

New Jersey Court of Errors and Appeals

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Between
EDWARD S. SAVAGE and MAR-
GARET T. SAVAGE,
Complainants
Respondents,
and
JOHN BLANCHARD EDGAR,
Defendant
Appellant.

On Appeal
from Chanc-
ery Orders.
(March Term,
1916.)

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BRIEF FOR APPELLANT.

These appeals question the propriety of an order of the Court of Chancery which enjoins the appellant from prosecuting his action pending in the Supreme Court, and a second order denying appellant's motion to strike out the respondent's bill of complaint. It is conceived that the error which underlies the judicial action complained of arises from the learned Vice-Cancellor's failure to give to a prior ruling of the Supreme Court, in the action there pending, the conclusive effect to which that ruling is entitled between the parties to the action, the present appellant and respondents. Far from refusing to determine the respondents' application for an order discontinuing or forever staying the action, as apprehended in the conclusions (*Case, page 45, line 25*), the Supreme Court discharged the rule to show cause, which

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was granted upon precisely the same allegations of fact as support the bill of complaint upon which the Chancery injunction order rests. The discharge of the rule to show cause, after full inquiry into the merits, was a determination by the Supreme Court of the question submitted no less conclusive upon the parties than would have been an order making the rule to show cause absolute.

The Facts.

Edgar had begun an action in the Supreme Court with the venue laid in Union County, against Savage and Mrs. Savage, in the alternative, to recover \$50,000.00 for services rendered, and interest from September 1, 1911. The action was at issue, ready for trial at the October term, 1914, of the Union Circuit, which was to open on October 6th. On Saturday, October 3rd, and on Monday, October 5th, Edgar and Savage met and signed a written agreement for settlement, and had other negotiations looking toward an adjustment of their dispute, which Savage claims amounted to a final settlement, but which Edgar contends was tentative merely, and never reached a final agreement. Savage is a member of the bar of New Jersey and New York, and his negotiations with Edgar were conducted in the absence, and without the knowledge, of the latter's attorneys. In view of the law which we think governs the questions raised by the appeal it is unnecessary to here state particularly the nature of the dispute which existed between the parties, or the character of the transactions claimed by Savage to be a settlement, except to say that the situation was fully developed in the application to the Supreme Court for an order discontinuing or forever staying the action, which is

printed at pages 53-177 of the *Case*. As part of the tentative settlement, \$2,000.00 was paid, and Savage's note for \$2,000.00, payable in thirty days, was delivered to Edgar. Certain shares of stock which were also to be delivered as part of the settlement, were transferred upon the corporation's books to the name of Edgar's wife, but were never delivered. After Edgar's attorneys had repudiated the alleged settlement, but while Edgar had not restored the note and cash received by him, because of use of the greater portion of the cash, he noticed his case for trial at the January term, 1915, of the Union Circuit. Thereupon Savage, upon petition set forth in the record of the case before the Supreme Court (*Case, pages 58-61*), applied for and obtained a rule to show cause why the prayer of the petition (which was that an order might be entered, discontinuing or forever staying the action) should not be granted, and depositions were taken at length on notice, as shown upon the record before the Supreme Court (*Case, pages 53-177*). The Supreme Court, by rule entered March 10, 1915, discharged the order to show cause, and gave leave to Mr. and Mrs. Savage to file a supplemental answer or answers, setting up the settlement claimed to have been made with Edgar, within twenty days after service upon their attorneys of a copy of the order (*Case, page 177*). The opinion of the Supreme Court is found at *Case, page 174*.

From this order discharging the order to show cause, Savage appealed to this Court, and upon the issue being moved for argument, Edgar, on notice, moved to dismiss the appeal, upon the ground that the judicial action of the Supreme Court which was complained of by Savage was discretionary, not final, and was not appealable, and this court thereupon being of opinion that the order from

which the appeal was taken was not final, ordered that the appeal be dismissed (*Case, pages 4 and 37*). Thereafter, without availing themselves of the leave granted by the Supreme Court to file a supplemental answer setting up the alleged settlement, Mr. and Mrs. Savage filed their bill of complaint in the Court of Chancery and obtained a rule to show cause, with stay (*Case, page 30*). After argument upon the adjourned day, the order to show cause was made absolute, and the injunction continued (*Case, pages 38-39*).

Shortly thereafter, Savage issued subpoena (*Case, page 39*), and Edgar gave notice of a motion to strike out the bill, which motion was denied (*Case, page 41*).

Savage thus sought to re-litigate in the Court of Chancery a controversy which had already been fully heard in the Supreme Court, where the question properly belonged, and there decided against him. He had attempted to review on appeal the action of the Supreme Court in refusing to stay Edgar's action; but this court had decided that the order of the Supreme Court disposing of the application for a stay, was not the subject of appeal, and, on motion, had dismissed the appeal. It was only after Savage had failed in his attempt in the Supreme Court to stay Edgar's action pending in that court, upon precisely the same grounds as were subsequently urged in his bill in Chancery, and after he had been defeated in his appeal (these proceedings involving a delay of a year) that he sought the aid of the Court of Chancery.

By consent of the solicitors, the printed state of the case used before this court on the argument of the appeal taken by Savage from the order of the Supreme Court, was used in the Court of Chancery for the purpose of acquainting that Court with the subject matter of the controversy, showing the issues which had been litigated, and

the determination of the Supreme Court (see Stipulation, Case, page 38).

These appeals challenge the action of the Court of Chancery in enjoining Edgar from continuing his action at law, and in refusing to strike out the bill of complaint. The questions raised on both motions make necessary a review of the whole proceeding, and they will be considered and discussed together. 10

The appellant argues:

(1) *The subject matter of the bill of complaint had already been fully litigated and determined in the Supreme Court.*

(2) *Savage having elected to seek his remedy in the law court, where the action was pending (the jurisdiction of which Court to decide the issue was conceded) is concluded by the judgment of that court.* 20

(3) *Even if the determination of the Supreme Court were not conclusive, the Court of Chancery should not have granted an injunction staying the action at law, but should have put Edgar upon terms to consent that the alleged settlement might be pleaded in the action at law, as an accord and satisfaction.* 30

(4) *The bill of complaint presenting no matter properly of equitable cognizance should, on motion, have been struck out.*

I.

The subject matter of the bill of complaint had already been fully litigated and determined in the Supreme Court.

10 (A) *IDENTITY OF ISSUES.*

In order that the substantial identity of the subject matter of the bill with the controversy submitted to the Supreme Court upon the order to show cause granted December 23, 1914, may be shown, we append a brief abstract, in parallel columns, of the allegations of the petition and of the bill of complaint.

20	ABSTRACT OF PETITION TO SUPREME COURT.	ABSTRACT OF BILL OF COMPLAINT.
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1. Sets out action at law to which is annexed copy of complaint (*Case*, page 58).

2. Filing of answers and noticing issue for trial (*Case*, page 58).

30 3. Meeting of Savage and Edgar at Rahway, Oct. 3, 1914, and signing of agreement of that date. Check for \$2,000, and promissory note for \$2,000 delivered; appointment for meeting at Savage's office in New York, Oct. 5th
40 (*Case*, pages 58-60).

1. Sets out action at law, to which is annexed copy of complaint (*Case*, page 1).

2 & 3. Filing of answers and replies; noticing for trial (*Case*, pages 1-2).

4 & 5. Meeting of Savage and Edgar at Rahway Oct. 3, 1914; negotiations, compromise and settlement. Payment \$2,000 in cash, note for \$2,000, and agreement to meet in Savage's office in New York, Oct. 5th, to deliver

4. Meeting at Savage's New York office and direction by Savage that stock be transferred to Edgar's nominee (*Case, page 60*).

5. Edgar never called for stock, used proceeds of check and holds note. Noticed action for trial Jan. term, 1915 (*Case, page 60*).

stock and close transaction. Meeting Oct. 5, 1914; delivery of stock certificate (*Case, pages 2-3*).

6. Edgar used \$2,000 check, and retains \$2,000 note (*Case, page 3*). 10

7. Edgar, Dec. 17, 1914, noticed issue for trial Jan. term, Union Circuit Court (*Case, page 3*).

8. Dec. 23, 1914, complainant's petition, Supreme Court, for discontinuance or staying of the action on the ground of settlement; order to show cause returnable Feb. 16, 1915; order by Supreme Court denying complainant's application; appeal to Court of Errors and Appeals dismissed on ground that order was not final and not appealable (*Case, pages 3-4*). 20 30

9. Edgar retained proceeds of settlement until Jan. 15, 1915, when his attorneys tendered to the attorneys of the complainant note for \$2,000 and \$2,000 cash, but stock not returned (*Case, page 4*). 40

10. Settlement positive and final, and accepted by Edgar as a full compromise and settlement, and the agreement of settlement fully carried out and performed by the complainants, but violated by Edgar (*Case, pages 4-5*).

Prayer.

Petitioners allege that "by virtue of said settlement, the said action is abated, and your petitioners therefore pray that an order may be entered discontinuing, or forever staying, said action, and that the plaintiff in the meantime, and until the further order of this Court may be restrained from further prosecuting said action" (*Case, page 61*).

Prayer.

1. That Edgar may be ordered to carry out and perform his contract, and discontinue said action, pay all costs including attorney's fees and counsel fees (*Case, page 5*).

2. That he may be enjoined from proceeding in the action (*Case, page 5*).

3. For a temporary restraint pendente lite (*Case, page 5*).

4. That the action may be decreed to have been abated, and barred, and forever settled between the parties (*Case, page 5*).

5. Other relief (*Case, page 6*).

6. Prayer for subpoena (*Case, page 6*).

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It is apparent from the above comparison that the objects sought by the petition to the Supreme Court and by the bill in Chancery are the same, namely, an injunction to prevent Edgar from proceeding with his action at law against Savage. It is equally clear that the grounds upon which the claim to relief is based, are the same in each proceeding. Both allege an accord and satisfaction which abated Edgar's action, and left nothing upon which a judgment could rest. The identity of the matters in litigation in the Supreme Court and in the Court of Chancery is therefore established. 10

(B) *THE ISSUE HAD BEEN LITIGATED
AND DETERMINED IN THE SUPREME
COURT.*

The claim of Savage, the defendant in the Supreme Court, was that by the arrangement made by him with Edgar on October 3rd and October 5th, 1914, the action at law had been abated by a completed settlement, and the relief sought was "that an order may be entered discontinuing or forever staying said action, and that the plaintiff, in the meantime, and until the further order of this court, may be restrained from further prosecuting said action" (*Case, page 61, line 13*). The rule granted by Mr. Justice Bergen in the Supreme Court stayed proceedings in the action and gave leave to both sides to take depositions on five days' notice (*Case, page 70, line 27*). Pursuant to such leave, depositions were taken at length and constitute by far the greater part in bulk of the state of the case now before the court. They extend from pages 71 to 168, inclusive, of the printed case. No question was raised before the Supreme Court as to its plenary power to deal with the situation presented by the depositions and exhibits. The 20 30 40

Supreme Court, upon the case thus presented, and after hearing oral argument and examining briefs, declined to grant the relief sought by Mr. and Mrs. Savage, reserving to them, however, the right to plead by supplemental answer the defense of settlement. It is submitted that the action of the Supreme Court embodied in the rule discharging the
 10 rule to show cause was a determination of the issue before the court which is conclusive upon the parties, not only in the action itself, but in any other forum in which they might seek to re-litigate the question.

It was so held in the Court of Chancery by Vice-Chancellor Pitney in the case of *West New York Silk Mill Co. vs. Laubsch*, 53 N. J. Eq. (8 Dick.), 65 (1894), which was an attempt to obtain relief in equity, after the Circuit Court had refused to
 20 set-off against a judgment recovered against the complainant in the bill a prior judgment which had been obtained by a third party against the plaintiff in the circuit, and by such third party assigned to the complainant in the Chancery suit. The complainant there contended that because the doctrine of setting off one judgment against another was purely equitable, not founded upon any fixed rule which compelled the Court to grant it, but rested in the discretion of the Court to which the
 30 application was made, the refusal of the Circuit Court to set off was not conclusive, but left the matter still open to adjudication by the Court of Chancery. The action in the Circuit had been certified to the Supreme Court, and is reported in the case of *Laubsch vs. West New York Silk Mill Co.*, 57 N. J. L. (28 Vr.), 234 (S. C., 1894). The Vice-Chancellor, in refusing to entertain the application for an injunction, says (*page 69*):

40 "The complainant deliberately chose its forum, in which it had, at least, the benefit of the judgment of four judges of the Supreme

Court, who dealt with the case on the merits upon equitable principles precisely as this Court would have done had it come here in the first place. Having chosen that forum, I think it is as much estopped in case no writ of error will lie to the judgment of that Court as if it will. I am unable to see on what ground the fact that a writ of error will not lie, if such be the fact, can affect the question of estoppel." 10

(C) *UPON THE MERITS, THE APPLICATION TO STAY WAS PROPERLY REFUSED BY THE SUPREME COURT.*

Upon principle, and in view of authorities cited at Point II of this brief, the appellant urges that the correctness of the conclusion reached by the Supreme Court in determining the application for a stay addressed to it was not open to inquiry in the Court of Chancery. Even if it should seem apparent to the Court of Chancery, or to this Court, that the Supreme Court erred in refusing to grant to Savage the relief which he sought by his application to stay the action, such error could not be corrected by the Court of Chancery. 20

But if this view of the law does not receive the sanction of this Court, it is still insisted that the Supreme Court properly disposed of the application before it, upon the merits. 30

No settlement of the controversy pending between Edgar and Savage was ever reached.

The action which it is claimed was abated by settlement was at issue, ready for trial at the October term, 1914, of the Union Circuit, which was to open on October 6th. On Saturday, October 3rd, 40

Savage induced Edgar, an old gentleman of over 70 years of age (*Case, page 159, line 17*), who was in serious financial troubles, his home being under foreclosure, and in danger of immediate sale (*Case, page 112, line 27*) to come to his office in Rahway, and without opportunity for Edgar to confer with his attorneys, got him to sign a paper which was offered in evidence and marked Exhibit P 1. This paper, which is the alleged settlement, is set forth in the petition in the Supreme Court (*Case, page 59*). It provides for the payment of \$2,000.00 in cash, a thirty days note of Savage to Edgar for \$2,000.00, and the delivery of 250 shares of the common stock of the Tremley Point Corporation. The cash was paid by Savage's check at that time, and the note was then delivered. The stock was to be turned over at No. 10 Wall Street, New York City, on October 5th, the following Monday, at noon. The agreement reserved an option to Savage, his heirs or assigns, to purchase the 250 shares of the Tremley Point Corporation stock at any time within six months from the date of the agreement, by paying the par value thereof, viz., \$25,000.00.

On October 5th, Edgar met Savage at his office in New York, and proceeded with him to the office of the Tremley Point Corporation, 27 Pine Street, New York City, and there, after instructing the officers of the company as to the transfer of stock to be made, Savage presented another document for Edgar's signature, at which he balked, apparently realizing that he was in need of counsel before proceeding further with his former friend and business associate. This paper is set forth in full in the depositions (*Case, pages 77, 78*), and is intended to exonerate Savage from any charge of misrepresentation as to the value of the 250 shares of the common stock of the Tremley Point Cor-

poration, which he was unloading upon Edgar. In this document, which Savage deposes he had drawn up and had ready for Edgar upon his coming to his office that morning (*Case, page 85, line 26*), there is an express disclaimer of any representations on the part of Savage as to the value of the property of the Tremley Point Corporation, except the appraisals of Corbin & Day, which had been shown to the Colonel at the office of that company. It concludes with this language: "If you are willing to accept this stock, based solely upon these statements, you will kindly acknowledge the same with your signature." At this late stage of the transaction, Edgar concluded that he should submit this paper to his counsel, put it in his pocket, and it was produced as an exhibit before the commissioner when the depositions were taken in the Supreme Court. The stock remained with the officers of the corporation.

Within a day or two after the tentative settlement, the whole transaction was repudiated by Edgar's attorneys (*Case, page 136, lines 2-6; Case, page 148, lines 24-28*).

On January 15, 1915, the \$2,000.00 paid by Savage to Edgar on October 3rd, and also the 30 days' note for a like amount, by Savage to Edgar, were tendered to the defendant's attorney, and refused. The tender was renewed on the following day, January 16, in the presence of Savage, himself, and again rejected (*Case, pages 88, 89*).

No settlement was concluded on October 3rd. Savage admits in his deposition (*Case, pages 84, 85*) that Edgar wished to have an opportunity to see the appraisals of Day and Corbin; that he was to have the information that was contained in those appraisals. It is therefore apparent that no settlement had been reached on October 3rd, although steps had been taken which, if completed as con-

templated by the parties upon October 5th, would have constituted a satisfaction of the claim. When the parties met in New York on the following Monday, Savage had prepared a communication which is set out in his deposition (*Case, pages 77, 78*). The significant part of this document is that Savage made Edgar's assent and signature a condition to the carrying out of the terms of settlement which had been expressed in the agreement of October 3rd. The paper reads:

10 "I want it understood before delivery of said two hundred fifty (250) shares of common stock of the Tremley Point Corporation that said stock is delivered to you on the following statements and representations, and no others, to wit:" (Here follows the statement of the capitalization, indebtedness and property of the corporation.) "That I make no representation as to the value of this property, except the appraisals made by Floyd S. Corbin, and by the office of Joseph P. Day."

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"If you are willing to accept this stock, based solely upon these statements, you will kindly acknowledge the same with your signature. Yours truly, Edward S. Savage."

There is some natural discrepancy in the testimony of the opposing parties as to the actual incidents of October 5th. There is no question that Edgar did not sign the paper, that he took it with him unsigned, and that he did not take the stock then, or at any other time. Savage's story is as follows (*Case, page 79, line 31*):

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"I then turned to the Colonel, and said, 'Colonel, I want you to sign that letter.' He said, 'That is all right, I want to show it to my lawyer, and I will come back tomorrow—I will bring it back tomorrow when I come for the stock.' So he shook hands with us all and walked out of the office."

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On cross-examination Savage says (*Case*, page 87, line 30), that as soon as he had read the paper he handed it to the Colonel.

"Q. And he retained it from that time on?

A. He did.

Q. And after you had had the discussion, which you testified, as to the name in which the stock should be put—that it should be put in Mrs. Edgar's name and that had been communicated to Mr. Straussman—then the Colonel said that he would communicate this paper to his attorney and would come for the stock the next day? A. Yes, sir. 10

Q. Was any objection made to that by anybody? A. None at all; everything seemed to be entirely satisfactory."

Edgar says (*Case*, pages 103, 104), that in looking over the letter which Savage handed to him, he noticed that he (Savage) had made no personal guaranty at all, but merely relied upon the appraisal made by Mr. Corbin 20

"so that I said to him, 'I would like to submit this to my counsel,' and put it in my pocket.

I said, 'If my counsel should approve, I will probably be over tomorrow for the stock.' "

Even if Savage were merely reiterating what he had orally stated to Edgar at the time of their interview on October 3rd, he was adding to the conditions then assented to in the paper to which the terms of the agreement were committed, that Edgar should sign a paper exonerating Savage personally from any other representations than those set out in the letter of October 5th. This he made a condition to the delivery of the stock. It was a new condition, to which Edgar might or might not assent. It was a disclaimer on the part of Savage of the terms of settlement which they had reached on October 3rd. 30

But it is evident that Savage had made representations as to the value of the stock on October 40

3rd which he feared might come against him when Edgar found out that the stock was worthless. There is a marked discrepancy in the testimony of the two principals, as to what was said with regard to the 250 shares of common stock of the Tremley Point Corporation.

- There is no question that Edgar went to Savage's
- 10 Rahway office on October 3rd, on Savage's appointment (*Case, page 72, line 33*). Savage also admits that he opened up the subject of a settlement. According to Savage's account, without any discussion of the amount of the plaintiff's claim, or what would be accepted in settlement, he offered "\$25,000.00 worth of common stock," and Edgar agreed to accept this, with a check for \$2,000.00, and a note for \$2,000.00, payable in 30 days. According to Edgar's deposition (*Case, pages 100-102*) Savage
- 20 inquired the amount of his claim, was told that it was \$50,000.00, and interest amounting to \$12,000.00 or \$13,000.00 more; said he was willing to meet Edgar half way, and offered to give "\$25,000.00 worth of the Tremley Point Corporation stock in settlement." Edgar then said he must have some money, and Savage said he would give him \$5,000.00 in cash, which afterwards was modified to half cash and a note for thirty days. In drawing up the paper which Savage prepared for
- 30 Edgar's signature, the agreement as reduced to writing was for a check of \$2,000.00 and a note of \$2,000.00, although Edgar apparently did not observe the reduction of \$1,000.00 in the amount to be paid him until after the paper had been signed, and he was on his way to New York with the note. Edgar says that Savage stated with regard to the stock (*Case, page 101, line 32*):

- "I won't say that it is worth par today, because of the financial conditions of the
- 40 times, but, he says, 'It is given to you on the proposition that it is worth par; and I want

you to agree to carry it for six months and give me the privilege of redeeming it at par.' I think he said 'that stock will go to \$250.00 a share.'"

Savage says (*Case, page 74, line 35*) that after he had written out the agreement he read it to Edgar, who said "You didn't say anything about your option to purchase the stock," to which Savage replied, "No, I forgot that," so he then added the clause as it appears in the Exhibit P. 1 (*Case, page 59*). 10

It is significant that Savage should have omitted to mention in the agreement an option so valuable as he evidently wished the Colonel to esteem the right to repurchase this stock at par, and only inserted it in the written agreement when he was reminded of that by Edgar. If he knew the stock to be worthless, and wanted it to appear that he had made no representations to Edgar regarding its value, it becomes apparent why he omitted this otherwise important clause from the contract. That he did represent the stock to be worth par at the interview of October 3rd is by fair implication confirmed by his action on October 5th, when he prepared the paper for signature by Edgar, which is set out in full in his deposition (*Case, pages 77, 78*). 20

His anxiety to have it appear explicitly that the stock was accepted by Edgar, based solely on "these statements" (i. e., those of the document then ready for signature) indicates that there were earlier oral statements which he regarded as dangerous, and which he wished to disavow. 30

It is not without significance that, although the defendant has called Mr. Montgomery and Mr. Straussman, officers of the Tremley Point Corporation, to show that the appraisals of Corbin and Day were communicated to Edgar on October 5th, and Mr. Huntley from the office of Joseph P. Day, 40

to back up his appraisal, and that counsel for the defendants reserved the right to call Mr. Corbin as a witness (*Case*, page 99, line 19), neither Savage nor the officers of the Company, nor any other witness was called to testify that the common stock of the Tremley Point Comporation was worth a dollar. It is a fair inference that this
 10 stock, which Savage has been attempting to use in the settlement in lieu of \$25,000.00, is worthless. If Edgar had accepted the stock instead of so much cash, he would have been a loser to that extent.

The principles upon which courts act in using their undoubted power to stay pending proceedings, are discussed in the case of *Wallace vs. Leber*, 67 N. J. L. (38 Vr.), 26 (S. C., 1901).

20 *The failure to restore the part consideration received by the appellant, is not necessarily a ratification, even if the contract be considered as executed, and not still resting in negotiation.*

There is authority holding that where the party seeking to avoid a contract does not restore consideration which, in any event, he would be entitled to retain, such retention is not evidence of an election to ratify the election.

Gould vs. Cayuga Co. Nat'l Bk., 86 N. Y., 75, 87 (Earl, J.).

30 *Kley vs. Healey*, 127 N. Y., 555, 561 (Vann, J.).

In any event, where no third party rights have intervened, and pending the return of the consideration, the failure to restore the consideration is evidence only of an intention to ratify, of more or less weight, according to the circumstances. This court in the recent case of *Roberts vs. James*, 83 N. J. L. (54 Vr.), 492 (1912, Swayze, J.), reiterated the language of an earlier case, as follows
 40 (page 496):

“Delay in exercising the power of rescission is evidence of an election to treat the sale as valid, of more or less weight, according to the circumstances of the case, but of itself does not operate as an estoppel, unless in the meantime, superior rights of third persons have intervened.”

See also

Redrow vs. Sparks, 76 N. J. Eq. (6 Buch.), 133 (1909, Leaming, V. C.).

Reed vs. Benzine-ated Soap Co., 81 N. J. Eq. (11 Buch.), 182.

The rule seems to be that while the party seeking to rescind must restore the other to his former position, delay in restoring the consideration is evidence merely of an intention to ratify. In the case at bar, any such inference of intention is negated by the express repudiation of Edgar's attorneys notified to Savage's attorneys, as soon as the attempted settlement came to their notice (*Case*, page 136, lines 2-6; page 148, lines 24-28). No rights of third parties intervened, nor did Savage change his position on the strength of the agreement.

II.

The respondents are bound by the judgment of the Supreme Court, which has unquestioned jurisdiction, they having elected to seek their remedy in that Court.

The power of the Supreme Court to stay the action at law if there has been a settlement, has never been questioned. That such power was expressly conceded, appears from the opinion in the Supreme Court (*Case*, page 175, line 28). While the power is one which ought to be exercised with

extreme caution, Mr. Justice Dixon states it to be unquestionable. *Wallace vs. Leber*, 67 N. J. L. (38 Vr.), 26 (S. C., 1901). No less settled is the right of the Court of Chancery upon an original application, to grant relief to a litigant situated as Savage claims to be, if its aid is properly invoked; but having elected to pursue his remedy in the Supreme Court, without objection on the part of Edgar, and having been fully heard and dismissed from that court, he will not be permitted to again litigate the same subject matter in the Court of Chancery, even though the grounds upon which he seeks relief be of an equitable nature.

The law with respect to an application such as was addressed to the Court of Chancery is declared by Van Fleet, V. C., in the case of *Holmes vs. Steele*, 28 N. J. Eq. (1 Stew.), 173, 176 (1877):

20 "A matter once fully considered and decided by a competent tribunal, cannot be open to review, upon exactly the same facts, in another tribunal of merely concurrent powers, without producing conflicting decisions, and consequently, indecorous strife between the tribunals, and leading to a great deal of litigation, purely experimental and vexatious."

The court then discriminates between an application such as that to the Court of Chancery, which might, with equal propriety, be addressed to either tribunal, and an instance where the suitor seeks the aid of equity because of a just defense which a court of law cannot hear, or desires to set up a defense of which he had no knowledge (he being free from negligence), when the judgment at law was recovered, or seeking relief against a judgment procured by fraud of his adversary. A court of equity will not, however, enjoin the enforcement of a judgment, where the defendant had a fair opportunity to present his defense to the law court which had the same jurisdiction.

In the case at bar, not only has Savage had his opportunity to make his defense to the law court, but he had actually presented the situation fully, without objection by his opponent, in the Supreme Court, and that court had, after full consideration, decided against him—reserving to him, moreover, the right to present his defense at the trial, before the jury.

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See also

Vaughn vs. Johnson, et al., 9 N. J. Eq. (1 Stock), 173, 179 (1852).

Williamson, Ch.:

“If the complainant correctly states his case, his defence, whether there was a judgment against Cavalier or not, was equally available in law as equity, and the court, when the trial was had, was as competent to grant him relief on that trial as this court could be in a case instituted here upon the like facts. If this is so, and the court erred in judgment in overruling the defense, that error I cannot correct.”

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Reeves vs. Cooper, 12 N. J. Eq. (1 Beas.), 223, 226 (1859).

Williamson, Ch.:

“But where the party has presented the matter which he claims as the ground of his relief to a court of law, and the court has decided against him, or when, through his own negligence, he has failed to present it to the court in which the suit was pending, this court can grant no relief. It has no authority to sit in judgment to correct alleged errors of courts of law, and it will not aid a party, who through his own sheer negligence, has involved himself in difficulty.”

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The learned Vice-Chancellor does not consider that these cases sustain Edgar's position, and

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quotes from *Holmes vs. Steele*, to support the proposition that a suitor may have relief in equity in respect to a matter which the law court could not hear. But such is not the character of the issue which was presented to the Court of Chancery. Savage was asserting no equitable right of which he had been foreclosed in the action at law. No
 10 doubt had been suggested from any quarter that the Supreme Court had power to stay an action pending before it which had been settled or abated, and there had been no refusal to accept jurisdiction, nor a denial of relief on ground of lack of power.

This subject has received more recent exposition by this Court in the case of *Stein vs. Cuff*, 76 N. J. Eq. (6 Buch.), 277 (E. & A., 1909, Gummere, C. J.). Here upon a bill filed to restrain the enforce-
 20 ment of a judgment recovered against the complainant, and to compel a new trial of the action, facts were set up which induced Vice-Chancellor Leaming to grant an order to show cause why a preliminary injunction should not issue. Upon the hearing on the order, it appeared that in due time after the rendition of the verdict at circuit, an application for a new trial was made upon the same grounds which were used in support of the bill, and that the trial court had denied the ap-
 30 plication. Vice-Chancellor Leaming denied the application for a preliminary injunction, from which ruling the complainant appealed.

After stating that since courts of law have assumed jurisdiction over applications for new trials, so that equity will at this day interfere only when adequate relief cannot be afforded by the court in which the judgment has been obtained, the court proceeds:

40 "The refusal is to be justified also upon a broader ground. Assuming that the exercise

of jurisdiction by the court of chancery in applications for new trials is a matter of discretion in that court, nevertheless the jurisdiction over that subject is concurrent with that of the law courts, and a litigant may select either tribunal as the forum in which to have such an application considered and determined. If he selects the law court he cannot afterwards be heard upon the same matter in a court of equity, for such a proceeding would be, in its essence, a review of the determination of the legal tribunal, and such power of review does not reside in the court of chancery. The principle that the decision of a court of competent authority is binding and conclusive upon all other courts of concurrent power is of universal application; and for this reason, as was said by Chancellor Kent in *Simpson vs. Hart*, 1 Johns. Ch., 91, 97, in discussing the question which we are now considering: 'Where courts of law and equity have concurrent jurisdiction over a question, and it receives a decision at law, equity can no more re-examine it than courts of law in a similar case can re-examine a decree in a court of chancery.'"

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See also *Roarke vs. Roarke*, 77 N. J. Eq. (7 Buch.), 181, 185 (1910, Walker, V. C.);

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McMichael vs. Barefoot, 95 Atl. Rep., 620 (E. & A., Sept. 29, 1915, Walker, Ch.).

As is stated in the case last cited, the complainant, by applying to the law Court, had made an election of remedies, and must abide the result.

III.

10 **No case for injunction was presented. If the Court of Chancery was not precluded by the action of the Supreme Court, the appellant should have been put upon terms to permit the respondents to plead the alleged settlement in the law action.**

20 Such has been the practice approved by this court. Where a judgment had been obtained against the complainant, and certain payments made by the complainant after the entry of judgment, which made it inequitable that the judgment creditor should enforce the judgment against the complainant, who sought to perpetually restrain the enforcement thereof, this court, in the case of *Headley vs. Leavitt*, 68 N. J. Eq. (2 Robb.), 591, 595 (1904, Gummere, C. J.), says:

30 "The subject of the litigation which resulted in the judgment was one which was cognizable by a legal, rather than an equitable tribunal. The contract which the appellant sought to set up as a defence to the action in the supreme court would, if it had been executed by him, have constituted a legal, and not an equitable defence to that action. Subsequent performance of the contract on his part gives him no right to have the forum of the litigation changed to a court of equity, and to deprive the respondent of the determination of a jury upon the question of the existence or non-existence of such contract. The relief asked for by him in the alternate prayer hereinabove recited is all that should be granted to him.

40 "The decree appealed from should be reversed and a decree entered in the court of chancery restraining the respondent from pro-

ceeding to enforce the judgment, unless and until he consents to a retrial of the action in the supreme court, and further consents that the appellant on such retrial may set up the alleged contract as a defence by way of accord and satisfaction."

It is true, however, that in the latter case of *Trenton Street Railway Co. vs. Lawlor*, 74 N. J. Eq. (4 Buch.), 828, where a bill was filed by a defendant at law, who alleged a settlement agreed upon, but not so executed that it could be used at law to support a plea of accord and satisfaction, praying to enjoin the further prosecution of the suit, this court modified the decree appealed from so that upon the complainant paying into court for the benefit of the defendant the amount agreed upon, the defendant should be perpetually enjoined from prosecuting his action. The dissenting opinion of Judge Swayze was based upon the view that the procedure adopted in *Headley vs. Leavitt*, *supra*, should be followed, and the appellant restrained, unless he should consent that the appellee might set up the alleged contract as a defence by way of accord and satisfaction, leaving it to the jury to determine whether there was such a contract, and depriving the appellant only of the right to object that the accord was not followed by a satisfaction. It is suggested to the court whether the procedure adopted in the case of *Headley vs. Leavitt*, is not better adapted to protect the litigant, without interfering with the orderly course of the action at law and ousting the plaintiff of his right to submit issues of fact in an action at law to a jury.

Of course, in the case last cited, the application for relief was made originally, and only, to the Court of Chancery.

IV.

The bill of complaint presenting no matter properly of equitable cognizance, should, on motion, have been struck out.

10 At the time when the argument upon the injunction order came on, no subpoena to answer had been issued. After the entry of the order making absolute the order to show cause for an injunction, the respondents sued out process and brought the appellant into court (*Case, pages 39, 40*). Thereupon the appellant moved to strike out the bill.

The grounds on which the appellant rested his motion to strike out (*Case, page 41*) were:

20 "1. The bill does not allege any ground for equitable relief.

2. The bill shows that the subject matter upon which relief is sought, had, prior to the filing of the bill, been submitted to the New Jersey Supreme Court in an action there pending by the defendant against the complainants, and after the merits had been inquired into, the Supreme Court had refused to grant to the complainants the same relief which is sought by the bill, which determination of the Supreme Court precludes the complainants from maintaining their bill."

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The argument which has been made with respect to the injunction order, under Points I and II, *supra*, applies to the second ground specified on the motion to strike out the bill, and will not be here repeated. It sufficiently appears from the allegations of the 8th paragraph of the bill itself, (*Case, pages 3-4*) that there had been an application to the Supreme Court for substantially the same relief sought by the bill of complaint, upon which depositions had been taken, argument had,

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and the application of the respondents denied, and that an appeal had been taken to this court, and the appeal had been dismissed. The bill omitted any reference to the very significant paper which Mr. Savage, on October 5th, had requested Colonel Edgar to sign, and which is embodied in Colonel Edgar's affidavit used upon the motion for an injunction (*Case, pages 33-35*) ; but while this paper, no doubt, affects in important respects the merits of the controversy, even with this omission, there is sufficient in the allegations of the bill to show that there was an application to the Supreme Court for the same relief sought by the bill of complaint, which application was examined upon the merits, and denied. The former adjudication appears upon the face of the bill itself, so that on the grounds argued at length in Points I and II, the bill should have been struck out.

With regard to the first ground alleged, viz., lack of equity, the allegations of the bill are likewise specific. It is difficult to believe that the bill of complaint was framed by the respondents' solicitors on the theory upon which the learned Vice-Chancellor sustains their claim to relief. The injunction was granted because the case made out by the bill was conceived to be one of accord and satisfaction unexecuted, which may be specifically enforced in equity, because it cannot be availed of as a defense in an action at law. This is directly controverted by the allegations of paragraph 10 of the bill (*Case, page 4*) which expressly alleges that "the said settlement made by complainants with the said John Blanchard Edgar was positive, and final, and was accepted by the said John Blanchard Edgar, together with the property paid and delivered pursuant to the terms of the same, as a full compromise settlement of the said action of the said John Blanchard Edgar against the com-

plainants." Certainly this language does not set up an accord unexecuted, which could not be pleaded as a defense in a court of law—this wholly without reference to the permission given by the Supreme Court, in the order denying a stay to the respondents, to file a supplemental answer setting up the settlement (*Case, page 177*), which must be laid out of present consideration, as that order does not appear on the face of the bill. It is submitted that the view taken by the learned Vice-Chancellor of the effect of the several allegations of the bill respecting the compromise settlement, and its effect, is untenable, and that it clearly appears that the respondents were relying upon a settlement alleged to have been completely performed on their part, but which the appellant declined to observe. This presents a condition which could well be

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pleaded in the law court and there considered.

The objections to the bill as failing to present conditions calling for equitable relief are so obvious as to be properly raised under the former practice by a general demurrer (*Essex Paper Co. vs. Greacen*, 45 N. J. Eq. (18 Stew.), 504, (1889, Van Fleet, V. C.)), and under the prevailing procedure by motion to strike out. (*Steelman vs. Wheaton*, 72 N. J. Eq. (2 Buch.), 626, 629, 1907, Bergen, V. C.)

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Both orders appealed from should be reversed.

CARRICK & WORTENDYKE,
Solicitors of Appellant.

CHARLES L. CARRICK,
of Counsel.

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New Jersey Court of Errors and Appeals

Between
EDWARD S. SAVAGE, *et al.*,
Complainants-Respondents

and

JOHN BLANCHARD EDGAR,
Defendant-Appellant.

On Appeal.

BRIEF FOR COMPLAINANTS-RESPONDENTS.

Statement of Facts.

Edgar commenced an action in the Supreme Court against Mr. and Mrs. Savage in the year 1913, to recover \$50,000, claimed to be due him under the circumstances detailed in his complaint (Case, pp. 10-18, 63-69). After the cause was at issue (the defendants denying any liability whatever) (Answers, Case, pp. 22-28), Mr. Savage and Colonel Edgar met at Rahway on the third of October, 1914, and after some negotiations reached an adjustment of the suit, evidenced by the agreement which Edgar then signed, and which reads as follows (Case, p. 29):

“Rahway, Oct. 3rd, 1914.

Whereas, differences have arisen between J. Blanchard Edgar and Edward S. Savage, and suit is now pending in the Supreme Court of the State of New Jersey, wherein said Edgar claims the sum of fifty thousand dollars and interest. It is the desire and purpose of both parties to settle and adjust

all matters of difference and accounts between them. It is agreed that said Savage shall transfer to Edgar 250 shares of the common stock of the Trembly Point Corporation, and shall in addition thereto pay in cash two thousand dollars and give his note payable to said Edgar for two thousand dollars thirty days thereafter, in full settlement of all claims and demands whatsoever. The said Edgar in consideration thereof agrees to discontinue said suit at once and pay all costs including his attorney's fees and counsel fees. The receipt of two thousand dollars and the note above mentioned is hereby acknowledged. The stock is to be delivered at 10 Wall Street, on October 5th, 12 M. It being understood that said Savage, his heirs or assigns shall have the option to purchase said two hundred and fifty shares of Trembly Point Corporation stock any time within six months from this day by paying the par value therefor, but no obligation is created by this agreement to repurchase said stock.

