INDEX.

TESTIMONY.

Complainant's Witnesses:

Notice of Appeal.

(Filed September 18, 1927.)

IN CHANCERY OF NEW JERSEY.

Between
JOHN A. COZZONE & Co., a Corporation, Complainant,
and
WILLIAM C. REDFIELD, *et als.*, Receivers, etc., Defendants.

On Bill, &c. Amended Notice of Appeal.

The defendants, WILLIAM C. REDFIELD, EUGENE A. WIDMANN and BENJAMIN M. KAYE, Receivers in Equity in the United States District Court for the Southern District of New York for Pathe Freres Phonograph Co., hereby appeal from the final decree made by the Chancellor on the advice of Honorable John H. Backes, Vice Chancellor in the above entitled cause on October 15th, 1926, and from the whole and every part thereof to the Court of Errors and Appeals in The Last Resort In All Causes.

Dated, August 31st, 1927.

AUTENRIETH, GANNON & WORTENDYKE,
Solicitors for and of Counsel with Defendants.

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

WILLIAM R. GANNON,
Of Counsel with Defendants.

I hereby consent to the filing of the foregoing Amended Notice of Appeal nunc pro tunc as of September 1st, 1927.

SAMUEL ROESSLER,
Solicitor for and of Counsel with Complainant.

Bill of Complaint.

(Filed July 12, 1922.)

IN CHANCERY OF NEW JERSEY.

TO HIS HONOR, EDWIN ROBERT WALKER, CHANCELLOR OF THE STATE OF NEW JERSEY:

Complainant, John A. Cozzone & Company, a corporation duly organized and existing under the laws of the State of New Jersey, having its principal office in the City of Newark, Essex County, New Jersey, respectfully shows unto your Honor:

1. The complainant is engaged in the manufacturing business at #61 Arlington St., in the said City of Newark, and for several years, until sometime in the year 1920, manufactured parts for talking machines upon the order of Pathe Freres Phonograph Company, a corporation.

2. Sometime in the early part of December, 1920, the said Pathe Freres Phonograph Company, being indebted to the complainant for labor performed and materials furnished, in a large sum of money, caused to be issued to the said complainant two trade acceptances for Three thousand dollars each, to apply on account, one of which became due, according to its terms, on March 12, 1921, and the other on March 19, 1921.

3. That the complainant hypothecated the said trade acceptances shortly after the receipt thereof from the said Pathe Freres Phonograph Company, with one Samuel Schechner, to secure a loan of Three thousand dollars which had been made by the said Schechner to the complainant.

4. On March 12, 1921, one of said trade acceptances became due and payable, and after having

been duly presented for payment at #10-56 Grand Avenue, Brooklyn, New York (being the place of business of the said Pathe Freres Phonograph Company, and the place designated in said trade acceptance as the place of payment), was protested for non-payment.

5. That thereupon, on the 19th day of March, 1921, the said Samuel Schechner instructed his attorney to institute an action at law in the United States District Court, against the said Pathe Freres Phonograph Company and the said John A. Cozzone & Co., and John A. Cozzone and Antonio F. Pavia, whose names were endorsed on said trade acceptances, and that the attorney of the said Samuel Schechner accordingly, on the said 19th day of March, 1921, procured an original summons from the Clerk of the United States District Court, and also prepared a complaint in said action. Complainant is informed that prior to the above-mentioned date, the Pathe Freres Phonograph Company became financially embarrassed, and placed its affairs in the hands of a Creditors' Committee, of which one C. D. Bailey was appointed Secretary, and that on or about the above mentioned date, the said C. D. Bailey, acting on behalf of the Committee, called at the office of the said Samuel Schechner for the purpose of effecting a settlement of said threatened action.

6. Complainant further shows that on or about the last mentioned date, the said Samuel Schechner effected a settlement with the said Pathe Freres Phonograph Company through the said C. D. Bailey, acting as Secretary of the said Creditors' Committee, whereby the said Samuel Schechner agreed to accept the sum of Fifteen hundred dol-

lars in cash and two trade acceptances for Seven hundred and fifty dollars each, made payable on June 13, 1921, and on September 12, 1921, respectively, and in consideration of said cash payment and the delivery to him of the two trade acceptances of Seven hundred and fifty dollars each, the said Samuel Schechner delivered up to the said Pathe Freres Phonograph Co. the trade acceptance on which he threatened to institute suit, as aforesaid, and at the same time delivered up to the said John A. Cozzone & Co. the remaining trade acceptance of Three thousand dollars, which became due, according to its terms, on March 19, 1921.

7. Complainant further shows that at the time said settlement was effected, as aforesaid, the said John A. Cozzone & Co. was indebted to the Pathe Freres Phonograph Co. on an open book account for goods sold and delivered by the said Pathe Freres Phonograph Company to the said complainant, in the sum of $3041.23, and that the said C. D. Bailey, acting on behalf of said Creditors' Committee, proposed that in lieu of the said Creditors' Committee making payment of said trade acceptance, that the Pathe Freres Phonograph Company credit the said complainant with the said sum of Three thousand dollars on said open book account, and that the said complainant deliver up the said trade acceptance to the said Creditors' Committee, and that accordingly, an arrangement was entered into between the complainant and the said C. D. Bailey, acting on behalf of the said Creditors' Committee, wherein the said complainant delivered up said trade acceptance and the said Pathe Freres Phonograph Company credited said complainant on the said open book account with the sum of Three thousand dollars.

8. Complainant further shows that on the 22nd day of March, 1921, the said C. D. Bailey, acting on behalf of the Creditors' Committee, prepared a letter addressed to Pathe Freres Phonograph Company and Creditors' Committee, bearing date March 22, 1922 (a copy of which is annexed hereto and marked "Exhibit A"), which was signed by the complainant by its President and Treasurer, which purported to sell to the said Pathe Freres Phonograph Co. and said Creditors' Committee, and deliver up for cancellation, the two trade acceptances for Three thousand dollars each, hereinabove referred to, in consideration of the payment of one of said trade acceptances by the payment of Fifteen hundred dollars in cash and the delivery of the two new trade acceptances of Seven hundred and fifty dollars each hereinabove specifically referred to, but that no mention was made by the said C. D. Bailey, in the preparation of said letter, of the credit of Three thousand dollars on the open book account then due and owing by the complainant to the said Pathe Freres Phonograph Company.

9. Complainant further shows that it was not furnished with a copy of said letter of March 22, 1921, marked "Exhibit A", and that it had no knowledge of the terms therein contained, until June 26, 1922, being the trial date of the action instituted by one William P. Taylor, as assignee of said Pathe Freres Phonograph Co., to which suit more particular reference is hereinafter made.

10. Complainant further shows that on the 29th day of October, 1921, an action at law was instituted by said William P. Taylor, as assignee of Pathe Freres Phonograph Co., against the complainant in the Hudson County Circuit of the New

Jersey Supreme Court, in which action said plaintiff demanded, as damages, the amount claimed to be due on the open book account hereinabove referred to, being $3041.23, together with interest thereon.

11. Complainant further shows that an answer was interposed by the complainant to said action, in which, as a Separate Defense, the complainant herein set up the terms of the settlement hereinabove alluded to, and particularly the agreement relative to the surrender of the said trade acceptance of Three thousand dollars in consideration of the agreement entered into between the complainant and the said Pathe Freres Phonograph Company to credit this complainant with the said sum of Three thousand dollars on said open book account.

12. Complainant further shows that on June 26, 1922, said action was called for trial, and by Stipulation entered into between the attorneys for the respective parties to said suit, said action was tried before Honorable William H. Speer, without a jury.

13. Complainant further shows that on said June 26, 1922, shortly before the commencement of the trial of said action, the attorney for said William P. Taylor informed the attorney for the defendant, being the complainant herein, of the existence of said letter of March 22, 1921, and offered to file an amended reply in said action, alleging that the agreement mentioned in the Separate Defense of the defendant was that the surrender and delivery of the two trade acceptances was to be in accord and satisfaction of the whole amount due thereunder in consideration of the immediate payment of one-half of the amount thereof, and that said amended reply was filed with the Clerk of said Court.

14. Complainant further shows that at the trial of said action, it endeavored to prove, by witnesses procured for that purpose, the existence of the agreement alleged in the Separate Defense interposed by the defendant in the Supreme Court action, but that the Judge held that parol evidence could not be received in an action at law to vary the terms of a written agreement, and suggested to the defendant in said action the filing of a Bill of Complaint in the Court of Chancery of New Jersey, alleging fraud and mutual mistake.

15. Complainant further shows that the Judge of said Court, upon the conclusion of the trial of said action, announced that judgment would be entered in favor of the plaintiff and against the defendant, for the amount sued upon, viz., $3041.23, besides interest and costs, but that the entry of said judgment would be deferred for three weeks from that day, to afford the defendant in said action an opportunity to file its Bill of Complaint in this Honorable Court, and to make application to restrain the plaintiff in said action from proceeding with the entry of judgment and the issuance of a writ of execution, pending the determination of such proceedings in this Court.

16. Complainant further shows that it developed, in the course of the trial of said action in said Court, that there was no consideration for the assignment of the said account by the said Pathe Freres Phonograph Company to the said William P. Taylor, but that on the contrary, William C.

Redfield, Eugene A. Widmann and Benjamin M. Kaye, who had theretofore been appointed Receivers in Equity in the United States District Court for the Southern District of New York for the said Pathe Freres Phonograph Company, were the beneficial owners of said cause of action, and thereupon, a Stipulation was duly entered into by the attorneys for the respective parties in said action, whereby the said Receivers were substituted as parties plaintiff, which Stipulation has since been filed with the Clerk of the New Jersey Supreme Court.

17. Complainant further shows that upon application duly made to said Honorable William H. Speer, Judge of said Court, an order was duly entered on the tenth day of July, 1922, granting leave to the defendant in said action to file a counterclaim on account of a trade acceptance given by said Pathe Freres Phonograph Company to the complainant, dated November 2, 1922, for $1550.25, falling due on January 2, 1922, and that pursuant to said Order, the complainant herein has since filed with the Clerk of the New Jersey Supreme Court a Counterclaim, alleging that the substituted plaintiffs in said action are indebted to the defendant in said sum on said trade acceptance, which was protested for non-payment at maturity, and still remains wholly unpaid.

18. Complainant further shows that the letter of March 12, 1921, marked "Exhibit A", was procured by deceit, and that had the complainant been informed of its contents and legal effect, it would not have delivered up the trade acceptance of Three thousand dollars which became due on March 19, 1921, but that on the contrary, it relied upon the representations of the said C. D. Bailey that said

trade acceptance was delivered up under the terms of the agreement hereinabove alleged by the complainant, that credit would be given to the complainant on the said open book account for said sum, leaving a balance of $41.23 due from the complainant to the said Pathe Freres Phonograph Company.

19. Complainant further shows that it did not make payment of the said balance of $41.23 because at the time said agreement was entered into, the trade acceptance referred to in the Set-Off filed in said Supreme Court action, had not matured, and this complainant believed that it had the right to withhold payment of said balance on said open book account until the actual payment of said trade acceptance.

Complainant is without remedy in the Courts of law, and therefore prays:

1. That William C. Redfield, Eugene A. Widmann and Benjamin M. Kaye, receivers in equity in the United States District Court for the Southern District of New York for the Pathe Freres Phonograph Company, who are the defendants to this suit, may answer this Bill of Complaint without oath, and each statement therein made.

2. That it may be decreed that the agreement entered into between the complainant and the Pathe Freres Phonograph Company and its Creditors' Committee, contemplated the credit of Three thousand dollars on the open book account between the complainant and the said company, in consideration of the delivery of the trade acceptance of Three thousand dollars which became due on March 19, 1921.

3. That the letter of March 22, 1921, marked "Exhibit A", be reformed by including therein the agreement to credit the complainant on the open book account, as hereinabove recited.

4. That an accounting may be made of the accounts between the respective parties, and a decree entered for the amount which may be found due from the one to the other.

5. That the said William C. Redfield, Eugene A. Widmann and Benjamin M. Kaye, Receivers in equity in the United States District Court for the Southern District of New York for Pathe Freres Phonograph Company, may be restrained and enjoined by the injunctive order of this Court, from prosecuting further the action at law instituted by William P. Taylor on behalf of the Pathe Freres Phonograph Company against the complainant herein, in the Hudson County Circuit of the New Jersey Supreme Court, on October 29, 1921, and that said defendant herein be specifically enjoined from filing the Postea in said action and causing a writ of execution to be issued thereon, or from commencing any other proceedings on the subject matter of said suit, or from assigning and transferring the said account to any other person or persons, or from in any other manner in any wise parting with the title to said chose in action.

6. That a writ of subpoena may issue, commanding the defendants to answer this Bill of Complaint, and to abide by such decree as this Court may make in the premises.

SAMUEL ROESSLER,
Solicitor for and of
Counsel with Complainant.

Exhibit A.

March 22, 1922.

Pathe Freres Phonograph Company
and Creditors Committee.

Dear Sirs:

I hereby offer to sell and deliver to you for cancellation your two trade acceptances for $3,000 each coming due, respectively, on March 12 and March 19, and aggregate amount of $6,000, in consideration of your company not withstanding my signing of the Creditors' Extension Agreement, paying me $1,500 in cash and delivering me trade acceptances for $750 and for $750 coming due, respectively, on June 13, 1921, and on September 12, 1921, and in consideration of the Creditors' Committee agreeing to such payment acting through their agents.

Yours very truly,

(Signed). JOHN A. COZZONE & C.
JOHN A. COZZONE, Pres.
JOHN A. COZZONE (Seal)
Antonio F. Pavia, Treas.

Order Amending Bill.

(Filed November 25, 1925.)

IN CHANCERY OF NEW JERSEY.

Between,
JOHN A. COZZONE & Co.,
a corporation,
Complainant,

and

WILLIAM G. REDFIELD, *et als,*
Receivers, etc.,
Defendants.

On Bill, etc.

This matter coming on to be heard in the presence of Samuel Roessler, solicitor of the complainant, and William R. Gannon, Esquire, solicitor of the defendants; and it appearing that due notice has been given to the solicitor of the defendants of an application for leave to amend the Bill of Complaint herein, and that a copy of the proposed amendment has also been submitted to the solicitor of said defendants.

It is, on this 25th day of November, nineteen hundred and twenty-five, ORDERED that the complainant have leave to amend its Bill of Complaint in the following particulars, viz:

By adding the following after Paragraph #18.

Complainant further shows that at the time of the delivery to the said C. D. Bailey of the trade acceptance of $3000. which became due on March 19, 1921, there was endorsed thereon by the said C. D. Bailey in the top margin the following words, "cancelled to offset merchandise sold". That said memorandum was written on the said trade acceptance pursuant to the agreement then and there entered into between the complainant and the said C. D. Bailey, that credit would be given to the complainant on the open book account then owing by the complainant to the defendant.

Complainant further shows that the signatures to the letter of March 22, 1921, were procured by fraud and imposition practiced upon the complainant by the said C. D. Bailey, as agent for the defendant, with intent to deceive complainant in that he knew and the complainant charges that he knew that the complainant signed the said letter in the belief that it was surrendering the said note in discharge of the said book account, and that had the complainant known the purport of said paper it would not have affixed its signature thereto.

Complainant further shows that the signing of said paper was procured by the representations of the said C. D. Bailey, acting on behalf of the defendant, that credit would be given to the complainant on the open book account, in accordance with the memorandum then and there placed on said trade acceptance by the said C. D. Bailey, whereas the said C. D. Bailey never intended to credit the complainant on the said open book account nor did he intend to produce said trade acceptance bearing said memorandum should occasion have required its production.

Complainant further shows that the said defendant retained said trade acceptance in its possession and failed to produce it at the trial of the Supreme Court action hereinabove referred to, and also failed to produce it at the final hearing before the Vice Chancellor of this Honorable Court, to whom said matter was referred by the Chancellor, and in lieu of the original trade acceptance bearing said memorandum, the defendant produced at

Order Amending Bill.

said hearing what purported to be a true copy of said trade acceptance but which in fact did not contain the words "cancelled to offset merchandise sold."

Complainant charges that the said original trade acceptance with said memorandum endorsed thereon was fraudulently concealed by the defendant in furtherance of the fraudulent scheme entered into by the said C. D. Bailey on behalf of the defendant company to deprive the complainant of the benefit of said endorsement and to make it difficult for the complainant to prove the consideration for the surrender of the trade acceptance which became due on March 19, 1921.

Complainant also amends the prayer for relief in said bill contained by striking out the third paragraph in said prayer and substituting in lieu thereof the following paragraph:

3. That the written offer of March 22, 1921 marked Exhibit A be decreed to have been procured by fraud and deceit practiced upon the complainant by the defendant and that said writing be set aside.

AND IT IS FURTHER ORDERED that the complainant serve on the solicitor of the defendants a true copy of this Order and that the said defendants have twenty days after service upon them of said amendment in which to answer.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V. C.

Amendment to Bill.
(Filed November 25, 1927.)

IN CHANCERY OF NEW JERSEY.

Between
JOHN A. COZZONE & Co., a corporation,
Complainant,
and
WILLIAM C. REDFIELD, *et als.*,
Receivers, etc.,
Defendants.
} On Bill, etc.

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

The complainant by leave of the court to amend its bill of complaint herein, does hereby amend its bill of complaint in the following particulars, viz:

A. By adding the following after Paragraph #18.

18a. Complainant further shows that at the time of the delivery to the said C. D. Bailey of the trade acceptance of $3000. which became due on March 19, 1921, there was endorsed thereon by the said C. D. Bailey in the top margin the following words, "cancelled to offset merchandise sold". That said memorandum was written on the said trade acceptance pursuance to the agreement then and there entered into between the complainant and the said C. D. Bailey, that credit would be given to the complainant on the open book account then owing by the complainant to the defendant.

Complainant further shows that the said defendant retained said trade acceptance in its posses-

sion and failed to produce it at the trial of the Supreme Court action hereinabove referred to and also failed to produce it at the final hearing before Honorable John H. Backes, one of the Vice Chancellors of this Honorable Court to whom said matter was referred by the Chancellor, and in lieu of the original trade acceptance bearing said memorandum the defendant produced at said hearings what purported to be a true copy of said trade acceptance but which in fact did not contain the words "cancelled to offset merchandise sold".

Complainant charges that the said original trade acceptance with said memorandum endorsed thereon was fraudulently concealed by the defendant in furtherance of the fraudulent scheme entered into by the said C. D. Bailey on behalf of the defendant company to deprive the complainant of the benefit of said endorsement and to make it difficult for the complainant to prove the consideration for the surrender of the trade acceptance which became due on March 19, 1921.

Complainant further shows that the signatures to the letter of March 22, 1921 were procured by fraud and imposition practiced upon the complainant by the said C. D. Bailey as agent for the defendant with intent to deceive complainant as to the purport and legal effect of the paper so signed, and that had the complainant known the purport of said paper it would not have affixed its signature thereto.

Complainant further shows that the signing of said paper was also procured by the representations of the said C. D. Bailey acting on behalf of the defendant, that credit would be given to the complainant on the open book account, in accordance with the memorandum then and there placed

on said trade acceptance by the said C. D. Bailey, whereas the said C. D. Bailey never intended to credit the complainant on the said open book account nor did he intend to produce said trade acceptance bearing said memorandum should occasion have required its production.

Complainant also amends the prayer for relief in said bill contained by adding the following immediately succeeding the paragraph marked 3 in said prayer for relief:

3a. That the written offer of March 22, 1921 marked Exhibit A be decreed to have been procured by fraud and deceit practiced upon the complainant by the defendant and that said written offer be set aside.

SAMUEL ROESSLER,
Solicitor for Complainant.

Answer.

(Filed February 2, 1924.)

IN CHANCERY OF NEW JERSEY.

Between
JOHN A. COZZONE & COMPANY,
a corporation,
Complainant,

and

WILLIAM C. REDFIELD, *et als.*,
Receivers, etc.,
Defendants.

On Bill, &c.

The defendants, William C. Redfield, Eugene A. Widmann and Benjamin A. Kaye, Receivers in Equity in the United States District Court for the Southern District of New York for Pathe Freres Phonograph Company, answering the bill of complaint, say:

1. They have no information sufficient to form a belief concerning the matters contained in paragraphs 1, 2, 4 and 5 of the bill of complaint.

2. They deny paragraphs 3, 6, 7, 9, 11, 13, 14, 15, 18 and 19 of the bill of complaint.

3. They deny paragraph 8 of the bill of complaint except that they admit the execution and delivery of "Exhibit A" mentioned therein.

4. They admit paragraphs 10, 12, 16 and 17 of the bill of complaint.

Answer.

5. By way of affirmative defense defendants say that the agreement annexed to the bill of complaint and marked "Exhibit A" is the final and complete agreement of the parties hereto and that said agreement was executed and delivered by the complainant herein to the predecessors in title of the defendants herein without any fraud or misrepresentation on the part of the defendants herein and for a valid consideration, and a judgment at law in the New Jersey Supreme Court has been entered declaring that said agreement is the final and complete agreement of the parties hereto respecting the subject matter mentioned in said agreement.

FIRST PLEA.

Defendants say that the matters stated as a cause of action in the bill of complaint are *res adjudicata* in that the same subject matter between the same parties was tried in the New Jersey Supreme Court at the Hudson County Circuit and a judgment in favor of defendants in this suit was entered in said New Jersey Supreme Court action and complainant shows no ground for equitable relief.

SECOND PLEA.

Complainant has an adequate remedy at law in that it seeks relief from an alleged erroneous judgment at law and complainant has an adequate remedy at law by way of appeal, which it has not taken, and therefore complainant has not exhausted its remedy at law and has no ground for equitable relief.

Answer.

THIRD PLEA.

It appears on the face of the bill of complaint that the New Jersey Supreme Court acquired complete jurisdiction of the parties and subject matter in this suit on October 29th, 1921, and still retained said jurisdiction and complainant shows no equitable or legal ground for this Court assuming jurisdiction and according to established precedents this Court will not assume jurisdiction of the matters in controversy.

AUTENRIETH & GANNON,
Counsel for Defendants.

Order Amending Answer.
(Filed August 26, 1927)

IN CHANCERY OF NEW JERSEY.

Between JOHN A. COZZONE & Co., a corporation, Complainant, and WILLIAM C. REDFIELD, *et als.*, Receivers, etc., Defendants.	On Bill, &c.

This matter being opened to the Court by Autenrieth, Gannon & Wortendyke, of Counsel with the defendants in the above entitled cause, and it appearing that notice of motion to file the amended answer, annexed hereto, to the amended bill of complaint was duly given, returnable December 29th, 1925, and at such time that leave was given to file such amended answer, but that through mistake or omission said amended answer was never filed in the office of the Clerk in Chancery, and that an appeal from the final decree in the above entitled cause is about to be taken, and that defendants would be prejudiced by reason of such error or omission in filing said amended answer in the office of the Clerk in Chancery, and that this Order is consented to.

It is on this 26th day of August, 1927 ORDERED that the amended answer, hereto attached, be and

Order Amending Answer.

the same is hereby filed nunc pro tunc as of December 29th, 1925.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V. C.

We hereby consent to the making and filing of the foregoing order.

SAMUEL ROESSLER,
Solicitor for Complainant.

AUTENRIETH, GANNON & WORTENDYKE,
Solicitors for Defendants.

Amendment to Answer.
(Filed August 26, 1927)

IN CHANCERY OF NEW JERSEY.

Between
JOHN A. COZZONE & Co., a corporation,
Complainant,
and
WILLIAM C. REDFIELD, *et als.*,
Receivers, etc.,
Defendants.
} On Bill, etc.

The defendants, William C. Redfield, Eugene A. Widmann and Benjamin A. Kaye, Receivers in Equity in the United States District Court for the Southern District of New York of Pathe Freres Phonograph Company, answering the amendment to the bill of complaint, say:

1. That they deny the matters set out in paragraph 18a of the amendment to the bill of complaint but say, nevertheless, that complainant elected to ratify and confirm the written agreement marked Schedule A annexed to the bill of complaint when it learned of the alleged fraud upon defendants instituting suit in the New Jersey Supreme Court for the amount due on the book account and filed an answer in said suit, and further that complainant has failed to restore to defendants the consideration received at the time complainant executed and delivered the agreement Schedule A.

FIRST ADDITIONAL PLEA.

Defendants say that complainant failed to rescind and elected to ratify and confirm the agreement, Schedule A annexed to the bill of complaint upon learning of the alleged fraud when defend-

ants' predecessors in title instituted suit in the New Jersey Supreme Court for the amount due on the book account.

SECOND ADDITIONAL PLEA.

Defendants say that the question of fraud is res adjudicata in that the same subject matter between the same parties was tried in the New Jersey Supreme Court in the Hudson County Circuit and a judgment in favor of the defendants in this suit was entered in said New Jersey Supreme Court action, and complainant shows no ground for equitable relief.

THIRD ADDITIONAL PLEA.

Complainant has an adequate remedy at law in that it seeks relief from an alleged erroneous judgment at law and complainant has an adequate remedy by way of appeal which it has not taken and therefore complainant has not exhausted its remedy at law and has no ground for equitable relief.

FOURTH ADDITIONAL PLEA.

Defendants say that complainant upon learning of the alleged fraud failed to restore the consideration it received at the time of the execution and delivery of the agreement marked Schedule A annexed to the bill of complaint and also failed to place defendants or their predecessors in title in status quo with respect to the subject matter of the said agreement Schedule A sought to be rescinded and cancelled.

AUTENRIETH, GANNON & WORTENDYKE,
Solicitors for Defendants.

Replication.
(Filed February 27, 1924)

IN CHANCERY OF NEW JERSEY.

Between
JOHN A. COZZONE AND COMPANY, a corporation,
Complainant,
and
WILLIAM C. REDFIELD, EUGENE A. WIDMAN and BENJAMIN M. KAYE, Receivers in Equity in the United States District Court for the Southern District of New York for Pathe Freres Phonograph Company,
Defendants.
} On Bill, etc.

The complainant joins issue on that portion of the Answer of the defendants as is in the nature of an answer to the Bill of Complaint.

As to that portion of the Answer which is in the nature of a plea, complainant says that the matters therein set forth under "first plea", "second plea" and "third plea", have been heretofore adjudicated in favor of the complainant upon a motion made by the defendants in this cause, in which they moved to strike out the Bill of Complaint, and which resulted in the entry of an Order which was advised by the Honorable Alonzo Church, one of the Vice Chancellors of this Court.

Complainant hereby gives notice that at the final hearing in this cause it will move to strike out that portion of the Answer which is in the nature of a plea.

SAMUEL ROESSLER,
Solicitor for Complainant.

Testimony.

John A. Cozzone. Called by Complainant. Direct.

May 1, 1924.

IN CHANCERY OF NEW JERSEY.

Between
JOHN A. COZZONE & Co., a corporation,
Complainant,

and

WILLIAM C. REDFIELD, EUGENE A. WIDMAN and BENJAMIN A. KAYE, receivers in equity in the United States District Court for the Southern District of New York for PATHE FRERES PHONOGRAPH Co.,
Defendants.

Transcript of shorthand notes of testimony taken in the above entitled matter before his Honor, John H. Backes, Vice-Chancellor, at the Chancery Chambers, in the City of Newark, New Jersey, in the presence of Mr. Samuel Roessler, for complainant, and Messrs. Autenrieth & Gannon (Mr. Gannon) for defendants.

JOHN A. COZZONE, sworn for complainant.

DIRECT EXAMINATION BY MR. ROESSLER:

Q. You are the president of the John A. Cozzone Company? A. Yes, sir.

Q. You are still in business, are you? A. Yes, sir.

John A. Cozzone. Called by Complainant. Direct.

Q. You had dealings with the Pathe Freres in 1920? A. Yes, sir.

Q. And you had had dealings with them for some time prior thereto? A. Yes, sir.

Q. On December 8, 1920, you received from the Pathe Freres Company two trade acceptance for $3000 each, is that right? A. Yes, sir.

Q. I show you this paper dated December 8, 1920, is this the trade acceptance you received from the Pathe Company on that date? A. Yes, sir; two of them, one on the 8th and one on the 10th, I believe.

Q. And I show you a paper which purports to be a copy of another trading acceptance bearing date December 8th, is that a copy of the other trade acceptance you received? A. It is.

Mr. Roessler: I offer in evidence these two papers, the first dated December 8, 1920, Pathe Freres Company agrees to pay to John A. Cozzone for goods sold and delivered by Cozzone & Company to the Pathe Freres Company $3000 on March 12, 1921. The other paper is dated December 10, 1920, the Pathe Freres Company acknowledge an indebtedness to Cozzone & Company for goods sold and delivered in the sum of $3000 and agree to pay that sum on March 19, 1921, and these papers bear the endorsement of one Samuel Scheckner and the endorsement of Cozzone & Company. They are endorsed by John A. Cozzone & Company, John A. Cozzone president and Anthony Pacia, treasurer and by John A. Cozzone and Anthony Pacia individually, and also bear the endorsement of Samuel Scheckner.

Papers marked Exhibits C1 and C2.

Q. What did you do with these trade acceptances? A. Why, I went to Mr. Scheckner and asked him to discount both of them because I already had a $5000 trade trade acceptance in the bank discounted.

Q. When did you offer these trade acceptances to Mr. Scheckner? A. Soon after I received them, I believe.

Q. How soon after, do you recall? A. Probably within a week.

Q. Within a week. What happened then? A. Mr. Scheckner said, "I will discount one now for you, and carry you along, and see me within a few weeks"—and a week later he received a notice from the Pathe people saying that they are going into a creditor's agreement, and naturally I couldn't have Mr. Scheckner discount the other, but I told him the truth—I said, "Now, Mr. Scheckner, these people are in trouble here. I suppose you will have to hold the other trade acceptance until they both become due," and that is what I done.

Q. Were the trade acceptances paid after maturity? A. They were not.

Q. What happened? Were they protested? A. They were protested.

Q. And did you get into communication with the Pathe Freres Phonograph Company? A. I got in communication with the Pathe people. I called them up at once, and I think Mr. Bailey came over and spoke to Mr. Scheckner.

Q. Can you fix the date when Mr. Bailey came over from New York? A. It must have been about two weeks before Mr. Roessler was going to start suit.

Q. Well, the paper which Mr. Gannon has, dated March twenty-two, would you say it was about that date? A. About that time.

Q. What did you do when Mr. Bailey came over? A. Mr. Bailey came over—I had compromised with Mr. Scheckner on the $3000 trade acceptance that was protested, and he couldn't give a definite answer, naturally, because he said he had to take it up with his superior and was going to write Mr. Scheckner within a few days. Evidently it took him a week or ten days and Mr. Scheckner hadn't heard from Mr. Bailey, so Mr. Scheckner called me up, I remember it was on Friday afternoon, saying, "Mr. Bailey hasn't shown up and I want that thing paid." "Well", I told him "I will get in touch with the Pathe people, Mr. Bailey in the morning and have him come here and have him straighten it out." I recollect I come up to your office Saturday morning and you already had those papers drawn up.

Q. What papers do you refer to? A. The papers you had drawn up—you were going to sue the Pathe people and John A. Cozzone & Company for Mr. Scheckner because the trade acceptance was protested.

Q. Who was Mr. Bailey? A. Mr. Bailey, I understand, was the secretary or something for the creditors committee.

Q. Did he have any connection with the Pathe Freres Phonograph Company? A. No, sir, not that I know of.

Q. Well, do you know? A. Well, he wasn't in their employ before they got into trouble.

Q. Do you know who he was acting for in this particular transaction? A. He was acting for a gentleman by the name of Mr. Fosdic, I believe.

Q. Did he say who his superior was when he told you the first time he was going to speak to his superior? A. I don't know, no.

