

New Jersey Court of Errors and Appeals

WILLIAM R. S. DAVIS,

Plaintiff-Respondent,

vs.

SAMUEL CLARK,

Defendant-Appellant.

*On Appeal
from
Supreme
Court.*

Brief for Appellant.

Abstract of the Case.

The action is founded upon a promissory note purporting to have been made by Samuel Clark to the order of William Rotter for \$10,000.00, and the suit is brought by William R. S. Davis, and his declaration contains only the common counts in assumpsit. Rotter and Clark are joint defendants in the suit. Clark filed a plea of general issue and served a specification of defences upon demand for the same. He specifies failure of consideration and fraud in the execution and delivery of the note, and that the plaintiff had notice of the failure of consideration and of the fraud before the negotiation of the note to him.

At the trial, a witness who was a clerk in the Merchants National Bank, was called to identify the signatures of Clark and Rotter (p. 10). He had not ever seen either of these parties write his name, and proposed to identify their signatures by comparison

with their signatures on a card in the bank. His testimony was objected to, and objection was noted as a ground of appeal (p. 13).

The plaintiff was not called in his direct case, but his counsel announced that the plaintiff was the holder of the note. Objection was made to the note going in evidence, upon the ground that no proof had been made of the delivery of it to the payee, and also, there was no proof that the plaintiff was the holder (pp. 14, 15). The objections were duly noted as ground of appeal. Motion was made to nonsuit, upon the ground that there was no proof that the note was ever delivered by Clark to Rotter, the payee, and also, there was no proof that the plaintiff was the holder of the note. Motion was refused, and objection duly noted. The defendant, Clark, thereupon introduced evidence tending to show, and which he claimed at the trial did show that the note was made without any actual consideration and was obtained from him by fraud, the fraud consisting of misrepresentations made by Rotter, and tending to show, and as was claimed at the trial, by Clark, that Davis either knew or was in such a position that he was chargeable with notice of the failure of consideration and of the fraud. No motion was made to overrule the defence, and the plaintiff testified in rebuttal, and also called Rotter in rebuttal.

In the course of the examination of Clark and Rotter and Davis, it appeared that the note had actually been signed by Clark, and also had actually been endorsed by Rotter. At the close of the case, a motion was made to direct a verdict for the plaintiff, and the motion was granted, upon the ground that there was no question of fact to go to the jury as to whether the plaintiff was a holder in due course. The court seems to have held that the evidence amounted to nothing more than that Davis had notice of suspicious circumstances, and that it was not sufficient to show that

he acted in bad faith. The court did not make any ruling upon the question as to the existence of fraud as between Clark and Rotter, or whether there was any real consideration for the note. The case was disposed of entirely upon the fourth specification (p. 151), assigned as ground for directing a verdict: "That the plaintiff is a holder in due course, and that there is no evidence in the case which shows any such knowledge on the part of plaintiff, or notice of any defect in the title of Rotter, from whom the plaintiff got the note in question, as would deprive plaintiff of the right to recover as a holder in due course."

The undisputed facts established by the evidence, may be stated as follows: A corporation known as Peoples Talking Machine Company, was organized in nineteen hundred and ten, and also another corporation known as Wizard Phonograph Company, was organized with the same stockholders, which latter company was controlled by the Peoples Company. Rotter was an inventor, and had turned over certain patents, for which he had received at least 250 shares of stock of the Peoples Company, with certain other shares of the Wizard Company. Meisselbach was a practical manufacturer of the talking machines. These two men were of necessity relied upon by all the stockholders to carry on any business of the company. It does not appear that the company was actually making sales of talking machines, but was in an experimental stage, and had orders, or prospective orders. Clark and other individuals, Jacobs and Roos, and probably also Davis, the plaintiff in this suit, had been induced in some way to purchase stock of the Peoples Talking Machine Company, and Clark had paid \$5,000.00 for 250 shares. It seems that Davis had paid the same amount for 250 shares.

In April, 1911, Clark, Davis, Meisselbach, Jacobs and Roos were all the stockholders of the company, and each held 250 shares. In April, 1911, at a meet-

ing of the stockholders, Rotter stated in the presence of all the stockholders, including Davis, that he had a position offered him at a very much larger salary than he was getting then with the Peoples and Wizard Company, than they were paying him or that they could afford to pay him, and that he had accepted it, and that the company offering him the position was the Consolidated Record Company. Rotter stated that he intended to leave, and then Meisselbach stated that if he left [if Rotter left], he would leave. The stockholders realizing that if these two men left them they would be helpless, endeavored to induce Rotter to remain with them, and he suggested that he should buy their stock, and they finally agreed to sell Rotter their holdings for forty cents on the dollar. This agreement as between Clark, Davis, Meisselbach and Rotter was made on April 11, 1911, and is Exhibit D. 1 (p. 167). Clark received \$10,000.00 from Rotter. Jacobs and Roos were also bought out by Rotter, but Meisselbach was not, and remained in the company with Rotter (p. 135).

On April 15, 1911 (Exhibit P. 6, p. 162), Davis gave Rotter an agreement extending the time for the payment of \$10,000.00 to him, to July 11, 1911. On April 20, 1911, Rotter gave Davis a note at four months for \$10,000.00 (Exhibit P. 5, p. 161). On November 8, 1911, Rotter gave Davis four notes as follows: \$1,000.00 payable on demand, \$1,000.00 payable in three months; \$1,000.00 payable in five months, \$2,000.00 payable in seven months (Exhibits P. 9, P. 10, P. 11, P. 12, p. 164).

On November 15, 1911, Rotter gave Davis a check for \$1,000 (Exhibit P. 7, p. 163). None of these notes given by Rotter to Davis bear the endorsement of Davis, or any endorsement whatever, or anything to indicate that they were ever in the possession of Davis.

On December 19, 1911, Rotter approached Clark with a proposition to sell stock of Peoples Talking

Machine Company to him with a bonus of stock of Consolidated Record Company, and represented to Clark that Peoples Talking Machine Company was then in good condition, and that a Mr. Whitehead had put in \$10,000.00, and was to be the president of the company. As a matter of fact, Mr. Whitehead had invested \$100.00, and the company was not solvent. See testimony of Louis Hannoeh (pp. 80, 81, 82, 83). Clark was induced to buy back from Rotter 100 shares of the stock of People Talking Machine Company, for which he gave his note for \$10,000.00. He was also to receive as a bonus from Rotter 20,000 shares of the stock of Consolidated Record Company. The certificate for the 20,000 shares is dated December 20, 1911, and is signed by Rotter as treasurer, and Davis as president (Exhibit D. 3, p. 170).

