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Notice of Appeal and Grounds.

Filed October 7, 1930.

New Jersey Supreme Court

IRVINGTON TRUST COMPANY, a corporation, *Plaintiff-Appellee,* *vs.* ASHER MAURER, *Defendant-Appellant.*	*Action at Law,* Notice of Appeal and Grounds.

To Rossbach & Crummy, Esq.,
Attorneys of plaintiff-appellee,
763 Broad Street,
Newark, N. J.

Gentlemen:—

Please take notice that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the judgment of the Supreme Court entered in this cause on the following ground:

1. That the Supreme Court erred in confirming the judgment of the Essex County Circuit Court in favor of the plaintiff.

M. S. MAURER,
Attorney of defendant-appellant.

Service of the above notice of appeal and grounds hereby acknowledged this 9th day of July, 1930

ROSSBACH & CRUMMY,
Attorneys of plaintiff,appellee.

Supreme Court Opinion

NEW JERSEY SUPREME COURT.

No. 80, January Term, 1930.

IRVINGTON TRUST COMPANY,
a corporation,
Plaintiff-Appellee,

vs.

ASHER MAURER,
Defendant-Appellant.

Submitted January Term, 1930; decided June, 1930.
Appeal from Essex County Circuit.
Before Chief Justice Gummere and Justice Campbell.
For appellant, Maurice S. Maurer.
For appellee, A. J. Rossbach.

PER CURIAM:

This is an appeal from a summary judgment entered upon the striking out of an answer in an action to recover upon a promissory note made by the defendant to the order of Helene Weiss and by her negotiated to and discounted at and held by the plaintiff, bank.

The complaint in the action is in the usual form, setting up the note, averring that upon its due date it was presented for payment at the place where it was made payable and it was not paid, that the note was the property of the plaintiff, bank, had not been paid and demanding the amount therof,$1000. and interest from its due date, June 10, 1929. A copy of the note was attached to the complaint.

The answer of the defendant maker, which was struck out, admits the execution of the note but

denies there is anything due thereon, denies the plaintiff is the holder in due course, and for value, and denies that the defendant, maker, owes anything thereon either to the payee, Helene Weiss, or the plaintiff, bank. In addition nine separate defenses are set up:

1. That plaintiff is not the holder for value.

2. That plaintiff is not the holder in due course and was chargeable with knowledge of all defects in the note.

3. That plaintiff is not a holder in due course and is chargeable with all defenses available to defendant against the original holder.

4. That the defendant, maker, owes to Helene Weiss, the original payee, nothing on the said note.

5. That N. J. Lamp Works, Inc., is indebted to the Estate of Morris Weiss, deceased, in the sum of $1000. and has given prior notes, therefor and the note sued on was intended to be a note of that corporation, of which the defendant is an officer, but the corporate designation was, by error, omitted: that Helene Weiss, administratrix of said estate, with full knowledge of said error in the execution of the note and with full knowledge that the defendant owed her nothing took said note and discounted it at the plaintiff bank and took the proceeds for her own personal use.

6. That Helene Weiss has placed with the plaintiff bank securities to insure to it payment of the said note and of the moneys received by her thereon and said plaintiff is not a holder of said note for value.

7. That the defendant received no consideration from said Helene Weiss for said note.

8. That said Helene Weiss cannot maintain any claim or recover judgment against the defendant upon said note and for that reason he is not liable thereon to the plaintiff.

9. That plaintiff having on deposit, as security for the payment of such note, moneys and assets of Helene Weiss it cannot hold defendant for the payment of such note. Defendant claims that Helene Weiss is alone responsible to the plaintiff for the moneys received by her from it as proceeds of the discount of the note and urges that she be made a party defendant.

Upon motion, upon notice, affidavits and counter affidavits the answer was stricken out and summary judgment entered in favor of the plaintiff below, from which judgment the defendant below appeals and urges for reversal several grounds.

1. That the note was executed to Helene Weiss by mistake in that it was executed by the defendant, as maker, individually instead of as an officer of the N. J. Lamp Works, Inc., and this being so to the full knowledge of Helene Weiss she took the note fraudulently and dishonestly, therefore her title is defective and that defect makes it impossible for the plaintiff bank to be a holder in due course and consequently the defense of error in execution is open to the defendant, appellant, as it would have been to him against the original payee, Helene Weiss.

But there is nothing in the proofs showing that the plaintiff-appellee had any actual notice of such alleged defect or error nor that its taking of and discounting of the note amounted to bad faith. The note is entirely regular upon its face and there is no language contained in it that would

suggest, even slightly, that it was intended to be a corporate obligation. But appellant says the plaintiff-appellee had such facts putting it upon notice because its treasurer says in his affidavit used upon the motion to strike "that the note sued on is a renewal note of a succession of two prior notes, representing the same amount of money; the first given on September 10, 1928 for $1000. which note was signed by Asher Maurer, the defendant herein, made to the order of Helene Weiss and negotiated to the plaintiff: a renewal of said note was given on December 10, 1928 for $1000. signed by Asher Maurer payable to the order of Helene Weiss and discounted with the plaintiff bank for $1000; that the note in suit is the third note in the series or succession of notes and is made in the same manner, is signed in the same way and is for the same amount as the prior notes * * *". Against this the appellant in his counter affidavit asserts that he "has read the affidavit of Maxwell A. Cox (appellee's treasurer) and states that it is not true that the notes referred to were those of this deponent but that they were the notes of the N. J. Lamp Works, Inc., and further that it is not true that the Irvington Trust Company had no notice or knowledge of the error set forth hereinbefore by this deponent but that said Irvington Trust Company has in its possession in its files copies of the letters, notices and memoranda showing the relation of the N. J. Lamp Works, Inc. to the entire transaction and that the debt is that of the N. J. Lamp Works, Inc." attached to this affidavit are two letters of the appellee; one under date of June 8, 1928 to N. J. Lamp Works which no doubt accompanied a return of a note or some other item of $1000. of Helene Weiss and the other under date of

December 12, 1928 to Helene Weiss referring to the return to her of a note of the N. J. Lamp Works for $1000. which the Trust Company had recalled. The former of these is of too early a date to have reference to either of the notes set up in the affidavit of appellee's treasurer. The latter may refer to the note first referred to in such affidavit as falling due December 10, 1928. These communications being without explanation can be of little value except to invite conjecture. But, be the situation what it may ,and assume that the assertion in the affidavit of the treasurer of appellee respecting the notes preceding the one in suit and who the maker of such notes was, as being erroneous and the before quoted statements in appellant's affidavit to be true, we are unable to see how any factual question is thereby raised permitting the appellant to defend. Neither fraud nor knowledge of facts amounting to bad faith upon the part of the appellee are shown.

Two of the requisites making one a holder in due course, under Section 52 of the Neg. Ins. Act (3 Comp. States. 3734) are—

"3. That he took it in good faith and for value.

4. That at the time it was negotiatde to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it".

A defect in title is defined by Sec. 55, of the same Act to be:

"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument or any signature

thereon by fraud, duress or force and fear or other unlawful means, or for an unlawful consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud."

Notice of such a defect or infirmity as to charge one to whom the instrument is negotiated is defined by Sec. 56 of the Act, to be;

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith".