Q. Well, what happened then, when he came over the second time? A. Mr. Bailey came over on Mon-

day, I believe—rather, called him up on the 'phone and told him the circumstances, that we were going to start suit—that Mr. Scheckner was going to start suit and he should come over and try to straighten it out, so he comes over on Monday morning, I believe, and he straightened it out with Mr. Scheckner that the Pathe people should give him a check for $1500 and two trade acceptances for $750 apiece for the money which Mr. Scheckner advanced to Cozzone & Company, and on our book account we had—we took over some motors and some parts from the Pathe people because we knew we couldn't get any money, so I thought I would take some material in exchange, and it amounted to—during those three months that we held the trade acceptances—amounted to a little over $3000, so when Mr. Bailey came over he asked about the other trade acceptance and I said, "Mr. Bailey, we will return this over to you and you give us credit on the books for $3000, as you did with other trade acceptances and others matters we took from you." He said, it was perfectly satisfactory, and Mr. Scheckner was there at the time, and Mr. Bailey said, "All right. Now, we will sign this up—sign this agreement up that you are going to give me this trade acceptance". Mr. Scheckner was busy and he suggested we go to my office because Mr. Pavia had to sign it also.

Q. What did you do? A. So we went over to the office and sat down and signed that paper, which I understood to be the cancellation of the debt owing on my books to the Pathe people.

Q. Where was that paper drawn, do you know? A. Mr. Bailey brought that paper over with him. He had evidently had it drawn up over in his New York office.

Q. Was there any discussion between you and Mr. Bailey relative to the acceptance of fifty cents on the dollar? A. Never heard of such a thing.

Q. Anything said about that? A. No, sir.

Q. Who was present at your office when this paper was signed? A. Mr. Pavia and Miss Pavia, his daughter.

Q. Miss Pavia? A. Miss Pavia.

Q. Did Mr. Bailey give you a copy of that paper? A. No, sir.

Q. Was any demand made upon you subsequently by the Pathe Freres Company for the payment of this indebtedness of $3000? A. No, sir.

Q. Didn't you receive a communication later from an attorney demanding the payment of some such sum? A. That was about eight or nine months after, I believe, this thing happened.

Q. Can you fix the date, Mr. Cozzone? A. I can by looking at my statement there when I went over to see the attorney.

Q. I show you this paper and ask you whether that refreshes your memory. A. That is a copy of the statement that I brought over to see one of their attorneys in reference to straightening out the account.

Q. That is after the receipt of this letter? A. After the receipt of the letter from the attorney.

Q. And did you present the original of this account? A. Yes, sir.

Q. To whom? A. I cannot remember the attorney's name, but some attorney in New York.

Q. But that refreshes your memory as to the time. Can you fix the time now? A. Between August 16 and August 18 I should judge.

Q. 1921? A. 1921.

Q. And subsequently, in October, I believe of the same year, suit was instituted against you by a man

by the name of William P. Taylor as assignee of the Pathe Freres Company, is that correct? A. Yes, sir.

Q. That was October 29, 1921. Were your present—you were present in the Courtroom in Jersey City when the case came up for trial? A. Yes sir.

Q. And you were a witness in that case? A. Yes, sir.

Q. And on that day did you see a copy of the agreement—the agreement of March 22, 1921? A. Which agreement?

Q. The paper that you signed for Mr. Bailey? A. I did.

Q. I show you this paper? Is this the paper? A. Yes, sir.

Mr. Roessler: I offer it in evidence.
Paper marked Exhibit C3.

Q. March 22, 1921 (Reading) "Pathe Freres Phonograph Company and Creditors Committee. Dear Sirs: I hereby offer to sell and deliver to you for cancellation your two trade acceptances for $3000 each, coming due respectively on March 12 and March 19, an aggregate amount of $6000 in consideration of your company, notwithstanding my signing of the creditors extension agreement, paying me $1500 in cash and delivering to me trade acceptance for $750 and for $750 coming due respectively on June 13, 1921 and on September 12, 1921, and in consideration of the Creditors' Committee agreeing to such payments, acting through their agents. Yours very truly, John A. Cozzone & Co., John A. Cozzone, Pres. John A. Cozzone (seal), Anthony F. Pavia, Treas." As I understand you did not receive this

cash payment. That went to Mr. Scheckner, is that right? A. Yes sir.

Q. Going back to March 22, 1921, when this paper which has just been marked in evidence was signed, was the paper read to you by Mr. Bailey? A. No, sir.

Q. Did you read it? A. He gave it to me and I read it over and signed it.

Q. Did you understand what the paper—(interrupted) A. I understood that I would have got credit on the books for the other $3000.

Q. How did you arrive at that? A. That was the understanding we had with him in Mr. Scheckner's office.

Q. Was there anything said in your office along those lines? A. There was. Mr. Pavia asked him the same question.

Q. And did you rely on Mr. Bailey's statement to you? A. I did.

Q. Mr. Cozzone, is there another trade acceptance held by your company made by the Pathe Freres Company? A. Yes, sir.

Mr. Gannon: I object to this because I do not think it is, in the first place, the accounting is prayed for in the bill sufficiently to appraise us of the fact on this hearing and in the second place they filed a counterclaim in the law court which is held pending the outcome of this action in Chancery. They have adequate remedy in that.

The Court: What is your prayer, that this document be reformed?

Mr. Roessler: Yes.

The Court: Isn't that about as far as I can go?

Mr. Roessler: I also ask in my prayer for relief that an accounting be had.

The Court: Must you go back into the law courts?

Mr. Roessler: That is correct.

The Court: If you come in here for reformation how can you go further than reform and then let you go on with your action as to how much is due from the other in the law courts before a jury.

Mr. Roessler: I think that is so, I would like to make the offer at this time to show at the time this agreement was signed there was still other money due from the Cozzone Company to the Pathe Company.

Mr. Gannon: We will admit that.

Mr. Roessler: May I show the witness this paper dated November 2, 1923?

The Court: Yes.

Q. And this has not been paid? A. No, sir.

Mr. Roessler: I offer it in evidence, for that purpose.

Paper marked Exhibit C4.

Mr. Roessler: My object in offering this paper is merely to show that at the time of this agreement of March 22, 1921 there was other money due the Cozzone Company from the Pathe Freres Company as represented by the trade acceptance which became due on or about November 2, 1921 and upon its maturity another trade acceptance for $1550.26 was given by the Pathe Company to the Cozzone Company dated November 22, 1921, which has just been identified by the witness.

Mr. Gannon: May I correct my admission heretofore? I understood Mr. Roessler was offering this for the purpose of showing that on March 22, 1921, the time when these two $3000 trade acceptances were surrendered for $3000 that other money was due Cozzone from the Pathe Freres. Now, manifestly if this trade acceptance which he now offiers dated November 2, 1921, six or seven months afterward—it cannot be competent to show that fact.

Mr. Roessler: I had already stated this was a renewal. There were several renewals. I would like to ask a question to explain that.

Q. Mr. Cozzone, when was the debt created for which the original of this trade acceptance was given? A. I think it was around August or July, 1920, trade acceptance for five thousand and some odd dollars, which I discounted at the West Side Trust Company. They had been cutting that down gradually until that is what was left of it. That original one was in 1920, before they ever got in trouble.

Q. And the original $5000 and all the renewals were kept by this bank—discounted? A. Yes, sir; they paid the bank direct.

CROSS EXAMINATION BY MR. GANNON:

Q. I show you a paper writing marked C3, and is that the paper writing you stated which you read and then signed? A. I did.

Q. You read that before you signed it? A. I read it, yes, sir.

Q. How long have you been in this country? A. About 30 years.

Q. You read English quite fluently? A. I do.

Q. And did you see this statement in the letter, "I hereby offer to sell and deliver to your for cancellation your two trade acceptances for $3000 each, aggregating $6000 in consideration of your company paying me $1500 cash and delivering two trade acceptances for $750 each." You saw that in the letter before you signed it, didn't you? A. Yes, sir.

Q. And didn't you know that by the very terms of that agreement which you say you read that you were surrendering $6000 in trade acceptances for the value of $3000? A. No, sir.

Q. Well, how do you explain the fact that it is expressly set out in there that you are surrendering two trade acceptances aggregating $6000 upon the payment of $3000 aggregate if you did not understand that fact? A. I had in mind the agreement that I had with Mr. Bailey at the time he brought this agreement over there that he was going to give me credit on the books for $3000 and I cancel it.

Q. Does that agreement say anything about giving you credit for $3000 on the book account? A. The agreement doesn't say that.

Q. Then why did you sign it if that was the understanding? A. I understood that was what the sense of the agreement would be.

The Court: From whom?

Witness: From Mr. Bailey.

Q. You read the agreement? A. I read it over roughly.

Q. And if it did not express your agreement why did you sign it? A. When I read it I thought it did express my agreement with Mr. Bailey.

Q. Now, you testified in the Supreme Court action, didn't you? A. I did.

Q. And didn't you testify in the Supreme Court, page 12, as follows: "Q. What did you write anything down for? A. He told me to sign that agreement so that I could not sue him afterwards, just according to that agreement I did sign before, and that is specified in that paper, and I have the $3000 trade acceptance; he would give me credit on the books the way he did with some other stuff that I took—some machinery." Did you testify to that in the Supreme Court? A. I did.

Q. Now, it was stated that you were going to be able to sue the Pathe Freres Company afterwards? A. After when?

Q. After you had signed this agreement? A. Which agreement?

The Court: The letter or the other agreement?

Mr. Gannon: This agreement marked Exhibit C3.

A. That I was not to sue?

Q. Not to be able to sue the Pathe Freres Company after you signed that? A. I had no such agreement with Mr. Bailey.

Q. But you did sign this agreement, C3? A. I signed that.

Q. And you did testify in the Supreme Court that Mr. Bailey told you to sign that agreement so you couldn't sue the Pathe Freres Company afterwards? A. Mr. Bailey didn't say those words to me.

Q. I didn't ask you that. Did you testify to that in the Supreme Court? A. I do not remember.

Q. Now, can you fix for us the date when you hypothecated these trade acceptance to Mr. Scheck-

ner? A. It was shortly after I received them from the Pathe people.

Q. About what date? A. I could tell you if I looked at the trade acceptances.

Q. I show you exhibits marked C1 and C2 and ask you to tell me the date when you hypothecated these trade acceptances to Mr. Scheckner? A. It must have been three or four days after the receipt of these trade acceptances which would probably be December 12, I should judge.

Q. Now, you are quite sure of that date? A. I should judge about that time.

Q. It most certainly was in December? A. It was around that time. It couldn't be before because I couldn't go to Mr. Scheckner if I didn't have the trade acceptances.

Q. You are most certain it was in December and not in January? A. I think it was. I wouldn't say sure, but I think it was within three or four days of the date of the trade acceptances. I cannot remember, four years ago.

Q. According to that then you are sure it was in December and not January? A. I presume.

Q. Well, are you sure? Do you say that now? A. I wouldn't be sure.

Q. And when these trade acceptances became due what did Mr. Scheckner say to you? He wanted the money, didn't he? A. He wanted them paid naturally.

Q. And what did you tell him? A. I told him that I would see the Pathe people and see that they were paid.

Q. Why didn't you pay them yourself? A. Why didn't I pay them myself?

The Court: Answer the question, do not repeat it.

Q. Yes. A. Because it wasn't up to me to pay them.

Q. You had dealt with Mr. Scheckner, hadn't you? A. Yes, sir.

Q. The Pathe Freres hadn't dealt with him, had they? A. Yes, sir.

Q. Had Pathe Freres Company any part in hypothecating these trade acceptances with Mr. Scheckner? A. No, sir.

Q. So that you dealt with Scheckner directly? A. I did.

Q. And, therefore, if you were the one who was dealing with Mr. Scheckner, why didn't you pay him when he demanded payment? A. I asked Mr. Scheckner to wait until I saw the Pathe people and see that they paid it because it was protested.

Q. Why didn't you give Mr. Scheckner a check for what was due on those trade acceptances and then get it from the Pathe Freres? A. It wasn't necessary to do that because I asked Mr. Scheckner to wait until I saw the Pathe people.

Q. Did Mr. Scheckner agree? A. He did wait a while, yes, sir.

Q. Then he got impatient? A. He did.

Q. And threatened to start suit? A. Start suit against both of us.

Q. Why didn't you give Mr. Scheckner your check then to stop the suit? A. I didn't pay it because I got after the Pathe people right away and Mr. Bailey came over there and straightened the matter out before the suit was started.

The Court: You didn't pay because you didn't have the money?

Witness: Not exactly that, your Honor.

Q. Did you have the money in the bank at this time? A. I don't know just how much we had, I told Mr. Scheckner to wait a few days until I saw the Pathe people, and he did.

Q. If you had the money in the bank why was it necessary for you to hypothecate these trade acceptances? A. I didn't have the money in the bank at the time I discounted them.

Q. Did you have the money in the bank at the time they came due? A. I don't think I had enough to take care of them.

Q. That is why you did not give Scheckner your check? A. I didn't give him the check because he would wait a few days until I got the Pathe people over there.

Q. Scheckner had become impatient and threatened to start suit? A. He did start suit.

Q. And his attorney, Mr. Roessler, actually drew the papers to start suit against you and Pathe Freres? A. Yes, sir.

Q. And you knew that Pathe Freres was in a different district of the United States District Court and that they could not be brought into such a suit with you, didn't you? A. I didn't know anything about that.

Q. And you knew that if Scheckner started such suit the only one he could get would be you, didn't you? A. I did not.

Q. And you knew if Scheckner got judgment against you you didn't have the money in the bank to pay it, didn't you? A. I could probably pay him some of it and hold off—

Q. You had the plant and business, didn't you? A. Yes, sir.

Q. You didn't want any execution to be levied against your bsuiness and sold out, did you? A. Not if I could help it.

Q. That is the reason you went to the Pathe Freres to try to get the money from them? A. I went to the Pathe Freres to try to get the money from them because I knew if I didn't get it right away I would never get it.

Q. Now, I show you a paper writing and ask you if—whose signature that is on there? A. My signature.

Mr. Gannon: I offer in evidence agreement known as the Creditors Extension Agreement dated December 15, 1920, between Pathe Freres Phonograph Company, a Delaware Corporation, and such creditors of the company as shall execute this agreement or a counterpart thereof, signed by John A. Cozzone & Co., addressed 61 Arlington Street, Newark, N. J. I would like to read into the record paragraph three of that agreement. "Until January 5, 1921, and thereafter until October 1, 1921, in the event this agreement shall become operative, none of the creditors becoming parties to this agreement shall institute any action or proceeding for the appointment of a receiver of the company nor take any steps for the enforcement of its or his claims of whatever nature against the company." I would also like to read paragraph 15 of the agreement. "This agreement may be executed in counterpart by any creditor at any time and all of such counterparts (only one of which need be executed by the company) shall constitute one and the same agreement and shall be lodged with the company, and shall be open to the inspection and examination of the committee or any of the parties hereto. This agreement shall bind the executors, ad-

ministrators, successors and assigns of the respective parties hereto and shall terminate October 1, 1921, or on December 31, 1921, if extended as herein provided. All notices hereunder shall be sufficiently given if mailed to the parties hereto at the addresses noted under their respective signature." I would like also to read paragraph 2 of the agreement into the record. "This agreement shall not become operative (except temporarily until January 5, 1921, as provided in paragraph 111), until it is declared operative by the committee. The committee is hereby authorized to declare it operative when executed by a sufficient number of creditors to make it reasonably certain, in the opinion of the committee, that the purposes of the agreement can be obtained, and when the committee shall be assured to its satisfaction as to the co-operation of the company, its directors and management and as to any other matter by the committee deemed requisite.

Paper marked Exhibit D1.

Mr. Roessler: I would like to have you read the first sentence in paragraph 5. "This agreement, and the extension herein provided for, shall immediately terminate and end in case the company is adjudicated to be insolvent or bankrupt or makes an assignment for the benefit of its creditors."

Q. Do you remember the date when you signed this agreement, Exhibit D1? A. I do not remember the exact date, but I can get it, because I signed this agreement after I received the machinery from them people and after they took the balance of the stock that I had in the shop.

Q. Did you testify in the Supreme Court as follows: "Q. December 27, they made you a cash payment of $500? A. That is when I signed the creditors' agreement, I think." A. I can refresh my memory.

The Court: Is that about the time?

Witness: I couldn't say, probably December or January, but I remember I signed that agreement after they agreed to give me some machinery over there and a cash payment. Might be December 27, or January 3 or 4. I do not recollect.

Q. Did you testify to that in the Supreme Court? About—what did you testify about—or did you testify about that date? A. I don't know about that time; I can't say exactly, unless there is something there to show me when it was.

Q. Now, then, you got a notice that this creditors agreement, referring to Exhibit D1, was declared operative by the committee, didn't you? A. I do not remember.

Q. Well, would you say you did not? A. I would not say I did; I would not say I did not.

Q. Do you remember ever receiving any notice? A. I do not remember.

Mr. Gannon: I would like to have this marked for identification, at this time.

Paper marked Exhibit D2 for identification.

Q. Now, Mr. Pavia signed this agreement also, didn't he? A. Yes, sir.

Q. Referring to Exhibit C3. He did not come to the Supreme Court to testify, did he? A. No, sir.

Q. And about the time that this agreement, referring to Exhibit C3, was made, how much did Pathe Freres Phonograph Company owe you including the two $3000 trade acceptances which are the subject of this agreement? A. Besides the $3000 about fifteen or sixteen hundred dollars.

Q. That is all? A. About. I am not sure.

The Court: How is that?

Witness: After deducting the six thousand left around about fifteen or sixteen hundred.

The Court: And the one in the bank?

Witness: No; I still had the trade acceptances of $5000.

The Court: That was due the bank at the time.

Witness: At the bank, yes, sir.

Q. Don't you know, Mr. Cozzone, that it was about $5000? A. Originally.

Q. No, on March 22, 1921, don't you know that Pathe Freres Company owed you about $11,000 altogether?

The Court: That is the two trade acceptance involved and the $500 trade acceptance discounted in the bank.

Witness: Yes, sir; that is correct.

Q. That is right. So that at the time of the making of this agreement, referring to Exhibit C3, Pathe Freres Phonograph Company did owe you about between ten and eleven thousand dollars? A. About.

Q. Yes, and this trade acceptance, referring to Exhibit C5, $1550 trade acceptance, dated Novem-

ber 2, 1921, and the time that this agreement was signed, March 22, 1921, this trade acceptance was almost $5000? A. I presume. I do not remember exactly what it was.

Q. Well, it was about that? A. Well, I wouldn't say that because that $5000 was around 1920, and I think the Pathe people paid the bank something on account by the time this other agreement was signed.

Q. Well, in any event the debt represented by the trade acceptance marked Exhibit C5, was more than $1550 on March 22, 1921, is that correct? A. I wouldn't say sure but probably it did.

Q. Hadn't you testified a moment ago, that the Pathe Freres Phonograph Company owed you almost $11,000 altogether on that date? A. Not on that date, I am not sure.

The Court: They owed you six thousand represented by the two trade acceptances and the amount of a preceding trade acceptance on which there is now a balance due to you of $1500?

Witness: Yes, sir; that is correct.

The Court: Whatever that amount may have been?

Witness: I don't know, but this is the remnant of that $5000 trade acceptance.

Q. Did you testify as follows in the New Jersey Supreme Court action, page 13: "Q. On December 24, they turned over three screw machines to you of a value of $4,116? A. I presume so." Is that right? A. I think so.

Q. "Q. December 27, they made you a cash payment of $500. A. That is what I signed the credi-

tors agreement, I think." Is that right? A. I think so.

Q. "Q. And on the 29th they turned over screw machines to you of the value of $3,540. didn't they? And on the 31st phonographs of a value of $290.15? A. Yes, sir." Did you testify to that? A. Yes, sir.

Q. "Q. And on February 3, they turned over motors of a value of $2700? A. Yes, sir." Did you testify to that, making a total they turned over to you of machinery and merchandise of $11,190.40? A. Approximately.

Q. "Q. And in addition to that were these three trade acceptances, one for five thousand and two for three thousand each? A. Yes, sir." Did you testify to that? A. I believe so.

SAMUEL SCHECKNER, sworn for complainant:

DIRECT EXAMINATION BY MR. ROESSLER:

Q. You are in the real estate business in Newark? A. Yes, sir.

Q. How long have you known John Cozzone? A. Since he was a little boy, a few years old.

Q. Some time in December, 1920, did you discount for Mr. Cozzone a trade acceptance for $3000? A. Yes, sir, I did.

Q. I show you Exhibit C1 and ask you whether this is the trade acceptance you discounted? A. Yes, sir; this is my signature.

The Court: That is it?

Witness: This is the one, yes, sir.

Q. Did you pay him the money for it? A. I paid him the money for it.

Q. Later did he ask you to discount a second trade acceptance? A. Yes, sir.

Q. I show you this paper marked Exhibit C2, purporting to be the copy of the original trade acceptance, and ask you whether that is the copy of the second trade acceptance which he handed you? A. Yes, sir.

Q. Did you pay out any money on that? A. No, sir.

Q. Was the trade acceptance, C1, paid at maturity? A. No, sir.

Q. Was it protested? A. Yes, sir.

Q. Did you get into communication with Mr. Cozzone after that? A. Yes, sir, I did.

Q. Asked him to pay you? A. Yes, sir.

Q. Did you also communicate with the Pathe Freres Company? A. Yes, sir, I did.

Q. Did you see Mr. Bailey, the gentleman to my left? A. Twice at my office.

Q. At your office? A. Yes, sir.

Q. Will you please tell us what conversation you had with him, if Mr. Cozzone was present and when? A. Yes, sir.

Mr. Gannon: Both times?

Witness: Well, I do not remember exactly both times. Once I remember surely Mr. Bailey in my office, and I spoke to him over the 'phone several times. I do not remember he was twice in my office, but I do once. I remember surely. First time I do not remember.

Q. Do you recall the occasion when you received cash and two new trade acceptances from Mr. Bailey? A. Yes, sir; this is the occasion I remember very well.

Q. Will you tell us what conversation you had at that time? A. Mr. Bailey called at my office and he gave me $1500 check and two trade acceptances of $750 each and I therefore turned back again to Mr. Cozzone the other $3000—the other three thousand—both of them I returned back to Mr. Cozzone, six thousand dollars of trade acceptances.

Q. Was there any conversation between Cozzone and Mr. Bailey? A. Yes, sir; they had quite some, about five or ten minutes they spoke. I was not much interested in their argument; and they asked me to draw up some paper. I told them I had no time. I asked them to leave my office and go to their own office. I was not interested any more, except to get my money, that was all.

Q. What sort of paper did they ask you to draw up, with reference to what? A. Some agreement between them—some transaction between—

Q. What was the transaction. I want the conversation. A. Well, the conversation there was Mr. Bailey asked Mr. Cozzone if it wouldn't be more than fair to turn back the other $3000 and he said give him credit on his book account, Mr. Cozzone said, "I think you are right"—he agreed to it. He says, "Yes, perfectly proper for me to turn over and give me credit on whatever I owe you," and they asked me—going to call my stenographer and I said "No, I have no time," I said, "You better go to your own office and close your transaction." That is all.

Q. That is all you know about the transaction? A. That is all I know.

Q. Were the two trade acceptances for $750 each paid? A. Yes, sir.

Q. And you received the $1500 cash? A. I received the full amount.

Q. When you received the $1500 in cash and the two trade acceptances what did you do with the two trade acceptances that you had? A. I turned them back again to Mr. Cozzone.

Q. Who paid you the $1500 in cash and the two trade acceptances? A. Mr. Bailey.

Q. Why did you turn the trade acceptances to Mr. Cozzone? A. Well, I put them on the table and whatever of them took them—I put them right down before them and they both—I presume one was taken by Mr. Bailey and one was taken by Mr. Cozzone.

Q. Which one was being paid for by the $1500 in cash and— A. The first one. The first one which was due. I received one and then a few days I received another.

Q. The only one that belonged to you was which one? A. The first one that was due.

Q. The one you discounted? A. The one I discounted.

Q. You got in payment for that $1500 cash and two renewals? A. Yes, sir; I held the other one, the second one, as sort of security.

Q. Do you recall what you did with the one that was being paid—that was paid? A. I turned that to Mr. Bailey.

Q. What did you do with the other? A. To Mr. Cozzone.

Q. Why did you do that? A. Well, because I had it from Mr. Cozzone—I took it from him. Mr. Bailey paid me $3000. I didn't think he was interested in the other one. The transaction they had between them.

Q. Why did you turn the one to Mr. Bailey and the other to Mr. Cozzone? A. I have no occasion, but I figured when this man paid me the $3000 the

other I owed to Mr. Cozzone because at the time one was given to me first a few days Mr. Cozzone brought me the other one, and when I learned of this little mix-up of the Pathe I held the other one as security.

Q. I speak of this only because you did say earlier that you passed both of them over to Mr. Cozzone. A. Well, I turned over—they were both sitting right in my office, and I gave one to Mr. Bailey as he gave me the money, and Mr. Cozzone I gave the other. In fact, I tell you—

Q. Do you recall that distinctly? A. I tell you, I couldn't distinctly, but I am almost positive now, this moment, I turned them both to Mr. Cozzone, because Mr. Cozzone had endorsed all these papers to me. I didn't know who the Pathe were. I took it on the strength of Mr. Cozzone, and Mr. Cozzone—

Q. He had to endorse the two renewals? A. The two renewals and the check. The two renewals, I took his endorsement. I had no more faith because the Pathe had the creditors committee and I turned all the papers over to Mr. Cozzone.

Q. You recall that now? A. I recall that positive.

Q. You did not turn one to Cozzone and one to Bailey? A. No. I put them on the table and then he turned around to Mr. Cozzone and then they talked just a few minutes.

Q. Did you instruct me shortly after the trade acceptances became due to institute suit in the United States Court against— A. Yes, sir.

Q. Against whom? A. Against all the parties.

Q. And you know that I did actually draw up a complaint and got a subpoena and so forth? A. Yes, sir.

Q. I do not think you answered my question against whom, did I tell you, to institute suit? A. Against all the parties, Pathe and John A. Cozzone.

CROSS EXAMINATION BY MR. GANNON:

Q. Mr. Scheckner, your memory isn't so good on who got these trade acceptances, is it, generally? You do not remember the transaction at this date, do you? A. Well, you can refresh your memory. I have a pretty good memory.

Q. You are depending upon your recollection, isn't that so? You haven't any memorandum? A. No; I have no memorandum.

Q. You are just depending on your recollection here today? A. Yes, sir.

Q. And do you consider that your recollection as to the conversation which took place between Cozzone and Bailey before you is any better than your recollection as to who got these trade acceptances and who paid you? A. Well, naturally, I dealt with Mr. Cozzone. I had nothing to do with Mr. Bailey. Mr. Bailey simply called there with the check and trade acceptances endorsed in the name of Mr. Cozzone and I accepted from him and turned over to him.

Q. Your recollection, I am asking you now, is no better about the conversation than it is about the trade acceptances, is it? A. I couldn't say.

Q. You do not remember the exact words that were used? A. The exact words, no.

Q. You testified in the Supreme Court, didn't you? A. Yes, sir.

Q. You didn't testify anything about the conversation—about conversation between Cozzone and Bailey in your presence about the applying of this

trade acceptance on the book account? You didn't, did you? A. I do not know what I said to you there.

Q. Didn't you testify in the Supreme Court as follows? "Q. What was done at that time? A. At the time there was quite a little conversation about these matters and at the end Mr. Bailey said, 'Now, Cozzone, you know you owe us considerable money; it would not be any more than fair to turn over that trade acceptance of $3,000.' He said, 'I have no objection. I will give it to you so long as you take care of Scheckner. I don't want any more suits against my company'." Did you testify to that in the Supreme Court? A. I must have if it is there.

Q. And that is what took place—that is the conversation? A. Not exactly. There must have been about two hundred more words said there.

Q. Now, Mr. Scheckner, you notified the Pathe Freres when you got the trade acceptances from Cozzone, didn't you? A. Yes, sir.

Q. Wrote them a letter? A. Yes, sir.

ANTHONY PAVIA, sworn for complainant.

DIRECT EXAMINATION BY MR. ROESSLER:

Q. Mr. Pavia, you are the treasurer, I believe, of John A. Cozzone Company, the complainant in this suit? A. Yes, sir.

Q. I show you this paper which has been marked Exhibit C3 and ask you if that is your signature? A. Yes, sir.

Q. Who had charge of this transaction for your company, you or Mr. Cozzone? A. Mr. Cozzone.

Q. And he asked you to sign that paper? A. Mr. Cozzone and Mr. Bailey came to our office one morning, and I supervised the place, and I am always working, and I went in the office and I asked Mr. Cozzone what he wanted me to do. He said, "We have come to a certain agreement down at Mr. Scheckner's office"—I thought it was in your office—and he says, "you can sign those papers." I turned around and I looked at Mr. Bailey—He had a raincoat on and had one of those brief cases—and I says, "Mr. Bailey"—I asked Mr. Cozzone his name. Mr. Bailey said, "Mr. Bailey"—I said, "Mr. Bailey, I understand Mr. Cozzone is going to give you the other trade acceptance, will you give us some sort of receipt for it?" Just this way, he says, "Of course, you gave us several trade acceptances and this one that Mr. Cozzone give me, it is going to wipe the books" he said, "with counteraccount, as you usually done that before"—just the words he said to me.

Q. Was there anything else said? A. After he said that I signed, I think, two trade acceptances. I do not remember signing that paper but my signature is there, but I did not read it.

Q. That is your signature? A. Yes, sir.

Q. You said you did not read it? A. No; I never read it.

Q. Why didn't you read it? A. Because Mr. Cozzone said it was all right and I took Mr. Bailey's statement to me as a right one.

Q. Who else was present at the time? A. My daughter, stenographer.

Q. The young lady here? A. Yes, sir.

CROSS EXAMINATION BY MR. GANNON:

Q. The reason you did not read this agreement Exhibit C3 is because Mr. Cozzone told you he read it and understood it and it was all right? A. No, sir; I took Mr. Bailey's strength of the statement.

The Court: What?

Witness: I took his word for what he told me.

The Court: What did he tell you?

Witness: He told me that the trade acceptance, $3,000., that Mr. Cozzone gave him, was going to clean us off the books. That is the way he spoke, counterclaim, he said, the office would take care of it—something like that.

Q. 3,000 trade acceptance, is that right? A. Yes, sir.

Q. Didn't you know you were giving him $6,000 of trade acceptances? A. We wasn't giving the other one any more because Mr. Bailey gave us two trade acceptances and a check for $1,500.

Q. Gave it to you? A. Gave us I said, not to me.

Q. Who did he give it to? A. They had it, between Mr. Cozzone and Mr. Bailey.

Q. At the time you signed this agreement? A. Yes, sir; on the desk.

Q. Didn't you hear Mr. Scheckner testify that Bailey gave him the $1500 and two trade acceptances for $750 each and than then Scheckner turned over the two $3000 trade acceptances to Cozzone? Didn't you hear Mr. Scheckner just testify to that? A. I didn't have nothing to do with the trade acceptances. Mr. Cozzone was handling that.

Q. Tell me this. At the time this agreement was signed in your office did Cozzone have the two trade

acceptances for $3000 each in his hand? A. I don't know.

Q. You don't know. You didn't see them? Did Bailey have any money in his hand or checks that he gave to Cozzone? A. When I went into the office they were on the desk and I signed it.

Q. Did you see Bailey give Cozzone anything when he signed this agreement? A. No, sir.

Q. And after the agreement was signed who took it? A. The two of them took it and went away.

Q. The two of them took it and went away? A. They went away again, yes, sir.

Q. Mr. Bailey did not make it, did he? A. Well, that I do not recollect.

Q. But your recollection is good that Bailey said he would apply $3000 on the trade acceptance? A. Absolutely, because I asked him the question.

Q. Now, you knew that your company was sued in the Supreme Court, didn't you? A. Yes, sir.

Q. You did not testify, did you? A. I didn't know nothing about it. I didn't think—

The Court: Answer the question.

Q. You did not testify in the Supreme Court suit, did you? A. No, sir.

Q. And you knew your company was being sued? A. Yes, sir.

Q. And you knew that your defense was that this $3000 trade acceptance was to be applied on the book account, didn't you? Why didn't you come to the Supreme Court and testify to that, if you knew it? A. I didn't know nothing about it, I wasn't advised to it.