The testimony shows that in October, 1911, Rotter gave to Davis 5,000 shares of Consolidated Record stock, and Rotter and his wife and Davis being then the only stockholders, Davis was made president of the company. Davis was told by Rotter that he had sold 100 shares of Peoples Company stock to Clark, and had given Clark 20,000 shares of Consolidated Company, and had received from Clark a note for \$10,000.00, and this information was given to Davis before Davis got the note from Rotter, and it would seem that the information was given on December 20th at the time the note was made, or the evening before (see p. 145, etc.).

On January 17, 1912, Rotter gave to Davis a check for \$4,000, which was deposited on January 18, 1912, by Davis to his credit in Ironbound Trust Company (Exhibit P. 8, p. 163). On January 17, 1912, a certificate for fifty shares of stock of the Peoples Company, bearing date December 1, 1911, was endorsed in blank and signed by Rotter and Davis, and on January 18, 1912, the same certificate was assigned by Davis to Rotter (Exhibit P. 13, p. 165). On Decem-

ber 20, 1911, a certificate for 100 shares of Peoples stock, dated December 1, 1911, was endorsed in blank by Rotter (Exhibit D. 4, p. 171). Clark signed a certificate to the effect that he was the owner of 100 shares of Peoples stock and 20,000 shares of Consolidated stock, which he had purchased from Rotter and acknowledged the receipt of the certificates and assigned them to Rotter as collateral for the payment of his note (Exhibit D. 2, p. 169).

There is no express assignment of the 100 shares of Peoples stock or the 20,000 shares of the Consolidated stock by Rotter to Davis.

On January 18, 1912, Davis gave to Rotter his check for \$4,000.00, which was deposited by Rotter in Merchants National Bank on January 19, 1912 (Exhibit P. 4, p. 161). Davis' check was on the Ironbound Trust Company, where he had deposited Rotter's check for \$4,000.00 the same day. On January 18, 1912, Davis gave to Rotter his note for \$900.00, payable on February 21st (Exhibit P. 14, p. 167).

It was claimed by the plaintiff that on January 18th, he purchased from Rotter the note of Clark of \$10,000.00 and gave Rotter for the same, his check for \$4,000.00 and fifty shares of stock of Peoples Company at \$5,000.00, and his note for \$900.00, and that there was \$50.00 interest due on Clark's note and \$50.00 bonus, which made up the total sum of \$10,000.

As has been stated, none of the notes that Rotter had given to Davis, were endorsed in any way, and Davis did not give to Rotter any release of his agreement of April 11, 1911, to pay \$10,000.00, or any receipt in settlement, or in fact, any receipt at all. There was evidence, the testimony of Clark, that Davis had called on him in December, 1911, and early in January, 1912, and had given him some information to the effect that Rotter had a confession to make relating to the manner in which he had gotten Clark's stock originally. This was denied by Davis, who testi-

fied that he did not see Clark until after he had gotten the note from Rotter. It appears that Clark did not wish to have the note negotiated, and before it was turned over by Rotter to Davis, Rotter testified, and so did Davis, that Rotter communicated with Clark and asked his consent to negotiating it, and that Clark consented. This was denied by Clark. It afterwards appeared that Rotter had at the meeting in April, 1911, made a false statement, when he said that he had been offered a position at a higher salary. He had no intention of leaving and had not been offered any position, and had merely entered into a collusive scheme with Meisselbach to get entire control of the Peoples Company, and to buy out the stockholders as cheaply as possible.

The court did not make any ruling upon the evidence of fraud as between the original parties to the note, but held that there was no evidence to go to the jury which would show that the plaintiff was not a holder in due course, and directed a verdict for the plaintiff for the \$4,000.00 and the \$5,000.00 of Peoples stock, and deducted the \$900.00 which had not been paid and was represented by the plaintiff's note to Rotter, and said nothing about the \$100.00 which had not been paid.

Specification of Errors.

1. The direction of a verdict for the plaintiff.

Brief of Argument.

The grounds of appeal Nos. 1, 2, 3, 4 are not available, for the reason that proof was made in the case after the motion to non-suit, which established the making of the promissory note and its delivery to Rotter, and its subsequent delivery by him to Davis.

It is contended that the case should have been submitted to the jury. There was sufficient evidence that the note was obtained from Clark by fraud, and that there was no real consideration for it. The facts have been quite fully stated in the abstract of the case in this brief, but reference will be made to the testimony of Samuel Clark, beginning at page 16.

This testimony shows that Clark was the owner of 250 shares of Peoples stock, and that he was induced by the statement of Rotter, that he had an offer of a position at a higher salary and would leave the company, and the statement of Meisselbach, that he would go with him, to part with the 250 shares for \$10,000.00. Davis was present when the statements were made, and also participated in the agreement of sale, and it is a fair inference from the evidence, that Davis was influenced by the same causes that induced Clark to sell to Rotter. At the same time in April, 1911 (testimony of Clark, p. 27, l. 12), Rotter made a promise to each one of the parties who signed the agreement, a gentleman's promise, to allow Clark and the others to come back into the Company on even better terms than they sold to him. Clark testified that Davis was there and heard that promise.

In December, 1911 (see p. 28), Rotter said to Clark that the proposition was to give him \$10,000.00 worth of Peoples stock at par and \$20,000.00 of Consolidated Record Company as a bonus. Rotter also stated that Mr. Whitehead had placed \$10,000.00 with the company. At that time, Clark did not know anything about the financial condition of the company. On

page 30, line 31, Clark testified: "He (meaning Rotter) said it was in good shape, better shape than ever." Relying upon these statements, Clark executed the note for \$10,000.00.

The testimony of Mr. Hannoeh (p. 79 and particularly at pp. 80, 82 and 83) shows that Mr. Whitehead was a holder of one share of stock of the par value of \$100.00, and that the company was insolvent on December 19, 1911. This was ample proof of the fraud, and also of the failure of consideration. It was not contended that the Consolidated Record stock had any value whatever. That there must have been some inducement to Clark to buy back 100 shares of stock and pay \$10,000 when he had only a few months before sold 250 shares for \$10,000, was an inference arising from the testimony that was irresistible. The inducement was the representation of Rotter, that the company was in good shape, and that Mr. Whitehead had put in \$10,000.00.