The most that is urged is that Helen Weiss, the payee named in the note, took it with knowledge that the appellant had made an error in signing it personally, when, in fact, as he asserts he should have executed it as an officer of the N. J. Lamp Works, Inc. If this be so and constitutes such bad faith upon the part of Helene Weiss as to amount to fraud, which question we pass by, it is entirely impossible to spell out of any of the proofs in the case actual knowledge or knowledge of such facts as make for bad faith of the appellee.

In Rice vs. Harrington, 75 N. J. L. 806, it is held; "Bad faith, not merely notice of suspicious circumstances must be brought home to the holder for value of a negotiable note whose rights accrued before maturity in order to defeat his recovery upon the note on the ground of fraud in its inception". In Montvale vs. Bank, 74 N. J. L. 464, it is held: "The fact that a mayor of a municipality negotiates bonds which he had signed as mayor, was not sufficient to charge a bank, receiv-

ing them as collateral, with notice of the defect in his title, where the bank had no knowledge of his lack of authority to dispose of them".

We conclude, therefore, that this ground is without factual or legal merit.

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2. The next ground urged is that there was sufficient proof in the affidavit of appellant to raise the question of invalidity of the note and therefore there was a factual question to be presented to a jury.

This has been fully answered under ground one, and adversely to the contention of appellant.

3. The third ground is quite to the same point as the last preceding ground and appears to be
20 that appellant, personally, does not and never did owe Helene Weiss, any sum of money and that she took and negotiated the note in question dishonestly and in bad faith and that appellee had knowledge of such facts, therefore is not a holder of the note in due course and against it appellant is entitled to all defenses he would have had against the original payee.

Whatever may have been the actual situation between appellant and Helene Weiss, as has already
30 been pointed out there were no facts presented sufficient and necessary to charge the appellee.

4. The next ground is that Helene Weiss discharged and paid the note and therefore there was no liability as between the appellant and the Trust Company, appellee.

This is based upon the assumption and assertion of the appellant that Helene Weiss had a certion line of credit with the Trust Company, se-
40 cured, collaterally, by certain securities which she had deposited with it, and that being so the Trust

Company either did or should have charged against her account or collected from her through such collateral securities the note in question, as and when it fell due and therefore may not look to appellant for payment therefor.

To state the proposition is to dismiss it for lack of legal support.

5. The final ground is that it was error to strike out the answer as being both sham and frivolous.

Ordinarily this would be technically true, but where, as here, there are several defenses pleaded and attacked, some of which are sham, that is untrue, and others frivolous, that is presenting no legal defense if true, it is entirely proper and appropriate to strike them without particularizing which are sham and which are frivolous.

The judgment under review is affirmed, with costs.

Summons.

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

Charles J. Young, Special Deputy Sheriff of County aforesaid, being duly sworn, on his oath deposes and says that on the 25th day of June, A. D. 1929, he delivered personally to said defendant, Asher Maurer, a true copy of the within summons and complaint, with a ten days notice endorsed thereon.

CHARLES J. YOUNG.

Subscribed and sworn to this
28th day of June, 1929.
Harvey W. Keough,
A Notary Public of N. J.
My commission expires June 1, 1932.

The State of New Jersey

To:

ASHER MAURER

(L.S.)

You are Summoned to answer the annexed complaint of Irvington Trust Company, a corporation, in an action at law in the Essex County Circuit Court, And Take Notice, that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, WORRALL F. MOUNTAIN, Esquire, Judge of the Essex County Circuit Court, at Newark, this 24 day of June, in the year Nineteen Hundred and Twenty-nine.

JOHN H. SCOTT,
Clerk.

ROSSBACH & CRUMMY,
Attorneys.

Complaint.

ESSEX COUNTY CIRCUIT COURT.

IRVINGTON TRUST COMPANY, a corporation, *Plaintiff,* vs. ASHER MAURER, *Defendant.*	*Action at Law.* Complaint.

Plaintiff, a corporation of the State of New Jersey, with its principal office at No. 732 Nye Avenue, in the Town of Irvington, Essex County, New Jersey, says that:

1. It sues for the amount of a promissory note for One Thousand Dollars ($1,000.00), made by the defendant, Asher Maurer, a copy of which is hereto annexed and made a part hereof.

2. On the day the same fell due said note was presented for payment at the place where it was payable, but was not paid.

3. Said note is now the property of the plaintiff. It has not been paid.

Plaintiff demands as damages the sum of One Thousand Dollars ($1,000.00), with interest from June 10, 1929.

ROSSBACH & CRUMMY,
Attorneys for Plaintiff.

Note

$1000 00/100 Newark, N. J., March 8, 1929

Three months after date I promise to pay to the order of Helene Weiss

One Thousand no/100.....Dollars

at West Side Trust Company

Value received.

No..... Due June 10

A. MAURER

Endorsed: Helen Weiss

Affidavit of Merits.

Filed July 2, 1929.

ESSEX COUNTY CIRCUIT COURT.

IRVINGTON TRUST COMPANY, a corporation, *Plaintiff,*	*Action at Law.*
vs.	Affidavit of Merits.
ASHER MAURER, *Defendant.*	

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

Asher Maurer of full age being duly sworn according to law on his oath deposes and says that he is the defendant in the above stated cause and he believes that he has a just and legal defense to the said action on the merits of the cause.

ASHER MAURER.

Sworn and subscribed to before me
this 2nd day of July, 1929.
Terry Kalnitsky,
A Notary Public of N. J.

Answer.

Filed July 19, 1929.

ESSEX COUNTY CIRCUIT COURT.

IRVINGTON TRUST COMPANY, a corporation, *Plaintiff,*	*Action at Law.*	
vs.	Answer.	
ASHER MAURER, *Defendant.*		

The answer of the defendant, Asher Maurer.

The defendant, Asher Maurer, answering the complaint filed in the above matter, says that:

1. The defendant admits the execution of the note referred to in Paragraph 1 but denies that there is due anything thereon.

2. This defendant has no knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 2.

3. This defendant denies that the plaintiff is the holder in due course and for value of said note and denies that he owes anything to Helen Weiss or the plaintiff.

FIRST SEPARATE DEFENSE.

This defendant contends that the plantiff is not the holder for value of the said note.

SECOND SEPARATE DEFENSE.

This defendant contends that the plaintiff is not

the holder in due course of said note and is chargeable with knowledge of any and all defects.

THIRD SEPARATE DEFENSE.

The plaintiff is not the holder in due course of said note and is chargeable with any and all defenses available to this defendant against the original holder, Helen Weiss.

FOURT SEPARATE DEFENSE.

This defendant does not owe any money to Helen Weiss on said note.

FIFTH SEPARATE DEFENSE.

The New Jersey Lamp Works Inc., a corporation, is indebted to the Estate of Morris Weiss, deceased, in the sum of $1,000.00 and had given previous notes therefor. The note sued on was intended to be the note of the corporation, of which this defendant is an officer, but the corporate designation was omitted by error.

Said Helen Weiss, the administratrix of the Estate of Morris Weiss, deceased, with full knowledge of the error in the execution of said note and with full knowledge that said Asher Maurer does not owe her any money, discounted said note at the Irvington Trust Company and took said $1,000.00 received by her from the bank for her own personal use.

SIXTH SEPARATE DEFENSE.

Said Helen Weiss has placed with the Irvington Trust Company on deposit and as security monies, Irvington Trust Company payment of the said assets and effects to secure to said Irvington Trust

Company payment of the said $1,000.00 so received by her on said note and the Irvington Trust Company is not a holder for value of said note.