Q. What date was it that this conversation between Mr. Bailey and Mr. Cozzone and you took place? A. The day that we signed the trade accep-

tances,—check—I presume was around the middle of March.

Q. And about what time of the day was it? A. About eleven o'clock in the morning.

Q. And what sort of day was it, was it clear or— A. It was clear.

Q. Clear? A. Yes, sir.

Q. Wasn't raining? A. No, sir.

Q. Wasn't threatening? A. Well, that I couldn't say.

Q. But it was a clear day and was not raining? A. I was inside man, I don't look out very much.

Q. You didn't wear a raincoat or rubbers that day or carry an umbrella, did you? A. I do not wear such things in the factory.

Q. Why should Mr. Bailey, as you testified, have a raincoat on? A. He had a light coat. He stood up, never sit down, and I stood alongside of him and that is the reason I know.

Q. Didn't you testify on your direct examination that Mr. Bailey had a raincoat on? A. That is like raincoat, they use them for raincoats and other coats—they use it any time.

Q. Your recollection is good now? A. Absolutely.

Q. And he had a raincoat on and it was a clear day and you are sure as to the very words that Mr. Bailey used? A. Yes, sir, because it was very important to me.

Q. Why were they so important to you? A. I was anxious to see things fixed up.

Q. You say Mr. Cozzone handled the whole transaction, don't you? A. Yes, sir.

Q. Made all the arrangements? A. Yes, sir.

Q. And what reason was there for you to inquire about the details of the transaction if Mr. Cozzone

had taken care of it all and he had told you that it was all right? A. All the reason in the world. I am interested in it.

Q. If you were so interested in this transaction why didn't you read the agreement that you signed? A. Mr. Cozzone thought it was a release.

Q. Just read that to me. A. I have said that I did not read it.

Q. Will you please read it to us—to me? A. "Hereby offer to sell and deliver to you for cancellation your trade acceptances of $3000 coming due respectively March 12 and March 19, aggregate amount of $6000 in consideration of your company notwithstanding my signing of the creditors extension agreement, paying $1500 cash and delivery of two trade acceptances of $750 and for $750 coming due respectively June 13, 1921 and September 12, 1921 and in consideration—"

Q. You read English, don't you, and you did on that day? A. I did not read that.

Q. You could read English on that day? A. I wouldn't understand that now, the way it is, much.

Q. You could read English on that day? A. Yes, sir.

Q. Where is there anything in there which says that $3000 of trade acceptances was to be applied on the book account? A. I took Mr. Bailey's word I told you.

Q. You took Mr. Bailey's word? A. Yes, sir.

Q. And you took Mr. Cozzone's word? A. Yes, sir.

Q. If Bailey told you one thing and Cozzone told you another who would you believe? A. The two of them told me the same so—

Q. If Bailey told you one thing and Cozzone told you another who would you believe? A. Then I would investigate a little further.

Q. You would believe Mr. Cozzone, wouldn't you? A. Not very well.

Q. You would have read the agreement? A. Yes; I would have went over it carefully.

Q. And if you had read that agreement would you have signed it? A. Never.

Q. Although Mr. Cozzone had already signed? A. Well, I don't know.

Q. You saw him sign? A. That is my signature there, that is all.

Q. Had Cozzone signed when you signed? A. It is there.

Q. Is Mr. Cozzone authorized to sign agreements for the corporation? A. That I don't know.

Q. Well, you don't know that he is not? Is there anything in your by-laws or charter which prohibits the president from making contracts? A. It is a closed corporation. We haven't got strict by-laws.

REDIRECT EXAMINATION BY MR. ROESSLER:

Q. Do you recall that Mr. Cozzone was on the petit jury in the Court House in Newark at that time? A. Yes, sir.

Q. Was he serving on the jury on the day this case was supposed to come up in Jersey City? A. Yes, sir.

Q. Can I refresh your memory? Do you recall whether there was any discussion in reference to the adjournment of the case in the Supreme Court? A. Yes, sir; Mr. Cozzone come to the factory in a hurry and said the judge down in Jersey City would not stand for no more postponements, had to get down there and I had to take care of the factory.

Q. You had to take care of the factory, is that why you did not go to Jersey City? A. If I had to go I would have went along with him.

RECROSS EXAMINATION BY MR. GANNON:

Q. Cozzone did tell you he was going to Jersey City to testify in this action? A. Yes, sir.

Q. And you knew that the agreement you were relying on was not the one that you had signed, isn't that so? A. I never saw that agreement.

Q. But you did not go to Jersey City to testify, did you? A. No, sir.

MARY PAVIA, sworn for complainant.

DIRECT EXAMINATION BY MR. ROESSLER:

Q. Miss Pavia, are you in the employ of the John A. Cozzone Company? A. Not at present.

Q. Were you in their employ in March, 1921? A. I was.

Q. Do you know Mr. Bailey, the gentleman to my left? A. I just saw him the one time that he came up to the office.

Q. Do you know when that was? A. I do not recollect the date, no.

Q. But you do recall, I believe, Mr. Cozzone and your father signing a paper when Mr. Bailey was there? A. I do.

Q. And do you recall whether you saw this paper? A. No; I do not remember.

Q. Do you recall any conversation that was had at that time between Mr. Bailey and your father on Mr. Cozzone? A. I do remember that the three were standing up and I was standing right near and after the papers were all signed and Mr. Pavia was about to go away he turned around to Mr.

Bailey, he says, "What about receipts for these papers?" Mr. Bailey turned around and said, "There isn't any required, the contra account will take care of that on the books."

Q. And there was a contra account at that time? A. There was at that time, yes, sir.

Q. Did you have charge of the books at that time? A. I did.

Q. Did you bring with you the original entries in the books showing the condition of this account? A. They are the original entries.

Q. You were not a witness in the Supreme Court action, were you? A. No, sir, I was not asked any questions.

Q. Had I spoken to you at that time with reference to it? A. No.

CROSS EXAMINATION BY MR. GANNON:

Q. Miss Pavia, you say you do not know that that is the paper that was signed at the time in your office, do you? A. I do not.

Q. And you say that the only words that Mr. Bailey said were that the contra account would take care of the receipts? A. Those were the only words I paid attention to; that is all I heard.

Q. That is all you heard? A. That is all I heard.

Q. So you did not hear Mr. Bailey say directly that the $3000 trade acceptance was to be credited on the book account? A. Not those very words, no, sir.

JOHN A. COZZONE, recalled.

FURTHER DIRECT EXAMINATION BY MR. ROESSLER:

Q. Mr. Cozzone, when this case was reached for trial in Jersey City were you on the petit jury of Essex County? A. Yes, sir.

Q. And you were on it for, I think I have the original panel—

Mr. Gannon: Admitted.

Q. And did you prepare an affidavit towards getting an adjournment of that case on June 26th? A. Yes, sir.

Q. You were forced to trial that day? A. I was. I had to go right direct to Jersey City from the Court House here.

CROSS EXAMINATION BY MR. GANNON:

Q. You did go to Jersey City that day? A. I did.

Q. And did you hear your partner Mr. Pavia testify that you came to the shop before you went to Jersey City and told him that you had to go to Jersey City to try the case? You heard him testify to that? A. I think I did. I do not remember that.

Q. Well, didn't you hear him a few minutes ago? A. Yes, sir; I did.

Q. Isn't it true you did go to the shop before you went to Jersey City? A. That I couldn't say. I am not sure about that.

Q. Is he telling the truth or are you?

The Court: That is up to me.

John A. Cozzone. Recalled. Cross.

Q. Did you or didn't you go to the shop? A. I do not recollect. Probably I did and probably I didn't.

Q. Did you ask him to go to Jersey City with you? A. No.

Q. Why didn't you? A. Because I didn't think it was necessary.

Q. You knew you had to try your case that day, didn't you? A. I did.

Complainant rests.

Mr. Gannon: I offer in evidence transcript of shorthand notes of testimony taken on the 26th day of June, 1922, before Judge Speer without a jury in the Hudson County Circuit and New Jersey Supreme Court in a suit between William P. Taylor, complainant, vs. John A. Cozzone & Co., a corporation, defendant according to a stipulation between the parties hereto dated April 7, 1924, which is attached to the record.

Paper marked Exhibit D2.

Mr. Gannon: I offer the Supreme Court record of the pleadings with all endorsements.

Paper marked Exhibit D3.

The Court: The suit I am now trying is against Redfield. I have not the files here. Why is that?

Mr. Gannon: I will read the stipulation. "It is stipulated by and between the parties hereto through their respective attorneys that William C. Redfield, Eugene A. Whitman and Benjamin A. Kaye, receivers—

Mr. Roessler: The equity receiver was appointed between the time the Supreme Court action was started and the date of the trial.

The Court: After these negotiations that have been related to here the Pathe Company went into the hands of the receiver appointed by the United States Court in equity in an insolvency suit and Redfield and his associates were appointed receivers?

Mr. Roessler: Yes.

The Court: And this book account on which you sued at law passed to them as receiver?

Mr. Roessler: The interest in it, yes, sir, from Pathe Freres to them.

The Court: You did state to me that the Pathe people assigned to Taylor, did Taylor reassign to the receiver?

Mr. Roessler: He did not, but it was stipulated in the Supreme Court action that William C. Redfield and the other receivers—

The Court: That Taylor held for Redfield?

Mr. Roessler: Yes; and that they should be substituted as parties defendant. The reason for that—I think it is important—that stipulation was entered into when Judge Speer suggested the instittuion of the action in equity, then in order to help us get service on the defendants Mr. Gannon very kindly consented to this arrangement so that we could bring somebody into court.

The Court: What was the title of the law suit?

Mr. Roessler: William P. Taylor v. John A. Cozzone & Co., and then after the substitution of the receivers it was William P. Taylor—

The Court: To the use.

Mr. Roessler: No. William P. Taylor, Redfield, Whitman and Kaye, receivers in equity of the United States District Court for the Southern District of New York of the Pathe

Freres Phonograph Company, a corporation, substituted plaintiff.

The Court: The Pathe Company owned this claim which is now in the hands of the receiver and in the course of administration.

Mr. Gannon: Wound up. I don't know what the termination of it is but the Pathe is operating under a re-organization.

The Court: It is wound up with the exception of this account.

Mr. Gannon: Yes, sir. That is my understanding. I do not want to vouch definitely for the facts.

I offer in evidence, certified by the Clerk of the Court—United States District Court, Eastern District of New York, bill of complaint, answer, order appointing receivers, notice to creditors, in the suit between Samuel Louden Meeks, Inc., complainant, against Pathe Freres Phonograph Company, defendant. This is the receivership proceeding.

Paper marked Exhibit D4.

CHARLES D. BAILEY, sworn for defendant.

DIRECT EXAMINATION BY MR. GANNON:

Q. Mr. Bailey, where do you live? A. Summit, New Jersey.

Q. On about December 20th, you were in the employ of G. M. P. Murphy & Co.? A. I was.

Q. And who were they? A. They are a New York house that represents financial interest.

Q. They are a banking house? A. Banking house.

Q. And did they have charge of this Pathe Freres creditors' committee? A. They were appointed agents of the committee for the administration of the company's affairs.

Q. Who formed this committee? A. It was formed by a group of creditors representing various interests, banking creditors, trade creditors and note holders of the company.

Q. And G. M. P. Murphy & Company were employed by the creditors' committee to affect the reorganization of the Pathe Freres Company? A. They were.

Q. Did you occupy an official position in that committee? A. I did; I was secretary of the committee.

Q. And are you familiar with the facts and details of that committee by reason of your position? A. I am.

Q. I now show to you a paper writing purporting to be a copy of the minutes of the creditors' committee and ask you if that is a true copy of the original minutes? A. It is.

Q. And were the original minutes prepared by you? A. They were.

Q. Where are they? A. They are at our office in New York City.

Q. You mean G. M. P. Murphy & Company's office? A. G. M. P. Murphy, yes, sir.

Q. Were you able to bring them here with you today? A. Not without obtaining the consent of the various members of the committee.

Q. And you were unable to get that?

Mr. Gannon: I offer this in evidence.

Mr. Roessler: I object. I do not see how those minutes are binding on us.

Mr. Gannon: I offer the minutes of the creditors' meeting.

Mr. Roessler: I object because the original is not here.

The Court: You are going to produce the original?

Mr. Gannon: I think I accounted for the non-production of them. They are in another state and we cannot produce them.

The Court: Why not let them in subject to correction?

Mr. Roessler: I object on the further ground that the minutes are not binding upon us.

Mr. Gannon: I am merely offering them for the purpose of proving that at a meeting held January 3, 1921, the creditors, agreement was declared to be in effect.

The Court: Ask him that.

Q. Was the creditors extension agreement ever declared to be in effect pursuant to the provisions contained therein? A. It was declared operative at a meeting of January 3, 1921.

Q. You were present at such meeting? A. Yes, sir.

Q. Now, as a result of that did you send a letter to John A. Cozzone & Company, 61 Arlington Street, Newark, notifying them that the creditors agreement had been declared in effect by the committee? A. I did.

Q. I ask you if that is a copy of that letter? A. Yes, sir.

Mr. Roessler: I object on the ground that there has been no notice produced.

The Court: Have you got the original?

Mr. Roessler: No, sir. If I had it I would produce it.

The Court: You haven't got it and could not produce it even if notice were served on you.

Mr. Roessler: I guess that is true, yes, sir. If the court thinks it ought to go in I am not going to waste time opposing.

Paper marked in evidence by striking out the words "for identification".

Q. Did you mail the letter yourself or how did it go out? A. It was mailed with letters to all of the creditors which were sent out at the same time, declaring the plan operative.

Q. Now, Mr. Bailey, I show you Exhibit C3. That agreement was signed in your presence? A. It was.

Q. And did you cause that agreement to be drawn up? A. I did.

Q. You had negotiations leading up to the signing of this agreement? A. I did.

Q. Will you just state to the court what those negotiations were?

The Court: Start from the beginning.

A. Yes, sir. In the early part of February, 1921 the committee, or the Pathe Freres Phonograph Company received a letter from Mr. Scheckner stating that he was the holder of the two trade acceptances of the Pathe Freres Phonograph Company maturing in March, and that he would expect those acceptances to be paid at maturity. At the request of the committee I telephoned Mr. Scheckner to see if some arrangement could not be made to extend these acceptances under the creditors ex-

tension agreement. The conversation over the 'phone was unsatisfactory and therefore I went—or rather, I came to Newark to meet Mr. Scheckner, and in his office—Mr. Cozzone also was there—I tried to get Mr. Scheckner to agree to the extension in common with the other creditors. This he refused to do, as he claimed he was the innocent holder of this paper—third party—was not bound by the agreement which Mr. Cozzone had signed. He stated that he had only an interest in one of these acceptances, that the other was held as collateral, and that he would have to be paid in full. I explained that Mr. Cozzone was bound by an extension agreement which he had signed and that he had already received preferences from the creditors committees and from the Pathe Company to the extent of about $11,000 worth of screw machines, motor and cash; that other creditors with very much larger claims and in just as precarious financial position as he was were getting nothing, and that they would not agree to give him further preference, they had gone absolutely as far as they would go with him. He said that he had no money to take up this acceptance, that if Mr. Scheckner insisted on suing him that he would be forced to the wall. I then proposed to Mr. Cozzone that if we pay this $3000 acceptance that he return to us of $3000 of machinery which we had previously delivered to him, which if he had agreed to do would not have meant additional favor—preferencial treatment on his part—for him. He said that the machinery was set up in his plant and he was using it and that he did not want to give it up. He was using it on some work he was then doing. He did not want to give it up under any circumstances. Mr. Cozzone then, I believe, said he was going to

bring suit jointly against us. I said, "If you did you will force the Pathe Company into the hands of a receiver." I explained that if the committee were left to work out the company's affairs that eventually there was good prospectus of the creditors receiving a substantial payment on their claims; if they were forced to the wall the amount that the creditors would receive was problematical on account of the nature of certain of the assets of the company which were not in liquid form; that he would probably receive fifty cents on the dollar. He then said, "I am only obligated to Mr. Scheckner for one of these trade acceptances. If I receive fifty cents on the dollar for the two I will be relieved of my obligation to him, and it was with that in mind that we agreed to pay him $1500 in cash and two new trade acceptances totaling $6000. The reason that the two $750 trade acceptances were given was because at the moment the company was short of funds, but it was agreed by the committee that the two acceptances would be paid at maturity, and they were paid. After that conference I returned to New York to take up the matter with the agents for the committee, the executive committee and the attorney for the committee; fully explained the settlement, and the paper which has been submitted in evidence was drawn up on my understanding of the agreement; drawn up in New York by the attorney for the committee. Then I came back to Newark some time later, met Mr. Cozzone in Mr. Scheckner's office, delivered the check and the two new acceptances which were made to Mr. Cozzone's order; he endorsed them to—the check, I believe, to Mr. Scheckner, and then we went back to Mr. Cozzone's office where this agreement was signed, by himself and by the treasurer of his company.

Q. Now, Mr. Bailey, was there ever any discussion between you and Mr. Cozzone about applying this second trade acceptance upon the balance due on the book account from Cozzone to Pathe Freres at that time, or at any other time? A. There was not.

The Court: Wasn't it talked about at all?

Witness: No, sir.

The Court: You made no mention of it?

Witness: I made no mention of applying it on the account, no sir.

The Court: Anything said about the book account?

Witness: No, sir. Clearly as words could express it the other acceptance was to be cancelled.

Q. As a matter of fact Pathe Freres owed Cozzone on trade acceptance and outstanding accounts at the time this creditors agreement was signed, over $13,000 did they not? A. I believe they did.

Q. Do you recall Mr. Pavia being present at the signing of this agreement in Cozzone's shop? A. Yes, sir.

Q. Did he say anything to you at that time? A. Yes, sir.

Q. What did he say, do you remember? A. I cannot remember in detail, no.

Q. Did he speak to you of the book account? A. No, sir.

Q. Or applying the book account towards the satisfaction of the additional or the second $3000 trade acceptance? A. That was not spoken of, sir, either at any conference, because it was not until months later that, when Mr. Cozzone came to New

York and saw our attorney, that I knew there was any question in his mind about it.

CROSS EXAMINATION BY MR. ROESSLER:

Q. Mr. Bailey, do you remember the exact date when you called at Mr. Scheckner's office? A. I called there twice.

Q. The second time, when you paid him—when you gave him the check for $1500, was that on the date this agreement bears date, March 22nd? A. It was either March 22nd, or—I believe it was March 22nd.

Q. March 22nd? A. Within a few days.

Q. So this paper is dated the day on which this transaction was closed in Newark either at Mr. Scheckner's office or at the Cozzone plant, isn't that so?

The Court: Or a day or two after that date.

Witness: Or a day or two after.

The Court: He said it was drawn in New York.

Witness: I am trying to remember just the details.

Q. Now, when you went to Mr. Scheckner's office you say that you handed him the check for $1500. You did not know before you arrived at his office that this settlement would be effected, isn't that so? A. The settlement had been agreed upon at a previous conference.

Q. Between whom? A. Between Mr. Cozzone, Mr. Scheckner and myself.

Q. They had agreed upon that, to deliver up the two trade acceptances upon the payment of $1500

in cash and the giving of the two new trade acceptances, is that right? A. Yes, sir.

Q. And you say that was done in Mr. Scheckner's office? A. Yes, sir.

Q. A few days before March 22nd? A. It was prior to March 22nd.

Q. Prior to March 22. Are you sure about that? A. Yes, sir.

Q. Isn't it a fact that on March 22, you came to Mr. Scheckner's office and you there worked out the terms of the settlement? A. My recollection is, as I have told you, that I called there twice. At the first conference the details were agreed upon, at the second conference the delivery of the cash was made.

Q. Now, you were very anxious, on behalf of the committee Mr. Bailey, to dispose of this affair in as much as suit was threatened against the company, isn't that so? A. Yes, sir.

Q. And isn't it a fact that you paid one-half of my fee for drawing the complaint in this threatened action in the United States District Court? A. Yes, sir, owing to the fact that there had been some delay in coming to an agreement.

Q. Now, was anything said in Mr. Scheckner's office on the day you handed him the $1500 check about the terms of the settlement, having reference to the second trade acceptance? A. I do not remember.

Q. Do you recall asking Mr. Scheckner to draw an agreement or memorandum embodying the terms of this agreement? A. No.

Q. You do not recall that? A. No.

Q. But from Mr. Scheckner's office you do recall going over to the Cozzone office, on Plane Street, is that correct? A. Yes, sir.

Q. You say nothing whatsoever was said in the Cozzone office by you or by Mr. Cozzone or Mr. Pavia relative to the book account, is that correct? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. Did you tell Mr. Cozzone or Mr. Pavia that by the signing of this paper which has been marked Exhibit C3, I believe, they were to surrender all their rights in this trade acceptance? A. Mr. Cozzone told Mr. Pavia—he explained the matter to him.

Q. In your presence and hearing? A. Yes, sir.

Q. And was there any explanation given to Mr. Pavia by Mr. Cozzone that you still retained the right to sue him on the open book account? A. The question never came up.

The Court: Didn't it suggest itself to you?

Witness: You see, sir, at the time, there were other trade acceptances which had been given to Cozzone in an amount of about $5000, and we were trying at the same time to get the West Side Trust Company to come in under the agreement, and I thought that—the thought was in our minds that the book account could be adjusted in the final settlement with the West Side Trust Company under the extension agreement and final distribution of the assets was made. This was not the only amount involved.

The Court: This concern was not the only creditor, is that what you mean?

Witness: Yes, sir; not the only creditor either—Mr. Cozzone was a creditor, but he had the discounted paper with two different parties, and that was all—we considered it a debt to Cozzone.

Q. Now, Mr. Bailey, no demand was made on the Cozzone Company for the payment of this open book account until probably about six months or more after the signing of C3, is that right? A. I don't know when the demand was made.

Q. Don't you know that no demand was made until shortly before this suit was instituted in the Supreme Court of this State? A. No.

Q. Did you have anything to do with the writing of the letter to Mr. Cozzone & Company demanding payment of the open book account? A. No.

Q. Was any letter sent to Cozzone, do you know? A. I might explain that the organization had been effected at the time the Pathe Company wrote to Mr. Cozzone and that we were no longer interested.

Q. Oh, the creditors committee was out of existence then, is that right? A. Yes, sir, to the best of my knowledge.

Q. And this agreement had been terminated, isn't that so—this creditors agreement? A. The distribution of the assets had been made, yes, sir.

Q. Now, then, you did not adhere—I mean your creditors committee did not adhere strictly to the terms of this creditors agreement did it? A. As far as I know.

Q. Well, isn't it a fact that under the terms of this agreement no creditor to whom there was owing more than $1000 could be dealt with except in accordance— (interrupted) A. Except by the authorization of the committee.

Q. Wasn't it the authorization of the Pathe Company that was required? A. The Pathe Company? The control of the affairs of the Pathe Company was in the hands of the committee.

Q. Let me read you article 9 of the agreement which had been offered in evidence: "The Company shall have authority to adjust, compromise or pay all claims which do not exceed $1000, of persons not becoming parties to this agreement, and any claims in excess of such amount if the committee shall consent in writing." A. That is just what I said.

Q. This claim was for more than $1000? A. Yes, sir.

Q. Did you get the consent of the committee in writing before you dealt with Cozzone? A. To this settlement?

Q. Yes. A. Yes, sir.

Q. How did you get that consent? A. It is in the minutes of the committee.

Q. You haven't the minutes here, have you? A. No.

Q. Now, your first proposition was to have Cozzone return some machinery, is that right? A. Yes, sir.

Q. And if he returned the machinery what would happen? A. We would have paid the $3000 note which Scheckner held.

Q. You mean the first note which you did eventually pay? A. Yes, sir.

Q. But he would not agree to that proposition? A. No.

Q. Who drew this agreement, did you or did your attorney? A. Our attorney.

Q. Did you tell him that it was to be a sale of $6000 worth of acceptances for $3000? A. Yes, sir.

Q. You told him that? A. Yes, sir; he drew it on my explanation of the agreement.

Q. And did you suggest this particular form of contract. A. No; he did that himself.

Q. Now, you had been to see Mr. Cozzone on several occasions before this settlement was effected, isn't that so? A. Yes, sir.

Mr. Roessler: Let us get the date. I think you have the original assignment, Mr. Gannon.

Mr. Gannon: I did not bring the law court file with me.

Mr. Roessler: This is a copy you handed me, October 27, 1921.

Mr. Gannon: The complaint says October 27th.

Q. On October 27, 1921, the creditors committee was in force, is that so, and on January 3rd, was the meeting of the creditors committee that declared this creditors agreement operative, is that right? A. Yes, sir.

Q. That was January 3, 1921—January 3 or 5—and the creditors committee continued to function until what date? A. I believe it was October, 1921.

Q. This trial in the Supreme Court was held on the 26th of June, 1922? A. That is right.

Q. And you testified in that case that the committee had been discharged on the Friday preceding that date? A. I wanted to remark a few minutes before that I believed that is an error in the testimony. It reads, "Last Friday". I could not have said that because the distribution was made in 1921 and the committee discharged in 1921.

Q. After the discharge were the receivers appointed? A. Yes, sir.

Q. Did these assets revert to the Pathe Company upon the discharge of the committee? A. The control of the affairs of the company was taken over by the company itself, its own officers.

Q. By the Pathe Company? A. Yes, sir.

The Court: And they re-organized for operation and then went into the hands of the receiver?

Witness: Yes, sir; it was not a reorganization, it was distribution of such assets as the committee had on hand.

The Court: Among the creditors?

Witness: Among creditors, and I think several months later the receivers were appointed.

Q. Well, did the corporation function after the distribution of assets to the creditors? A. The corporation functioned for a period of several months.

Q. In active business? A. Yes, sir.

Q. What assets had the company? A. Why, they had corporation capital and they had their factory and they were selling their product, phonographs and records.

Q. All in addition to what was distributed among the creditors? A. Yes, sir.

Q. And was the company in possession of its assets in October 1921. A. I believe so. I cannot recollect the exact date when the distribution was made, and the committee discharged.

Q. Can you tell us— this record doesn't seem to indicate—when the receivers in this proceeding were discharged by the order of the court? A. I cannot tell you.

Q. But they were discharged a long time ago? A. I cannot tell you.

Q. But you know as a matter of fact that they have been discharged, don't you? A. Matter of hearsay.

The Court: Do you know, Mr. Gannon, when the receivers were discharged?

Mr. Gannon: I do not. I think it is so. I think they have been discharged.

Q. Have you any financial interest in this suit? A. None, whatever.

Q. In the proceeds of any judgment that may be collected? A. None whatsoever.

Q. The committee is no longer functioning, is it? A. No.

Q. Murphy & Company have no further interest in this matter, have they? A. No.

Q. They terminated their work years ago, isn't that so? A. Yes, sir.

Q. Why did you come today to testify—for whom —at whose request? A. Mr. Gannon's.

Q. Mr. Gannon's request? That is all.

REDIRECT EXAMINATION BY MR. GANNON:

Q. Now, when you say distribution of assets of the corporation, do you mean complete distribution or dividends?

The Court: Liquid assets—money assets.

Q. What you really mean is that the creditors got a dividend on account of the amount of their claim? A. Yes, sir.

Q. And when the creditors committee got the Pathe Freres Company in a fairly sound condition they dissolved? A. Yes, sir.

Q. And turned the corporation back to the Pathe Freres? A. Yes, sir.

Q. And right after that the receivers were appointed and insolvency proceedings begun? A. Yes, sir.

Q. (By the Court) You reorganized the finances —arranged to finance it? A. Yes, sir; they put the finances of the company in such shape—they

funded the debt—creditors accepted on terms obligations and it was due to—

The Court: The Company was able to function?

Witness: Itself—if it had not been for interests that wished it to do otherwise and had the receivers appointed.

Q. Now Mr. Bailey, you say the creditors committee received a letter from Scheckner that he had these trade acceptances? A. Yes, sir, the Pathe Freres Phonograph Company.

Q. In connection with that I would like to read from Exhibit D1 the stamp of the bank with whom Scheckner discounted this trade acceptance. "Pay to the order of any bank—final endorsement guaranteed, February 9, 1921, the National Newark & Essex Banking Company, Newark, N. J., collection department."

RECROSS EXAMINATION BY MR. ROESSLER:

Q. Mr. Bailey, did you have charge of the gathering in of the assets—of accounts receivable owing to the Pathe Company for its debtors? A. No.

Q. Did your concern have anything to do with that? A. They directed the company's officers to collect certain assets. They sold property.

Q. Didn't it occur to you that some mention ought to have been made at the time of these conferences with Cozzone relative to those book accounts which were then past due and owing by Cozzone to the Pathe Company? A. We could not very well ask to pay the company $3000 when they owed him other money.

Q. I see. A. We owed him $11,000 on acceptances.

Q. But after you got these two trade acceptances in your possession didn't you say anything at that time to Cozzone about the payment of the $3041? A. No; I did not.

Q. You knew there was such indebtedness? A. Yes, sir.

Q. No reference was made by you with reference to it or relative to it? A. Not demanding payment.

Q. You did not warn him or remind him, "Here, John, you know you have to pay that book account, we have to get our money in," nothing like that? A. No.

REDIRECT EXAMINATION BY MR. GANNON:

Q. And you also knew there was a $5000 trade acceptance outstanding? A. I knew that Cozzone was owed $5000 by the Pathe Company in addition to this six.

BY THE COURT:

Q. The only hope you held out to Cozzone was that if he prosecuted he would recover about fifty per cent? A. Yes, sir—if Scheckner prosecuted.

Q. Now, if the book account stood he would have in hand, and he had in hand at that time at least fifty per cent, did he not, of the $6000, namely $3041 in book accounts? A. Yes, but he had another obligation of $5000 on which he was an endorser.

Q. Is that the explanation of the thing? Is that why you did not speak of the $3000 book account that he owed your concern? A. Yes, sir; I never spoke of it because there was other indebtedness of the Pathe Company to Cozzone all of which had to be adjusted.

Q. You said that in your argument you held before them that if they attempted to sue all they would get would be fifty percent. Cozzone already had fifty percent in his book account and if he prosecuted he would get fifty percent, as you say, which would net him seventy-five percent, already having had in hand fifty per cent of the amount due? A. Well, there was another consideration, that is, if there had been a receiver appointed, petition in bankruptcy filed, the machinery deliveries to Cozzone might have ben considered preferential.

Q. Was that spoken of? A. I do not recall.

FURTHER DIRECT:

Q. Mr. Bailey, at the time you entered into this agreement on March 22, 1921, there was another trade acceptance of approximately $5000, isn't that right?

The Court: In the bank.

Mr. Gannon: But it had not been hypothecated by Cozzone, isn't that so?

The Court: It had been hypothecated.

Mr. Gannon: He discounted it in his own bank. He had not turned it over to a third person. I mean he discounted it himself.

Witness: Yes, sir.

Q. When you gave these renewals, trading acceptances from time to time subsequently to March 21, did you attempt to deduct the amount owing by Cozzone on the open book account? A. No, the bank was not interested in it.

Defendant Rests.

Testimony Closed.

Notice to Dismiss Bill.

(Filed December 29, 1925)

IN CHANCERY OF NEW JERSEY.

Between
JOHN A. COZZONE & Co., a Corporation,
Complainant,

and

WILLIAM C. REDFIELD, *et als.*,
Receivers, etc.,
Defendants.

} On Bill, Etc.

To: JOHN A. COZZONE & Co., a corporation, Complainant, and SAMUEL ROESSLER, its Solicitor.

PLEASE TAKE NOTICE that on Tuesday, December 29th, 1925, at 10 o'clock in the forenoon at Chancery Chambers in the Prudential Building, 763 Broad Street, Newark, N. J., we will move to dismiss the bill of complaint as amended in the above entitled cause on the following grounds:

1. That it appears from the pleadings and proofs that complainant failed to rescind the agreement, Schedule A annexed to the bill of complaint, upon learning the alleged fraud, but ratified the same and cannot now ask for cancellation and rescission.