No motion was made to overrule the defence, and in disposing of the subsequent motion to direct a verdict for the plaintiff, the court seems to have assumed that the defendant had made satisfactory proof of the fraud and failure of consideration.

The plaintiff claims as a holder in due course.

Under the statute P. L. 1902, Comp. Stat., Vol. 3, p. 3741, par. 52, a holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face.
2. That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact.
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.

Paragraph 55 provides:

"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."

Paragraph 56 provides:

"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."

Paragraph 59 provides:

"Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course; but the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

In disposing of the motion to direct a verdict, the court relied upon the case of *Holcomb vs. Wyckoff*, 6 Vr., 35, and the case of *Aldrich vs. Peckham*, 45 Vr., 711.

In the last cited case, the court states at page 715:

"It should be remarked in passing that at the time the note in suit was given, the Negotiable Instrument Act, approved in 1902, was not in effect."

The motion to direct a verdict (p. 151) was presented upon four grounds, as follows:

1. That there having been no attempt to rescind or return the \$10,000 received by the defendant Clark, in April, 1911, for his stock, the defence of want of consideration under the second specification of defences, must necessarily fail.

2. That there is no evidence in the case to support the defence of failure of consideration.

3. That there is no evidence in the case to support the defence of fraud.

4. That the plaintiff is a holder in due course, and that there is no evidence in the case which shows any such knowledge on the part of plaintiff, or notice of any defect in the title of Rotter, from whom the plaintiff got the note in question, as would deprive plaintiff of the right to recover as a holder in due course.

Manifestly the first ground is immaterial. Clark had sold his stock, and he was not seeking to recover any damages by reason of the original fraudulent statements made by Rotter in April, 1911.

The second ground, it has been shown, is not sustained, as there was ample proof of the failure of consideration, for the note given in December, 1911, by Clark to Rotter. It has also been shown that there was ample evidence of fraud, and that the court was evidently of the opinion that fraud had been proved, or that there was sufficient evidence of fraud to go to the jury.

Under the statute, the proof of fraud sustained the defence that the title of Rotter was defective, and therefore, the burden was upon the plaintiff to prove that Rotter acquired the title to the note in due course, or in other words, that Rotter's title was based upon valuable consideration, and that he acquired the note honestly.

However, regardless of the question as to the burden of proof, there was sufficient evidence in the case to go to the jury, tending to show that Davis had knowledge of such facts, that his action in taking the instrument amounted to bad faith.

The facts referred to, may be stated briefly, as follows:

1. He was present when Rotter made the representation in April, 1911, that he had an offer of a higher salary and proposed to leave the Peoples Company.
2. He was a party to the agreement whereby he sold his 250 shares of Peoples stock to Rotter for \$10,000, that is, forty cents on the dollar.
3. He was present and heard Rotter's promise, called a gentleman's promise, to let the stockholders come into the company again at a future time.
4. He made an agreement with Rotter on April 15, 1911 (Exhibit P. 6, p. 162), extending the time for payment of the \$10,000 to July 11, 1911, from which it may be inferred that he knew that Rotter was not able to pay him cash.
5. On April 20, 1911, he took Rotter's note for \$10,000 payable in four months, thereby extending the time again for another month; and afterwards, according to the testimony, surrendered that note to Rotter, and it bears no endorsement to show that it ever passed through the hands of Davis.
6. On November 8, 1911, he took from Rotter four notes (Exhibits P. 9, P. 10, P. 11 and P. 12, pp. 164, 165), and he afterwards surrendered these four notes at a time when only one note was due, without endorsing them.
7. In October, 1911, he received from Rotter 5,000 shares of stock of Consolidated Company (testimony, p. 139), and was made president of the company, the

stockholders being Rotter and his wife and Davis, and he paid nothing for the stock.

8. On December 20, 1911, Davis signed as president of the company, a certificate for 20,000 shares of stock of Consolidated Record Company made out in favor of Samuel Clark (Exhibit D. 3, p. 170).

9. Davis was told by Rotter (testimony, p. 145) on December 20th at the time (Exhibit D. 3) that he, Rotter, had sold 100 shares of Peoples stock to Clark for \$10,000, and that he was giving Clark 20,000 shares of Consolidated Record as a bonus.

10. Davis testified (p. 108) that he did not know anything about the Peoples Talking Machine stock, whether it was worth one dollar or par.

11. Clark testified (p. 37, l. 20) that Davis came to see him once the latter part of December and once early in January. At that time, Davis asked Clark whether he, Davis, should invest more money in the Wizard Company and in the Peoples Company. He wanted to know what Clark thought of it, and Clark told him that it was a pretty good thing, but that he, Davis, had all he ought to carry, and at that time, Clark told Davis that he had given a note to Mr. Rotter. That was in the latter part of December, 1911. At that time (p. 38, l. 19) Clark testified as follows: "He told me that Mr. Rotter had told him some things that perhaps I ought to know, but he had promised Mr. Rotter that he would not tell what they were." On page 39, Clark testified that Davis came to see him again along the first part of January, and that he then said that he had seen Rotter, and that he thought it was possible that Rotter would finally tell Clark. This related to something that Rotter had done as is subsequently shown in the testimony. This testimony was sufficient to go to the jury and leads to the inference that Davis at that time knew of some conduct on the part of Rotter whereby he had taken

advantage of Clark; or it leads to the inference that Rotter and Davis were then in collusion to deceive Clark, so that he would not make any objection to the negotiation of his note. On January 17th or 18th, Rotter gave Davis a check for \$4,000.00, he having previously in November, 1911, paid him \$1,000.00, and although that check is dated January 17th, it was deposited on January 18th in Ironbound Trust Company (Exhibit P. 8, p. 163). On the same day, Davis gave Rotter a check for \$4,000.00 drawn against his account in Ironbound Trust Company, which was deposited with Rotter in Merchants National Bank January 19th. It is apparent that one check paid the other. Rotter at the same time, delivered to Davis a certificate of stock in Peoples Company for fifty shares, and Davis reassigned the certificate to Rotter (Exhibit P. 13, p. 165). Davis the same date, January 18th, gave Rotter a note for \$900.00 (Exhibit P. 14). The testimony relating to this transaction is that of Davis, and particularly, his cross examination, beginning at page 91, and also, the cross examination of Rotter, beginning at page 134. It was the contention of Davis, the plaintiff, and Rotter the defendant, that Rotter was settling with Davis for the balance of \$9,000.00 that he owed him, although there was not a word said about interest, and no interest appears to have been paid. No explanation was made why Davis was willing to take fifty shares of Peoples stock at par, when he had only a few months before sold the same stock at forty cents on the dollar. He did not give Rotter a release from his contract to pay him \$10,000, and he did not even give any receipt showing that a settlement had been made. The transaction speaks plainly that it was a mere exchange of checks, and that Davis was not in a position to pay one dollar of money. He had to give his note for \$900.00. It was manifestly a question for the jury to decide whether that transaction of January 17th or 18th, was one that was made in good faith between

