

## INDEX.

	PAGE
Notice of Appeal.....	1
Petition of Appeal.....	2
Final Decree .....	6
Bill of Complaint .....	9
Twelve Promissory Notes .....	12
Answer .....	17
Amended Bill of Complaint.....	19
Schedule A, Twelve promissory notes....	25
Schedule B, Letter dated September 11, 1928, from Schneider & Groggins to Samuel Cherkos .....	30
Schedule C, Receipt acknowledging receipt of release and letter.....	31
Answer to Amended Bill of Complaint and Counterclaim .....	34
Schedule "A", Release dated September 8, 1928, signed by Herman Falkenstein...	40
Special Replication and Answer to Counter- claim .....	43
Case .....	46

### TESTIMONY.

#### *Complainant's Witnesses:*

Herman Falkenstein—	
Direct .....	46
Cross .....	49
Redirect .....	61
Recross .....	62
Recalled:	
Direct .....	78
Cross .....	79

	PAGE
Charles A. Schneider—	
Direct .....	64
Cross .....	67
Redirect .....	77

*Defendant's Witnesses:*

William P. Gibson—	
Direct .....	80
Cross .....	84

EXHIBITS.

*Complainant's:*

	<i>Admitted</i>	<i>Printed</i>
	<i>Page</i>	<i>Page</i>
C-2. Letter from Schneider & Grogins to Samuel Cherkos, dated September 11, 1928 .....	62	88
C-3. Letter from Schneider & Grogins to Samuel Cherkos, dated September 21, 1928 .....	67	90

*Defendant's:*

D-1. (For identification) General Release signed by Herman Falkenstein, dated September 8, 1928 .....	57	91
D-2. Escrow Receipt and Agreement dated September 12, 1928, signed by Samuel Cherkos...	60	94

**Notice of Appeal.**

(Filed July 2, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

HERMAN FALKENSTEIN,  
Complainant,

and

WILLIAM P. GIBSON,  
Defendant.

On Bill,  
&c.

10

The defendant, William P. Gibson, hereby appeals from the Final Decree, made in the above entitled cause on February 28th, 1930, made by the Chancellor on the advice of Vice Chancellor Alonzo Church, and from the whole and every part thereof to the Court of Errors and Appeals in the Last Resort in All Causes.

20

Dated, June 26th, 1930.

SAUL NEMSER,  
Solicitor for and of Counsel With  
Defendant, William P. Gibson.

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

30

SAUL NEMSER,  
Of Counsel With Defendant, William P. Gibson.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 28th day of June, 1930.

RIKER & RIKER,  
Solicitors of Complainant.

40

**Petition of Appeal.**

(Filed July 18, 1930.)

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10

HERMAN FALKENSTEIN,  
Complainant-Respondent,

and

WILLIAM P. GIBSON,  
Defendant-Appellant.On Appeal  
from  
Court of  
Chancery.TO THE HONORABLE THE COURT OF ERRORS AND  
APPEALS IN THE LAST RESORT IN ALL CAUSES:

20

The petition of William P. Gibson, the appellant  
in the above-entitled cause, respectfully shows that:

30

1. Petitioner finds himself aggrieved by a final  
decree made in the Court of Chancery by his Honor,  
Edwin Robert Walker, Chancellor of the State of  
New Jersey, bearing date the twenty-eighth day of  
February 1930, in a certain cause in said Court of  
Chancery wherein the said Herman Falkenstein  
was complainant and the said William P. Gibson  
was defendant, in this respect, to wit, that the said  
Decree adjudges that

40

“Now therefore it is on this 28th day of Feb-  
ruary, 1930, DECREED that the defendant Wil-  
liam P. Gibson be and he is hereby estopped  
and forever enjoined from setting up the said  
general release dated September 8, 1928 as a  
defense to the cause of action of the complain-  
ant herein.

*Petition of Appeal.*

And it is further ORDERED, ADJUDGED AND DECREED that there is due and owing by the defendant, William P. Gibson, to the complainant, Herman Falkenstein the sum of \$2333.34 together with interest thereon from the 26th day of July, 1927.

And it is further ORDERED that the said defendant, William P. Gibson pay to the said complainant the costs of this suit to be taxed including a counsel fee of two hundred fifty dollars which is hereby allowed to the complainant. 10

And it is further ORDERED that the said defendant, William P. Gibson, within five days after service upon him, or his solicitor, of true but uncertified copies of this decree, and of the taxed costs pay to the said complainant the amount due to him as aforesaid and that in default of such payment, execution may issue to make the said sums according to the practice of this court." 20

2. Petitioner appeals from the said Final Decree of the Chancellor which decrees as aforesaid, on the ground that the same is erroneous in that

(1) The complainant's bill should have been dismissed. 30

(2) The relief prayed for by the defendant in his counterclaim should have been granted.

(3) Complainant has an adequate remedy at law.

(4) Complainant has executed and delivered to the defendant, a written general release dated Sep-

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*Petition of Appeal.*

tember 8th, 1928 and marked in evidence in this cause as Exhibit D-1, which general release is a complete bar to complainant's suit.

10 (5) The Chancellor erroneously determined that the general release executed and delivered by the complainant to the defendant as aforesaid, was affected and limited by the reservation or condition set forth in Defendant's Exhibit D-2 and does not release and discharge the defendant from complainant's alleged cause of action in this suit.

20 (6) The Chancellor should have found as a fact that the defendant did not consent, approve or acquiesce in the alleged reservation or condition contained in Defendant's Exhibit D-2 and that the defendant's attorney had no right or authority to accept anything but a general release absolute in form and free and clear from any reservation or condition whatever.

(7) The Chancellor over the objection of the defendant erroneously permitted the introduction in evidence of Exhibit C-3, offered by complainant.

(8) The Chancellor refused defendant's counsel an opportunity of summing up the case with conclusion of the testimony.

30 (9) The refusal of the Chancellor to continue the hearing until 2 P. M. of the same day on defendant's application so as to allow time for the attendance of a material witness for the defendant, was an abuse of discretion and reversible error.

Petitioner, therefore, prays that the said Final Decree of the said Chancellor may be wholly re-

*Petition of Appeal.*

versed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this court shall seem proper.

SAUL NEMSER,  
Solicitor For and of Counsel With  
Appellant.

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Service of a copy of the within Petition of Appeal is hereby acknowledged this 16th day of July, 1930.

RIKER & RIKER,  
Solicitors and of Counsel With  
Complainant-Respondent.

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**Final Decree.**

(Filed Feb. 28, 1930.)

## IN CHANCERY OF NEW JERSEY.

Between

HERMAN FALKENSTEIN,  
Complainant,

10

and

WILLIAM P. GIBSON,  
Defendant.