2. That complainant failed upon learning of the alleged fraud and still fails to restore the consideration paid by defendants' predecessors in title at the time of the execution and delivery of the agreement Schedule A.

Notice to Dismiss Bill.

3. That complainant filed an answer to the suit in the New Jersey Supreme Court instituted by the defendants' predecessors in title alleging fraud and that the judgment entered in said action in favor of the defendants in this suit is res adjudicata.

4. That the proofs submitted to the Court on final hearing in this cause do not substantiate the allegations of the bill and is not of the character and sufficiency to warrant granting the equitable relief of cancellation and rescission.

And at the same time, we shall move to file the annexed additional pleas and amendment to answer.

Dated, December 12th, 1925.

Yours respectfully,

AUTENRIETH, GANNON & WORTENDYKE,
Solicitors for Defendants.

Final Decree.

(Filed October 15, 1926.)

IN CHANCERY OF NEW JERSEY.

Between JOHN A. COZZONE & Co., a Corporation, Complainant, and WILLIAM C. REDFIELD, *et als.*, Receivers, etc., Defendants.	On Bill, Etc.

This cause coming on to be heard in the presence of Samuel Roessler, solicitor of the Complainant and Messrs. Autenrieth & Gannon, solicitors of the defendants, and the court having examined the pleadings and having taken proofs orally and in open court and having heard and considered the arguments of counsel;

And the court being satisfied that the Complainant was fraudulently induced to deliver up to Pathe Freres Phonograph Co. a corporation for whom the defendants herein were subsequently appointed Receivers, the trade acceptance referred to in the Bill of Complaint, on the promise that it was to offset by that amount the sum of $3041.23, being the balance of the merchandise item owing at that time by the Complainant to the said Pathe Freres Phonograph Co. and that notwithstanding such representation made on behalf of the said defendants, a suit was instituted in the New Jersey Supreme Court, Hudson County Circuit by William P. Taylor, as Assignee of said Pathe Freres Phonograph Co. against the Complainant to recover the sum of $3041.23, which suit resulted in the entry of a judgment against the Complainant for said sum but that the filing of the Postea was stayed pending the termination of this proceeding; and the Complainant by amendment to its Bill of Complaint having charged the defendants with fraud in the procurement of the written offer of March 22, 1921, and prayed that said written offer be set aside because of said fraud; and the Court being satisfied that the allegations of said Bill of Complaint as amended have been sustained by the evidence in this cause;

IT IS, on this 13th day of October, Nineteen hundred and Twenty six, ORDERED, ADJUDGED AND DECREED that the written offer dated March 22, 1921 made by the Complainant to the Pathe Freres Phonograph Co. a corporation for whom the defendants herein were appointed Receivers, be and the same is hereby set aside and held to be fraudulent and declared null and void; and that the delivery of the said trade acceptance effected a discharge of the book account owing by the Complainant to the said Pathe Freres Phonograph Co.

AND IT IS FURTHER ORDERED that the defendants and their agents and servants be and they are hereby restrained and enjoined from prosecuting or proceeding further with suit heretofore instituted in the New Jersey Supreme Court against the complainants by William P. Taylor in which the defendants were substituted as plaintiffs, and also from instituting and prosecuting any other suit

Final Decree.

upon the book account with the complainant John A. Cozzone & Co. a corporation.

AND IT IS FURTHER ORDERED the defendants pay to the Complainant its cost in this cause to be taxed.

Respectfully advised,

E. R. WALKER,
C.

JOHN H. BACKES,
V. C.

We hereby approve of the foregoing decree as to form only.

AUTENRIETH, GANNON & WORTENDYKE,
Solicitors of Defendants.

Opinion.
(Filed June 25, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
JOHN A. COZZONE & Co., a Corporation,
Complainant,

and

WILLIAM C. REDFIELD, *et als.*, Receivers, etc.,
Defendants.

Equity will set aside a contract entered into by mistake, where the party seeking to take advantage of it, procured it, knowing that the signer was laboring under the mistaken belief that it correctly set forth the contract. To procure it under such circumstances is a fraud; to take advantage of it is also a fraud.

On bill to reform a contract.

For complainant, SAMUEL ROESSLER.

For defendants, AUTENRIETH & GANNON.

BACKES, V. C.

Pathe Freres Phonograph Company owed Cozzone & Co., for merchandise, approximately, $20,000., evidenced by a trade acceptance of $5,000., discounted and held by a bank; a trade acceptance of $3,000 discounted by one Scheckner; a trade acceptance of $3,000. in hand, and by an open book account balance of about $9,000. To induce Cozzone & Co. to sign a credit extension agreement, The Pathe

Company, then in financial difficulty and in charge of a creditor's committee, delivered to it, in part payment of the indebtedness, merchandise and machinery, equal in value to the book account, and enough to pay the $3,000 trade acceptance Cozzone & Co. had in hand. The exact amount in excess of the book account was $3,041.23. When the Scheckner trade acceptance fell due, it was protested, and upon Scheckner's threat of suit, The Pathe Company paid him $1500 in cash and gave renewals of $750. each. At the same time Cozzone & Co. surrendered the $3,000. trade acceptance in hand, on the promise, as it claims, that it was to offset by that amount the $3,041.23 balance of the merchandise item. The Pathe Company, shortly afterwards, went into the hands of receivers, the defendants in this suit, who brought an action in the Supreme Court to recover the $3,041.23 on book account, to which action Cozzone & Co., set up, that it had surrendered the $3,000 trade acceptance in hand in satisfaction of that much on the book account, and that it owed but $41.23. At the trial before Circuit Court Judge Speer, without a jury, the receivers offered in evidence this written offer, and testimony that the $3,000 trade acceptance in hand was delivered up pursuant to its terms:

"March 22, 1921

"Pathe Freres Phonograph Company and
Creditors Committee.

Dear Sirs:

I hereby offer to sell and deliver to you for cancellation your two trade acceptances for $3,000 each coming due, respectively, on March

12 and 19, an aggregate amount of $6,000, in consideration of your Company, notwithstanding my signing of the Creditors' Extension Agreement, paying me $1,500 in cash and delivering me trade acceptances for $750 and for $750 coming due, respectively on June 13, 1921 and on September 12, 1921, and in consideration of the Creditors' Committee agreeing to such payment acting through their agents.

Yours very truly,

JOHN A. COZZONE & Co.,
JOHN A. COZZONE, Pres.
JOHN A. COZZONE (Seal)
ANTONIO F. PAVIA, Treas."

Cozzone & Co. offered testimony that the trade acceptance in hand was delivered up for cancellation in part satisfaction which the trial judge refused to entertain, and ordered judgment for the plaintiffs, deferring the entry until Cozzone & Co. could apply to this court for relief. Upon the filing of this bill, to reform the written offer, to include the contemporaneous promise of offset, action in the law suit was stayed. The testimony before me was substantially like that in the trial at law; Cozzone the president of Cozzone & Co., maintaining that he surrendered the trade acceptance for cancellation upon the promise of one Bailey, the secretary of the Creditors' Committee, that his company was to have credit for it on the book account; and there is considerable supporting testimony that he so promised. On the other hand Bailey insisted that there was no mention of credit during the negotiations, and explained that Cozzone, his company being financially shakey, was

anxious to appease Schencker and agreed to surrender the trade acceptance, if the Pathe Company would settle with Schencker, and avert the threatened judgment and execution against his company, he, Bailey, having at the same time reasoned with Cozzone, that if the Pathe Company were forced to the wall he would probably receive but fifty cents on the dollar. He further testified, that when the bargain was truck, he had the lawyer of the Creditors' Committee prepare the written offer in New York and that some days later he returned to Newark, paid Schencker, and thereupon Cozzone and Pavia, the Treasurer of Cozzone & Co., signed the paper and surrendered the trade acceptance. It was a story faultlessly and frankly told, but it was not appealing. It ran counter to common experience. Men do not ordinarily surrender two trade acceptances for the payment of one. At the conclusion of the testimony there was little question that Cozzone's version was true, although he admitted having read the paper before signing. His explanation is that he signed the paper "which I understood to be the cancellation of the debt owing on my books to the Pathe people", and that when he read it "I thought it expressed my agreement with Mr. Bailey", and that he "understood that was what the sense of the agreement would be", from Mr. Bailey.

Some time after the hearing, the solicitor of the receivers came to me in chambers with the trade acceptance in hand of $3,000., which had not been produced either at the trial or at law or here, and he was advised to show it to opposing counsel, and, upon motion, a rehearing was granted and the trade acceptance was offered in evidence. On the face,

in the top margin, is written "Cancelled to offset mdse. sold". There was no explanation. It had ever since its surrender by Cozzone been in the hands of the Pathe Company or the receivers. And there is no explanation of the fact, that the words of cancellation on the original were not written on the copy of the trade acceptance produced before me at the first hearing. The words of cancellation, in my opinion, conclusively impugn the integrity of the written offer. Counsel for the receiver, not disputing the irrefutable conclusion of fact, nevertheless contends, that the complainant is not entitled to a reformation, because, according to the well-settled principle "where a party attaches his signature to a contract, otherwise valid, a conclusive presumption is created, except as against fraud, that the signer read, understood and assented to its terms". Fivey v. Penna. R. R. Co., 67. N. J. L. 627. And, that if it was the result of a mistake, the mistake was unilateral, on the part of the complainant, and that contracts were not reformable in equity except upon mutual mistake. Green v. Stone, 54 N. J. Eq. 387. If the contract was the result of a unilateral mistake the remedy is by rescission. Wirsching v. Grand Lodge F. & A. M. of N. J., 67 N. J. E. 711. And if procured by fraud it may be reformed or altogether stricken down—rescinded. In the light of the established facts attending the execution of the disputed document there can be no reasonable doubt that Bailey, the secretary, encouraged the officers of the complainant to sign it knowing that they were laboring under the belief that it effected a discharge of the book account. That was a fraud. And to take advantage of it is also a fraud. Black on Rec. and

Opinion.

Canc., Sec. 130 and cases cited; Scott v. Hall, 60 N. J. Eq. 451; Dunston Litho. Co. v. Borgo, 84 N. J. L. 623.

The written offer will be set aside and if a prayer to that end is necessary it may be added to the bill. The fraud may also be charged by amendment.

Upon a rescission the status quo ante must be restored as nearly as may be. Here there is nothing to restore. Payment by the Pathe Company of the Schencker trade acceptance, which it claims was the consideration for the cancellation of the trade acceptance in hand, was its bounden duty. The extension agreement did not apply to the Schencker debt because it was signed by Cozzone after he became the owner of the trade acceptance. The Pathe Company gave nothing for the trade acceptance in hand.

Decree accordingly with costs.

Petition of Appeal.

(Filed September 7, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JOHN A. COZZONE & Co., a Corporation, Complainant-Appellee, and WILLIAM C. REDFIELD, *et als.*, Receivers, etc., Defendants-Appellants.	On appeal from the Court of Chancery.

TO THE HONORABLE, THE COURT OF ERRORS AND APPEALS, In the last resort in all causes:

The petition of William C. Redfield, Eugene A. Widmann and Benjamin M. Kaye, Receivers in equity in the United States District Court for the Southern District of New York, for Pathe Freres Phonograph Co., the appellants in the above entitled cause, respectfully shows that:

The petitioners find themselves aggrieved by a final decree made in the Court of Chancery by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date October 15th, 1926, in a certain cause in said Court of Chancery, wherein the said John A. Cozzone & Co., a corporation, was complainant, and the said William C. Redfield, Eugene A. Widman and Benjamin M. Kaye, Receivers in equity in the United States District Court for the Southern District of New York for Pathe Freres Phonograph Co., were defendants, in

this respect, to wit, that the said decree adjudges that the written offer, dated March 22nd, 1921, made by complainant to the Pathe Freres Phonograph Co., a corporation, for whom the defendants herein were appointed Receivers, be set aside and held to be fraudulent and is declared null and void; and that the delivery of the trade acceptances mentioned in said written offer effected a discharge of the book account owing by the complainant to the said Pathe Freres Phonograph Co.; and further restrained and enjoined the defendants and their agents and servants from prosecuting or proceeding further with the suit heretofore instituted in the New Jersey Supreme Court against complainant by William P. Taylor in which the defendants were substituted as plaintiffs, and also from instituting and prosecuting any other suit upon the book account with the complainant.

And petitioners appeal from the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous in that

FIRST: Said decree disregards the pleas set up by way of answer by the defendants, and all the evidence in support thereof.

SECOND: For the further reason that it appeared from the pleadings and proofs that complainant failed to rescind the agreement, Schedule A annexed to the bill of complaint, upon learning of the alleged fraud, but ratified the same, and therefore could not ask for the relief of cancellation and rescission decreed.

THIRD: That it further appeared from the pleadings and proofs that complainant failed, upon learning of the alleged fraud, to restore the consideration paid by the defendants' predecessors in title at the time of execution and delivery of said agreement, Schedule A, and has never returned the said consideration.

FOURTH: That it appeared by the pleadings and proofs that complainant filed an answer to the suit in the New Jersey Supreme Court, instituted by the defendants' predecessors in title, alleging fraud, and that a judgment was entered in said action in favor of the defendants in this suit, which is res adjudicata on said question of fraud.

FIFTH: That the proofs submitted to the Court on final hearing do not substantiate the allegations of the bill, and are not of the character and sufficiency to warrant the equitable relief of cancellation and rescission decreed.

Petitioners therefore pray that the said decree of the said Chancellor may be wholly reversed, set aside, and for nothing holden, and that the petitioners may have such other relief in the premises as to this Court shall seem proper.

AUTENRIETH, GANNON & WORTENDYKE,
Solicitors for and of Counsel with
Appellants.

Answer to Petition of Appeal.

(Filed September , 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JOHN A. COZZONE & CO., a Corporation, Complainant-Appellee, and WILLIAM C. REDFIELD, *et als.*, Receivers, etc., Defendants-Appellants.	On appeal from the Court of Chancery.

The answer of John A. Cozzone & Co., the above named appellee to the petition of appeal of William C. Redfield, Eugene A. Widmann, and Benjamin M. Kaye, Receivers in equity in the United States District Court for the Southern District of New York for Pathe Freres Phonograph Co., the above named appellants.

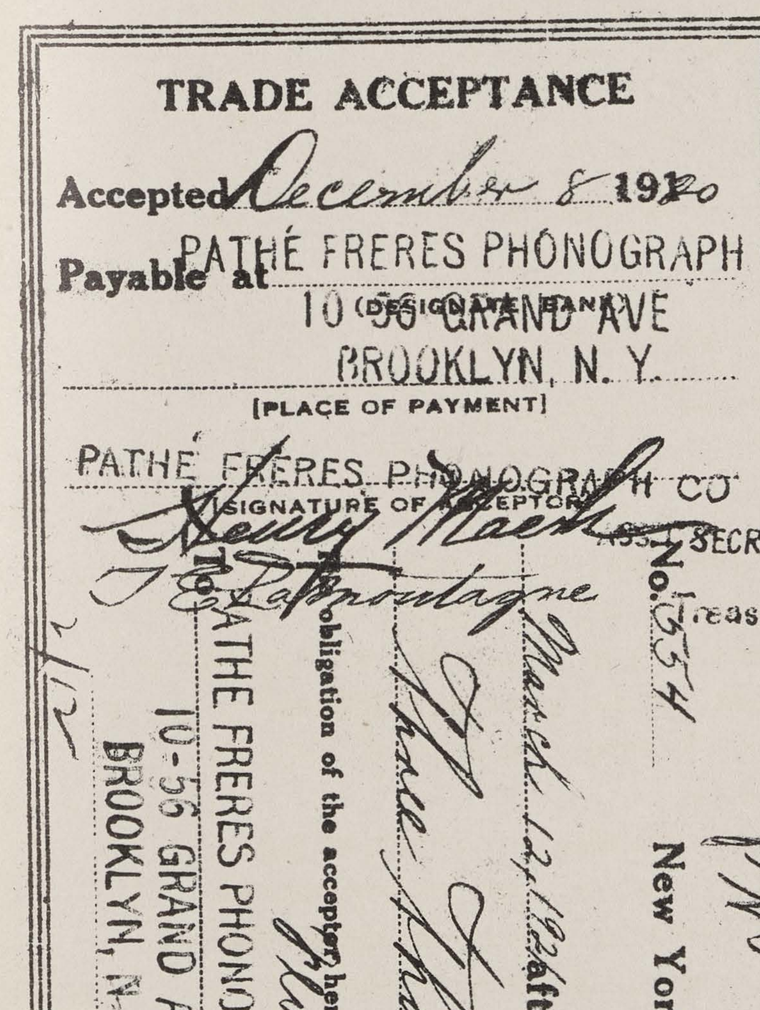
This appellee not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereto, nevertheless admits that a decree was on October 15th, 1926, made and entered in the Court of Chancery of New Jersey in the above entitled cause for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

SAMUEL ROESSLER,
Solicitor for and of Counsel with Appellee.

Exhibit C-1.

(Front)


TRADE ACCEPTANCE

Accepted December 8 1920

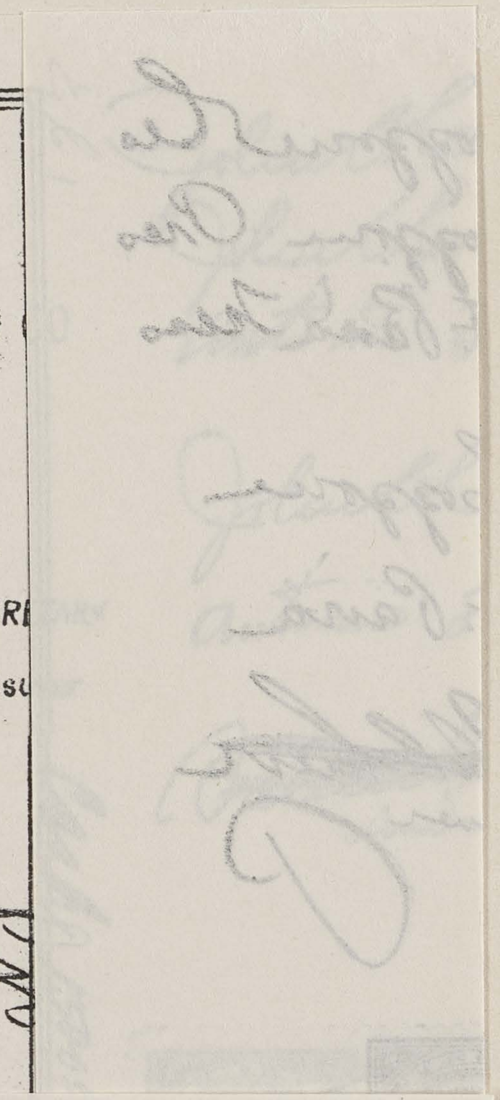
Payable at PATHÉ FRERES PHONOGRAPH
10-56 GRAND AVE
BROOKLYN, N. Y.
(DESIGNATE BANK)
[PLACE OF PAYMENT]

PATHÉ FRERES PHONOGRAPH CO
SIGNATURE OF ACCEPTOR
Henry Maeth ASST. SECR
J E Lafontagne Treasu

No. 554
New York
March 12, 1921 after

To PATHE FRERES PHONO
10-56 GRAND A
BROOKLYN, N.

(Back)



Answer to Petition of Appeal.

(Filed September , 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JOHN A. COZZONE & Co., a Corporation, Complainant-Appellee, and WILLIAM C. REDFIELD, *et als.*, Receivers, etc., Defendants-Appellants.	On appeal from the Court of Chancery.

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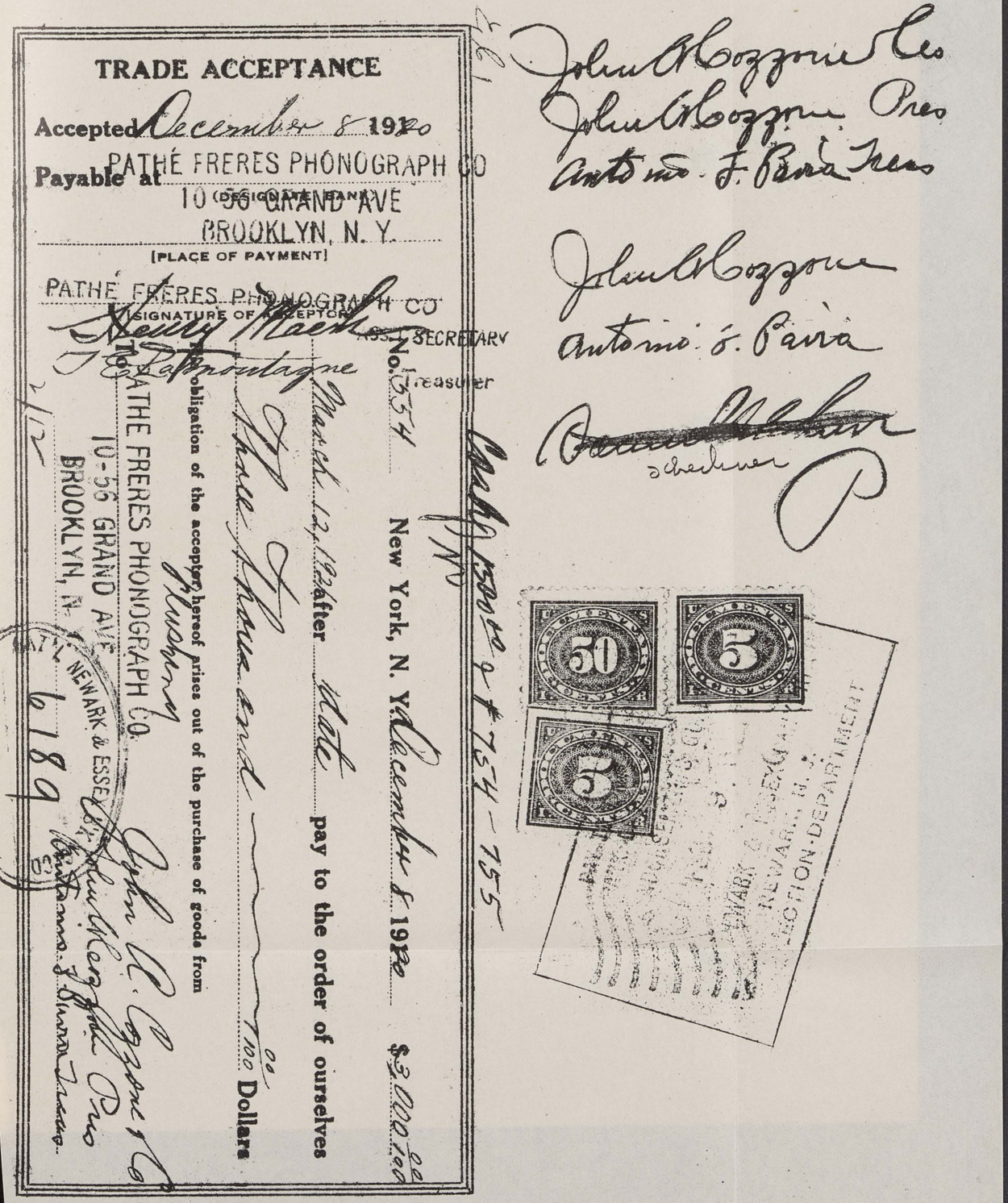


Exhibit C-2.

(Front) (Back)

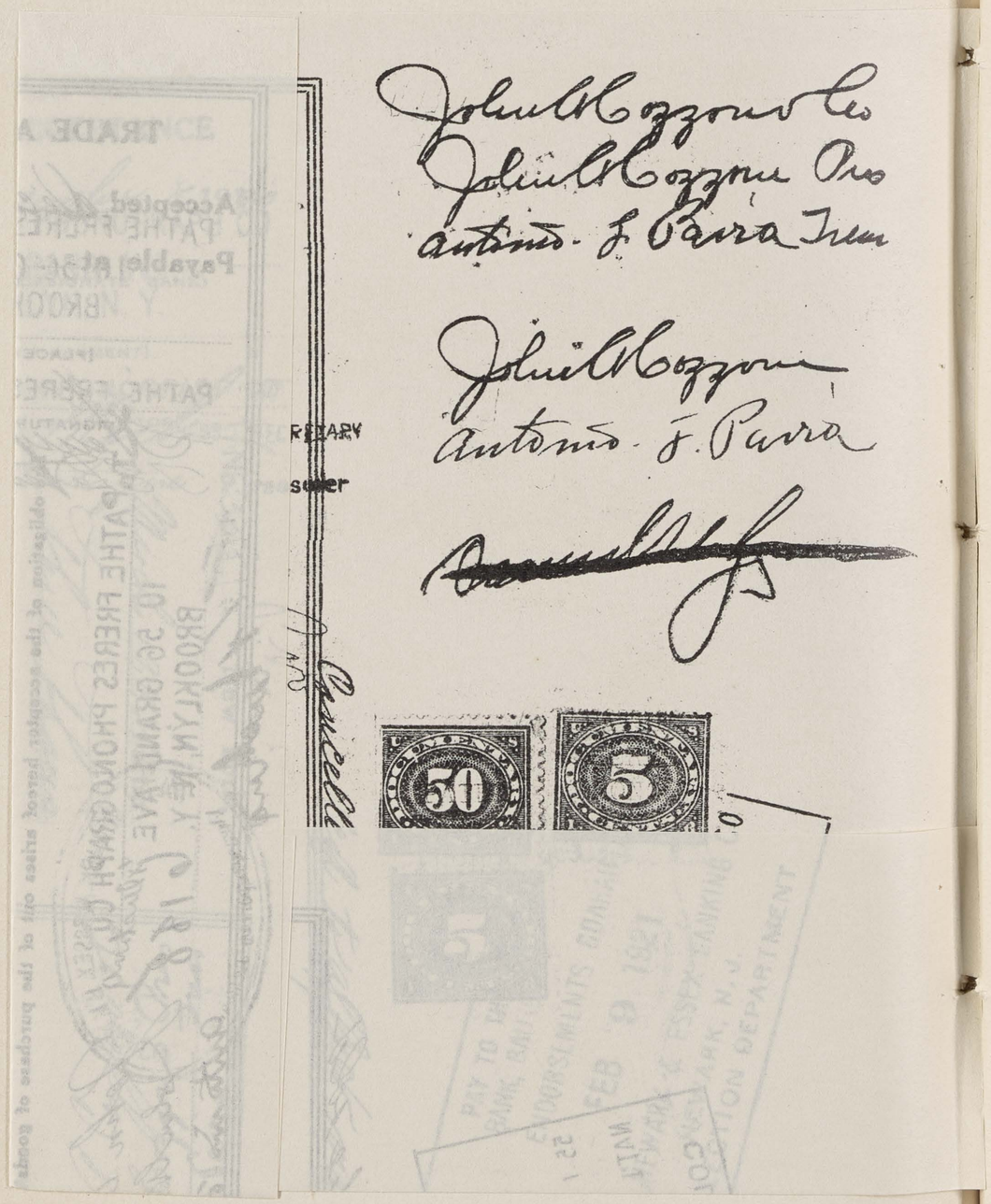


Exhibit C-3.

March 22, 1921.

Pathe Freres Phonograph Company
and Creditors Committee.

Dear Sirs:

I hereby offer to sell and deliver to you for cancellation your two trade acceptances for $3,000 each coming due, respectively, on March 12 and March 19, an aggregate amount of $6,000 in consideration of your Company, not withstanding my signing of the Creditors' Extension Agreement, paying me $1,500 in cash and delivering me trade acceptances for $750 and for $750 coming due, respectively, on June 13, 1921, and on September 12, 1921, and in consideration of the Creditors' Committee agreeing to such payment acting through their agents.

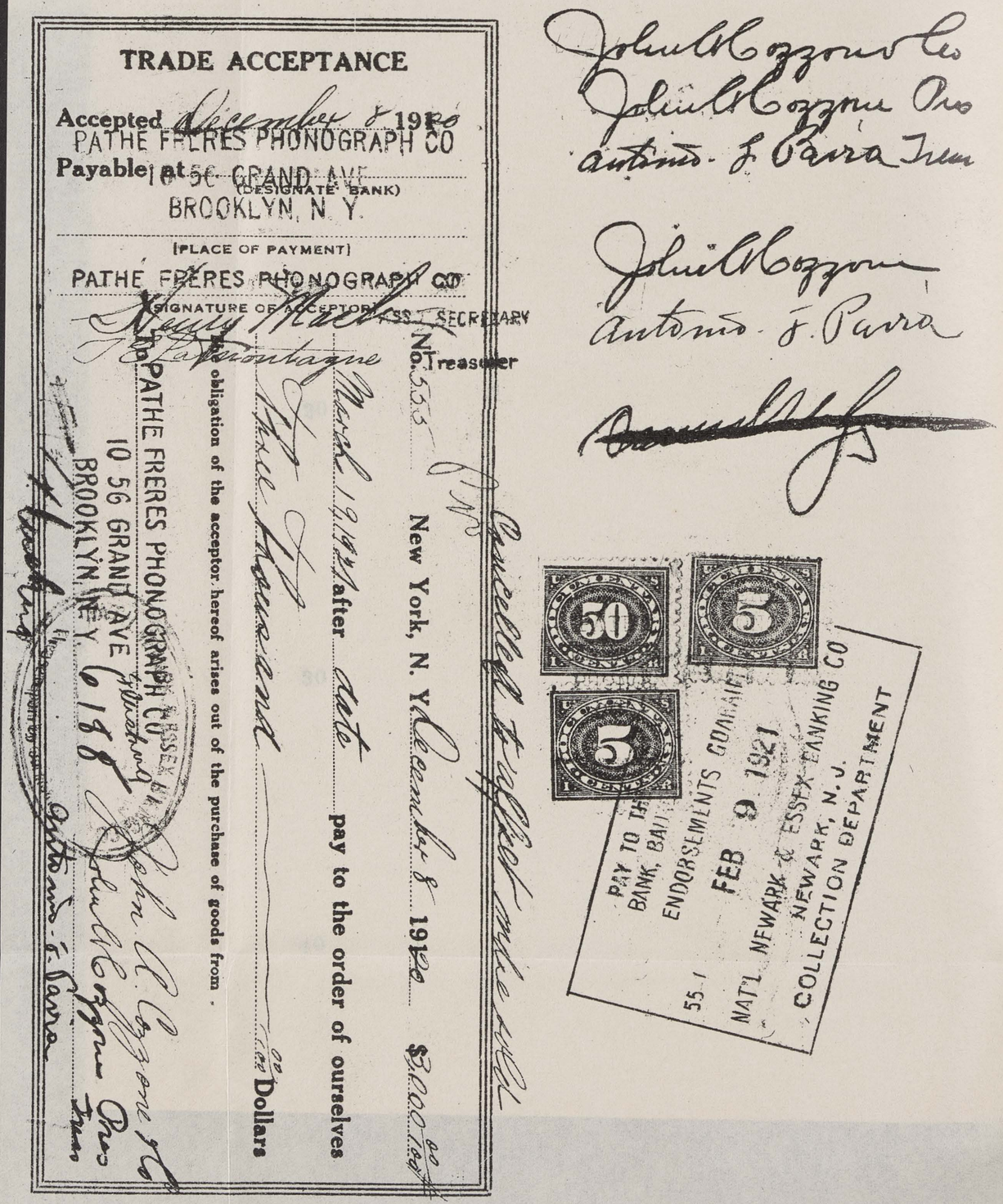
Yours very truly,

JOHN A. COZZONE & CO.
John A. Cozzone Pres.

John A. Cozzone (Seal)
Antonio D'Pavia, Treasurer.

Exhibit C-2.

(Front) (Back)



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Antonio D'Pavia, Treasurer.

Exhibit C-4.