(Signed) J. Blanchard Edgar."

(Case, p. 29.)

At the same interview at which this agreement was signed Savage handed Edgar his check for \$2,000, and his promissory note payable thirty days thereafter to the order of the plaintiff, in full accordance with the terms of the foregoing agreement (Case, pp. 74, 75).

This was on a Saturday morning (Case, p. 72, l. 12). It was arranged at the same time that Colonel Edgar should call at Mr. Savage's office in New York on the following Monday at noon and procure the stock certificate for \$25,000 of

the common stock of the Trembly Point Corporation (Case, p. 75, l. 10). The plaintiff deposited Mr. Savage's check for \$2,000 in the bank at Rahway on Saturday (Case, p. 106, l. 12) and at the same time drew out \$100 against it (Case, p. 116, l. 35-45). On the following Monday, at noon, Edgar went to Savage's office in New York City for the purpose of getting the stock, pursuant to the appointment, and after Mr. Savage had taken some certificates from his safe they went to the office of the company on Wall Street for the purpose of getting the stock transferred (Case, p. 75, l. 35-45). Savage states that en route to the office Colonel Edgar said the settlement was embarrassing him because he has agreed to pay his counsel \$12,500 (Case, p. 76). They proceeded to the office, however, and upon reaching there met the president and secretary of the company, and in the presence of these gentlemen Mr. Savage produced and read a letter (Case, p. 76), which he had written and proposed to hand to the plaintiff, which letter purported to indicate the exact attitude of Savage concerning the value of the stock about to be transferred (Case, pp. 77, 78). After this had occurred, at Savage's request, Mr. Montgomery, the president of the company, produced two written appraisals by prominent real estate experts (Case, p. 79, l. 10-20, 169-172), and the same were carefully read to Mr. Edgar. Assuming it to be true, as Edgar contends, that it was understood by the parties that Edgar should have an opportunity to examine these appraisals before finally consummating the matter, the sequence of subsequent events is of the greatest importance in view of Edgar's present contention that there never was a final agreement of settlement reached between the parties. The record discloses that after these appraisals were read carefully to Colonel Edgar he,

Edgar, requested that the stock be transferred to his wife rather than himself (Case, p. 79, l. 20-30); hence any mental reservation which Edgar contends existed at the Rahway interview on Saturday, until he had an opportunity to see these appraisals, was then and there abandoned, as indicated by his direction to have the stock transferred to his wife. Savage then desired Edgar to sign the letter above referred to, and Colonel Edgar said he desired to show that letter to his counsel before signing it, but that he would bring it back the next day when he came for the stock (Case, p. 79, l. 30-40, p. 103, l. 40, p. 104, l. 1-10). There is not a particle of evidence to justify the claim that Savage exacted or required that Edgar should sign the letter, as a condition to the completion of the deal. He simply suggested it as an extra precaution, and after the failure of Edgar to come back the next day for the stock, as he promised to do, the matter was considered by Savage as settled, without the letter being signed. This was October fifth. The stock was, in fact, transferred that day as directed by Edgar in the name of Harriet B. Edgar (Case, pp. 79, 96, l. 2-45). Colonel Edgar after seeing his lawyer, telephoned on Tuesday that he had not as yet had an opportunity to see his counsel, and that he would be over the next day (Case, p. 79, l. 38). *He never called for the stock and it still stands on the books of the company transferred as above stated.* It appears from the evidence of the bank cashier (p. 116, l. 1-20) as well as from the transcript of Mr. Edgar's bank ledger account (Exhibit P-3, opposite p. 172), that with Edgar's assent a note past due for \$75.00 was made good out of the \$2,000 deposited on the day that it was met (October 3rd), as well as \$100 drawn thereon as above stated, and on the 5th that \$50 was drawn; on the 6th, \$116.95, and on the 7th three checks amounting in all to \$159.69; on the 8th, \$10; and

on the 9th three separate checks amounting to \$1,250.56, and on the 10th two items amounting to \$101, practically exhausting the \$2,000 so deposited (Case, p. 117, l. 25-35). In that situation, without Col. Edgar's having written or stated anything to Mr. Savage, and having retained the note for \$2,000, beside having spent the money proceeds of the check, a notice of trial was served upon Savage's attorneys (Case, p. 8, l. 40, p. 9, l. 1-10), on the 17th of December, 1914, indicating his proposition to have the case tried at the approaching January term, 1915, at the Union Circuit of the Supreme Court. Savage deeming that the suit had been adjusted by the settlement made on October 3rd, presented a petition (Case, p. 58) to Justice Bergen on the 23rd of December, 1914, setting up the foregoing facts in a general way and praying that the action might be stayed, and procured from him an order to show cause (Case, p. 14), returnable before the Court, why the prayer of said petition should not be granted. The Supreme Court subsequently discharged this rule (Opinion, p. 174, Order, p. 177), and the Court of Errors affirmed their order upon the ground that there was no appeal therefrom.

This action was then commenced (Bill of Complaint and Affidavit, p. 1-10) and an order to show cause why injunction should not issue with an ad interim stay, was allowed by Vice-Chancellor Backes (Case, p. 30).

I.

The Court of Chancery had undoubted jurisdiction to grant the complainants their desired relief.

On October 3, 1914, a claim for a large sum of money in favor of Colonel Edgar was in process of suit against Mr. and Mrs. Savage. While the

validity of the claim was stoutly denied, on that day an argument of compromise was made and partially executed, by the terms of which Edgar was to receive in full satisfaction of his alleged claim Savage's note for \$2,000, which he received; \$2,000 in cash, which he received, and two hundred and fifty shares of the common stock of the Trembly Point Corporation, which subsequently, at Edgar's request, was transferred on the books of the company to Mrs. Edgar, but neither she or her husband has lifted the certificate thus transferred, nor offered to re-transfer it (^{Statement} ~~State~~ of Facts, *supra*).

There can be no doubt that compromises of litigation of this character, when incompletely performed, or executed, will be specifically carried out by courts of equity. *Pryer v. Gribble*, L. R. 10 Ch. App., 534; *Richards v. Eyton*, 2 DeG. MacN. & G., 79; *Stapleton v. Stapleton*, 1 Atk., 2; *Hart v. Hart*, 18 Ch. Div., 670, where it was held that the English Court of Chancery had the power to enforce specific performance of an agreement for the compromise of a suit pending in the divorce court. *Phillips v. Berger*, 2 Barb., 608, and 8 Barb., 527. *Cook v. Richardson*, 59 N. E. Rep., 675.

There are two leading cases in New Jersey:

Headley v. Leavitt, 65 N. J. Eq., 748, where there is an instructive opinion representing the unanimous view of the Court of Errors and Appeals by Justice Hendrickson; and

Trenton Street Ry. Co. v. Lawlor, 74 N. J. Eq., 828, in which TRENCHARD, J., says:

"It is further suggested at the argument that this was not a case of equitable relief, it being contended that the agreement of compromise could be set up as a defense under a proper plea in the action at law. We think this is not so. The agreement for

compromise remains unexecuted, the defendant having refused to accept the money and repudiated his contract. It is, therefore, an accord unexecuted. An accord that is unexecuted is not an available defense at law against the original cause of action, but it may, in a proper case, become available as an equitable defense thereto. *Headley v. Leavitt*, 65 N. J. Eq. (20 Dick.) 748. In that case Justice Pitney, at the trial at circuit, refused to permit such a defense to be interposed, on the ground that the accord was unexecuted and that fact was held by this Court to justify the filing of a bill in chancery to restrain the plaintiff from further prosecuting her suit at law until she agreed to permit the defendant to take advantage of the contract which he had subsequently executed, this Court thereby recognizing that the executed contract, although it constituted an equitable did not constitute a legal defense. *Headley v. Leavitt*, 68 N. J. Eq. (2 Robb.), 591."

In *Gardner v. Short*, 19 N. J. Eq., 341, it was held that an unexecuted agreement to compromise or settle a debt for a fixed sum is not defense to a suit at law. See also *Lyon, et al., v. Nelson, et al.*, 38 N. J. L., 358.

The situation here is exactly similar to that existing in *Headley v. Leavitt*, supra, namely, a partially executed compromise of an existing claim, and the Court of Errors there held that the Court of Equity could administer the relief we here desire, which was unobtainable in a court of law.

There is a further ground, if indeed any be necessary, why the complainants are legally entitled to have the contract of settlement specifically performed.

If the defendant were seeking a specific performance of the contract, a court of equity would give him relief, since equity decrees the specific performance of a contract to deliver shares of stock where the shares have no market rating and thus are not easily obtainable, as is the case here.

Pomeroy's Equitable Remedies, par. 752.
Krouse v. Woodward, 42 Pac., 1084.
New England Trust Co. v. Abbott, 38 N. E., 432.
Hills v. McMunn, 83 N. E., 963.
 36 Cyc., 560.
Johnson v. Brooks, 93 N. Y., 337.
Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y., 365.

Sandford v. Barber, 74 N. J. Eq., 352, held, where the corporate stock, to which a contract of sale relates, is not procurable in the market, and its pecuniary value is not readily ascertained, specific performance will, as a rule, be decreed. It will not be presumed that the shares of stock in what is known as a close corporation can either be procured in the market or that they have any market value, and whenever their procurement or their value comes in question, proof of these facts will be required. Where the complainant has performed all of the conditions of the contract on his part to be performed, so far as permitted to do so by the defendant, the defendant will be required to specifically perform his part of the contract. On page 357 of that case, WALKER, V. C., says:

"I think the complainant's case falls more nearly within that other rule stated in 26 Am. & Eng. Encycl. of Law, 2d edition 122, namely, that where the corporate stock to which the contract relates is not procurable

in the market and its pecuniary value is not readily ascertainable, specific performance will, as a rule, be decreed, &c."

A remedy in equity must be mutual, and if a bill will lie for one party to a contract, it will also lie in favor of the other.

Moore v. Baker, 62 N. J. Eq., 208.

Straus v. Norris, 77 N. J. Eq., 33.

Laav v. Smith, 68 N. J. Eq., 81.

36 Cyc., 566.

Adderley v. Dickson, 1 Simm. & Stu., 607.

Hamblin v. Dinneford, 2 Edws., 531.

Story says in paragraph 723 of his Equity Jurisprudence:

"Where the specific performance of a contract respecting chattels will be decreed, upon the application of one party, courts of equity will maintain a like suit at the instance of the other party, although the relief sought by him is merely in the nature of compensation in damages or value; for in all such cases, the court acts upon the ground that the remedy, if it exists at all, ought to be natural and reciprocal as well for the vendor as for the purchaser."

Lewis v. Lechmore, 10 Mod., 503.

"There is not the same reason for admitting the vendor to come into equity for specific performance as there is for the vendee; since the one comes there to obtain that for which he has no remedy at law, namely, the land; but the other wants nothing but the money which he may recover at law in damages, but this was determined in favor of the

vendor; because upon mutual covenants there ought to be mutual remedies."

Phillips v. Berger, 2 Barb., 608, holds:

"The remedy of a specific performance being mutual and reciprocal, if the party agreeing to sell an article would be bound to perform specifically, he can compel the other party to pay, notwithstanding that a decree in his favor would be nothing more than a verdict and judgment at law."

EDMONDS, *J.*, says on page 613:

"It was valid and binding upon the plaintiff and its performance by him could have been enforced in equity and on the principle of mutuality he can enforce it on his part."

Hooper v. Hooper, 16 N. J. Eq., 147. The doctrine is well established that remedy in equity is mutual and that the vendor may maintain his bill in all cases where the purchaser could sue for specific performance of the agreement. On pages 147 and 148 of that case, Green, Chancellor, says:

"The contract is certain and fair in all its parts, and is for an adequate consideration. The complainant was in no default upon his part. He proffered himself ready and willing to perform the contract, according to its terms. He tendered a deed and the possession of the premises. He made prompt application for relief by filing his bill in this Court. Under such circumstances it is as much a matter of course for courts of equity to decree a specific performance of the con-

tract as it is for a court of law to give damages for the breach of it. *Hall v. Warren*, 9 Vesey, 608; *Greenway v. Adams*, 12 Vesey, 395, 400; Story Eq., Jur. Sec., 751, Sec. 771.

It constitutes no objection to the relief prayed for, that the application is made by the vendor to enforce the payment of the purchase money, and not by the vendee to compel a delivery of the title. The vendor has not a complete remedy at law. Pecuniary damages for the breach of the contract is not what the complainant asks, or is entitled to receive at the hands of a court of equity. He asks to receive the price stipulated to be paid in lieu of the land. The doctrine is well established that the remedy is mutual, and that the vendor may maintain his bill in all cases where the purchaser could sue for a specific performance of the agreement. *Lewis v. Lord Lechmore*, 10 Mod., 503; *Walker v. Eastern Counties Railway Co.*, 6 Hare, 594; Fry on Spec. Perf., Sec. 23."

The case of *Bumgardner v. Leavitt*, 13 S. E., 67, which is a case very much like the principal case, holds:

"As a general rule equity will not enforce specific performance of contracts for the delivery of shares of stock; but when the purchaser has bargained for or taken an option upon such shares because they have to him a unique and special value, the loss of which could not be adequately compensated by damages at law, the chancellor, in the exercise of a sound discretion, may decree specific execution.

Where such relief would be granted to the purchaser were he to apply, the seller, who

has given to the purchaser such preference or option, is entitled to like relief by reason of the operation of the principle of mutuality of right and remedy."

Therefore it is submitted that if complainant cannot maintain a bill on the ground of a right to a specific performance to compromise, he nevertheless is entitled to such a decree on the ground that the defendant could maintain his bill for specific performance were he seeking one and the remedy of specific performance must be mutual.

II.

No good reason appears why the defendant should be excepted from this rule.

Our contention is that the parties had agreed to settle their controversy. This is evidenced by Edgar's signature to the agreement of settlement; his acceptance and detention of the cash and note, and his direction that the stock be transferred to his wife, which was done. Edgar, on the other hand, takes the alternative position:

(a) That the agreement was only tentatively reached, and never finally consummated; or

(b) That if made it was induced by Savage's representation that the stock was worth par.

Consider these claims in their inverse order:

While Mr. Savage stoutly denies any such representation, nevertheless, assuming Edgar's contention to be correct, and that the representation as to the value of the stock was made, there are two reasons why Edgar should not be permitted to rely thereon as a ground for repudiating the settlement; namely,

(1) There is not a word to show the alleged representation was false.

(2) If it did appear to be false the conduct of Edgar in retaining the money and note until January 15th, 1915, and in directing the transfer of the stock to be made in his wife's name, and in never having had his wife offer to undo that transaction makes it impossible for Edgar to rely on the alleged misrepresentation to upset the transaction.

As to the first of the above reasons, who says it is not worth par? Edgar does not—nor does anyone else. On the contrary, the proofs show that the Trembly Point Corporation has assets valued at either \$2,671,900 (Jos. P. Day appraisal, Case, p. 169 and testimony of Huntly, pp. 97-99), or \$2,600,000 (Corbin appraisal, Case, p. 170) against which there is an indebtedness of less than \$400,000. There is issued \$750,000 preferred stock, and \$1,000,000 common stock, leaving a margin of from one-quarter to one-half a million dollars (Case, p. 74, l. 1-10), for surplus after paying debts and stock at par. (Also Case, p. 93, l. 40, p. 94, l. 1-15, p. 95, l. 40, p. 97, l. 1-10). *This is all the evidence there is.*

Not only does Edgar not show that the stock was not worth par, or indeed offer any evidence whatever to substantiate that contention, but he never claimed that it was not worth that amount, or expressed any reason for his change of attitude and failure to call again for the stock, beyond telephoning Mr. Savage on Tuesday, the 6th of October, "that he hadn't had an opportunity to see his counsel yet, and he would be over the next day" (Case, p. 79, l. 35). He contented himself with entire silence thereafter until December 17th, when he served a notice of trial.

As already shown, the petition in the Supreme Court to stay the cause immediately followed (the

petition being filed December 23, 1914). Edgar still retained the note and the money and the stock still continued in his wife's name on the corporate books. On January 15, 1915 (p. 88), Edgar's counsel tendered to Savage's attorney the money without any interest and note. This was refused. No action has ever been taken with regard to the stock.

Considerable evidence was offered by Edgar to account for this, for both he and his counsel were aware of the familiar rule of law requiring a party who claims to have made a contract through fraud, to promptly rescind and make restoration. This evidence is only material as indicating the utter unreliability of Edgar's evidence. He first claimed that a note in the bank (where he deposited Savage's check of October third) exhausted the proceeds of the check.

When this was shown to be false, (Case p. 103 l. 10-20, p. 109 l. 10-45, p. 116 l. 10-30, p. 117 l. 10-45, pp. 118 and 119 and Exhibit p. 3 opp. p. 172), he invented the story of the payment of \$1,000 to a Mr. Barclay, at Matawan, when the falsity of this was about to be shown (as it was later shown by Mr. Barclay) (Case p. 122 l. 15-45, pp. 123, 124, 125, p. 126 l. 38, pp. 127, 128, 129, 130, 131, p. 162 l. 32-45, pp. 163, 164, 165, 166), he merely resumes the witness stand and invents the story of a payment to a Mr. Bevier of New York. (Case pp. 131, 132). The facts then are that on the 3rd of October a settlement was made, evidenced by the agreement (Case p. 29 and 59) and consummated by the payment to Edgar of \$2,000 in cash, which he spent, and the delivery of a note, which he retained until January 15, 1915, three weeks after the filing of this petition to stay the action, and three months and thirteen days after the settlement, when Judge Carrick tendered the note and check for \$2,000, to Mr. McCarter. For some reason, which does not

appear, Colonel Edgar apparently repented of his bargain deliberately made on the 3rd of October and consummated in the manner we have shown. He says (Case p. 148) that it was on Tuesday or Wednesday, October 6th or 7th (Case p. 148 l. 28) that he determined to back out of this bargain. After that date he deliberately drew out upwards of \$1,500 of the money from the bank and spent it as he desired (Testimony referred to Supra and Exhibit pp. 3 and 172), and never offered either to return the note, or any money until the 15th of the following January, nearly one month after the complainants had filed their petition to stay the cause, and over three months after the contract of settlement was made. This use of the money (he had no other money) was a deliberate and recurring appropriation and use of the property, after his determination to recede from the contract (*Dennis v. Jones*, 17 Stew. 513). Now it has time and again been settled "that where a party has an election to rescind, he must elect promptly, and having elected, he must abide by his decision; and that failure to rescind within a reasonable time is plenary evidence of his election not to do so." Parker J., in *Reed v. Benzine-ated Soap Co.*, 81 N. J. Eq., 182, 185, and cases cited. See also,

Clambitt vs. Doyle 73 N. J. Eq., 678 (E. XA. 1907)
Gerli & Co. v. Mistletoe Silk Mills, 83
 N. J. L., 7;

Sun Dredging Co. v. Ottens, 84 N. J. L.,
 741.

Dennis vs. Jones 44 N. J. Eq., 513 (E. XA)

The reason underlying this rule is that a party can not both approbate and reprobate.

Byard v. Holmes, 4 Vr., 119;

Doughton v. Camden, etc., Ass'n, 41 N. J.
 Eq., 556;

Russell v. Russell, 60 id. 282; affirmed
 63 id. 282.

The only exception to this rule is where the contract is wholly executory on the part of the alleged fraud doer (*Roberts v. James*, 83 N. J. L., 492). That, of course, is not the situation here.

In *Reid v. Hibbard*, 6 Wis., 175, a compromise of a pending claim was made by the agent of the alleged creditor and payment made to the alleged creditor for a given sum of money in compromise of a pending suit. Later the creditor sought to ignore the settlement upon the theory that the agent was unauthorized by him to make the alleged settlement. The court in disapproving of this says:

"There is strong reason to believe that they (the principal creditors) did originally authorize a compromise, and at all events there can be no doubt that they ratified the same, accepted the draft with full knowledge of the circumstances under which it was obtained, realized the proceeds thereof, and applied them to their own use without one word of dissent. This conduct fixes upon them all the responsibility of the acts of the agents, and puts out of consideration the question of authority in the one or the other."

In *Bryant v. Proctor*, 14 B. Monroe (Ky.), 362, it was held, that though a party make a compromise under a mistake of the facts, yet if after he is fully informed of the facts he receives the compromise money, he will be adjudged to have waived any advantage he might ^{have} had from his former ignorance of the facts.

To the same effect are:

Stewart v. Hass, 23 La. Annual, p. 783;
Wales v. Newbould, 9 Mich., 45;
Steinway v. Steinway, 48 N. Y. Sup., 1046.

In *Gavenheimer v. Brunn*, 63 Texas, 369, it was held that where a fraudulent creditor is induced by the fraudulent representations of his debtor to compromise, and receives a part of his payment, he can not, on discovery of the fraud, retain the sum paid and sue for the balance due as on account or contract; but he may retain the payment and maintain an action in the case for the damages sustained by the fraud.

This conduct of Edgar's in deliberately using the money that he had received under the settlement, and retaining the note for months after it became due, and failing to undo the transfer of the stock to Mrs. Edgar, which was made at his express direction, is really left wholly unexplained. Counsel will probably refer to his impecuniosity, but as was held by the Supreme Court of the United States in *French v. Shoemaker*, 14 Wallace, 315, equity will not set aside a contract whose purpose is a settlement of disputes simply because one party to it was in want of money when he made it, and because such want may have been an inducing cause for his making it. Equity favors amicable compromises of controversies where pecuniary interests are complicated and conflicting.

There is no room for the application of the principle adopted in some of the cases to the effect that a tender back of proceeds of a settlement is unnecessary when the original claim will accomplish that result. Thus it was held in *O'Brien v. Chicago*, 57 N. W. Rep., 425, that if a plaintiff who ultimately succeeds in establishing his main claim gives credit thereon for the amount received in the repudiated settlement, the law is satisfied. The same is true of *Ellerton v. Ellerton*, 50 N. Y., 670. Other authorities, including, we believe, some in New Jersey, hold the contrary. See *Brown v. Hartford Fire Insurance Co.*, 117 Mass., 479. Even if

the principle first stated should be the law it cannot govern this case, because of the facts with reference to the stock.

Again Edgar's contention (b) *supra*, that the agreement of compromise was never finally reached, cannot avail.

We have the written agreement deliberately signed, complete in itself. We have the acceptance and expenditure of the cash; the acceptance and retention of the note, and the transfer by Edgar's direction of the stock on the books of the company to Mrs. Edgar, as the last and final step in the transaction. There is not a word to indicate that Edgar's desire to show the letter that Mr. Savage desired him to sign to his counsel amounted to more than a mere pause in the final consummation. The statement by Savage that Edgar left stating he would call the next day for the stock is uncontradicted by Edgar, and is corroborated by Straussman. (Record p. 96 l. 30.) Instead of calling the next day Edgar telephoned he would call later and he simply never did this, remaining entirely silent until his case was noticed for trial.

We submit that there is no foundation whatever in the proofs for the contention that there was not a final meeting of the minds upon the agreement of settlement; that the letter which Savage proposed Edgar should sign was an afterthought interjected into the situation by Savage, not as part of the agreement, but as an extra precaution, and that Edgar's failure to sign it was not considered by Savage as a break in the arrangement. Surely if it had been Savage would, during the three months that followed, have made some effort to recover his note and the \$2,000 which Edgar had.

Moreover Edgar's conduct in failing to restore the money and note, and to re-transfer the stock, during the months that followed, estopped him

from claiming that the arrangement under which he received the money and note, and had the stock transferred to his wife, was not consummated. Assuming his position with regard to the original transaction to be correct, it was his duty to elect to determine whether he should stand by it or go back to the original situation. As shown in the opening of Chapter 20 of Bigelow on Estoppel, a party can not occupy inconsistent positions, and where one has an election between several inconsistent courses of action he will be confined to that which he first adopts. Any decisive act of the party done with knowledge of his rights, and of the fact, determines his election and works an estoppel. It was incumbent upon Edgar to take one or the other attitude with reference to the transaction, assuming his contention with regard to the tentative character of the settlement to be correct. If the facts can be twisted into the theory that there was no final settlement, then it was Edgar's duty not only to fly his flag and announce that fact (which he failed to do), but likewise to restore to Savage his note, and do everything in his power to undo the stock transfer, as well as to hand back the money. Instead of this he remained active as to the stock and the note, and deliberately continued to spend the money. In other words, this conduct indicated an intention or election on his part to adopt the settlement as final, and that position once taken by him is irrevocable. See *Rodermund v. Clark*, 50 N. Y., 354, and cases therein cited, to the effect that where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts, and that any decisive act of the party with knowledge to his rights and of the fact determines his election in the case of conflicting and inconsistent remedies.

We, therefore, contend that the complainants-respondents made a plain case for an injunction, and that nothing appeared on behalf of the defendant to interfere therewith.

III.

The subject matter of the bill of complaint has not been fully litigated and determined in the Supreme Court.

A simple reading of the opinion (Case, p. 174) and the rule discharging the order to show cause (p. 177) conclusively shows that the subject matter was never determined in the Supreme Court on its merits.

It is true that the facts alleged in the petition in the Supreme Court and in the bill in the Court of Chancery, are the same substantially, but the remedies and relief sought in the Court of Chancery upon which the complainants are entitled to a hearing are much more sweeping and extensive than the simple restraint sought by the petition in the Supreme Court. In that essential and important respect the two proceedings differ from each other, and it cannot be said that the right to remedies sought by the Chancery suit has been fully litigated and determined in the action at law. The important remedy of specific performance was not even prayed in the petition in the Supreme Court, and that Court had no jurisdiction to give relief of that character, which the facts alleged, if true, show the complainants were entitled to have.

In the case of *West New York Silk Mill Co. v. Laubsch*, 53 N. J. Eq., 65, in the Court of Chancery, the proceeding in the court of law appears to have been identical as to facts and remedies with the proceeding in Chancery, and what is more

important, the court of law determined the matter on its merits which it refused to do in the case at bar. This Silk Mill case is therefore not a precedent on the point now involved, and in any event is not controlling on this Court.

If proper to do so, it is submitted that the action of the Supreme Court was erroneous. It was proved and not denied that a written agreement was made and signed, that there was proper consideration for it. Assuming that it took effect either party was entitled to have it carried out, unless it was rescinded for proper cause. If the cause of false representation be assigned, then the record contains some proof of a representation of the value of the stock given in settlement, but there was no proof offered whatever that such representations were false. Therefore, on this ground, the Supreme Court should have sustained the settlement.

If, on the other hand, while admitting the signing of a complete written agreement of settlement, and the partial performance of it, Edgar claims it was only tentative and not to take effect until he had inspected and approved of the Day & Corbin appraisals, the greater weight of all the evidence on this contention is against him.

If not then agreed on, Edgar's assent is conclusively implied from his conduct in holding the avails of his so-called tentative arrangement for over three months, and by his failure at any time to return the stock or offer to return interest on the money while held by him. This conduct works an absolute estoppel against him to claim the agreement was tentative, and operates as a ratification and acceptance of the settlement, if it can be considered tentative.

This conduct, and his other conduct, according to the evidence, also has the effect of proving that the dealings of the parties was a final and com-

plete settlement agreed on on October 3, 1914, because such conduct would be inconsistent with the settlement being tentative.

The settlement agreed upon on October 3, 1914, was final and complete.

1. The written terms were absolute and cannot be varied by any parol agreement.

2. The delivery of \$2,000 cash and a note was inconsistent with any tentative understanding.

3. The action of Edgar in directing a transfer of the stock to his wife and promising to return for the certificate indicates finality, even after hearing the contents of Savage's letter of October 5th.

4. The retention of the money and note after hearing the letter of October 5th read, indicates acquiescence in the terms of the settlement, and the temporary refusal to assent to the terms of the letter merely indicates an unwillingness to assent to any new conditions in connection with the settlement.

5. The right to inspect the appraisals of Day & Corbin did not prevent the settlement made on October 3, 1914, from being final. If those appraisals had varied from what Savage had represented them to be, there would be a right of rescission upon the return of the money and note, but rescission takes place only after a contract has been agreed upon.

6. If the letter of Savage of October 5th, 1914, was the imposition of a new condition, then the fact that Savage did not at any time afterward insist on the acceptance of such condition, but al-

lowed Edgar to retain the money, note and stock, up to the present time, constitutes a withdrawal of such condition.

The letter of Savage of October 5th, 1914, can be more readily understood in the light of the several contradictions in testimony on the part of Edgar, to such an extent as to indicate an intent to commit perjury (*Supra*, this brief). With the knowledge that Edgar's word could not be depended upon, it was only a reasonable precaution for Mr. Savage to attempt to guard against a false charge of misrepresentation. Instead of operating as a guard, the letter evidently, as we think, inspired in Edgar's mind the idea of charging fraud and misrepresentation, and he immediately proceeded to do it upon his attorneys expressing their disapproval, and in order to justify himself with them. It so happens, however, that his attempt to keep the avails of his settlement with Savage will not enable him to get the benefit of his present allegation of fraud, false as we say it is. He wants to keep the money and at the same time say it was given to him under fraudulent circumstances and get the benefit of that too.

Savage's letter of October 5, 1914, was not made a condition of settlement previously agreed upon. Edgar was free to accept it or reject it. He did not accept it then, but took it under consideration and went on with the consummation of the settlement. His subsequent conduct (keeping the money, stock, etc.) and silence must be taken as a refusal to accept the letter, and Savage's assent to such refusal must be implied from the fact that he never afterward insisted on Edgar's accepting the letter.

IV.

The failure to restore the entire consideration received on the settlement, and the great delay in offering a return of a part, with the consequent prejudice to Savage, not only is weighty evidence of the intention to ratify the agreement but also operates by way of estoppel to render the attempt at rescission futile.

Savage has been injured by the delay in offering to return the money and note:

(1) By loss of interest on the money.

(2) By having to keep money ready to meet the note for three months, till offered.

Savage was not obliged to accept a return of the money and note even if settlement was induced by fraudulent representation, or was merely tentative or a new condition was injected by Savage (i. e. the letter), because;

(1) Interest was not offered at the same time for the time the money was held and for the time the amount of the note was held idle by Savage, awaiting its presentation.

(2) The long delay in making the offer whereby Savage lost the use of his money (a total of \$4,000) for which even legal interest might not be complete compensation. In a case such as this the law cannot say that the payment of interest will restore the *status quo*. If Edgar had been guilty of an unreasonable delay in carrying out his rescission, the law will not inquire into the extent of Savage's loss because of the delay.

(3) The offer to return was not accompanied by a return of the stock.

(4) The inability of Savage to make any use of the stock while it was tied up subject to Edgar's acceptance operated to Savage's prejudice, so as to make a belated return of the stock, even if it had been made on January 15, 1915, unavailing and ineffective as a rescission.

(5) Savage had then incurred expense in legal proceedings based in part at least on Edgar's failure to tender a return, and Edgar did not offer to compensate for that expense.

(6) The rights of the parties had become fixed by the giving of a notice of trial without offering a return and by the appeal of Savage to the Court based on Edgar's defaults, which he could not open during the course of the proceedings.

Edgar waited until after the petition of Savage to the Supreme Court, when he had knowledge from which he was assured that Savage would refuse the offer of return, and by so doing has been enabled to have the use of the money and stock until the present, and Savage has been obliged to keep the money ready to meet the note if presented during the litigation, or if the final determination of this controversy shall be in his favor.

The so-called letter of repudiation of the settlement of Edgar's attorneys, of about October 7th, 1914, (Case, p. 136, l. 2-6, p. 148, l. 24-28), is not before the Court. The only evidence is that a letter was written, but the contents of the letter have not been shown and did not appear before the Court of Chancery, and therefore *here* ought not to be considered an absolute repudiation. In any event, Edgar's conduct in subsequently retaining the

money and note for over three months, and in keeping the stock until the present time, must be considered a ratification and withdrawal of any previous repudiation or rescission.

The letter of Edgar's attorneys could only, if unequivocal and absolute, have the legal effect of a rescission of the agreement, providing it was accompanied by a prompt restoration of the proceeds of the agreement rescinded. If not so accompanied, the attempt at rescission was *negatory*.

If this letter should, however, be considered simply as a disclaimer that any settlement had been made, the receipt and retention of the stock, money and note paid in consequence of the dealings of the parties was inconsistent with such a claim, and moreover, operated as an acceptance and ratification of the proposal made by Savage, so as to fully overcome the effect of any such attempted disclaimer, or as a withdrawal of it.

However, the letter itself was not before the Court of Chancery, and not being considered there, cannot be considered here. The secondary evidence in the record designates it as a "repudiation." That would seem to mean either a rescission for fraud, or a disclaimer of the making of the contract. In either case, Edgar's conduct rendered it ineffective.

It was said in the case of *American Dock & Imp. Co. v. Trustees of Public Schools*, 35 N. J. Eq., p. 181:

"The equitable doctrine invoked is that a party who accepts a benefit must take it *cum onere*. He cannot have the advantage of one part of a transaction which enures to his benefit and repudiate other parts which are advantageous to the other party. If he voluntarily accepts a benefit from the transaction with knowledge of its import, he

ratifies it as a whole, and he cannot repudiate its obligations without first restoring the consideration he has received. He must elect between entire repudiation, with a restoration of the benefits received under it, and complete adoption of the proceedings with all its obligations. The equity of a party who relies on an equitable estoppel to give validity to an inefficient contract is not to have his contract made binding, but to put his adversary to an election between performance of the contract and repudiation of it upon equitable terms" pp. 262 and 263.

V.

The remedy sought in the Supreme Court proceedings was not only not litigated or determined, but was also not co-extensive or equally beneficial with the remedy now sought in the Chancery suit, and therefore the doctrine of election of remedy will not apply to the complainants in the Chancery suit.

The only remedy the Supreme Court could have given, if Savage had been successful, was to stay the prosecution of the action at law. If that had been the decision, Savage could have instituted an action for specific performance in the Court of Chancery to compel the acceptance of the stock and the payment of Edgar's counsel fees and costs, in order to relieve him (Savage) from liability therefor under the law of 1914.

The Supreme Court discharged the rule without passing on the merits of the application, reserving the right to Savage to litigate those rights in the same Court in the same cause but in another man-

ner. This decision, simply a step in the cause, did not preclude Savage from litigating the same rights (and also other rights) in another court of competent jurisdiction. The opinion of the Supreme Court clearly shows that the Court did not determine the rights of the parties, they were left undetermined, and the consideration of them was left for another branch of the same court later in the prosecution of the suit.

The appellant treats the petition in the Supreme Court as if it were an independent suit; it was simply a step in the cause, and on the intermediate proceeding in question, the Supreme Court practically left the parties where they were before the proceeding was started, without taking away any of their rights, simply refusing to pass on the merits of the controversy under that form of proceeding. Savage then commences an action in another competent court for the same and other more extensive remedies. The insistment on behalf of Edgar would seem to be that having started a proceeding in the Supreme Court, Savage is compelled to carry those proceedings to a conclusion in the same Court, by a trial before a jury, even though there are rights and remedies to which Savage is entitled which are not cognizable by the Court of law, and which can be determined only by a court of equity, to wit: the enforcement of an unexecuted accord and satisfaction, which is not a defense at law, the administration of the remedy of specific performance by compelling Edgar to take the stock as agreed, to discontinue the action at law, and to pay his counsel fees and costs and relieve Savage from liability therefor under the law of 1914.

There is nothing in the record now which is a final decision on the merits of the facts involved in the Chancery suit. The record shows the contrary. Therefore if there was an attempt to elect a remedy,

it was unavailing, as the tribunal appealed to declined to consider the matter submitted on its merits. The situation presented is, to some extent, the same as if Savage had ^{commended}~~commended~~ a proceeding asking for the same relief before a tribunal having no jurisdiction of such matters, and such tribunal had so determined. In such a case, Savage would not have been precluded from instituting a proceeding of the same kind before a competent tribunal.

It happens that the Supreme Court did have jurisdiction over the subject matter he submitted (which, however, is not identical as to the remedies asked for in the Chancery suit in question), but the Supreme Court also was invested with a discretion to do three things:

1. Hear and decide the case on the merits and grant relief.
2. Hear and decide the case on the merits and refuse relief.
3. Refuse to consider the merits, and refuse to take jurisdiction; which is what it did.

In the first and second instances, the decision might be final and conclusive (but only as to the remedies prayed); in the third instance, there has been no decision on the merits and the parties are not bound, even to follow the relief reserved, but can take any proceedings desired in any competent tribunal to obtain a decision on the merits and for the same relief, and certainly for other relief to which they might be entitled on the same state of facts.

The Supreme Court, on the application made to it by Savage, had the equitable power, in that proceeding, if it had chosen to exercise it, of consider-

ing and determining the sufficiency of the defense of an ^{unexecuted} ~~executed~~ accord and satisfaction, it did not consider the matter, however, but reserved to Savage the right to set up that defense in the trial of the cause, if he chose to do so. Conceiving that at the trial the Supreme Court had *there* no power to allow this defense to be considered by the jury, Savage certainly had the right to take the case to a tribunal where this equitable defense could be considered and determined on the merits. Where there is a defense purely equitable, the Court of Chancery has power to take the case from the law court, and where a defense actually presented is overruled by the law court because it is an equitable defense, the Court of Chancery can, in effect, review the judgment of the law court based on the exclusion of such defense.

"Where a suit is pending for the same cause in a court of law, all that the defendant can ask, is an order putting the complainant to his election, whether he will proceed at law or in equity.

"The complainant will not be put to this election, unless the suit at law is for the same cause, and the remedy afforded co-extensive and equally beneficial with the remedy in equity."

Way v. Bragaw, 16 N. J. E., 213.