20

30

This cause coming on to be heard in the presence of Riker & Riker, Solicitors for the complainant, and Saul Nemser, Solicitor for the defendant, and the Court having examined the pleadings and taken proofs orally in open court and being satisfied that the defendant instituted an action at law in the New Jersey Supreme Court on May 20, 1927, against one Henry W. Green in the name of the defendant herein as agent for and for the account of the complainant herein, that the defendant herein compromised and settled said action at law upon the receipt of a certain sum of money which he has failed to pay or account for to the complainant herein, that the general release delivered by the complainant to the defendant under date of September 8, 1928, was delivered upon the condition and with the reservation that it should not operate to release any claim which the complainant might have against the defendant on account of the money received by the defendant on the settlement of the said action at law against Henry W. Green and that the defendant should be estopped and enjoined

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*Final Decree.*

from setting up said general release as a defense to this cause of action by virtue of his agreement to that effect.

And it further appearing that the parties hereto have stipulated and agreed that the defendant herein received on the 26th day of July, 1927, the sum of \$2,333.34 net upon the settlement of the said action at law against the said Henry W. Green after the payment of all costs and disbursements in connection therewith, including counsel fees. 10

Now, THEREFORE, it is on this 28th day of February, 1930, DECREED that the defendant, William P. Gibson, be and he is hereby estopped and forever enjoined from setting up the said general release dated September 8, 1928, as a defense to the cause of action of the complainant herein. 20

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is due and owing by the defendant, William P. Gibson, to the complainant, Herman Falkenstein, the sum of \$2,333.34, together with interest thereon from the 26th day of July, 1927.

AND IT IS FURTHER ORDERED that the said defendant, William P. Gibson, pay to the said complainant the costs of this suit to be taxed, including a counsel fee of two hundred fifty dollars, which is hereby allowed to the complainant. 30

AND IT IS FURTHER ORDERED that the said defendant, William P. Gibson, within five days after service upon him, or his solicitor, of true but uncertified copies of this decree, and of the taxed costs pay to the said complainant the amount due to him 40

*Final Decree.*

as aforesaid and that in default of such payment, execution may issue to make the said sums according to the practice of this court.

Respectfully advised,

E. R. WALKER,  
C.

10

ALONZO CHURCH,  
V. C.

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**Bill of Complaint.**  
(Filed January 31, 1929.)

IN CHANCERY OF NEW JERSEY.

TO THE HONORABLE EDWIN ROBERT WALKER, CHAN-  
CELLOR OF THE STATE OF NEW JERSEY :

The complainant, Herman Falkenstein, of the  
Borough of Bronx, in the City, County and State 10  
of New York, respectfully shows that :

1. On and after various dates between October  
14, 1926, and November 12, 1926, complainant was  
the holder and owner for value before maturity of  
twelve certain promissory notes of which said notes  
copies (which he believes to be true, taken from  
copies alleged to be true, annexed to and made a  
part of a certain complainant in an action at law  
hereinafter referred to) are annexed to and made 20  
a part of this complaint. Said notes were made by  
Henry W. Green to the order of complainant there-  
in described as H. Falkenstein.

2. The said Henry W. Green defaulted in the  
payment of said twelve notes on their respective  
due dates and complainant, about to depart from  
this country, entered into an arrangement with  
defendant, William P. Gibson, whereby said de- 30  
fendant was, during complainant's absence, to col-  
lect for complainant the amounts due on said notes.

3. In pursuance of said arrangement, complain-  
ant endorsed said notes in blank without recourse  
and placed them in the hands of a firm of attorneys  
with instructions to institute suit thereon in the  
name of defendant William P. Gibson, and later,  
after his return from abroad, at the request of said  
defendant, and in reliance upon his diligence and 40

*Bill of Complaint.*

honesty, authorized said attorneys to deliver, and they did deliver, said notes so endorsed to said defendant.

10 4. On May 20, 1927, defendant William P. Gibson instituted suit on said notes in his own name in the New Jersey Supreme Court against Henry W. Green, maker as aforesaid, for the collection thereof, and on July 21, 1927, after the suit was at issue discontinued it.

20 5. Complainant is advised, verily believes, and charges to be the fact that defendant compromised and settled complainant's said claim against Henry W. Green, discontinued said suit, and surrendered all of said notes to said Henry W. Green in consideration of the payment of a large sum of money by said Henry W. Green or by someone in his behalf to said defendant.

30 6. Complainant has frequently demanded of defendant an account of the moneys collected by and paid to him on said notes as hereinabove charged, but said defendant has neglected and refused, and still neglects and refuses to render such account to complainant, and complainant has received no moneys from defendant for or on account of said notes so delivered to defendant for collection.

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That William P. Gibson, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

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*Bill of Complaint.*

2. That the said defendant William P. Gibson may be ordered to make full and true discovery and disclosure of and concerning all and singular his dealings with the attorneys who represented him in the suit instituted by him for the collection of said notes, the attorney who, in said suit represented Henry W. Green, the maker of said notes and the defendant in said suit and with the said maker, respecting said notes, and that an account be taken by and under the direction of this Honorable Court of all dealings of complainant and defendant and of defendant with the maker of said notes and their respective attorneys, in respect to said notes. 10

3. That in taking said account the defendant William P. Gibson may be charged with the amount collected by him and paid by said Henry W. Green or by some one in his behalf to said defendant in settlement of said suit to secure the discontinuance of the same and the surrender of said notes. 20

4. That in taking said account, the defendant may not be allowed to charge complaint with any but a reasonable sum for legal services and disbursements which may appear to have been incurred by him in connection with the collection of said notes. 30

5. That a writ of subpoena may issue, commanding said defendant to answer this bill of complaint and to abide by such decree as this court may make in the premises.

RIKER & RIKER,  
Solicitors for Complainant.

THOS. E. FITZSIMMON,  
Of Counsel. 40

**12 Promissory Notes—Annexed to  
Bill of Complaint.**

\$1000. # November 9, 1926.

One month after date I promise to pay to the  
order of H. Falkenstein

One Thousand # .....Dollars

**10** Payable at 155 East 42nd St., N. Y. City.

Value received

No. Due HENRY W. GREEN.

Endorsed

“H. Falkenstein  
without recourse”

**20**

\$300. # Nov. 11th, 1926.

One month after date I promise to pay to the  
order of H. Falkenstein

Three Hundred # .....Dollars

Payable at 155 East 42nd St., N. Y. City.

**30** Value received

No. Due HENRY W. GREEN.

Endorsed

“H. Falkenstein  
without recourse”

**40**

*12 Promissory Notes.*

\$2000. # Nov. 7th, 1926.

One month after date I promise to pay to the  
order of H. Falkenstein

Two Thousand # .....Dollars

Payable at 155 East 42nd St., N. Y. City.

Value received

10

No. Due HENRY W. GREEN.