Rotter and Davis, or was a mere subterfuge to put the Clark note in the possession of Davis, so as to shut off any defence by Clark.

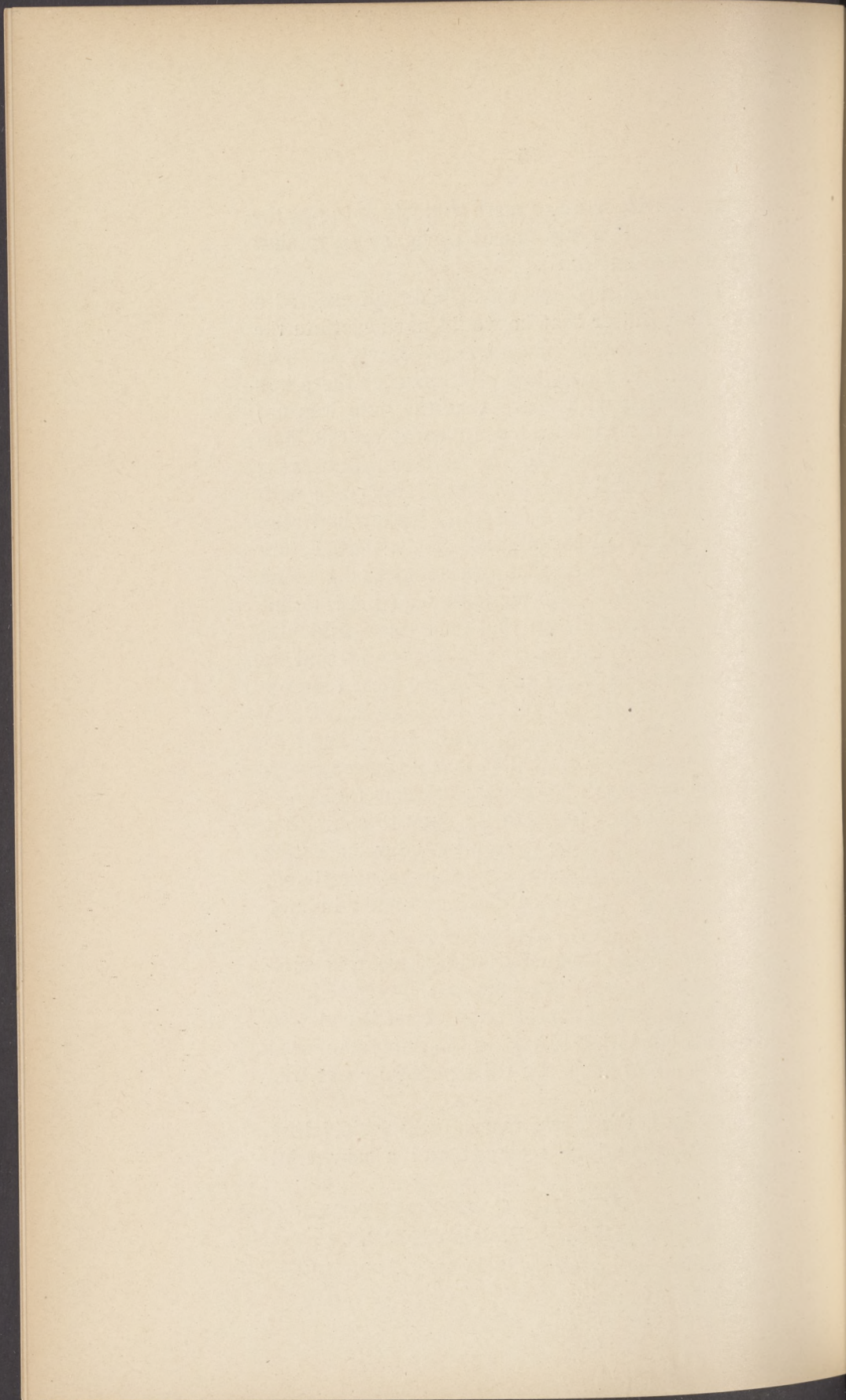
12. The evidence shows that Clark had exacted a promise from Rotter that he would not negotiate the note without Clark's consent, and Davis testified (p. 108) that Mr. Rotter had told him that there was an understanding with Clark that the note was not to be discounted without his approval at the Merchants Bank, and at page 109, he testified that because of this arrangement, that Mr. Clark had made with Mr. Rotter when he gave the note, Rotter had seen Clark, but that he did not himself ask Mr. Clark before he took the note whether he consented to its going out of his possession. Rotter testified (p. 127) that he called up Mr. Clark on the 'phone and told him what he wanted to do, and that Clark said that he had nothing against it, he only did not want the note discounted in the Merchants National Bank. Clark testified (p. 150) that Rotter did call him up and told him that he needed money, but he did not say anything about how much he needed, or what for.

Here was evidence to go to the jury to show that Davis had notice of some agreement between Rotter and Clark that the note was not to be negotiated, which made it his duty to see Clark and make inquiry of him.

It is respectfully contended that there was sufficient evidence to go to the jury to show knowledge of facts on the part of Davis, from which it could be inferred that his action in taking the note, amounted to bad faith. Therefore, the ruling of the court was erroneous.

The appellant, therefore, respectfully insists that the judgment should be reversed and a new trial granted.

JEROME T. CONGLETON,
FRANK E. BRADNER,
Of Counsel with Appellant.



COURT OF ERRORS AND APPEALS.