This was a suit to set aside fraudulent conveyances in order that a judgment might be collected. The complainants had started a proceeding in the Supreme Court under the provisions of an act to prevent fraudulent trusts and assignments, but a justice of the Supreme Court had signed an order of discontinuance. The defendant claimed the discontinuance was invalid because not made by the Supreme Court, and pleaded in bar that this other suit was pending for the same cause. The Chancery court held, first, that the attempt to discontinue

was in fact an election to take the remedy of the Chancery suit and second, that from an examination of the bill of complaint and the statute, it appeared that the remedy in the two suits could not be co-extensive, and under the authorities cited in the opinion the plea could not be sustained. "The former suit must not only be for the same cause, but the effect must be the same. The remedy must be co-extensive and equally beneficial to the complainant. *Law v. Rigby*, 4 Brown's Ch. R., 63; *Pickford v. Hunter*, 5 Simons, 122; 2 Daniel's Ch. Pr., 721." (See pp. 217, 218.)

And so in the case at bar, the complainants herein, having failed in the Supreme Court to obtain a consideration of the merits, and nothing but the reserved right to plead the facts for the purpose of a trial at law, and conceiving, properly as we think, that such facts, if pleaded, would be overruled as a defense, have practically discontinued their proceedings in the Supreme Court and have elected to take their remedy in the Court of Chancery.

Again, following the above case, it seems the theory of such an election is not necessary, for the reason that in the case at bar the remedy in the Supreme Court is by no means co-extensive with the remedy in the Court of Chancery and by no means as beneficial to the complainants. The Supreme Court could not administer the remedy of specific performance by compelling an acceptance of the stock or the payment of the counsel fees and costs in order to relieve the complainants from the heavy responsibility for the contingent attorneys fees of twenty per cent. referred to in the evidence (p. 111, l. 1-45; see also p. 76) under the law of 1914, p. 410 giving attorneys a lien on the subject matter of a suit prosecuted by them.

The case of *Way v. Bragaw*, supra, was followed in the Court of Chancery in the case of *Roarke v.*

Roarke, 77 Eq., 181, in which it was held that the proceedings commenced by the complainant afforded a remedy co-extensive and equally beneficial with the remedy in equity. The bill of complaint, however, was retained until the exhaustion of the remedy in the legal proceedings.

Way v. Bragaw is also cited in the case of *Larter v. Canfield*, 59 N. J. Eq., 461, in which it was held.

“In order that a plea of a former action pending may be sustained, it is necessary that all of the relief to which the complainant may be entitled in the second suit should be attainable in the first, and the remedy there afforded must be equally as beneficial as that which he may secure in the second suit.”

In the opinion in the last suit the court points out the difference between the two suits in question and while there appeared to be some of the same matters involved, held them not to be for the same matters and effect and not for like relief. (See p. 468.)

In the Chancery case of *Griffing v. A. A. Griffing Iron Company*, it was held:

“When such a plea is set down for hearing, its averments must be examined, and if they do not plainly show that the former suit is for the same subject-matter and that the relief sought therein will be as beneficial to the complainant as that he seeks by this bill, the plea must be overruled.”

61 N. J. Eq., 269.

In the above case a bill was filed for the distribution of the accumulated profits by a corporation. The plea alleged that a suit was pending in equity

in the United States Circuit Court against the corporation alone, averring it to be insolvent, that its business could not be conducted at a profit and praying for a receiver and a winding up and division of the profits among the stockholders. The Court said that under the United States Circuit Court suit the complainants would get as an incident, a division of the accumulated profits, but held that the purpose of the two bills was diverse and grounded on different matters. That the relief asked can not be accorded in the other suit nor would the remedy in that suit be as beneficial to the complainant as that he sought in the Chancery suit. The plea was overruled. (See p. 273.)

In *Van Houten against Stevenson* 68 N. J. Eq., 490 and also reported again in 69 N. J. Eq., 626, in an action for foreclosure of a mortgage a plea was filed setting up the pendency of a partition suit in which the complainant as mortgagee was not a party. It ^{was} also held that the record did not show another suit pending for the same matter and that the plea must be overruled. This case was affirmed in the Court of Errors and Appeals in 69 N. J. Eq., 835.

The principles involved are stated in "Cyc" as follows:

"To sustain the plea of a former suit pending it must appear that the subject-matter and the relief sought in the second suit are the same as in the first suit."

"A plea of the pendency of a prior action is not available unless the prior action is of such a character, that, had a judgment been rendered therein on the merits, such judgment would be conclusive between the parties and could be pleaded in bar of the second action."

"A plea in abatement of another action

pending will fail where there is a substantial difference in the relief sought."

"If the whole relief sought in the second suit is not attainable in the first, or if the relief which may be given or the remedies available in the second suit are more extensive than can be attained in the first, a plea to the second suit of the pendency of the first is not good."

"The rule in equity is the same as at law, namely, that the plea of a prior suit pending can be pleaded only when all the relief sought for in the second action is obtainable in the first."

"Where the substantial facts upon which the plaintiff's right to relief is based are identical in the two actions, and the relief obtainable in the first includes all the relief sought in the second, the first will abate the second, although the actions differ in matters of form and in the relations of defendant to the infringement of plaintiff's rights."

* * * * *

"It has been held that a second suit for some of the same things sued for in a former suit still pending will not abate, in whole or in part, the former suit. So a plea in abatement to the entire action that another suit for the same cause was pending at the time of the second suit is not a good plea if the proof shows that the first suit was only for part of the same matter sued for in the second."

1 Cyc. pp. 27, 28, 29 and 30.

See also 15 Cyc. 266.

In *Carlisle v. Cooper*, 18 N. J. Eq., 241, and in *Steers v. Shaw*, 53 N. J. L., 358, the objects of the

suits in question in each case were held to be different, and that no election was required. In the last cited case, a judgment upon notes had been obtained in New York and a suit was commenced in New Jersey on the same notes. Later an action was commenced in New Jersey on the New York judgment and to that action it was pleaded that the action upon the notes was pending. Held a bad plea as the causes of action were not the same.

The pendency of an action at law by A against B in court of another state, constitutes no bar to a suit in equity in New Jersey by B against A for the same object.

Fulton v. Golden, 25 N. J. Eq., 353.

VI.

No case was presented which would occasion the imposition of terms in connection with the granting of the injunction.

The reason for the terms imposed in *Headley v. Leavitt*, 68 N. J. Eq., 591, 595, was that the changing of the ^{form} ~~form~~ was dependent on action by the appellant in ^{the related performance of} ~~carrying out~~ the agreement of settlement (which action was not prevented by any conduct of the other party), and it was not thought proper or equitable to allow him by his own ^{reluctant} ~~action~~ to deprive the law court of jurisdiction, so the terms were imposed that required him to remain in the law court. In *Trenton Street Railway v. Lawlor*, 74 N. J. Eq., 828, that was not the situation and it is not the situation; the complainant could not pay the consideration of the settlement because the defendant refused to accept it, and the only terms imposed was that complainant pay the

money into court. In the case before the Court now Savage has done all that there is for him to do under the agreement of settlement, except to pay the note which he is willing to do at any time and will pay the money into court if required. That ought not be required because of the action of the defendant in this case, and because he has not presented the note at the bank therein specified, where the complainant is required to keep a sufficient amount of money awaiting presentation of the note at any time.

VII.

The motion to strike out the bill of complaint was properly denied.

The grounds of the motion to strike out the bill of complaint, as here argued, are:

(1) That the bill shows the subject matter has already been fully determined by the Supreme Court, and (2) that the bill shows that the settlement was completely performed, and that therefore the defense was cognizable at law and equity had no jurisdiction.

(1) Paragraph 8 of the bill (Case, p. 3) alleges ~~that~~ the "application to the Supreme Court on a petition for the discontinuance or staying of the said action on the ground of the making of said settlement." This is the only prayer of the petition alleged. The same paragraph (p. 4) states that "an order was made by the Supreme Court denying the application." Of course this means the application which was prayed for in the petition. The prayer of the bill of complaint, however, includes other remedies, in addition to restraint, viz., to perform specifically the contract by discontinu-

ing the action and paying all costs, attorney's and counsel fees, and that it may be adjudged that the action at law has been abated by the settlement, and the cause of action barred, as well as for such other and further relief as the nature of the cause may require, etc. (Case, p. 5, 6). There is no allegation in the bill that these additional rights and remedies have been adjudicated and determined by the Supreme Court. The bill therefore makes out a case for equitable relief for these remedies at least, or for any other relief which the facts alleged would afford.

It is also clear the bill does not allege that the matters stated were adjudicated and determined in the Supreme Court. It simply alleges that the application was denied. That does not necessarily imply an adjudication on the merits. The denial might have been based on a lack of jurisdiction, or the exercise of a discretion not to take jurisdiction, as was actually the case in this instance, and it requires proof to be submitted at the hearing to show upon what the denial alleged was predicated. The objection cannot be made by motion to strike out.

(2) The bill of complaint does not allege the agreement of settlement was fully carried out and performed. It distinctly alleges that said agreement "has been fully carried out and performed "in all respects *on the part of the complainants*, "but that *the said Edgar has violated* the said "agreement in that he has attempted and is now "attempting to bring the said suit to trial in the "Supreme Court notwithstanding the same has "been fully settled and has not carried out and performed the said agreement on his part in that he "has failed, neglected and refused to discontinue "the said suit and to pay all costs, including his

"attorney's and counsel fees" (Case, p. 5, lines 3-16).

The accord and satisfaction is therefore alleged to be unexecuted on the part of Edgar at least, and is not a good defense at law, under the cases hereinbefore cited, in which the plaintiff at law was the person charged with having failed to comply with the agreement. These authorities seem to hold that if either party to the agreement has failed to execute it, it cannot be considered as executed, and cannot be pleaded as a defense at law. That being so, a case for equitable relief is presented by the allegations of the bill and it should not be stricken out.

VIII.

The order for injunction, and order refusing to strike out the bill of complaint, which are under review, should be affirmed with costs.

Respectfully submitted,

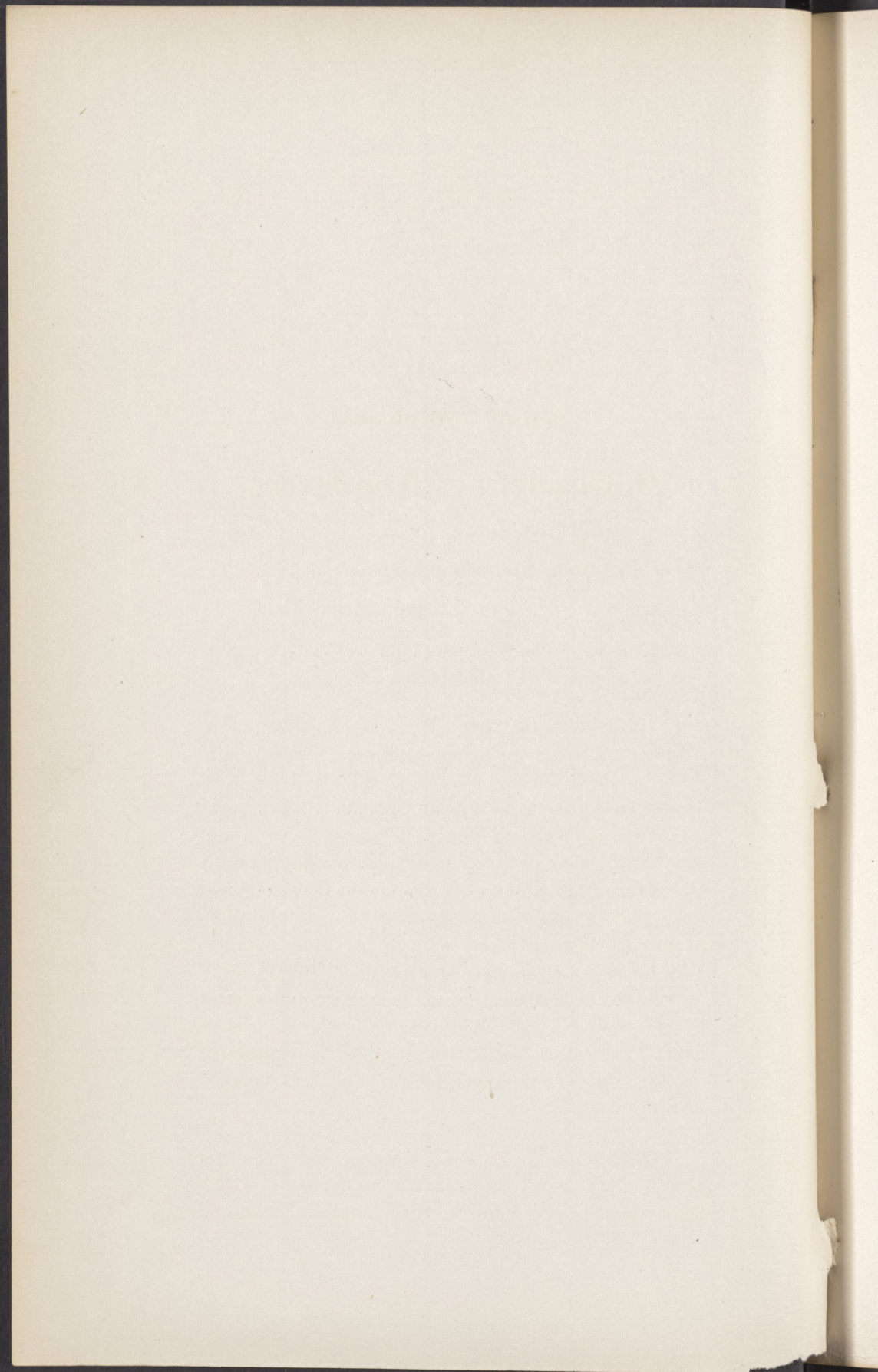
C. McK. WHITTEMORE,
Solr. of Complainants-Respondents,
ROBERT H. McCARTER,
Of Counsel.

March Term, 1916.

[7621]

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(Filed July 21, 1915.)

Bill of Complaint.

10

In Chancery of New Jersey

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

The complainants, Edward S. Savage and Margaret T. Savage, of the City of Rahway, New Jersey, respectfully show that:

20

1. On September 10th, 1913, John Blanchard Edgar instituted an action against the complainants in the Supreme Court of the State of New Jersey to recover the sum of \$50,000 alleged to be due upon an express contract made on or about July 1st, 1905, for services in connection with the purchase of the stock of four certain corporations; that said action was instituted against the complainant, Edward S. Savage, in the first instance, and in the alternative against the complainant, Margaret T. Savage, on an allegation of agency by the said Edward S. Savage for the said Margaret T. Savage; that a true copy of the complaint in the said action is hereto annexed and marked Exhibit A.

30

2. That complainants filed answers in the said action in the Supreme Court, true copies of which are attached hereto and marked Exhibits B and C.

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Bill of Complaint.

3. That the said Edgar filed replies to said answers, true copies of which are attached hereto and marked Exhibits D and E, and the issue joined in said action was noticed for trial at several terms of the Union County Circuit Court but said issue has never been tried.

10

4. On October 3d, 1914, complainant, Edward S. Savage, had an interview with the said John Blanchard Edgar at Rahway, New Jersey, and after some negotiations concluded an adjustment, compromise and settlement of the issues involved in the said action in the Supreme Court and made and entered into an agreement with relation thereto whereby said Savage agreed to transfer to said Edgar 250 shares of the common stock of the Tremley Point Corporation, and pay \$2,000 in cash and to give said Edgar his note for \$2,000 payable in thirty days thereafter in full settlement of all claims and demands whatsoever, and the said Edgar in consideration thereof agreed to discontinue the said action in the Supreme Court at once and pay all costs, including his attorney's fees and counsel fees; that a true copy of the said agreement of settlement signed by the said John Blanchard Edgar is hereto annexed and forms a part hereof, marked Exhibit F.

20

30

5. On said 3d day of October, 1914, in accordance with said agreement, complainant delivered to said Edgar his check for the sum of \$2,000 and his promissory note payable in thirty days for the sum of \$2,000, and on the 5th day of October, 1914, pursuant to said agreement, said Edgar called at the office of said Savage at No. 10 Wall Street in the City of New York and said Savage there delivered to said Edgar a certificate for 250 shares

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Bill of Complaint.

of the common stock of the Tremley Point Corporation and said Savage and Edgar then went to the transfer office of the Tremley Point Corporation at #27 Pine Street in the City of New York and the said stock was then delivered to the Secretary of said company for transfer to the said Edgar and by the direction of the said Edgar then and there made, the said stock was transferred to the name of Harriet B. Edgar, the wife of the said Edgar.

10

6. Said Edgar has used the proceeds of the said check of \$2,000 and retained and still retains the said note of \$2,000 executed by the said Savage.

7. But notwithstanding the making and execution of said settlement by the said Savage, on December 17th, 1914, a notice of trial of the issues joined in the said cause in the Supreme Court was served upon the attorneys of the complainants notifying the complainants of the intention to move the said cause for trial at the January term following, of the Union County Circuit.

20

8. On December 23d, 1914, complainants applied to a Justice of the Supreme Court upon a petition for the discontinuance or staying of the said action on the ground of the making of said settlement, and an order was duly made by said Justice requiring the said Edgar to show cause before the Supreme Court on February 16th, 1915, why the prayer of the petition should not be granted, and staying all proceedings in said cause, and thereafter depositions were taken by the complainants and the said Edgar pursuant to authority given by said order; that the said rules to show cause came on for argument before the Supreme

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Bill of Complaint.

10 Court upon the petition and said depositions, and thereafter an order was made by the Supreme Court denying the application of the complainants, and thereafter the complainants entered an appeal from said order of the Supreme Court to the Court of Errors and Appeals of New Jersey, which appeal was, on the 28th day of June, 1915, upon the motion of the attorney of the said Edgar, dismissed on the ground that the said order from which the appeal was taken was not a final order in said cause and therefore not appealable.

20 9. That the said Edgar retained the proceeds of said settlement until the 15th day of January, 1915, when the said proceeding by the complainants was pending in the Supreme Court, on which date the attorneys of the said Edgar tendered to the attorneys of the complainants the promissory note of the said Savage to the said Edgar for the sum of \$2,000, and a certified check for the sum of \$2,000 endorsed payable to the attorneys for the said Savage, which tender was refused, but the said Edgar or the said Harriet B. Edgar has not returned to the complainants the said 250 shares of the common stock of the Tremley Point Corporation assigned and transferred by the direction of the said John Blanchard Edgar to Harriet B. Edgar, as part of the consideration of the settlement agreed upon as aforesaid.

30 10. The said settlement made by complainants with the said John Blanchard Edgar was positive and final and was accepted by the said John Blanchard Edgar together with the property paid and delivered pursuant to the terms of the same as a full compromise settlement of the said action
40 of the said John Blanchard Edgar against the

Bill of Complaint.

complainants, and the agreement of settlement made in writing as hereinbefore mentioned has been fully carried out and performed in all respects on the part of the said complainants but that the said Edgar has violated the said agreement in that he has attempted and is now attempting to bring the said suit to trial in the Supreme Court notwithstanding the same has been fully settled, and has not carried out and performed the said agreement on his part in that he has failed, neglected and refused to discontinue the said suit and to pay all costs including his attorney's fees and counsel fees.

10

Complainants are without adequate remedy in a court of law and, therefore, pray:

1. That the said John Blanchard Edgar may be ordered and decreed to specifically carry out and perform his said contract with the said Savage and to discontinue the said action in the New Jersey Supreme Court, and to pay all costs, including his attorney's fees and counsel fees.

20

2. That the said Edgar may be forever enjoined and restrained from further proceeding with the said action in the New Jersey Supreme Court against the complainants.

30

3. That the said Edgar may be temporarily restrained and enjoined from proceeding with the said action in the New Jersey Supreme Court pending the determination of this suit.

4. That it may be adjudged and decreed that the said action in the Supreme Court has been abated by the said compromise settlement made between the said parties and that the cause of action upon

40

Affidavit of Edward S. Savage.

which said suit is founded may be declared to be barred and forever settled between the said parties.

5. That the complainants may have such other and further relief in the premises as the nature of the cause may require, and as may be proper and agreeable to equity and good conscience.

6. That a writ of subpoena may issue commanding said John Blanchard Edgar to answer this bill of complaint and to abide by such order as the Court may make in the premises.

C. McK. WHITEMORE,
Solicitors for and of Counsel
with the Complainants.

20

ROBERT H. McCARTER,
of Counsel.

State of New Jersey, } ss.:
County of Union, }

I, Edward S. Savage, of full age being duly sworn according to law on my oath depose and say: That I am one of the complainants named in the foregoing bill of complaint; Margaret T. Savage the other complainant is my wife; all of the business and transactions which have been had with John Blanchard Edgar as referred to in said bill of complaint have been had with me and my said wife has had no business transactions directly with the said Edgar with regard to any matters referred to in said bill. All of the matters and things set forth in said bill of complaint are true to the best of my knowledge, information and belief.

30

40

Affidavit of Edward S. Savage.

On September 10th, 1913, the said John Blanchard Edgar commenced suit against Margaret T. Savage and myself in the New Jersey Supreme Court to recover the sum of \$50,000 as set forth in the said bill of complaint and the copy of the complaint annexed hereto; the agreement to pay the sum of \$50,000 set forth in the said complaint in the Supreme Court is wholly fictitious and untrue and neither myself nor my wife have ever been indebted to the said John Blanchard Edgar upon any agreement to pay him the sum of \$50,000 in connection with the purchase of the stock of the corporations mentioned in the said complaint or on any other account.

To the said complaint answers were filed by me and by my said wife as referred to in the foregoing bill and as annexed hereto and thereafter the issue joined in said suit was noticed for trial at three successive terms of the Union County Circuit Court but was not tried.

On October 3rd, 1914, I met John Blanchard Edgar at Rahway, New Jersey, and negotiated with him for a settlement of the action against myself and my wife in the Supreme Court, and he and I reached an agreement of settlement upon the terms that I should transfer to him 250 shares of the common stock of the Tremley Point Corporation, pay him the sum of \$2,000 in cash, and give him my note payable to him for \$2,000 within thirty days thereafter, and the said Edgar in consideration thereof agreed to discontinue the said suit in the Supreme Court at once and to pay all costs, including his attorney's fees and counsel fees, and the said settlement so agreed upon was reduced to writing and signed by the said Edgar in my

Affidavit of Edward S. Savage.

presence and the Exhibit B attached hereto is a true copy of the said written agreement of settlement now in my possession.

10 At the time of the said settlement and upon the signing of said agreement, I delivered to the said Edgar my check for \$2,000 and my promissory note payable to said Edgar in thirty days thereafter, for the further sum of \$2,000, the receipt of which check and note is acknowledged by the said Edgar in said written agreement. At the time of said settlement said Edgar and myself agreed to meet at my office in New York, #10 Wall Street, on the following Monday, and accordingly said Edgar came to my office on the 5th day of October, 1914, and I took from my safe a certificate for 250 shares of the common stock of the Tremley Point Corporation and endorsed it in blank and exhibited it to said Edgar and we then agreed to go to #27 Pine Street, the transfer office of the Tremley Point Company and have the stock there transferred to said Edgar, and in pursuance of said agreement we went to said office and I delivered the said certificate of stock to the Secretary of said Company in the presence of said Edgar and requested said Secretary to transfer the same to said Edgar, whereupon the said Edgar stated that he would prefer to have said stock transferred to his wife, and accordingly the said Secretary was directed to transfer the said 250 shares of the common stock of the Tremley Point Corporation to Harriet B. Edgar, and the said John Blanchard Edgar stated to the Secretary that he would call the next day for the new certificate of stock, but I am informed that he has never taken said certificate of stock from the Secretary of said Company.

40 About two and a half months after the making of said settlement said Edgar's attorneys served

Affidavit of Edward S. Savage.

upon the attorneys of myself and my wife, a notice of the trial of the action in the Supreme Court at the January Term of the Union County Circuit, and thereupon on December 23rd, 1914, I and my wife made an application to the Supreme Court to stay the said action on the ground of the making of said settlement, and an order to show cause was granted upon said application staying said suit and returnable at the February Term of the Supreme Court 1915. After the granting of said rule, depositions and proofs were taken, and upon the argument before the Supreme Court the rule to show cause was discharged in the exercise of alleged discretionary power of the Supreme Court upon an application of that character. An appeal from the decision of the Supreme Court was taken to the Court of Errors and Appeals and on the 28th day of June, 1915, application was made by the said Edgar to dismiss the said appeal and argument upon said application was had before the Court of Errors which decided that the order appealed from was not a final order and was therefore not appealable and the appeal was thereupon dismissed.

On the 15th day of January, 1915, while the proceeding brought by myself and my wife in the Supreme Court to stay the suit was pending, the attorneys of said Edgar tendered to my attorneys a certified check for \$2,000 and my promissory note for \$2,000, which I gave to said Edgar on October 3rd, 1914, but the tender of said check and note were refused by my attorneys. No offer of the return of said check and note was ever made previous to January 15th, 1915, and said Edgar or his wife Harriet B. Edgar have not returned or offered to return to me the 250 shares of the

Exhibit A.

common stock of the Tremley Point Corporation, which I caused to be transferred on the books of said Company to said Harriet B. Edgar on October 5th, 1915.

10 I have carried out and performed all the terms and conditions of the settlement on my part to be performed but the said suit in the Supreme Court has not been discontinued by the said Edgar as he agreed to do as part of the settlement I made with him as above mentioned.

EDWARD S. SAVAGE.

Sworn and subscribed before me this
19th day of July, 1915.

20 A. R. WHITEMORE,
Notary Public of N. J.

Exhibit "A."

NEW JERSEY SUPREME COURT.

30	JOHN BLANCHARD EDGAR, Plaintiff,	}	Action at Law. Complaint.
	vs.		
	EDWARD S. SAVAGE and MAR- GARET T. SAVAGE, Defendants.		

State of New Jersey, }
Union County, } ss. :

40 The plaintiff, residing at Avenel, in the County of Middlesex and State of New Jersey, demands

Exhibit A.

of the defendant, Edward S. Savage, residing at Rahway, in the County of Union in said State, the sum of Fifty thousand Dollars (\$50,000) with interest from the first day of September, A. D. 1911, which sum is due from the said defendant because of the facts set forth in the following six paragraphs:

10

1. On or about July 1, 1905, the defendant Edward S. Savage agreed with the plaintiff that if he the said plaintiff would enter into a contract with one John W. Houston, of the City of New York, for the purchase by the plaintiff of all the interest of said John W. Houston in four certain corporations of New Jersey, to wit: The New Jersey Terminal Railroad Company, The Carteret Construction Company, the Carteret Realty Company and the Sound Shore Front Improvement Company, for a sum which should be agreeable to, and be approved by the said defendant Edward S. Savage, and should continue to hold all interest under such contract and under all contracts, agreements, deeds or other instruments which should thereafter be made to vest the title thereto in the plaintiff for the use and benefit of the said defendant Edward S. Savage, and deal with and dispose of the same as he, the said Edward S. Savage should direct, then the said defendant Edward S. Savage should pay unto the plaintiff the sum of \$50,000.00, when he, said Edward S. Savage, or the said four corporations in which, on the making of the aforesaid contract by the plaintiff with the said John W. Houston, the said Edward S. Savage would own a controlling interest, should have disposed of the property owned by them, or of so much thereof as should enable the defendant

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30

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Exhibit A.

Edward S. Savage to pay said sum of \$50,000.00 to the plaintiff.

10 2. In pursuance of the said agreement or understanding made between the plaintiff and said defendant Edward S. Savage, the plaintiff did, on or about July 10, 1905, enter into a written contract with the said John W. Houston, by which the said John W. Houston agreed to sell to the plaintiff all his interest in the said corporations above named, for the sum of \$200,000.00, to be paid to said John W. Houston, in the manner provided for under said contract; that the price at which the said interests were to be conveyed to the plaintiff and all the terms of said contract, were expressly assented to and approved by the said defendant, Edward S. 20 Savage, before the plaintiff entered into said agreement with the said John W. Houston.

30 3. Thereafter, at the request and direction of the said defendant, Edward S. Savage, the plaintiff, by writing under his hand and seal, assigned, transferred and set over all his rights under the said contract of July 10, 1905, made between the plaintiff and said John W. Houston, unto the defendant, Margaret T. Savage, the wife of the defendant, Edward S. Savage; but at the direction of the said Edward S. Savage the fact of said transfer was withheld from the said John W. Houston, and from all others interested in the said corporations, and the written assignment of the plaintiff's interest in said contract to said Margaret T. Savage was not placed upon record, but by the direction of said Edward S. Savage, and to further his business plans and interests, was kept secret and undisclosed by the plaintiff. 40

Exhibit A.

4. The plaintiff thereafter continued as the ostensible owner of all rights under said contract of July 10, 1905, with said John W. Houston, and all subsequent negotiations for the performance of said contract of July 10, 1905 (which was thereafter modified by certain supplemental agreements made by and between the plaintiff and said John W. Houston) and all business connected with the performance of said contract with said John W. Houston, and the modifications thereof, were carried on by the plaintiff after constant conferences with and directions by the said Edward S. Savage, and in all things connected with the performance of said contract, plaintiff followed out and observed the directions of the said Edward S. Savage.

5. On or about the tenth day of July, A. D. 1909, the performance of the said contract with the said John W. Houston was completed under the direction of the said Edward S. Savage, by the payment to said John W. Houston of the balance due under the contract, and all the property, rights and interest of the said John W. Houston of, in and to the four corporations above named were thereupon transferred to said Edward S. Savage or his nominee, and all of the evidences of ownership thereof which the said John W. Houston then possessed were delivered over unto the said Edward S. Savage, or his nominee in accordance with the directions of the defendant Edward S. Savage.

6. The plaintiff is informed and believes the fact to be, and so alleges, that the said Edward S. Savage thereafter disposed of all his interest in the said property sold by the said John W. Houston

Exhibit A.

10 to the plaintiff in and by the agreement of July 10, 1905, either immediately or through the action of the four corporations above named, in which corporation by reason of the execution of the contract of July 10, 1905, made by and between the said John W. Houston and plaintiff, Edward S. Savage held a controlling interest, or of so much thereof as would enable him to pay to plaintiff the compensation agreed upon, and thereupon the plaintiff became entitled to have and demand of and from the said Edward S. Savage, the said sum of \$50,000 with interest from the first day of September, 1911, until the same shall be paid to him.

20 As a further and separate cause of action against the defendant, Margaret T. Savage, whose residence is with said Edward S. Savage, and who is joined with him in accordance with provisions of The Practice Act (1912), because the separate causes of action against the defendants have a common question of law and fact, and arose out of the same series of transactions, the plaintiff demands of said defendant Margaret T. Savage the sum of \$50,000.00, with interest from the first day of September, A. D. 1911, which sum is due from the said defendant because of the facts set forth in the following paragraphs, numbered 7 to 12, inclusive.

30 7. On or about July 1, 1905, the defendant Margaret T. Savage (acting by and through her agent Edward S. Savage) agreed with the plaintiff that if he, the said plaintiff, would enter into a contract with one John W. Houston for the purchase by the plaintiff of all the interest of said John W. Houston in the four certain corporations of New Jersey, particularly mentioned in paragraph 1 above set forth, for a sum which should

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Exhibit A.

be agreeable to and be approved by said defendant Margaret T. Savage, and should continue to hold all the interests under such contract, and under all contracts, agreements, deeds or other instruments which should thereafter be made to vest the title thereto in the plaintiff for the use and benefit of the said Margaret T. Savage and deal with and dispose of the same as she, the said Margaret T. Savage, acting through her agent the said Edward S. Savage, should direct, then the said Margaret T. Savage should pay unto the plaintiff the sum of \$50,000.00, when she the said Margaret T. Savage, or the said four corporations in which on the making of the aforesaid contract, by the plaintiff with the said John W. Houston, the said Margaret T. Savage would own a controlling interest, should have disposed of the property owned by them, or of so much thereof as should enable the defendant Margaret T. Savage to pay said sum of \$50,000.00 to the plaintiff.

8. In pursuance of the said agreement or understanding made between the plaintiff and said defendant Margaret T. Savage (acting by her agent Edward S. Savage) the plaintiff did on or about July 10, 1905, enter into a written contract with the said John W. Houston, by which the said John W. Houston agreed to sell to the plaintiff all his interest in the said four corporations above named for the sum of \$200,000.00, to be paid to said John W. Houston in the manner provided for under said contract; that the price at which the said interests were to be conveyed to the plaintiff, and all the terms of said contract, were expressly assented to and approved by the said defendant Margaret T. Savage (acting by Edward S. Savage, her

Exhibit A.

agent) before the plaintiff entered into said agreement with the said John W. Houston.

10 9. Thereafter, at the request and direction of the said defendant Margaret T. Savage (acting by her agent Edward S. Savage) the plaintiff, by writing under his hand and seal, assigned, transferred and set over all his rights under the said contract of July 10, 1905, made between the plaintiff and the said John W. Houston unto the defendant Margaret T. Savage, wife of Edward S. Savage; but at the direction of the said Margaret T. Savage (acting through her agent Edward S. Savage) the fact of said transfer was withheld from the said John W. Houston, and from all others interested in the said corporation, and the
20 written assignment of the plaintiff's interest in said contract to said Margaret T. Savage was not placed upon record, but by the direction of said Margaret T. Savage (acting through her agent Edward S. Savage) and to further her business plans and interests, was kept secret and undisclosed by the plaintiff.

30 10. The plaintiff thereafter continued as the ostensible owner of all rights under said contract of July 10, 1905, with said John W. Houston, and all subsequent negotiations for the performance of said contract of July 10, 1905 (which was thereafter modified by certain supplemental agreements made by and between the plaintiff and said John W. Houston) and all business connected with the performance of said contract, plaintiff followed out and observed the directions of said Margaret T. Savage (acting through her agent Edward S. Savage).

40

Exhibit A.

11. On or about the tenth day of July A. D. 1909, plaintiff completed his performance of the said contract with the said John W. Houston, under the direction of the said Margaret T. Savage (acting through her agent Edward S. Savage) by the payment to said John W. Houston of the balance due under the contract, and all the property, rights, and interest of the said John W. Houston of, in and to the four corporations above named were thereupon transferred to said Margaret T. Savage and all the evidences of ownership thereof, which the said John W. Houston then possessed were delivered over unto the said Margaret T. Savage in accordance with the directions of the defendant Margaret T. Savage (acting through her agent Edward S. Savage).

12. The plaintiff is informed and believes the fact to be, and so alleges, that the said Margaret T. Savage (acting through her agent Edward S. Savage) thereafter disposed of all her interest in the said property so sold by the said John W. Houston to the plaintiff in and by the agreement of July 10, 1905, either immediately or through the action of the four corporations above named, in which corporations by reason of the execution of the contract of July 10, 1905, made by and between the said John W. Houston and plaintiff, said Margaret T. Savage held a controlling interest, or of so much thereof as would enable her to pay to plaintiff the compensation agreed upon, and thereupon the plaintiff became entitled to have and demand of and from the said Margaret T. Savage the said sum of \$50,000.00, with interest from the first day of September, 1911, until the same shall be paid to him.

Exhibit B.

Plaintiff therefore demands of the defendant Edward S. Savage upon the first cause of action set forth in paragraphs 1 to 6 inclusive, the sum of fifty thousand Dollars (\$50,000.00), with interest from September 1, 1911, or, in the alternative, demands of the defendant Margaret T. Savage, upon the second cause of action set forth in paragraphs 7 to 12 inclusive, above, the sum of fifty thousand dollars (\$50,000.00), with interest from September 1, 1911.

Plaintiff's Attorneys.

20

Exhibit "B."

NEW JERSEY SUPREME COURT,

JOHN BLANCHARD EDGAR, Plaintiff, vs. EDWARD S. SAVAGE and MARGARET T. SAVAGE, Defendants.	}	Action at Law. ANSWER.
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The separate answer of the defendant Edward S. Savage who resides in Rahway, in the County of Union and State of New Jersey, to the complaint of John Blanchard Edgar, plaintiff.

40

Defendant denies that there is due from him to the plaintiff the sum of fifty thousand dollars (\$50,000) with interest thereon from the first day of September, nineteen hundred and eleven or any

Exhibit B.

other sum because of the facts set forth in the first six paragraphs of the complaint, to which answer is made by the said defendant as follows:

1. The defendant denies the allegations contained in paragraph 1.

2. Defendant admits the allegations contained in paragraph 2 of the complaint, except that he denies that the contract made with said Houston as therein mentioned was made in pursuance of the alleged agreement or understanding between plaintiff and the said defendant. 10

3. Defendant admits the allegations contained in paragraph 3.

4. Defendant admits the allegations contained in paragraph 4 except that he denies that any business connected with the performance of said contract was carried on by the plaintiff and says that all of said business was transacted and carried on and conducted entirely by this defendant and without any conferences with or directions by this defendant to the said plaintiff, and the said plaintiff did not follow out and observe the directions of this defendant other than with regard to acting as the ostensible owner as to the said John W. Houston of all the rights under the said contract. 20 30

5. Defendant admits the allegations contained in paragraph 5 of the complaint, except that he denies that the said plaintiff paid or participated in any way in the payment to said John W. Houston of the balance due under the said contract or in any performed any services in connection with the transfer of any property by the said John W. Houston to this defendant or his nominee. 40

Exhibit B.

6. This defendant admits the allegations contained in paragraph 6 of the complaint, except that he denies that any compensation to the plaintiff was agreed upon, and also that the plaintiff ever became entitled to demand of and from this defendant the sum of fifty thousand dollars (\$50,000) with interest or any other sum.

SECOND SEPARATE DEFENCE.

This defendant alleges for a second separate defence that at the request of this defendant, the said plaintiff volunteered gratuitously to act as the nominal purchaser for this defendant of all of the interest of John W. Houston in four certain corporations named in paragraph 1 of the complaint, and that further in the said business or transactions the said plaintiff rendered no services to or for this defendant.

THIRD SEPARATE DEFENCE.

This defendant alleges for a third separate defence that no contract or agreement made by this defendant as alleged in paragraph 1 of the complaint was ever entered into by this defendant in writing or signed by this defendant or his authorized agent; and that the said alleged agreement was a contract for sale of lands, tenements or hereditaments or of an interest in or concerning them, and that therefore this defendant is not liable upon any such alleged agreement as set forth in said complaint by virtue of the statute in such case made and provided.