Endorsed

"H. Falkenstein  
without recourse"

\$500. # Nov. 2nd, 1925.

20

One month after date I promise to pay to the  
order of H. Falkenstein

Five Hundred # .....Dollars

Payable at 155 East 42nd St., N. Y. City.

Value received

30

No. Due HENRY W. GREEN.

Endorsed

"H. Falkenstein  
without recourse"

40



*12 Promissory Notes.*

\$1200.00 New York, October 25, 1926.

One month after date I promise to pay to the order of H. Falkenstein

Twelve Hundred and .....00/100 Dollars

Payable at 155 East 42nd Street, New York, N. Y., Suite 215.

10

Value received

No. Due HENRY W. GREEN.

Endorsed

“H. Falkenstein  
without recourse”

20

\$275. # Oct. 23rd, 1926.

One month after date I promise to pay to the order of H. Falkenstein

Two Hundred and Seventy-five # .....Dollars

Payable at 155 East 42nd St., N. Y. City.

Value received

30

No. Due HENRY W. GREEN.

Endorsed

“H. Falkenstein  
without recourse”

40



**Answer.**

(Filed April 23, 1929.)

## IN CHANCERY OF NEW JERSEY.

Between

HERMAN FALKENSTEIN,  
Complainant,

and

WILLIAM P. GIBSON,  
Defendant.On Bill,  
&c.

10

The defendant, residing in the City of Plainfield, County of Union and State of New Jersey, answering the bill of complaint.

This defendant answering the bill of complaint, says: 20

1. He denies the allegations of Paragraph "1".
2. He denies the allegations of Paragraph "2".
3. He denies the allegations of Paragraph "3".
4. He denies the allegations of Paragraph "4". 30
5. He denies the allegations of Paragraph "5".
6. He denies the allegations of Paragraph "6".
7. This defendant further answering says that the complainant has an adequate remedy at law.
8. This defendant further answering says that the complainant, Herman Falkenstein, did execute 40

*Answer.*

and deliver unto the defendant, a certain written release, dated September 8th, 1928, wherein the said Herman Falkenstein in consideration of the payment to him of the sum of Twenty-six Hundred and Thirty (\$2630.00) Dollars, as in said release stated, did release and forever discharge the said defendant, William P. Gibson from any and all alleged causes of action, which release the defendant will produce on the Final Hearing of this cause.

SAUL NEMSER,  
Solicitor of Defendant.

20

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**Amended Bill of Complaint.**

(Filed July 16, 1929.)

IN CHANCERY OF NEW JERSEY.

Between

HERMAN FALKENSTEIN,  
Complainant,

and

WILLIAM P. GIBSON,  
Defendant.On Bill,  
&c.

10

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

The complainant, Herman Falkenstein, of the Borough of Bronx, in the City, County and State of New Jersey, respectfully shows that:

20

1. On and after various dates between October 14, 1926, and November 12, 1926, complainant was the holder and owner for value before maturity of twelve certain promissory notes of which said notes copies (which he believes to be true, taken from copies alleged to be true, annexed to and made a part of a certain complaint in an action at law hereinafter referred to) are annexed to and made a part of this complaint as Schedule A. Said notes were made by Henry W. Green to the order of complainant therein described as H. Falkenstein.

30

2. The said Henry W. Green defaulted in the payment of said twelve notes on their respective due dates and complainant, about to depart from this country, entered into an arrangement with

40

*Amended Bill of Complaint.*

defendant William P. Gibson, whereby said defendant was, during complainant's absence, to collect for complainant the amounts due on said notes.

10 3. In pursuance of said arrangement, complainant endorsed said notes in blank without recourse and placed them in the hands of a firm of attorneys with instructions to institute suit thereon in the name of defendant William P. Gibson and later, after his return from abroad, at the request of said defendant, and in reliance upon his diligence and honesty, authorized said attorneys to deliver, and they did deliver, said notes so endorsed to said defendant.

20 4. On May 20, 1927, defendant William P. Gibson instituted suit on said notes in his own name in the New Jersey Supreme Court against Henry W. Green, maker as aforesaid, for the collection thereof, and on July 21, 1927, after suit was at issue discontinued it.

30 5. Complainant is advised, verily believes, and charges to be the fact that defendant compromised and settled complainant's said claim against Henry W. Green, discontinued said suit, and surrendered all of said notes to said Henry W. Green in consideration of the payment of a large sum of money by said Henry W. Green or by someone in his behalf to said defendant.

40 6. Complainant has frequently demanded of defendant an account of the moneys collected by and paid to him on said notes as hereinabove charged, but said defendant has neglected and refused, and still neglects and refuses to render such account

*Amended Bill of Complaint.*

to complainant, and complainant has received no moneys from defendant for or on account of said notes so delivered to defendant for collection.

7. On or prior to September 8, 1928, the complainant was plaintiff in a certain action of law then pending in the Union County Circuit Court wherein the defendant William P. Gibson and Phyliss M. Gibson were defendants, arising out of facts other than those set forth in Paragraphs 1-6 inclusive of this bill of complaint. 10

8. In the course of negotiations entered into between him and the said defendants looking to the settlement of said then pending litigation, he and Herman Falkenstein, Inc., a corporation, signed a certain release bearing date the 8th day of September, 1928, the terms of which he and the said Herman Falkenstein, Inc., released the said defendants from any and all causes of action. 20

9. On or about September 11, 1928, the complainant caused said release, so signed, to be delivered to one Samuel Cherkos, whom the complainant believes to be an attorney at law in the State of New York, accompanied by a letter, of which a true copy is annexed to and made a part of this bill of complaint as Schedule B., wherein and whereby said release was delivered in pursuance of said negotiations only if upon the express condition that the defendant, William P. Gibson, be advised of and having been advised of, agree to and accept as a limitation upon the general terms of said release a reservation from the operation and effect thereof in favor of complainant of any and all rights of action of said complainant against the 30 40

*Amended Bill of Complaint.*

said defendant arising out of the facts alleged in Paragraphs 1-6 inclusive of this bill of complaint.

10     10. The said Samuel Cherkos signed and returned to complainant a paper writing of which a true copy is annexed to and made a part of this complaint as Schedule C., wherein and whereby he acknowledged receipt of said release and the said letter imposing upon the delivery of said release the aforesaid condition and agreed to advise the defendant of the condition and to return said release unless the condition so imposed was agreed and accepted by the defendant.

20     11. That the said defendant was advised of said condition and having been advised of it agreed to and accepted as a limitation upon the general terms of said release the reservation therefrom of any and all rights of action of the complainant against him arising out of the facts alleged in Paragraph 1-6 inclusive of this bill of complaint, well knowing that complainant would and intending that he should, in reliance upon said acceptance refrain from taking any steps to secure the return to him of the said release so delivered.