WILLIAM R. S. DAVIS, <i>Plaintiff-Respondent,</i> vs. SAMUEL CLARK, <i>Defendant-Appellant.</i>	}	<i>By Appeal from Supreme Court.</i>
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BRIEF FOR PLAINTIFF-RESPONDENT.

STATEMENT OF THE CONTROVERSY.

This action is brought by William R. S. Davis against Samuel Clark on a promissory note made by Samuel Clark to the order of William Rotter for \$10,000.00 bearing date December 20th, 1911, the following being a true copy :

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\$10,000.00. Newark, N. J., December 20, 1911.

Sixty days after date I promise to pay to the order of William Rotter Ten Thousand Dollars at Merchants' National Bank, Newark, N. J.

Value received.

(Signed) Samuel Clark.

(Endorsed) William Rotter, 862 So. 15th St., Newark, N. J.

(See declaration Record pages 1 to 5.)

Samuel Clark filed a plea of general issue (Record p. 5) and, in response to a demand for specification of defenses, specified (Record pp. 8 and 9) lack of consideration for the note and fraud in securing its execution and delivery, and that the plaintiff had notice of the failure of consideration and of the fraud before its negotiation to him.

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The plaintiff produced the note and proved the execution of the same by Samuel Clark and the endorsement on the same by the payee, William Rotter, and notice of protest, and then rested his case.

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The defendant's motion to non-suit the plaintiff, on the ground (Record p. 15) that there was no proof that the note was ever delivered by Samuel Clark to William Rotter, the payee, and upon the further ground that there was no proof that the plaintiff is the holder of the note, was denied; the appellant states six grounds of appeal, but abandons grounds Nos. 1, 2, 3, and 4, admitting that they are not available, for the reason that proof
10 was made in the case after the motion to non-suit, establishing the making of the promissory note by Samuel Clark and its delivery by him to William Rotter and its subsequent endorsement by William Rotter and delivery by him to William R. S. Davis, plaintiff, and the fact that Davis is the holder of the note, (Appellant's brief p. 8).

Appellant relies upon grounds of appeal Nos. 5 and 6, which take exception to the action of the court in directing a verdict for the plaintiff, (Record p. 155).
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It appeared by the evidence that in 1910 a New Jersey Corporation was organized known as the Peoples Talking Machine Company, having a capital stock of \$150,000.00, divided into 1,500 shares having a par value of \$100.00 each (Record p. 18). In the same year the Wizard Phonograph Company was organized with a capital stock of \$600,000.00, of which \$500,000.00 was common stock having a voting power and the other \$100,000.00 was preferred stock (Record p. 52). The Peoples Talking Machine Company was the holding and selling company and the Wizard Phonograph Company was the manufacturing company.
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In the early part of the year 1911, Samuel Clark, defendant herein, purchased stock in said Peoples Talking Machine Company having a par value of \$25,000.00 for \$5,000.00 and thus became associated with August F. Meisselbach, William Rotter, William R. S. Davis, Mr. Jacobs and Mr. Ross, each of the named gentlemen holding an equal one-sixth
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share of the capital stock of the said Peoples Talking Machine Company, and each holding one or more shares of the common stock of the Wizard Phonograph Company, in order to qualify them to act as Directors of the last named company.

It appears that William Rotter received his allotment of 250 shares of stock in said company in return for certain patents on talking machines, etc.; the other five gentlemen interested in the company had each paid \$5,000.00 for their shares of the capital stock. 10

The Peoples Talking Machine Company was the holder of 49,894 shares of the common stock and 10,000 shares of preferred stock, each having a par value of \$10.00 of said Wizard Phonograph Company, a corporation engaged in the manufacture of phonographs and talking machines, with a place of business and factory in J. C. Mundy's building in Newark, New Jersey, where a great number of machines were made (Record p. 18). 20

At a meeting held April 11th, 1911, a written agreement (Record p. 20, Ex. D. 1 Record p. 167) was made and signed by Clark, Davis, Meisselbach and Rotter, under the terms of which Rotter agreed to pay within thirty days from the date thereof to each of the others \$10,000.00 in cash for the shares of stock owned by them in the Peoples Talking Machine Company.

On April 15th, 1911, William Rotter carried out the terms of that agreement with Samuel Clark, defendant herein, and paid him \$10,000.00 cash for the stock that he had purchased previously for \$5,000.00 and Clark executed and delivered to Rotter an assignment in writing, (Ex. P. 2 Record p. 158) of his 250 shares of the capital stock of the Peoples Talking Machine Company and his one share of Wizard Phonograph Company stock and incorporated in said writing was a release by Clark to the Peoples Talking Machine Company and Wizard Phonograph Company and said William Rot- 40

ter, releasing them from all claims and demands whatsoever (See Record p. 20 L. 28; pp. 55 to 60).

By agreement bearing date April 15th, 1911 (Ex. P. 6 Record p. 162) William R. S. Davis extended the time for the payment of \$10,000.00 by Rotter for said stock to July 11th, 1911.

10 On April 20th, 1911, William Rotter executed and delivered to William R. S. Davis his promissory note for \$10,000.00 payable 4 months after date (Ex. P. 5 Record p. 161) being in payment of said capital stock purchased by Rotter, which note superceded the agreement of April 15th.

Rotter also purchased by payment of \$10,000.00 cash to each, the Jacobs and Ross holdings of stock in the Peoples Talking Machine Company, and Meisselbach retained his interest in the company, as will hereinafter appear.

20 On November 8th, 1911, Rotter took up the \$10,000.00 note held by Davis (Ex. P. 5) and gave in its place four promissory notes aggregating \$5,000.00 (Exs. P. 9, 10, 11, 12, Record pp. 164, 165) and assigned to him certificate No. 14 (Ex. P. 13, Record p. 165) for 50 shares of the capital stock of the Peoples Talking Machine Company (Record p. 120, 121); later by check bearing date November 15th, 1911 (Ex. P. 7, Record p. 163). Rotter paid the said demand note for \$1,000.00 (Ex. P. 9). On January 17, 1912, Rotter cancelled the balance of his indebtedness to Davis by taking up
30 the three notes aggregating \$4,000.00 (Exs. P. 10, 11, 12) by paying Davis \$4,000.00 in cash (p. 93, 118, 119) (Ex. P. 8, Record p. 163).