FOURTH SEPARATE DEFENCE.

This defendant for a fourth separate defence avers that no agreement by this defendant with the

said plaintiff as alleged in paragraph 1 of the said complaint was ever reduced to writing and signed by this defendant or by any other person thereunto by him lawfully authorized; and that the said alleged agreement as set forth in said complaint was not to be performed within one year from the making thereof, and was not as so alleged in said complaint performed within one year of the making thereof and therefore this defendant is not liable upon any said alleged agreement to the said plaintiff by virtue of the statute in such case made and provided. 10

FIFTH SEPARATE DEFENCE.

This defendant for a fifth separate defence avers that the alleged cause of action stated in the complaint did not accrue within six years next before the commencement of this action, and the said defendant is not liable to the plaintiff by virtue of the statute in such case made and provided. 20

SIXTH SEPARATE DEFENCE.

This defendant for a sixth separate defence avers that this defendant paid the said plaintiff in full for any and all services performed or rendered by the said plaintiff for this defendant under and by virtue of the said alleged agreement set forth in the said complaint and that the said plaintiff accepted said payment in full satisfaction and discharge thereof. 30

SEVENTH SEPARATE DEFENCE.

This defendant for a seventh separate defence avers that this defendant delivered and paid to the said plaintiff, and the said plaintiff accepted 40

Exhibit C.

and received from the said defendant certain sums
 of money and other property in full accord and
 satisfaction of all claims and demands of the said
 plaintiff upon and against this defendant by reason
 of the alleged facts set forth in the said complaint,
 and thereupon released and discharged the said
 defendant of and from any and all such claims and
 demands or other claims and demands of any name
 or character.

Attorney of Defendant,
 EDWARD S. SAVAGE.

Exhibit "C."

20

NEW JERSEY SUPREME COURT.

30

JOHN BLANCHARD EDGAR,	}	Action at Law. ANSWER.
Plaintiff,		
and		
EDWARD S. SAVAGE and MARGARET		
T. SAVAGE,		
Defendants.		

The separate answer of Margaret T. Savage who
 resides in the City of Rahway, in the County of
 Union and State of New Jersey, to the separate
 and alternative cause of action of John Blanchard
 Edgar, plaintiff in the above stated cause.

Defendant denies that there is due and owing
 from this defendant to the said plaintiff the sum
 of fifty thousand dollars (\$50,000) with interest
 from the first day of September, nineteen hundred

Exhibit C.

and eleven, or any other sum because of the facts set forth in paragraphs 7 to 12 inclusive, of the complaint, and answering the said paragraphs says:

1. This defendant denies the allegations contained in paragraph 7, of the complaint. 10

2. This defendant denies the allegations contained in paragraph 8 of the complaint.

3. This defendant denies the allegations contained in paragraph 9, except she admits that the said contract mentioned in the said complaint was assigned and transferred by the said plaintiff to this defendant without the knowledge or consent of this defendant, and solely by direction of Edward S. Savage, the husband of this defendant, as his nominee, whereby a trust for the said Edward S. Savage by this defendant was created or resulted in and to the property and rights so assigned and transferred to this defendant. 20

4. This defendant admits the allegations contained in paragraph 10 except that she denies that any business connected with the performance of said contract was carried on by the plaintiff, and says that all of said business was transacted and carried on and conducted entirely by Edward S. Savage, and without any conferences with, or directions by him or this defendant, to the said plaintiff; and this defendant further denies that the plaintiff followed out or observed any directions of this defendant acting through her agent, Edward S. Savage, and also denies that the said Edward S. Savage was her agent with reference to any of the matters set forth in the said complaint. 30
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5. This defendant denies all the allegations contained in paragraph 11.

6. This defendant denies all the allegations contained in paragraph 12.

10

SECOND SEPARATE DEFENSE.

This defendant alleges for a second separate defense that at the request of Edward S. Savage, the said plaintiff volunteered gratuitously to act as the nominal purchaser for him of all of the interest of John W. Houston in four certain corporations named in paragraph 1 of the complaint, and that in the said business or transaction the said plaintiff rendered no services to or for this defendant.

20

THIRD SEPARATE DEFENSE.

This defendant for a third separate defense avers that no contract or agreement made by this defendant as alleged in paragraph 7 of the complaint was ever entered into by this defendant in writing or signed by this defendant or her authorized agent; and that the said alleged agreement was a contract for sale of lands, tenements, or hereditaments or of an interest in or concerning them, and that therefore this defendant is not liable upon any such alleged agreement as set forth in said complaint by virtue of the statute in such case made and provided.

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FOURTH SEPARATE DEFENSE.

This defendant for a fourth separate defense avers that no agreement by this defendant with the said plaintiff as alleged in paragraph 7 of the said complaint was ever reduced to writing and signed

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Exhibit C.

by this defendant or by any other person thereunto by her lawfully authorized; that the said alleged agreement as set forth in the said complaint was not to be performed within one year from the making thereof, and was not as so alleged in said complaint performed within one year of the making thereof, and therefore this defendant is not liable upon any said alleged agreement to the said plaintiff by virtue of the statute in such case made and provided. 10

FIFTH SEPARATE DEFENSE.

This defendant for a fifth separate defense avers that the alleged cause of action stated in the complaint did not accrue within six years before the commencement of this action, and the said defendant is not liable to the plaintiff by virtue of the statute in such case made and provided. 20

SIXTH SEPARATE DEFENSE.

This defendant for a sixth separate defense avers that this defendant paid the said plaintiff in full for any and all services performed or rendered by the said plaintiff for this defendant under and by virtue of the said alleged agreement set forth in the said complaint; and that the said plaintiff accepted said payment in full satisfaction and discharge thereof. 30

SEVENTH SEPARATE DEFENSE.

This defendant for a seventh separate defense avers that this defendant delivered and paid to the said plaintiff, and the said plaintiff accepted and received from the said defendant certain sums of 40

Exhibit D.

money and other property in full accord and satisfaction of all claims and demands of the said plaintiff upon and against this defendant by reason of the alleged facts set forth in the said complaint, and thereupon released and discharged the said defendant of and from any and all such claims and demands or other claims and demands of any name or character.

Attorney of Defendants.

Exhibit "D."

20

NEW JERSEY SUPREME COURT.

JOHN BLANCHARD EDGAR, Plaintiff,	}	Action at Law. Reply to Answer of Edward S. Savage.
vs.		
EDWARD S. SAVAGE and MAR- GARET T. SAVAGE,		
Defendants.		

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REPLY TO SECOND SEPARATE DEFENSE:

The plaintiff denies that he volunteered gratuitously to act as the nominal purchaser of the interest specified in said defense, or that he rendered no services to or for the defendant.

REPLY TO SIXTH SEPARATE DEFENSE:

40 The plaintiff denies that the defendant paid him in full, or at all, for services rendered by him under

Exhibit E.

the agreement set forth in the complaint, or that the plaintiff received or accepted any payment in satisfaction and discharge thereof, or of any part thereof.

REPLY TO SEVENTH SEPARATE DEFENSE:

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Plaintiff denies that the defendant delivered or paid to him, or that he accepted from the defendant, any sums of money, or other property, in full accord and satisfaction of any or all of his claims and demands against the defendant by reason of the facts set forth in the complaint, or that he released or discharged the defendant from such claims and demands, or any of them.

CARRICK & WORTENDYKE,
Attorneys of Plaintiff.

20

Exhibit "E."

NEW JERSEY SUPREME COURT.

JOHN BLANCHARD EDGAR, Plaintiff, vs. EDWARD S. SAVAGE and MAR- GARET T. SAVAGE, Defendants.	}	Action at Law. Reply to Separate Answer of Margaret T. Savage.	30
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REPLY TO FIRST SEPARATE DEFENCE:

The plaintiff has no knowledge or information sufficient to form a belief as to the matters of fact

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alleged by the defendant in the third and fourth paragraphs of her first separate defence.

REPLY TO SECOND SEPARATE DEFENCE:

10 The plaintiff denies that he volunteered gratuitously to act as the nominal purchaser of the interest specified in said defence, or that he rendered no services to or for the defendant.

REPLY TO SIXTH SEPARATE DEFENCE.:

20 The plaintiff denies that the defendant paid him in full or at all for services rendered by him under the agreement set forth in the complaint, or that the plaintiff received or accepted any payment in satisfaction and discharge thereof, or of any part thereof.

REPLY TO SEVENTH SEPARATE DEFENCE:

30 Plaintiff denies that the defendant delivered or paid to him, or that he accepted from the defendant any sums of money, or other property, in full accord and satisfaction of any or all of his claims and demands against the defendant by reason of the facts set forth in the complaint, or that he released or discharged the defendant from such claims and demands or any of them.

CARRICK & WORTENDYKE,
Attorneys of Plaintiff.

Exhibit "F."

Rahway, Oct. 3d, 1914.

Whereas differences have arisen between J. Blanchard Edgar and Edward S. Savage, and suit is now pending in the Supreme Court of the State of New Jersey wherein said Edgar claims the sum of Fifty Thousand Dollars and interest. It is the desire and purpose of both parties to settle and adjust all matters of difference and accounts between them. It is agreed that said Savage shall transfer to Edgar 250 shares of the Common stock of the Trembly Point Corporation and shall in addition thereto pay in cash Two Thousand Dollars and give his note payable to said Edgar for Two Thousand Dollars thirty days hereafter, in full settlement of all claims and Demands whatsoever. The said Edgar in consideration thereof agrees to discontinue said suit at once and pay all costs including his attorney's fees and Counsel Fees. The receipt of Two Thousand Dollars and the note above mentioned is hereby acknowledged. The stock to be delivered at 10 Wall on Oct. 5th, at 12 M. It being understood that said Savage his Heirs and Assigns shall have the option to purchase said Two hundred and Fifty shares of Trembly Point Corporation stock any time within six months from this day by paying the par value therefor, but no obligation is created by this agreement to repurchase said Stock.

(signed) J. BLANCHARD EDGAR.

Rule to Show Cause.

(Filed July 21, 1915.)

10 Upon reading and filing the bill of complaint in the above entitled cause, and the affidavit of the complainant Edward S. Savage, attached thereto, it is on this twenty-first day of July, nineteen hundred and fifteen, ordered that the defendant, John Blanchard Edgar, show cause before the Chancellor, at the Chancery Chambers in the City of Trenton, on Tuesday, the twenty-seventh day of July, nineteen hundred and fifteen, at ten thirty o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the said defendant should not be enjoined from further prosecuting his action now pending against the complainants in the Supreme Court of New Jersey, until the deter-
20 mination of this cause.

And it is further ordered that until the hearing and determination of this rule, the said defendant is restrained from taking any further proceedings in said action in the Supreme Court, except noticing the cause for trial.

30 And it is further ordered that a copy of this order, with a copy of said bill of complaint and the affidavit and exhibits attached thereto (which copies may be certified by the solicitor of complainants), be served on the said defendant personally or by leaving the same at his usual place of abode, within two days from the date hereof.

JOHN H. BACKES,
V. C.

E. R. WALKER,
C.

Affidavit of John Blanchard Edgar.

(Filed October 25, 1915.)

State of New Jersey, }
 County of Hudson, } ss.:

John Blanchard Edgar, of full age, being duly
 sworn according to law, on his oath deposes and
 says: 10

1. I am the defendant named in the bill of complaint filed by Edward S. Savage and Margaret T. Savage in the above entitled cause, now pending in the Court of Chancery. I am familiar with the allegations of the bill of complaint, and also with the statements of the supporting affidavit of Edward S. Savage, thereto annexed. It is not true, as stated in said bill of complaint and in the affidavit of Mr. Savage, that on October 3rd, 1914, a settlement of the action pending by me in the New Jersey Supreme Court against him, or in the alternative against his wife Margaret T. Savage, was reached. Terms of settlement were then discussed and partially agreed upon, but there remained to be produced certain evidence to satisfy me of the value of the stock which was to be given to me in pursuance of the tentative settlement, and we parted on October 3rd, to take up the matter again upon Monday, October 5th, at Mr. Savage's New York City office. It is not true that I ever had possession of the two hundred and fifty shares of stock of the Tremley Point Corporation, which are referred to in the bill of complaint and supporting affidavit. 20 30

2. The facts in regard to the alleged settlement are as follows: I was plaintiff in an action in 40

Affidavit of John Blanchard Edgar.

the New Jersey Supreme Court, the venue being laid in Union County, to recover fifty thousand dollars agreed on as compensation for certain services which I had rendered to the defendants, or one of them, in connection with the purchase of the stock of certain corporations. My action against the defendants was on the list for trial at the October term, 1914, of the Union County Circuit, which was to open on Tuesday, October 6th. On the morning of Saturday, October 3rd, Mr. Savage, with whom I had for many years prior to bringing my action, been on close terms of business and friendship, requested me to come to his office in the City of Rahway before I should go to New York City, stating that he desired to talk with me about some other interests which he had, not related to the action pending against him and Mrs. Savage. Pursuant to his request, I called at his office, and after discussing the business which was the ostensible object of his calling me to his office, he opened the subject of settlement of my suit pending against him. After negotiations, which are set out in detail in the depositions which were subsequently taken on his application to stay the proceedings in the Supreme Court, I agreed to accept Five thousand Dollars in cash, and stock of the Tremley Point Corporation for Twenty-five thousand Dollars, upon the statement of Mr. Savage that it was worth par, he reserving the right to buy back at par within six months, with the proviso that I should have the right, on the following Monday, October 5th, to satisfy myself by an inspection of certain appraisements which had been made of the property of the Tremley Point Corporation, as to the value of the stock so offered me in settlement. I received at that time, Mr. Sav-

Affidavit of John Blanchard Edgar.

age's check for Two thousand Dollars, and his note at thirty days for Two thousand Dollars, which I thought when he handed it to me was for Three thousand Dollars, and which I did not notice particularly until I was on the train on my way to New York. I had had no conference with or advice from my attorneys, nor did I confer with them in regard to the subject matter of the suit or settlement until after my second interview with Mr. Savage in New York on October 5th. 10

3. On October 5th, 1914, in accordance with our appointment, I went to Mr. Savage's New York office, and he produced from his safe a paper which he said was a certificate of the shares of stock, and I went with him to the office of the corporation where he handed the certificate of stock to the Secretary for transfer, and asked that the appraisals of the corporation's property be shown to me. He also then and there produced a paper which he asked me to sign, of which the following is a copy: 20

"October 5, 1914.

"Col. J. Blanchard Edgar, 30

Dear Sir:

Whereas differences have arisen between us, and on Saturday, October 3rd, 1914, we made a complete and full settlement of all matters of accounts and differences between us, and in adjustment of the same I gave you my check for Two thousand (\$2,000) Dollars, and my note for Two thousand (\$2,000) Dollars, payable in thirty (30) days; and did agree to transfer to you two hundred fifty 40

Affidavit of John Blanchard Edgar.

(250) shares of the common stock of the Tremley Point Corporation, on the fifth day of October, at twelve o'clock noon, at my office No. 10 Wall St., New York City,

10 Now that there may be no further differences between us, I want it understood before delivery of said two hundred fifty (250) shares of common stock of the Tremley Point Corporation, that said stock is delivered to you on the following statements and representations, and no others, to wit:

20 That the Tremley Point Corporation has a capital of One million seven hundred fifty thousand (\$1,750,000) Dollars, divided into Seven hundred and fifty thousand (\$750,000) Dollars of six (6) per cent. accumulative preferred stock, and One million (\$1,000,000) Dollars in common stock.

30 That the Company has indebtedness, mortgage and otherwise, amounting to approximately Four hundred thousand (\$400,000) Dollars, and that the assets of the Company consist solely of about five hundred seventeen (517) acres of land, of which about four hundred seventeen (417) is located at Tremley Point, Union County, New Jersey, having a frontage on the Staten Island Sound of about two thousand (2,000) feet, and three or four thousand feet on the Rahway River.

The property extends from the Staten Island Sound up to and across the tracks of the Long Branch division of the Central Railroad; and that the other hundred acres is located in Woodbridge Township, and binds on the Rahway River, containing about one hundred (100) acres.

40 That I make no representation as to the value of this property except the appraisals made by Floyd S. Corbin, and by the office of Joseph P. Day.

Affidavit of John Blanchard Edgar.

If you are willing to accept this stock, based solely upon these statements, you will kindly acknowledge the same with your signature.

Yours truly,

EDWARD S. SAVAGE."

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4. I noticed in looking over this paper, that he made no personal guaranty at all as to the value of the corporation's property, but merely relied on the appraisement made by Mr. Corbin, so I said to him that I would like to submit the paper to my counsel, and if he approved, I would be over for the stock on the following day. When I showed the paper to my attorneys, they advised me against continuing the transaction, and I never went back for the stock, nor did I receive it, nor was it ever tendered or offered to me. As soon as my attorneys Messrs. Carrick & Wortendyke, were acquainted with the circumstances of the alleged settlement, they notified Mr. Savage's attorneys, Messrs. McCarter & English, of my repudiation of the transaction.

20

5. It is true that my financial condition was such that I was compelled to use some portion of the Two thousand Dollars, cash, which was paid to me by Mr. Savage in the check of October 3rd, 1914, but I at first expected that he would satisfy me of the value of the stock offered and thus the settlement be carried through, and, in addition, I had certain negotiations then pending for the disposition of property interests, which I expected would put me in funds to return, if necessary, the Two thousand Dollars, but which, in reality, miscarried, and did not produce the results I antici-

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Affidavit of John Blanchard Edgar.

10 pated. My attorneys did, however, in January, 1915, before beginning the taking of depositions under the order to show cause obtained by Mr. Savage from the Supreme Court, tender back to the attorneys of Mr. Savage the sum of Two thousand Dollars, and also the two thousand dollar note, which were refused. I have never seen the certificate of stock referred to in Mr. Savage's affidavit, nor did I know that the certificate had actually been filled out in the name of Mrs. Edgar until it was testified to at the taking of the depositions in the Supreme Court.

20 6. On December 23, 1914, the complainants applied to the Supreme Court, by petition setting forth the alleged settlement made by them with me, claiming that my action was abated, and praying that an order might be entered discontinuing or forever staying said action, upon which petition an order was then made requiring me to show cause why the prayer of the petition should not be granted. Under this order depositions were taken, which are fully set out in the printed case before the New Jersey Court of Errors and Appeals, and which take up about 98 printed pages in said book.

30 As shown by said printed state of the case, on March 10th, 1915, the order to show cause was discharged by the Supreme Court, and the defendants Edward S. Savage and Margaret T. Savage were given twenty days after service upon their attorneys of a copy of the order, to file a supplemental answer or answers setting up the settlement claimed to have been made with me. Thereafter, an appeal was taken by the said Edward S. Savage and Margaret T. Savage from the order

40 of March 10th, 1915, to the Court of Errors and Appeals, and the case printed and prepared for

Affidavit of John Blanchard Edgar.

argument at the June term, 1915. When the case came on for argument on June 28, 1915, my attorneys, on notice to the attorneys of the complainants, moved to dismiss the appeal on the ground that the judicial action of the Supreme Court complained of was discretionary, not final, and not appealable, and the Court, thereupon, being of the opinion that the order from which the appeal was taken was not final, ordered that the appeal be dismissed. All of the matters which are here alleged by the complainants as ground for equitable relief were fully litigated and disposed of by the Supreme Court. 10

7. Since the dismissal of the appeal by the Court of Errors and Appeals, my attorneys have again offered to return to the attorneys for Mr. Savage the Two thousand Dollars paid me by his check on October 3, 1914, and also his promissory note at thirty days for Two thousand Dollars, delivered to me at the same time, but said offer was declined. I have never had possession of the shares of stock of the Tremley Point Corporation, referred to in the bill of complaint and the affidavit of Mr. Savage, nor have I, or my wife Harriet B. Edgar, ever claimed any right in or to the same. 20

30

JOHN BLANCHARD EDGAR.

Subscribed and sworn to before me
at Jersey City, this
24th day of September, A. D. 1915.

ELSIE B. MACCRACKEN,
Notary Public
of New Jersey.

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Stipulation.

(Filed November 5, 1915.)

10 It is hereby stipulated by and between the parties hereto that upon the argument on the return of the order to show cause heretofore made in the above entitled cause, both parties may make use of the printed state of the case in the Court of Errors and Appeals, on appeal from the Supreme Court, in which John Blanchard Edgar was plaintiff-respondent, and Edward S. Savage and Margaret T. Savage were defendants-appellants, without formal proof or other authentication, in order that it may appear to the Court what the issue was before the Court of Errors and Appeals and the Supreme Court, and the determination of said
20 Courts thereon.

C. McK. WHITTEMORE,
Solicitor of Complainants.

CARRICK & WORTENDYKE,
Solicitors of Defendant.

30 (The state of the case referred to in the above stipulation is printed *infra*, beginning page 53.)

Order for Injunction.

(Filed October 28, 1915.)

The order to show cause heretofore granted in the above stated cause coming on to be heard in
40 the presence of Messrs. Carrick & Wortendyke,

Subpoena to Answer.

solicitors of the defendant, and Robert H. McCarter, Esq., and Clark McK. Whittemore, Solicitors for and of counsel with the complainants; and the bill of complaint and affidavit attached thereto, and the affidavits and proofs submitted on the part of the defendant having been read, and the same, together with the arguments of counsel, having been considered, and it appearing to the Court that the said rule to show cause should be made absolute 10

IT IS, on this twenty-eighth day of October, nineteen hundred and fifteen, ordered that said rule to show cause be and the same is hereby made absolute, and that the said John Blanchard Edgar be and he hereby is enjoined and restrained from further prosecuting his action at law now pending against the said complainants in the New Jersey Supreme Court to recover the sum of fifty thousand dollars upon the cause of action set forth in said bill of complaint and affidavits, until he, the said John Blanchard Edgar shall have fully answered the bill of complaint, and this Court shall make other order to the contrary. 20

Respectfully advised,

E. R. WALKER,
C. 30

JOHN H. BACKES,
V. C.

Subpoena to Answer.

NEW JERSEY, to wit: The State of New
(Seal) Jersey to John Blanchard Edgar,

GREETING: WHEREAS a bill of complaint has lately been exhibited against you in our Court of Chancery of Edward S. Savage and 40

Notice to Strike Out.

Margaret T. Savage, to be relieved touching the matters therein contained,

10 THEREFORE, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said court at Trenton, on or before the expiration of twenty days from and after the fifth day of November, 1915, and in default thereof such order or decree will be made against you as the Court shall think equitable and just.

WITNESS, his Honor Edwin Robert Walker, Chancellor of our said State, at Trenton, the twenty-seventh day of November, in the year of our Lord one thousand nine hundred and fifteen.

20 C. McK. WHITTEMORE,
Sol'r.

ROBERT H. McADAMS,
Clerk.

Service acknowledged October 28, 1915.

CARRICK & WORTENDYKE,
Solicitors of Defendant.

30

Notice to Strike Out.

(Filed November 9, 1915.)

TO CLARK McK. WHITTEMORE, ESQUIRE, SOLICITOR
OF COMPLAINANTS:

PLEASE TAKE NOTICE that on Tuesday, the
9th day of November, next, at half-past ten o'clock
40 in the forenoon, or as soon thereafter as counsel

Order Denying Motion to Strike Out.

can be heard, at the State House in the City of Trenton, we shall apply to the Chancellor for an order striking out the bill of complaint in the above entitled cause, upon the following grounds:

1. The bill does not allege any ground for equitable relief. 10

2. The bill shows that the subject matter upon which relief is sought, had, prior to the filing of the bill, been submitted to the New Jersey Supreme Court in an action there pending by the defendant against the complainants, and after the merits had been inquired into, the Supreme Court had refused to grant to the complainants the same relief which is sought by the bill, which determination of the Supreme Court precludes the complainants from maintaining their bill. 20

Dated, October 29, 1915.

CARRICK & WORTENDYKE,
Solicitors of Defendant.

Service of notice of which the within is a true copy is hereby acknowledged this 30th day of October, A. D. 1915. 30

C. McK. WHITTEMORE,
Solicitor of Complainants.

Order Denying Motion to Strike Out.

(Filed November 10, 1915.)

This matter being opened to the Court by Messrs. Carrick & Wortendyke, solicitors and of 40

Vice Chancellor's Conclusions.

10 counsel with the defendant, and it appearing that the defendant has heretofore served notice upon the solicitor of the complainants of his application to strike out the bill of complaint in the above entitled cause, upon the grounds specified in said notice; and upon hearing counsel in behalf of said motion, and in opposition thereto, and the Court having considered the same,

It is thereupon, on this ninth day of November, nineteen hundred and fifteen, ordered that said application be, and the same is hereby denied.

Respectfully advised,

E. R. WALKER,
C.

JOHN H. BACKES,
V. C.

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Vice Chancellor's Conclusions.

(Filed January , 1916.)

On Motion for Preliminary Injunction and Motion to Strike out Bill.

30 For the Complainants: MESSRS. CLARK MCK. WHITTEMORE; ROBERT H. MCCARTER.

For the Defendant: MESSRS. CARRICK & WORTENDYKE.

BACKES, V. C.

40 Upon the argument of the order to show cause why the defendant should not be restrained from prosecuting his action at law until a final determination of this suit, the defendant raised but three questions in opposition: (1) that the sub-

Vice Chancellor's Conclusions.

ject matter has been litigated and determined in the Supreme Court; (2) this Court will not under the circumstances assume jurisdiction of the controversy; and (3) that the bill of complaint being met by the defendant's affidavit, no preliminary injunction can go.

The facts disclosed by the affidavits are these: Mr. Edgar had an action pending in the Supreme Court to recover \$50,000 from Mr. Savage and his wife, which they agreed to adjust, and which agreement they reduced to writing, as follows:

10

"Rahway, Oct. 3rd, 1914.

Whereas differences have arisen between J. Blanchard Edgar and Edward S. Savage, and suit is now pending in the Supreme Court of the State of New Jersey wherein said Edgar claims the sum of fifty thousand dollars and interest. It is the desire and purpose of both parties to settle and adjust all matters of difference and accounts between them. It is agreed that said Savage shall transfer to Edgar 250 shares of the common stock of the Trembly Point Corporation and shall in addition thereto pay in cash two thousand dollars and give his note payable to said Edgar for two thousand dollars thirty days hereafter, in full settlement of all claims and demands whatsoever. The said Edgar in consideration thereof agrees to discontinue said suit at once and pay all costs including his attorney's fees and counsel fees. The receipt of two thousand dollars and the note above mentioned is hereby acknowledged. The stock to be delivered at 10 Wall on Oct. 5th, at 12 M. It being understood that said Savage his heirs

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40

Vice Chancellor's Conclusions.

and assigns shall have the option to purchase said two hundred and fifty shares of Trembly Point Corporation stock at any time within six months from this day by paying the par value therefor, but no obligation is created by this agreement to repurchase said stock.

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(Signed) J. Blanchard Edgar."

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On the day of adjustment Savage paid to Edgar \$2,000 by check; and gave him his note for a like amount, payable in thirty days, and the following Monday morning the two met by appointment in Savage's New York office to pass the shares of stock. Accompanied by Edgar, Savage took a certificate of 250 shares of the common stock of the Trembly Point Corporation to the company's transfer office, and endorsed in blank, delivered it to the secretary of the company, with directions to transfer it to Edgar, and upon request of Edgar directed it to be transferred to Harriet B. Edgar, his wife. Edgar promised to call for the new certificate the next day, which he failed to do, and set up in justification that his agreement was for \$5,000 in cash; that the capital stock was represented to be worth par, for the assurance of which he reserved to himself the right to inspect certain appraisements of the property of the company; that he took the check under a mistaken notion that it was for \$3,000; that at the time of the intended transfer Savage tendered to him, for signature, an acquittance, which, he said he would like to first submit to counsel, who, upon examination, advised against continuing the transaction; that he did not return for the stock, nor did he receive it, nor was it ever tendered to him. He, however kept the note and used the proceeds of the check.

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In January, 1915, his attorneys offered to return \$2,000 and the note.

Vice Chancellor's Conclusions.

The case thus made out is one of accord and satisfaction unexecuted, which may be specifically enforced in equity on the principle laid down in *Headley vs. Leavitt*, 65 N. J. Eq., 748; S. C., 68 N. J. Eq., 591; *Trenton Street Ry. Co. vs. Lawlor* 74 N. J. Eq., 828. This was not controverted, and it was conceded upon the argument and in the brief of counsel, that the complainants might properly have sought relief in this Court if they had originally filed a bill. It appears that after the defendant repudiated his contract, he gave notice of trial of his action at law, and threatened to proceed with it, when the complainants applied to the Supreme Court to exercise its equity power to enforce the contract of settlement and to dismiss the suit, which that Court declined to do. The point the defendant made is that "having been fully heard and dismissed from that Court, the complainants will not be permitted to again litigate the same subject matter in this Court, even though the grounds upon which they seek relief be of an equitable nature;" viz.: *res judicata*. An examination of the proceedings and the *per curiam* opinion of the Supreme Court disclose that the Court did not determine the matter. It is the very thing the Court refused to do, and on the ground that because the proofs were conflicting, the issue of fact, whether there was or was not a satisfaction, ought not to be decided upon the depositions, but should (if it was triable at law) be pleaded in defense and submitted to a jury, together with the other issues in the case. The privilege given to the complainants to plead the settlement, was not in the nature of an adjudication that the issue could and must be tried at law, and was not intended as a bar to an appeal to Chancery. The course directed left the complainants in precisely

- the same position they were in before they applied to the Supreme Court to control the proceedings, except that they had the Court's permission to set up the defense if it were available to them at law. The complainants conceived that they could not make out a perfect legal defense, so they came here with their equities not to again litigate matters decided by the Supreme Court, or to review its findings, but to obtain relief which this Court alone can give. *Holmes vs. Steele*, 28 N. J. Eq., 173; *Vaughn vs. Johnson*, 9 N. J. Eq., 173; *Reeves vs. Cooper*, 12 N. J. Eq., 223, upon which the defendant's counsel relied, do not sustain their position. In each of these cases, the grounds for relief were all of things purely legal, of which the law Court had jurisdiction and had determined.
- The distinction in remedies is plainly pointed out in the case first cited, where it was held that: "A suitor who comes to a court of equity asking that he may have the benefit of a just defence which a court of law cannot hear, * * * presents a case exclusively the subject matter of equity cognizance; and he has, therefore, a right to have his adversary enjoined until the validity of his claim to relief has been examined; but the doctrine is perfectly well settled, that this court will not, on the application of a defendant in a judgment at law who has had a fair opportunity to be heard upon a defence over which the Court pronouncing the judgment had full jurisdiction, enjoin the enforcement of the judgment, simply on the ground that it is unjust, even if it is convinced the court passing judgment committed an error in law." And resort may be had to equity even after the law court has investigated and overruled the equitable defence. *The Commercial Union Assurance Co. vs. The N. J. Rubber Co.*, 64

Vice Chancellor's Conclusions.

N. J. Eq., 338; Headley vs. Leavitt, 65 N. J. Eq., 748. Upon the case as presented, the complainants were entitled to a preliminary injunction.

Two weeks after the injunction was granted, the defendant moved to strike out the bill, which was denied. The motion was not discussed, counsel submitting it upon their previous argument; the defendant's counsel stating that they desired a ruling for the purpose of reviewing it with an appeal to be taken from the order granting the injunction. I now observe that one of the grounds in the notice of the motion to strike out is that "the bill does not allege any ground for equitable relief." If, in the broad sweep of this assignment, it was meant to specify that the technical verbiage of the bill shows a complete accord and satisfaction, cognizable at law, it was not brought to my attention, and the language of the bill was not so understood upon the argument. My interpretation of it, although at the time not seriously considered, and that of counsel in the discussion was, that Savage had delivered the certificate of capital stock for transfer as directed by Edgar, but that it had not been in fact accepted, and for the reasons already stated. In this view, the bill makes out an accord and satisfaction, unperformed, and enforceable in equity. The allegation that that the settlement made "was positive and final and was accepted by the said J. Blanchard Edgar, together with the property paid and delivered pursuant to the terms of the same as a full compromise settlement," is to be read in connection with later allegations and regarded as an averment that on their part, the complainants had fully carried out and performed the agreement, but that the defendant had refused.

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Notice of Appeal.

(Filed November 20, 1915.)

10 The defendant hereby appeals from the order made in the above entitled cause on the 28th day of October, 1915, whereby he is enjoined and restrained from prosecuting his action at law now pending against the complainants in the New Jersey Supreme Court, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

20 The defendant also hereby appeals from the order made in the above entitled cause on the 9th day of November, 1915, which denies the defendant's application to strike out the bill of complaint therein, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, November 15, 1915.

CARRICK & WORTENDYKE,
Solicitors and of Counsel with Defendant.

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

30 CHARLES L. CARRICK,
Of Counsel with Defendant.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

EDWARD S. SAVAGE and MARGARET
T. SAVAGE,
Complainants-Respondents,
and
JOHN BLANCHARD EDGAR,
Defendant-Appellant.

On Appeal
from Chancery
Orders.

10

Petition of Appeal.

(Filed November 26, 1915.)

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

The petition of John Blanchard Edgar, the appellant in the above entitled cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the twenty-eighth day of October, nineteen hundred and fifteen, wherein the said Edward S. Savage and Margaret T. Savage were complainants, and the said John Blanchard Edgar, was defendant, in this respect: that the said order made absolute the order to show cause theretofore made by said court, and enjoined and restrained the appellant from further prosecuting his action at law pending against the respondents in the New Jersey Supreme Court to recover the sum of fifty thousand dollars upon the cause of action set forth in the bill of complaint and affidavits, until the appellant should have fully answered the bill of complaint, and the Court of Chancery should make order to the contrary. And your petitioner humbly appeals from the whole of said order, upon the ground that the same is erroneous, for that the rule to show cause should have

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Petition of Appeal.

been discharged, and the appellant should not have been enjoined and restrained as aforesaid.

10 And your petitioner likewise finds himself aggrieved by another order made in the Court of Chancery, bearing date the ninth day of November, nineteen hundred and fifteen, in the same cause, in this respect: that said order denied the appel-
20 lant's application to strike out the bill of complaint upon the ground (1) that said bill does not allege any ground for equitable relief, and upon the further ground (2) that said bill shows that the subject matter upon which relief is sought had, prior to the filing of the bill, been submitted to the New Jersey Supreme Court in an action there pending by the appellant against the respondents, and after the merits had been inquired into, the Supreme Court had refused to grant to the re-
spondents the same relief which is sought by their bill of complaint. And your petitioner humbly appeals from the whole of said order, upon the ground that the same is erroneous, for that the Court of Chancery should have granted the appel-
lant's application, and should have struck out the bill of complaint for the reasons aforesaid.

30 Your petitioner therefore prays that both of said orders of the Chancellor may be wholly reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

CARRICK & WORTENDYKE,
Solicitors of Appellant.

CHARLES L. CARRICK,
Of counsel with Appellant.

40 Service of a copy of the within petition of appeal is hereby acknowledged this November 23rd, 1915.

C. McK. WHITTEMORE,
Solicitor of Respondents.

Answer to Petition of Appeal.

(Filed January , 1916.)

The answer of the above named respondents (complainants) to the petition of appeal of the above named appellant (defendant).

These respondents not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless say and admit that an order was on the 28th day of October, last past, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. 10

And for further answer to the said petition of appeal these respondents say and admit that another order was on the 9th day of November, 1915, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form of said other order, these respondents pray to refer thereto when the same shall be produced. 20

And these respondents are advised and believe that the said two orders of the Court of Chancery in said cause are each and both of them agreeable to equity and they pray that the same may be affirmed with costs to be adjudged to these respondents. 30

C. McK. WHITEMORE,
Solicitor for and of counsel with the
the respondents, Edward S. Savage
and Margaret T. Savage.

ROBERT H. McCARTER,
Of counsel with Respondents.

Consent is hereby given to the filing of the within answer as in time.

CARRICK & WORTENDYKE, 40
Solicitors of Appellant.
January 14, 1916.

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Notice of Appeal.

Filed March 20, 1915.

NEW JERSEY SUPREME COURT.

JOHN BLANCHARD EDGAR,
Plaintiff,

vs.

EDWARD S. SAVAGE and
MARGARET T. SAVAGE,
Defendants.

Action at Law. 10
Notice of
Appeal.

SIRS:

TAKE NOTICE that the defendants appeal to the New Jersey Court of Errors and Appeals from the order of the above stated Court, except the last paragraph thereof, entered the tenth day of March, 1915, discharging the order to show cause, because the Court erred in discharging the said order to show cause instead of making the said order to show cause absolute. 20

Dated, March 17th, 1915.

Yours respectfully,

MCCARTER & ENGLISH,
Attorneys of Defendant, 30
Edward S. Savage.

C. McK. WHITEMORE,
Attorney of Defendant,
Margaret T. Savage.

To

MESSRS. CARRICK & WORTENDYKE,
Plaintiff's Attorneys.

1915, protesting however, that such order is not appealable. 40

CARRICK & WORTENDYKE,
Plaintiff's Attorneys.

Petition.

NEW JERSEY SUPREME COURT,
UNION COUNTY.

10	JOHN BLANCHARD EDGAR, <i>Plaintiff,</i>	}	<i>Action at Law. Petition.</i>
	vs.		
20	EDWARD S. SAVAGE and MARGARET T. SAVAGE, his wife, <i>Defendants.</i>		

The petition of Edward S. Savage, and Margaret T. Savage, respectfully shows:

20 1. That the above action was commenced in this court on the tenth of September, 1913, against the defendants above named, to recover the sum of \$50,000.00, alleged to be due from the defendants to the plaintiff, upon the theory that the plaintiff had rendered the defendant services in the sale of certain stocks of the New Jersey Terminal Railroad Company, Carteret Construction Company, Carteret Railroad Company, and the Sound Shore Front Improvement Company. Annexed hereto as Exhibit

30 A and made a part hereof is a copy of the complaint in said cause, to which your petitioners beg leave to refer.

2. These defendants in due course filed answers denying any liability whatever to said plaintiff, and the case was regularly noticed for trial for the January Term, 1914, but not tried; for the May Term, 1914, and not tried, and for the October Term, 1914, but not tried.