30     12. Complainant did rely upon said acceptance by the defendant of the aforesaid reservation from the general terms of said release and in reliance thereupon did refrain from taking any steps to secure the return to him of the said release so delivered.

40     13. Complainant will to his great injury be deprived of the relief prayed for in said bill of complaint, and any other relief to which he may be entitled by reason of the facts alleged in said bill

*Amended Bill of Complaint.*

of complaint if said defendant is permitted to plead said release in defense against any action of proceeding which your complainant may institute on account of said facts alleged in said bill of complaint or to offer the same in evidence in any such action.

Complaint is without adequate remedy in the courts of law and therefore prays: 10

1. That William P. Gibson, who is the defendant to this suit, may answer this amended bill of complaint and each statement therein made.

2. That said defendant William P. Gibson may be enjoined from pleading said release in defense against any and all actions or proceedings brought, maintained or instituted by the complainant, whether civil or criminal, in law or in equity, upon the facts alleged in this bill of complaint and from introducing or offering said release in evidence in any such action or proceeding and from causing said release to be so pleaded or so offered and introduced in evidence. 20

3. That this Honorable Court may adjudge that said defendant, William P. Gibson, ought not to be permitted against his own acknowledgment by his acceptance of the aforesaid reservation as a limitation upon the terms of said release, to say that the complainant did execute and deliver to him a certain written release dated September 8, 1928, wherein the said Herman Falkenstein in consideration of the payment to him of the consideration of said release, stated, did release and forever discharge said defendant from any and all alleged causes of action. 30 40

*Amended Bill of Complaint.*

10 4. That the said defendant William P. Gibson may be ordered to make full and true discovery and disclosure of and concerning all and singular his dealings with the attorneys who represented him in the suit instituted by him for the collection of said notes, the attorney who, in said suit represented Henry W. Green, the maker of said notes and the defendant in said suit and the said maker, respecting said notes, and that an account be taken by and under the direction of this Honorable Court of all dealings of complainant and defendant and of defendant with the maker of said notes and their respective attorneys, in respect to said notes.

20 5. That in taking said account the defendant William P. Gibson may be charged with the amount collected by him and paid by said Henry W. Green or by some one in his behalf to said defendant in settlement of said suit to secure the discontinuance of the same and the surrender of said note.

30 6. That in taking said account, the defendant may not be allowed to charge complainant with any but a reasonable sum for legal services and disbursements which may appear to have been incurred by him in connection with the collection of said notes.

7. That a writ of subpoena may issue, commanding said defendant to answer this bill of complaint and to abide by such decree as this court may make in the premises.

RIKER & RIKER,  
Solicitors of Complainant.

IRVING RIKER,  
Of Counsel.

**Schedule A, Annexed to Amended Bill of  
Complaint.**

\$1000.#

November 9, 1926.

One month after date I promise to pay to the  
order of H. Falkenstein

One Thousand #.....Dollars

Payable at 155 East 42nd St., N. Y. City. 10

Value received

No. Due

HENRY W. GREEN.

Endorsed

“H. Falkenstein  
without recourse”

20

\$300.#

Nov. 11th, 1926.

One month after date I promise to pay to the  
order of H. Falkenstein

Three Hundred #.....Dollars

Payable at 155 East 42nd St., N. Y. City.

Value received

30

No. Due

HENRY W. GREEN.

Endorsed

“H. Falkenstein  
without recourse”

40

Schedule A.

\$1200.00 New York, N. Y., October 25, 1926.

One month after date I promise to pay to the order of H. Falkenstein

Twelve Hundred and .....00/100 Dollars

Payable at 155 East 42nd St., New York, N. Y., Suite 215.

10

Value received

No. Due HENRY W. GREEN.

Endorsed  
"H. Falkenstein  
without recourse"

20

\$275.# Oct. 23rd, 1926.

One month after date I promise to pay to the order of H. Falkenstein

Two Hundred and seventy-five .....Dollars

Payable at 155 East 42nd St., N. Y. City.

30 Value received

No. Due HENRY W. GREEN.

Endorsed  
"H. Falkenstein  
without recourse"

40

## Schedule A.

\$2,000.# Nov. 7th, 1926.

One month after date I promise to pay to the  
order of H. Falkenstein

Two Thousand ..... Dollars

Payable at 155 East 42nd St., N. Y. City.

Value received 10

No. Due HENRY W. GREEN.

Endorsed

"H. Falkenstein  
without recourse"

---

\$500.# Nov. 2nd, 1925.

One month after date I promise to pay to the  
order of H. Falkenstein

Five Hundred ..... Dollars

Payable at 155 East 42nd St., N. Y. City.

Value received 30

No. Due HENRY W. GREEN.

Endorsed

"H. Falkenstein  
without recourse"



*Schedule A.*

\$872.#

October 19th, 1926.

One month after date I promise to pay to the  
order of H. Falkenstein

Eight Hundred and Seventy-two ..... Dollars

Payable at 155 East 42nd St., N. Y. City.

10

Value received

No. Due

HENRY W. GREEN.

Endorsed

"H. Falkenstein  
without recourse"

20

\$1410.50/100

October 15th, 1926.

One month after date I promise to pay to the  
order of H. Falkenstein

Fourteen Hundred and Ten 50/100 ..... Dollars

Payable at 155 East 42nd St., New York, N. Y.

Value received

30

No. Due

HENRY W. GREEN.

Endorsed

"H. Falkenstein  
without recourse"

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**Schedule B, Annexed to Amended Bill of  
Complaint.**

September 11th, 1928.

Samuel Cherkos, Esq.,  
67 West 44th St.,  
New York City.

10                   Re: *Faulkenstein vs. Gibson.*

Dear Sir:

Supplementing general release bearing date Sep-  
tember 8th, 1928, and modifying said general re-  
lease, this letter shall serve as a record of the res-  
ervation made by Herman Faulkenstein and Her-  
man Faulkenstein, Inc. of the right both civilly  
and criminally he or it may have against William  
P. Gibson by reason of the failure on the part of  
20 said Gibson to turn over to said Faulkenstein  
and/or the said corporation the sum of \$3500, or  
such other additional sums as said Gibson has col-  
lected from one Henry Green on an indebtedness  
amounting to \$8,000. The conditional delivery of  
the release is provided for in the escrow receipt and  
agreement, bearing even date herewith, is without  
prejudice to the rights of Faulkenstein and the  
Faulkenstein corporation against Gibson as afore-  
said.

30                   It is understood that you will apprise your client  
of this reservation and that your client will con-  
sent to the limitation imposed on the general re-  
lease by this letter.

Please acknowledge receipt.

Yours very truly,

SCHNEIDER & GROGGINS,

40                   By (Signed) CHARLES A. SCHNEIDER.

**Schedule C, Annexed to Amended Bill of Complaint.**

UNION CITY CIRCUIT COURT.