SEVENTH SEPARATE DEFENSE.

There is no consideration to Asher Maurer from Helen Weiss for the execution of said note.

EIGHTH SEPARATE DEFENSE.

Said Helen Weiss cannot maintain any claim against this defendant or recover any judgment against this defendant on said note and this defendant is therefore not liable to the Irvington Trust Company.

NINTH SEPARATE DEFENSE

The plaintiff, having on deposit and as security monies and assets of said Helen Weiss, cannot hold this defendant on the said note.

The defendant, Asher Maurer, claims that said Helen Weiss is alone responsible to the Irvington Trust Company for money received by her from the said plaintiff and respectfully urges that said Helen Weiss may be made a party defendant in the above matter to the end that judgment may be entered against her in favor of the plaintiff therefor.

MAURICE S. MAURER,
Attorney of Defendant.

Notice of Motion to Strike Out Answer

ESSEX COUNTY CIRCUIT COURT.

IRVINGTON TRUST COMPANY, a corporation, *Plaintiff,* *vs.* ASHER MAURER, *Defendant.*	*Action at Law.* Notice of Motion to Strike Out Answer.

To: MAURICE S. MAURER, ESQ.,
207 Market Street,
Newark, N. J.
Attorney for Defendant, or

To Whom it May Concern:

Please Take Notice, That on Monday, the 12th day of August, 1929, we shall apply to his Honor, William A. Smith, Esq., Judge of the Essex County Circuit Court at the Court House in the City of Newark, at ten o'clock in the forenoon or as soon thereafter as counsel may be heard, for an order to strike out the answer filed in the above entitled cause on the grounds that the allegations therein contained are sham and frivolous, and that the said answer discloses no legal defense to the action; and further that the plaintiff will move for a summary judgment for the amount due the plaintiff on the affidavit hereto annexed.

Dated: July 26th, 1929.

ROSSBACH & CRUMMY,
Attorney for Plaintiff.

Affidavit of Maxwell A. Cox.

ESSEX COUNTY CIRCUIT COURT.

IRVINGTON TRUST COMPANY, a corporation, *Plaintiff,*		*Action at Law.*
vs.		Affidavit.
ASHER MAURER, *Defendant.*		

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

Maxwell A. Cox, being duly sworn, according to law, upon his oath deposes and says: That he is the Treasurer of the Irvington Trust Company, a corporation, the plaintiff in the foregoing action, and that he is duly authorized to make this proof; that the said Irvington Trust Company, a corporation, is the holder of a promissory note in the sum of $1,000.00 dated March 8, 1929, made by Asher Maurer to the order of Helen Weiss, and endorsed by the said Helene Weiss; that the said note was negotiated to the plaintiff in the ordinary course of business without notice or knowledge of any defect, defense, or off-set to the same; that credit for the same was given to the said Helene Weiss, and the said credit was drawn against by the said Helene Weiss by checks on the plaintiff bank. Deponent further says that the note sued on is a renewal note of a succession of two prior notes, representing the same amount of money, the first given on September 10th, 1928, for $1,000.00,

which note was signed by Asher Maurer, the defendant herein, made to the order of Helene Weiss, and negotiated to the plaintiff; a renewal of said note was given on December 10th, 1928, for $1000.-00, signed by Asher Maurer, payable to the order of Helene Weiss, and discounted with the plaintiff bank for $1,000.00; that the note in suit is the third note in the series or succession of notes, and is made in the same manner, is signed in the same way, and is for the same amount as the prior notes; the plaintiff had no notice or knowledge and has no notice or knowledge of any error in the execution or delivery of the note in question, as alleged in the answer of the defendant; that said note was delivered to the deponent at the banking house of the plaintiff in the regular course of business, and neither deponent nor any officer of the bank had any dealings or relations in the matter with the defendant, Asher Maurer, regarding the note; deponent says that he does not know the defendant and had no dealings of any kind with him, nor was any information communicated to deponent or to the plaintiff regarding said note, excepting that given by the payee of the note, Helene Weiss, and that was limited to a request to have the note discounted, which was done. Deponent says that said Helene Weiss has a line of credit with the plaintiff's bank, and in connection with her line of credit some collateral security; that a copy of the note sued on is hereto attached and made a part hereof; and that there is justly due and owing to the plaintiff on said note the sum of $1,000.00, with interest from June 10, 1929, amounting to $7.67, making in all the sum of $1,007.67.

MAXWELL A. COX.

Affidavit of Maxwell A. Cox.

Subscribed and sworn to before me
this 27th day of July, 1929.
Frank Young, Jr.,
Notary Public of New Jersey.

$1,000 00/100 Newark, N. J. March 8 1929.
Three months after date I promise to pay to the order of Helene Weiss
One Thousand no/100.....Dollars
at West Side Trust Company
Value received.
No..... Due June 10 A. MAURER

Endorsed: Helen Weiss

Affidavit of Maxwell A. Cox.

Filed Aug. 23, 1929.

ESSEX COUNTY CIRCUIT COURT.

IRVINGTON TRUST COMPANY, a corporation, *Plaintiff,*	*Action at Law.*
vs.	Affidavit.
ASHER MAURER, *Defendant.*	

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

Maxwell A. Cox, being duly sworn, according to lay, upon his oath deposes and says: That he is the Treasurer of the Irvington Trust Company, a corporation, the plaintiff in the foregoing action; that he is duly authorized to make this proof and that he as such officer of the plaintiff, and for and on behalf of the plaintiff believes that there is no defense to the action and the said plaintiff believes that there is no defense to the action, this affidavit being supplemental to one heretofore made, the matters and things therein deposed being herein repeated and re-affirmed.

MAXWELL A. COX.

Subscribed and Sworn to before me
this 29 day of July, 1929.
Frank Young,
Notary Public of N. J.

Affidavit of Asher Maurer.

ESSEX COUNTY CIRCUIT COURT.

IRVINGTON TRUST COMPANY, a corporation, *Plaintiff,* vs. ASHER MAURER, *Defendant.*	*Action at Law.* Affidavit.

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

Asher Maurer, of full age, being duly sworn according to law on his oath, deposes and says that:

He is the defendant in the above entitled action.

This deponent is not and never was indebted to Helene Weiss for any amount at any time. The New Jersey Lamp Works, a corporation, is indebted to the Estate of Morris Weiss, of which Helene Weiss is administratrix, in the sum of One Thousand Dollars. In September 1928 and December 1928, the New Jersey Lamp Works executed notes to secure the payment of One Thousand Dollars to the Estate of Morris Weiss. The notes referred to by Maxwell A. Cox in his affidavit were notes of the New Jersey Lamp Works, a corporation, and not of this deponent. Annexed to this affidavit are copies of a letter and a memorandum of the Irvington Trust Company, now in the possession of this deponent, in which said Trust Company shows that the notes were those of the New Jersey Lamp Works, a corporation.

Through an error, the words "New Jersey Lamp Works" were omitted from the note sued on when

same was delivered to the administratrix of the estate of Morris Weiss. Helene Weiss, with full knowledge of the error, endorsed said note to the Irvington Trust Co. for a loan. The Irvington Trust Company, despite its knowledge that the previous notes were of the New Jersey Lamp Works, loaned money on said note to Helene Weiss with full knowledge of the relationship of the parties and the circumstances and said Helene Weiss has failed to account to the estate of Morris Weiss therefor.