40 3. On the 3rd of October 1914, your petitioner, Edward S. Savage, met the plaintiff at Rahway, and

Petition.

after some negotiation concluded an adjustment and settlement of the differences between the plaintiff and your petitioners resulting in the signature of the following document by the said plaintiff:

“Rahway, Oct. 3d, 1914.

10

Whereas differences have arisen between J. Blanchard Edgar and Edward S. Savage, and suit is now pending in the Supreme Court of the State of New Jersey, wherein said Edgar claims the Sum of Fifty Thousand Dollars and interest. It is the desire and purpose of both parties to settle and adjust all matters of difference and accounts between them. It is agreed that said Savage shall transfer to Edgar 250 shares of the Common Stock of the Trembly Point Corporation, and shall in addition thereto pay in cash Two Thousand Dollars and give his note payable to said Edgar for Two Thousand Dollars thirty days hereafter, in full settlement of all claims and demands whatsoever. The said Edgar in consideration thereof agrees to discontinue said suit at once and pay all costs including his Attorney's fees and Counsel fees. The receipt of Two Thousand Dollars and the note above mentioned is hereby acknowledged. The stock to be delivered at 10 Wall on October 5th, at 12 M. It being understood that said Savage his heirs or assigns shall have the option to purchase said Two hundred and fifty shares of Trembly Point Corporation stock any time within six months from this day by paying the par value therefor, but no obligation is created by this agreement to repurchase said stock.

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(Signed) “J. BLANCHARD EDGAR.”

Petition.

At the same time the check of your petitioner, Edward S. Savage, for \$2,000.00, was given to and accepted by the plaintiff, and the promissory note of said Edward S. Savage for thirty days for the sum of \$2,000.00 was made, executed and delivered to the plaintiff herein; and an arrangement was made by which the plaintiff was to meet said Savage at Savage's office in the City of New York, on the 5th of October for the purpose of getting from said Savage the stock provided for in said agreement of settlement.

4. The plaintiff and your petitioner, Edward S. Savage, met at Savage's office, and a certificate for two hundred and fifty shares of the stock of the Trembly Point Corporation was taken by your petitioner, Edward S. Savage, from his safe and endorsed in blank and shown to Colonel Edgar. It was then agreed between Messrs. Savage and Edgar that they would go to 27 Pine Street, the transfer office, and have the same transferred to Colonel Edgar. Accordingly Messrs. Savage and Edgar went to the office at 27 Pine Street, and Mr. Savage delivered the stock to the Secretary for transfer, and requested him to transfer it to J. Blanchard Edgar, Avenel, New Jersey, whereupon the plaintiff, Colonel Edgar, suggested to Mr. Savage that he would prefer to have the stock transferred to his wife, Hattie. Accordingly Mr. Savage, the petitioner, directed the transfer agent to transfer the two hundred and fifty shares to Harriet B. Edgar in the place of Colonel J. Blanchard Edgar. Whereupon Colonel Edgar stated to the Secretary and transfer agent that he would call the next day for the stock.

5. Colonel Edgar then left the office and your petitioners are informed that he has never called for the stock. He has, however, used the proceeds of the check and still holds the said note, notwithstanding

Petition.

which the attorneys of your petitioners received on the 17th day of December, 1914, a notice of trial of the above cause, before such Circuit Judge as shall hold the Supreme Court issues in the Union County Circuit, at the January Term, 1915.

Your petitioners allege that by virtue of said settlement the said action has abated, and your petitioners therefore pray that an order may be entered discontinuing or forever staying said action, and that the plaintiff in the meantime, and until the further order of this Court, may be restrained from further prosecuting said action.

10

McCARTER & ENGLISH,
Attorneys of Petitioner,
Edward S. Savage.

20

C. McK. WHITTEMORE,
Attorney of Petitioner,
Margaret T. Savage.

30

40

Affidavit of Edward S. Savage.

NEW JERSEY SUPREME COURT,

UNION COUNTY.

10 JOHN BLANCHARD EDGAR,
Plaintiff;

vs.

EDWARD S. SAVAGE and
MARGARET T. SAVAGE,
Defendants.

Action at Law.
Affidavit.

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

20 EDWARD S. SAVAGE, of full age, being duly
sworn according to law on his oath says, I am one
of the petitioners above named. I have read the fore-
going petition. The facts therein stated are true. At
the time of the adjustment therein referred to, not
only did Colonel Edgar sign the document correctly
copied in the foregoing petition, but he accepted my
check for \$2,000.00, and the check has come back from
the bank where he deposited it and received the pro-
ceeds, but he also accepted and still holds my note
30 for \$2,000.00. He agreed at the same time to meet
me in New York the following Monday, October 5th,
1914, and procure the stock; and said petition cor-
rectly sets out what occurred at my office, and at the
office of Richard M. Montgomery, at 27 Pine Street,
New York City.

EDWARD S. SAVAGE.

Sworn to and subscribed at Newark, N. J.,
this 21st day of December, A. D. 1914,
before me:

40 DANIEL B. SMITH,
(L. S.) Notary Public for New Jersey.

*Exhibit A.***Exhibit A.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JOHN BLANCHARD EDGAR,
Plaintiff,

vs.

EDWARD S. SAVAGE and
 MARGARET T. SAVAGE,
Defendants.

10

Action at Law.
Complaint.

STATE OF NEW JERSEY, }
 UNION COUNTY. } ss:

20

The plaintiff, residing at Avenel, in the County of Middlesex and State of New Jersey, demands of the defendant, Edward S. Savage, residing at Rahway, in the County of Union in said State, the sum of fifty thousand dollars (\$50,000.00) with interest from the first day of September, A. D., 1911, which sum is due from the said defendant because of the facts set forth in the following six paragraphs:

1. On or about July 1, 1905, the defendant Edward S. Savage agreed with the plaintiff that if he the said plaintiff would enter into a contract with one John W. Houston, of the City of New York, for the purchase by the plaintiff of all the interest of said John W. Houston in four certain corporations of New Jersey, to wit: The New Jersey Terminal Railroad Company, the Carteret Construction Company, the Carteret Realty Company and the Sound Shore Front Improvement Company, for a sum which should be agreeable to, and be approved by, the said defendant Edward S. Savage, and should continue

30

40

Exhibit A.

10 to hold all interest under such contract and under all
contracts, agreements, deeds or other instruments
which should thereafter be made to vest the title
thereto in the plaintiff for the use and benefit of the
said defendant Edward S. Savage, and deal with and
dispose of the same as he, the said Edward S. Savage
should direct, then the said defendant Edward S. Sa-
vage should pay unto the plaintiff the sum of
\$50,000.00, when he, said Edward S. Savage, or the
said four corporations in which, on the making of the
aforesaid contract by the plaintiff with the said John
W. Houston, the said Edward S. Savage would own
a controlling interest, should have disposed of the
property owned by them, or of so much thereof as
20 should enable the defendant Edward S. Savage to
pay said sum of \$50,000.00 to the plaintiff.

2. In pursuance of said agreement or understand-
ing made between the plaintiff and said defendant
Edward S. Savage, the plaintiff did, on or about
July 10, 1905, enter into a written contract with the
said John W. Houston, by which the said John W.
Houston agreed to sell to the plaintiff all his inter-
est in the said corporations above named, for the
sum of \$200,000.00, to be paid to said John W. Hous-
ton in the manner provided for under said contract;
30 that the price at which the said interests were to be
conveyed to the plaintiff and all the terms of said
contract, were expressly assented to and approved
by the said defendant, Edward S. Savage, before the
plaintiff entered into said agreement with the said
John W. Houston.

3. Thereafter, at the request and direction of the
said defendant, Edward S. Savage, the plaintiff, by
writing under his hand and seal, assigned, trans-
ferred and set over all his right under the said con-
tract of July 10, 1905, made between the plaintiff and
said John W. Houston, unto the defendant Margaret
T. Savage, the wife of the defendant, Edward S. Sa-
40

Exhibit A.

vage; but at the direction of the said Edward S. Savage the fact of said transfer was withheld from the said John W. Houston, and from all others interested in the said corporations, and the written assignment of the plaintiff's interest in said contract to said Margaret T. Savage was not placed upon record, but by the direction of said Edward S. Savage, and to further his business plans and interests, was kept secret and undisclosed by the plaintiff.

10

4. The plaintiff thereafter continued as the ostensible owner of all rights under said contract of July 10, 1905, with said John W. Houston, and all subsequent negotiations for the performance of said contract of July 10, 1905 (which was thereafter modified by certain supplemental agreements made by and between the plaintiff and said John W. Houston) and all business connected with the performance of said contract, with the said John W. Houston, and the modifications thereof, were carried on by the plaintiff after constant conferences with and directions by the said Edward S. Savage, and in all things connected with the performance of said contract, plaintiff followed out and observed the directions of the said Edward S. Savage.

20

5. On or about the 10th day of July, A. D. 1909, the performance of the said contract with the said John W. Houston was completed under the direction of said Edward S. Savage, by the payment to said John W. Houston of the balance due under the contract, and all the property, rights, and interest of the said John W. Houston, of, in and to the four corporations above named were thereupon transferred to said Edward S. Savage or his nominee, and all of the evidences of ownership thereof which the said John W. Houston then possessed were delivered over unto the said Edward S. Savage, or his nominee in

30

40

Exhibit A.

accordance with the directions of the defendant Edward S. Savage.

10 6. The plaintiff is informed and believes the fact to be, and so alleges, that the said Edward S. Savage thereafter disposed of all his interest in the said property sold by the said John W. Houston to the plaintiff in and by the agreement of July 10, 1905, either immediately or through the action of the four corporations above named, in which corporation by reason of the execution of the contract of July 10, 1905, made by and between the said John W. Houston and plaintiff, Edward S. Savage held a controlling interest, or of so much thereof as would enable him to pay to plaintiff the compensation agreed upon, and thereupon the plaintiff became entitled to have and demand of and from the said Edward S. Savage the said sum of \$50,000.00 with interest from the first day of September, 1911, until the same shall be paid to him.

20 As a further and separate cause of action against the defendant Margaret T. Savage, whose residence is with said Edward S. Savage, and who is joined with him in accordance with the provisions of The Practice Act (1912), because the separate causes of action against the defendants have a common question of law and fact, and arose out of the same series of transaction, the plaintiff demands of said defendant Margaret T. Savage the sum of \$50,000.00, with interest from the first day of September, A. D. 1911, which sum is due from the said defendant because of the fact set forth in the following paragraphs, numbered 7 to 12, inclusive:

30 7. On or about July 1, 1905, the defendant Margaret T. Savage (acting by and through her agent Edward S. Savage) agreed with the plaintiff that if he, the said plaintiff, would enter into a contract with one John W. Houston for the purchase by the plaintiff of all the interest of said John W. Houston in

Exhibit A.

the four certain corporations of New Jersey, particularly mentioned in paragraph 1 above set forth, for a sum which should be agreeable to and be approved by said defendant Margaret T. Savage, and should continue to hold all the interests under such contract, and under all contracts, agreements, deeds or other instruments which should thereafter be made, to vest the title thereto in the plaintiff for the use and benefit of the said defendant, Margaret T. Savage, and deal with and dispose of the same as she, the said Margaret T. Savage, acting through her agent, the said Edward S. Savage, should direct, then the said defendant, Margaret T. Savage, should pay unto the plaintiff the sum of \$50,000.00, when she, the said Margaret T. Savage, or the said four corporations in which on the making of the aforesaid contract by the plaintiff with the said John W. Houston, the said Margaret T. Savage would own a controlling interest, should have disposed of the property owned by them, or of so much thereof as should enable the defendant Margaret T. Savage to pay said sum of \$50,000.00 to the plaintiff.

8. In pursuance of the said agreement or understanding made between the plaintiff and said defendant Margaret T. Savage (acting by her agent Edward S. Savage) the plaintiff did, on or about July 10, 1905, enter into a written contract with the said John W. Houston, by which the said John W. Houston agreed to sell to the plaintiff all his interest in the said four corporations above named for the sum of \$200,000.00, to be paid to said John W. Houston in the manner provided for under said contract; that the price at which the said interests were to be conveyed to the plaintiff, and all the terms of said contract, were expressly assented to and approved by the said defendant Margaret T. Savage (acting by Edward S. Savage, her agent) before the plaintiff entered into said agreement with the said John W. Houston.

Exhibit A.

9. Thereafter, at the request and direction of the said defendant Margaret T. Savage (acting by her agent Edward S. Savage), the plaintiff, by writing under his hand and seal, assigned, transferred and set over all his rights under the said contract of July 10, 1905, made between the plaintiff and the said John W. Houston unto the defendant Margaret T. Savage, wife of Edward S. Savage; but at the direction of the said Margaret T. Savage (acting through her agent Edward S. Savage) the fact of said transfer was withheld from the said John W. Houston, and from all others interested in the said corporation, and the written assignment of the plaintiff's interest in said contract to said Margaret T. Savage was not placed upon record, but by the direction of said Margaret T. Savage (acting through her agent Edward S. Savage) and to further her business plans and interests, was kept secret and undisclosed by the plaintiff.

10. The plaintiff thereafter continued as the ostensible owner of all rights under said contract of July 10, 1905, with said John W. Houston, and all subsequent negotiations for the performance of said contract of July 10, 1905 (which was thereafter modified by certain supplemental agreements made by and between the plaintiff and said John W. Houston) and all business connected with the performance of said contract, plaintiff followed out and observed the directions of said Margaret T. Savage (acting through her agent Edward S. Savage).

11. On or about the tenth day of July, A. D. 1909, plaintiff completed his performance of the said contract with the said John W. Houston, under the direction of the said Margaret T. Savage (acting through her agent Edward S. Savage) by the payment to said John W. Houston of the balance due under the contract, and all the property, rights and

Exhibit A.

interest of the said John W. Houston, of, in and to the four corporations above named were thereupon transferred to said Margaret T. Savage and all of the evidences of ownership thereof, which the said John W. Houston then possessed were delivered over unto the said Margaret T. Savage in accordance with the directions of the defendant Margaret T. Savage (acting through her agent Edward S. Savage).

12. The plaintiff is informed and believes the fact to be, and so alleges, that the said Margaret T. Savage (acting through her agent Edward S. Savage) thereafter disposed of all her interest in the said property so sold by the said John W. Houston to the plaintiff in and by the agreement of July 10, 1905, either immediately or through the action of the four corporations above named, in which corporations by reason of the execution of the contract of July 10, 1905, made by and between the said John W. Houston and plaintiff, said Margaret T. Savage held a controlling interest, or of so much thereof as would enable her to pay to plaintiff the compensation agreed upon, and thereupon the plaintiff became entitled to have and demand from the said Margaret T. Savage, the said sum of \$50,000.00, with interest from the first day of September, 1911, until the same shall be paid to him.

Plaintiff therefore demands of the defendant Edward S. Savage upon the first cause of action set forth in paragraphs 1 to 6 inclusive, the sum of fifty thousand dollars (\$50,000.00), with interest from September 1, 1911, or, in the alternative, demands of the defendant, Margaret T. Savage upon the second cause of action set forth in paragraphs 7 to 12 inclusive, above, the sum of fifty thousand dollars (\$50,000.00), with interest from September 1, 1911.

CARRICK & WORTENDYKE,

Plaintiff's Attorneys.

Order.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10

JOHN BLANCHARD EDGAR,
Plaintiff,

vs.

EDWARD S. SAVAGE and MAR-
GARET T. SAVAGE, his wife,
Defendants.

*Action at Law.
Order.*

20 Upon reading the duly verified petition of the de-
fendants in the above entitled cause,

It is on this 23rd day of December, 1914, ordered,
that the plaintiff show cause before the Supreme
Court at Trenton, on the sixteenth day of February
nineteen hundred and fifteen, at ten o'clock in the
forenoon, why the prayer of said petition should not
be granted, and in the meantime and until other-
wise directed it is ordered that all other proceedings
in said cause be stayed.

30 And it is further ordered, that each side may have
leave to take depositions on five days' notice, to be
read upon the return of this rule.

Let this rule be entered.

J. J. BERGEN,
Judge Supreme Court.

Entered, December 23, 1904, on motion of
McCARTER & ENGLISH,
Attorneys.

Edward S. Savage, direct.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JOHN BLANCHARD EDGAR,

Plaintiff.

vs.

EDWARD S. SAVAGE and MAR-

GARET T. SAVAGE, his wife,

Defendants.

10

*On Rule to
Show Cause.*

DEPOSITIONS taken in the above entitled cause pursuant to Notice hereto annexed, before Nicholas W. Bindseil, a Supreme Court Commissioner, at the office of Messrs. McCarter & English, No. 765 Broad Street, Newark, New Jersey, on Saturday, January 16, 1915, at ten o'clock in the forenoon.

20

APPEARANCES:

Mr. Robert H. McCarter and Mr. Clark McK. Whittemore, attorneys for Petitioners.

Mr. Charles L. Carrick for John Blanchard Edgar, Plaintiff.

It is stipulated and agreed by and between the attorneys for the respective parties that the testimony of the witnesses may be taken down in shorthand by the Commissioner and afterwards reduced to typewriting, the signatures of the witnesses to their said testimony being waived.

30

EDWARD S. SAVAGE, being duly sworn according to law, on behalf of Petitioners, on his oath says:

DIRECT EXAMINATION by *Mr. McCarter.*

Q. You are a member of the bar and live at Rahway, Mr. Savage?

40

A. Yes, sir.

Edward S. Savage, direct.

Q. And are the petitioner in this petition?

A. Yes.

Q. And one of the defendants in the suit of Colonel Edgar?

10 A. Yes, sir.

Q. Do you remember having a conversation with Mr. Edgar on the morning of October 3, 1914, touching the litigation that was then in progress between you and him and your wife?

A. Yes, sir.

Q. Please state what occurred, showing how it came about.

A. In September previous, Colonel Edgar, who was the president of the Carteret Realty Company, of which I am treasurer, notified me that somebody representing the Pipe Line Company—an oil company—wanted to put a pipe across some property owned by the Carteret Company, and had been to see him about it, and he referred the man to me. A little later, after that information, I met Colonel Edgar at the depot and said that the "Pipe Line man was just here talking to me this morning and he is very anxious about this thing," but, he says, "He has gone now, and I don't know where he is."
20 I got a third communication from Colonel Edgar advising me that the Pipe Line man had been to see him again, and on Saturday, the third day of October, I called Colonel Edgar up on the telephone and asked him if he could designate where it was proposed to put this pipe line. He said he thought he could. I said, "if you will come up to my office in the Rahway Bank Building this morning, I would like to show you the map, and have you designate where this pipe line is to go." I asked him if he
30 I couldn't come up on the half past eight trolley, as I wanted to get away that morning early. Promptly at half past eight Colonel Edgar came to my office. He then informed me that the Pipe Line man offered
40

Edward S. Savage, direct.

not \$5 a foot, but \$5 a rod, and we both agreed that that was too low for the property, and after discussing its location and what \$5 a rod would amount to, I said to him, "Colonel, we have got a very unpleasant litigation; whichever way it goes, it is going to sever the present family relations which have existed between our families," and he said, "I am afraid so." I said, "Colonel, while I don't recognize any liability whatsoever, rather than have the unpleasantness of this lawsuit, I would make a reasonable compromise and settlement with you." He said, "I would be very glad to do it." "Well," I said, "I will tell you, I am interested in the Tremley Point Corporation; they own that land down at Tremley;" I said, "It consists of about 514 acres; it has about 2,000 feet front on the Staten Island Sound; it extends back and across the tracks of the Central Railroad, about 400 acres in that plot, and about 100 acres on the other side of the Rahway River, binding on the Rahway River. Right back of what is known as the Squire property." "Oh, yes," he said, "I know, my father owned the Squire property and sold it to Squire for \$1,200." Something was said about that being \$50 or \$70 an acre—something of that kind, I don't remember exactly the figures—and I said, "Squire sold that property for \$4,000 an acre." He said, "I hadn't heard of that." "Yes," I said, "and that property which we"—referring to the Carteret Realty Company—"sold adjoining the Williams & Clark property for \$5,000 an acre five or six years ago, to the White Star Silica Fire Clay Company, they have been offered \$8,000 for and wouldn't accept less than ten." I said, "The fact is that all this water front along the Staten Island Sound from Elizabethport to Perth Amboy has been practically taken up by large manufacturing concerns." I said, "The Tremley Point Corporation has a capital of \$1,750,000, divided into

Edward S. Savage, direct.

\$750,000 accumulative preferred stock and \$1,000,000 of common stock, and they owe mortgage and other indebtedness of about \$400,000. You are just as familiar as I am with the value of that property. The
 10 property has been appraised by the office of Joseph P. Day & Floyd S. Corbin, and I will refer you to their appraisement as to what they think of the value of this property." "Well," he said, "that is all right, but I have got to have some money. I have got to pay my lawyers and I have got some things that are pressing me." I said, "Colonel, just how much money have you got to have?" He said, "I cannot get along with less than \$3,800." He said, "If you give me a check for \$2,000 and a note
 20 for \$2,000, payable in thirty days, and that stock, I will accept your proposition." "Well," I said, after a moment's reflection, "I am inclined to accept your proposition." I said, "Colonel, this stock that I am giving you, Mr. Montgomery has had a negotiation on—

Q. One moment. Had you mentioned any amount of stock?

A. \$25,000 worth of common stock.

Q. Go on.

30 A. I said, "Mr. Montgomery has had a negotiation on with some people; it looks like a sale of this property for \$6,000 an acre, but it has been interrupted by the war. If this property should be sold for \$6,000 an acre, I want the privilege of repurchasing that stock at par." He said, "All right." I then was seated at my desk and wrote out an agreement, the original of which I have in my hand, and read it to the Colonel. He said, "You didn't say anything
 40 about your option to purchase the stock." I said, "No, I forgot that;" so I then added that to the agreement as I had written it, and read it to Colonel Edgar, and handed it to him. He read it, signed it, and I drew a check for \$2,000, dated October 3,

19*

Edward S. Savage, direct.

on the Rahway National Bank, and handed him the \$2,000 check and a note for \$2,000, and said to him, "Now, about that stock, that is at my office at 10 Wall Street; what time Monday will suit you to come there, and I will deliver it to you?" He said, "Well, twelve o'clock." That being agreed upon, we adjourned. 10

Mr. McCarter: I now offer in evidence the paper signed by Colonel Edgar, dated Rahway, October 3, 1914, which has just been produced by the witness.

(Marked Exhibit P 1.)

(By consent of counsel a true copy of Exhibit P 1 is marked as an exhibit in place of the original.) 20

(Copy produced marked Exhibit P 1.)

I also offer check dated October 3, 1914, signed by Edward S. Savage to the order of J. Blanchard Edgar for \$2,000, endorsed by Mr. Edgar.

(Marked Exhibit P 2.)

Q. This check that has just been offered in evidence, which you produce, how did you get possession of that?

A. It was returned to me with my vouchers from the Rahway National Bank. 30

Q. What next occurred?

A. On Monday morning I dictated a letter in my office, which, after I had it transcribed, I put in my pocket. I waited for Colonel Edgar to come in. The Colonel came promptly at twelve o'clock and I went to my safe and took out the five certificates of stock, \$50 shares each, and showed them to the Colonel.

Q. In what company?

A. In the Tremley Point Corporation. I said, "Now, Colonel, we will go down to Mr. Montgom- 40

Edward S. Savage, direct.

10 ery's office, 27 Pine street, and have this stock transferred." The Colonel and I then started out of the office, and as we got down the street, the Colonel kind of stopped; he said, "Savage, this is putting me in
20 Hell's hole." "What?" I said. "Well," he said, "my lawyers demand that I pay them \$12,500." "What," I said, "for what?" "Well," he said, "they took it on speculation; they were to have fifty per cent. and now they demand \$12,500." I said, "You didn't tell me that on Saturday. On the contrary," I said, "I gave you money in order that you might pay your lawyers and you expressly agreed that you would pay your costs and counsel fees and discontinue this suit." "Well," he said, "I don't know what I am go-
20 ing to do about that; they demand \$12,500." I said, "I don't know, Colonel. Why didn't you say something about that before?" About that time we reached—it was only a short distance from my office to Mr. Montgomery's, from 10 Wall street to 27 Pine street—we arrived at Mr. Montgomery's office; we walked upstairs and I introduced Mr. Edgar to Mr. Montgomery and Mr. Straussman.

Q. Who is Mr. Montgomery and who is Mr. Straussman in reference to this Company?

30 A. Mr. Montgomery is the gentleman who put together these properties and organized the Tremley Point Corporation, and is the principal stockholder in that corporation, its vice-president. Mr. Straussman is the secretary, and keeps the transfer books and the books of account of the Tremley Point Corporation.

Q. What other officers were there at that time in the Company?

40 A. Mr. Montgomery had formerly been president, but at the last election he resigned and I was elected president of the company.

Q. Go on.

Edward S. Savage, direct.

A. Having introduced Colonel Edgar to Mr. Straussman and Mr. Montgomery, I said, "Mr. Montgomery, Colonel Edgar and I have been old friends and we have had differences and we have settled them all up, and part of the settlement is the transfer to Colonel Edgar of 250 shares of the common stock of the Tremley Point Corporation." I said, "I have written a letter here to Colonel Edgar, that I will read, so that there shall be no misunderstanding as to exactly the position of this affair." I then read to Colonel Edgar this letter:—this letter was read to Colonel Edgar in the presence of Mr. Montgomery and Mr. Straussman—

"October 5, 1914.

Col. J. Blanchard Edgar.

Dear sir:—

Whereas differences have arisen between us, and on Saturday, October 3d, 1914, we made a complete and full settlement of all matters of accounts and differences between us, and in adjustment of the same I gave you my check for Two Thousand (\$2,000) dollars, and my note for Two Thousand (\$2,000) dollars, payable in thirty (30) days; and did agree to transfer to you Two hundred fifty (250) shares of the Common stock of the Tremley Point Corporation, on the fifth day of October, at twelve o'clock noon, at my office, No. 10 Wall St., New York City.

Now that there may be no further differences between us, I want it understood before delivery of said Two hundred fifty (250) shares of Common stock of the Tremley Point Corporation, that said stock is delivered to you on the following statements and representations, and no others, to wit:—

That the Tremley Point Corporation has a capital of One Million seven hundred fifty

Edward S. Savage, direct.

thousand (\$1,750,000.) dollars, divided into seven hundred and fifty thousand (\$750,000.) dollars of six (6) per cent. accumulative Preferred stock, and One million (\$1,000,000.) dollars in Common stock.

10

That the Company has indebtedness, mortgage, and otherwise, amounting to approximately Four hundred thousand (\$400,000.) dollars, and that the assets of the Company consist solely of about Five hundred seventeen (517) acres of land, of which about Four hundred seventeen (417) is located at Tremley Point, Union County, New Jersey, having a frontage on the Staten Island Sound of about Two thousand (2,000) feet, and three or four thousand feet on the Rahway River.

20

The property extends from the Staten Island Sound up to and across the tracks of the Long Branch division of the Central Railroad; and that the other hundred acres is located in Woodbridge Township, and binds on the Rahway River, containing about One hundred (100) acres.

30

That I make no representation as to the value of this property, except the appraisals made by Floyd S. Corbin, and by the office of Joseph P. Day.

If you are willing to accept this stock, based solely upon these statements, you will kindly acknowledge the same with your signature.

Yours truly,

Edward S. Savage."

40

As I stated, that letter was read to Colonel Edgar aloud, in the presence of Mr. Straussman and Mr. Montgomery, and I handed him the letter. Mr. Straussman then said, "What is Mr. Edgar's full name?" I said, "Colonel J. Blanchard Edgar." He

Edward S. Savage, cross.

said, "The address?" I said, "Avenel, New Jersey." He then asked me to spell Avenel, which I did. I am a little ahead of my story.

Before this conversation, I asked Mr. Montgomery if he had the appraisals of Mr. Day and Mr. Corbin and he said, "Yes." He got them out, and he and Colonel Edgar took seats side by side in Mr. Montgomery's office, and Mr. Montgomery proceeded to read aloud to Colonel Edgar, and to explain to him, the written appraisements made by Joseph P. Day and Floyd Corbin. That took some ten minutes or longer. In the meantime, Mr. Straussman and I were in the room, but taking no part in that. After the appraisements were read, then Mr. Straussman said, "What is Colonel Edgar's name?" "J. Blanchard Edgar." "His address?" "Avenel, New Jersey." And I spelled Avenel. The Colonel was standing right alongside of me. Mr. Straussman was at his desk. Mr. Montgomery was on the other side of the desk. Colonel Edgar stepped up close to me and he said, "Savage, I think I had better put this in Hattie's name." "All right, it makes no difference to me, Colonel." I turned to Mr. Straussman and I said, "Mr. Straussman, instead of making that stock out to Colonel J. Blanchard Edgar, make it to Harriet B. Edgar." I then turned to the Colonel and said, "Colonel, I want you to sign that letter." He said, "That is all right, I want to show it to my lawyer, and I will come back tomorrow—I will bring it back tomorrow when I come for the stock." So he shook hands with us all and walked out of the office. On Tuesday I got a telephone message from him saying that he hadn't had an opportunity to see his counsel yet and he would be over the next day. That is the last of the transaction.

CROSS-EXAMINATION by *Judge Carrick*:

Q. The first communication, I understand, Mr. Savage, that you had with Colonel Edgar on the

Edward S. Savage, cross.

subject of this settlement was on Saturday, October 3?

A. Yes.

Q. And that was the Saturday preceding October 6th, when the Union Circuit opened?

10

A. I presume so, I don't remember now.

Q. You recall that about time preparations were being made for the trial, and the trial was impending?

A. Yes, we were ready for the trial on Tuesday at that term of court.

Q. The case was noticed and was on the call for the October Term?

A. Yes, sir, there is no doubt about that.

20

Q. I understand that you called up the Colonel on that morning of October 3 and suggested that he call and see you?

A. Yes, the Colonel and I had had previous to that two or three communications.

Q. Wasn't the statement made by Colonel Edgar at that time that you expected this gentleman who had been negotiating for some pipe line rights across the meadow property, was to be at your office and you wanted to discuss the matter with him?

30

A. No, I wanted to prepare to meet this man; I wanted to talk to Colonel Edgar who had had several interviews with that man, and ascertain what this man wanted, and where he wanted to go—

Q. Never mind about that. You have answered the question. When he came there, you first discussed, as I understand, the proposition with reference to the Pipe Line, which was other property and didn't concern this litigation, and then you opened up the subject of the unfortunate litigation which was pending between you and Colonel Edgar?

40

A. Yes, sir.

Q. You have in your direct examination, I suppose inadvertently, given us first your discussion

Edward S. Savage, cross.

with Colonel Edgar as to the property of the Tremley Point Corporation; wasn't there something said before you got to that point, about the terms of settlement?

A. I think that when we talked settlement, I suggested the proposition to give him 250 shares of the Tremley Point Common stock—of the Tremley Point Corporation.

Q. You mean that was the first thing that you said?

A. No.

Q. Wasn't there some discussion about the amount of the Colonel's claim?

A. Oh, yes.

Q. Tell us what that was.

A. I said, "Colonel, I don't recognize any liability whatsoever;" I said, "If I could settle this case with you and make a fair compromise that is satisfactory, I would be glad to do it, rather than go into court. What do you want?" He said, "I think I am entitled to \$50,000." I said, "I don't think you are entitled to a cent. If we are going to discuss it on those lines, there is no use of discussing it." And he said, "What proposition have you got to make?" I said, "I will give you 250 shares of common stock of the Tremley Point Corporation," and then explained to him what the Tremley Point Corporation was. Then he said that he wanted some money.

Q. Didn't he speak about the interest that had accrued upon his claim during the four years that it had been pending since you had disposed of this property?

A. No, not that I know of.

Q. Wasn't something said about paying a certain proportion of his claim?

A. No.

Edward S. Savage, cross.

Q. And was anything said about any fixed sum that you offered to pay him?

A. No.

10 Q. Colonel Edgar made no proposition to you of settlement at all?

A. I made a proposition to give him 250 shares of the common stock; then he said he should have to have money, because he had his lawyers to pay, and he had some bills that were pressing; that he would have to have \$3,800.

Q. Then you added the \$3,800 to the 250 shares of stock?

A. Yes, sir.

20 Q. But you never mentioned before that time any sum of money that you agreed upon, or offered to him as the basis of a settlement?

A. No, sir.

Q. Did you say anything about the value of the shares of stock which you offered him?

A. No; I told him what the property consisted of. I said, "You are just as familiar with it as I am, Colonel, but as to the value of it, I will refer you to the appraisements made by Day and Corbin."

30 Q. These appraisements, of course, were not there?

A. No. And I asked him to come to New York and see them. It was agreed that he should come on Monday.

40 Q. Then I understand that before making any statement at all as to the value of this stock, and without having offered him any sum of money, and without there having been anything before the Colonel to ascertain what the value of this stock was, your proposition was to give him 250 shares of that stock, and that he accepted that proposition, with the addition of the \$3,800 in cash which he wanted, is that so?

Edward S. Savage, cross.

A. Mr. Carrick, you don't exactly state the facts.

Q. If not, I want you to state them correctly.

A. You remember that Colonel Edgar was just as familiar with this property as I was and had known it longer; that he and I had owned the property adjoining this property; that his father had owned the next adjoining property, and that he mentioned—

10

Q. I don't care about all that.

A. (Continuing)—and when we talked about Tremley Point, he knew exactly what it was all about; it wasn't necessary for me to fix any value, because he had just as good an opinion of it as I had.

Q. I haven't heard you say as yet that you made any proposition to him at that time to give him any particular shares of stock?

20

A. I did, sir; I offered him 250 shares of the common stock of the Tremley Point Corporation.

Q. Now it is common stock?

A. I told him that the Company had a capital of \$1,750,000, divided into \$750,000 of preferred stock and \$1,000,000 of common stock, and they owed \$400,000 in mortgage and other indebtedness, and that I would give him 250 shares of the common stock.

30

Q. Now you say the proposition was to give him common stock?

A. Certainly; it never was anything else.

Q. And that was specified in the beginning?

A. It certainly was.

Q. The only proposition you made was common stock?

A. Nothing else was mentioned.

Q. And you made no statement whatever to him as to the value of that stock?

40

A. None whatsoever, except to tell him what it consisted of, what the company's assets were and its liabilities.

Edward S. Savage, cross.

Q. You, of course, are a member of the bar both of New York and New Jersey?

A. Yes.

Q. You had attorneys in this case?

10 A. Yes.

Q. You had Mr. McCarter, who is your attorney, and Judge Whittemore was representing Mrs. Savage?

A. Yes.

Q. And you knew, of course, that Colonel Edgar was represented by Mr. Wilson and myself?

A. I didn't know Mr. Wilson, I only knew you were in the case.

20 Q. As I understand it, you made this proposition for settlement direct to Colonel Edgar, and no suggestion of a settlement was ever made through attorneys in this case?

A. Except that I expressly provided that it should provide for the costs and counsel fees of the attorneys, and so expressed it in the agreement.

30 Q. The understanding then was that Colonel Edgar was to go to New York on the following Monday, that would be October 5, at noon, and he was there to see the appraisements of Mr. Day and Mr. Corbin?

A. He was to come there to get the delivery of the stock—yes, he had the opportunity to come down. I referred it to him.

Q. Wasn't that expressly agreed upon, that he was to see those appraisals?

A. Yes, I think so.

Q. You expected him to have the information that was contained in those appraisals, did you not?

40 A. Why, of course, I referred him to what they thought of the value of the property, and so expressed to him at the time, and in my office.

Q. He was to see those appraisals, in order to confirm your views as to the value of that property?

Edward S. Savage, cross.

A. No. Judge Carrick, don't you see, from the fact that Colonel Edgar was just as familiar with the value of this property as I was, I made no representations, but I told him it had been appraised by Day and Corbin, and that I referred to them— 10
to their appraisals as to the value.

Q. While the Colonel may have been as good a judge of value of property in that locality as you, you don't mean to say that he knew anything about the organization of this company?

A. Not at all.

Q. Or its debts?

A. No.

Q. Or what the value of its common stock was?

A. No. 20

Q. Except as you might have made a statement to him, or as he might have obtained that information from the appraisals of these gentlemen that you speak of?

A. Yes. The appraisals wouldn't show the debts of the company?

Q. I understand that before the Colonel arrived in New York at your office, you had had prepared this communication under date of October 5, 1914, which you have read in your direct examination? 30

A. Yes.

Q. And this paper which I show you, upon two sheets, bearing the printed heading "10 Wall Street, New York," is the paper that you had prepared for him, and which you subsequently read, as you testified, in his presence?

A. Yes.

Q. That is your signature on the second sheet?

A. Yes, sir.

Judge Carrick. I will ask that that be marked 40
for identification.

(Marked Exhibit D 1 for identification.)

Edward S. Savage, cross.

Q. Then when you went around to Mr. Montgomery's office, which was on Pine Street—

A. 27 Pine street.

10 Q. (Continuing.)—these appraisals of Mr. Day and Mr. Corbin were produced by Mr. Montgomery and were read?

A. Yes, sir; to him.

Q. And where are those appraisals now?

A. They are in Mr. Montgomery's possession, and I presume they will be introduced.

Mr. McCarter. I now produce them and hand them to Judge Carrick.

Q. These are the appraisals, are they, which Mr. Montgomery produced?

20 A. Yes, sir.

Q. And these two appraisals, one of which bearing the letter head of Joseph P. Day, and the date September 25, 1914, upon two sheets, signed in the name of Joseph P. Day, that is one of the appraisals, Mr. Savage, I understand, which was produced and communicated to the Colonel on that day?

A. Yes, sir.

Judge Carrick. I would like to have that appraisal marked for identification.

30 (Marked Exhibit D 2 for identification.)

Q. And this other, on the letter head of Floyd S. Corbin, and bearing date of August 29, 1912, on two sheets, and signed Floyd S. Corbin, is the appraisal of Mr. Corbin which was communicated to Colonel Edgar upon that day?

A. I think so.

Judge Carrick. I would like to have the appraisal of Mr. Corbin marked for identification.