<p style="text-align: center;">HERMAN FAULKENSTEIN, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">PHYLLIS M. GIBSON and WILLIAM P. GIBSON, Defendants.</p>	}	
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The undersigned, acting as correspondent for Sol. Nemser of Jersey City, New Jersey, attorney for the above named defendants, hereby acknowledges receipt of the following instruments:

20

1. Stipulation (original and duplicate) discontinuing the above entitled action.

2. General release dated September 8th, 1928 from Herman Faulkenstein and Herman Faulkenstein Inc. to William P. Gibson and Phyllis M. Gibson.

3. Letter from Schneider & Groggins acting for the plaintiff as local counsel only, supplementing the general release heretofore referred to.

Condition subject to approval of client. If not approved, status quo to be restored.

S. C.

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4. Four notes, three dated August 9th, 1926, one in the sum of \$1732.50, a second in the sum of \$900 and a third in the sum of \$500, and the fourth dated October 19, 1926, in the sum of \$200.

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*Schedule C.*

The undersigned agrees to hold the aforesaid instruments in escrow and not to deliver same over to the defendants or to any other person save on the express condition that the full sum of \$2630 be first paid to Herman Faulkenstein, the plaintiff in the above entitled action, said sum to be paid by the defendants Phyllis M. Gibson and William P. Gibson, in the following manner:

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\$500 by check of the undersigned, delivered at the time of the signing of this escrow receipt, the receipt whereof is hereby acknowledged by Herman Faulkenstein.

Receipt of these notes not acknowledged, but to be obtained and delivered to Faulkenstein.

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\$500 by note dated this day due October 10th, 1928, bearing interest at the rate of 6% per annum.

\$500 by note dated this day due November 10th, 1928, bearing interest at the rate of 6% per annum.

Herman  
Faulkenstein.  
S. C.

\$500 by note dated this day due December 10th, 1928, bearing interest at the rate of 6% per annum, and

\$630 by note dated this day due January 10th, 1929, bearing interest at the rate of 6% per annum, and which said notes have been executed by the Gibsons.

30

In the event the Gibsons shall fail to pay any of the aforesaid notes on the respective due dates thereof Faulkenstein may, at his election, if the default continues for five days, without any further or other notice to the Gibsons demand of the undersigned the return of the aforesaid instruments and may continue the action now pending in the Union County Circuit Court of New Jersey, crediting the Gibsons in said action with the amounts actually received and charging the Gibsons with the differ-

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*Schedule C.*S. C.  
H.

ence between the original amount sued for and the amounts actually received in which event Falkenstein is to return the unpaid notes last above described to the undersigned.

Dated, New York, September 12th, 1928.

(signed) SAMUEL SHERKOS. 10

Consented to

(signed) HERMAN FALKENSTEIN.

Service of the amended bill of complaint is hereby acknowledged this 6th day of July, 1929.

SAUL NEMSER,  
Solicitor of Defendant. 20

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*Answer to Amended Bill of Complaint and  
Counterclaim.*

5. He denies the allegations of Paragraph Five, except that this defendant admits that the suit instituted by him in the New Jersey Supreme Court against Henry W. Green was settled and discontinued.

6. He denies the allegations of Paragraph Six, and further says that the complainant is not entitled to any accounting from this defendant whatsoever. 10

7. He denies the allegations of Paragraph Seven. This defendant further answering says that there was a suit instituted in the New Jersey Supreme Court, Union County, in the month of July, 1927, wherein Herman Falkenstein, Inc., a corporation of the State of New York, was plaintiff and Phyllis M. Gibson, were defendants, in an action at law. 20

8. He admits the allegations of Paragraph Eight.

9. He has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph Nine, and therefore leaves complainant to his proof thereon.

10. He has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph Ten, and therefore leaves complainant to his proof thereon. 30

11. He denies the allegations of Paragraph Eleven, and further answering says that the Release executed by complainant and delivered to this defendant, is an absolute, unconditional, general release, and that this defendant paid consideration 40

*Answer to Amended Bill of Complaint and  
Counterclaim.*

therefore, and accepted the said Release without any reservation or limitation upon the general terms of said release, nor did this defendant ever consent to or approve of any reservation or limitation upon the general terms of said Release.

10      12. He denies the allegations of Paragraph Twelve.

13. He denies the allegations of Paragraph Thirteen. This defendant further answering says that the said Release mentioned, constitutes a complete and absolute legal and equitable defense to complainant's alleged cause of action.

FIRST SEPARATE DEFENSE.

20

1. The complainant herein has executed and caused to be delivered to this defendant, a certain Release bearing date, September 8th, 1928, wherein and whereby the said complainant herein, in consideration of the payment to him of the sum of Twenty-six Hundred and Thirty (\$2630.00) Dollars by the defendant, as in said Release stated, did release and forever discharge the said defendant, William P. Gibson, from any and all alleged causes of action, a copy of which Release is hereto annexed, marked Schedule "A" and made a part hereof.

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SECOND SEPARATE DEFENSE.

1. Complainant has a complete and adequate remedy at law.

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*Answer to Amended Bill of Complaint and  
Counterclaim.*

THIRD SEPARATE DEFENSE.

1. Complainant, by reason of his delay and lack of due diligence has been guilty of laches in asserting any of his alleged rights or causes of action. This defendant has changed his position and has been prejudiced by reason of said complainant's laches. 10

By way of counter-claim against complainant, this defendant says:

1. Annexed to complainant's amended bill of complaint and forming a part thereof, are Schedules "B" and "C", which are hereby made a part hereof. 20

2. Complainant has executed his general Release and caused the same to be delivered to this defendant, a copy of which General Release is hereto annexed, marked Schedule "A" and made a part hereof.

3. As consideration for the delivery to the defendant of said general Release, this defendant has paid to complainant herein, the sum of Twenty-six Hundred and Thirty (\$2630.00) Dollars. 30

4. Said general Release was delivered to and accepted by this defendant, without any limitation or reservation upon the general terms thereof, and was accepted by this defendant as an absolute, unconditional, general Release.