(Front) (Back)

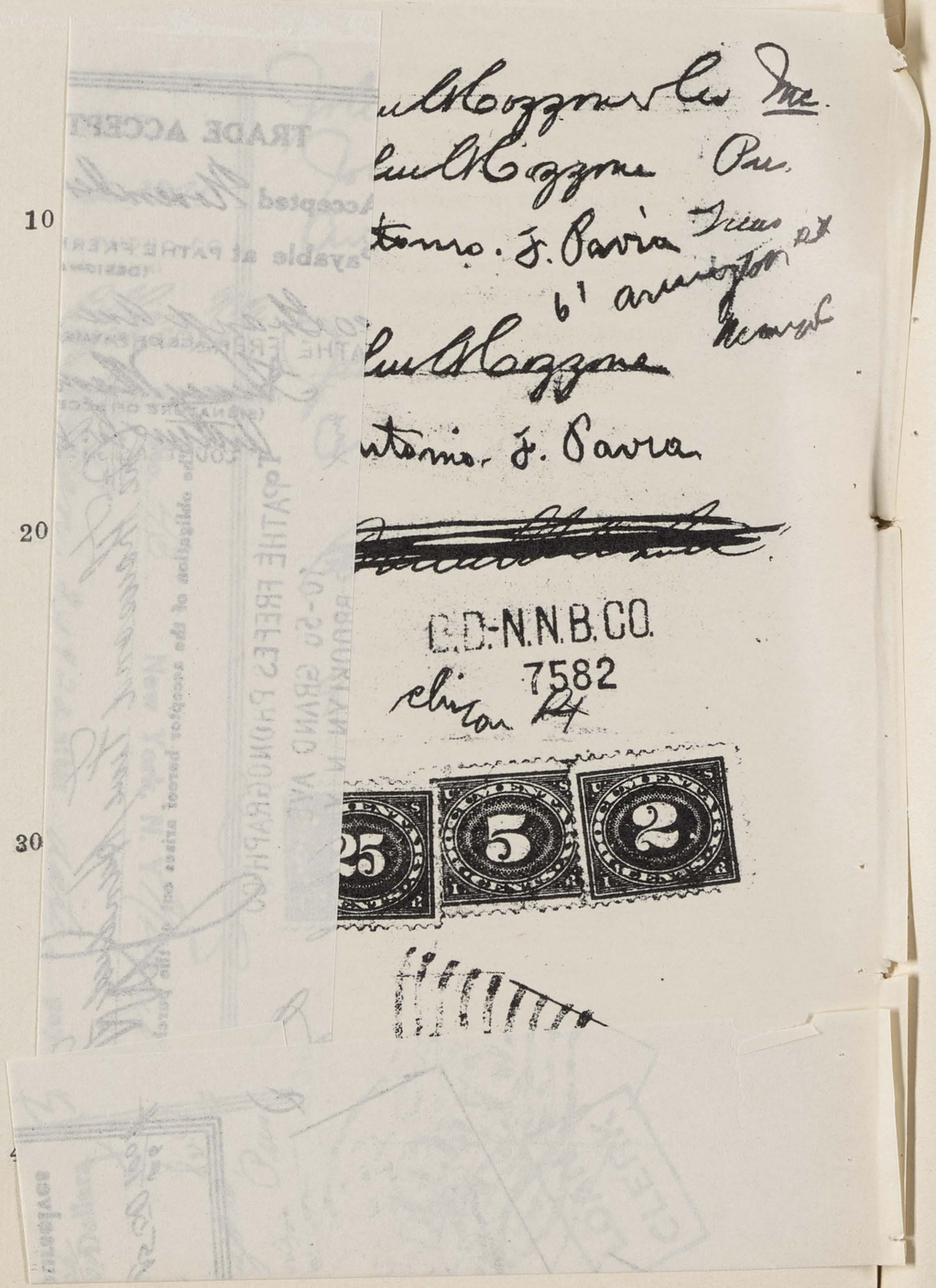


Exhibit D-1.

CREDITORS' EXTENSION AGREEMENT.

Agreement made as of December 15, 1920, between Pathe Freres Phonograph Company, a Delaware Corporation (hereinafter called the Company) and such Creditors of the Company as shall execute this agreement or a counterpart hereof (hereinafter called the Creditors).

WHEREAS, the Company, while solvent, is temporarily embarrassed solely by its inability to market its products, and it will be for the advantage of the Company and of the Creditors that an extension of time of payment of its indebtedness be granted.

NOW THEREFORE, in consideration of the premises and of the mutual promises of the parties hereto, it is agreed by and between the parties hereto, as follows:

1. The Creditors hereby designate and appoint Messrs. James H. Carter, Vice-President of The National City Bank of New York; Joseph Brown, Vice-President of The Chatham and Phoenix National Bank of the City of New York; Frank Bailey, Vice-President of the Title Guarantee and Trust Company, Brooklyn; G. Foster Smith, President of The Nassau National Bank of Brooklyn; E. P. Maynard, President of the Brooklyn Trust Company; James H. Perkins, Montgomery & Co., as a Committee, with full power and authority to represent Creditors jointly and severally, in respect of their claims against the Company. A majority in amount of the Creditors, in meeting or by one or more writings, may appoint two additional persons as members of the Committee. Each member of the Committee shall evidence his acceptance of his ap-

Exhibit C-4.

(Front) (Back)

TRADE ACCEPTANCE

Accepted November 2 1921

Payable at PATHE FRERES PHONO. CO
(DESIGNATE BANK)

20 Grand Ave Bklyn N.Y.

PATHE FRERES PHONOGRAPH CO.

(SIGNATURE OF ACCEPTOR) ASST. SECRETARY

COUNTERSIGNED Treasurer

No. 48

To PATHÉ FRERES PHONOGRAPH CO.
10-56 GRAND AVE
BROOKLYN N.Y.

The obligation of the acceptor hereof arises out of the purchase of goods from

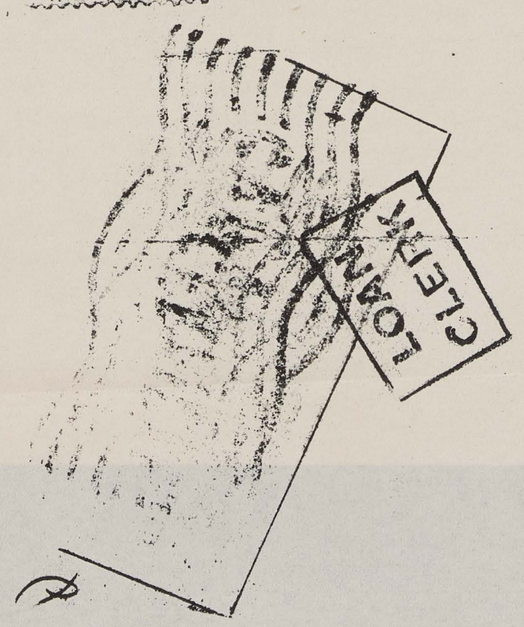
Dated New York, N.Y. November 2 1921

$15.30/100 Dollars

pay to the order of ourselves 2 1/2 22 after date

John L. Cozzone Inc.
John L. Cozzone Pres.
Antonio F. Pavia Treas. & 61 avenue Newark
John L. Cozzone
Antonio F. Pavia

C.D.-N.N.B.CO.
7582



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business, as the committee may deem advisable in the interest of the creditors. The company shall be controlled absolutely in matters of policy by the committee, this to include the closing up or retrenching departments, carrying on any old business, entering into or engaging in any new business, reducing inventories, liquidation of its business, the volume of business to be done, new inventories, the financing of branch offices, the employment or discharge of officers and employees, etc. The committee shall not be required, however, to operate the business of the company or to control the routine of its affairs or (except as any member may otherwise elect) to become its officers or directors. The committee may, however, in its uncontrolled discretion, itself or by its agents and representatives or by agents and representatives of the company, appointed by the committee, operate the business of the company and control the routine of its affairs.

8. At the request of the committee from time to time the officers and a majority of the directors of the company shall resign and such person or persons as the committee shall designate shall be elected or appointed in their stead. The company, its stockholders, directors and officers, shall take such action and shall co-operate with the committee, at such times and in such manner as the committee shall, in its uncontrolled discretion, from time to time direct or request.

9. The company shall have authority to adjust, compromise or pay all claims which do not exceed $1,000, of persons not becoming parties to this agreement, and any claims in excess of such amount if the company shall consent in writing. The committee shall assume in the first instance that the

books of the company correctly state its debts, and in the event of any dispute as to such debts, the committee shall cause inquiry to be made and endeavor to determine the correct amount thereof; and the committee is expressly authorized to settle and compromise any such difference, and any agreement, compromise and settlement made by the committee shall be binding and conclusive upon all parties to this agreement. In the event that the committee and any creditors cannot agree, such controversy shall be settled by arbitration, the committee and the creditor each appointing one arbitrator and the two arbitrators, if they cannot agree, shall appoint a third, whose decision shall be binding and conclusive. The company has outstanding $1,500,000 Three Year 8% Sinking Fund Gold Notes which, by their terms, are not due until October 1, 1923. In order to prevent the maturing of these notes during this agreement, the committee shall have power and authority to make or consent to such arrangements and payments for the purpose of preventing the happening, during the term of this agreement, of a default under said notes and the indenture covering the same, as the committee shall in its uncontrolled discretion deem for the best interests of the creditors becoming parties to this agreement.

10. The committee shall have full power and authority to employ or direct the employment (during the term of this agreement) of, and to delegate such powers and authority of the committee to, such agents, employees, accountants, attorneys and counsel of the committee or of the company, as the committee, in its uncontrolled discretion, shall deem necessary or proper to accomplish the purposes of this agreement; to fix the amount of their compen-

sation and the same shall be paid by the company; and to construe this agreement and its construction shall be binding upon all parties hereto.

11. The committee shall have the same powers and authority with respect to the subsidiary corporations of the company as are conferred herein with respect to the company.

12. No member of the committee shall be liable personally or otherwise to any party of this agreement for any act or omission, or for any mistake of judgment, law or fact, unless actuated by fraudulent or dishonest motives.

13. The committee may appoint or designate not less than three of its members as an Executive Committee and may change from time to time the personnel thereof and fill vacancies therein. The Executive Committee, if so designated and appointed, shall have and may exercise all the powers and authority herein conferred upon the Committee (except the powers and authority conferred by Paragraphs 2, 5 and 6) while the committee is not in session, unless or to the extent that the committee may otherwise determine. The Executive Committee may act by a majority at a meeting or by a writing signed by a majority of its members without a meeting.

14. The committee may act by a majority vote at any meeting in the presence of a quorum or by a writing signed by a majority of the committee without a meeting. A majority of the committee shall constitute a quorum at any meeting. The committee may adopt such rules for the guidance of itself and the executive committee as it may determine. It

may delegate to one or more of its members the performance of specified business or duties. It may from time to time add to its number additional member or members. In the event that any member of the committee shall cease to be a member thereof through death, resignation, inability or refusal to act, the vacancy so caused shall be filled by a majority of the remaining members of the committee. The members of the committee shall receive no compensation for their services, but the company shall furnish the committee, from time to time, upon its demand, with the necessary funds to pay its expenses and disbursements, including the expenses and fees of its counsel.

15. This agreement may be executed in counterparts by any creditor at any time and all of such counterparts (only one of which need be executed by the company) shall constitute one and the same agreement and shall be lodged with the company, and shall be open to the inspection and examination of the committee or any of the parties hereto. This agreement shall bind the executors, administrators, successors and assigns of the respective parties hereto and shall terminate October 1, 1921, or on December 31, 1921, if extended as herein provided. All notices hereunder shall be sufficiently given if mailed to the parties hereto at the addresses noted under their respective signatures.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals as of the day and year first above written.

Creditors' Signature and address

Amount of claim

Exhibit D-2.

NEW JERSEY SUPREME COURT.

WILLIAM P. TAYLOR

vs.

JOHN A. COZZONE.

Transcript of shorthand notes of testimony taken on the 26th day of June, 1922, before Judge Speer without a Jury.

APPEARANCES:

MR. GANNON for the plaintiff.

GEORGE P. KELLY,
Official Stenographer,
Eighth Judicial District,
Court House,
Jersey City, N. J.

Exhibit D-2.

NEW JERSEY SUPREME COURT.

WILLIAM P. TAYLOR

vs.

JOHN A. COZZONE.

Mr. Gannon for the plaintiff.
Mr. Roessler.

Tried June 26, 1922, before Speer, J., without a Jury.

(Counsel for the plaintiff admits that the assignment to Taylor was made merely for the purpose of the suit.)

(Plaintiff's counsel offers in evidence the book account and the assignment.)

Plaintiff rests.

JOHN A. COZZONE, sworn.

DIRECT EXAMINATION BY DEFENDANT'S COUNSEL:

Q. You are the president of John A. Cozzone and Company, a corporation? A. Yes.

Q. You are in business in Newark? A. Yes.

Q. You had business dealings with the Pathe Freres Company? A. Yes.

Q. Your dealings covered a period of a few years, is that right? A. Yes.

Q. On March 22, 1921, had you received certain trade acceptances from the Pathe Freres Company?

The witness: Mr. Schechner's trade acceptance.

The Court: One or both?

The Witness: One of them.

Q. Was only one due at that time, or were they both due at that time?

The Court: When was it he came over; when was the date he came over?

The Witness: They have it in one of those letters when the trade acceptances were made out.

The Court: The trade acceptances are stated in this contract to have been due March 12 and 19. I want to know when Mr. Bailey came over and you said one trade acceptance was due.

The Witness: They were both due, both made at the same time, but Mr. Schechner had only discounted one of them.

Q. They were both due at that time? A. Yes; I think so. It was one six thousand dollar account.

Q. You are sure of that, they were both due at that time? A. Yes, only Mr. Schechner had only discounted one for me. When he was about to discount the other Pathe were in difficulties and he would not do it. He said "I will hold this until the other is paid."

Q. What happened? A. So Mr. Bailey came over and we settled on giving Mr. Schechner $1.500. cash and two trade acceptances for $750. each for the first trade acceptance, and the other trade acceptance Mr. Bailey said "Now you owe the Pathe people money." I said, "Yes, we do. We owe them

about three thousand dollars." He said "The best we can do is to give you the trade acceptance back and give you credit on our books for the three thousand dollars, leaving a balance of $41. I did not give a check for $41 because they still owe me $1500 today.

Q. On what? A. On a trade acceptance which you have there, that they failed to pay at the bank. I had discounted it at the bank.

Q. Is this the trade acceptance you refer to, which is still unpaid? A. Yes.

The Court: That is the one given in payment of the first trade acceptance?

A. No; this is still another one.

Q. The two trade acceptances of $750 each—showing you two trade acceptances of $750 each—these are the ones that were given to Mr. Schechner at that time? A. Yes.

Q. These have actually been paid? A. Yes.

(Marked D-1 and D-2 in evidence)

Q. Now, this is another trade acceptance, you say? A. Yes.

Q. I show you this check, which Mr. Gannon—to be perfectly fair—has just handed me, of $1500. Did that pay this trade acceptance of $1500? A. No; that paid the trade acceptance of $750. together with those other two notes.

Q. Was this check paid? A. No; it was protested.

Defendant's Counsel: I offer this in evidence.

Plaintiff's Counsel: I object to that. That has nothing to do with this transaction; it is an entirely separate matter.

Defendant's Counsel: It may play an important part in view of the fact that the Pathe Freres company is the beneficial owner of this account; Taylor is only the owner of the naked legal title. It seems to me if that be a fact we certainly would have a right to show an indebtedness owing to us by the Pathe Company.

The Court: You mean at the time it was said you cleaned up the other matter?

Defendant's Counsel: Exactly.

The Court: I think that is relevant, because it might bear strongly upon the question of whether if six thousand dollars were standing out they would promise that for three thousand dollars and at the same time leave outstanding another trade acceptance for $3,000. which was unpaid and the check for which was protested.

(Check marked in evidence D-3.)

Q. Have you your book account with you? A. Yes.

Q. What do these sheets represent? A. Our account with the Pathe people.

Q. Were they taken from your ledger? A. Yes.

Q. When were they removed? A. Today.

Q. Under my instructions? A. Yes.

Q. What does it show? A. I mean what does it show generally?

Plaintiff's Counsel: I object.

Defendant's Counsel: We are trying this case without a jury. I think I have a right to go into the whole transaction and show there

was really an indebtedness of six thousand dollars owing at the time this transaction was entered into.

Plaintiff's Counsel: We admit that absolutely.

The Court: That is admitted.

Q. What does this account show? That shows your transactions with the Pathe Company? A. Yes.

Q. What balance does it show to be due?

Plaintiff's Counsel: I object to this unless I know the purpose of the offer.

Defendant's Counsel: To show the trade acceptances were given for money actually owing by Pathe Company to Cozzone at the time they were made; in other words there was really a debt of $6,000. owing at the time the two trade acceptances of $3,000. each were given.

Plaintiff's Counsel: I admit that.

The Court: That is admitted. What is the use of wasting time trying to prove it?

Q. Will you just repeat what the arrangement was in Mr. Schechner's office? A. I called up Mr. Bailey—

Q. I mean as to the book account; as to the other trade acceptance; what was to become of it? Were you to make them a present of the three thousand dollar trade acceptance?

Plaintiff's Counsel: I want to reserve a motion to strike this out on the ground it tends to vary the terms of that written agreement.

The Court: I will admit it subject to—it does seem to fly right spang in the face of the

words of that paper. I will see what the situation is when the time comes.

Defendant's Counsel: That is why I want to have the book account offered in evidence, to show that, first, if there was such agreement to deliver up the trade acceptance it does not necessarily follow that the debt itself represented by the book account was to be wiped out—

The Court: What does it show?

Defendant's Counsel: They are trying to say—

The Court: They are trying to say the words of that paper mean what they say. What good would it do to give the trade acceptances if the debt was still due? If the debt was due they could collect it just as well as they could collect the trade acceptance.

Defendant's Counsel: Except this: If the trade acceptance remained in Mr. Schechner's possession he was in a position to bring suit aaginst the Pathe Company, and that is what they wanted to avoid.

The Court: These people could bring suit against the Pathe Company. What difference did it make who brought suit against the Pathe Company when the whole situation was in the hands of a creditors' committee.

Q. What do you say was the arrangement about the other trade acceptance? A. We would return that trade acceptance providing he would give us credit on the books, because the books showed—to which I agreed—$3041; and Mr. Bailey accepted it on that account.

Q. Mr. Bailey represented whom? A. Pathe Freres.

Q. Did you go over to see the Pathe Company after that? A. No, sir.

Q. Did you ever receive a statement from them demanding $3041. A. No, sir.

Q. At any time before the suit was brought? A. No, sir; the only thing I received was a letter from a New York lawyer and I went over there and showed them my statement showing I owed them $41. That was all I heard until Mr. Gannon got hold of the case.

CROSS EXAMINATION BY PLAINTIFF'S COUNSEL:

Q. Is that your signature? A. Yes.

Q. Is the the signature of the treasurer of your corporation? A. Yes.

(Paper offered in evidence and marked P-1)

Q. Is that your signature? A. Yes.

(Paper offered in evidence and marked P-2)

Q. Was this agreement signed before or after you delivered up the two trade acceptances you spoke of for three thousand dollars, each, or was it signed at the time this transaction took place? A. At the time the transaction took place.

Q. In other words, the trade acceptances were delivered up at the time this agreement was signed and you received $1500 in cash and two other trade acceptances, is that so? A. Yes; and it was understood that the balance would be taken off our book account.

Q. Is that your signature? A. Yes.

Exhibit D-2.

Q. Is that your signature? A. Yes. These I turned over to Mr. Schechner because he owned the trade acceptance at that time and he got the cash.

(Papers marked P-3, P-4 and P-5 in evidence)

Q. Why didn't you show on the face of the agreement that the balance of three thousand dollars was to be taken off the book account? A. He was there himself and drew it up.

BY THE COURT:

Q. You were there and you signed it. You are no child. A. I was there and signed it, but the understanding was had between us.

Q. Why didn't you put it in the agreement? A. I thought his word was good.

Q. What did you write anything down for? A. He told me to sign the agreement so that I could not sue him afterwards, just according to that agreement I did sign before, and that is specified in that paper, and I have the three thousand dollar trade acceptance; he would give me credit on the book the way he did with some other stuff that I took—some machinery.

Q. At the same time? A. Before that.

Q. No; I mean at the same time. A. At the same time I received the other part, yes.

Q. At the time this contract that was offered in evidence was signed there was nothing else dealt with? A. Except the book account I owed him.

BY PLAINTIFF'S COUNSEL:

Q. At the time this creditors' agreement was signed Pathe Freres Company owned you quite a lot of money, didn't they? A. Yes.

Exhibit D-2.

Q. They owed you about eleven thousand dollars on trade acceptances? A. Yes; five thousand was at the bank and the balance was $1500. the trade acceptance which is not paid yet.

Q. In other words, this $1500 trade acceptance which has been offered in evidence and that you speak of represents a balance on the five thousand dollar trade acceptance? A. Yes.

Q. In addition to that there were two or three thousand dollar trade acceptances? A. Yes.

Q. Making a total balance of eleven thousand dollars on trade acceptances due you from Pathe Freres? A. When I signed that agreement they owed me about twenty thousand dollars.

Q. I am coming to that. But there was eleven thousand dollars owing you on trade acceptances? A. Yes.

Q. In addition about ten thousand dollars on the book account? A. Yes.

Q. Making a total of between eighteen and nineteen thousand dollars due you? A. Yes.

Q. Did Pathe Freres turn any machinery over to you? A. They did, as I requested them.

Q. How much, and to what value? A. I haven't a recollection just now. If you could show me something I could probably verify it.

Q. On December 24 they turned over three screw machines to you of a value of $4116? A. I presume so.

Q. December 27 they made you a cash payment of $500? A. That is when I signed the creditors' agreement, I think.

Q. And on the 29th they turned over screw machines to you of the value of $3540. didn't they? and on the 31st phonographs of a value of $290.15? A. Yes, sir.

Q. And on February 3 they turned over motors of a value of $2700? A. Yes, sir.

Q. Making a total they turned over to you of machinery and merchandise of $11,190.40? A. Approximately.

Q. And in addition to that were these three trade acceptances, one for five thousand and two for three thousand each? A. Yes, sir.

Q. Was that machinery and merchandise turned over to you before or after you had signed the creditors' extension agreement? A. It was agreed I should get that machinery when I would sign the agreement.

Q. So that you signed the agreement first? A. At the same time.

Q. You did not get it until after the agreement? A. It was agreed I would get $500. cash and the machinery before I would sign the agreement.

Q. You signed the agreement and got the five hundred dollars cash and the machinery? A. Yes, sir.

Q. When did you negotiate these trade acceptances to Mr. Schechner? A. About four or five days before I got the creditors' agreement from the Pathe people.

Q. What was the consideration of the assignment to Mr. Schechner? A. Three thousand dollars in cash. He was going to discount both of them. He said "I will discount this one this week and the other in a couple of weeks." About four or five days later I got the creditors' agreement from the Pathe people. Naturally I would not have gone to Mr. Schechner and asked him to cash the other because it would not have been fair.

Q. So that all Mr. Schechner paid you for those trade acceptances was three thousand dollars? A.

And he kept the other as security until the other was paid.

Q. And you turned the proceeds of the agreement with Pathe Freres over to Mr. Schechner for what you owed him? A. I didn't get that question.

Q. All you owed Mr. Schechner was three thousand dollars? A. That is what he gave me.

Q. You turned over the $1500 check and the two trade acceptances for $750 each to Mr. Schechner in full payment of what you owed him, is that right? A. Yes; and Mr. Bailey was there at the time.

Q. If the agreement was as you say, why did you sign this paper (P-1)? A. I signed this paper saying he was going to take the three thousand give me credit on the books, the way he did the other money and machinery.

BY THE COURT:

BY THE COURT:

Q. But he did not say so? A. No.

Q. What you said on the face of that paper was that you were going to deliver up both trade acceptances, for six thousand dollars, to this man, and in consideration of delivering up those trade acceptances you were going to get a $1500 check and two trade acceptances for $750. each, dated as appears in that paper? A. That is true, but this was drawn up in my office; we were in Mr. Schechner's office when the agreement was verbally put together between Mr. Bailey, Mr. Schechner and me, and the understanding was I was to turn over the trade acceptances with the understanding it was to be credited on the books. Then Mr. Bailey came over to the office and dictated this to the stenographer there and I thought the understanding was the same as we arrived at in Mr. Schechner's office.

Exhibit D-2.

BY PLAINTIFF'S COUNSEL:

Q. What office did you go to? A. My office; my shop.

BY THE COURT:

Q. Then your claim now is that through some mistake this paper which is offered in evidence does not contain the true terms of the contract that was entered into between you and those parties at that time? A. No, sir; I would swear to that.

Q. Then it would seem you were in the wrong court on that proposition. What would happen would be this: If that clearly was a mistake, a mutual mistake between these parties, and the paper which was offered in evidence and which apparently contains the whole of the contract entered into between the parties does not state those terms correctly, the proper method would be to go to a court of chancery to have that mistake rectified and the contract re-formed.

Defendant's Counsel: It seems to me there is another proposition that has not been disposed of. I think the Castelli case, decided by Chief Justice Gunmere, is authority for the proposition that there is no consideration; and that is their case, that in consideration of giving us three thousand dollars we were to deliver up six thousand dollars of trade acceptances. There is absolutely no consideration.

The Court: What do you say the consideration is, Mr. Gannon?

Plaintiff's Counsel: The consideration is this: As has been developed by the testimony, the Pathe Freres Company was under no obligation to pay this man on account of signing that creditors' agreement—

Exhibit D-2.

The Court: He had not signed the creditors' agreement at that time.

Plaintiff's Counsel: At the time this subsequent agreement was signed, yes.

The Witness: I had discounted my notes before the creditors' agreement.

Plaintiff's Counsel: But he signed the creditors' agreement before the notes became due and before this other agreement which we claim is the defense.

The Court: What is the consideration?

Plaintiff's Counsel: The third paragraph provides that from January 5, 1921, and thereafter until October 13, 1921, in event this agreement shall become operative none of the creditors party to this agreement shall institute any action for the appointment of a receiver of the company or take any steps for the enforcement of his or its claims of whatever nature against the company.

The Court: That is the creditors' agreement?

Plaintiff's Counsel: Yes.

The Court: With whom?

Plaintiff's Counsel: He had signed it.

The Court: He had signed it with whom? That was just an agreement amongst creditors, wasn't it?

Plaintiff's Counsel: The creditors' committee.

The Court: That was not an agreement made with Pathe Freres?

Plaintiff's Counsel: On behalf of Pathe Freres.

The Court: But not with Pathe Freres.

Plaintiff's Counsel: Yes; it was between the Pathe Freres and such creditors of the company as shall execute this agreement, hereinafter called the creditors.

The Court: And your contention now is that that agreement, made between the company and this person caused him to give up some right?

Plaintiff's Counsel: No; my contention is that this agreement is binding upon him because of public policy. Where creditors come in and mutually agree among themselves to withhold pressing their claims against a common debtor there is sufficient consideration among the creditors to make the agreement binding.

The Court: That agreement may be binding among them but that is not your defense to this suit.

Plaintiff's Counsel: At the time these trade acceptances became due Cozzone negotiated to get money.

The Witness: Now—

The Court: You keep quiet.

Plaintiff's Counsel: They came due and Pathe Freres were threatened with suit, and they said to Schechner "We don't care, go ahead and sue us; we have nothing to lose." Cozzone said, "No; if you sue me they will get a judgment against me in Jersey. Schechner is in Jersey. They will issue an execution and wipe me out, and I have a plant that is valuable enough to pay the judgment." Then they came to us and Cozzone said "Won't you do something for me?" We said "We are under no obligation to do anything for you, as between

you and us. You have assigned these trade acceptances in violation of the agreement, and you have gotten yourself into this hole yourself. If you press us now and throw us into the hands of a receiver you will get probably twenty-five to fifty cents on the dollar and that is all you will get out of it." Cozzone said "If you will give me fifty cents on the dollar I will take it." And in consideration of waiving the privilege of pressing this claim before October 1921, he sold his claim. That is the consideration of this agreement.

The Court: What do you say about that?

Defendant's Counsel: In the first place, counsel is testifying, it seems to me. There is nothing before the court which would indicate this creditors' extension agreement was signed by all the creditors of the Pathe Company, and in order to make it binding it would have to be so executed. All we have before us now is the agreement of John A. Cozzone. Secondly, counsel's statement that he was willing to take fifty or twenty-five percent—the only way that could become effective it seems to me would be by a composition duly executed—duly accepted by all the creditors.

The Court: What is stated as the consideration in that agreement right there?

Defendant's Counsel: "Now, therefore, in consideration of the premise and of the mutual promises of the parties hereto." That means all the creditors and such creditors of the company as shall execute this agreement or a counterpart thereof.

The Court: That does not require all to execute it. Such ones as shall. Now, he did.

Defendant's Counsel: If all the creditors had signed then I say the consideration would be the act of all the other creditors signing.

The Court: But that is not what they agreed. They stated on the face of that paper that it bound such as did sign. It did not require all to sign, and it is not so worded; and therefore it binds this man if he signed it alone; it would bind him. Now, if that bound him to something which enabled these people to wait until October before they executed their claims against him and they gave up that right, that is a valuable right they gave up under the contract which they had and they had the indubitable right—

Defendant's Counsel: Paragraph two: "This agreement shall not become operative except temporarily until January 5, 1921, until it is declared operative by the committee. The committee is hereby authorized to declare it operative when executed by a sufficient number of creditors to make it reasonably certain in the opinion of the committee that the purposes of the agreement can be obtained, and when the committee shall be assured to its satisfaction"—

The Court: All right. Unless they show that actually occurred, the agreement will be no good at all because of insufficient consideration. Go ahead. That will have to be shown by affirmative facts in the fact.

By Plaintiff's Counsel:

Q. You had negotiated one of these trade acceptances to the West Side Bank? A. Yes.

Q. A five thousand dollar trade acceptance? A. Yes.

Q. You were not a party to the creditors' agreement? A. Not that I know of.

Q. And they threatened to sue you, didn't they? A. No, sir.

Q. The West Side Bank?

Defendant's Counsel: I object to this.

The Court: I will let him ask it.

A. We discounted a five thousand dollar note in the course of business before the Pathe Company were in trouble, which is what in business we do, and they only paid the West Side—

The Court: Never mind. You have answered.

Samuel Schechner, sworn.

Direct Examination by Defendant's Counsel:

Q. What is your business? A. Real estate and insurance.

Q. Your office is in the Union Building adjoining mine? A. Yes.

Q. You have known Mr. Cozzone how long? A. Since he was about three or four years of age.

Q. Did you take an assignment of these two trade acceptances of three thousand dollars each? A. No; one.

Q. Did you hold one, or more? A. He originally brought me one—no, he gave me two at a time, and I discounted only one. Later, a few days later, I

found out the Pathe were in trouble and I refused to discount the other, and I held the other as security for the first.

Q. Did he agree to let you hold the other as security, for the first? A. If he didn't, I had it in my hand and I would not give it up.

Q. Was the trade acceptance which you took an assignment of paid at maturity? A. No, not paid.

Q. And what did you do? A. I communicated with Pathe and also with Mr. Cozzone, and made arrangements whereby they paid me $1500.

Q. Well, did you start suit? A. I was about to start suit and I think I instructed you to go ahead; I do not remember exactly.

Q. I show you this subpoena in the United States Court in this matter. Did you instruct me to institute these proceedings in the United States Court? A. I told you to go ahead and sue, yes.

Q. Did you communicate then with the Pathe Company? A. I think you did.

Q. Did anyone come over to see you from New York? A. Yes; Mr. Bailey was over.

Q. The gentlemen sitting there at the table? A. Yes.

Q. And you had a conversation with him? A. Yes.

Q. What arrangement was made with him at that time? A. He gave me a check for $1500 and two acceptances for $750. each.

Q. Were they paid? A. Yes, sir.

Q. Was Cozzone there at the time? A. Yes.

Q. And Mr. Bailey and yourself? A. Yes.

Q. Was I in the room? A. No, sir.

Q. I had nothing to do with that transaction? A. No, sir.

Q. What was done at that time? A. At the time there was quite a little conversation about these

matters and at the end Mr. Bailey said "Now, Cozzone, you know you owe us considerable money; it would not be any more than fair to turn over that trade acceptance of three thousand dollars." He said "I have no objection. I will give it to you so long as you take care of Schechner. I don't want any more suit against my company."