40 (Marked Exhibit D 3 for identification.)

Q. As you understand it, referring to the Corbin appraisal, this "\$200,000" written on the margin

Edward S. Savage, cross.

on the right hand side of the first sheet, was that there at the time?

A. I cannot tell you anything about that.

Q. You don't recall that?

A. I don't remember.

Q. And was it before or after these two appraisals had been communicated to Colonel Edgar that the discussion arose as to the name in which the stock should be placed?

A. After the appraisals.

Q. And it was then that you read to him the communication signed by you?

A. No, that was the first thing I did when I went in that office; I introduced Colonel Edgar and I said to Mr. Montgomery, "The Colonel and I have been friends, we have had differences," and I read the letter then. That was the first thing I did when I got in the office.

Q. It was after that that the appraisal was communicated to him?

A. Then the appraisal was read, yes, sir.

Q. When did you hand this letter, Exhibit D 1 for identification, to Colonel Edgar?

A. As soon as I read it, I handed it to the Colonel.

Q. And he retained it from that time on?

A. He did.

Q. And after you had had the discussion, which you testified, as to the name in which the stock should be put—that it should be put in Mrs. Edgar's name, and that had been communicated to Mr. Straussman—then the Colonel said that he would communicate this paper to his attorney and would come for the stock the next day?

A. Yes, sir.

Q. Was any objection made to that by anybody?

A. None at all; everything seemed to be entirely satisfactory.

Edward S. Savage, cross.

Q. Mr. Savage, has Mr. McCarter communicated to you a tender which was made yesterday to him, as your attorney, of the return of your note of October 3rd, of \$2,000, and the tender of a certified check for \$2,000?

10

Mr. McCarter. I will state that it is conceded that on January 15, 1915, yesterday, Judge Carrick handed me certified check on the Commercial Trust Company of New Jersey, to his own order, for \$2,000, dated January 15, 1915, and endorsed, "Pay to McCarter & English, Attorneys of Edward S. Savage, Charles L. Carrick;" and also a note dated, "Rahway, October 3, 1914," for \$2,000, to the order of J. Blanchard Edgar, upon the Rahway National Bank, at one month, together with a letter, dated January 15, 1915, which can be read into the record:

20

"January 15, 1915.

Messrs. McCarter & English,
Counselors at law,
Newark, N. J.

Gentlemen:—

Edgar vs. Savage.

30

We deliver to you with this letter the promissory note of Edgar S. Savage to the order of J. Blanchard Edgar, \$2,000.00, dated October 3, 1914, payable one month after date at the Rahway National Bank; also certified check of Mr. Carrick to his own order for \$2,000.00, endorsed payable to you as attorneys for Edgar S. Savage. This latter check is a refund of the amount of the check which was given by Mr. Savage to Colonel Edgar on the same date, both being delivered as a portion of the tentative settlement which was that day arrived at between the respective parties.

40

Edward S. Savage, re-direct.

This return is made to you as attorneys for Mr. Savage, in order that the parties may be restored to the position in which they stood at the time when the note and check were delivered by Mr. Savage to Colonel Edgar.

10

Very truly yours,

CARRICK & WORTENDYKE."

That I stated to Judge Carrick that I was unable to accept either the note or the check, and returned them to him, and of course, retained the letter which has just been put into the record, and that upon seeing Mr. Savage this morning, which is the first time I had seen him since that occurrence, I told him substantially the occurrence, which, as far as I know, was the first information he had of it.

20

Q. You recognize this note as being the note in question? I now show it to you.

A. Yes.

Judge Carrick. I state now, for both the witness and for his counsel, that this note and this certified check are ready to be delivered at any time, now or at any other time you may want them.

30

RE-DIRECT by *Mr. McCarter.*

Q. You have stated once or twice in the course of your examination, that Colonel Edgar was quite as familiar with this property as you. What reason have you to make that statement?

A. In the first place, Colonel Edgar's father owned a tract of land of twenty acres in that neighborhood, which is located at the confluence of the Rahway River and Staten Island Sound; that the Tremley Point property is just across the river.

40

Q. Across what river?

Edward S. Savage, re-cross.

10 A. The Rahway River, within three or four hundred feet of the Edgar property, and the balance of the Tremley Point property directly abuts the Edgar property on the east. Besides, that Colonel Edgar for ten or twelve years has been the president of the Carteret Realty Company, and the Carteret Realty Company has been the owner of land immediately in this vicinity; and that Colonel Edgar was the president of the company when that property was bought, was president of it when it was sold; that Colonel Edgar was down on and across these various water front properties at the time of the building of the terminal railroad every day for a year or more—practically every day; that he was familiar with the purchase of all the property by the various
20 factories in Carteret, the prices at which the water front sold, and generally was as familiar with values of water front in that vicinity as I was, or anybody else could be.

Q. Where is this terminal railway which you speak of?

A. It runs from Rahway down to Carteret and up and down the Sound along the water front from Tufts Point; from the Rahway River practically.

30 Q. And passes near this property of the Tremley Corporation?

A. Yes, sir; right down to that property.

Q. How far from this neighborhood does Colonel Edgar live?

A. About three miles and a half.

RE-CROSS by *Judge Carrick*.

Q. You don't mean to say that Colonel Edgar knew anything about the value of this stock you were offering him, whatever he might know about the value of the shore front property, do you?
40

A. The value of the stock is based upon the value of the land.

Richard M. Montgomery, direct.

Q. Answer that question.

A. Yes, I do.

Q. And did you know the value of the stock at that time?

A. I thought so.

Q. But you made no representation of its value?

10

A. No, I was careful not to.

Q. You were careful to put in the clause in the agreement that you might buy it back at par in six months?

Q. Yes, and explained the reason for it to the Colonel.

RICHARD M. MONTGOMERY, being duly sworn according to law, on behalf of petitioners, on his oath says:

20

DIRECT EXAMINATION by *Mr. McCarter*.

Q. You live where?

A. New York City.

Q. And are you the Mr. Montgomery that has been referred to in the evidence of Mr. Savage?

A. Yes, sir.

Q. Are you interested in the Tremley Point Corporation?

A. Yes, sir.

30

Q. How long have you had an interest in that corporation?

A. Since its formation.

Q. Which was about when?

A. Five or six years ago, I think.

Q. Where does its land lie?

A. Its principal holdings are at Tremley, and upon Tremley Point, Rahway River and Staten Island Sound, and in addition they have property in Woodbridge, across the river, at Carteret.

40

Q. Do you recall a visit at your office on Pine street in the City of New York, on Monday, the fifth of October, by Colonel Edgar and Mr. Savage?

Richard M. Montgomery, direct.

A. I do.

Q. Will you please state, as near as you can recall, all that occurred that day in your presence?

10 A. Colonel Edgar called with Mr. Savage, I think about noon, and in the presence of Mr. Straussman and myself, Mr. Savage stated that he had made a settlement of his differences with Colonel Edgar, and at that time read a letter addressed to Colonel Edgar and stated that he had agreed to give him, in addition to certain cash and other securities, 250 shares of the common stock of the Tremley Point Corporation. Mr. Savage then stated that he had told Mr. Edgar that he did not know and did not
20 make any representations as to the value of that stock, but that I had in my possession two appraisals, one made by Joseph P. Day and the other by Floyd S. Corbin, which I should show him, and I did show him those appraisals and read them to him.

Q. Are these appraisals you have produced and which have already been marked by Judge Carrick the ones you refer to?

A. Yes.

30 Q. Turning to the Corbin appraisal, I find it has some lead pencil annotations; will you please state what the facts are about that?

A. Those lead pencil annotations are my figures. The "\$200,000" in ink, on the first page, adjacent to the \$600,000, are Mr. Corbin's figures, indicating in his judgment he had under-estimated that, and would mark it up \$200,000.

Q. Was the \$200,000 ink figure on the estimate on the day you referred to?

A. Yes.

40 Q. Were the lead pencil annotations, at the bottom, on the appraisal that day?

A. No, sir; I made those myself afterward.

Q. So that with the exception of the lead pencil annotations on the bottom of the first page of the

Richard M. Montgomery, direct.

Corbin estimate, it is exactly in the same condition now as it was then?

A. Entirely.

Q. Please state what next occurred.

Judge Carrick. What is the paper you have before you? 10

Witness. This is a statement which I made myself the day following, so that I might have my mind refreshed if necessary.

Judge Carrick. Can you testify without it?

Witness. Yes.

Judge Carrick. Then I will ask you to lay it aside.

Q. After the appraisals had been read, do you remember anything more that occurred? 20

A. Mr. Savage said that he had come there to deliver to Colonel Edgar 250 shares of common stock and asked to have it transferred to Colonel Edgar. Colonel Edgar said he would prefer having the stock put in the name of Harriet B. Edgar, his wife, and Mr. Straussman was instructed to put that stock in the name of his wife. Just what happened, I don't know—I think it was not put in that day, but Colonel Edgar stated he would come back and give later instructions—no, he would come back the next day to get the stock, or come back the next day to have his stock transferred. I think he had the stock. 30

Q. While you were reading the two appraisals of Messrs. Day and Corbin, what did Colonel Edgar do?

A. He sat by my side and looked over the papers.

Q. Do you recall anything being stated during the interview with regard to the indebtedness?

A. I do.

Q. What was that? 40

A. Mr. Savage stated that he thought the obligations were about \$400,000 on the property; Mr.

Richard M. Montgomery, cross.

10 Straussman said not,—“something less than that;” Mr. Savage said, “I would rather overstate than understate the amount of the indebtedness,” and also that the company was composed of \$1,750,000 of stock, \$750,000 of which was preferred and \$1,000,000 common.

Q. Was this statement you referred to in the letter that Mr. Savage read?

A. Yes, and Mr. Savage also stated that himself.

Q. Independently of the letter?

A. Yes, when he said he made no representations as to the value of the property.

CROSS-EXAMINATION by *Judge Carrick.*

20

Q. You say that Colonel Edgar sat by you and looked over the papers. Do you refer to any other papers than these two appraisals?

A. No.

Q. Those were the only two papers?

A. Yes.

Q. And as I understand you, when Mr. Savage came in, or shortly after, he handed to you or to Mr. Straussman, five certificates for 50 shares each?

30

A. He did not hand them to me; I think he handed them to Mr. Straussman.

Q. While you were there?

A. While I was there.

Q. And the transfer was not made that day, I understood you to say?

A. It was not.

Q. Do you know when it was made?

A. No, sir; I do not know.

39*

Junior A. Straussman, direct.

JUNIOR A. STRAUSSMAN, being duly sworn according to law, on behalf of Petitioners, on his oath said:

DIRECT EXAMINATION by *Mr. McCarter.*

Q. You live where, Mr. Straussman?

10

A. In New York City.

Q. What position do you hold in the Tremley Point Corporation?

A. I am the secretary.

Q. Where do you keep the transfer books of the company?

A. At my office, 27 Pine street.

Q. Do you recall Mr. Savage and Colonel Edgar coming to your office on Monday morning, the fifth of October last?

20

A. Yes, I do.

Q. Please tell us all that occurred that day as you recall it.

A. Mr. Savage and Colonel Edgar came in the office.

Q. Did you know Colonel Edgar?

A. No, Mr. Savage introduced Colonel Edgar to Mr. Montgomery and myself, and he stated that he had had some difficulties with the Colonel that had been settled, and that he desired now to acquaint him with some facts in relation to the Tremley Point Corporation, and he read a letter to the Colonel, stating—

30

Q. He read the letter?

A. He read a letter to the Colonel. I remember that in the letter it mentioned about indebtedness.

Judge Carrick. Never mind about that.

Q. Was anything said in the letter concerning the indebtedness?

A. Yes, something was said in the letter concerning the indebtedness of the Tremley Point Corporation, and I think Mr. Savage spoke about it afterward as being \$400,000, and I interrupted and said

40

Junior A. Straussman, direct.

I thought it was probably a little bit high, and he said, "Well, I want to be on the safe side; I don't want to make any exorbitant claims." Then Mr. Savage asked Mr. Montgomery whether he had the appraisals of the office of Joseph P. Day and Corbin, and Mr. Montgomery said "Yes," and produced the appraisals. Then Mr. Montgomery sat alongside of Colonel Edgar and read the letters or appraisals to Colonel Edgar. Colonel Edgar sat in a position where he could look over Mr. Montgomery's shoulder and read them at the same time, if he so desired, and then Mr. Savage produced five certificates of 50 shares each, of the Tremley Point Corporation, a total of 250 shares, which he said was a part of his settlement with Colonel Edgar, as stated in his letter, and asked that they be transferred. I asked to what name, and Mr. Savage said J. Blanchard Edgar; whereupon Mr. Edgar said, "I think you had better make that out in my wife's name," and Mr. Savage accordingly turned to me and said, "Make them out in the name of Harriet B. Edgar." I asked Colonel Edgar whether he wished them in separate certificates or all in one certificate, and he said, "Make them all in one certificate." I asked if he desired to wait while the certificates were transferred, he said no, that he would be around tomorrow for the same. That is about all I had to do with the transaction, except that I afterwards transferred the stock in accordance with instructions.

Q. When did you make the actual transfers?

A. I think late in the day, the same day.

Q. Have you got the certificate as thus transferred?

A. Yes, I brought the certificate over.

40 *Mr. McCarter.* Witness produces certificate No. 100, for 250 shares of common capital stock of the Tremley Point Corporation, dated the fifth of October, 1914.

Robert Huntley, direct.

Q. I ask you whether the signature of Richard M. Montgomery, as Vice-President, is Mr. Montgomery's signature?

A. Yes.

Q. And the signature of Junior A. Straussman as Assistant Treasurer is your own signature? 10

A. Yes.

Q. This certificate bears date the fifth; was that the date it was actually prepared?

A. Yes.

Q. And completed?

A. Yes.

Q. And that is the corporate seal annexed?

A. Yes.

Q. Did Colonel Edgar come the next day for this certificate? 20

A. No, he did not.

Q. It has been in your possession ever since?

A. Yes.

Mr. McCarter. We offer that certificate in evidence and state now to counsel and to Colonel Edgar, that that has been ready and is now ready for them whenever they want it, and we tender it to them now, that that has been ready ever since for them. 30

No Cross-examination.

ROBERT HUNTLEY, being duly sworn according to law, on behalf of Petitioners, on his oath says:

DIRECT EXAMINATION by *Mr. McCarter.*

Q. You live where, Mr. Huntley?

A. New York City.

Q. What is your business?

A. Real estate appraiser and broker.

Q. Are you, or were you in September, 1914, connected with the real estate office known as Joseph P. Day? 40

Robert Huntley, direct.

A. I was.

Q. What experience have you had prior to September 25, 1914, as to the values of shore front and property in the rear thereof, along Staten Island Sound?

10 A. I have appraised a great many pieces of property along the Staten Island Sound and Staten Island. I have collected records of the information regarding the values of that property. I have conferred with our own salesmen regarding values through there, and the information which they have collected, and given them information which I have collected, and have gathered information from various sources as to values. I personally have not
20 made any sales. For the last eight or nine years my attention has been devoted entirely to the collection of information regarding values and the appraisal of property. I make all appraisals for Mr. Day's office.

Q. That is quite a large office?

A. Yes, sir; a large office.

Q. And did you make an appraisal prior to September 25, 1914, of the property known as the property of the Tremley Point Corporation, down on
30 Staten Island Sound, and in the rear thereof?

A. I did.

Q. Will you look at Exhibit D 2 for identification, which I now show you, and ask you if that appraisal is the result of your investigation?

A. Yes, sir.

Q. In your opinion at the time that you made this appraisal, was the property worth the figures named in the appraisal?

A. It was.

40 Q. Have you generally kept abreast of the values of property in that locality since that time?

A. I have.

Q. Has there been any depreciation of the value of that property, in your opinion, since that time?

John Blanchard Edgar, direct.

A. There has not.

Q. Was the appraisal given in Exhibit D 2 for identification, in your opinion, a fair one of the value of that property?

A. It was.

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Mr. McCarter. It is conceded that the case in which these proceedings are pending was noticed for trial by the plaintiff for the January Term, and before the presentation of the petition upon which this testimony is based, to Justice Bergen, and the obtaining of the rule to show cause and restraining order, the notice being dated December 17, 1914.

That is all, with the exception of Mr. Corbin, whom we may deem it necessary to call, but who cannot be here today, and there may be one more short witness.

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JOHN BLANCHARD EDGAR, being duly sworn according to law, on his own behalf, says:

DIRECT EXAMINATION by *Judge Carrick.*

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Won't you come to the third of October, 1914, and tell how you happened to go on that morning to Mr. Savage's office in Rahway?

30

A. Mr. Savage called me up on that morning, on the telephone, and asked me if I would meet him in his office and discuss the question of the right of way through the property owned by the Carteret Realty Company on the Blair Road, through which an oil company wanted to lay their pipe line; that he had seen the representative once and expected him again to discuss the thing, I understood him, that morning in his office.

40

Q. You went to his office?

A. I went to his office and met him there. I didn't meet the agent, but met Mr. Savage there. We dis-

John Blanchard Edgar, direct.

10 cussed the question about the pipe line going through and whether there would be any further negotiations with the agent. He said, "I am through with that." And Mr. Savage said, "Now, there is another matter, and a more important one, that I want to discuss with you," and then he started to speak of the pending suit and said much as he testified here. He referred in a general way to the pleasant relations that existed between us, and the suit would be very apt to break up all these relations and make it very unpleasant. He said "beside that there will be a lot of unpleasant things connected with it, in the newspapers." He said "the very publicity of the thing and of the court proceedings
20 in the Elizabeth papers over it will make very unpleasant reading for everybody interested." He said "In the second place, it will be particularly unpleasant for Mrs. Edgar, if she appears as a witness on the stand. And in the third place, I want to tell you now, that if we don't agree, that I am going to press this to the very end; I will follow it out until the very last court. And another thing, I want to tell you, you think that Heald is a friend of yours. I want to tell you that he is a friend of
30 mine now, and you will find before you will get through with this thing, he is the most bitter enemy that you have."

Q. Did he refer in any way to your financial circumstances?

A. Yes, he spoke of those; he said, "I want to make an agreement with you, if it is a possible thing, and settle this thing, I know some of your troubles; I know about your financial difficulties; I probably know more about them than you do yourself; certainly more than anyone else." He said, "I would like to have the thing settled, if possible." He said, "What is the amount of your claim?" I said, "Savage, you know very well it is \$50,000 and the
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John Blanchard Edgar, direct.

interest, now about \$12,000 or \$13,000." He said, "Well, I am willing to meet you half way, and I would like to do it," and he said, "I am willing to give you \$25,000 worth of the Tremley Point Corporation stock in settlement." I said, "I have got to have some money anyhow, Savage," so then he said, "I will give you \$5,000 in cash," and after little while he said, "I cannot do it, I haven't got that much money in the bank." He said, "How about giving you half of it, and my note for thirty days?" I said, "All right, that will do." When he came to look it over again—I think he referred to a memorandum in his pocket—he said, "I haven't even \$2,500 in the bank; I will make you a check for \$2,000," so he made the check for \$2,000, and made a note which he handed me. He was in a hurry and so was I, and he handed me a memorandum paper which expressed the differences existing between us in a way. 10 20

Q. This paper which has been produced here?

A. Yes.

Q. And that was signed by you?

A. I signed it, yes.

Q. What was said about the stock; what was the talk about the stock of the Tremley Point Corporation? 30

A. In speaking of it, he said this: he said, "I won't say that it is worth par today, because of the financial conditions of the times, but," he says, "it is given to you on the proposition that it is worth par; and I want you to agree to carry it for six months and give me the privilege of redeeming it at par." I think he said "That stock will go to \$250 a share.

Q. Was anything said at that time about the preferred and common stock? 40

A. No, I don't remember, except as it was expressed in the paper; there was nothing referred to in the conversation.

John Blanchard Edgar, direct.

Q. What was Mrs. Edgar's condition of health at that time?

10 A. Very poor indeed, I was very much worried about her; she has been and is yet in a serious condition, and it affected her nerves very much, indeed; she was in a very nervous condition, and only the night before, in referring to this matter—

Mr. McCarter. I object to this testimony.

Q. You left and went to New York?

A. I left and went to New York.

Q. And the check was delivered to you at that time?

A. Yes.

Q. And also the note?

20 A. Yes.

Q. What did you do with the check?

A. I went downstairs—his office was up over the bank—I went down there and deposited the check and took a train to New York.

Q. And that is the same bank on which the check was drawn?

A. Yes.

Q. Are you a depositor in that bank?

A. Yes.

30 Q. Did you look at the note at that time?

A. Not until after I got in the car, particularly.

Q. Then what did you observe?

A. I observed it was drawn for \$2,000 instead of \$3,000.

Q. We might just as well at this time, Colonel Edgar, refer to the reason why when this tentative settlement was repudiated the \$2,000 was not returned; why was that?

40 *Mr. McCarter.* Objected to, because it characterizes the settlement as a tentative settlement; and secondly, because we don't suppose it makes any difference why.

John Blanchard Edgar, direct.

Judge Carrick. There is a stay in this case, and I will ask to have it answered.

A. Why the delay occurred?

Q. Yes.

A. I deposited the check that day and went to New York and had a matter of a note which was due the following week, the earlier part of the week, which I expected to have renewed, and I was expecting some money from another source, and disappointed in both affairs, and in the meantime the funds of the check were used, and under the circumstances I wasn't able to make immediate tender of the note.

Q. You couldn't renew your note?

A. No.

Q. The following Monday you went, I understand, to New York, to Mr. Savage's office?

A. I did.

Q. Won't you tell what happened there?

A. I went to Mr. Savage's office by appointment, about noon on Monday; he went to his safe and produced what he said was a certificate of the shares of stock; he said, "We will go around to Mr. Montgomery's office and have this transferred." We went around to the Montgomery office and he handed the certificates of stock to the secretary, I think, for transfer, and then asked Mr. Montgomery to produce the maps showing the location of the property, and also the appraisals which had been made on it. Mr. Montgomery produced the maps which showed the proposition of development there, and made statements about the value of it, and so on, and in the meantime Mr. Savage handed me a letter to read, which has been exhibited here, and in looking that over, I noticed that he made no personal guarantee at all, but merely relied on the appraisal made by Mr. Corbin; so that I said to him "I would like to submit this to my counsel," and put

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John Blanchard Edgar, cross.

it in my pocket. I said, "If my counsel should approve, I will probably be over tomorrow for the stock."

10 Q. You have heard Mr. Savage state that while walking from his office down to the Pine street office, where the transfer was to be made, he made some statement to you about the amount of money which would be necessary for you to pay counsel; do you recall that conversation?

20 A. I don't recall anything of it at all. I merely said this, that it would take more money than I expected for counsel fees, but I said, "I doubt very much if I have a right to settle with you, because I have talked with my counsel originally about a contingent fees," but there was no amount named at all; that I am positive about.

CROSS-EXAMINATION by *Mr. McCarter.*

Q. Now, Colonel, when did you observe that the note that Mr. Savage handed you that morning was for \$2,000?

A. On the cars going to New York.

Q. Did you read the statement that you signed that morning,—that agreement of settlement?

30 A. I did.

Q. I call your attention to the fact that the paper which bears your signature, marked Exhibit P 1, states, among other things: "It is agreed that said Savage shall transfer to Edgar 250 shares of the common stock of the Tremley Point Corporation and shall in addition thereto pay in cash Two Thousand Dollars and give his note payable to said Edgar for Two Thousand Dollars thirty days thereafter;" you read that, didn't you?

40 A. Yes, but it didn't occur to me it was \$2,000 instead of \$3,000. I would like to say—

Mr. McCarter. One moment. Please answer my questions.

John Blanchard Edgar, cross.

Q. Mr. Savage wrote out this document, Exhibit P. 1, which you signed, and you read it very carefully and directed his attention to the fact that he omitted to state the fact with regard to the opinion to repurchase; don't you remember that?

10

A. I do.

Q. And then that was written in by Mr. Savage?

A. I think so.

Q. And then you signed it?

A. I think so.

Q. And then Mr. Savage drew his check and gave you the check, and drew his note and gave you the note?

A. He did.

Q. And then you left?

20

A. I did.

Q. And took the train to New York?

A. Yes.

Q. Have you ever, before you testified this morning, suggested to Mr. Savage or to Mr. McCarter or to Judge Whittemore, that that note was to have been \$3,000?

A. No.

Q. As I understood you, before you and Mr. Savage separated on that Saturday morning, you agreed to meet Mr. Savage in New York for the purpose of getting the stock?

30

A. Yes.

Q. And that appointment was for twelve o'clock?

A. Yes.

Q. You kept the appointment?

A. Yes.

Q. And Mr. Savage produced the stock, that is, certificates standing in his name, or someone else's name?

A. He said it was the stock; I didn't look at it; I didn't handle it.

40

John Blanchard Edgar, cross.

Q. Then you and he went down to the transfer office to get it transferred?

A. Yes.

Q. When had you deposited the check, Saturday?

10 A. Saturday.

Q. Before you took the train?

A. Oh, yes; I went right down to the bank underneath and deposited it and went over to the train.

Q. And what became of the note?

A. I handed it to Judge Carrick.

Q. When?

A. My impression is that it was either the Monday or the Tuesday when I came back from New York with the certificate.

20 Q. You hadn't seen Judge Carrick previous to the twelve o'clock interview with Mr. Savage on Monday?

A. No.

Q. Nor, previous, of course, to the interview that followed, with Messrs. Montgomery and Straussman?

A. No, sir.

Q. You hadn't seen him before then?

A. No.

30 Q. It is true, is it not, that you live within a few miles of this Tremley Point property?

A. Four or five miles.

Q. You know the property?

A. I know its general location.

Q. It consists of a large tract at the confluence of the Rahway River and the Staten Island Sound?

A. Yes.

Q. You have been interested in considerable property down there, have you not?

40 A. Yes, but not on that side of the Rahway River, nor on the Tremley Point side; I know very little about it.

John Blanchard Edgar, cross.

Q. The Rahway River at its confluence with the Sound is how wide?

A. I wouldn't like to say.

Q. About?

Q. I don't want to say.

Q. The thing that gives the shore front property its value is the depth of water in the Sound, isn't it?

10

A. Yes.

Q. You don't mean there is any difference in depth north and south of the Rahway River, do you, to any extent right there?

A. I thought you asked the width of the river there.

Q. (Last question repeated.)

20

A. I guess it is about the same; it varies in different places in the Sound.

Q. You had been for a number of years connected with the Carteret Realty Company?

A. Yes.

Q. Had been a stockholder in it?

A. Yes.

Q. Are still?

A. Yes.

Q. How many shares of stock have you in the Carteret Realty Company?

30

A. One.

Q. Is that all your interest?

A. Yes; my wife had an interest.

Q. How much has she got?

A. 32 shares.

Q. Therefore you have had an interest, knowing the value of the property that the Carteret Company owns?

A. Yes.

Q. This interest that you and your wife have in that is about one-third of the total company?

40

A. Yes.

John Blanchard Edgar, cross.

Q. Where is the Carteret property?

A. On the south side of the Rahway River.

Q. How near to the Rahway River?

10 A. The nearest portion that I recall is three-quarters of a mile.

Q. And you have a piece that was later sold, that was within a few hundred feet of the Rahway River?

A. Yes, probably 1,500 feet, maybe 2,000 feet.

Q. Your father owned property immediately adjoining some of the Tremley Point property, didn't he?

A. Yes, he owned a plot on the corner of the south side of the Rahway River and the Sound.

Q. Immediately opposite this particular property?

20 A. Yes.

Q. So that from your earliest recollection you had your attention directed to this property?

A. Yes.

Q. And have known about it all your life?

A. Yes.

Q. You have lived within a very short distance of it?

A. Moderately close.

Q. You have made money out of land down there?

30 A. A little. I can also recall that some of the same salt meadow has been sold for \$10 an acre.

Q. Haven't some of the enterprises with which you have been connected down there sold shore front property as high as \$5,000 an acre?

A. I believe they have.

Q. And the Carteret Company?

A. Yes.

Q. But there have been sales even higher than that, of which you are aware?

40 A. I have heard of some.

Q. That was all before this occurrence of October 3?

A. Yes.

John Blanchard Edgar, cross.

Q. You went over to New York, and after that interview ceased, you went to see Judge Carrick?

A. Yes.

Q. I didn't quite understand what you said with regard to a note down in the bank; you deposited this \$2,000 check in the bank? 10

A. Yes, sir.

Q. Did you go back to the bank?

A. That day?

Q. No, Monday or Tuesday?

A. I went back there, I think, on Tuesday; I am not positive.

Q. What about this note?

A. I had a note coming due.

Q. How much? 20

A. \$1,000.

Q. Go on.

A. And I also expected some money in on the payment of a mortgage, and I thought the mortgage money would pay the note, and if not, I was going to make arrangements to renew it, and in the meantime the time had arrived for the payment of the note, and the money was used from the proceeds of the check.

Q. Who held that note? 30

A. I think it was held by Chamberlain and Barclay.

Q. As I understand it, the first effort to return either the amount of the check or the note by you was yesterday, when Judge Carrick saw me and made the tender that has been referred to?

A. I suppose so.

Q. Assuming that the note was a thousand dollars, which took half of the check, you used the rest of the proceeds of the check, didn't you? 40

A. I used some of it.

Q. Didn't you use it all?

A. No.

John Blanchard Edgar, cross.

Q. From time to time, for how long after you had seen Judge Carrick did you draw against that fund?

10 A. I don't want to say exactly, I don't remember, but I drew against it after there was a balance there, I notified Judge Carrick, because I had made arrangements in another way to make the check good.

Q. Had you drawn on the check on Saturday or Monday before you saw Judge Carrick?

A. I think not; I am not positive about it; I think not.

20 Q. Do you remember going down to the office of Mr. Montgomery, stating to Mr. Savage generally to the effect that you felt somewhat embarrassed by the fact that you hadn't paid your counsel, or words to that effect?

A. There was something said about it, if I remember right.

Q. You knew what the agreement that you had signed on the preceding Saturday said with regard to that?

A. Yes.

Q. Were you aware that you had agreed in that paper to pay your own counsel and costs?

A. Yes.

30 Q. Then if the amount that you were to pay them didn't come up that day, what purpose had you in making any remark about it?

A. It started by the statement that in thinking it over, I doubted whether I had the right to make an agreement with Mr. Savage without the consent of my counsel.

Q. Did you have an agreement with your counsel to pay them on a percentage basis?

A. I decline to answer.

40 *Judge Carrick.* Answer; why, certainly.

A. Yes; I did.

Q. What was the agreement you had with your counsel?

Judge Carrick. Answer.

John Blanchard Edgar, cross.

A. I had an agreement with one of them, that is, Mr. Wilson.

Q. Mr. Edmund Wilson?

A. Mr. Edmund Wilson. An agreement—we talked the matter over and he talked it over with Judge Carrick. 10

Q. What was the agreement with Mr. Edmund Wilson?

A. Twenty per cent.

Q. Twenty per cent. of the amount recovered?

A. Yes.

Q. What was your agreement with Judge Carrick?

A. Originally I gave him a retainer and we started in on the regular basis that I was to pay him whatever his bill amounted to. 20

Q. Did you modify that?

A. It was modified by his conversation with Mr. Wilson.

Q. I asked you what your ultimate arrangement was with Judge Carrick?

A. I never had anything more to say about the matter with Judge Carrick.

Q. You understood, though, did you not, that the twenty per cent. that Attorney-General Wilson and you discussed, included the compensation for Judge Carrick? 30

A. I assumed that.

Q. Did Mr. Wilson state that he talked with Judge Carrick with regard to it?

A. He said he would talk with him.

Q. And Judge Carrick wasn't present at the interview?

A. Oh, no.

Q. Was the interview ever referred to by Judge Carrick or Mr. Wilson after Mr. Wilson had talked with Judge Carrick? 40

A. Never by Mr. Wilson.

Q. Was it by Mr. Carrick?

John Blanchard Edgar, re-direct—re-cross.

A. It was just referred to by Judge Carrick, that he had talked with Mr. Wilson about it.

Q. Do you remember during the interview, Mr. Savage speaking of the proposed sale of the land at
10 \$6,000 per acre?

A. I do not.

Judge Carrick. Which interview do you refer to?

Mr. McCarter. In Rahway.

Q. Did you know where the transfer office was of the Tremley Point Corporation?

A. No.

Q. Mr. Savage volunteered to go down there with you for the purpose of getting the stock transferred,
20 didn't he?

A. Yes.

Q. And that was the object you had in going down there with him, wasn't it?

A. Yes.

RE-DIRECT EXAMINATION by *Judge Carrick.*

Q. Colonel Edgar, there has been reference to the difficulties that you had in returning this check for \$2,000, due to your condition at the time?

30 A. Yes.

Q. Was your home at Avenel, the home farm, under foreclosure at the time?

A. It was.

Q. Do you know of any effort made by Mr. Savage to procure a loan for the purpose of buying in that place of yours at foreclosure sale?

Mr. McCarter. Objected to as irrelevant and immaterial.

A. I had heard that there was.

40 RE-CROSS by *Mr. McCarter.*

Q. From whom had you heard any such rumor as that, Colonel Edgar?

Edward S. Savage, direct.

A. At the office of the Mutual Life Insurance Company.

Q. I asked you from whom?

A. I don't recall the gentleman's name; he has charge of the real estate department.

10

Judge Carrick. That is all.

EDWARD S. SAVAGE recalled in rebuttal.

DIRECT EXAMINATION by *Mr. McCarter.*

Q. Colonel Edgar has stated that in the conversation you had with him that day at your office in Rahway, among other things, you said that you thought this stock would go to \$250; was any such statement as that made by you? 20

A. No such statement was made, nor nothing like it. I made no representations as to the value of this stock whatsoever, except I said that if Mr. Montgomery succeeded in making that sale at \$6,000 an acre, I would want an option for six months to buy it back, but I forgot to put it in the agreement, and it wasn't put in until Colonel Edgar called my attention to it.

Q. And he also said that you told him that the stock was to be given to him on the proposition that it was worth par. 30

A. No such statement at all.

Q. Have you endeavored in your direct examination to give all the conversation that did occur between you and Mr. Edgar touching this transaction?

A. I have endeavored to give the conversation which took place between the Colonel and I *verbatim*.

40

Garret S. Jones, direct.

GARRET S. JONES, being duly sworn according to law, in rebuttal, on behalf of the petitioners, says :

10 DIRECT EXAMINATION by *Judge Whittemore.*

Q. Where do you reside and what is your business?

A. I reside in Elizabeth, New Jersey; business in Rahway, New Jersey.

Q. With what institution there are you connected?

A. Rahway National Bank.

Q. What is your position in the Rahway National Bank?

A. Cashier.

20 Q. Are you familiar with the accounts of that institution?

A. Yes, sir.

Q. And the account in particular of J. Blanchard Edgar?

A. Yes, sir.

Q. Have you got a transcript of that account with you?

A. I have.

Q. Will you produce it, please?

30 *Judge Carrick.* I want to interrupt to ask whether the witness is here under subpoena?

Witness. Yes.

Q. You have a subpoena to produce these papers here, have you?

A. Yes, I was subpoenaed to come here and tell what I know about this affair.

Judge Carrick. Have you got your subpoena?

Witness. I don't think the subpoena called for any papers. (Subpoena produced.)

40 *Judge Carrick.* Witness produces an original subpoena which does not seem to contain any direction to produce any papers. As I un-

Garret S. Jones, direct.

derstand the ethics of banking business, no banker produces the account of his customers, unless he is ordered to do so by the court. It may be some different rule prevails in this institution.

Witness. I haven't produced any voluntarily that I know of. 10

Q. Were you requested to bring with you the data from which to identify under this subpoena?

A. No, but I naturally brought some documents to refresh my memory.

Judge Carrick. I call your attention to the fact that the subpoena does not require you to produce any papers.

Witness. It requires me to testify to the truth, and in order to do that, I have some papers to refresh my memory so that I may testify as to the truth. That is my privilege, I think. 20

Q. Do you remember the occasion of Mr. Edgar coming to the bank and depositing the check for \$2,000 in the month of October last?

A. Yes, sir.

Q. Whose check was it, if you know, if you remember?

A. Mr. Edward S. Savage's check. 30

Q. Are you able to say whether or not this is the check to which you refer, marked Exhibit P 2? (Witness shown check.)

A. Yes, sir; that is the check.

Q. What was done when the check was presented by Mr. Edgar with regard to its payment; was it paid in cash or how?

A. It was not cash, it was placed to the credit of the account that he represents there.

Q. Did you have a conversation with Colonel Edgar at the time he handed in that check for deposit? 40

Garret S. Jones, direct.

A. Only in reference to the matter that was charged against us that same day. There was no conversation in regard to this check whatever.

10 Q. What conversation did you have at the time when the check was deposited?

A. I said to him we had a note there that was past due and I would now charge it to his account, as this deposit made it good.

Q. What did he say?

Q. He said all right; it was agreed to, anyway; he made no objection, and it was done.

Q. Do you recall the amount of that?

A. I think it was \$75, about that amount.

Q. Do you recall to whom that note was made?

20 A. I think it was given to the Milton Mills Company, Rahway, New Jersey.

Q. Do you recall any other note of Mr. Edgar's which was presented for payment at about that time or afterwards?

A. I do not.

Q. Was there any other note so purchased and charged to his account after this one which you have just spoken about?

A. I don't recall any other.

30 Q. Have you a transcript of Colonel Edgar's account?

A. I have, covering that period.

Q. On the occasion when Colonel Edgar presented this check of Mr. Savage's for deposit, did he draw against it that day?

A. Yes, sir.

Q. Can you say in what amount?

A. \$100.

Q. And how was that paid?

40 A. In cash.

Q. By you to him?

A. By the teller.

Q. By the paying teller to him?

Garret S. Jones, direct.

A. Yes, sir.

Q. You say you have a transcript of Colonel Edgar's account; will you produce it, please?

Judge Carrick. We object to the use of the transcript.