Helene Weiss pledged with the Irvington Trust Co. certain collateral security for repayment of any and all loans to be given to her by the Irvington Trust Co. and the Irvington Trust Co. extended a margin of credit to Helene Weiss agreeing to loan her money to the amount of said line of credit with an agreement to charge against said collateral security all discounted paper of Helene Weiss which should not be collected and all money remaining unpaid on such loans.

Accordingly, The Irvington Trust Company, holding such collateral security of Helene Weiss, loaned to said party One Thousand Dollars on said note sued on. The Irvington Trust Co. has not instituted suit against said Helene Weiss on her endorsement on the note in question because said Helene Weiss has secured the money due to said Bank. The Bank, having been placed by Helene Weiss in a position to be secured its money as against her without necessity of suit, is now proceeding against this deponent.

This deponent, as soon as he was apprised of the error, offered to Helene Weiss, for the Estate of Morris Weiss, a correct note of the New Jersey Lamp Works which said Helene Weiss refused to

accept. Said Helene Weiss informed this deponent that she presented the corrective "New Jersey Lamp Works" note to the Bank and it refused to accept same.

This deponent has read the affidavit of Maxwell A. Cox and states that it is not true that the notes referred to were those of this deponent but that they were the notes of the New Jersey Lamp Works, a corporation; and further it is not true that the Irvington Trust Co. had no notice or knowledge of the error set forth hereinbefore by this deponent but that said Irvington Trust Co. has in its possession in its files copies of letters, notices and memoranda showing the relation of the New Jersey Lamp Works to the entire transaction and that the debt is that of the said New Jersey Lamp Works.

This deponent has a good and legal defense to any suit by Helene Weiss and the arrangement between the Irvington Trust Co. and Helene Weiss is an attempt to prevent this deponent from interposing such defense against any suit by Helene Weiss as payee. The Irvington Trust Co. did not protest the note, plead such protest, serve notice thereof upon Helene Weiss or do any act to retain its legal hold over said Helene Weiss; this the Bank failed to do since it had been secured its amount by Helene Weiss.

ASHER MAURER.

Sworn and subscribed to before me
this 24th day of August, 1929.
Terry Kalnitsky,
A Notary Public of N. J.

Affidavit of Asher Maurer.

IRVINGTON TRUST COMPANY.

Irvington, N. J. June 8, 1928.

N. J. Lamp Works,
21 William Street,
Newark, N. J.

We return the following collection:

Maker	Amount
Helen Weiss	$1,000.00

As requested by Mrs. Weiss.

IRVINGTON TRUST COMPANY
IRVINGTON, N. J.

Dec. 12, 1928

Mrs. Helen Weiss,
715 Stuyvesant Ave.,
Irvington, N. J.

Dear Madam:

We return herewith note of New Jersey Lamp Works in the amount of $1000.00 which we recalled.

Very truly yours,

L. S. APPLEGATE,
Asst. Treas.

LSA;CZ

Order for Summary Judgment.

Filed Sept. 19, 1929.

ESSEX COUNTY CIRCUIT COURT.

IRVINGTON TRUST COMPANY, a corporation, *Plaintiff,* *vs.* ASHER MAURER, *Defendant.*	*Action at Law.* Order for Summary Judgment.

It appearing by affidavit filed in the above cause that the defense made by the defendant's answer is sham and frivolous, and the defendant, after due notice, having failed to show such facts as entitled him to defend;

It is ORDERED that the defense be struck out and that final judgment be entered for plaintiff for the sum of One Thousand and Fifteen Dollars and —— Cents ($1015.00) and costs.

WILLIAM A. SMITH,
Judge of Essex County Circuit Court.

On motion of
ROSSBACH & CRUMMY,
Attorneys.

Rule entered September 19, 1929.
(Costs taxed at $75.13).

Judgment.

ESSEX COUNTY CIRCUIT COURT.

50259

IRVINGTON TRUST COMPANY, a corporation, *Plaintiff,* *vs.* ASHER MAURER, *Defendant.*	*Action at Law.* On Order Striking Our Defense.

Judgment entered Sept. 19, 1929

Damage	$1,105.00
Costs	75.13
Total	$1,090.13

ROSSBACH & CRUMMY, Attys of pltf.

Judgment on order striking out Defense in the above entitled action was rendered on the nineteenth day of September, A. D., Nineteen Hundred and Twenty-nine, in favor of the plaintiff, Irvington Trust Company and against the defendant, Asher Maurer, for the sum of One Thousand Fifteen Dollars ($1,015) damage and seventy five dollars and thirteen cents costs of suit.

Judgment entered and signed, Sept. 19, 1929. Book 108 Circuit Court Judgments, page 338.

Rule of Affirmance

Filed October 4, 1930.

NEW JERSEY SUPREME COURT.

IRVINGTON TRUST COMPANY, a corporation, *Plaintiff,* *vs.* ASHER MAURER, *Defendant.*		*Action at Law.* On Appeal from Essex County Circuit Court Rule on Affirmance

This cause having been duly argued at the January, 1930, term, by Rossbach & Crummy, attorneys for the plaintiff-appellee, and Maurice S. Maurer, attorney for the defendant-appellant, and the court having considered the same and finding no error in the record of the proceedings in the Circuit Court,

It is thereupon ORDERED and ADJUDGED that the judgment of the Circuit Court removed to this court on appeal be affirmed with costs, and that the record be remitted to the Circuit Court of Essex County to be proceeded within accordance with its judgment and the practice of said court.

Rule entered October 3, 1930.

On Motion of:
ROSSBACH & CRUMMY,
Attorneys for plaintiff-appellee.

A True Copy

Fred L. Bloodgood,
Clerk.

New Jersey Court of Errors and Appeals

IRVINGTON TRUST COMPANY, a corporation, Plaintiff-Appellee, vs. ASHER MAURER, Defendant-Appellant.	Action at Law.

BRIEF FOR PLAINTIFF-APPELLEE.

The defendant-appellant's statement of facts in his brief do not quite agree with those in the record. There is no allegation of bad faith in the answer. The claim is that "The note sued on was intended to be the note of the corporation, of which this defendant is an officer, but the corporate designation was omitted by error." Page 15 of the State of Case.

There is no allegation in the answer of knowledge by the bank of the alleged bad faith of Helene Weiss set up in defendant's brief. The answer says: "Said Helene Weiss, the administratrix of the Estate of Morris Weiss, deceased, with full knowledge of the error in the execution of said note and with knowledge that said Asher Maurer does not owe her any money, discounted said note at the Irvington Trust Company and took said $1,000.00 received by her from the bank for her own personal use."

There is no allegation in the answer that Helene Weiss was not entitled to the $1,000.00 nor that the name of the payee was also entered by mistake

but there is a pointed reference to the Estate of Morris Weiss, of which Helene Weiss is alleged to be the administratrix, and that she "took said $1,000.00 for her own personal use and that she failed to account to the Estate of Morris Weiss therefor". Pages 15 and 23 of the State of Case. Defendant injects no allegation of error on his part as to this part of the case and whatever inference arises therefrom is chargeable to him as well as to Helene Weiss. However, there is no claim that the bank had notice of any fact with relation to any private arrangement between the parties and the Estate of Morris Weiss.

The bank discounted the note for its customer, Helene Weiss, in the ordinary course of business without notice of any defect.

