LEMBECK & BETZ EAGLE BREWING COMPANY,
Defendant-Appellant.

On Bill, &c. 10

The answer of the above named respondent to the petition of appeal of the above named appellant.

This respondent not acknowledging any or all matters which in said petition of appeal are contained, to be true, for the answer thereto, nevertheless, says and admits: that an order was on the sixth day of January, Nineteen hundred and sixteen, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as therein stated, but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. 20

And this respondent is advised and believes, that the said order is agreeable to equity, and prays that the same may be affirmed, with costs to be adjudged to this respondent. 30

EDWARDS & SMITH,
Solicitors for and of Counsel
with Respondent.

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