Q. When I use the word "transcript," please tell me whether this is the transcript or the original. 10

A. This is the original leaf from the ledger in use at that time.

Q. Of whose account?

A. The Edgarton Farm.

Q. Whose account is that?

A. That is under the control, and under the checking privilege of J. B. Edgar.

Q. To whose account was the check of Mr. Edward Savage's for \$2,000 credited. 20

A. To this account.

Q. By whose direction?

A. Mr. Edgar made out a deposit ticket, I think.

Q. Will you please tell us what drafts were made against this account after the third of October, and under what dates and for what amounts?

A. Two items were charged that day: note \$75 and check cashed for \$100; on the 5th, there was \$50; on the 6th, \$116.85, and on the 7th, three items, amounting to \$159.69; on the 8th, \$10; and on the 9th, three items amounting to \$1,350.56, and on the 10th, two items, amounting to \$101; that practically used up that deposit. 30

Judge Carrick. There were no deposits made in the interim?

Witness. No, sir.

Q. Can you state from the account what that balance was at the time of the last draft which you have testified to? 40

A. The balance at the time he made the deposit was \$2.48; at the time of the closing or paying of the

Garret S. Jones, direct.

items I have specified, his balance was \$39.38. Practically those items used up that deposit.

Judge Carrick. Was that on October 10th the last balance?

10 *Witness.* Yes, October 10th closed up the business.

Q. What was the first deposit made after the \$2,000 and the next succeeding deposit?

A. October 13 there was a deposit of \$200; on October 31, \$20; November 2, \$20; November 18, \$5; December 4, \$175; December 9, \$60.

Judge Whittemore. I offer this account in evidence.

(Marked Exhibit P. 3.)

20 Q. Have you brought with you the vouchers for drafts made by Colonel Edgar against this account?

A. Covering that period, yes, sir.

Q. Will you please produce them and give the particulars of the date and amount of each one?

A. October 3, \$100.

Q. You may give the payee's name.

30 A. That is to the order of J. B. Edgar. October 3, note paid, \$75; check dated October 5, \$50, George M. Friese; check dated October 3, \$116.85, to the order of W. C. Warner; check, October 3, \$103.31, to the order of the Union County Trust Company, Elizabeth; check dated October 3, \$33.80, to the order of G. M. Aschenbach; check dated October 5, \$22.50, to the order of R. F. Thienes; check dated October 7, \$10, to the order of Milton Mills Co.; check dated October 8, \$100.56, F. V. Dobbins; check dated October 9, \$250, F. V. Dobbins; check, October 9, \$1,000, to the order of J. B. Edgar, cash; check; October 7, \$95, to the order of C. D. P. Gibson; check,
40 October 8, \$6, to Stanley W. Jones.

Q. Has Colonel Edgar any account in his own name, Mr. Jones, in the Rahway City National Bank?

Garret S. Jones, cross.

A. No, sir.

Q. Has he any other account which is under his control, to your knowledge, in your bank?

A. No.

Q. Do you know anything about a note of \$1,000, 10
made by Colonel Edgar to Barclay & Chamberlain,
presented at your bank for payment?

A. I don't recall any knowledge of it.

Q. Was any such note paid on this account of
Colonel Edgar's?

A. No, sir.

Judge Whittemore. I offer these checks in evidence which have been produced by the witness.

(Thirteen checks marked Exhibits, P. 4 to P. 16, 20
both inclusive.)

CROSS-EXAMINATION by *Judge Carrick.*

Q. Who is the President of the Rahway National Bank?

A. Mr. William Howell was at that time.

Q. Who is now?

A. Mr. Frank H. Smith.

Q. Have you conferred with any of the other officers or the directors of the bank about producing these papers here today? 30

A. No, sir.

Q. Who subpoenaed you?

A. I cannot tell you; I got the subpoena by mail.

Q. Were you paid any witness fee?

A. No, sir, I didn't know whether I was entitled to any or not.

Q. And you got it by mail from whom?

A. I cannot say about that, as I recall.

Q. You got a letter did you?

A. I don't know if there was a letter with it or 40
not.

Mr. Savage. It came from Mr. McCarter's office.

Garret S. Jones, cross.

Q. Why did you come here; how did you know what you were to bring here?

A. The subpoena told me what I was to come for and tell what I knew about this transaction between
10 Mr. Edgar and Mr. Savage.

Q. This hasn't anything to do with the transaction; did you get a letter which told you what you were required to testify to?

A. I don't know any letter that I recall; I don't think there was any letter with the subpoena; I don't know whether there was or was not.

Q. When did you get the subpoena?

A. About two days ago.

Q. You cannot recall whether that subpoena was
20 accompanied with a letter or not?

A. I say it may have been, I am not positive.

Q. Why aren't you positive?

A. Because I might have destroyed it, if there was one; I only read the subpoena; that is all I had anything to do with, so far as the matter was concerned.

Q. Have you exhibited this sheet from the bank's ledger or its vouchers, or any of them, to any person other than the bank clerks since you received
30 that subpoena?

A. No, sir.

Q. Did you before you received the subpoena?

A. No, sir.

Q. How did you know that it was these particular checks that you were to produce?

A. Because these particular checks went to dispose of the money for this deposit.

Q. And was that what you were asked to do?

A. Yes, sir.

40 Q. To show how the money for that deposit was disposed of?

A. Yes, sir.

Q. How were you asked that?

Garret S. Jones, cross.

A. To show what I knew about this affair, this case.

Q. How did you know that it was the \$2,000 deposit that was to be accounted for?

A. If I recall, I think I had some conversation with Mr. Savage in reference to the matter, that that is what he would want me to testify, as to the disposition of the proceeds of that check; that is my recollection.

10

Q. When did you have this conversation with Mr. Savage?

A. That may have been a couple of weeks ago; I don't recall exactly.

Q. And that was the only communication you had then, with the exception of the receipt of this subpoena?

20

A. Yes. As I say, there might have been a letter; I don't say there was or was not.

Q. Is Mr. Savage an officer of the Rahway National Bank?

A. No, sir.

Q. Is he a depositor in the Rahway National Bank?

A. Yes, sir.

Q. Is he a director or hold any official position with the bank?

30

A. No, sir.

Q. Then you have produced these papers here upon the request of one depositor, the account of another depositor, without any direction from your Board of Directors or from the president of the bank?

A. Yes, sir. I brought them here for my own satisfaction, to be able to testify, to refresh my memory.

40

Q. And simply because you were informed by Mr. Savage, a depositor in your bank, that he wanted to learn what the bank's records show as to the account

John Blanchard Edgar, direct—cross.

of another depositor in the bank; that is correct, is it?

A. No, he wanted me to prove that Mr. Edgar had the proceeds of this check; that is what he asked me to prove, and I brought the goods to prove it.

Q. He wanted you to show how the money had been disposed of, did he?

A. He wanted me to show that he had the benefit of it; he didn't ask me—only give who it went to, as far as I know.

JOHN BLANCHARD EDGAR, plaintiff, recalled for further

DIRECT EXAMINATION by *Judge Carrick.*

Q. This note that you spoke of, the \$1,000 note, where was that paid?

A. I paid it to Mr. Chamberlain personally; I met him by appointment.

Q. And the \$1,000 check which has been produced here by the cashier of the Rahway National Bank, was used for that purpose?

A. Yes.

CROSS-EXAMINATION by *Judge Whittemore.*

Q. You cashed that check, did you, Colonel Edgar?

A. I think so, yes, sir.

Q. At the Rahway Bank?

A. I think so.

Q. Where did you meet Mr. Chamberlain?

A. I think I met him at Matawan.

Q. And when, with relation to the time that you cashed the check?

A. I think about that time, within a day or two of that time.

Q. The same day or later?

A. I don't recall about that; I think so.

Q. Do you remember what you did with the money between the time you cashed it and the time you paid it to him?

John Blanchard Edgar, cross.

A. I suppose I carried it in my pocket.

Q. Can you say whether you carried it in your pocket for one, two or three days?

A. I think I met him the same day that I drew it, I don't recall positively.

10

Q. Did you get your note from him?

A. Yes.

Q. When was that note due?

A. About the date of that check.

Q. How did you happen to meet Mr. Chamberlain at Matawan?

A. By appointment.

Q. Why did you go to Matawan?

A. I had some business down there and he lives down at Cranbury, and he came over to Matawan on some other business, and I met him there.

20

Q. What is the business of the firm of Chamberlain & Barclay?

A. General produce business, hay, grain, potatoes and things of that kind.

Q. Was this note given in payment for some merchandise sold by them in the usual course of trade?

A. Yes.

Q. Was that note deposited in the bank for collection?

30

A. I think so; I think they recalled it,—

Q. In what bank?

A. In the Rahway Bank,—but I am not positive about that. I had written to them about it.

Q. What makes you think that the note was deposited and then withdrawn?

A. I wrote them about it.

Q. Do you know whether it was actually deposited?

A. I do not.

Q. How would your writing to them give you any information that they had deposited the note?

40

John Blanchard Edgar, cross.

A. Because the note was about due and I supposed they would deposit it for collection.

Q. Was it payable at the Rahway Bank?

A. Yes.

10 Q. Can you give us the date when it was due?

A. I cannot; I think it was about the date of that check.

Q. Was it due before you made the settlement with Mr. Savage?

A. That I don't recall.

Q. It wasn't in the bank when you deposited this \$2,000 check, was it?

A. I think not.

20 Q. When did you write your letter about the note, before or after you had settled with Mr. Savage?

A. I think before; I don't remember clearly. The dates are about the same.

Q. Why didn't you pay the note through the bank in the usual course of business?

A. I hoped to get the note renewed.

Q. But when you drew the money, you knew you couldn't renew it, didn't you?

A. Yes.

30 Q. Why didn't you let the note be paid out of the bank then?

A. No, I didn't know that it wouldn't be renewed; I went down to Matawan to meet him, to know about it, and I went down—I had an idea that he would refuse to renew it, and I wanted to be prepared for the emergency.

Q. What had you written him, to what effect?

A. Asking him if he was willing to renew the note.

Q. What did you do with the note that you got from him?

40 A. I am not sure; I think it is home.

Q. Can't you fix the date it came due?

A. No, I don't recall now.

Q. How much was it?

John Blanchard Edgar, cross.

A. \$1,000.

Q. Did you pay interest on it?

A. Yes.

Q. How much interest did you pay on it?

A. The interest was paid when it was renewed, 10
before the discount.

Q. Didn't you say in your direct examination, that that note was paid out of the account in the Rahway Bank?

A. It was.

Q. You mean to give the interpretation to that, that you took the money out of the Rahway Bank and in that way it was paid out of the Rahway Bank?

A. Well, yes.

Q. That isn't what you said on your direct examination, is it? 20

A. That is the truth, that it was paid out of the proceeds of that check.

Q. On October 9th were you satisfied with the settlement you had made with Mr. Savage?

A. No, sir.

Q. Who was present when you settled with Mr. Barclay?

A. Mr. Barclay I settled with.

Q. Who was present? 30

A. Mr. Barclay and myself, no one else.

Q. Where did you make the settlement with him?

A. At the station at Matawan.

Q. Inside of the station or on the platform outside?

A. I am not positive; I think it was inside the station.

Q. Did you get any receipt for the cash you gave him?

A. I got the note back.

Q. Did he write anything on the note? 40

A. No.

Q. Whose note was it; who gave him the note; who was the maker of the note?

John Blanchard Edgar, cross.

A. It was signed by me.

Q. Was it the note of the Edgerton Farm?

A. Yes, signed by me.

Q. Is that a corporation?

10 A. No.

Q. That is just a trade name under which you do business?

A. Yes.

Q. On October 9th were you satisfied with this settlement?

A. I don't recall that I was; I was dissatisfied with it the moment I came back from New York with that letter of Mr. Savage's, on the 5th, I think it was.

20 Q. Have you any other bank account than this one in the Rahway National Bank?

A. A small account in the savings bank.

Q. What savings bank?

A. The Rahway Savings Institution.

Q. Did you have \$2,000 in that account in the Rahway Savings Institution on October 8th?

A. No.

Q. On October 7th?

A. No.

30 Q. Did you have any money on deposit at that time in the Rahway Savings Institution?

A. I think so.

Q. How much was it?

A. I don't remember.

Q. Can you approximate it?

A. No.

Q. Was it \$100?

A. I think not; less than \$100.

Q. Aren't you mistaken as to what you did with that thousand dollars you drew out of the bank?

40 A. I think not.

Q. Is that something that you could be mistaken about, you think?

A. I am liable to be mistaken about anything.

John Blanchard Edgar, cross.

Q. Where did you get a thousand dollars otherwise than from this account, in cash to pay Mr. Chamberlain?

A. I expected a payment from another matter.

Q. Where did you get it, if you didn't get it from this account? You say you think so; that implies that perhaps you are mistaken about it. 10

A. I did get it from this account.

Q. Then there is no thinking about it; you are sure of it?

A. Yes.

Q. You are sure the money you drew from this account was paid to Mr. Chamberlain?

A. Yes.

Q. Which was it, Barclay or Chamberlain? 20

A. Mr. Barclay.

Q. What is his first name?

A. I have forgotten; the firm is known as Chamberlain & Barclay.

Q. Where does he live?

A. Cranbury, New Jersey.

Q. Isn't it a fact that the money that you drew from the Rahway National Bank on this check of \$1,000, on October 9th, was paid by you to the Mutual Life Insurance Company on account of your mortgage and interest? 30

A. I don't think so.

Q. Is that something that you don't know positively whether you did or didn't?

A. I made arrangements in another way to get the money; I was negotiating then with two or three people to get money to carry on this account.

Q. Did you get money anywhere else?

A. I did.

Q. Who from? 40

Judge Carrick. I object to that, and ask the witness not to answer. The witness will decline to answer by advice of counsel.

John Blanchard Edgar, cross.

10 Q. Why is it that you cannot say whether or not the thousand dollars you drew out of the Rahway National Bank on this check of October 9th was or was not the money that you paid to the Mutual Life Insurance Company on account of your mortgage and interest?

A. There were three or four transactions going on at the time and I don't remember clearly.

Q. Then this money may have gone to the Mutual Life Insurance Company instead of to Chamberlain & Barclay?

20 A. It would be possible that the other money that I paid Chamberlain & Barclay came from another source, but I thought the money I paid the Mutual Life came from another source; I don't remember clearly, I would have to look the matter up.

Q. You have so many thousand dollar transactions that you don't remember where you got the money from?

A. No, that isn't it.

Q. What was the date you paid the Mutual Life Insurance Company?

A. That I don't recall.

30 Q. Was it at the same time you had the transaction with Chamberlain & Barclay in the way of payment of the note, or before or after?

A. I cannot say.

Judge Whittemore. We would like to have the examination continued until next Saturday, at 10 o'clock.

By consent of counsel, a copy of the transcript produced by the witness, Mr. Garret S. Jones, is substituted for the original exhibit and marked Exhibit P 3.

40 Adjourned to Saturday, January 23, 1915, at 10 A. M.

Argument.

NEW JERSEY SUPREME COURT.

JOHN BLANCHARD EDGAR,
Plaintiff,

vs.

EDWARD S. SAVAGE AND WIFE,
Defendants.

10

Continuation of testimony in the above entitled cause before Nicholas W. Bindseil, a Supreme Court Commissioner, at the office of McCarter & English, Prudential Building, Newark, New Jersey, on Saturday, January 30th, 1915, at 10:30 A. M.

20

Appearances. Counsel as before stated.

Judge Carrick. I want to state in behalf of Colonel Edgar, that in accounting for the disposition of the \$1,000 which was withdrawn from the Rahway Bank by the check of October 9th, mistakes were made; the witness desires to correct his testimony with reference to what was done with the money that was so withdrawn from the bank. Unless there is some reason why you want to put in your other witness first, I suggest that we let the Colonel make that statement while we are waiting for the witness.

30

Mr. McCarter. In view of the fact that the statement just made by Judge Carrick is of considerable importance, we feel it right to say that we desire to prove some facts by the witness who will be here in a moment, before any attempted explanation is made by Colonel Edgar, that—as will appear from the testimony of the witness who is to be sworn—

40

Argument.

10 Colonel Edgar, immediately upon leaving this office two weeks ago, telephoned to Mr. Barclay, of the firm of Chamberlain & Barclay, of Cranbury, expressing a desire to see him; and he did see him on the following Monday, but that in the meantime Mr. Savage had seen him, and discovered, as will appear by Mr. Barclay's testimony, that the facts with regard to some of the testimony given by Colonel Edgar, are exactly the opposite from what Colonel Edgar had sworn to, and we want it to appear on the record that Colonel Edgar knows all this and saw Mr. Savage in Cranbury, and we do not feel that he can take the
20 sting out of his false testimony, by endeavoring to explain it in the manner indicated, before the testimony of Mr. Barclay is given, and for that reason we desire to have Mr. Barclay sworn first, and he will be here now any moment.

30 *Judge Carrick.* It seems to me that it will be eminently fair that Colonel Edgar should be permitted to correct his testimony now, and of course that does not in any way affect the right of the defendant to show the explanation was not correct or show anything that brings out the facts. I think Colonel Edgar ought to be permitted to state what really was done with that \$1,000 that was withdrawn from the bank.

Mr. McCarter. All right.

John Blanchard Edgar, direct.

JOHN BLANCHARD EDGAR, recalled for further DIRECT EXAMINATION by *Judge Carrick*.

Q. I understand that you wish to correct your testimony with respect to what was done with money withdrawn from the Rahway Bank through the cashing of the check of October 9, 1914, for \$1,000? 10

A. Yes, I would like to.

Q. Won't you state what was done with that money and what impression you had with regard to it at the time when you were examined two weeks ago today?

A. I wish to say that I was in error when I stated that I paid that money to Mr. Barclay, meeting him at the time that I said. I was a good deal confused that day by several things, and made a misstatement. 20

Q. What was done with the money, the thousand dollars?

A. As a matter of fact, I paid this money to a gentleman in New York—\$950 of it, rather—on, I think, the—it was a Friday, and I think the following week.

Q. Who was the gentleman to whom this payment was made?

A. Mr. H. B. Bevier, of Poughkeepsie, New York. 30

Q. He is in business there?

A. Yes, a druggist.

Q. Where was this payment to him made in New York City?

A. I met him where we often meet, at a restaurant, Whyte's, in Fulton street.

Q. On what account was this payment made?

A. On account of a note which he had of mine, \$1,250 note.

Q. When had he got this note from you? 40

A. Sometime in September previous; he came to my house with his family in an auto, one day, and we had an open account extending some years, and

John Blanchard Edgar, cross.

he wanted some money, and he thought he could get a note discounted, and I gave him a note for \$1,250.

Q. Did he discount that note?

A. No, he couldn't he said.

10 Q. He then asked you to pay him something on account?

A. Yes.

Q. And this payment was made on account, this \$950.

A. Yes.

Q. How do you account, or can you account for getting that transaction mixed up with the Chamberlain & Barclay note?

20 A. Of course, I got it mixed; there were two or three things in my mind; I had seen Mr. Barclay in reference to the purchase of a carload of corn and carload of hay, which would amount to about \$1,000, and having the three or four things on my mind, I just made that statement without thinking about it. After I had gone from here, within fifteen minutes, it came to me that it was an error and I called up Mr. Barclay on the 'phone and asked him for an appointment, that I would like to see him.

30 Q. And he made an appointment with you for Monday?

A. Yes; that was Saturday I left here; I went down to the Market street telephone station and telephoned him from there and asked him if I could see him on Monday.

Q. You did see him on Monday afternoon down at where, Cranbury?

A. Cranbury, his office.

Q. And found Mr. Savage there?

A. Mr. Savage came while I was there.

40 CROSS-EXAMINATION by *Mr. McCarter*.

Q. Colonel Edgar, did you leave this office and go immediately to the Market street station that day?

A. I think I did; I am not positive about that—

John Blanchard Edgar, cross.

yes, I think I went direct there; I was thinking that I stopped and got a bite to eat—yes, I think I did.

Q. You did get a bite or went direct?

A. No, I got a bite, I think, before I went there.

Q. And within fifteen minutes, anyway, of the time that you left this office you recalled that you had told the wrong story about this thing? 10

A. I did, and tried to think the thing over and straighten the thing out.

Q. You then telephoned to Mr. Barclay down at Cranbury?

A. Yes.

Q. You didn't come back here and tell Mr. McCarter you had made a mistake?

A. No.

Q. You didn't tell Judge Carrick you had made a mistake? 20

A. I did when I saw him next.

Q. I mean that day?

A. Oh, no, he had gone.

Q. You didn't telephone his office that day?

A. No, I don't think I did.

Q. This Mr. Bevier that you speak of is a relative of yours, isn't he?

A. Well, in a way, yes; his father's sister was my father's second wife. 30

Q. And I understand you to say that sometime last September Mr. Bevier with his family turned up at your house in an automobile?

A. They did.

Q. And he said he had occasion to use some money and he wanted the use of your name on a note for the purpose of discounting it, and thereby getting money?

A. Oh, no.

Q. What? 40

A. I owed him some money; we had an unsettled account for a number of years.

John Blanchard Edgar, cross.

Q. How much did you owe him?

A. We figured up that I owed him about \$1,000.

Q. Have you any more definite recollection of the amount than what you now say?

10 A. Well, it was agreed to be on a basis of a thousand dollars; it was an outstanding account; we hadn't anything specially to show for all the transactions. There were open accounts for horses and wagons. I had had horses training at Poughkeepsie and had joint accounts on the ownership of horses, and he had paid some of the trading bills, and we figured it up as well as we could.

Q. What is the business of Mr. Bevier?

A. A druggist.

20 Q. And the nature of the indebtedness that you say you liquidated at the sum of \$1,000 was in connection with horses that you and he had operated with?

A. Yes.

Q. Extending over how long a period?

A. A dozen years.

Q. Ever paid him anything on account?

A. Yes.

30 Q. Have you any memorandum anywhere to indicate this indebtedness?

A. No.

Q. Nothing to show for it at all?

A. No, except my own diary account.

Q. So a note was given to him for \$1,250?

A. Yes.

Q. \$250 more than you owed him?

A. Yes.

Q. What day was it that you met Mr. Bevier in New York and paid him \$950?

40 A. I think it was a Friday.

Q. What Friday?

A. I think it was the Friday of the following week.

John Blanchard Edgar, cross.

Q. That is to say, the affair was, as your counsel called it, tentatively settled on Saturday, October 3; you mean the next Friday?

A. Yes, I think the following week Friday.

Q. The Friday following the Monday that you were in New York and went down to Mr. Montgomery's office? 10

A. Yes.

Q. You paid him cash \$950?

A. Yes.

Q. You carried that cash with you how long?

A. I think I got it out of the bank either that day or the day before.

Q. For what purpose did you draw it out of the bank that day or the day before? 20

A. I wanted to pay him.

Q. Had you an appointment to meet him?

A. Yes, telephoned him.

Q. You telephoned him?

A. He telephoned me; I think he also wrote me.

Q. Have you got the letter?

A. No.

Q. Where is the letter?

A. I don't know.

Q. Where did he write you? 30

A. I never kept the letters.

Q. When did he write you?

A. He wrote me every week or ten days.

Q. You said he also wrote you making an appointment; I ask when he wrote you?

A. Some time that week before I met him.

Q. You have no memorandum indicating your indebtedness to him, and you haven't kept the letter that he wrote you?

A. No. 40

Q. And you drew, you say, from the bank, either on the day you met him or the day before, how much money?

John Blanchard Edgar, cross.

A. \$1,000.

10 Q. You had in the meantime, of course, seen Judge Carrick, and knew that Judge Carrick had written a letter to Mr. Savage's counsel, repudiating the transaction, didn't you?

A. Yes.

Q. And notwithstanding that, you nevertheless after that, two or three days, drew out \$1,000 from the bank.

A. Yes.

Q. Can you tell what restaurant it was that you met him and paid him?

A. Yes.

Q. Whose it is?

20 A. Where we always meet, Whyte's Restaurant.

Q. Where is that?

A. In Fulton street.

Q. Did you pay the note in full?

A. No.

Q. You paid practically all you owed on it, didn't you?

A. Pretty nearly all.

Q. How much was left?

A. I think less than \$100.

30 Q. Did you take a receipt for the money?

A. No.

Q. So while you say you had owed this man \$1,000 for a dozen years—

Witness. No, transaction for a number—

Q. How long had you owed him \$1,000?

A. I don't recall it; the accumulation of all these notes amounted to about \$1,000, as near as we could figure it up.

40 Q. You gave him a note for \$1,250, which concededly was \$250 in excess of what you owed him?

A. Yes.

Q. You made an appointment to meet him at his request and paid off \$950 of that note at Whyte's Fulton Street Restaurant?

John Blanchard Edgar, cross.

A. Yes.

Q. And drew no memorandum of any kind?

A. No.

Q. To indicate the truth of that payment?

A. No.

Q. The fact of that payment?

A. No.

Q. He has still got the note?

A. He has.

Q. What is his first name?

A. Henry.

Q. You left that note in his hands for the full amount of \$1,250, notwithstanding the fact that you had paid—at any rate all but \$50 of the amount you really owed him?

A. About that.

Q. Do you recall how the note was drawn?

A. It was a regular bank note.

Q. And had been given in September?

A. Yes.

Q. Payable at the bank?

A. At the Rahway Bank.

Q. When was it due?

A. I think it was a two months' note. I am not positive whether it was two or three.

Q. Had it been at the Rahway Bank?

A. Oh, no.

Q. He hadn't then presented it for payment at the time it was due?

A. No.

Judge Carrick. It wasn't due.

Q. Had you directed him not to?

A. It wasn't due; it was given on the 22nd or 23rd of September.

Q. Who was present when it was given beside Mr. Bevier?

A. I don't think there was anybody in the room; his sons were in the house.

John Blanchard Edgar, cross.

Q. Have you seen Mr. Bevier since you testified two weeks ago?

A. No, I think not.

Q. Written to him?

10 A. I guess so; I get letters from him; we correspond almost every week.

Q. You know whether you have written?

A. I think I have.

Q. Telephoned to him?

A. Yes, I have.

Q. Of, course, you testified at the last hearing very explicitly that you drew this money from the bank and that you went down to Matawan and met Barclay at the Matawan Station, and then and there
20 paid him the thousand dollars; you now say that you discovered within fifteen minutes after that testimony was given, that that was all wrong, do you?

A. I don't want to say that it was absolutely in fifteen minutes; it was within a short time.

Q. All wrong?

A. Wrong.

Q. Why, then, did you telephone Mr. Barclay rather than Judge Carrick or Mr. McCarter?

A. I wanted to see him and talk the matter over
30 with him, telling him what I had done.

Q. What did you telephone him?

A. Asked him if I could have an appointment to see him on Monday.

Q. Did you mention Mr. Savage in the telephone conversation?

A. No, not that I recall; I never mentioned his name.

Q. When you got there you asked him if he knew a man by the name of Savage, didn't you?

40 A. I think I did.

Q. And then did you tell him that you had made the mistake?

A. Yes.

John Blanchard Edgar, cross.

Q. What was it you told Mr. Barclay when you got there?

A. I don't recall.

Q. As near as you recall, tell us what you told him.

A. That I made a mistake in my testimony.

10

Q. Won't you tell us, is that all?

A. On top of that he said that Mr. Savage and Mr. Jones, of the Rahway Bank, had been down to see him on Saturday; I said, "You probably know all that occurred about the case." I said very little after that.

Q. So while you went down there for the purpose of explaining to him, as you say, that you made a mistake, as a matter of fact, you didn't explain it?

A. I didn't explain it?

20

Q. Yes.

A. I don't think I went into any particulars; I might have.

Q. How did you go to Cranbury on Monday, Colonel; what method did you adopt for reaching there?

A. I went on the cars.

Q. And in order to get there from Rahway how do you go?

A. Take a train to Cranbury, a Camden train.

30

Q. It takes about half to three-quarters of an hour to get there by train from your place?

A. Yes, the biggest part of an hour.

Q. And it practically broke the day to go down there?

A. I left about noon, I think.

Q. I ask you to repeat as near as you can recall exactly what you said to Mr. Barclay when you got there; you had made an appointment, you say, by telephone within fifteen minutes or so from the time that you left this office, after having testified, and you went down to see him by appointment; won't you tell us what you told him?

40

John Blanchard Edgar, cross.

10 A. I started to tell him about what had occurred here preparatory to it, and he said that Mr. Savage and Mr. Jones had been down to see him; I said, "Then you probably know all about it," and I don't recall exactly what I told him, but referred to the case.

Q. Then you hadn't met Mr. Barclay at Matawan, either at the time you stated or any other time?

A. Yes, I think I did in connection with the corn and the hay; I think I met him at the Matawan Station.

Q. By appointment?

A. I don't recall clearly now whether it was or not; I thought it was, but I may be mistaken.

20 Q. When did you meet him, either by appointment or otherwise, at the Matawan Station and talk about this carload of corn?

A. My impression is that it was the latter part of September.

Q. I ask you again to search your memory and tell us whether it is a fact that either in September or at any time, within a year, you had met Mr. Barclay at Matawan Station.

A. My impression was that I had.

30 Q. Can't you remember whether you had or had not?

A. He says that I didn't.

Q. I ask you to state—and I think I have a right to an answer—whether or not it is true in fact, not as an impression, that in September last, you met Mr. Barclay at the Matawan Station?

A. I think that I did.

Q. And talked with him concerning the purchase of a carload of hay and corn?

40 A. Yes.

Q. Is that fact or isn't it a fact?

A. That I talked to him about it?

Q. Yes.

John Blanchard Edgar, cross.

A. It is a fact.

Q. You did?

A. Yes.

Q. At Matawan?

A. I think it was at Matawan; I don't want to be 10
positive, but my impression is it was Matawan.

Q. What did you say about the carload of corn
and hay?

A. About the price they would bring and the pos-
sibility of getting it.

Q. Did you buy the carload of hay or corn?

A. No. I was talking about the prices, and he was
going to let me know later on about the prices; he
quoted prices then.

Q. What did you say and what did he say; what 20
was the conversation?

A. In regard to the prices?

Q. What did you say to him; did you inquire what
the price of hay and corn was?

A. I did.

Q. By the carload?

A. Yes.

Q. What did he say?

A. He said, I think, he thought it was about seven-
ty-cents and—ear corn was about seventy cents a 30
bushel, and alfalfa he thought would be about \$24 or
\$25 a ton, and then the question was about second
crop of clover hay.

Q. Do you know how many tons there are in a
car?

A. It depends on the size of the car.

Q. I suppose it does; the ordinary freight car?

A. From six to nine hundred bushels.

Q. You say then that some time last fall you had a
talk with Mr. Barclay, of Cranbury—you think the 40
conversation occurred at Matawan—in which you
asked him the price of corn and alfalfa and hay, and
he quoted you figures?

A. Yes.

John Blanchard Edgar, cross.

Q. So there is no doubt about that?

A. About that conversation?

Q. Yes.

A. No.

10 Q. Did you owe him any money at that time?

A. I did.

Q. Was anything said about paying what you owed him?

A. I think that the note was in the bank at that time.

Q. How long had you owed him money?

A. It had been a running account.

Q. For how long?

A. Two or three years.

20 Q. Did he express a willingness to sell you a thousand dollars worth or more of goods without any payment made on that note that had been running for several years.

A. Nothing was said about that.

Q. When did you buy anything of Mr. Barclay previous to this conversation?

A. I don't recall.

Q. Had you bought anything from him in five years?

30 A. I think I had.

Q. Sure?

A. Yes.

Q. When?

A. I don't recall.

Q. Isn't it a fact that you became in his debt in 1907, and that you haven't purchased anything of him since 1908?

A. I didn't know it was as long as that; of course, if that is the account from his books, it must be right.

40 Q. I am asking for your recollection.

A. It is not clear on that at all.

Q. Did you meet him by appointment at Matawan on this occasion?

John Blanchard Edgar, cross.

A. I thought so; I don't recall clearly.

Q. What was there about the conversation that you now say took place, in which he quoted you a price which you estimate would have aggregated in the neighborhood of \$1,000, that made you think when you were under oath, that you had met him there and paid him \$1,000 on a note? 10

A. I am not able to explain it.

Q. Did you owe him a thousand dollars?

A. No.

Q. The fact is that you didn't owe him but about \$300?

A. About that.

Q. And hadn't you in fact renewed that very note for about \$300 two days before you testified? 20

A. I don't recall that.

Q. Just think; isn't it a fact that on the seventh of December you renewed a note that had been running since 1907 or 1908 for a little over \$300 to Chamberlain & Barclay?

A. I know I renewed the note; just the date I don't recall.

Q. A short time before you testified?

A. The note would show it.

Q. You remember renewing that note? 30

A. I remember renewing the note.

Q. And that was just a short time before you testified?

A. That I don't recall.

Q. You know what the amount of that note was?

A. I believe the note was \$300.

Q. Having renewed that note a short time before you testified—at two months, wasn't it?

A. Yes.

Q. That note had been running ever since 1907? 40

A. I don't recall that.

Q. Several years?

A. The date shows it.

John Blanchard Edgar, cross.

Q. Several years?

A. I guess it had.

Q. You renewed it from time to time?

A. Yes.

10 Q. Had you paid anything on account of it?

A. I think so.

Q. When?

A. I don't recall.

Q. Can you recall making any payment on account of it?

A. I think I have.

Q. Over and above the discount?

A. That I don't recall. I think I have.

20 Q. In view of the fact that a short time before you testified on the sixteenth of January you had renewed the note to Mr. Barclay for about \$300, how do you now explain the fact that on the sixteenth of January you swore you paid Mr. Barclay a thousand dollars, when the extent of your obligation was about \$300, and you had only a short time before renewed that obligation?

A. I was thinking about the amount of the purchase would be \$1,000 and on a cash basis; there wouldn't be any note about it.

30 Q. Had you made the purchase?

A. No.

Q. That was way back in September?

A. In September.

Q. Have you no other explanation, Colonel Edgar, to make than that?

A. I don't care to make any other.

Q. Do you remember that on the seventh of December you renewed the note to Mr. Barclay for \$300, paying \$25 and interest?

40 A. I do.

Q. Hadn't you had a note of yours in Mr. Barclay's possession commencing in 1908 and renewed

John Blanchard Edgar, cross.

from time to time during 1909, 1910, 1911, 1912, 1913 and 1914, and wasn't it renewed on the sixth of October for two months, and renewed again, as you have already sworn, on December 7?

A. If the record shows that, I suppose it must be so. 10

Q. In view of the fact that on the seventh of December you renewed that note for \$300 and paid \$25 and interest, how can you account for the fact that you stated that after your settlement with Mr. Savage you had met Mr. Barclay at Matawan and paid him \$1,000 on account of the note and took up the note?

A. And took up the note?

Q. Yes, and had it home.

A. I cannot explain it. I got mixed on the dates. 20

Q. Did you ever owe him a thousand dollars?

A. I think not.

Q. Did you ever pay him a thousand dollars, Barclay?

A. I don't know that I ever paid him that sum of a thousand dollars.

Q. So that your statement with regard to having met him at Matawan, either by appointment or accident, just as you prefer; having paid him \$1,000 of these moneys taken from the bank,—proceeds of the check of Mr. Savage, and took up the note, which was at home, for \$1,000, were false, were they? 30

A. They were not true; not intentionally untrue, but I was mixed in my dates.

Q. There was never any time, as I understand it, when you paid Mr. Barclay \$1,000, either at Matawan or anywhere else, and there was never a note for \$1,000?

A. This matter of a thousand dollars was a matter I had in my mind with respect to the purchase of corn and hay. 40

John Blanchard Edgar, cross.

Q. There was never a time that Barclay had your note for \$1,000.

A. No.

10 Q. There never was a time that you paid a note for a thousand dollars to Barclay?

A. No.

Q. And there wasn't any note at home for a thousand dollars which you had paid and taken up from him?

A. No.

20 Q. The only explanation you have is that you had a talk with him in a general way, touching the purchase of some hay, corn and alfalfa, which aggregate amount, as you calculated, would be about a thousand dollars?

A. Yes.

Q. You never made the purchase?

A. No.

Q. Never incurred the obligation?

A. Never was consummated.

Q. How often have you telephoned Mr. Bevier since you testified here two weeks ago?

A. Twice, I think.

Q. Where from?

30 A. I think from New York.

Q. Matawan perhaps?

A. Not Matawan.

Q. Can you state where it was in New York that you telephoned to Mr. Bevier?

A. I don't recall.

Q. Did you telephone to his store at Poughkeepsie?

A. Yes?

40 Q. Was it at some pay telephone station or in some private office in New York that you telephoned from?

A. I think I telephoned once from a public telephone; I don't recall whether I telephoned the other time from a private office or not.

John Blanchard Edgar, cross.

Q. You have no recollection where either of these telephones was?

A. Not clearly.

Q. Or on what day they were?

A. No.

Q. But they were between the time you were here two weeks ago and the present time?

A. Yes.

Q. I understood you to say also, that this gentleman, Mr. Bevier, made an appointment to meet you at your place in September, when he came down in the automobile?

A. No.

Q. Where did Mr. Bevier telephone you when he met you by appointment and you paid him \$1,000 or the \$950.

A. At my house.

Q. You have a telephone there?

A. Yes.

Q. You didn't telephone Mr. Bevier from your house to Poughkeepsie?

A. I don't recall; I may have done it, but I don't recall.

Q. Colonel, can't you remember whether when you telephoned Bevier in the past two weeks, you telephoned from your home, or whether it was from New York?

A. I don't recall; I may have done so.

Q. Wasn't it, in fact, that you did it from your house?

A. No, I don't say it is a fact, for I don't recall clearly. It might have been. I would like to say—

Q. You arranged for the meeting in New York, by telephone, to pay the money?

A. I think he wrote me a letter asking me to meet him in New York.

Q. There was no telephone?

A. For that I think he wrote me a letter.

10

20

30

40

John Blanchard Edgar, cross.

Q. Did he tell you he had to have some money?

A. Yes.

Q. And that letter you destroyed?

10 A. No, I don't recall. I have a letter from him every week; I don't keep any of them.

Q. You had seen Judge Carrick two or three days before the Friday when you paid Bevier, hadn't you?

A. Yes.

Q. And he told you that it was your duty to pay back this money?

A. Yes.

Q. Notwithstanding that, two days after that you drew a thousand dollars out of the bank and took it to New York to Mr. Bevier?