The note is drawn in the singular number and uses the pronoun "I", nothing on the face of the note points to a corporate undertaking. There is no designation or description after the signature and no corporate title of any kind appears on the note. Page 12, State of Case.

I.

The bank had notice of no facts impeaching the note.

The answer says: "That the bank is chargeable with any and all defenses available to the defendant against the original holder, Helene Weiss".

Now what are the facts of which the bank had notice? A letter dated June 8, 1928, addressed to N. J. Lamp Works, reading: "We return the following collection: Maker, Helene Weiss, Amount $1,000.00, as requested by Mrs. Weiss". Page 25 of the State of Case. And a letter dated December 12, 1928, addressed: "Mrs. Helen Weiss, 715 Stuyvesant Ave., Irvington, N. J. Dear Madam: We return herewith note of New Jersey Lamp Works in the amount of $1,000.00 which we recalled. Very truly yours, L. S. APPLEGATE, Asst. Treas. LSA:CZ".

The first letter refers to a note coming due on or before June 8, 1928 of which the maker is Helene Weiss. Obviously no notice of any fact impeaching the note in suit can be gathered from this letter.

The second letter is dated December 12, 1928 and refers to a note of the New Jersey Lamp Works. The Supreme Court in passing upon this letter says it raises no factual question permitting the appellant to defend. "Neither fraud nor knowledge of facts amounting to bad faith upon the part of the appellee are shown". Page 6 of the State of Case, lines 14-23.

Asher Maurer was an officer of the New Jersey Lamp Works. That is admitted. A note of his company was not paid at maturity and the payee

brings in a new note signed by Asher Maurer personally, complete and regular on its face. Whether it is a renewal, a substitution or a new note, must the bank refer to its files to look for suspicious circumstances? Has it not a right to assume that the parties, for reasons satisfactory to themselves, have arranged to give a note different from the former? And is it not a matter of common experience for a bank to take its customer's note without fear of consequences, even though the maker be different from a former maker, and the note be avowedly given to replace a former note? A letter in the bank's files recording the return of a former note unpaid can surely not bind it with notice that some time in the future the maker will represent that the note was a mistake and should be surrendered. For it may be noted here that the appellant himself made no demand for the return of the note or advised the appellee of the alleged error although he knew it was at the bank and had been discounted. He left that to the payee. He says she told him that the bank refused to surrender the note sued on and accept another in its place. But why leave it to her? She took advantage of his error. The Supreme Court in disposing of the claim of notice says: "The most that is urged is that Helene Weiss, the payee named in the note, took it with knowledge that the appellant had made an error in signing it personally, when in fact, as he asserts he should have executed it as an officer of the N. J. Lamp Works, Inc. If this be so and constituted such bad faith upon the part of Helene Weiss as to amount to fraud, which question we pass by, it is entirely impossible to spell out of any of the proofs in the case actual knowledge or knowledge of such facts as make for bad faith of the appellee".

"In Rice vs. Harrington, 75 N. J. Law 806, it is held 'Bad faith, not merely notice of suspicious circumstances must be brought home to the holder for value of a negotiable note whose rights accrued before maturity in order to defeat his recovery'."

"In Muntvale vs. Bank, 74 N. J. Law 464, it is held 'The fact that a mayor of a municipality negotiates bonds which he had signed as mayor, was not sufficient to charge a bank, receiving them as collateral, with notice of the defect in his title, where the bank had no knowledge of his lack of authority to dispose of them'."

II.

The mistake alleged is no defense.

Section 55 of the Negotiable Instrument Act reads: "The title of a person who negotiates an instrument is defective within the meaning of this act where he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to fraud".

There is no allegation of fraud in the case. The claim is that "the corporate designation was omitted by error", but that is not fraud. Fraud arises when there is some misrepresentation as to the effect of the instrument and the signer is lulled into a sense of security without reading it. There is no allegation of duress or force or fear or other unlawful means. "Error" is the term used, and the error is that of the appellant, for it is alleged that Helene Weiss had knowledge of the error not that

she committed it or had anything to do with it. Page 15 of the State of Case, line 7.

Section 55 goes on, "or where he negotiates it in breach of faith, or under such circumstances as amount to fraud".

There is no allegation in the answer of bad faith in the negotiation of the note and none is presented by the facts. Bad faith in the negotiation of the note arises when there is a violation of some agreement not to negotiate or to hold the note pending the performance of some act or the happening of some event and must be specially pleaded.

An example of negotiation in breach of faith is presented in Peterson vs. Alton, 162 App. Div. 21, 147 N. Y. Supp. 280. In that case the maker of a note payable to his own order endorsed it in blank and delivered it to *F* to get it discounted for the maker's benefit. *F* delivered the note to *P* and *P* delivered it to *A* for the same purpose. *A* kept the note. The maker sued *A* for cancellation thereof. Held, that there was a fraudulent diversion and that the burden of proof was upon *A* to show that he was a bona fide holder for value. There can be no question of negotiation in bad faith because, according to appellant's own version, the note was given for the express purpose of replacing a note already held by the bank.

Long before the adoption of the Negotiable Instrument Act the rule was laid down in New Jersey that "where there is a doubt or ambiguity on the face of the instrument, as to whether the person meant to bind himself or only to give an evidence of debt against an institution or body of which he is a representative, parol evidence is undoubtedly admissible, not indeed to show the intention of the parties to the contract, but to prove extrinsic circumstances by which the respective

liability of the principal and agent may be determined; such as to which the consideration passed and credit was given; and whether the agent had authority; and whether it was known to the party that he acted as agent. But if the name of the principal does not appear in the instrument, and the instrument is without ambiguity, and asserts a positive liability on the part of the person contracting, parol evidence to bind the principal or to discharge the agent is not admissible". Kean vs. Davis, 21 N. J. Law 683, at page 694; 47 Am. Dec. 182.

The word "error" is not used in the case of Kean vs. Davis, but the "intention" of the parties is referred to and the intention of the parties cannot be shown to contradict the instrument when it is in clear and unambiguous terms.

In Kean vs. Davis the signature was as follows: "John Kean, President Elizabethtown and Somerville R. R. Co." In that case evidence was admitted to show that John Kean signed as agent for the corporation and did not intend to assume a personal obligation. The ground upon which the evidence was admitted was that the signature was ambiguous. In the concluding paragraph of the opinion by the Chief Justice, the following language is used: "In arriving at this conclusion, I do in nowise dissent from many of the legal positions contained in the opinion of the court below. On the contrary, I yield to them my entire concurrence, sustained as they are by much learning and great weight of authority. I have no wish or purpose to say aught tending to shake the stability or to violate the sacredness of written contracts. But where upon the face of the instrument, it is doubtful who is the contracting party, both reason and

authority authorize the production of extrinsic evidence to remove that doubt."

And on page 692 of the report of the case, the court says: "In most, if not in all the cases where parol evidence has been rejected, it will be found that the contract was clearly in the name of the agent, and not of the principal. The evidence was offered not to show who was in truth the contracting party, but to relieve the party contracting from the effect of an obligation which he had clearly assumed, by proof that, at the time of the contract, he was acting as agent".