5. In the margin of Schedule "C" annexed to the bill of complaint and made a part hereof, there 40

*Answer to Amended Bill of Complaint and  
Counterclaim.*

- 10 appear the words, "Condition subject to approval  
of client. If not approved, status quo to be re-  
stored, S. C." which words appear opposite Para-  
graph Three of the said stipulation known as Sched-  
ule "C", which Paragraph Three refers to letter  
attached to the bill of complaint, and marked Sched-  
ule "B". This defendant never approved nor gave  
his consent to the limitation or reservation alleged  
to have been imposed upon the general Release as  
set forth in Schedule "B" annexed to the complaint  
and made a part hereof, and said defendant made  
the payments mentioned in the stipulation marked  
Schedule "C" amounting to the sum of Twenty-six  
Hundred and Thirty (\$2630.00) Dollars, only after  
complainant herein had waived the matters con-  
tained in Schedule "B", and after an agreement and  
20 understanding between the said complainant and  
this defendant's New York attorney, that the said  
matters contained in Schedule "B" should become  
null and void, and be entirely disregarded and of  
no effect, the said complainant well knowing that  
this defendant desired to finally and completely ad-  
just, at the time of the delivery of the said general  
release, any and all matters in difference between  
the said complainant and this defendant.
- 30 This defendant does hereby tender and offer to  
restore and return to complainant herein, upon this  
Court decreeing, a rescission of the said stipula-  
tion marked Schedule "C" annexed to the bill of  
complaint, any and all property, documents and  
chattels, that may have been delivered by the com-  
plainant to this defendant, upon the complainant  
doing likewise, and restoring this defendant to his  
original position, and the matters in difference be-  
40 tween the parties in status quo.

*Answer to Amended Bill of Complaint and Counterclaim.*

This defendant therefore prays:

1. That said complainant, Herman Falkenstein, may answer this counterclaim, and each statement herein made.

2. That the stipulation of settlement designated as Schedule "C" annexed to the bill of complaint and made a part hereof, may be rescinded, revoked and set aside and the rights of the respective parties therein restored to status quo, and that the said complainant may be compelled by decree of this court to return and refund to the defendant, the sum of Twenty-six Hundred and Thirty (\$2630.00) Dollars, and any and all other sums of money paid by this defendant to complainant, under and by reason of said stipulation marked Schedule "C", and to return to this defendant, any and all other consideration, notes, goods, property or chattels, so that the said parties may be restored to their original positions.

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SAUL NEMSER,  
Solicitor of Defendant.

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**Schedule "A", Annexed to Answer to  
Amended Bill of Complaint and  
Counterclaim.**

TO ALL TO WHOM THESE PRESENTS SHALL COME OR  
MAY CONCERN,

10 GREETING: Know Ye, That, Herman Falkenstein  
and Herman Falkenstein, Inc., a corporation with  
offices at 155 East 42nd Street, in the Borough of  
Manhattan, City of New York, for and in consid-  
eration of the sum of Twenty-six hundred and thirty  
dollars (\$2630.00), lawful money of the United  
States of America to us in hand paid by William P.  
Gibson and Phyllis M. Gibson, the receipt whereof  
is hereby acknowledged, have remised, released and  
forever discharged, and by these presents do for  
20 ourselves our heirs, executors, administrators and  
assigns, remise, release and forever discharge the  
said William P. Gibson and Phyllis M. Gibson, their  
heirs, executors, administrators and assigns, of all  
and from all manner of action and actions, cause  
and causes of action, suits, debts, dues, sums of  
money, accounts, reckonings, bonds, bills, special-  
ties, covenants contracts, controversies, agreements,  
promises, variances trespasses damages judgments,  
30 extents, executions, claims and demands whatso-  
ever, in law or in equity, which against William P.  
Gibson and Phyllis M. Gibson, we ever had, now  
have or which we or our heirs, executors, adminis-  
trators and assigns, hereafter can, shall or may  
have for, upon or by reason of any matter, cause  
or thing whatsoever from the beginning of the world  
to the date of the date of these presents.

Schedule "A".

IN WITNESS WHEREOF, We have hereunto set our hand and seal the 8th day of September in the year one thousand nine hundred twenty-eight.

HERMAN FALKENSTEIN (L. S.)

HERMAN FALKENSTEIN INC.

By HERMAN FALKENSTEIN 10  
President.

Sealed and delivered  
in the presence of:

CHARLES A. SCHNEIDER.

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30

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*Schedule "A".*

STATE OF NEW YORK, }  
 COUNTY OF NEW YORK, } ss. :

10 On this 12th day of September, in the year one thousand nine hundred and twenty-eight, before me personally appeared HERMAN FALKENSTEIN, to me known, and known to me to be the same person described in and who executed the within instrument and acknowledged to me that he executed the same.

CHARLES A. SCHNEIDER,  
 Notary Public, N. Y. C. #929.

STATE, CITY & COUNTY OF NEW YORK, ss. :

20 On the 12th day of September, 1928, before me came HERMAN FALKENSTEIN, to me known, who, being by me duly sworn, did depose and say that he resides 3505 Decatur Avenue, in the Borough of Bronx, City of New York, that he is the President of Herman Falkenstein, Inc., the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of  
 30 the board of directors of said corporation, and that he signed his name thereto by like order.

CHARLES A. SCHNEIDER,  
 Notary Public, N. Y. C. #929.

**Special Replication and Answer to  
Counterclaim.**

(Filed August 2, 1929.)

IN CHANCERY OF NEW JERSEY.

Between

HERMAN FALKENSTEIN,  
Complainant,

and

WILLIAM P. GIBSON,  
Defendant.

On Bill,  
&c.

On Amended  
Bill.

10

In reply to the third separate defense stated in the answer of the defendant to the amended bill of complaint, and not anticipated in the bill of complaint or in the amended bill of complaint, complainant by leave of court says that:

20

1. He denies that portion of the third separate defense which reads "complainant by reason of his delay and lack of due diligence has been guilty of laches in asserting any of his alleged rights or causes of action."

2. As to the remainder of third separate defense, he has no knowledge or information sufficient to form a belief and, therefore, leaves defendant to his proof thereon.

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Complainant joins issue upon the remainder of the answer.

As to the counterclaim contained in said answer, complainant says:

1. He admits the allegations of paragraph one thereof.

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*Special Replication and Answer to Counterclaim.*

2. He admits that portion of paragraph two thereof which alleges that complainant executed the general release, of which what purports to be a copy is annexed to and made a part of said paragraph two as Schedule A, but with relation to the delivery thereof refers to and makes a part of this answer to defendant's counterclaim paragraphs  
10 seven to twelve inclusive of the amended bill of complaint.

3. Complainant admits that defendant paid him the sum of \$2,630.00, but denies that this payment was the consideration for the delivery to defendant of said general release and states that this payment was the consideration for the delivery to the defendant of the said general release only after said  
20 defendant had accepted as a limitation upon the general terms of said release a reservation for the operation and effect thereof of any and all rights of action of complainant arising out of the matters and things set forth in paragraphs one to six inclusive of said amended bill of complaint.