Q. What else was said? A. There was a lot said; I was not interested any more than to get my money.

Q. Was anything said as to what was to become of that other trade acceptance, by the man that was representing the Pathe Company?

Plaintiff's Counsel: I object to that, subject to the same motion.

The Court: I will permit the question.

A. You mean the second one?

Q. Yes. A. I am telling you Mr. Bailey told Mr. Cozzone "Now, we are going to pay Schechner, what will happen? You owe us considerable money. I want that trade acceptance of three thousand back so I can apply it on my account." He said "Very well." I understood it was all over. They left for Mr. Cozzone's office.

Q. Were you there when the papers were drawn? A. No. I told them I was to busy—"You go up to your office to finish your business."

Q. Was the amount owing by Cozzone to the Pathe Company mentioned at that time, the exact figures? A. It was not, no. They spoke, but—I don't know—this was very expressly expressed by giving them the trade acceptance on account of the money which he owes the Pathe.

Exhibit D-2.

CROSS EXAMINATION BY PLAINTIFF'S COUNSEL:

Q. Did you notify the Pathe people that you held these acceptances? A. Yes, sir.

Q. How soon after you got them did you notify them? A. I think the next day; I do not know exactly.

Q. You are sure of that? A. No; I am not sure.

Q. You are sure it was a day or so after? A. No. Maybe it was a month. Maybe I notified them before they were due; I don't know.

Q. Did you notify them a day before or a month before? A. I may have notified them four or five days before; I do not know.

Q. How soon after you bought these trade acceptances did you notify the Pathe Freres Company that you held them? A. Maybe I did not know. I do not make a business of trade acceptances.

Q. Did you notify Pathe Freres Company? A. I do not remember.

Q. Is that your signature? A. Yes.

(Paper marked P-6 for identification.)

A. May I see my signature, please?

Q. Yes; to refresh your recollection. A. May I read it?

Q. Surely. A. Yes, sir. This is my letter, my signature.

Q. So you did notify the Pathe Freres Company by letter that you held the two trade acceptances? A. Yes.

Q. How many days before you wrote this letter did you get the trade acceptances? A. I do not know. He owned me some money and I took it and advanced him the balance in cash.

(Defendant Rests.)

Exhibit D-2.

CLARENCE D. BAILEY, sworn.

DIRECT EXAMINATION BY PLAINTIFF'S COUNSEL:

Q. What is your occupation or business? A. Banking.

Q. With what firm are you? A. With G. M. P. Murphy and Company, 52 Broadway, New York.

Q. Who are they? A. They are a banking house representing financial interests.

Q. They are the ones who organized this creditors' committee for the Pathe Freres Phonograph Company? A. No; the creditors' committee was formed by several of the larger creditors, banks and trade creditors, and G. M. P. Murphy and Company were employed by the creditors' committee to effect a reorganization of the Pathe Company if it could be done.

Q. They are what is commonly known as financial doctors? A. If you wish to call them that.

Q. And that creditors' committee was formed? A. Yes.

Q. Did you occupy any official position in that committee? A. I was secretary of the creditors' committee.

Q. Are you familiar with the facts and details of that committee by reason of your position? A. Yes.

Q. I show you creditors' agreement dated December 15, 1920, P-2, and ask you if that is the creditors' agreement between the Pathe Company and its creditors. A. It is.

Q. About what percentage of creditors signed that agreement?

Defendant's Counsel: I object. It seems to me that is not the best proof.

The Court: I think that is true.

Plaintiff's Counsel: Withdraw the question.

Q. Was this agreement ever declared operative by the committee?

Defendant's Counsel: I object. He cannot answer that question.

The Court: He was secretary of the committee.

Defendant's Counsel: Were you secretary of the whole committee?

The Witness: I have testified to that effect

The Court: I will permit the question.

A. It was.

Q. On what date? A. January 4.

Q. And did you notify John A. Cozzone and Company of that fact? A. John A. Cozzone was notified.

Plaintiff's Counsel: I ask that the original of this letter of which I have a carbon copy be produced.

Defendant's Counsel: I have no objection to the carbon copy being used.

Q. I ask you if that is a copy of a letter which you sent Cozzone notifying him of the fact that the creditors' committee—that the creditors' agreement had become operative? Yes.

Q. Dated January 26, 1921, advising John A. Cozzone Company that Monday, January 3, 1921, by an agreement with the creditors' extension committee, it was declared the whole agreement had become operative.

(Paper marked Exhibit P-7)

Q. I show you exhibit P-1 and ask you if you drew that agreement. A. I did not.

Q. Who drew it? A. It was drawn by C. A. Braunback, an attorney for the creditors' committee.

Q. Where was it drawn? A. In our office.

Q. In New York City? A. In New York City, after I had returned from a conference with Mr. Cozzone and Mr. Schechner.

Q. So that when Mr. Cozzone says he went to his office and his stenographer drew that agreement he is mistaken? A. Yes.

Q. Where did you get the information, or upon what facts or conferences is that agreement based? A. It is based on an understanding which I reached with Mr. Cozzone, at a conference in Mr. Schechner's office.

Q. What was that conference? A. A conference on the question of a trade acceptance which was either about to become due or was past due a few days; and if I may tell the circumstances of that conference I will have to go back a few weeks.

Q. At the time this creditors' agreement was made between Mr. Cozzone and the Pathe Freres Company do you know how much the Pathe Freres Company owned Cozzone? A. Approximately, They owed him $8400. in one amount, and in addition to that he held about eleven thousand of trade acceptances.

Q. What was done at that time after this creditors' extension agreement was signed—what was done, if anything, to prefer Cozzone? A. Cozzone explained to agents of the committee that his own position was precarious, that he would have to have some assistance, and they gave him preferential payments in the way of cash and by delivering cer-

tain machinery to him at different times which totalled altogether about eleven thousand dollars. At the time he signed the agreement he was—they turned over some screw machines to him worth about four thousand dollars and made him a payment of $500 in cash, and then after that machines and motors were delivered to him at odd times.

The Court: Were all the assets of the Pathe Company at that time turned over to the creditors' committee?

A. The creditors' committee controlled the Pathe, yes.

The Court: They had power and right to dispose of the assets?

A. Yes.

Q. Was there any obligation on this creditors' committee to prefer Cozzone? A. None.

Q. That was about the time the creditors' extension agreement was signed? A. Yes.

Q. That this preference to the extent of $11,000 was given to Cozzone? A. Yes.

Q. So that would create a balance on the book account of $2700. approximately in favor of the Pathe Company? A. Yes.

Q. And left outstanding a five thousand dollar trade acceptance and two three thousand trade acceptances? A. Yes.

Q. Now, about March 1922, did two, three-thousand dollar trade acceptances become due? A. Yes.

Q. Did you have any conversations with Cozzone about that time? A. I did.

Q. What were they? A. When the first acceptance fell due some time prior to the maturity of

that acceptance we were notified by Mr. Schechner that they were in his possession, and Mr. Schechner was not a party to the extension agreement. In a conference with Mr. Schechner I tried to arrange to have him become a party to the agreement, to join with the creditors, but he could not see his way clear to do it, and insisted that some payment be made against the acceptance which he was holding. At a contract in his office he agreed to take a part payment of the acceptance and other trade acceptances in renewal; but I explained to him that Cozzone had had preferential treatment from the committee far beyond any other creditor; that they had done all they possibly could for him. If it came to a question of paying this six thousand dollars they absolutely could not do it; they were not prepared to go any further. However I suggested that if we paid this acceptance that Cozzone return to us certain of the machinery which we have delivered to him.

Q. Just a minute. Just repeat that. A. Mr. Schechner insisted on payment of the trade acceptance. I told him the committee was not prepared to go any further in giving Cozzone preferential treatment, and I suggested that we might pay something against the acceptance if Cozzone would return to us certain of the machinery which we delivered to him, not to offset the payment we were to make him. Cozzone said he could not do that. The machinery was set up in the shop and he was using it. Then the question of cancelling the trade acceptances were discussed and Cozzone agreed to return to us for cancellation six thousand dollars of acceptances in consideration of the payment of fifteen hundred dollars in two renewals of seven hundred and fifty dollars each. He did that because I—

Exhibit D-2.

The Court: Was anything said at that time about giving credit to him on the books of the company for three thousand dollars more representing one of the acceptances?

The Witness: No sir.

Q. And did Mr. Cozzone tell you that he was going to sue him—was going to sue the Pathe Freres Company—or, rather, Schechner, I mean? A. Yes; he told me he was.

Q. And what did you say to Schechner and Copzone in reply to that? A. I told him that if it was his judgment that he was going to bring suit, that we could not defend it; we had gone as far as we could in preferential payment to Cozzone.

Q. Did you tell him anything about how much they would recover on a judgment? A. I told him the creditors could not possibly recover more than fifty cents on a dollar.

Q. As a matter of fact, Mr. Bailey, how much did the creditors receive?

Defendant's Counsel: I object.

Plaintiff's Counsel: Withdraw it.

Q. What did Cozzone say when you said that if anything? A. I don't remember the exact words, but then the question of the delivery of this trade acceptance came up.

Q. That led up to the agreement that you reached, that six thousand dollars in trade acceptances was to be surrendered for three thousand dollars? A. Yes, sir; it did.

Q. In consideration of your waiving the consideration of the creditors extension agreement. Now, you went back to New York? A. Yes.

Exhibit D-2.

Q. Did you confer with anybody about this agreement? A. Yes.

Q. With whom? A. With the agents of the creditors committee, with the executive committee of the creditors' committee, and with the attorney for the committee.

Q. And what was the decision? A. They agreed to settlement with Cozzone.

Q. And in confirmity with that arrangement this agreement for the surrender was drawn up? A. Yes.

Cross Examination by Defendant's Counsel:

Q. Did the Pathe Freres Company eventually go into the hands of a receiver? A. Yes.

Q. It did, when? A. I don't know.

Q. In 1921? A. I believe so.

Q. You are familiar with this agreement, aren't you, Mr. Bailey? A. Yes.

Q. Don't you know that paragraph five, or article five, reads as follows: "This agreement and the extension herein provided for shall immediately terminate and end in case the company is adjudicated to be insolvent or bankrupt or make that a fragment for the benefit of its creditors? You knew that when you came to court today, didn't you? A. Yes.

Q. That is true. And it is a fact, then, that this company has gone into the hands of a receiver? A. Yes.

Q. And are you familiar with the affairs of the company since it went into the hands of a receiver? A. No.

The Court: Well, when did it go into the hands of a Receiver?

Exhibit D-2.

The Witness: It went, to the best of my knowledge, in December, 1921.

Plaintiff's Counsel: Way after this thing took place.

Q. But this agreement, you understand, article five, was to terminate when a receiver was appointed? A. Yes.

Q. And the creditors had not been paid in accordance with the terms of this agreement after that? A. There are no terms in that agreement about payment.

Q. What kind of receivership was this, bankruptcy or equity, do you know? A. I don't know.

Plaintiff's Counsel: Equity.

Q. And this particular claim which is now sued upon is really the property of the receiver, is it not? A. I do not know.

Q. Well, don't you know, as a matter of fact, that this claim was turned over to Taylor expressly for the purpose of bringing suit? A. I don't know.

Q. In this court? A. I don't know.

Q. Well, was there any consideration paid by Taylor to the Pathe Company for the payment of this claim? A. I don't know. The creditors' committee was dissolved last Friday when the distribution of assets was made to the creditors, and I have had no connection with the affairs of the company since that time.

Q. But you did hear Mr. Gannon say there was no consideration? A. I am not testifying to Mr. Gannon's—

Q. Now, you saw me also at the time of this settlement was effected, did you not, at my office? A. Yes.

Exhibit D-2.

Q. And I told you that I had the two trade acceptances, representing Samuel Schechner? A. (No answer.)

Q. Well, you spoke to me about it? A. I spoke to you about your bill of twenty-five dollars.

Q. My bill was fifty dollars for preparing the complaint, and you paid part of it? A. That is correct.

Q. And it showed you at that time this original subpoena and this complaint in the United States District Court? A. Yes.

Q. In which the Pathe Company was a party defendant; isn't that so? A. Yes.

Q. Now, didn't you tell Cozzone at the time this settlement was effected that if suit were not brought against the Pathe Company, eventually the creditor's committee hoped and expected to be able to pay all creditors in full? A. No; I don't believe I ever made such a statement.

Q. Wasn't that brought in your mind at that time? A. It was hoped to effect a reorganization which would pay the creditors.

Q. That was your expectation, and that is why this agreement was entered into; isn't that so? A. Yes.

Q. So that you didn't tell Cozzone at that time that he would get only fifty or forty or any other percentage on his claim; did you? A. Yes.

Q. What did you tell him? A. I told him that a receivership at that time could not mean more than fifty cents on the dollar because of the nature of the assets of the Pathe Company.

Q. That is, if a receiver were applied for at that time? A. Yes.

Q. But you did assure him, however, that if this creditor's committee were permitted to work out the

affairs of the Company the creditors would get one hundred cents on the dollar; isn't that so? A. I never thought they would get one hundred cents on the dollar.

Q. You expected that? A. I said they would possibly realize more than fifty cents on the dollar.

Q. Didn't you hope to realize one hundred cents on the dollar?

Plaintiff's Counsel: Are you speaking of the time of the execution of this agreement?

Defendant's Counsel: Yes, March 22 I am referring to.

Plaintiff's Counsel: That is not the creditors' extension agreement. He is talking about the creditors' extension agreement in December, 1920.

Q. Well, let us get to March 22, when this paper was signed, this letter which has been marked in evidence. Didn't you expect to be able to pay all creditors in full? A. In March, 1921?

Q. I mean eventually didn't you expect in March of 1921—to eventually pay all creditors in full? A. Why, there were too many considerations involved to expect anything of the kind—the attitude of the creditors; business conditions; there were a great many things involved. It was hoped to work out a reorganization which was not done until some months later.

Q. Now, did you tell Cozzone at that time that by the signing of this letter, which has been marked P-1, he was surrendering all claims to those trade acceptances, to both trade acceptances? A. Yes.

Q. Did you also tell him that he was not to receive any credit on the account which was then owing? A. I never told him—

Q. —by him? A. Pardon me now, Mr. Bailey? A. Yes.

Q. Did you explain to him at that time that he would receive no credit on the account owing by the Cozzone Company to the Pathe Freres Company? A. I did not, because the question of credit on the books was not discussed.

Q. Was not discussed. So that nothing was said about that at all? A. Nothing.

Q. Did you explain to him at that time that he was giving up three thousand dollars, the second trade acceptance, in consideration of having the first one paid? A. Yes.

Q. Or was that the legal effect that you had in your mind? A. It was a question of—no, that was not the legal effect I had in my mind. I am not a lawyer. It was a business proposition.

Q. You did intend to accomplish that object; is that so? A. Yes.

Q. Did you communicate that intention to John Cozzone Company? A. I tried to.

Plaintiff's Counsel: I object.

Defendant's Counsel: I think the bases hold that accord and satisfaction must be clearly proven beyond question. I think I have a right to show on cross examination that there was not accord and satisfaction.

The Court: I do not think you are showing it in that way when right on the face of the instrument the intent of the parties is clearly expressed. Intent is there, without any question about, on the face of that document.

The Court (after discussion): Let us understand that as far as the proceeding here is concerned, it is closed. I am simply allowing this

Exhibit D-2.

proceeding to lay over for three weeks so as not to have a judgment against your client. (Addressing defendant's counsel) If you wish to attack the agreement either on the ground of mutual mistake of fact or of fraud, that attack on either one or the other of those grounds will have to be instituted in three weeks.

Mr. Gannon: I would like to move to strike out the testimony of Cozzone on the ground that it tends to vary all or part of the written agreement.

The Court: Well, I have already announced what my opinion is on that subject, and in giving the judgment that I did give I did not consider that evidence as in the case; because I think that its clear effect would be to change the whole legal effect of the contract entered into by the parties. I think it is inadmissible for that purpose.

Exhibit D-3.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

WILLIAM P. TAYLOR, Plaintiff, vs. JOHN A. COZZONE & Co., a Corporation of the State of New Jersey, Defendant.	Action at Law. Transcript of Pleadings for Trial.

WILLIAM R. GANNON, attorney for plaintiff.

SAMUEL ROESSLER, attorney for defendant.

The defendant, JOHN A. COZZONE & Co., a corporation was summoned October 29th to answer unto the plaintiff WILLIAM P. TAYLOR, in an action at law on the following complaint:

The plaintiff residing in Jersey City, Hudson County, and State of New Jersey says that:

1. He sues for the price of goods sold and delivered to the defendant PATHE FRERES PHONOGRAPH Co., a corporation, upon a book account of which a copy is attached hereto, and the whole of which is due and unpaid.

2. On October 27th 1921 the PATHE FRERES PHONOGRAPH Co., a corporation, assigned all its right, title and interest in and to their claim against the defendant to the plaintiff for a valuable consideration.

Exhibit D-3.

Plaintiff demands as damages the amount due on said book account, being $3041.23, together with interest thereon.

WILLIAM R. GANNON.

STATEMENT.

Brooklyn, New York.

JOHN A. COZZONE,

To PATHE FRERES PHONOGRAPH CO., Dr.

1920.			
Dec.	31	Balance due on open acct.	$8.78.
1921.			
Feb.	15	1543 "A" Motors	2700.25.
Apr.	14	Misc. Motor parts	250.00.
May	30	Trans. Accts. Rec.	82.20.
		TOTAL	$3041.23.

Filed November 1st 1921.

AFFIDAVIT OF MERITS.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } SS.:

JOHN A. COZZONE, being duly sworn, on his oath says that he is the President of John A. Cozzone & Co., a corporation, the defendant in the above entitled cause, and that he believes that said John A.

Exhibit D-3.

Cozzone and Company has a just and legal defense to said action on the merits of the case.

(Signed) JOHN A. COZZONE.

Sworn and subscribed to before me }
this 9th day of November, 1921. }

JEAN KEMPER,
A Notary Public
of New Jersey.

ANSWER.

The defendant, a corporation of the State of New Jersey, having its principal office at #61 Arlington Street, in the City of Newark, Essex County, New Jersey, says that:—

1. It admits that the Pathe Freres Phonograph Co., a corporation, sold and delivered to the defendant goods, wares and merchandise, upon a book account, of which a copy annexed to the complaint is a true copy, in the sum of $3041.23, but this defendant denies that the whole of the said sum of $3041.23 is due and unpaid, but on the contrary, this defendant says that there is due on said account the sum of $41.23.

2. This defendant has no knowledge sufficient to form a belief as to the allegations contained in the second paragraph of the Complaint.

Exhibit D-3.

SEPARATE DEFENSE.

This defendant says that on or about December 12th 1920, it was the holder of a trade acceptance wherein and whereby the Pathe Freres Phonograph Co. acknowledged that it was indebted to the defendant corporation for the purchase of goods from it in the sum of $3000. and agreed to pay to the defendant company the said sum of $3000. on or about March 12th 1921; that at the maturity of the said trade acceptance, some time in the month of March, 1921, the said Pathe Freres Phonograph Co. was unable to make payment to the defendant company of the amount due thereunder, viz. $3000.00, and thereupon an arrangement was entered into between the defendant company and the said Pathe Freres Phonograph Co., whereby this defendant surrendered and delivered up, or caused to be surrendered and delivered up, the said trade acceptance so issued as aforesaid by the said Pathe Freres Phonograph Co., in consideration of the agreement then and there entered into between this defendant company and the said Pathe Freres Phonograph Co., to credit this defendant with the said sum of $3000. on the open book account in the sum of $3041.23 then owing by this defendant to the said Pathe Freres Co.

(Signed) SAMUEL ROESSLER,
Attorney for defendant.

Filed November 16th 1921.

Exhibit D-3.

REPLY.

The plaintiff replying to the answer filed by the defendant in the above entitled cause says that:

1. He denies the matters set out in the "Separate Defense" contained in the answer filed by the defendant in the above entitled matter.

WILLIAM R. GANNON
Attorney for plaintiff.

Filed November 17th 1921.

AMENDED REPLY.

The plaintiff replying to the answer filed by the defendant in the above entitled cause says that:

1. He denies the matters set out in the separate defense contained in the answer filed by the defendant and says that the agreement mentioned in said separate defense was that the surrender and delivery of the two trade acceptances mentioned was to be in accord and satisfaction of the whole amount due thereunder in consideration of the immediate payment of one half of the amount thereof.

WILLIAM R. GANNON
Attorney for Plaintiff.

(Seal) Clerk

Exhibit D-3.

I, ENOCH L. JOHNSON, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above stated cause as the same remain on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said court at Trenton this 23rd day of June, 1922.

ENOCH L. JOHNSON

Postea.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

WILLIAM C. REDFIELD, EUGENE A. WIDMAN and BENJAMIN M. KAYE, Receivers in Equity, etc., Plaintiffs, vs. JOHN A. COZZONE & Co., a Corporation of the State of New Jersey, Defendant.	Action at Law.

This action was called for trial before Judge William H. Speer, in the Hudson County Circuit on June 26th, 1922, in the presence of both parties. The case was tried by the Court without a jury, a trial by jury having been waived by both parties.

Both parties were heard and submitted their evidence and the Court thereupon gave a verdict in favor of the plaintiff and against the defendant, and assessed the plaintiffs' damages at the sum of Thirty-two hundred and seventy-nine and 65/100 ($3279.65) Dollars.

WM. H. SPEER,
Judge.

39

New Jersey Court of Errors and Appeals

Between JOHN A. COZZONE & Co., a corporation, Complainant-Appellee, and WILLIAM C. REDFIELD, *et als.*, Receivers, etc., Defendants-Appellants.	On Appeal from the Court of Chancery.

BRIEF OF APPELLANTS.

This is an appeal from a final decree of the Court of Chancery, decreeing that the written offer, dated March 22nd, 1921, made by the complainant to Pathe Freres Phonograph Company, a corporation, for whom the defendants herein were appointed Receivers, be set aside and held to be fraudulent and declared null and void, and that the delivery of said trade acceptance effected a discharge of the book account owing by complainant to the Pathe Freres Phonograph Company at the time, and further enjoining the defendants from prosecuting or proceeding further with the suit theretofore instituted in the New Jersey Supreme Court against complainant by William P. Taylor, in which the defendants were substituted as plaintiffs, and from instituting and prosecuting any other suit upon the book account. The agreement dated March 22nd, 1921 is Exhibit A, attached to the bill of complaint (Case, p. 11).

The appeal, as disclosed by the petition of appeal (Case, pp. 95, 96 and 97) is based upon five grounds,

which will be argued in the order set forth in the petition of appeal.

Before proceeding with the argument, we desire to call the Court's attention to the fact, as disclosed by the opinion of the Court of Chancery (Case, p. 89), that after final hearing, the complainant was directed to amend its bill of complaint, so as to change the prayer for relief from reformation to that of cancellation and rescission, and accordingly an amendment to bill was filed (Case, p. 15) and to meet said amendment, an amendment to answer was filed, (Case, p. 23) and as no further testimony was taken after the filing of such amendment to bill and answer, the decree made must be rested upon such amended pleadings and the testimony taken on final hearing, as applicable to said pleadings as amended. There is no question but that the original prayer for relief was reformation, as admitted by counsel for the complainant in colloquy with the Court upon final hearing, (Case, p. 33) and it is quite apparent from the opinion of the Court (Case, p. 89) and the final decree (Case, p. 86), that the final relief granted was that of cancellation and rescission.

FIRST GROUND OF APPEAL.

The decree disregards the pleas set up by way of answer by the defendants and all the evidence in support thereof.

Reference to the answer (Case, p. 18) discloses that three pleas were interposed by said answer, and reference to the amendment to answer, (Case, p. 23) discloses that four additional pleas were interposed.

The Chancery Act of 1915 P. L. 1915, page 195, Sect. 51, and Chancery Rules, Rules 67 and 68

abolished pleas, and provided in effect that every defense theretofore presentable by plea was to be made by an answer in lieu of plea. In other words, the remedy by plea remains, except that it is called by a new name, and the proceeding has been changed. Under the new practice, we contend that we were entitled to have the matters set up in the pleas contained in the answers filed by us, adjudicated by the Court, and we say this was not done, unless it be inferred that the Court took cognizance of the pleas upon the final hearing, and decided them upon the testimony produced at the final hearing.

If the Court followed this procedure, we contend that the decree is contrary to the legal effect of said pleas, as supported by the evidence produced at the final hearing.

Defendants' first plea was

> "DEFENDANTS SAY THAT THE MATTERS STATED AS THE CAUSE OF ACTION IN THE BILL OF COMPLAINT ARE RES ADJUDICATA, IN THAT THE SAME SUBJECT MATTER BETWEEN THE SAME PARTIES WAS TRIED IN THE NEW JERSEY SUPREME COURT AT THE HUDSON COUNTY CIRCUIT AND JUDGMENT IN FAVOR OF DEFENDANTS IN THIS SUIT WAS ETERED IN SAID NEW JERSEY SUPREME COURT ACTION, AND COMPLAINANT SHOWS NO GROUND FOR EQUITABLE RELIEF."

A perusal of Exhibit D-2 (Case, p. 110) and Exhibit D-3 (Case, p. 145), both introduced by the defendants' show clearly that the same subject matter between the same parties was tried in the New Jersey Supreme Court at the Hudson County Circuit, and judgment rendered in favor of the defendants in this suit.

Without extended argument on this point, we believe that the Court can readily ascertain, first, that the agreement sought to be rescinded in this suit, was set up in bar by the defendants in the Supreme

Court action, and the testimony in the Supreme Court action, Exhibit D-2 (Case, p. 110), will clearly indicate the fact that the complainant in this action tried to avoid the effect of the agreement sought to be rescinded in this action, and that the Supreme Court found against it. In fact, this is shown as the situation on the face of their bill of complaint by all the facts set out, and it is apparent that the Chancery suit is nothing more or less than an attempt to retry the case which has already been tried and determined between the very same parties in the New Jersey Supreme Court.

We cite in support of this defense

Barber vs. *Miller,* 72 N. J. Eq. 248; affirmed 74 N. J. Eq. 453.

Vice Chancellor Garrison in the case of

Commonwealth Roofing Co. vs. *Ricco,* 81 N. J. Eq. 315,

at page 318 struck out a bill of complaint, because, as he stated:

> "This bill is framed for two purposes—one is to retry in this case, upon the theory that there was fraud in the inception of the contract, the right of this complainant to a mechanics' lien upon the property in question. As to that, the face of the bill shows that they have had their day in Court in mechanics' lien suit, and therefore if that matter had appeared solely in the bill, the entire bill from beginning to end would have been stricken out upon a motion to strike out."

See also:

Stein v. *Cuff,* 76 N. J. Eq. 277.

We think the Court will readily see by a comparison of the Supreme Court testimony with the testimony in the Court of Chancery, that with the

exception of the testimony of Anthony Pavia and Mary Pavia, the testimony, both as to character and scope was the same in the Supreme Court as in the Court of Chancery. Both John A. Cozzone and Samuel Schechner testified in the Supreme Court, and attempted to set up the same fraud which they set up in this case.

We contend, therefore, that on the first plea of defendants' answer, the Court of Chancery should have dismissed complainant's bill of complaint.

The second plea, set up in the answer stated

> "COMPLAINANT HAS AN ADEQUATE REMEDY AT LAW IN THAT IT SEEKS RELIEF FROM AN ERRONEOUS JUDGMENT AT LAW, AND COMPLAINANT HAS AN ADEQUATE REMEDY AT LAW BY WAY OF APPEAL, WHICH IT HAS NOT TAKEN, AND THEREFORE, COMPLAINANT HAS NOT EXHAUSTED ITS REMEDY AT LAW, AND HAS NO GROUND FOR EQUITABLE RELIEF."

We do not think there is any question but that the complainant in this suit could set up in the Supreme Court as a defense to the agreement, the fraud which it alleges in this suit.

Dunston Lithographing Co. vs. *Borgo,* 84 N. J. 623, by the Court of Errors and Appeals distinctly states that such fraud as is claimed in the suit at hand, would be a complete bar in the Supreme Court. See also

McDonald vs. *Central Railroad,* 89 N. J. L. 251.

Assuming the Supreme Court erred in refusing to accept testimony of fraud, which, however, was not the case, complainant has an adequate remedy at law by appeal, and under the authority of

Dunston Lithographing Co. vs. *Borgo, supra,*

and

McDonald vs. *Central Railroad, supra,*

would undoubtedly obtain a reversal and a new trial. What happened in the Supreme Court action, however, is that Judge Speer, who sat as a Court without a jury, refused to receive testimony for the purpose of adding to, varying or altering the contents of a written instrument, but he did receive all the testimony that John A. Cozzone and Samuel Schechner gave in that action for the purpose of establishing that the instrument was fraudulently procured, and Judge Speer's decision was that there was no evidence of fraud sufficient to upset the agreement sought to be rescinded in this suit.

Complainant in this suit has not taken any appeal from the judgment of the Supreme Court, but within a few weeks after said judgment was entered, filed a bill in this suit, seeking to reform the instrument, Exhibit A, attached to the bill of complaint (Case, p. 11), and to enjoin defendants in this suit from proceeding on their judgment at law.

We respectfully submit that defendants' second plea set forth in their answer is a complete bar to complainant's suit, and that the Court of Chancery erred in disregarding said plea and the testimony produced at final hearing in support thereof.

The third plea set forth in the answer of defendants was as follows:

> "IT APPEARS ON THE FACE OF THE BILL OF COMPLAINT THAT THE NEW JERSEY SUPREME COURT ACQUIRED COMPLETE JURISDICTION OF THE PARTIES AND SUBJECT MATTER IN THIS SUIT ON OCTOBER 29, 1921, AND STILL RETAINS SAID JURISDICTION AND COMPLAINANT SHOWS NO EQUITABLE OR LEGAL GROUNDS FOR THIS COURT ASSUMING JURISDICTION, AND ACCORDING TO ESTABLISHED PRECEDENTS THIS COURT WILL NOT ASSUME JURISDICTION OF THE MATTERS IN CONTROVERSY."

Vice-Chancellor Bergen, in the case of *Shaw* vs. *Frey*, 69 N. J. Eq. 321-323, enunciates the principle that

> "The rule that the Court first obtaining jurisdiction should be allowed to proceed to the determination of the questions at issue, is so well settled as to render unnecessary the citation of authority to sustain it."

In the case of *Sweeney* vs. *Williams*, 36 N. J. Eq. 627, Chief Justice Magie, at page 629 says:

> "But if there exist a concurrent jurisdiction in Courts of Law and Courts of Equity, the latter will decline to entertain jurisdiction after the jurisdiction of the Courts of Law has attached, unless the relief that the applying party is entitled to ask cannot be fully obtained in the Court of Law."

In the case of *Bigelow* vs. *Old Dominion Copper Co.*, 74 N. J. Eq. 457, Chancellor Pitney, in a discussion of this question, said on page 474:

> "And besides there is the general rule essential to the orderly administration of justice that as between Courts otherwise equally entitled to entertain jurisdiction, that Court which first obtains possession of the controversy ought to be allowed to proceed and dispose of it without interference, a rule established, of course, primarily for the benefit of the suitor, rather than for the protection of the dignity of the Court."

See also:

Brick v. ~~Burr~~ Burr, 47 N. J. Eq. 189 (191).

The same rule was also applied by Chancellor Runyon as far back as the case of *Home Insurance Company* vs. *Howell*, 24 N. J. Eq. 238, at page 241.