In Sadler vs. Young, 78 N. J. Law 594: "The body of the contract provides that he, not the corporation, shall pay the commission, and it is signed by him personally, and not as agent or representative of the corporation. Since the decision of Kean vs. Davis, 20 N. J. Law 425, and s. c. on error, 21 N. J. Law 683, 47 Am. Dec. 182, the law has been settled in this state that an agent who contracts in such form as to make himself personally responsible cannot afterwards, whether his principal was, or was not, known at the time of the making of the contract, relieve himself from that responsibility".

In the case in hand, Asher Maurer claims that the note was a mistake that he intended to give the note of the New Jersey Lamp Works. Obviously he had power to do that. He was an officer of the corporation and he says he intended to bind his principal, the New Jersey Lamp Works, but through an error he entered into the obligation personally leaving off the name principal, the New Jersey Lamp Works, and instead signed his own.

If in Kean vs. Davis the name of John Kean appeared alone without any corporate designation,

can there be any doubt as to how the case would have been decided?

In the instant case Asher Maurer claims he made an error in signing the note as he did. But he signed it as an individual in clear and unambiguous language without any indication of a corporate liability. By so doing he places himself squarely within the rule that when a person assumes an obligation in clear and unambiguous language he cannot be heard to say that he made a mistake and intended to bind someone else.

If a person could repudiate his deliberate obligation by claiming he intended to contract for another and that he made a mistake in signing in his individual capacity the foundation for the stability of commercial transactions would be subjected to serious disturbance. All a person would have to do in order to avoid a contract solemnly entered into would be to say that he intended to sign as an agent and that he made an error in signing his own name instead of that of some other person or corporation and he would be put to no great difficulty in showing that he had no interest in the transaction and that someone else had an interest in the transaction and that the person in whose favor the contract was made knew that someone else had an interest in the contract.

Cases cited by counsel dealing with the use of corporate funds for the individual purposes of an officer have no application to the instant case.

Helene Weiss had a line of credit with the appellee and in connection with the same had on deposit with the bank some collateral. How this concerns the appellant is difficult to see. There is

nothing in the record that the appellee failed to protest the note as to Helene Weiss. And if it did, notice of dishonor may have been sufficient or perhaps a waiver of notice may have sufficed.

Respectfully submitted,

ROSSBACH & CRUMMY,
Attorneys for Plaintiff-Appellee.

NEW JERSEY COURT OF ERRORS AND APPEALS.

IRVINGTON TRUST COMPANY, a corporation, *Plaintiff-Respondent,* —*vs*— ASHER MAURER, *Defendant-Appellant.*	ON APPEAL FROM SUPREME COURT.

BRIEF OF DEFENDANT-APPELLANT.

FACTS.

The New Jersey Lamp Works, a corporation of New Jersey, located in Newark, New Jersey, was indebted to the Estate of Morris Weiss in the sum of One Thousand Dollars. Some time in 1926, the New Jersey Lamp Works executed a note by Asher Maurer, its president, and delivered same to Helene Weiss, executrix of the Estate of Morris Weiss. Said note was for a period of three months. Every three months thereafter, the New Jersey Lamp Works executed and delivered to said Helene Weiss a new three-month promissory note for said sum of One Thousand Dollars and said administratrix recalled the previous notes from her bank, Irvington Trust Company, and returned same to New Jersey Lamp Works. On June 8, 1928, the Irvington Trust Company returned the recalled note of March 8, 1928 direct to New Jersey Lamp Works with a letter dated June 8, 1928 which is still in the possession of the New Jersey Lamp Works (State of Case page 17). On December 12, 1928, the Irvington Trust Company returned to Helene Weiss the note of September 8, 1928 of the New Jersey Lamp Works, recalled by her. Said Helene Weiss returned

the note and the letter from the Bank to New Jersey Lamp Works (State of Case page 17). The note of December 8, 1928 was renewed on March 8, 1928 by the New Jersey Lamp Works as before but, by error, the name of the corporation was omitted and only the signature of its president appeared on the note.

Asher Maurer is not and never was indebted to Helene Weiss for any amount at any time (State of Case page 14, line 22). Helene Weiss, knowing that Asher Maurer was not indebted to her, retained the note and turned same over to the Irvington Trust Company as a renewal of the December 1928 note of New Jersey Lamp Works, which was returned by the Bank. The Bank, at that time, had in its files copies of all correspondence with reference to the entire transaction and knew, or should have known, that the note was for the corporate indebtedness and was not properly executed .

After the note had been received by the Bank and BEFORE date of maturity, the New Jersey Lamp Works was informed of the error by Helene Weiss and a proper note was offered to Helene Weiss to replace the improperly executed note. Said Helene Weiss returned said note to the New Jersey Lamp Works with the advice that she presented the corrective note of the corporation to the Bank and said Bank refused to accept same. (State of Case page 15, line 38, to page 16, line 9).

The Irvington Trust Company, without protesting the note or serving notice of protest upon Helene Weiss, endorser, instituted suit against Asher Maurer alone, seemingly waiving all right to hold Helene Weiss on her endorsement.

Asher Maurer, in his answer filed in said suit, claimed:

1. He does not owe any money to Helene Weiss.

2. Helene Weiss retained the note with full knowledge of the error and, in bad faith, turned same over to the Bank to replace a note of the New Jersey Lamp Works.

3. The Irvington Trust Company had knowledge of the bad faith of Helene Weiss, not a holder in due course, and is chargeable with all defenses available against Helene Weiss.

4. The Irvington Trust Company and Helene Weiss entered into an arrangement to institute suit in the name of the Irvington Trust Company in an attempt to avoid the defenses available to Asher Maurer against Helene Weiss and said Helene Weiss placed with the Irvington Trust Company on deposit and as security moneys to secure to the Bank payment of said note.

5. The Irvington Trust Company is not a holder for value of said note.

Upon motion to strike out the answer of Asher Maurer, the Irvington Trust Company offered the affidavit of its treasurer, Maxwell A. Cox, to the effect that it had no knowledge of any defect in the note; that said "note is a renewal of a succession of two prior notes, representing the same amount of money, the first given on September 10, 1928, for $1,000, which note was signed by Asher Maurer, the defendant, made to the order of Helene Weiss and negotiated to the plaintiff; a renewal of said note was given on December 10, 1928 for $1,000 signed by Asher Maurer". He further deposed that "the note in suit is made in the same manner, assigned the same way, and is for the same amount as the prior notes". (State of Case page 18, line 35 to page 19, line 14). Deponent further swore that the plaintiff had no

notice or knowledge of any error in the execution or delivery of the note.

Deponent further admitted that it holds collateral security of Helene Weiss. (State of Case page 19, line 29).

In behalf of the defendant, Asher Maurer, affidavit of the defendant was offered, to which were annexed the letter of the Irvington Trust Company to the New Jersey Lamp Works, returning a note of $1,000 to it on June 8, 1928 and the letter of the Bank to Helene Weiss dated December 12, 1928 returning the $1,000 note of September 10, 1928 referred in the affidavit of Maxwell A. Cox (State of Case page 25).

In his affidavit, Asher Maurer averred and said that he did not owe any money to Helene Weiss; that the September 1928 note was the debt of the New Jersey Lamp Works and attached the Bank's letter as proof of the truth of that statement; that a correct note of New Jersey Lamp Works was offered immediately upon discovering the error, which was refused by the Bank and Helene Weiss. (State of Case page 23, line 27 to page 24, line 7).