4. He denies the allegations of paragraph four thereof.

30 5. He admits that portion of paragraph five thereof which reads "In the margin of Schedule "C" annexed to the bill of complaint and made a part hereof, there appear the words, "Condition subject to approval of client. If not approved, status quo to be restored, S. C." which words appear opposite Paragraph Three of the said stipulation known as Schedule "C", which Paragraph Three refers to letter attached to the bill of complaint, and marked Schedule "B".  
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*Special Replication and Answer to Counterclaim.*

6. He denies the remainder of paragraph five thereof.

7. He denies the allegations of the last numbered paragraph of said counterclaim and states that it is his belief that the defendant is not now in a position to restore and return to complainant any and all property, documents and chattels that may have been delivered by the complainant to said defendant or to restore complainant to his original position. 10

8. Complainant reserves the right to move at the trial of this cause to strike out said counterclaim on the ground that it discloses no cause of action of which equity will take cognizance in that it does not set forth such facts as entitle the defendant to the rescission prayed for therein. 20

RIKER & RIKER.

Solicitors for Complainant.

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**Case.***H. Falkenstein. Called by Complainant. Direct.*

## IN CHANCERY OF NEW JERSEY.

February 6, 1930.

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Between

HERMAN FALKENSTEIN,  
Complainant,

and

WILLIAM P. GIBSON,  
Defendant.

20

Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, Alonzo Church, Vice Chancellor, at the Chancery Chambers, Newark, N. J., in the presence of Riker & Riker for complainant; Saul Nemser, Esq., for defendant.

(Counsel open to Court.)

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HERMAN FALKENSTEIN, sworn for complainant.

DIRECT EXAMINATION BY MR. RIKER:

Q. Are you the complainant in this case? A. Yes, sir.

Q. Where do you live? A. 3505 Decatur Avenue, New York City.

40

Q. In 1926 and 1927 were you the owner of a series of notes made by Henry W. Green, of Trenton? A. Yes, sir.

*H. Falkenstein. Called by Complainant. Direct.*

Q. What was the approximate total of them?

A. Approximately \$8,000.

Q. Were they payable and came due? A. No, they have not.

Q. What did you do with them to collect them?

A. Well, I had to leave for Germany and I turned them over to Mr. Gibson with the power of attorney to collect them for me.

10

Q. Where did you do that? A. Here in Newark.

Q. Whereabouts? A. Depue—I have forgotten the name of the attorneys.

Q. Lindabury, Depue & Faulks? A. Lindabury, Depue & Faulks, yes.

Q. Did you, or anyone, instruct them to institute suit on the notes? A. Mr. Gibson did.

Q. Were you there at the time? A. No, I left for Germany after I turned the notes over and signed power of attorney, I left for the other side.

20

Q. Who did you deliver the notes to? A. To Lindabury and Depue.

Q. Did you endorse them? A. Yes, and one of the gentlemen told me I should endorse without recourse.

Q. And did you? A. I did.

Q. Did you receive any consideration from Mr. Gibson for turning the notes over to him? A. I never did.

30

Q. Did you have any written agreement as to the terms upon which he received them? A. No.

Q. Did you have an oral understanding? A. Well, no. We were very good friends and I took his word for most anything.

Q. Was suit brought upon those notes? A. As I understood, yes, because it had been settled before the suit was started.

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*H. Falkenstein. Called by Complainant. Direct.*

Mr. Riker: I offer in evidence a certified copy of the summons and complaint in a suit in the New Jersey Supreme Court, in which William P. Gibson is complainant and Henry W. Green was defendant, and which purports to be upon a series of notes.

Mr. Nemser: No objection.

10

(Certified copy marked Exhibit C-1.)

Q. I show you exhibit C-1 which is annexed to the copies of a number of notes, and ask you to examine the notes of the copies on that page and the following ones and tell me whether they are copies of the notes which you own. A. Yes, sir.

Q. Do you know what became of the original notes? A. No; I left them with Lindabury and Depue. I don't know what became of them after.

20

Q. Do you know how much was made in settlement of that suit? A. I understood—I have been informed there was paid about \$3,500.

Q. Did you ever receive any money from Mr. Gibson? A. I never did.

Q. Have you ever demanded that he account to you? A. I did. In this case I never did receive anything.

30

Q. Subsequent to the time that that suit was settled did you have other litigation with Mr. Gibson? A. Yes. Mr. Gibson owed me approximately \$3,000 and I sued him and this case was settled out of court for \$2,600 or \$2,650.

Q. And at that time? A. At that time when I signed the release, with the understanding it has nothing to do with this case.

Q. Did you sign a general release to Mr. Gibson? A. I signed a general release, yes, but there was—

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*H. Falkenstein. Called by Complainant. Cross.*

Q. What was the understanding? A. (Continuing.) This release has nothing to do with the Green case where they collected the money.

Q. Were you represented at the time that the general release was executed? A. Absolutely.

Q. By whom? A. Attorney Schneider.

Q. New York? A. Right here.

Q. And Exhibit C-1 which is the summons and complaint and is filed by Messrs. Fleming and Handford as attorneys for the complainant, do you know how they came to be the attorneys for the complainant? A. No. 10

## CROSS EXAMINATION BY MR. NEMSER:

Q. Where do you live, Mr. Falkenstein, do you say? A. 3505 Decatur Avenue, New York. 20

Q. How long have you known Mr. Gibson? A. Well, since 1925 or 1926, I think, 1924, maybe.

Q. Were your relations very friendly with him at the time of this transaction? A. Very friendly, absolutely friendly.

Q. He did certain work for you? A. No, he never did certain work for me.

Q. Did he ever go to Florida for you? A. Never.

Q. Did he ever do any work for you? A. No.

Q. On the Smokers magazine? A. No. 30

Q. Did he ever go to Wilkes-Barre for you? A. Never.

Q. You say these notes were delivered to Mr. Gibson under a power of attorney? A. Exactly.

Q. You mean, a written power of attorney? A. A written power of attorney.

Q. And did you have that drawn by Mr. Gibson? A. It was drawn by an attorney. 40

*H. Falkenstein. Called by Complainant. Cross.*

Q. Who was the attorney? A. Lindabury and Depue.

Q. You signed it? A. Absolutely.

Q. And what did you do with it after you signed it? A. Give it to Mr. Gibson.

Q. Personally? A. Well, the attorneys turned it over.

10 Q. Did you see them do it? Did you see the attorneys turn the power of attorney over? A. Well, this I couldn't say.

Q. When did you go to Europe? A. January, 1927, January the 13th, to be correct on it.

Q. These notes, totalling \$8,000, were due in 1926, weren't they? A. Maybe November, 1926, possibly.

20 Q. Well, isn't it a fact that these notes were all past due before you went to Europe? A. That is the reason I went to Europe. I had some property in Europe to sell to pay the notes.

Q. Is it or is it not a fact that these notes were all past due before you went to Europe? A. Yes.

Q. Why didn't you bring suit on them before you went to Europe? A. Because Mr. Gibson took this matter in hand to settle for me.

30 Q. How did he come to do that? A. He told me so many stories, that Mr. Green was coming with the money and then Mr. Green was on his way with this money and then he was held up on Manhattan Transfer, and he always had something else to tell me. I didn't get the money.