There were four additional pleas set forth in the amendment to answer (Case, p. 23) and an argument of the second, third and fourth grounds of appeal set out in the petition of appeal (Case, p. 96) will involve an argument of the legal effect of

the four additional pleas set out in the amendment to answer, and we will, therefore, not argue the four additional pleas at length at this point, but request the Court to consider our arguments on the second, third and fourth grounds of appeal, hereinafter set out, as applicable to the four additional pleas.

We feel that the first additional plea will be argued in legal effect under the second ground of appeal; the fourth additional plea will be argued in legal effect under the third ground of appeal; the second additional plea will be argued in legal effect under the fourth ground of appeal, and the third additional plea has been argued in legal effect under the argument upon the third plea as above set out.

SECOND GROUND OF APPEAL.

It appeared from the pleadings and proofs that complainant failed to rescind the agreement Exhibit A, annexed to the Bill of Complaint, upon learning of the alleged fraud, but ratified the same, and therefore cannot ask for the relief of cancellation and rescission decreed.

We contend that the Court of Chancery erred on the ground above set forth, because it appears affirmatively from the certified transcript of pleadings Exhibit D-3 (Case, p. 145) and the transcript of testimony in the Supreme Court action, Exhibit D-2 (Case, p. 110), that the complainant in this action set up the defense in the Supreme Court suit between the same parties, and therefore, upon learning of the fraud did not elect to rescind, but ratified the agreement and sought to retain the advantage received by complainant under the same, and defended against the recovery of the amount

due on the book account, which was the subject of the New Jersey Supreme Court suit, on the ground of fraud inducing said agreement.

This Court, in the case of *Arnold* vs. *Hagerman,* 45 N.J. Eq. 186, at page 196, had laid down the rule

> "Upon discovery of fraud, which has induced a contract, the party defrauded must promptly elect whether he will rescind or not, and if he then evinces an intention not to rescind, the contract becomes as to him irrevocably established."

This Court in the recent case of *Maioran* vs. *Calabrese,* 4 N. J. Rpts. #43, page 1576, at page 1579, states the extent to which the rule will be applied; that the election to rescind must be made promptly, and refused to set aside an agreement made on June 4th, 1925, because the bill was not filed until February 11th, 1926, approximately eight months after the contract had been performed, although the injured party stated that she discovered the alleged fraud on August 20th, 1925, and in support of such decision, cited the case of *Faulkner* vs. *Wassmer,* 77 N. J. Eq. 537, in which case, this Court also refused to grant relief because the bill had not been filed until four months after the alleged fraud was discovered, and based its decision in the case, not upon the doctrine of *laches* but

> "upon the ground that the lapse of such a length of time under the circumstances afforded plenary proof of an election by her not to rescind, to which conclusive effect should have been given."

and cites the further cases of *Dennis* vs. *Jones,* 44 N. J. Eq. 513, and *Clampitt* vs. *Doyle,* 73 N. J. Eq. 678. There is no question but that rescission must be made promptly.

Ct.

Kvedar vs. *Shapiro,* 98 N. J. L. 225 (Ct. of E. & A.).

The facts in our case applicable to these rules of law are as follows: As disclosed by the transcript of pleadings in the New Jersey Supreme Court, Exhibit D-3 (Case, p. 145), the complainant, John A. Cozzone & Co., was summoned October 29th, 1921, on a complaint based upon a book account of said John A. Cozzone & Co. with Pathe Freres Phonograph Company, which had been assigned to the plaintiff in said suit. On November 16th, 1921, John A. Cozzone & Co., the complainant in this suit, filed an answer to said complaint in the New Jersey Supreme Court action (Case, p. 147), and under the separate defense, set forth in said answer, set forth an agreement for the surrender of the trade acceptances which they alleged later in the Chancery suit operated as a cancellation of the book account. The case was actually tried seven months later on June 26th, 1922, before Judge Speer in the Hudson County Circuit, at which time the fraud alleged in the Chancery suit was aired in full, and decided against the complainant, and a month later, or eight months after the filing of said answer in the Supreme Court action, the complainant filed its bill in Chancery, alleging the fraud for which they seek to rescind and cancel the agreement Exhibit A attached to the bill of complaint. The complainant certainly must have known at the time they filed their answer whether or not an alleged fraud had been perpetrated upon them in procuring the agreement Exhibit A. This is established by the fact that their testimony throughout the whole Supreme Court action, which was reiterated in the trial in Chancery, claimed fraud in the execution of the agreement, Exhibit A, and we respectfully contend that the principal enunciated in the case of *Faulkner* vs. *Wassmer, supra,* applies

> "that the lapse of such a length of time under the circumstances afforded plenary proof of an election by her not to rescind, to which conclusive effect should have been given."

THIRD GROUND OF APPEAL.

It appeared from the pleadings and proofs that complainant failed upon learning of the alleged fraud, to restore the consideration paid by defendants' predecessors in title at the time of the execution and delivery of the agreement Exhibit A, and has never returned said consideration.

It is a condition precedent to the rescission of a contract that where the party seeking the rescission has received any consideration, that such consideration must be returned upon learning of the alleged fraud and the election to rescind; otherwise such election to rescind is ineffectual.

It appears affirmatively from the pleadings and proofs and from the agreement, Exhibit A itself, that the complainant received $3000. consideration from the defendants' predecessors in title at the time of the execution and delivery of said Exhibit A, and there is no evidence whatever in the proofs that such consideration has been returned or even tendered, the claim being that if complainant can avoid the agreement on the ground of fraud, there is no obligation to return the consideration.

In this connection, we feel that the Court of Chancery, in its opinion (Case, p. 94) went astray on the facts. The opinion states

> "Upon a rescission, the status quo ante must be restored as nearly as may be. Here there is nothing to restore. Payment by the Pathe Company of the Schechner trade acceptance, which it claims was the consideration for the cancellation of the trade acceptance in hand, was its bounden duty. The extension agreement did not apply to the Schechner debt, be-

cause it was signed by Cozzone, after he became the owner of the trade acceptance. The Pathe Company gave nothing for the trade acceptance in hand."

Of course, the complainant signed the creditors' extension agreement, Exhibit D-1, after the two trade acceptances, which were the subject of the agreement, Exhibit A, were executed and delivered by the Pathe Freres Company to complainant, but this was the very purpose of the creditors' extension agreement, as we shall more particularly point out.

It is true that if the creditors' extension agreement, Exhibit D-1 (Case, p. 103), was not in existence, it was the duty of Pathe Freres Company to pay said trade acceptance, but while the payment was made to Schechner it was made or the credit of the complainant, because the complainant had hypothecated one of the trade acceptances with Schechner, and Schechner was pressing complainant for money. (See Schechner testimony, Case, p. 46, etc.) There was no obligation on the part of Pathe Freres Company to pay said trade acceptance, either to complainant or Schechner at that time, because paragraph 3 of the creditors' extension agreement (Case, p. 104) states:

> 3. Until January 5th, 1921, and thereafter until October 1st, 1921, in the event this agreement shall become operative, none of the creditors becoming parties to this agreement shall institute any action or proceeding for the appointment of a Receiver of the Company, or take any steps for the enforcement of his or its claims of whatever nature against the Company."

The complainant had signed the creditors' extension agreement (Case, p. 41), and therefore, although it hypothecated the trade acceptance to

Schechner, it was bound by the terms of the creditors' extension agreement, and that prevented it from taking any steps for the enforcement of its claims of whatever nature against the Company. Therefore, when the Pathe Freres Company paid Schechner $3000. in satisfaction of the trade acceptance which complainant had hypothecated with Schechner, they paid said sum for the account of complainant, and they were not obliged to do so under the terms of the creditors' extension agreement and this was the consideration for the agreement, Exhibit A. That it was a valid consideration is supported by the case of *Roberts* vs. *Banse,* 78 N. N. L. 57, at the bottom of page 58 and the top of page 59. Therefore, the Court of Chancery arrived at an erroneous conclusion, when, in its opinion, it stated that it was the duty of the Pathe Freres Company to pay the trade acceptance, and if the Pathe Freres Company paid the $3000., and it did, and was not obliged to do so, and made such payment in consideration of the making of the agreement, Exhibit A by the complainant, it parted with a consideration that it was not obliged to part with under the terms of the creritors' extension agreement that had been signed by the complainant, and even if the agreement, Exhibit A, was procured by fraud, we contend that complainant is required to return to the defendants the $3000. paid by Pathe Freres Company, for the account of the complainant as consideration for the execution by complainant of the agreement, Exhibit A, before rescission can be decreed.

In the case of *Henninger* vs. *Heald,* 52 N. J. Eq. 431, at page 437, affirmed by this Court in 53 N. J. Eq. 694, Vice-Chancellor Bird held that

> "A party demanding a rescission of a contract must return or offer to return the consideration received by him. It is a settled prin-

ciple in Courts of Equity that relief will never be extended to a party against his own conduct without exacting from him strict justice to his adversary."

This Court, in the recent case of *Maioran* vs. *Calabrese,* 4 N. J. Adv. Rpts. No. 43, page 1576, at page 1578, reiterated that principle, when it stated

> "It is well settled that one induced to enter into a contract by fraudulent misrepresentations has a choice of two remedies; the first remedy is that if the party who alleges he has been defrauded, desires to rescind the contract on the ground of fraud, he must restore to the other party to the contract what he has received, and recover what he has paid or parted with under the terms of the contract. The rescission must be made promptly."

Citing

Byard vs. *Holmes,* 33 N. J. L. 119;
Kvedar vs. *Shapiro,* 98 N. J. L. 225.

A perusal of the facts cited in said opinion immediately after that paragraph indicates that they are quite similar to the facts in this case; namely, the complainant sought to retain the $3000. paid by the respondents and part of the property conveyed to her, but restore the part of the property conveyed to her which she claimed was fraudulently misrepresented to her. In this case, the complainants seek to retain the benefit of the $3000. paid by the Pathe Freres Company to Schechner for their account, and also to impress a claim upon the book account they owed at the time to the Pathe Freres Company, even though they alleged that the very agreement in which they claim credit or allowance on said book account was to be given to them was fraudulently induced by the representative of the Pathe Freres Company.

We know there is no question in this case, and that it cannot be contended, that complainant ever returned the consideration paid for the execution of the agreement, Exhibit A, or even offered to return the same. For this reason, we contend that the Court of Chancery erred in not dismissing the bill of complaint.

FOURTH GROUND OF APPEAL.

It appeared by the pleadings and proof that complainant filed an answer to the suit in the New Jersey Supreme Court instituted by defendants' predecessors in title, alleging fraud, and that a judgment was rendered in said action in favor of the defendants in this suit, which is *res adjudicata* on said question of fraud.

The fraud complainant sets up as a basis for rescission in this suit, was set up as a defense in the Supreme Court action, in avoiding the effect of the agreement, Exhibit A. The Supreme Court action was based on a book account, and the defendant's answer admitted the book account, but claimed an allowance by reason of surrender of two trade acceptances. The reply was the sale of the said two trade acceptances, as contained in the agreement, Exhibit A, and the rejoinder was fraud in procuration of said agreement, and the Supreme Court adjudicated in favor of the defendant in this suit, and therefore the judgment of the Supreme Court was *res adjudicata.*

Barber vs. *Miller,* 72 N. J. Eq. 248, affirmed 74 N. J. Eq. 453;
Commonwealth Roofing Co. vs. *Riccio,* 81 N. J. Eq. 315, p. 318.

The Court of Chancery, in the recent case of *McGarvey* vs. *Young,* 4. N. J. Adv. Rpts. No. 43, page 1562, at page 1565 (affirmed by this Court on a *per curiam* opinion, 5 N. J. Adv. Rpts. No. 23, page 873), regarding the doctrine of *res adjudicata,* defined the doctrine of *res adjudicata* as follows, quoting from *In re Walsh Estate,* 80 N. J. Eq. 565, at page 569:

> "The doctrine res adjudicata has been clearly defined in this State, and it is the law 'that the judgment of a Court of competent jurisdiction on a question of law or fact, or on a question of mixed law and fact, once litigated and determined is, so long as it remains unreversed, conclusive upon the parties and their privies, not only as to the particular property involved in the suit in which it is pronounced, but as to all future litigation between the same parties or their privies touching the subject matter, though the property involved in the subsequent litigation is different from that which was involved in the first. All that is required in cases where the prior and subsequent litigations involve different things to render the judgment in the first conclusive upon the parties in the subsequent, is that there shall be substantial identity in the subject matter of the two and that must always be the case, as is obvious where the judgment in the first rests on a decision of the same question substantially which is presented for decision by the subsequent'. City of Paterson vs. Baker, 51 N. J. Eq. 57. All that is necessary is that the right to relief in the one suit shall rest upon the same point or question which in essence and substance was litigated and determined in the first suit, and in such case, the parties and those in privity with them are concluded, 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but as to any other admissable matter which might have been offered for that purpose.*' (Italics ours.) Ibid., 51 N. J. Eq. 53; Cromwell vs. Sac County, 94 U. S. 351, 352; 24 L. Ed. 195."

Further on in said opinion of *McGarvey* vs. *Young,* the Court amplifies the doctrine by the statement:

> "The judgment is final between the parties as to all defenses which were or could have been set up in the earlier suit. Thompson vs. Williamson, 67 N. J. Eq. 212-214. 'It is not necessary that the action in which the judgment is found and that in which it is relied on as an estoppel, should be of the same kind or for the same cause of action.' Sawyer vs. Woodbury (Mass.), 7 Gray 502, 66 Am. Dec. 518; City of Paterson vs. Baker, supra. 'The doctrine is not a mere rule of procedure, but a rule of justice unlimited in its operation which must be enforced whenever its enforcement is necessary for the protection and security of rights and for the preservation of the repose of society.' City of Paterson vs. Baker, 51 N. J. Eq. 69; Putnam vs. Clark, 34 N. J. Eq. 540. 'It is a rule of law based upon two grounds, the first that there should be an end to litigation and the second that a person should not be twice vexed for the same cause; 24 Am. & Eng. Encycl. L. (2d Ed.), 713-714, and cases cited."

Further on in the opinion of said *McGarvey* vs. *Young,* the Court further amplifies the doctrine by the statement:

> "Vice-Chancellor Backes in Sarson vs. Maccia, 90 N. J. Eq. 433 said 'Nor in order to raise the estoppel is it necessary that the pleadings in the first suit should have counted upon the precise false representations set up as the cause of action in the second. It is enough if the matter was triable in the first suit and that it was actually litigated and ad-

judicated. *This defense can be interposed by way of plea in bar.*" (Italics ours.) Wain vs. Meirs, 80 N. J. Eq. 488, at page 499.

Immediately thereafter in said opinion of *McGarvey* vs. *Young* at the bottom of page 1567, is the statement, supported by authorities,

> "that parties and those in privity with them are concluded 'not only as to every matter * * * offered and received to sustain or defeat the * * * demand, but as to any other admissable matter, which might have been offered for that purpose' ".

And again in said opinion is found the statement of law supported by authorities—

> "that the judgment of a Court having jurisdiction of the parties and the subject matter of the suit is conclusive not only as to the res of that case, but as to all further litigation between the same parties touching the same subject matter, though the res itself may be different."

See also:

Commercial vs. *Hamilton,* 99 N. J. Eq. 492; affirmed 137 Atl. 403;
Brick v. Burr, 47 N. J. Eq. 18 (191).

We, therefore, respectfully contend that the judgment of the Supreme Court is a bar to the Chancery action, and that the judgment can be set up, and was set up as a bar in the second additional plea and was substantiated by pleadings and proofs that complainant offered in the Chancery action, and that the Court of Chancery erred in not dismissing complainant's bill for that reason.

FIFTH GROUND OF APPEAL.

The proofs submitted to the Court on final hearing did not substantiate the allegations of the Bill and are not of the character sufficient to warrant the equitable relief of cancellation and rescission decreed.

We respectfully contend that the complainant has not produced the character, quality or quantity of proof sufficient to establish fraud, which would warrant this Court in granting the higher relief of cancellation and rescission as prayed for.

This Court, in the case of *Green* vs. *Stone,* 54 N. J. Eq. 387, at page 399, laid down the rule regarding the reformation of a deed—and the same principal would apply to cancellation and rescission—

> "To justify the reformation of a deed executed, delivered, accepted and acted upon on the ground that it did not correctly express the agreement made by the parties, the proof must be clear and convincing and upon testimony that is unexceptionable, both with regard to the agreement actually made by the parties and the mutuality of the mistake through which a different agreement was put in the deed. In Howly vs. Flannelly, 3 Stew. Eq. 612 (614), Vice Chancellor Van Fleet says: 'When the evidence, in demonstration of mistake, is doubtful or equivocal or strongly contradicted, so that it is impossible for the mind to reach a strong conviction as to the truth, the Court will not change what is written * * * until a mistake has been established by such force of proof as leaves no rational doubt of the fact, no change in the writing sought to be reformed is entitled to be called a correction.' "

This principle applies with equal force to the case of fraud. A perusal of the facts discussed in this case of *Green* vs. *Stone* will disclose the character of proof which the Court discussed as insufficient, and to our mind, it was just as strong as the character and quality of the proof reduced by the complainant in the case at hand.

This case further clearly enunciates the principle that unless there be mutual mistake, the only ground for reformation is fraud or misrepresentation. Mutual mistake means that which demonstrates clearly that according to the understanding of both of the parties the writing does not express the true agreement. If, however, it appears that the writing expresses the understanding of one of the parties even though it does not express the understanding of the other party, cancellation and rescission cannot be had on the ground of mistake—the only basis for cancellation and rescission then being misrepresentation amounting to fraud. This case of *Green* vs. *Stone,* supra, has been followed by the Courts of this State for the past 29 years, and only as recently as the case of *Malone, et al.,* vs. *Romano* (Court of Errors and Appeals), 95 N. J. Eq. 291, it is cited with approval as enunciating the principle that "the proof must be clear and convincing and upon testimony that is unexceptionable." And see *Giamarres* vs. *Allemania Fire Insurance Co.,* 91 N. J. Eq., 114, for character of proof required.

There is a further principle of law which is clearly established in this state, namely, that where a person reads a written instrument and signs it, he is conclusively presumed to have understood its terms and is bound by it except as against fraud. *Fivey* vs. *Pennsylvania Railroad Co.,* 67 N. J. L. 627. It will be noted in this case that the Court was discussing the question of what was sufficient

to constitute fraud and (page 633) the statement will be found:

> "But to establish a misrepresentation that will invalidate a contract, it must appear that the representations were not only false, but made with intent to deceive and that the party seeking relief acted upon and was misled by them. It is difficult to see wherein the statement of the medical examiner was false or fraudulent within the rule here stated."

The fraud alleged in the *Fivey* case was that the medical examined misstated the nature of the paper signed by Fivey, and Fivey claimed that that was such fraud as would invalidate the release he gave because it was fraudulently procured. The Court of Errors and Appeals held that this did not constitute such fraud as would enable Fivey to avoid the instrument. In our case the circumstances are not even as strong as this. The President of the complainant corporation admitted reading the paper before he signed it (Case, page 35), in the following distinct language:

> "Q. I show you paper writing marked C-3, and is that the paper writing you stated which you read and then signed? A. I did.
>
> Q. You read that before you signed it? A. I read it, yes, sir.
>
> Q. How long have you been in this Country? A. About thirty years.
>
> Q. You read English quite fluently? A. I do.
>
> Q. And did you see this statement in the letter 'I hereby offer to sell and deliver to you for cancellation your two trade acceptances for Three Thousand Dollars each, aggregating Six Thousand Dollars, in consideration of your Company paying me Fifteen Hundred Dollars cash and delivering two trade acceptances for Seven Hundred Fifty Dollars each'. You saw that in the letter before you signed it, didn't you? A. Yes, sir."

And on page 36 of the Case it is clearly demonstrated that the President of the complainant corporation knew the contents of the instrument when in answer to the question

> "Q. And if it did not express your agreement, why did you sign it? A. When I read it, *I thought it did express my agreement with Mr. Bailey.*"

We believe it is, therefore, clearly demonstrated that, first, there was no mutual mistake and therefore the only ground upon which relief can be had is fraud; and secondly, the President of the complainant corporation read the instrument sought to be reformed and understood it and therefore there was no fraud or misrepresentation as to the contents of the instrument. The only remaining basis of fraud therefore would be such as might be practiced in procuring such instrument. Without arguing at this time the inconsistency of the complainant's charge that the agreement was something other than the plain, distinct, expressed terms in the writing, the only remaining basis of fraud there could be is the breaking of a promise to do something in the future. We believe it has been clearly established by the decisions in this State that a promise or assurance that something thereafter will be done, or as to any future event, is not a misrepresentation, but a contract for the violation of which a remedy must be sought on the contract.

Assuming therefore, for the sake of argument, that Bailey did make the promise to apply the remaining trade acceptance on Cozzone's book account, it will clearly be seen that because of the expressed terms of the written instrument sought to be reformed, there was a promise or an assurance of something to be done in the future, ~~which clearly comes within~~

~~the rule stated by the Court of Errors & Appeals in *Lembeck* vs. *Gerken, supra.*~~ How much less force is given to the complainant's testimony on this point when it is considered that Cozzone testified, as above quoted, that he read the instrument; had been in the country thirty years; read English fluently; that he saw the statement about the sale of $6000. in trade acceptances for $3000; and that he thought it expressed the agreement between the parties. Authority for this contention is contained in the case of *Lovett* vs. *Taylor,* 54 N. J. Eq. 311, which, without quoting the opinion at length, establishes the principle that fraud cannot be predicated on a mere refusal to perform a parole promise not proven by any writing. This case does establish an exception of fraud in procuration, but a comparison of the facts in that case with the present case will show the extent to which fraud must be established in order to regard a violation of a promise or assurance to do something in the future as amounting to fraud in procuration.

Regarding the weight of evidence, we contend that the same rule applying to reformation, applies to the equitable remedy of rescission and cancellation, and this Court, in the case of *Giammares* vs. *Allemannia Fire Insurance Co.,* 91 N. J. Eq. 114, at page 119 reversing the decree of the Court of Chancery, stated,

> "Courts of equity do not grant the high remedy of reformation upon a probability; nor even upon the mere preponderance of evidence, *but only upon a certainty of error.*" (Italics ours.)

In the case of *Hupsch* vs. *Resch,* 45 N. J. Eq. 657, affirmed 46 N. J. Eq. 609, Vice Chancellor Pitney in dealing with this question stated,

> "that he who asks to have a written instrument reformed, must make out a perfectly clear case, *free from doubt.*" (Italics ours.)

There is the distinction to be borne in mind between the degree of proof required when an instrument alleged to have been fraudulently procured, is being asserted, and when such instrument is being defended against. In the first case, the Court may refuse relief even though the evidence of fraud is most unsatisfactory, if the agreement is unconscionable or even harsh, but that is not the situation in this case. The complainant is seeking to rescind and avoid this agreement, Exhibit A, which has been fully performed, and is in fact asking to have it set aside and at the same time retain the consideration paid for it. The complainant is endeavoring to avoid the effect of a judgment in the New Jersey Supreme Court, adjudicating that a certain amount is due on a book account, and for that purpose, is drawing into controversy in this Court the validity of the agreement, Exhibit A, in order to enable it to avoid the judgment of the Supreme Court. This is, manifestly, not a case where the defendants are asking for relief, but on the contrary, complainant is the one asking for relief, and as very aptly stated by former Justice Reed of this Court in the case of *Putnam* vs. *Clark,* 33 N. J. Eq. 338, page 343,

> "The complainants do not stand here defending against a person who produces an assignment, and thereby asserts its genuineness, but they occupy the position of parties who themselves produce the instrument and assert its falsity. They must prove that falsity. They cannot rest their case upon a technical presumption arising from circumstances of suspicion. They must prove it by showing affirmatively a collocation of circumstances which impress the mind with a conviction that the instrument was fraudulently altered."

Now to deal with the credibility and weight of the witnesses for the complainant by which they endeavor to establish fraud. An analysis of the testimony of John A. Cozzone, President of the complainant corporation, who conducted all the negotiations with Mr. Bailey on behalf of the creditors' committee, discloses the following facts, (case p. 35). Cozzone read the agreement before signing it. He had been in the country for thirty years. He reads English fluently. He saw the statement in the agreement sought to be rescinded about the sale of $6000.00 worth of trade acceptances for $3000.00 (Case, p. 36). He read the paper and thought it did express his agreement with Mr. Bailey (Case, p. 36). And he admitted testifying in the Supreme Court action between the same parties, (Case, p. 37)—

> "Q. What did you write anything down for? A. He told me to sign that agreement so that I could not sue him afterwards just according to that agreement I did sign before and that is specified in that paper and I have the $3000. trade acceptance; he would give me credit on the books the way he did with some other stuff that I took, some machinery."

Cozzone's admission in the Supreme Court, which he refused to repeat in the present action, is significant respecting his understanding that he was not able to sue Pathe Freres afterwards. In other words, he knew he was giving up any right of action which he might have on that trade acceptance. Although, on page 37 of the Case, he admits testifying as quoted in the Supreme Court, six questions later, when an attempt is made to pin him down regarding what he meant by his words "could not sue him afterwards" he did not remember testifying that way in the Supreme Court. This merely indicated the character of Cozzone's interested testimony.

At the final hearing there appeared to be some question in the Court's mind why Cozzone should have been willing to sell $6,000.00 worth of trade acceptances for $3,000.00. The explanation of this is that Cozzone did not have enough money in the bank to take care of the $3,000.00 trade acceptance he had hypothecated with Schechner (Case, p. 40) and he knew Schechner was threatening suit against him and could not sue the Pathe Freres Company in the same action because they were in another State, and he did not want any execution levied and his business sold out (Case, p. 40), and he knew that Pathe Freres Company was in bad financial condition because he had signed a creditors' extension agreement on December 27th, 1920, or about three months previous (Case, p. 43), and he was told by Bailey that even if he did sue Pathe Freres Company and throw them in the hands of a Receiver he would only get fifty cents on the dollar. Schechner had already started suit against Cozzone, and his attorney had already drawn and issued the papers (Case, p. 40). Cozzone knew that under the creditors' extension agreement he could not maintain any suit against the Pathe Freres people himself until October 1st, 1921, or more than six months after Schechner was demanding his money (Case, p. 41). Under these circumstances it is perfectly apparent why Cozzone accepted the fifty cents on the dollar agreement when he did not have enough money in the Bank to pay Schechner the amount of the $3,000.00 trade acceptance he had hypothecated, and upon which Schechner had started suit, and if recovered a judgment, would have levied an execution against Cozzone's business.

The next witness produced by the complainant in an attempt to prove the agreement alleged, is Mr. Schechner, the man with whom the trade ac-

ceptance had been hypothecated Schechner's testimony throughout is uncertain, and we do not think, even though full credibility may be attached to it, that it is of such character as to be called convincing under the rule laid down by this Court in *Green* vs. *Stone, supra, Giammares* vs. *Allemannia Fire Insurance Co., supra,* and *Hupsch* vs. *Resch, supra.* Schechner says he was not much interested in the conversations between Cozzone and Bailey (Case, p. 48, l. 13), and although he attempted to quote a conversation (Case, p. 48, l. 22), he admits testifying in the Supreme Court (Case, p. 52):

> "Q. What was done at that time? A. At the time there was quite a little conversation, about these matters, and at the end Mr. Bailey said, 'Now, Cozzone, you know you owe us considerable money, it would not be any more than fair to turn over that trade acceptance of $3,000.' He said, 'I have no objection, I will give it to you as long as you take care of Schechner. I don't want any more suits against my Company.' "

Such testimony by Schechner in the Supreme Court is contradictory of his attempt in the Chancery Court (Case, p. 48) to state conversations, and it will be noticed that Schechner, even in his direct examination (Case, p. 50) after uncertainly stating certain facts, in reply to questions of complainant's counsel finally says:

> "Q. Do you recall that distinctly? A. I tell you I couldn't distinctly, but I am almost positive now this amount, I turned them both to Mr. Cozzone because Mr. Cozzone had endorsed all these papers. I didn't know who the Pathe were, I took it on the strength of Mr. Cozzone, and Mr. Cozzone—"

This is contradictory to his former statements that he gave one $3,000 trade acceptance to Mr. Bailey

and the other $3,000 trade acceptance to Cozzone. On cross examination Schechner admits (Case, p. 51):

> "Q. You do not remember the exact words that were used? A. The exact words, no."

And this in the face of the fact that on his direct examination he attempts to quote conversations. And further on in his cross examination (Case, p. 52) he admits testifying in the Supreme Court that Cozzone said to Bailey that he would turn over the other $3,000 trade acceptance if Pathe would take care of Schechner, as above quoted in full.

The next witness produced by the complainant is Anthony Pavia, treasurer of the complainant corporation, who also signed the agreement sought to be rescinded. A perusal of Pavia's testimony will show that it is very disconnected even on direct examination—he has one big idea "counter-account" which he varies by using the word "counter-claim" (Case, p. 54). How Bailey ever came to use the word "counter-claim" is beyond our imagination, because neither in its technical or usual sense had it any relation to the matter being discussed.

Pavia admits that he didn't read the agreement (Case, p. 54), because he took Cozzone's statement that it was all right and the character of his testimoney is clearly indicated (Case, p. 54), in reply to a question of the Court:

> "Q. What did he tell you? A. He told me that the trade acceptance, $3,000 that Mr. Cozzone gave him, was going to clean us off the books. That is the way he spoke, counter-claim, he said, the office would take care of it—*something like that.*"

Bailey most certainly never told Pavia that surrendering the $3,000 trade acceptance would clean the Cozzone Company off the books, because at that

time Pathe Freres Company was indebted to the Cozzone Company about $11,000 (Case, p. 46), and Cozzone Company was not indebted to the Pathe Freres Company. Therefore, either we must assume that Bailey was talking absurdities if he said this to Pavia, or that Pavia has a greatly distorted recollection or imagination of what facts were stated. We think the latter is more likely because at the very end of his answer to the Court his statement "something like that" indicates the degree of accuracy he was endeavoring to adhere to in his testimony.

The further quality of Pavia's testimony is indicated (Case, p. 54) on cross examination regarding who had the trade acceptances, and he testified that Mr. Cozzone and Mr. Bailey had them between them at the time the agreement sought to be rescinded was signed. Two questions later, when it was endeavored to pin him down on the question of who had the papers in their hands at the time he, Pavia, was signing the agreement, he retreats to the subterfuge of uncertainty, and says, "I do not know." And a question later he admits in answer to the question, "Did you see Mr. Bailey give Mr. Cozzone anything when he signed this agreement," answer, "No, sir" (Case, p. 55).

Another significant contradiction or uncertainty in Pavia's testimony is concerning the Supreme Court action. Pavia did not testify in the Supreme Court action because he says (Case, p. 55), "I did not know anything about it," and when asked why he did not come to the Supreme Court to testify to the same thing that he was testifying to in the Chancery action, he repeats that he did not know anything about it. He is further sure that Mr. Bailey had on a raincoat, although he admits it was a clear day. The very significant admission of Pavia (Case, p. 57, l. 4), regarding why he did not

read the agreement before he signed it is contained in the question and answer:

> "Q. If you were so interested in this transaction, why did you not read the agreement before you signed? A. Mr. Cozzone thought it was a release."

And again, (Case, p. 57, l. 33), he says he took Mr. Cozzone's word as to the contents. A humorous situation would be shown (Case, p. 57, l. 35), were it not for the seriousness of the question of Pavia's creditability, when in answer to a question if Bailey told him one thing and Cozzone told him another, would he believe Mr. Cozzone, Pavia says "not very well."