Asher Maurer in his affidavit, denied the statements in the affidavit of Maxwell A. Cox, treasurer of the plaintiff, with reference to the notes being those of Asher Maurer and that the Bank had no notice or knowledge of any defects, and stated that they were the notes of the New Jersey Lamp Works and that the Bank did have knowledge of the error and defect, referring to the communications of the Bank, signed by the assistant treasurer, in support of the truth of Asher Maurer's statements (State of Case page 24, line 9.)

After argument on the motion, the learned Circuit Court Judge ordered the answer and defenses stricken out and summary judgment entered against the defendant for the amount of the note.

From this judgment, the defendant appealed to the Supreme Court. The Supreme Court affirmed the said judgment despite the apparently false statements in the affidavit of the plaintiff's treasurer.

Defendant claims the judgment of the Supreme Court was erroneous both as to the law and as to the facts and has brought this appeal.

There are four question involved in the consideration of this appeal:

1. Did the plaintiff have knowledge of the defect in the execution of the note?

2. Is the plaintiff chargeable with knowledge of the bad faith of Helene Weiss in negotiating the bad note?

3. Is the plaintiff a holder in due course?

4. Can the plaintiff sue in its name merely as an accomodation for its endorser to prevent the defendant from interposing defenses against such original payee?

These questions will be dealt with in this brief in the order stated.

ARGUMENT.

I.

THE PLAINTIFF HAD KNOWLEDGE OF THE DEFECT IN THE EXECUTION OF THE NOTE.

From the affidavit of the treasurer of the Bank, it is quite clear that the note sued upon was intended to be a renewal of a prior note, and was supposed to have been made "in the same manner, signed in the same way and for the same amount as the prior notes" (State of Case page 19, lines 13 and 14). This affidavit is untrue as

shown by the Bank's memorandum which discloses that the December 1928 note was the obligation of the corporation. From the said affidavit, however, the defendant's contention that the note was to have been a corporate obligation is corroborated since it is admitted that the Bank expected to receive a note signed "in the same way", namely by the New Jersey Lamp Works.

When the note of December 1928 became due on March 1928, Helene Weiss brought to the Bank the erroneous Asher Maurer note and recalled the corporate note.

It is hardly possible that the officer of the Bank accepted the note of March 1929 without noticing the difference in the signatures of the recalled note and the renewal note. Before accepting an "Asher Maurer" note in place of a "New Jersey Lamp Works" note, such officer must have sought information from the Bank's depositor as to the new maker's liability or the reason for such a change before relieving the Corporation of liability. He certainly should have inquired into the reason for the execution of a personal note to secure a corporate indebtedness. The Bank cannot deny knowledge of its own correspondence and must have known of the letters attached to defendant's affidavit.

There is, of course, no explanation for the unquestionably false statements in the affidavit of the plaintiff's officer as to the previous notes.

The plaintiff, therefore, must have had knowledge of such facts that its action in taking the instrument amounted to bad faith as contemplated by Section 56 of the Negotiable Instruments Act. This is strengthened by the fact that the Bank refused to accept a corrective note offered before maturity of the note in question (State of Case page 23, line 37 to page 24 line 7).

Surely the Bank must have seen the change in makers, and, either intentionally overlooked it at the request of the endorser, or was very negligent. It has been often held that one who ought to have known of defects is not an innocent purchaser. In PAIKA vs. PERRY, 225 Mass. 563, it was held that if that transferee knows something is wrong he does not take in good faith though he does not know the exact nature of the fraud.

II.

THE PLAINTIF IS CHARGEABLE WITH KNOWLEDGE OF THE BAD FAITH OF HELENE WEISS IN NEGOTIATING THE BAD NOTE.

Since there can be no question that the Bank was aware of the change in maker of the renewal note, the plaintiff is chargeable with knowledge of its endorsers bad faith in negotiating the note in question.

Helene Weiss, the transferor, had no claim against Asher Maurer. Upon receiving the note in question, it was her duty to be honest in the matter and to return the bad note, demanding a corporate note. Her retention of the Asher Maurer note, and negotiation thereof, is an act of bad faith as contemplated by Section 55 of the Negotiable Instruments Act, which holds:

> The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or UNDER SUCH CIRCUMSTANCES AS AMOUNT TO A FRAUD.

In FEHR vs. CAMPBELL, 288 Pa. 549, 137 At-

lantic Reporter 113, the Supreme Court of Pennsylvania, referring to the Uniform Negotiable Instruments Act, said at page 116:

> "Section 52 of the Negotiable Instruments Law (Act of 1901 P. L. 194, Pa. St. 1930, Sec. 16042) provides that:
>
> "A holder in the course is a holder who has taken the instrument under the following conditions: . . . . . (3) that he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it".
>
> Did plaintiff take this note in what the law would consider good faith? Again: Did plaintiff not have notice of a defect in the title of Stein, who, in negotiating the paper to him (plaintiff) treated $1,700 of the obligation as though it belonged to him (Stein) personally, rather than to his corporation?
>
> The freedom from the defense of prior equities afforded to a holder in due course is an extraordinary protection, which, although having its origin in the law merchant, is closely akin to similar protection given in other types of cases by courts of equity; and running through all the authorities dealing with holders in due course we find the principle, not always stated, perhaps, that he who seeks the protection given one in that position must have dealt fairly and honestly in acquiring the instrument in controversy and in regard to the rights of all prior parties, this is, the kind of good faith which the law demands, and the principle is closely analogous to the

equitable doctrine of clean hands. As said in Goodman v. Simonds, 20 How. 343 366 (15 L. Ed. 934):

"Every one must conduct himself honestly in respect to the antecedent parties, when he takes negotiable paper, in order to acquire a title which will shield him against prior equities".

Again, in Adams v. Ashman, 203 Pa. 536, 542, 53 A. 375, 377, we find the following:

"The manner in which the note was handled . . . . . did not exhibit upon the part of the plaintiff that entire good faith, which equity exacts of one who would deprive a defendant of the right to set up the true condition of affairs as a defense".

In Johnson & Kettell Co. v. Longley Co., 207 Mass. 52, 56, 92 N. E. 1035, 1037, the court said:

"Where . . . . . the transaction . . . . . on (its face . . . . . is an appropriation of the corporation's money to the payment of the individual's debts (it) is bad unless shown to be good. Since the transaction is bad unless shown to be good (in the absenec of proof as to the validity of the transaction), ... no question of . . . . . purchase in good faith can arise".

And in McDowell v. Bauman, 189 Ky. 136, 138, 224 S. W. 641, 642, is the following:

"McDowell cannot be regarded as a purchaser in good faith, for, when his attorney . . . . . received the check, the check itself was notice of the fact that it was drawn on

the funds of the corporation to discharge the obligation of a third party".

See, also, Pelton v. Spider Lake Co., 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963; Kenyon Co. v. National Deposit Bank, 140 Ky. 133, 130 S. W. 965, 31 L. R. A. (N. S.) 169. These cases and others which we shall mention all show, if nothing more, that, to constitute the taker a holder in due course, the paper in question must be acquired, by one so claiming, in a manner entirely free from unlawful bargaining, particularly of the character shown by the evidence now before us.