40 On or about December 19, 1911, Clark called at the office of the Peoples Talking Machine Company (Record pp. 25, 31, 62, 67) and arranged with Rotter to purchase from him 100 shares of capital stock of the Peoples Talking Machine Company for \$10,000.00 and Rotter agreed to give as a bonus 20,000 shares (\$1.00 par) of the capital stock of the Consolidated Record Company; on the follow-

ing morning, December 20th, 1911, that agreement was consummated and certificate No. 39 of the Peoples Talking Machine Company for 100 shares, together with certificate No. 6 for 20,000 shares of the Consolidated Phonograph Record Company were assigned and delivered by Rotter to Clark and in return therefor Clark executed and delivered his promissory note for \$10,000.00, which is the note involved in this suit. At the same time Clark executed and delivered to Rotter a writing acknowledging the receipt of the two said certificates purchased from Rotter for \$10,000.00 represented by his promissory note bearing date December 20th, 1911, and did by said writing redeliver said certificates to Rotter as collateral security for the payment of said note, (Ex. D. 2, Record p. 169). 10

On January 18th, 1912, Davis purchased the Clark note of \$10,000.00 executed December 20th, 1911, by paying to Rotter \$4,000.00 cash, together with \$900.00 note and capital stock of the Peoples Talking Machine Company, having a par value of \$5,000.00 (Record p. 89 line 35 to p. 91 line 22). 20

Clark as appellant here rests his case on two propositions (1) want of consideration in the note sued on as between Rotter and Clark known to the plaintiff Davis; (2) fraud on the part of Rotter in securing the execution and delivery by Clark of the note sued on, and fraud being known to the plaintiff Davis.

It was admitted on the trial that the burden was on Clark to show want of consideration and fraud and to bring knowledge thereof home to the plaintiff Davis. (Record p. 26). It was further conceded by counsel for Clark that even suspicious circumstances would not be enough to defeat plaintiff's right of recovery (Record p. 154, lines 8 to 15). 30

I.

THE RECORD SHOWS AMPLE CONSIDERATION FOR THE NOTE SUED ON AS BETWEEN CLARK AND ROTTER, AND IS ENTIRELY VOID OF PROOF TO THE CONTRARY.

10 The transfer of the 100 shares of Peoples Talking Machine Company stock is a valid consideration for the note and the purchase of the same is admitted by Clark, who testified that he had bought the stock and considered himself the owner of the stock .

(Record page 25) :

“Q. Well, after that—that was in April, 1911—did you have any further interest whatever in the Peoples Company or Consolidated Company?

20 “A. Not until I bought this stock, if you consider that.”

(Record page 62) :

“Q. Now, when you came back into the company, in December, 1911, as you tell us, without investigation, you bought a hundred shares of stock of the Peoples Company and 20,000 shares, par one dollar, of the Consolidated Phonograph Record Company, did you not?

“A. As I understood it, I bought the Peoples stock and the other stock was given as a bonus.

30 “Q. At any rate, you got the two bunches of stock?

“A. Yes, sir.

“Q. For the same money, or the same note?

“A. Yes, sir; the same price.”

(See also Clark, pp. 31 to 34; 65 to 67).

See also Ex. D. 2, in which Clark writes:

40 “I, Samuel Clark, the owner of the within Certificate numbered (39) thirty-nine of the Peoples Talking Machine Company, for one hundred (100) shares of Capital stock of said Company, and also

owner of another Certificate hereto attached and numbered (6) six of the Consolidated Phonograph Record Company for 20,000 shares of Capital stock of the Company last mentioned, which I have purchased from William Rotter for Ten Thousand 00/100 Dollars (\$10,000.00) represented by promissory note bearing date December 20th, 1911, payable sixty days after said date, do hereby acknowledge the receipt of said Certificates of stock, and do hereby assign, transfer and deliver said Certificates to William Rotter to be held by him as collateral security for the payment of said note, and upon the payment of said note the said Certificates of stock is to be reassigned and redelivered to me, and the same to become my property absolutely.

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“SAMUEL CLARK.”

It is not necessary to appeal to any other witness than the defendant Clark. He never in the whole course of the trial said a word suggesting failure of consideration. One of the specifications of defence had set up that the shares of stock for which the note in suit was given was at the time it was given the property of the defendant Clark (Record p. 8 line 27 (2)). This was an attempted repudiation of the sale of April, 1911, and is alluded to in the first ground advanced by the plaintiff at the trial on motion to direct a verdict. It was abandoned at the trial (Record p. 56 line 23). None the less at the trial and in the brief presented here much is said about the alleged unfair treatment of the defendant Clark, when in April, 1911, Rotter bought from him the stock for which Clark had paid \$5,000.00 thirteen months before, for \$10,000.00 spot cash. Clark claims that when that purchase was made Rotter promised him an opportunity to repurchase, and it is astonishing to

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talk of no consideration for the note of December 20th, 1911, when it was given, as Clark claims, for stock Rotter had promised Clark a chance to rebuy, and which Clark had six months before sold for the very same amount in cash.

There certainly was nothing to go to a jury as between Clark and Rotter, on the question of consideration.

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II.

THE RECORD SHOWS NO PROOF OF FRAUD IN OBTAINING THE NOTE SUED ON, AS BETWEEN CLARK AND ROTTER, AND IS ENTIRELY VOID OF PROOF TO THE CONTRARY.

The note sued on is dated December 20th, 1911.

20 Mr. Clark says that when he agreed to buy the stock, which was the day before the date of the note, Rotter told him a Mr. Whitehead was going in for \$10,000.00 and was to be President, and that he, Clark, then said that he felt that would be a good thing. (Record pp. 29 and 30). Clark further says that Rotter told him the business was in good shape (Record p. 30 line 30).

30 But Mr. Clark does not say that these statements were in any sense representations or other than mere expressions of expectation and opinion on the part of Rotter, or, even that the statements were made in response to inquiries by Clark, and Clark does not say that he relied on these statements or was in any way influenced by them. Counsel says so in the appellant's brief but Clark didn't say so at the trial. And Clark, when he repudiated the note, did not even mention these statements.

40 We can listen to what Clark said at the trial by reading the record, from which we will find that Clark never refused to pay this note because of any fraud or misrepresentations made to him when the

note was given, but solely and only because of the knowledge he acquired after January 20th, 1912, of the history of the transactions in April, 1911, resulting in the purchase by Rotter of the stock of his associates.