Further evidence of the character and quality of Pavia's testimony is indicated (Case, p. 58, l. 31) where on redirect examination he admits that Mr. Cozzone came into the factory in a hurry on the day the Supreme Court action was to be tried and told him that he was going to Jersey City, and that if he had to go, he would have gone along with Cozzone, although (Case, p. 55) Pavia said he did not know anything about the Supreme Court suit. Pavia could read English as evidenced (Case, p. 57, l. 11) when he read the agreement sought to be rescinded in response to the demand of defendant's counsel, and of course, he is bound by the contents of the instrument, as he had an apportunity of reading it, to the same degree as if he had read it and then signed it. The remaining witness produced by the complainant was Mary Pavia, daughter of Anthony Pavia, the treasurer of the corporation, and (Case, p. 60) she admits that she does not know whether the paper writing Exhibit C-3, which is the agreement sought to be rescinded, was the one that the parties had before them at the office and this witness also has the big idea, expressed differently, of "contra account". On cross examination, she admits that the only words she heard Mr. Bailey say were that the "contra account" would take care of the receipt for the papers, and that she did not hear Mr. Bailey say that the $3000. trade acceptance was to be credited on the book account (Case, p. 60), although she was present and must have heard the conversation between the parties.

We respectfully submit that this character and quality and amount of testimony does not rebut the presumption raised by the written agreement sought to be rescinded, and does not establish clear and convincing evidence of the fraud which is necessary before rescission and cancellation of this instrument can be decreed by this Court. The most that can be contended is that a promise or assurance was made by Bailey that something in the future would be done and there is very meagre evidence of this, certainly not such clear and convincing evidence as under the rule in *Green* vs. *Stone, supra,* is sufficient to establish fraud in procuration.

We respectfully contend that the complainant has not made out "a perfectly clear case, free from doubt," under the rule laid down in *Giammares* vs. *Allemmania Fire Insurance Co.,* 91 N. J. Eq. 114, in view of the uncertain character and contradictions of the testimony not only of the witness, Cozzone, but also of Schechner and Pavia, and applying the rule enunciated in the case of *Hupsch* vs. *Resch,* 45 N. J. Eq. 657, affirmed 46 N. J. Eq. 609, the complainant is not entitled to rescission and cancellation "upon the mere preponderance of evidence, but only upon a certainty of error".

Contrast with the testimony of the complainant, first, the express, clear and distinct terms of the instrument sought to be rescinded and cancelled, and secondly, the testimony of Bailey as to the details of the transaction.

The written agreement sought to be rescinded and cancelled, reads as follows:

March 22nd, 1921.

Pathe Freres Phonograph Co.,
and Creditors Committee

Dear Sirs:

I hereby offer to *sell and deliver to you for cancellation* your two trade acceptances for $3000. each coming due respectively on March 12th and March 19th aggregate amount of $6000., in consideration of your company notwithstanding my signing of the creditors' extension agreement, paying me $1500. in cash and delivering me trade acceptances for $750. and for $750. coming due respectively on June 13th, 1921 and on September 12th, 1921, and in consideration of the creditors' extension Committee agreeing to such payment acting through their agents.

Yours very truly

(Signed) JOHN A. COZZONE & Co.
John A. Cozzone, Pres.
John A. Cozzone Seal
Antonio F. Pavia, Treas.

This agreement was not obtained in a rush or hurry, the negotiations for it extending over a period of a couple of days, and as Bailey testified (Case, p. 69), after having a conference with Schechner and Cozzone, he returned to New York and took up the matter with the agents for the Committee, the Executive Committee and the Attorney for the Committee, and the agreement was drawn up in New York by the Attorney for the committee, not by Bailey, and then some time later, Bailey returned to Newark, met Cozzone at Schechner's office and closed the transaction. This fact stands absolutely uncontradicted, and there was not even an attempt made by complainant to contradict or impeach this statement of Bailey's.

There is nothing uncertain or equivocal or misleading about the terms of this agreement. There is no attempt to conceal the fact that two separate trade acceptances aggregating $6000. were to be sold upon the payment of $3000. and delivered for cancellation; on the contrary, the terms of the transaction are distinctly and clearly set out and also the consideration, and as Judge Speer in the Supreme Court said, in deciding that this agreement was not procured fraudulently, and did not permit testimony to be introduced to add to, vary or alter its terms (Case, p. 143, l. 31).

> "Right on the face of the instrument the intention of the parties is clearly expressed. Intent is there without any question about it on the face of that instrument."

How a man who could read English fluently and had been in the country thirty years and in business undoubtedly for a number of years, and read the foregoing agreement and could not see plainly by its terms that the document said nothing about counter-account and unequivocally contradicted what he claims was his understanding, is beyond us.

Contrasting furthermore, the character of the testimony produced by the defendant, we find that Mr. Bailey, the Secretary of the Creditors' Committee, who handled the transaction on behalf of the Pathe Freres Co., unlike the complainant's witnesses, is a disinterested party. At the time of the trial in the Supreme Court and also in the trial in Chancery, Bailey's connection with Pathe Freres Company, through the Creditors' Committee, had ceased, and by the time of the Chancery trial, Bailey was not even in the employ of the financial firm who organized and handled the affairs of the Creditors' Committee and Pathe Freres Company. In contrast to the story of the complainant's wit-

nesses, Mr. Bailey (Case, pp. 67-68-69), gives a clear and distinct statement of all the details of the transaction which absolutely confirms the understanding and the term of the agreement sought to be rescinded and cancelled. Bailey's story is absolutely inconsistent with the testimony of the complainant's witnesses, and we challenge counsel for the complainants to point out in the testimony where Bailey either contradicts himself, or any inconsistencies are shown in his testimony. Mr. Bailey is either a most clever knave or he told the truth in his testimony, and his testimony is clear and distinct three years after the transaction took place in sharp contrast to the uncertain statements of the complainant's witnesses. Bailey also testified in the Supreme Court action (Case, pp. 133 etc), to the same scope in his testimony both on direct and cross examination as in the Chancery suit, and we challenge counsel for the complainant to point out any inconsistencies or contradictions between Bailey's testimony in the Supreme Court action and his testimony in the Chancery action.

That there was no reason for the parties to discuss the question of crediting this trade acceptance on the book account or, as the witness Pavia for the complainant said to wipe out the book account between the parties, is indicated clearly by Bailey's answer to a question by the Court (Case, p. 73, l. 20). When in answer to the question of the Court whether the question of crediting the other trade acceptance on the book account did not suggest itself, Bailey explained the condition of the book account, namely, that there was almost $11,000. due Cozzone from the Pathe Freres at the time the agreement sought to be rescinded was made, and that in the final settlement under the extension agreement, any amount chargeable against Cozzone in the book account would then have been taken

care of by the outstanding indebtedness of the Pathe Freres Company. And this is just what took place later on, namely, of the $11,000. balance in favor of Cozzone at the time of the agreement sought to be rescinded, every part has been paid to Cozzone with the exception of $1500. balance on a trade acceptance, which is th subject of a counterclaim by the complainants at the present time, and the amount of this $3000. trade acceptance which Cozzone claims should be credited against the book account.

The Court inquired of defendants' counsel at the final hearing whether or not we did not believe that the sale of $6000. in trade acceptances for $3000. was not a harsh or unjust transaction. Our answer to that is two-fold. First, if, as a matter of fact, the parties made that agreement and there was a consideration for it, this Court will not inquire into the harshness of the agreement of the parties unless affirmative relief was being sought on the same, and then the doctrine of an unconscionable agreement could be invoked by the Court. This is not the situation in this case at all. The defendants are not seeking to obtain any affirmative relief under this agreement; the complainant is seeking to avoid it and it has already been executed. In the second place, considering the transaction as a whole, Cozzone certainly has not been unjustly treated by the Pathe Freres Co. At the time of the execution of the creditors' extension agreement by Cozzone, Pathe Freres owed him almost $20,000. Mr. Bailey previously stated the condition of the book account in the Chancery proceedings (Case, p. 73), and more fully in the Supreme Court suit (Case, p. 135), and Cozzone was preferred over other creditors by the delivery of machinery and parts and payments of cash to the extent of approximately $9000. and trade acceptances, one for $5000.

and two for $3000. each were given to Cozzone. The $5000. trade acceptance was reduced to $1500. and that balance is now the subject of a counterclaim in the Supreme Court suit. For the two $3000. trade acceptances Cozzone received $3000., so that out of about $20,000. Cozzone received $15,500., or approximately 78%, which is remarkable, considering the fact that six months after this settlement of the two $3000. trade acceptances was made, the Pathe Freres Company went into the hands of a Receiver, and our best information is that the creditors received about 22% of the amount of their claims. So that, on the contrary, Cozzone was very kindly treated and preferred to other creditors, and if the $3000. trade acceptances he now seeks to have applied on account of the outstanding balance due from him is allowed, he will have received $18,500. out of less than $20,000. indebtedness of Pathe Freres Company due him at the time the financial difficulties of Pathe Freres commenced and they went into the hands of the Creditors' Committee in December, 1920. We do not think that under these circumstances any agreement to sell $6000. worth of trade acceptances for $3000. in view of the fact that Cozzone had prior thereto received preferences to the extent of almost $11,000. by delivery of machinery and parts, can be considered a harsh or unjust bargain.

Since the final hearing, counsel for the defendants discovered an endorsement on one of the original $3000. trade acceptances, (Exhibit P-2, Case, p. 100), surrendered under the agreement sought to be rescinded, "Cancelled to offset merchandise sold". At the final hearing, when the original was called for, a copy was produced on which did not appear such notation. The original was not in Court on the day of the final hearing, but was discovered by counsel for the defendants in

the law court file which was also not in Court the day of the final hearing. The fact that the law court file was not in court is disclosed by the testimony (Case, p. 78, l. 3). Upon learning of such discrepancy, counsel for the defendants disclosed the fact to the Court and to counsel for the complainant that there was such notation on the original of the trade acceptance, but was not on the copy. We have investigated and endeavored to ascertain who placed such notation upon the trade acceptance but have been unable to ascertain any facts concerning the matter, although we have been in communication with the person who was Treasurer of the old Pathe Freres Company, and he knows nothing about the matter. A perusal of the original book account of the Pathe Freres Company with John A. Cozzone & Co., which was in Court at the trial and inspected by complainant's counsel, discloses, however, that no such credit was given on the book account and the matter of who made this notation on the trade acceptance and how it came to be there is therefore left unexplained, but is contradicted in three ways; first, by the contents of the written agreement sought to be rescinded; second, by Bailey's testimony; and third, by the enrties on Pathe Freres original book account. It will be argued undoubtedly by counsel for the complainant, that the inference should be drawn that because such notation appears on the trade acceptance, it should be taken as an admission against interest on the part of the defendants. Assuming this to be so, and it would be put in as part of the complainant's case, it is contradicted in the three ways above stated, and even before it can be considered as an admission against the defendants, it must be shown that the person who made such notation had authority to do so, and what his basis or reason was for doing so. Fur-

thermore, even if that be established, it can nevertheless be contradicted by other testimony, and we contend it is contradicted clearly and distinctly, first, by the terms of the agreement sought to be rescinded, second by Bailey's testimony, and third, by the book account kept in the usual course of business by the Pathe Freres Company. In order to accept this as an admission against interest and argued to be controlling the agreement sought to be rescinded, and Bailey's testimony must be discarded as untrue, and the converse of this situation is true, namely, that if the agreement sought to be rescinded is believable, and Bailey is telling the truth, manifestly, the notation on the trade acceptance must be a mistake or error upon the part of the person who placed the same thereon. We do not argue that Cozzone made this notation on the trade acceptance before delivery to Bailey, because we have no proof of the fact any more than the complainant has proof of the fact that the notation was placed thereon by someone with authority in the employ of Pathe Freres Company. Attempted argument against Cozzone in such a way discloses how weak the converse argument against Pathe Freres Company is on such a basis.

We respectfully submit, therefore, that the decree of the Court of Chancery should be reversed for the reasons above argued, and that a decree should be made in favor of defendants, and the injunctive relief granted complainant should be dissolved.

AUTENRIETH, GANNON & WORTENDYKE,
Of Counsel with Defendants-Appellants.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

JOHN A. COZZONE & Co., a corporation,
Complainant-Appellee,

and

WILLIAM C. REDFIELD, *et als.*, Receivers, etc.,
Defendants-Appellants.

On Appeal from the Court of Chancery.

BRIEF OF APPELLEE.

The facts briefly stated, are:

Pathe Freres Phonograph Company, for whom the defendants-appellants were appointed receivers, was indebted to John A. Cozzone & Co., complainant-appellee, in an amount approximating $20,000.00, evidenced by a trade acceptance of $5,000.00, discounted by a bank; two trade acceptances of $3,000.00 each, held by one Samuel Schechner as security for a loan of $3,000.00, and by a balance due upon an open book account of about $9,000.00. To induce the complainant to sign a Creditors' Extension Agreement, The Pathe Freres Company, then in financial difficulties and in charge of a creditors' committee, delivered to it, in part payment of the indebtedness, merchandise and machinery, equal in value to the book account, and enough to pay the $3,000.00 trade acceptance John A. Cozzone & Co. then had in hand. The exact amount in excess of the book account was $3,041.23. When one of the $3,000.00 trade acceptances held by Schechner fell due, it was protested for non pay-

ment, and upon Schechner's threat of suit, The Pathe Freres Company paid him $1,500.00 in cash and gave renewals of $750.00 each. At the same time Cozzone & Company surrendered the $3,000.00 trade acceptance in hand, on the promise that it was to offset by that amount the $3,041.23 balance of the merchandise item. The Pathe Company, shortly afterwards, went into the hands of receivers, the defendants in this suit, who brought an action in the New Jersey Supreme Court to recover the $3,041.23 on book account, to which action Cozzone & Co. set up, that it had surrended the $3,000.00 trade acceptance in satisfaction of that much of the book account, and that it owed but $41.23. To this answer the plaintiff set up a general denial (State of Case, p. 149). Upon the trial, before Circuit Court Judge Speer, the plaintiff filed an amended reply, in which he set up that the agreement mentioned in the defendant's separate defense was that the surrender and delivery of the two trade acceptances mentioned in the answer was to be in accord and satisfaction of the whole amount due thereunder in consideration of the immediate payment of one-half of the amount thereof. This written offer, which was received in evidence, reads as follows:

March 22, 1921.

Pathe Freres Phonograph Company
and Creditors Committee.

Dear Sirs:

I hereby offer to sell and deliver to you for cancellation your two trade acceptances for $3,000 each coming due, respectively, on March 12 and March 19, and aggregate amount of $6,000 in consideration of your Company, notwithstanding my signing of the Creditors' Extension Agreement, paying me $1,500 in cash and delivering me trade acceptances for $750 and for $750 coming due,

respectively, on June 13, 1921, and on September 12, 1921, and in consideration of the Creditors' Committee agreeing to such payment acting through their agents.

Yours very truly,
JOHN A. COZZONE & CO.
John A. Cozzone Pres.
John A. Cozzone (Seal)
Antonio D'Pavia, Treasurer.

Cozzone & Co. offered testimony that the trade acceptance in hand was delivered up for cancellation in part satisfaction, which the trial judge refused to entertain, and ordered judgment for the plaintiff, deferring the entry until Cozzone & Co. could apply to the Court of Chancery for relief. Upon the filing of the bill of complaint in the Court of Chancery, to reform the written offer, to include the contemporaneous promise of offset, action in the law suit was stayed. The testimony in the Chancery action was substantially like that in the trial at law, except that additional testimony was offered by the complainant to prove the alleged fraud in the procurement of the written offer of March 22, 1921.

Some time after the hearing, the solicitor of the receivers came to the Vice-Chancellor before whom the case had been tried and produced the trade acceptance in hand of $3,000.00, which had not been produced either at the trial at law or in the Chancery hearing, and, upon motion, a rehearing was granted and the trade acceptance was offered in evidence. On the face, in the top margin, is written "Cancelled to offset msde. sold." This paper had, ever since its surrender by Cozzone, been in the hands of the Pathe Company or the receivers. There was no explanation of the fact, that the words of cancellation on the original were not written on the copy of

the trade acceptance produced before the Vice-Chancellor at the first hearing.

The complainant by amendment to its bill of complaint charged fraud in the procurement of the written offer and prayed that the written offer be set aside.

The final decree ordered that the written offer, dated March 22, 1921, be set aside and held to be fraudulent and declared null and void and enjoined the defendants from proceeding further with the action at law and also adjudged that the delivery of the trade acceptance operated as a discharge of the book account.

ANSWER TO APPELLANT'S POINTS.

1.

Appellants, in their "First Ground of Appeal," complain that the decree disregards the pleas set up by way of answer by the defendants and all the evidence in support thereof.

The pleas to the jurisdiction of the Court as contained in the defendants' Answer and Amended Answer are substantially the same grounds as were advanced by the defendants in their motion to dismiss the bill of complaint.

The grounds for dismissal were the following:

a. The bill does not disclose any cause of action.

b. It relies upon misrepresentations or fraud as a cause of action and the particulars with dates and items are not stated therein.

c. Complainant has an adequate remedy in the courts of law, and the courts of law having first acquired jurisdiction of the subject matter, a court of equity will not interfere.

This motion was argued before Vice-Chancellor Church, who, in his opinion, says, "I have considered the memorandum of counsel filed with me and have decided to deny the application of the defendants' solicitors, asking that the complaint be stricken out."

The several pleas interposed by the defendants' answers were also argued before Vice-Chancellor Backes, before whom the cause was tried on final hearing, and voluminous briefs were submitted by counsel for the defendants. In view of these facts, it cannot be argued that the Court did not take cognizance of the pleas; on the contrary, they were fully considered and upon the final hearing, decided adversely to the defendants.

In their argument in support of the first plea, appellants' counsel contend that the matters stated as the cause of action in the bill of complaint are *res adjudicata,* in that the same subject matter between the same parties was tried in the action at law, and complainant shows no ground for equitable relief.

In support of this proposition, counsel for appellants cite

Commonwealth Roofing Co. v. *Riccio,* 81 N. J. Eq., p. 315.

The facts in that case, briefly stated, are as follows:

A judgment had been entered in a mechanics' lien suit at law between the parties, the law court holding that the complainant had not the right to a mechanics' lien. Vice-Chancellor Garrison held that the question was absolutely at issue in the law suit and was settled by the judgment in favor of the defendant and was not open to be relitigated between the same parties

in the suit in equity. The object of the bill in equity was to recover from the owner moneys alleged to have been "stopped" in his hands by notices under the third section of the Mechanics' Lien Act. Vice-Chancellor Garrison held that the judgment in the law court settled between the parties that the filed contract must be treated as a valid contract between them, and in denying relief the Court said:

> "The tendency of the courts of equity has been to refrain from exercising their jurisdiction in certain classes of cases, particularly those where a mere money recovery is sought, just as soon as the law courts have *possessed* and *exercised* a jurisdiction adequately to afford a complete remedy."

In distinguishing between the case above cited and the instant case it should be borne in mind that Judge Speer, before whom the case was tried at law, without a jury, did not *exercise* a jurisdiction adequately to afford the appellee a complete remedy. Furthermore, it should also be borne in mind that the appellees were responsible for the refusal of the law court to exercise jurisdiction (State of Case, p. 117, ll. 36-39; p. 144, ll. 10-13). The rule is well settled in this State that a defendant having successfully excluded the matter at law is estopped from asserting in equity that it should have been received at law.

> *Asbury Park First National Bank* v. *Albertson,* 47 Atl., p. 818;
>
> 16 *Cyclopedia of Law & Procedure,* p. 40 (Note 61);
>
> *Redcliffe* v. *High,* 2 Rob. (Va.) p. 271.

In their argument in support of the appellants' second plea, it is contended that appellees have an adequate remedy at law in that it seeks re-

lief from an erroneous judgment at law, and appellees had an adequate remedy at law by way of appeal which has not been taken, and therefore "Complainant has not exhausted its remedy at law, and has no ground for equitable relief."

> The Court of Errors and Appeals, in
>
> *Gallagher* v. *Lembeck & Betz Eagle Brewing Company,* 86 N. J. Eq., p. 188,

held, (citing *Metler* v. *Metler's Adm.,* 19 N. J. Eq., p. 457) that even though the defense was good at law,

> "the complainants were entitled as against the payee to an injunction against enforcement of the note at law, and to a decree that it be delivered up.
>
> The rule is that where the party has equitable rights not cognizable in a court of law, which would in a court of equity have prevented such an adjudication as was made in the court of law, the judgment will interpose no obstacle to redress in equity, since the court of law had no proper jurisdiction of the subject matter forming the basis of redress in equity. 2 Story Equity Jur., 1573. In Smalley *v.* Line, et al., 1 Stew. Eq., 348, it was held that the fact that a complainant attempted to set up a merely equitable defense in a suit at law will not debar him from subsequently setting it up in a court of equity against the judgment. This doctrine is sustained also in Hughes *v.* Nelson, 2 Stew. Eq., 547. Nor is a party denied such remedy because he did not test the accuracy of the action of the law court in overruling his defense by a review on error. *He may accept the ruling of the law court and pursue his remedy in equity.* Borcherling *v.* Ruckelshaus,, 4 Dick. Ch. Rep., p. 340."
>
> *Headley* v. *Leavitt,* 65 N. J. Eq., p. 748, at p. 755.

See also

Commercial Nat. Trust & Savings Bank of Los Angeles v. *Hamilton, et al.,* 133 Atl. Rep., p. 703.

The case last above cited is also authority for the proposition that relief will be afforded against a judgment where the facts on which the equitable defenses are based were unknown to the defendant at the time of the trial in the law court, or the judgment was fraudulently procured.

Mechanics' Nat. Bank v. *Burnet Mfg. Co.,* 33 N. J. Eq. 486.

The failure of the appellants to produce the original trade acceptance, with the words "Cancelled to offset mdse. sold" written on its face, deprived the appellees of a defense which would have availed them at law and it is therefore urged that the judgment at law was fraudulently procured.

ANSWER TO SECOND AND THIRD GROUNDS OF APPEAL.

In its second ground of appeal, appellant argues that appellees failed to rescind the agreement Exhibit A, upon learning of the alleged fraud but ratified the same, and therefore cannot ask for the relief of cancellation and rescission; and in its third ground of appeal that complainant failed upon learning of the alleged fraud, to restore the consideration paid by defendants' predecessors in title, and has never returned said consideration.

Appellees are willing to confine their answer to these two grounds of appeal, by quoting the

following excerpt from the opinion of the learned Vice-Chancellor (State of Case, p. 94):

> "Upon a rescission the *status quo ante* must be restored as nearly as may be. *Here there is nothing to restore.* Payment by the Pathe Company of the Schechner trade acceptance, which it claims was the consideration for the cancellation of the trade acceptance in hand, was its bounden duty. The extension agreement did not apply to the Schechner debt because it was signed by Cozzone after he became the owner of the trade acceptance. The Pathe Company gave nothing for the trade acceptance in hand."

ANSWER TO FOURTH GROUND OF APPEAL.

Under this heading, appellants argue that the judgment rendered in the action at law, is *res adjudicata* upon the question of fraud, and cite

Commercial Nat. Trust, etc. v. *Hamilton,* 99 N. J. Eq., p. 492; affirmed 137 Atl., p. 403.

The Hamilton case does not support the appellants' contention. On the contrary, a reading of the opinion of Vice-Chancellor Leaming is a strong argument in favor of the Court of Chancery exercising jurisdiction where the law court has rejected the defense tendered.

> "When an equitable defense has been tendered and rejected by the law court relief may be entertained in equity without first reviewing the action of the law court."

Headley v. *Leavitt,* 65 N. J. Eq., p. 748;

Gallagher v. *L. & B. Eagle Brewing Co.,* 86 N. J. Eq., p. 188.

Appellants in their brief cite the recent case of *McGarvey* v. *Young,* 4 N. J. Adv. Rpts. 43, p. 1562 and quote an excerpt from the opinion in

that case in which reference is made to the opinion of Vice-Chancellor Backes in the case of *Sarson* v. *Maccia,* 90 N. J. Eq., p. 433. The bill in the Sarson case was filed to restrain the defendant from prosecuting an action in the Supreme Court to recover damages for deceit, on the ground that the cause of action had been determined by the Court of Chancery on its merits, adversely to the defendant and is therefore *res adjudicata.* In granting a perpetual injunction in this case Vice-Chancellor Backes found that the question of fraud and deceit which was the gist of the action before him had been decided adversely to the defendant by Vice-Chancellor Stevens in the prior suit. He therefore found that all essential elements of a plea of *res adjudicata* were present. He found that the matter was triable in the first suit *and that it was actually litigated and adjudicated.* The Court points out that Vice-Chancellor Stevens dismissed the bill after a hearing, reciting in the decree of dismissal that no representations had been made, nor fraud practiced upon the defendant by the complainant.

In the instant case it is respectfully urged by the appellee that the equitable defense relied upon was not triable at law and was, in fact, rejected by the trial court. Under the circumstances it cannot be contended that the case was heard and disposed of *on its merits* in the action at law.

ANSWER TO FIFTH GROUND OF APPEAL.

Appellants in their brief urge that the proof submitted to the Court on final hearing did not substantiate the allegations of the bill and are not of the character sufficient to warrant the equitable relief of cancellation and rescission decreed. This argument can best be answered by quoting from the opinion of Vice-Chancellor Backes (State of Case, pp. 93-94) wherein he says:

> "In the light of the established facts attending the execution of the disputed document there can be no reasonable doubt that Bailey, the secretary, encouraged the officers of the complainant to sign it knowing that they were laboring under the belief that it effected a discharge of the book account. *That was a fraud.* And to take advantage of it also is a fraud. Black on Rec. and Canc., Sec. 130 and cases cited; Scott *v.* Hall, 60 N. J. Eq. p. 451; Dunston Litho Co. *v.* Borgo, 84 N. J. Law, p. 623."

Appellants rely upon the principle of law which is clearly established in this State that where a person reads a written instrument and signs it he is conclusively presumed to have understood its terms and is bound by it except as against fraud. Appellees also subscribe to the correctness of this proposition but insist that the evidence before the Court is convincing that there was fraud in its procuration. The evidence in the case clearly indicates that the officers of the complainant company signed the agreement (Exhibit C. 3) in reliance upon the representations made by Bailey, for the defendants, that credit would be given to the complainant on the open book account. The failure of the appellant to produce the original trade acceptance in the action at law rendered it impossible for the appellees to successfully prove the fraud in the

transaction. Had the plaintiff in the action at law produced the original trade acceptance with the words "cancelled to offset mdse. sold," written across its face, Judge Speer would undoubtedly have admitted the defense. The concealment of the original trade acceptance shut the door to the only defense which was available to the defendant at law. It is very significant that the copy of the trade acceptance which was offered in evidence before Judge Speer did not contain the all important memorandum. We have a right to assume that there was fraud on the part of Bailey in the concealment of the original. Unquestionably the endorsement thereon was made at the time of the signing of Exhibit C. 3 for the very purpose of inducing Cozzone and Pavia to sign the written offer. This is clearly established by the testimony of John A. Cozzone as it appears on page 36 of the State of the Case, as follows:

> "Q Didn't you know that by the very terms of that agreement which you say you read that you were surrendering $6,000 in trade acceptances for the value of $3,000? A No, sir.
>
> Q Well, how do you explain the fact that it is expressly set out in there that you are surrendering two trade acceptances aggregating $6,000 upon the payment of $3,000 aggregate if you did not understand the fact? A I had in mind the agreement that I had with Mr. Bailey at the time he brought this agreement over there that he was going to give me credit on the books for $3,000 and I cancel it."

The testimony of Anthony Pavia (see page 53 of the State of the Case) on this subject is as follows:

> "I says, * * * Mr. Bailey I understand from Mr. Cozzone that he is going to give you the other trade acceptance, will you give us some sort of receipt for it?" "Just this way he says, 'of course you gave us several trade acceptances. This one that Mr. Cozzone gives me it is going to wipe the books' He said, 'that counter account, as you usually done that before'—just the words he said to me."

Mary Pavia, a witness called by the appellee also testified that Mr. Bailey said in answer to a request for a receipt for the papers at the time of the signing of Exhibit C. 3 (see State of the Case, p. 60) "Mr. Bailey turned around and said—there isn't any required. The contra account will take care of that on the books." She was then asked:

> "Q And there was a contra account at that time? A There was at that time, yes, sir."

The action at law was instituted by one William P. Taylor who, according to the testimony of defendants' counsel, was merely a "dummy" for the Pathe Freres Company. At the conclusion of the trial before Judge Speer, plaintiff's counsel consented to the substitution of William C. Redfield, et als., receivers, etc. for the Pathe Company. It would appear therefore that the book account sued upon had been assigned by the Pathe Company to Taylor and that the legal title to the chose was never in the receivers. It appears from the testimony of Bailey (State of Case, p. 79) and from the admission of appellants' counsel that the receivers have long since been discharged. In answer to Vice-Chancellor Backes' question, "Do you know, Mr. Gannon, when the receivers were discharged?" Mr. Gannon replied, "I do not. I think it is so. I think they have been discharged." (See also State of Case, p. 79, ll. 20 to 36). It would appear therefore that the receivership having long since been discharged

there is no one to receive the proceeds of any judgment if one were rendered in favor of the defendant.

Mr. Bailey on cross examination (See State of the Case, p. 82) was asked:

> "Q But after you got these two trade acceptances in your possession, didn't you say anything at that time to Cozzone about the payment of the $3,041? A No, I did not.
>
> Q You knew there was such indebtedness? A Yes, sir.
>
> Q No reference was made by you with reference to it or relative to it? A Not demanding payment.
>
> Q You did not warn him or remind him—Here John, you know you have to pay that book account, we have to get our money in. Nothing like that? A No."

The production after final hearing of the trade acceptance with the words "cancelled to offset mdse. sold" written across its face stamps this testimony of Bailey as false. Evidently the parties did discuss the book account and its disposition.

It is submitted that the testimony in the case establishes beyond doubt that the agreement entered into between the parties on March 22, 1921, as evidenced by Exhibit C. 3, does not reflect the entire transaction.

In *Hunt* v. *Rhodes,* 1 Pet. (26 U. S. p. 1) the United States Supreme Court stated the following rule:

> "Where an instrument is drawn and executed which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfill or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement."

This reasoning was adopted by Vice-Chancellor Lewis in the case of *Stern* v. *Connolly,* 95 N. J. Eq., p. 356, which was a suit brought for the reformation of a written agreement.

Vice-Chancellor Lewis in disposing of the point which was raised as to whether the Court of Chancery would assume jurisdiction after the jurisdiction of the court of law is attached, says:

> "I am not so sure that the law court would give any other construction to the contract than that claimed by the complainant, but, in the event that the law court should rule otherwise, the granting of equitable relief at this time would at least prevent recurrent litigation. Green *v.* Morris & E. Railway Co., 12 N. J. Eq. 165.
>
> If, therefore, equitable relief of reformation customarily exercised under the circumstances heretofore indicated is properly applicable to a situation where the complainant goes so far as to seek reformation, not because the written instrument fails to set forth the correct terms of the verbal agreement, but because it fails to clearly indicate the real intent of the parties, then I would be inclined to grant the reformation prayed for by the complainant in this case."

Cochran v. *Burns,* 91 N. J. Eq. 7;

Ex'rs. Wintermute v. *Executor Snyder,* 3 N. J. Eq. 489;

Frichneckt v. *Meyer,* 39 N. J. Eq. 551;

Sarecki v. *Guarantee Realty Co.,* 82 N. J. Eq. 489.

It is respectfully urged that the law court in the instant case could not and did not exercise jurisdiction sufficiently to afford full relief and that the Court of Chancery was the proper tri-

bunal to grant the equitable relief sought, viz: reformation or rescission.

It is respectfully submitted that the evidence to establish fraud in the procurement of the written offer marked Exhibit C. 3 is clear and convincing. Bailey, the secretary of the creditors' committee encouraged the officers of the complainant to sign Exhibit C. 3 knowning that they were laboring under the belief that it effected a discharge of the book account. Unquestionably the words "cancelled to offset mdse. sold" were written across the face of the trade acceptance at the time of the signing of Exhibit C. 3 for the very purpose of inducing the complainant to sign the instrument. Furthermore, the concealment of the original trade acceptance created the very situation of which the defendants now complain, that is to say, the failure of the trial court to receive the evidence of fraud and the institution of the suit in equity for reformation and rescission.

It is respectfully submitted that the decree of the Court of Chancery should be affirmed for the reasons stated in the opinion of Vice-Chancellor Backes and the reasons above argued.

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