20 A. Yes, I did.

Q. On an obligation that you had owed him, as you say, for an indefinite time?

A. Yes.

Q. Did Judge Carrick tell you that he was going to write a letter to me (Mr. McCarter), undertaking to repudiate the so-called settlement?

A. I think he did.

30 Q. And that was on the Tuesday or Wednesday that you saw him after the transaction in the Montgomery office, wasn't it.

A. I think it was.

Q. Did you tell Judge Carrick at that time that this money had been absorbed on a note that had matured?

A. I think so.

Q. You did?

A. I am not positive about it.

Q. That wasn't true either, was it?

A. That the money had all been absorbed?

40 Q. Yes, at that time.

A. It hadn't all been absorbed, no.

Q. And Judge Carrick told you that it was necessary for you, if you wanted to repudiate that settle-

John Blanchard Edgar, cross.

ment, to hand back to Mr. Savage the proceeds of the check and the note, didn't he?

A. He did.

Q. You understood that?

A. I did.

Q. You thoroughly comprehended the importance of that?

A. Yes.

Q. And that was on that Tuesday interview, wasn't it?

A. It may have been; I don't recall.

Q. Did you see Judge Carrick more than that once that week?

A. I think I did; I am not positive.

Q. Did you go out to the bank and go back and report to Judge Carrick that that check had been absorbed by a note, and you couldn't hand it back?

A. That I don't recall positively; I may have done so.

Q. If you did, it was untrue, wasn't it?

A. It was untrue?

Q. Yes.

A. No, it wasn't.

Q. It hadn't been absorbed if you hadn't drawn the thousand dollars; yet notwithstanding that, you subsequently drew and paid Bevier—

A. I don't know, the records will show. I would like to say this, if you will allow me to make a statement—

Mr. McCarter. I think you had better make it to your counsel.

Judge Carrick. I think you should allow him.

What is it, Colonel?

Witness. I was expecting money on a mortgage which was negotiated for and was to be paid in any day through my other counsel, Mr. Frank Dobbins, who was negotiating the sale

John Blanchard Edgar, cross.

of a mortgage, and it looked to me as if it was coming in any day; so I virtually borrowed this money out of the bank and that money was to come in.

10

Q. Then I understand you now to say you were expecting daily the payment of a mortgage through the hands of Mr. Frank V. Dobbins, a lawyer of Rahway, and that you rather expected to make the tender back to Mr. Savage from the proceeds to be derived from the payment of this mortgage; is that right?

A. I expected to make that money good in the bank after Judge Carrick told me that it must be paid back.

20

Q. So you had a mortgage that you expected to be paid through Mr. Dobbins?

A. Yes.

Q. For how much?

A. \$1,250.

Q. Who was to make that payment?

A. Mr. Dobbins was negotiating it.

Q. Was it a mortgage that was old that was to be paid off?

30 A. It was a second mortgage taken on the sale of a piece of real estate which he expected to get cash; he made the arrangements for it to be cash.

Q. In other words, you owned a second mortgage upon some real estate?

A. Yes.

Q. Aggregating how much?

A. \$1,250 the mortgage.

Q. And Mr. Dobbins was negotiating the disposition of that mortgage for you and you expected to get the proceeds?

40

A. Yes.

Q. What land was that mortgage on?

A. On a piece of real estate on the Woodbridge road.

John Blanchard Edgar, cross.

Q. Who made the mortgage?

A. A man whose name was, I think—I don't know—something like Sadawsky.

Q. When had he made the mortgage?

A. Two or three weeks before, I think.

Q. Made it to you?

10

A. Made it to Mrs. Edgar; she owned the property.

Q. She sold it and Sadawsky gave back a second mortgage to you for \$1,250?

A. Yes.

Q. Has Mr. Dobbins still got that mortgage?

A. He has disposed of it; I don't know what has become of it.

Q. Have you had the proceeds?

20

A. Most of it.

Q. Most of the \$1,250.

A. Yes.

Q. When did you get them?

A. It has been coming on, the payments.

Q. Since the date that you paid Mr. Bevier?

A. Yes.

Q. How much have you received?

A. I don't recall exactly.

Q. As near as you can recall.

30

A. I think in the neighborhood of a thousand dollars of it; it has been used in other transactions by Dobbins.

Q. Who paid you the money, Dobbins?

A. Dobbins.

Q. How much money did you get personally on account of this second mortgage?

A. The total?

Q. Yes.

A. I don't recall.

40

Q. A thousand dollars?

A. No.

Q. You said a little while ago you did.

John Blanchard Edgar, cross.

A. That I received a thousand dollars?

Q. I understood you to say so.

A. I didn't intend to say that.

Q. How much did you get?

10 A. I don't remember.

Q. \$50.

A. More than that.

Q. \$500.

A. It has been paid in small payments.

Q. Who paid it?

A. Mr. Dobbins.

Q. To you?

A. To me.

Q. And did you give him a receipt?

20 A. I don't know that I did.

Q. You remember that during the life of this bank account, and on or about the eighth of October, you drew a check for \$150.50 to Mr. Dobbins, out of this very money?

A. If the records show that, it must be so; I don't recall it.

Q. And on the 9th you drew another check to Mr. Dobbins for \$250?

A. Yes.

30 Q. If he was collecting money for you, why were you paying Dobbins?

A. There were several transactions going through. I hoped to have him here to testify to this thing that I am telling you about; I haven't been able to get him here.

Q. What other transactions beside the cash we paid you were there, and from whom did the cash come on this Sadawsky mortgage; did Mr. Sadawsky pay it all?

40 A. I don't know whether he paid it or his brother-in-law or some of his family. Some of his family were negotiating the real estate transaction. They have since acquired the property and live there now.

John Blanchard Edgar, cross.

Q. I understand that you sold some property to a man named Sadawsky and that a second mortgage was given back to you, or Mrs. Edgar, for \$1,250, which you put in Frank Dobbins' hands to get cash, and you say that it was the proceeds of that mortgage that you expected to receive, and were disappointed in not receiving? 10

A. Yes. At the same time, Sadawsky was negotiating for another piece of property at \$5,000, \$2,500 cash, all of which I expected would occur about that week or the next.

Q. Did Sadawsky pay off his second mortgage?

A. I understand that he did.

Q. And it was canceled?

A. I believe it to be canceled; I don't know. 20

Q. And surrendered to him?

A. I haven't it; I left it with Frank Dobbins.

Q. When did you leave it with Frank Dobbins?

A. I think when it was first made; I don't recall exactly.

Q. About when was that?

A. I think it was some time in September; middle or latter part of September; I don't recall that.

Q. When did he make the first payment to you?

A. I don't recall. 30

Q. Before or after you drew a thousand dollars from the bank on the ninth of October?

A. I think before, but I am not positive of it.

Q. How much did he pay you before?

A. I don't recall.

Q. How much were you expecting to get?

A. If that thing went through I expected to get \$1,000 and also \$2,500 from the sale of the other piece of property.

Q. How much have you had? 40

A. The other piece of property isn't closed up yet.

Q. Is the Sadawsky mortgage satisfied?

A. That is satisfied.

John Blanchard Edgar, cross.

Q. You are sure about that?

A. I am told so by Frank Dobbins. Dobbins and I haven't settled our accounts yet.

10 Q. Do you know how much you or Dobbins has had on account of it?

A. I haven't had a statement of it.

Q. How much have you had?

A. That I don't recall.

Q. When did you get the last money from Mr. Dobbins?

A. I don't recall that.

Q. Since you were here two weeks ago?

A. I think I have had some from him within two weeks; I am not positive.

20 Q. Have you any record of the total amount received?

A. I have a record of it.

Q. You were subpoenaed by us to produce the note to Chamberlain & Barclay for a thousand dollars which you swore you paid?

A. Yes.

Q. You cannot produce that note?

A. No, I cannot.

Q. It never existed?

30 A. Never.

Q. Have you no idea how much money you got from Dobbins?

A. No.

Q. Whether it was \$100 or \$500?

A. I don't recall.

Q. Can't you give us some estimate?

A. I think it is more than \$100.

Q. Had you had any from Dobbins previous to the last hearing on account of that Sadawsky mortgage?

40 A. I think so,—two weeks ago that was,—yes.

Q. How much have you had altogether?

A. I don't know.

John Blanchard Edgar, cross.

Q. \$500?

A. I don't know.

Q. \$300?

A. I cannot say.

Q. How much have you had since the last hearing? 10

A. A small amount.

Q. How much?

A. I don't know; I think in the neighborhood of \$50.

Q. Has the Sadawsky mortgage been paid off?

A. I understand it has.

Q. In full?

A. Yes.

Q. And someone owes you or Mrs. Edgar \$1,250 on account of it, except as may have been paid? 20

A. Yes.

Q. Who owes it, Dobbins?

A. I look to Dobbins for the settlement of the matter.

Q. He was your attorney in the matter?

A. Yes.

Q. And you have no idea how much is due?

A. There have been two or three other deals going through.

Q. You have no idea how much is due you? 30

A. No.

Q. Have nothing to show for it?

A. No.

Q. And no way by which you can satisfy yourself or Mrs. Edgar whether you will get, or have had, all that is really coming to you on that Sadawsky mortgage?

A. I have got a memorandum of the money I have received.

Q. Where are those memoranda? 40

A. Home.

Q. The dates and the amounts you received from Dobbins?

John Blanchard Edgar, cross.

A. Yes.

Q. You have no recollection what they are?

A. No.

Q. Are they in your account?

10

A. Yes.

Q. You kept a little account?

A. Yes.

Q. Will that same book show the alleged indebtedness to Mr. Bevier?

A. I think it will.

Q. What book is that?

A. That will probably be in my diary.

Q. You speak of some book account that will show the amounts received from Mr. Dobbins; is that

20 your diary you speak of?

A. Yes.

Q. Touching your knowledge of the value of this property owned by the Tremley Point Corporation, whose stock you received or were to receive, I want to again advert to your acquaintance with the land down there. The Carteret Realty Company owned land on Staten Island Sound, didn't it?

A. Yes.

Q. Meadow land?

30

A. Yes, on the Carteret side.

Q. On the west side of the Sound?

A. Yes.

Q. So does the Tremley Point Corporation own land on the west side of the Sound?

A. I am told they do.

Q. You had been president of the Carteret Company?

A. Yes.

40 Q. You and your wife had for ten or fifteen years continuously owned stock in that company?

A. Yes, and do still.

Q. You have been a director of it?

A. Yes.

John Blanchard Edgar, cross.

Q. Are yet?

A. Yes.

Q. You are today president of it?

A. I believe so.

Q. And have been for ten years, haven't you?

10

A. I don't know whether I have or not.

Q. Since the organization of the company you have been president?

A. No, sir.

Q. Who was before you?

A. Charles E. Heald.

Q. Is he the man that testified for you in this suit?

A. Yes.

Q. Is he the man of whom you recently borrowed \$2,000?

20

Judge Carrick. Objected to, and I instruct the witness not to answer, it is entirely foreign to this transaction.

Q. Where did the money come from that Judge Carrick tendered to me, do you know?

Judge Carrick. I instruct the witness not to answer that question.

Witness. I decline to answer.

Q. It didn't come from the proceeds of the check of Mr. Savage which you had spent, did it?

30

A. No.

Q. Don't you know where that money came from?

A. What money?

Q. That Judge Carrick tendered me on your behalf?

A. I think I do.

Q. I ask you where it came from.

Judge Carrick. I instruct the witness not to answer.

Q. How many shares has your wife owned during all this period in the Carteret Company?

40

John Blanchard Edgar, re-direct.

A. A one-third interest less one share.

Q. That is true today, isn't it?

A. Yes.

10 Q. And has been so ever since the organization of the company?

A. Yes.

Q. You are no stranger to lands on Staten Island Sound, are you?

A. Not entirely.

Q. Haven't you frequently in your connection with the Carteret Realty Company taken people proposing to buy lands down there, out in your carriage to the lands and gone over it with them?

A. I have occasionally.

20 Q. And you are familiar with the sales that have been made there for the Carteret Company?

A. Nothing lately.

Q. What is the last sale you are familiar with?

A. Four or five years, that I positively know anything about.

Q. Land along Staten Island Sound is very valuable?

A. Some of it is, on the Sound.

RE-DIRECT by *Judge Carrick.*

30 Q. This Carteret Realty Company to which your attention has been directed, is a corporation having one hundred shares outstanding?

A. Yes.

Q. And one-third owned by you and Mrs. Edgar?

A. Yes.

Q. And one-third by Mr. Savage?

A. Yes.

Q. Who owns the other third? Houston or Heald, who was it?

40 A. I think it was sold by Mr. Heald to Mr. Houston.

John Blanchard Edgar, re-cross.

Q. Is it an active corporation; has it been doing active business?

A. Nothing has been actively done lately.

Q. How long since the last sale was made?

A. Four or five years.

Q. Colonel, in any of those statements which you have made at the last session two weeks ago, with reference to the payment of money to Chamberlain & Barclay, which apparently were wholly in error, did you intentionally or purposely misstate the facts?

10

Mr. McCarter. I object to that.

A. I did not.

Q. What is your age?

A. I was born in 1843.

RE-CROSS by *Mr. McCarter.*

Q. Well, Colonel, you know that you were under oath, didn't you?

20

A. Oh, yes.

Q. And you knew that you were undertaking to explain why you had not tendered back to Mr. Savage the proceeds of the check that you had deposited on Saturday, the third of October?

A. Yes.

Q. And you admit that to be a matter of some importance, owing to Judge Carrick's advice that you should tender that money back?

30

A. Yes.

Q. And with the importance of the matter before your mind plainly, you stated first that you had found your bank account depleted by a maturing note for \$1,000, and that later you changed the statement and said that on the ninth of October, after you had heard the cashier of the bank testify, you drew out a thousand dollars, met Mr. Barclay at Matawan and paid him a note of that amount, a thousand dollars, which you owed him and which was due, and that you had that note at home. I ask you what do you mean

40

John Blanchard Edgar, re-cross.

when you say that you didn't wilfully make those statements?

A. I made the statements, but I was confused in my mind.

10 Q. Didn't it occur to you that it might be judicious or important, in view of the change in your testimony today, to produce the note to Mr. Bevier, your kinsman?

A. No, it didn't occur to me.

Q. Have you ever in your life met Mr. Barclay at Matawan Station or in Matawan?

A. I think that I have; I think I met him at the Matawan Station.

Q. When?

20 A. I think it was last fall.

Q. How did you happen to be there?

A. I often go there.

Q. Do you go by train?

A. Yes, always by train.

Q. Have you business or friends in Matawan?

A. I go to Matawan and get a carriage and drive often down to Holmdel.

Q. What time in September do you think you met him there?

30 A. I think the latter part of September.

Q. You cannot say when?

A. I don't recall.

Q. The Carteret Realty Company within the past two or three months has made a deed which you signed as president, for some land down there on the Sound in this neighborhood?

A. Not that I recall.

Q. The right of way deed?

A. The right of way for the oil pipe line, yes, sir.

40 Q. When was the last deed for land that you signed?

A. I don't recall.

Q. Two years ago?

Ezekiel S. Barclay, direct.

A. I don't think so; it may have been that; I don't recall at all.

EZEKIEL S. BARCLAY, sworn in rebuttal for petitioners.

10

DIRECT EXAMINATION by *Mr. McCarter.*

Q. You live where, Mr. Barclay?

A. Cranbury, New Jersey.

Q. Are you in any business?

A. Yes.

Q. What is your business?

A. We are shippers of hay and grain.

Q. What is the name of your firm?

20

A. Chamberlain & Barclay.

Q. How long have you known Colonel Edgar?

A. I think about seventeen years. The first I ever remember Colonel Edgar was when he was running for the Assembly in 1898.

Q. Do you remember two weeks ago today receiving a telephone message from Colonel Edgar?

A. Yes.

Q. What time did you get that message?

A. I am under the impression it was around two or three o'clock in the afternoon.

30

Q. Was he on the 'phone?

A. Yes.

Q. Do you remember what he told you?

A. No, I don't. If I remember right, he told me he wanted to see me about—he asked me if I was coming to Rahway any time soon, and I replied that I didn't think that I was, and he said he wanted to see me about some business matters and he would like to talk with me, and I informed him I didn't expect to be in Rahway, and I think that is about all there was to the conversation.

40

Q. Did he make any appointment with you?

Ezekiel S. Barclay, direct.

A. Not certain; I think that he spoke of coming down on the following Monday, but there was no appointment made.

Q. He said he might be down?

10 A. That is as I remember it.

Q. Did he come?

A. Yes, sir.

Q. Do you recall what he told you when he arrived there?

A. No; I probably could go over it; I really would have to refresh my mind on that, although I think that he told me he had gotten confused on some evidence that he had given here, and just what he said to me, I cannot tell you word for word; it was a
20 general conversation.

Q. Mr. Savage had been there the preceding Saturday afternoon?

A. Yes.

Q. Did you tell Mr. Savage that you had received a telephone from Colonel Edgar?

A. I think I did.

Q. When Mr. Edgar called on you, on Monday, did you inform him that Savage had been there on Saturday?

30 A. I think perhaps I did, although I wouldn't testify certainly about that, but I am under the impression that I did.

Q. Mr. Edgar swore in this suit two weeks ago on or about the ninth of October he met you at the Matawan Station and paid you \$1,000, to take up a note of that amount which he owed you, and that he went down there and took up the note; is that a fact?

A. He didn't pay me \$1,000.

Q. Did he pay you anything in Matawan?

40 A. No, sir.

Q. Did he meet you at Matawan?

A. I wouldn't testify surely about that; I don't remember positively that he did, although it is pos-

Ezekiel S. Barclay, direct.

sible; I wouldn't testify one way or the other about that, because I couldn't be sure about that.

Q. Did he ever pay you \$1,000 in cash?

A. I think not, no, sir.

Q. Or in any other way; check or any other way?

10

A. For a thousand dollars?

Q. At one time?

A. I don't think he did.

Q. Did he ever owe you a thousand dollars?

A. It is possible that he did.

Q. Within the last five years?

A. I wouldn't imagine quite a thousand dollars, although he has owed us quite an amount at different times.

Q. Have you a transcript of your books here?

20

A. I have a copy that we made of a few—

Q. Look at any memorandum you may have in your possession and see if Colonel Edgar, since 1907, has owed you as much as \$1,000.

A. I notice on May 18, I think we had his note at that time for \$720.84—

Q. Won't you please answer my question? (Last question repeated.)

A. I started to answer that question. I started to say to you that we had one note of \$720.84; I don't think that our records show that he owed us anything else at that time; it is possible, but I don't think that these notes run together.

30

Q. When was that?

A. On May 18, our record shows, 1907.

Q. On August 27, 1907, what was the indebtedness reduced to?

A. From this record I have here—I don't seem to have any record of August 27, 1907.

Judge Carrick. Is this record one you made yourself from the books?

40

Witness. Yes, it is a record.

Ezekiel S. Barclay, direct.

Q. What is the next record that you have?

A. After May 18, we have June 22, 1907, \$628.64.

Q. Give us your next record.

10 A. October 12, 1907, \$338.33. I notice on the other side we have a check for October for \$300; that accounts for that reduction.

Q. Have you got January, 1908?

A. \$344.33.

Q. Go on right down.

A. February 29, \$500; April 29, 1909, \$177; August 21, 1909, \$185; November 9, 1909, \$113.25; February 5, 1910, \$90.50.

Q. That is the amount of the indebtedness at that time?

20 *Judge Carrick.* I don't understand he is giving the amount of the indebtedness.

Witness. I am not giving the indebtedness; you subpoenaed me to bring a copy of our note book, and this is what this is; but this is a copy of our note book and how they were reduced or increased I cannot testify.

Mr. McCarter. In view of the misunderstanding, I am quite willing to have it all stricken out.

30 *Judge Carrick.* I think it might as well stay as it is.

Q. Did you have a merchandise account outside of the note account?

A. It is very likely we did at times.

Q. During this period?

A. I think likely during that period that we did, because the account was more active at that time; I think we were selling him goods at that time.

40 Q. Let us get down to the last year; what was the amount of the note that you had, any note that you had of Colonel Edgar's, during the year 1914?

A. We had on March 11, 1914, a note for \$304.50.

Ezekiel S. Barclay, direct.

Q. That was renewed when?

A. That note came due and it wasn't renewed for quite a little while, as I remember, and my impression is that I met Colonel Edgar in Rahway and asked him about the account, and I think he gave me a note then for \$325; we were not sure about the amount, but we thought \$325 would be about the amount, including the interest.

10

Q. And that was when?

A. That was given on the ninth of October, 1914.

Q. And that fell due in two months?

A. Yes, sir.

Q. And renewed when?

A. On the tenth of December.

Q. Did that note go through the bank?

20

A. I think so; I wouldn't be positive, but I think

so.

Q. You had no other note than that?

A. No, sir.

Q. During the year 1914?

A. No, sir.

Q. And he owed you no other money than that, did he?

A. No.

Q. And that was renewed when?

30

A. The last renewal on the tenth of December; it was renewed in this way; he gave us a check for \$25 and the interest and a new note for \$300.

Q. That note will mature when?

A. I think that was for two months; that should be due the tenth of February.

Q. Did you not stop selling Colonel Edgar goods in 1908?

A. According to our books, the last sale I made to Colonel Edgar was November 7, 1908.

40

Q. Did you have any written or verbal communication with Colonel Edgar, either in October or the latter part of September, 1914, in which he asked you to renew a note and you refused?

Ezekiel S. Barclay, direct.

A. That is a hard question to answer right off the reel. I know that there had been a time when we—

Q. I am only asking whether you had any written or verbal communication. (Last question repeated.)

10 A. I cannot answer that question without prefacing my remarks a little bit, which will answer the question. Saying yes or no, I cannot say; I wouldn't answer.

Q. I wanted your best recollection whether you had any communication, either verbal or written, with Colonel Edgar, emanating from him?

A. I am under the impression that we did write him that we wouldn't renew the note, but I couldn't be too positive about that, because a good many
20 things happen in a year's business, and it is hard to remember every little conversation that transpires here, there and all over; whether we did or did not, I cannot testify for sure.

Q. Where was it that you renewed the note in October, in Rahway?

A. That was the renewed date of the last one?

Q. Yes.

A. Yes, I think I met him on the street in Rahway. I frequently go to Rahway on business. If I remem-
30 ber correctly, I met him on the street and asked him about it and we fixed it up in a stationery store.

Q. In Cherry street?

A. Right opposite William Hower's, if I remember correctly.

Q. And you and he then agreed that the amount of interest and what not that he owed you on this whole account was in the neighborhood of \$325, so he gave you a note for that amount?

A. Yes, and the understanding was that if there
40 was a little difference one way or the other, it would be taken care of.

Q. Where was the renewal in December made?

A. That was done by mail.

Ezekiel S. Barclay, cross.

Q. That didn't go through the bank?

A. I think the way it was done, I think that at his request we recalled the note; I think that is the way it was done.

Q. Do you remember whether that was payable at the Rahway National Bank? 10

A. Yes, I am quite positive of that.

Q. Have you seen the Colonel between that Monday, the 18th of January, when he called on you, and today?

A. No.

Q. Haven't talked with him over the 'phone?

A. No, sir.

CROSS-EXAMINATION by *Judge Carrick.*

Q. Mr. Barclay, the record you have here wouldn't show any cash sales, would it? 20

A. No, sir.

Q. When you went to Rahway on October 9, and had this conversation with Colonel Edgar, I presume it was, in the first place, asking whether he could pay the note or take care of some part of it?

A. Yes.

Q. When you found that he wasn't able to do that, then this note for \$325 was given? 30

A. Yes, sir.

Q. You spoke of recalling the note which was renewed, I think you said, on December 10; you mean recalling it from the bank; you put it in the bank for collection, and at his request it was recalled?

A. Yes.

Q. After you received this telephone message from Colonel Edgar two weeks ago, and which, according to your recollection, was between two and three o'clock in the afternoon of Saturday, you saw Mr. Savage? 40

A. Yes.

Ezekiel S. Barclay, cross.

Q. How long after the telephone communication?

A. According to my recollection, Mr. Savage was at our office between three and four o'clock in the afternoon.

10 Q. He came down in his limousine?

A. Yes.

Q. And he had Mr. Jones, the cashier of the Rahway Bank, with him?

A. Yes.

Q. He hadn't telephoned you before his coming?

A. If I remember correctly, Surrogate Clayton, of Middlesex County, called me up to see if I would be in the office; I am under that impression; I think that was the day.

20 Q. Did you know Mr. Savage prior to that time; was he an acquaintance of yours?

A. No, but I knew him by sight.

Q. And Mr. Jones, had you some acquaintance with him?

A. Yes.

Q. And he introduced Mr. Savage when he came in?

A. Surrogate Clayton, of Middlesex County, introduced Mr. Savage.

30 Q. There were three of them there together?

A. Yes.

Q. And then Mr. Savage was down again on Monday afternoon?

A. Yes.

Q. And came in there while you were talking with Colonel Edgar on that Monday afternoon?

A. Yes.

Q. And he then had the subpoena which he served upon you to appear here last Saturday and produce
40 the book?

A. Yes.

BOTH SIDES REST.

Exhibit D 2 for Identification.

(Exhibit D 2 Iden. 1/16/15.)

"JOSEPH P. DAY

REAL ESTATE

31 Nassau Street,

New York, September 25, 1914.

10

Mr. Richard M. Montgomery,

27 Pine Street,

New York City.

Dear Sir:

In reply to your inquiry, I beg to say that in November, 1912, I appraised for you 907 acres of land including the Tremley Point Corporation property at Tremley, Union County, N. J., consisting of about 500 acres, as follows:

200 acres on Tremley Point, at \$7,500 per acre	\$ 1,500,000	20
---	--------------	----

300 acres adjacent to Tract No. 1, extending to the Long Branch Division of the Jersey Central R. R., at \$3,000 per acre	900,000	
---	---------	--

14½ acres adjoining the Long Branch Division of the Jersey Central R. R., but across from Tremley Point, at \$2,000 per acre.....	29,000	
---	--------	--

	\$ 2,429,000	30
--	--------------	----

For assembling a large number of holdings in one ownership, add ten per cent.	242,900	
--	---------	--

	\$ 2,671,900	
--	--------------	--

Since making that appraisal, the United States Government has made an appropriation for the improvement of the waterways in and about Staten Island, and are at present dredging Staten Island

40

Exhibit D 3 for Identification.

Sound to give to a uniform depth of water of about thirty feet. This improvement, when completed, ought to make this channel a very popular one and ought to increase the value of the land adjoining.

- 10 The desirability of land along Staten Island Sound for manufacturing purposes, especially for firms who receive and ship large cargoes by both rail and water, is becoming more apparent every day, and our office has had occasion in the past year to look up sites along Staten Island Sound and adjacent waters for firms contemplating a location for their plants in this general location, and we have found values very firm with a tendency to increase steadily.

- 20 I could not state that prices have advanced in certain percentage, but I do think your property is worth more now than it was in 1912 and that the chances of your marketing it at a good price would be bright were it not for the financial condition due to the European war.

Yours very truly,

(Signed) JOSEPH P. DAY.

R.H./S."

(Exhibit D 3 Iden. 1/16/15.)

30

"FLOYD S. CORBIN

REAL ESTATE AND LOANS

10 Wall Street.

New York, August 29, 1912.

Mr. Richard M. Montgomery,
No. 27 Pine Street, City.

Dear Sir:

- 40 Agreeable to your request, I have made a careful examination of the tract of land of about 907 acres, located in Union County, New Jersey, beginning at

115*

Exhibit D 3 for Indentification.

the Staten Island Sound and running directly west to within a point distant about 1,500 feet from the main line of the Pennsylvania road.

This tract has a frontage of about 2,100 feet on Staten Island Sound and about 7,000 feet on the Rahway River. The total area of 900 acres is made up of about 150 acres salt meadow and 750 acres upland. 10

My estimate of the present value of this property is as follows:

100 acres on Staten Island Sound, at \$6,000 per acre	(ink) 600,000	No. 200,000	
300 acres on Rahway River, adjoining above, at \$3,500	1,050,000		20
(Being a plot of 400 acres east of Long Branch R. R. to S. I. Sound.)			
200 acres near Linden, at \$2,500 per acre.....	500,000		
300 acres between Long Branch Div. (Pa. R. R.) and tract near Linden, at \$1,500 per acre	450,000		30
900 acres, total value.....	\$ 2,600,000		

In making this estimate I have taken into consideration the value of the property for industrial purposes,—such as terminals, warehouses, factories, etc., because the property has both deep water and rail facilities. Direct connection may be had with the C. R. R. of N. J., Pennsylvania and the New 40

Exhibit D 3 for Identification.

Jersey Short Line, which is to be constructed between Jersey City and Philadelphia.

	(Pencil)	600,000
10		1,050
	Woodbridge	300
		1,950,000

20 By reason of its size and shape, the above tract will lend itself admirably to an economical and comprehensive development for the purposes above enumerated, and if so developed will fill to an extent, a much needed want in the port of New York, of which this section is an integral part.

I have a specialty of water-front properties in the port for fifteen years, and am very familiar with values and locations. Personally, I have sold over 200 acres of land on the Staten Island Sound alone within the period mentioned.

The property offers an attractive opportunity for exploitation, as it would be very difficult to duplicate except at much higher figures than I have given above.

30 Respectfully submitted,

Very truly yours,

(Signed) FLOYD S. CORBIN."

Exhibit P 3, Jan. 16, 1915—Nicholas W. Bindseil.

EDGARTON FARM, J. B. EDGAR SHEET NO. 7

E. C. MORSS, Bookkeeper.

DATE	1914	CHECKS IN DETAIL	TOTAL CHECKS	DEPOSITS	BALANCE
March	7	AMT. FD.	\$2,166.75	\$2,201.09	\$ 34.34
			\$ 75.00		
	20		10.00	100.00	49.34
		\$ 20.00			
	24	7.20	27.20	20.00	42.14
	26			15.00	57.14
	28		15.00		42.14
April	4		18.96		23.18
	7			15.00	38.18
	11		6.00	5.00	37.18
	13		158.00	158.00	37.18
			6.00		
	15		34.35	25.00	21.83
	16		13.95		7.88
		\$ 8.50			
	18	12.00	20.50	15.00	2.38
	21			7.00	9.38
	24		7.45		1.93
	27		10.00	14.00	5.39
	28		4.90		1.03
May	5			7.00	8.03
	25			14.00	22.03
	26		21.50		.53
	29			15.00	15.53
June	2		12.48		3.05
	6		6.00		2.95
July	1			15.00	12.05
	3		15.33		3.28
		22.75	30.00		
	6	30.00	82.75	150.00	63.97
		15.00			
	7	9.50	24.50		39.47
	9		20.00		19.47
	11		15.00		4.47
	14			32.00	36.47
	15		35.00		1.47
	18			60.00	61.47
		5.05			
	21	50.00	55.05	15.00	21.42
	24		12.40		9.02
	25			5.00	14.02
	28		10.00		4.02
Aug.	1		3.75	8.00	8.27
	8		6.00		2.27
	11			15.00	17.27
	12		11.15		6.12

This is a true, exact and correct copy of the leaf from the individual ledger of The Rahway National Bank, Rahway, N. J., exhibited at the hearing in the Edgar-Savage case at Newark, N. J., January 16, 1915.

DATE 1914		CHECKS IN DETAIL		TOTAL CHECKS	DEPOSITS	BALANCE
AMT. FD.				2,917.47	2,921.09	3.62
Aug.	26			10.00	10.00	3.62
Sept.	8			3.00		.62
	9				25.00	25.62
	10			15.00		10.62
	12				10.00	20.62
	16			10.00		10.62
	19				250.00	260.62
		40.00	10.00			
	21	16.26	15.00	81.26		179.36
	22			8.40		170.96
	24			5.80		165.16
		25.00	15.00	16.32		
	25	7.00	10.00	16.36		75.48
		20.00				
	26	50.00		70.00		5.48
Oct.	2			3.00		2.48
		75.00				
	3	100.00		175.00	2,000.00	1,827.48
	5			50.00		1,777.48
	6			116.85		1,660.63
		103.39	22.50			
	7	33.80		159.69		1,500.94
	8			10.00		1,490.94
		100.56	1,000.00			
	9	250.00		1,350.56		140.38
			95.00			
	10		6.00	101.00		39.38
		10.00				
	13	120.00		130.00	200.00	109.38
			26.42			
	20		12.50	38.92		70.46
	22			5.00		65.46
	26			20.00		45.46
	27			13.00		32.46
	31			10.00	20.00	42.46
Nov.	2			20.00	20.00	42.46
	6			9.43		33.03
	7			7.50		25.53
	9			10.00		15.53
	16			10.00		5.53
	18				5.00	10.53
	20			9.20		1.33
Dec.	4				175.00	176.33
		10.00	15.00			
	5	15.00		40.00		136.33
			20.00			
	9		10.00	30.00	60.00	166.33
	11			35.00		131.33
	12			25.00		106.33

Certificate of Commissioner.

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

I HEREBY CERTIFY that the foregoing testimony was taken before me, Nicholas W. Bindseil, a Supreme Court Commissioner of the State of New Jersey, on Saturday, the sixteenth and thirtieth of January, 1915, at the office of McCarter & English, Prudential Building, Newark, New Jersey, in the presence of Robert H. McCarter, Esquire, of McCarter & English, for petitioners, and Charles L. Carrick, Esquire, for plaintiff; that it was stipulated and agreed by and between the attorneys for the respective parties that the testimony of the witnesses should be taken down in shorthand by me and afterwards reduced to typewriting, the signature of the witnesses to their said testimony being waived; and I further certify that the foregoing is a true and correct transcript of my shorthand notes of the testimony of the witnesses given before me.

Dated, February 2nd, 1915.

NICHOLAS W. BINDSEIL,
Supreme Court Commissioner of New Jersey.

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Opinion of Supreme Court.

Opinion.

Filed March 9, 1915.

NEW JERSEY SUPREME COURT.

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FEBRUARY TERM, 1915.

JOHN BLANCHARD EDGAR,
Plaintiff,

vs.

EDWARD S. SAVAGE and
MARGARET T. SAVAGE,
Defendants-Petitioners.

*On Petitioners
Rule to Show
Cause.*

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Argued February 25, 1915. Decided March 8, 1915.
Before Justices Trenchard, Bergen and Black.
For the rule, Robert H. McCarter and Clark McK.
Whittemore.

For the plaintiff, Carrick & Wortendyke.
Per Curiam.

30 The plaintiff in this action brought his suit against
the defendants to recover the sum of \$50,000, which
he alleged to be due for services rendered for the
sale of certain stocks in a railroad and three indus-
trial companies. After this cause was at issue, the
defendants claimed to have made a settlement with
the plaintiff, notwithstanding which, the plaintiff
gave notice of trial. The defendants then submitted
a petition setting forth that a settlement had been
made in writing on all the matters of difference, by
the terms of which the defendants were to transfer
to plaintiff two hundred and fifty shares of the
40 common stock in a land company, i. e., the Tremley
Point Corporation, pay him \$2,000 in cash, and give
him a note for \$2,000; that the cash was paid to the

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plaintiff, the note given and the stock transferred to the plaintiff's wife by his request. Thereupon a rule to show cause was allowed why the action should not be stayed. It is now moved to make that rule absolute upon the testimony taken under it. According to this testimony, it is made to appear by the evidence of Mr. Edgar, that in addition to what appeared in the petition for the rule, the defendants made some representations as to the value of this stock, which was said to have a par value of \$25,000; that on the morning when the check was given to him, as well as the note, he was asked to sign a statement that the defendant was making no representation as to the value of the property except the appraisals made by Mr. Corbin and Mr. Day, concluding with this, "If you are willing to accept this stock, based solely upon these statements, you will kindly acknowledge the same with your signature." Mr. Edgar declined to sign until he had submitted the paper to his attorney, and thereafter he declined to accept the stock and sometime afterwards undertook to rescind the agreement to settle by tendering the return of the \$2,000 and the note, which the defendants declined to accept. While the power of the court to control the proceedings within its jurisdiction is not questioned by the plaintiff's counsel, he however, insists, that the court will not interfere and restrain the prosecution of a suit which has been settled, unless the facts are substantially undisputed, so that it appears the power of the court is being used contrary to good faith. We are inclined to think that this question ought not to be settled by the court upon these conflicting depositions, and that the defendants should be allowed to file a supplemental answer setting up the settlement, to which the plaintiff may take issue, and the question of fact settled by a jury, where the defendants will have the advantage of every legal objection,

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that is now represented concerning the delay in making the offer of restitution and other matters now urged in support of the rule. This accords with the rule stated by Baron Alderson in the case of *Crocker v. Tempest*, 7 M. & W. 502, "The exercise of the power is certainly a matter for the most careful discretion; and where there are conflicting statements of fact, I agree that it is in general much better not to try the question between the parties on affidavit."

We think the rule ought to be discharged without prejudice to the defendants to set up this new matter in a supplemental answer and without payment of costs on this rule.

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Rule Discharging Order.

Rule Discharging Order.

Entered March 10, 1915.

NEW JERSEY SUPREME COURT

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JOHN BLANCHARD EDGAR,
Plaintiff,
 vs.
 EDWARD S. SAVAGE and
 MARGARET T. SAVAGE,
Defendants.

*Rule
 Discharging
 Order to
 Show Cause.*

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The order to show cause made in the above entitled action on the twenty-third day of December, nineteen hundred and fourteen, together with the depositions taken thereunder, having come on for hearing on the return day before this court, and the court having heard the argument of Robert H. McCarter, Esquire, of counsel with the defendants in support of the rule, and of Charles L. Carrick, Esquire, of counsel with the plaintiff in opposition thereto, and having considered the same,

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It is ordered that said order to show cause be, and the same is hereby discharged, without costs.

It is further ordered that the defendants have leave within twenty days after service upon their attorneys of a copy of this order, to file a supplemental answer, or answers, setting up the settlement claimed to have been made with the plaintiff.

Rule entered March 10, 1915.

On motion of

CARRICK & WORTENDYKE,
Plaintiff's Attorneys.

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