What happened in April, 1911, certainly did not constitute fraud in this note of December 20th, 1911. Any connection between the two is properly characterized by Judge Adams as "shadowy." We may appropriately quote from Clark's testimony as to this December note transaction (Record p. 49). 10

"By Mr. Bradner.

"Q. Before you gave the note to Mr. Rotter did you make any investigation of the condition of the Peoples Talking Machine Company?

"A. No, sir.

"Cross examination by Mr. Hardin.

"Q. Mr. Clark, you had been interested in the company before, had you not? 20

"A. Had I what?

"Q. You had been interested in the company before?

"A. Oh, yes, for a year.

"Q. And you knew Mr. Rotter?

"A. Yes, sir.

"Q. Was that the reason that you did not make any new investigation?

"A. I don't know as that was the reason. I had faith in the thing. 30

"Q. (By Mr. Bradner). You had what?

"A. I had faith in the movement."

It should also be noted, that while Clark had sold the stock for which he originally paid \$5,000.00 in April, 1911, for \$10,000.00 he had retained and still retained at the time of the trial \$4,000 worth of the preferred stock of the Wizard Company, held in the names of his children and mother-in-law for which he had paid \$2,000.00 (Record p. 54 lines 1 to 10; p. 56 lines 1 to 10). 40

During the interval therefore from April to December he had continued interested to some extent and if not actually familiar had ample opportunity to know the situation and prospects. He had besides originally sold with the expectation of a possible repurchase on equally favorable terms.

The case nowhere shows that there was anything false in fact in Rotter's statement that Mr. Whitehead was expected to become President of the People's Company and put \$10,000.00 in it or in Rotter's report that the business was in as good shape as ever. It appears affirmatively that Whitehead was a stockholder and attended the annual meeting in February, 1912, which Clark also attended and at which Mr. Whitehead was elected a Director. (See minutes, Record p. 85.) Mr. Whitehead was not called as a witness.

It also appears from the treasurer's statement at the same meeting read into the record on page 20 87, that at the close of business December 31st, 1911, the People's Company had a surplus of \$409,224.98 above a stock issue of \$150,000. The liabilities shown just about balanced the quick assets, but the company had large holdings in the capital stock of the International (formerly the Wizard) in which Clark was a stockholder. The accountant was in Court (Record p. 82 line 20), but was not sworn. Mr. Hannock, the Treasurer of the Company, who presented this statement to the stockholders, could not have understood the question 30 asked him, or could not have understood it as referring to cash assets, when he said (on page 83 line 20) that to pay Meisselbach's debt of \$10,000.00 would have wiped out the assets of the People's Company. On the preceding page he had testified that on December 19th, 1911, the People's Company had \$5,000.00 in cash and two thousand finished machines and parts enough to make up three or four thousand more, the finished machines being 40 at cost worth \$3.50, the machines and parts there-

fore representing a cost worth of fifteen to eighteen thousand dollars. (Record p. 82 line 23 et. seg.) The Treasurer further stated (p. 83 line 3 et. seg.) that the company had assurance of plenty of orders from Mr. Rotter and from Mr. Delano, who was Clark's brother-in-law and not connected with the business. The original cash contribution to the People's Company had been of \$5,000.00 each by Clark, Meisselbach, Davis, Jacobs and Ross in February, 1910, Rotter's contribution being patents as Clark was well aware, and for a Company of that cash capital the condition shown by the Treasurer in December, 1911, indicated a prosperous outlook. 10

Mr. Clark nowhere in his testimony claims that he was misinformed as to the company's condition. Indeed his sole grievance is that he was led to sell his stock in April, 1911, by a trick on the part of Rotter and Meisselbach. This he says he learned in January, 1912 (after Rotter had sold the note to Davis), through what he styles Rotter's "confession." This "confession" is described by Clark in direct examination on pages 41 and 75 of the Record and on cross-examination beginning on page 59 at line 17. He gives the time in the latter part of January or the first part of February, 1912. The "confession" was in brief to this effect: that Rotter and Meisselbach had had an offer of \$500,000.00 half cash and half stock, for the People's Company from John W. Gates, and had put up the scheme between them to buy out Clark, Davis, Jacobs and Ross for \$10,000 each. After getting rid of them Rotter and Meisselbach would get the big profit out of the deal. Rotter threatened to leave the Company unless the others sold to him, and Meisselbach, who did the Company's manufacturing, threatened to quit if Rotter did not stay. Clark represented Rotter as being so troubled in conscience in January, 1912, over this matter that he could not sleep nights and as making this "confession" to restore his peace of mind. 20
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Mr. Rotter's account of this is quite different (Record p. 133), as is Mr. Davis' (Record pp. 114, 115), but we will not discuss the differences.

Mr. Clark because of this "confession" refused to pay the note in suit.

He himself has never given any other reason. His counsel have been unable from the record to quote any other reason from his lips.

10 On direct examination Clark says only that on the morning after the statement by Rotter concerning the transaction of April, 1911, while Clark, Rotter and Davis were at the lawyer's office, he (Clark) stated that under the circumstances he would not pay the note. (Record p. 42 line 14; p. 43 line 5.)

On cross-examination Clark repeatedly says that his only reason for refusing to pay the note was the deception practiced on him by Rotter and Meisselbach in April, 1911.

20 Page 59 line 17:

"Q. Now, the difficulty that you find in this matter—the dissension that you find is in the transaction of April, 1911, when you sold your

"A. Yes, sir.

"Q. That is the time you say you were deceived by Mr. Rotter?"

"A. Yes, sir."

stock for \$10,000 to Mr. Rotter?

Page 69 line 24:

30 "Q. After the time when you discussed this, or made this arrangement about the payment of \$7,500 of this note and a renewal for 2,500, when did you next see Mr. Davis after that?

"A. At the time when Rotter made the confession to us, which was some few days after that.

"Q. Now, on that occasion was there anything further said between you and Mr. Davis about the note?

40 "A. Yes, I said I wouldn't pay it after the confession was made.

"Q. Because of the confession?

"A. Yes.

"Q. That was the reason?

"A. Yes.

"Q. That was the only reason you gave?

"A. Yes."

Page 70 line 1.

"Q. Now, when did you next see Mr. Davis?

"A. Early the next morning.

"Q. And at Mr. Kahrs's office?

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"A. At Mr. Kahrs's office.