Let us turn to decisions that deal with the taking of paper under circumstances most nearly approximating those in the case at the bar. In Ward v. City Trust Co., 192 N. Y. 61, 69, 73, 84 N. E. 585, 587, 589, the check of a third party, payable to the order of a manufacturing corporation, had been indorsed by the president and general manager of the latter and delivered to the trust company defendant in payment of a personal loan obtained by such president for himself. In a suit, by the assignee for creditors of the corporation, against the trust company, to recover the amount of the check, the New York Court of Appeals said that—

"The form of the check in question was notice to the trust company that Umsted (president of the manufacturing corporation) was using the property of the corporation . . . . . to pay the personal debt of himself . . . . . in apparent violation of its rights . . . . . The effect of such notice was to put the trust company upon inquiry

to see whether it was about to accept money from one to whom it did not belong . . . . . The presumption arising from the fact of the check was that it belonged to the (corporation), and that its president had no right to use it to pay his personal debt".

The court further said:

"While Umsted (the president owned all the stock (of the corporation) . . . . . still the rights of creditors remained, even if the corporation and its stockholders were ready to give away every right within their power".

Then, again:

"It was not enough for the trust company to part with value, ...it was bound to act in good faith in order to get good title. . . . . Bad faith in taking commercial paper does not necessarily involve furtive motives, for it exists when the purchaser has notice of facts which, if unexplained, would show that he was taking the property of one who, ... 'owed him nothing, in payment of a claim that he held against someone else . . . .' . ."

At page 119, after citing sections 55 and 56 of the Negotiable Instruments Act, the court said:

"Application of the last-mentioned sections of the act to the present case leads to the same result as is reached under the 'good faith' clause of section 52. However illogical it may seem to say that one's title to a commercial instrument may be made defective by reason of acts done by himself in transferring it to another, that is exactly what section 55 declares to be the

law. NEGOTIATION OF AN INSTRUMENT IN BAD FAITH, OR FRAUDULENTLY, CONSTITUTES A DEFECT IN THE TITLE OF THE NEGOTIATOR. Even though the terms used may seem incongruous, the substantial result is righteous. The term 'defect of title' is employed only in connection with the establishment of the status of holders in due course, and as so used serves a desired and proper purpose. The object of the latter part of section 55, is to prevent one from becoming a holder in due course who takes an instrument with notice that his transferer is not acting honestly. It is the same object as is found in the 'good faith" clause of section 52, but viewed from a somewhat different angle. That clause has regard to the attitude of the taker of the instrument, while section 55 emphasizes rather the honesty of the negotiator as brought to the notice of the taker. The object of the whole is, however, a single one— to require a thoroughly honest and fair transaction to constitute one a holder in due course."

III.

PLAINTIFF IS NOT A HOLDER IN DUE COURSE.

From all of the foregoing, it appears that the plaintiff herein had actual knowledge of circumstances with reference to the negotiation to it by its transferrer of the note in question that charged plaintiff with knowledge of its transferrer's bad faith.

One of the requirements of Section 52 of the Act to constitute one a holder in due course is that at the time it was negotiated, said holder had

no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

The plaintiff, having accepted the note with knowledge of the defective title of Helene Weiss, and having further refused to accept a proper and corrective note, prior to maturity, the plaintiff is not a holder in due course.

The mere fact that a bank discounts a note does not make it a holder in due course if the requirements of Section 52 are not met.

The Bank, in the present case, not only had knowledge, through its own correspondence, of the bad faith, but it deliberately offered false affidavits on the motion to strike out the answer in the hope that the defendant did not have any of the correspondence set forth on page 25 of the State of the Case.

IV.

PLAINTIFF IS SUING ONLY AS AN ACCOMODATION FOR HELENE WEISS TO PREVENT DEFENSES AGAINST ORIGINAL PAYEE.

It is quite important to discover why the plaintiff failed to protest the note in question or serve notice of protest upon its transferrer, Helene Weiss, thereby relieving said Helene Weiss of liability to it.

In view of the fact that the original obligation was that of the New Jersey Lamp Works, there can be no consideration for the note of Asher Maurer, obtained by Helene Weiss through error, not by agreement. Asher Maurer, therefore, has good and proper legal defenses against any suit by Helene Weiss under said note.

In an attempt to avoid such defenses, an arrangement was made between the plaintiff and said

Helene Weiss whereby the plaintiff sued in its name for Helene Weiss to prevent the defendant from interposing such defenses.

The note became due March 1928; three years have elapsed. The plaintiff has no legal rights against Helene Weiss under this note. Can it be assumed that the plaintiff, a modern business institution, having first demanded from Helene Weiss collateral security (State of Case page 19, line 32) suddenly and gratuitously relieves Helene Weiss from liability and proceeds against the defendant on its own behalf only?

There can be no doubt that this suit is in behalf of Helene Weiss but in the name of the plaintiff as an accomodation for its depositor to prevent such defenses as the law allows.

Such an arrangement to deprive a defendant of legal defenses is illegal and improper.

In FIRST NATIONAL BANK vs. FOX, 40 Appeal Cases 430, decided by the Court of Appeals of the District of Columbia, it appeared that one Staples sold a yacht under fraudulent circumstances, taking a note in payment, which was endorsed to the plaintiff Bank. Staples arranged to have the Bank sue on the note for said Staples.

Justice Van Orsdel held that "a bank which discounted a note before maturity without notice of an alleged defense against its endorser, and thereafter, with full notice of such alleged defense and for the exclusive purpose of avoiding same, entered into an arrangement to have the suit brought in the name of the Bank, through its attorneys, at his expense, and for his sole benefit, having first been placed by him in a position to be paid without necessity of suit and regardless of the proposed litigation, sues as a mere accomodation to the endorser, and not as an innocent holder, although

it so acquired the note, and the action is therefore subject to any defense available against the endorser".

It is here contended that the instant case is even stronger in favor of this defendant as Irvington Trust Company did have knowledge before maturity of the defect complained of.

In ST. LOUISE THIRD NATIONAL BANK vs. EXUM, 79 Southeastern 498, it appeared that McLaughlin Bros., payees and depositors of the plaintiff, placed with the bank a note obtained by fraud from the defendant Exum. The litigation in reference to the note was ocntrolled by payee's attorney and suit was brought under instructions of and for McLaughlin Bros. but in the Bank's name.

Chief Justice Clark said:

"It would seem that the understanding was that if a note was not paid, the bank was to bring suit in its own name under McLaughlin Bros. instructions and through their attorneys, and the bank was to look finally to McLaughlin Bros. for any note which was not collected. One of McLaughlin Bros. told a witness a number of times that they would remain liable on the notes whether protested or not, and the bank was given instructions not to protest the notes and also held a general waiver of protest. Not only this but McLaughlin Bros. guaranteed the payment of the notes. It was at the request of McLaughlin Bros. That this and other suits upon these notes were brought in the name of the bank under the general supervision of the attorneys for McLaughlin Bros."

It is respectfully submitted, therefore, that the plaintiff had actual knowledge of the defect in the title of Helene Weiss in the note and that said Helene Weiss endorsed and negotiated said note under such circumstances that such negotiation

was dishonest, that the plaintiff is not a holder in due course of said note and has proceeded to institute suit as an accomodation in behalf of Helene Weiss for the purpose of preventing the defendant from interposing legal defenses; that the affidavit of the plaintiff, on which judgment was entered in the above matter, was false and that it was error for the court to enter judgment on said false affidavit. It is, therefore, respectfully submitted that for these reasons the judgment appealed from should be reversed.

Respectfully submitted,

MAURICE S. MAURER,
Counsel of Defendant-Appellant.

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