"Q. And was there any conversation then with reference to the note?

"A. Yes, sir.

"Q. And its payment?

"A. Yes, sir.

"Q. Well, what did you say or they say or anybody say about the payment?

"A. The only thing that was said about the note was said by me: that, as Mr. Rotter had made the confession, I would not pay the note. 20

"Q. And that was the only reason you gave?

"A. That was the only reason I gave them.

"Q. And that was the only reason you had?

"A. No, because of the things which that brought out—that confession brought out.

"Q. Things growing out of that knowledge of that confession, as you call it?

"A. That grew out of that.

"Q. That was the reason?

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"A. Yes.

"Q. That confession?

"A. I think I should say a little something there. I think there were some other things said at that meeting, when he made that confession, that bore upon this point.

(By referring to page 75 of the Record it will appear that the "other things" were further details of the "confession.")

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"Q. Now, the confession, as you call it, was that Mr. Rotter had deceived you and the others in April, 1911, when you had sold your stock in the People's Phonograph Company and in the Wizard Company to him for \$10,000, by telling you that he was proposing to leave the company?"

"A. Well, that was the first; that was the first thing that he said was not so.

10 "Q. Well, that is the confession, is it not, that you refer to, or that was a part of the confession?"

"A. Yes, sir."

Mr. Clark and Mr. Rotter agree that the note in suit was given with the understanding between them that it was not to be discounted or transferred by Rotter without Clark's consent, and that Rotter sought and obtained Clark's consent to the transfer to Davis. No charge of fraud can therefore be suggested out of this condition. Indeed none is suggested.

20 Clark has made no effort to rescind the sale of his stock in April, 1911. He has retained the \$10,000 cash then paid him. (Record p. 58 line 38; page 61 line 1.)

Certainly this record made by Clark himself shows no jury question as to any fraud in obtaining the note sued on as between Clark and Rotter.

III.

30 THE RECORD SHOWS NO PROOF OF ANY NOTICE TO DAVIS OF ANY INFIRMITY IN THE NOTE SUED ON.

The note was complete and regular upon its face. Davis became the holder thereof on January 18, 1912, before its maturity.

He took it in good faith and for value.

40 He had no notice at the time it was negotiated to him of any infirmity in the instrument or in the title thereto.

He was a holder in due course under the definition in the Negotiable Instruments Statute (3 Comp. Stat. 3741, par. 52).

It is conceded that mere suspicious circumstances could not defeat the right of Davis to recover. (See reply of Mr. Bradner to question of the Court.) (Record p. 154 line 8.)

The Negotiable Instruments Act Sec. 56 affirms in statutory form the Doctrine of *Aldrich v. Peckham* 74 N. J. L. 711 decided on a note given before that act was passed. 10

Not only did Davis have no notice of infirmity. He had the positive assurance of the maker that the note was genuine, and acquired it with the acquiescence of the maker.

We again quote only from Clark's own testimony.

In December, 1911, Clark told Davis he had given the note to Rotter. (Record top page 38.)

On January 20, 1912, Rotter told Clark that he had transferred the note to Davis. (Record p. 45 line 21.) 20

After January 20, 1912, Davis told Clark he had acquired the note. (Record p. 46.)

On that occasion nothing was said about the payment of the note. (Record p. 68 line 10.)

A few days after Davis and Clark came to an understanding about the payment of the note. They parted with the agreement that Davis would accept at the maturity of the note on February 19, 1912, \$7,500 in cash and renew for the balance of \$2,500. (Record p. 68 line 39 to p. 69 line 20.) 30

At the end of January or the beginning of February but before the maturity of the note, Clark told Davis he would not pay the note because of Rotter's confession.

The evidence as to reason for the refusal assigned by Clark has already been referred to.

There is no pretense that Davis was a party to the alleged conspiracy of April, 1911. Rotter and 40

Meisselbach were the wicked ones, Davis being a co-victim with Clark, if the Clark version of the so-called confession be accepted.

There is no pretense that Davis had anything to do with the transaction of December, 1911, out of which the note sued on arose.

It is not pretended that Clark would have denied the note at any time if Davis had asked him about it. Such inquiry would have been idle, as Clark had
 10 already told Davis he had given Rotter the note, and after Davis told Clark of the purchase Clark not only made no objection but gave no notice of invalidity as against Rotter and arranged to pay the larger part at maturity and renew the balance.

How can this alleged confession of Rotter made if at all *after Davis had the note* and had had his ownership thereof recognized by Clark, invalidate Davis's title theretofore acquired.

The brief for defendant-appellant endeavors to
 20 find a jury question on the assumption that there was some lack of consideration or fraudulent conduct as between Clark and Rotter and elaborates certain circumstances as indicating a possibility of knowledge on Davis's part of some infirmity in the note sued on. The assumption to begin with is without foundation and the claim as to Davis is not supported by the record, even if every word Clark has
 30 spoken on the witness stand be given the effect most favorable to the defense. His counsel do not point out a single occasion or quote a single word when or by which Clark offered any criticism of this note to Davis before or after Davis acquired it or when or by which Clark asserted lack of consideration or fraud in securing it, as reason for non-payment.

We have not referred to the testimony of Davis and Rotter, which might if necessary be appealed to as completely negating the defences specified. There are no substantial contradictions except in the character of the alleged "confession" made after
 40 Davis had acquired the note and agreed to accept

\$7,500 cash at maturity and renew the balance. Clark and Davis and Rotter all agree that Clark never advance any reason at any time for refusing to pay this note, except the transaction of April, 1911. The fruits of that transaction \$10,000 in cash, double the amount of his original investment, Clark still retains.

The record shows no jury question as to any fact involving Davis's right to recover as a holder in due course.

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IV.

THE JUDGMENT SHOULD NOT BE DISTURBED.

There would have been no error in directing a verdict for the plaintiff for the full amount of the note sued on, as originally asked at the trial. The deduction, with plaintiff's assent, of \$900, representing the note for that amount given by Davis to Rotter remaining unpaid, does not harm the defendant Clark, and is not ground of error. Indeed we do not understand that appellant addresses any part of his argument to this point.

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Respondent respectfully submits that the judgment should be affirmed.

LINTOTT, KAHR & YOUNG,
Attorneys of Plaintiff-Respondent.

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JOHN R. HARDIN,
Of Counsel.

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