Q. What did Mr. Gibson have to do with it? A. Mr. Gibson brought Mr. Green in, and Mr. Green is a close friend of Mr. Gibson; that is the reason I take any contract with Mr. Green and I took Mr. Gibson's word and I loaned him money.

*H. Falkenstein. Called by Complainant. Cross.*

Q. What month in 1927 did you go to Europe?

A. January the 13th I left.

Q. All these notes became due in October, November or December, 1926? A. Exactly.

Q. And you felt you had to turn those notes over to somebody because you were going to Europe?

A. Well, in this case I know Mr. Gibson was a very close friend of Mr. Green's and he always told me he could get the money without lease—without anything. That is the reason this has been turned over to Mr. Gibson. 10

Q. You endorsed these notes without recourse, didn't you? A. Exactly.

Q. Why? A. The attorney asked me to do it.

Q. Which attorney? A. Lindabury and Depue.

Q. Did you pay Lindabury, Depue & Faulks a retainer? A. I don't think I did. No. I did not. 20

Q. Had you ever done any business with them before? A. No.

Q. And you say you went over there with Gibson? A. Mr. Gibson went before me and made all arrangements and took me over one day.

Q. Mr. Gibson had been there once before himself? A. Absolutely.

Q. And then you came over the second time with him? A. Yes. He took me over there.

Q. Whom did you speak to when you went there? A. Mr. Stryker. 30

Q. And did he agree to take the case? A. He did.

Q. Without any retainer or compensation? A. Well, Mr. Gibson took care of it.

Q. When did you return from Europe? A. Latter part of February.

Q. 1927? A. Yes. 40

*H. Falkenstein. Called by Complainant. Cross.*

Q. So you were away less than two months altogether. A. Oh, yes, I came back on the same date. I was away about six weeks, seven weeks.

10 Q. Tell us, Mr. Falkenstein, what was it actuated you, what was your motive in turning these notes over to Gibson to bring suit when you knew you could have handed those notes to some other attorney? A. Because Mr. Gibson was a very close friend to Mr. Green and he could do much better than anybody else, and I trusted this man with almost anything I had, that is the reason why, I had the utmost confidence in him.

Q. When you got back from Europe, did you go to Lindabury, Depue & Faulks? A. No, I did not.

20 Q. You knew they were handling the case? A. Yes, sir. So I didn't get the money, I turned this thing over to my attorney and he started first suit in Mr. Gibson's case, where he owed me some money.

Q. When you got back the latter part of February, 1927— A. Yes.

Q. You never went over to Lindabury, Depue & Faulks. A. No, I don't think I did.

Q. And you knew, of course, that they were handling this suit. A. Well, Mr. Gibson always told me. That is the reason I didn't go over.

30 Q. Did you see Mr. Gibson after you got back? A. I think I did.

Q. Are you sure? A. I think I did.

Q. Well, weren't you interested in finding out what was happening in the suit? A. Absolutely.

Q. What? A. Yes, I was. Oh, then he—at that time he had his office on 5th Avenue, and I have seen him.

40 Q. Mr. Gibson is an accountant, isn't he? A. He is.

*H. Falkenstein. Called by Complainant. Cross.*

Q. He never did any work for you? A. He never did.

Q. In his professional duties as an accountant?  
A. He never did. I have a different accountant.

Q. Did you, at any time after you returned from Europe, up to the present day, go back to Lindabury, Depue & Faulks? A. No.

Q. You instituted this present suit in January, 1929, that is correct, isn't it? January 31? A. Possibly. 10

Q. And you instituted the present suit for an accounting without ever going to Lindabury, Depue & Faulks? A. I—

Q. To find out what happened to that suit against Green, is that so? A. Yes, I did.

Q. These notes represented, as I understand, Mr. Falkenstein, a loan of \$8,000 to a man by the name of Green? A. Yes, sir. 20

Q. Where did Green come from? A. Trenton, New Jersey.

Q. And you met him through Gibson? A. Exactly.

Q. Did you charge a bonus for that loan?

Mr. Nemser: It may be important as a preliminary question, if it is not, I will consent to have it stricken out and the answer stricken out. Suppose I withdraw the question for the time being. Perhaps I can get it in some other way. 30

Q. Isn't it a fact, Mr. Falkenstein, that your purpose in turning these notes over to Gibson was to make Gibson a third party so that he could sue Green without having the defense of usury raised? A. No, sir. 40

*H. Falkenstein. Called by Complainant. Cross.*

Q. Isn't that the real reason why you turned these notes over to Gibson? A. No.

Q. As a matter of fact, you never gave Green the full \$8,000 on these notes, did you? A. I did.

Q. The full \$8,000? A. Yes, sir.

Q. By check or cash? A. Always cash.

10 Q. That is the way you do your business, always cash? A. The man always demands cash; this man always demands cash.

Q. Your business is loaning money? A. It is not.

Q. Don't you make a practice of loaning money at usurious rates?

Mr. Riker: I object to this line of questioning.

20 The Court: I will sustain the objection.

Q. Now, Mr. Falkenstein, let me see if I understand you correctly: Some time in September, I believe you said, 1926, you and Mr. Gibson were in the office of Lindabury, Depue & Faulks? A. Yes, sir.

Q. And you gave Mr. Gibson a power of attorney to bring suit on these notes? A. Yes, sir.

30 Q. You signed a written power of attorney? A. I did.

Q. Then you went to Europe and you returned some time the latter part of February, 1927? A. Exactly.

Q. And you never went back to Lindabury, Depue & Faulks? A. No.

Q. To find out what happened to this suit? A. Well, I was informed.

Q. Did you? A. I did not go back.

*H. Falkenstein. Called by Complainant. Cross.*

The Court: No. He said that two or three times.

Mr. Nemser: All right.

Q. When did you first find out that the suit against Green had been settled? A. I found it out the—I couldn't tell you the time. I don't know.

Q. Well, how long was it after you got back from Germany? A. I don't know. I can't remember. 10

Q. Weren't you interested? A. Absolutely interested.

Q. Why didn't you get in touch with Lindabury, Depue & Faulks and find out as soon as you got back? A. I turned this matter over some time to Donegan & Donegan in New York and they told me all about it and told me what happened and they were very much against it, that I should withdraw the notes from Lindabury, Depue & Faulks and send them over to Fleming & Fleming. I don't know why Mr. Gibson insisted at that time to take the notes away, but I simply acted on Mr. Gibson's advice in the whole matter. 20

Q. Was the matter taken out of the hands of Lindabury, Depue & Faulks? A. From Mr. Gibson, yes.

Q. At your request? A. No, at Mr. Gibson's request. 30

Q. When did you find that out? A. Well, I had to consent to it.

Q. Why? A. They wouldn't turn over—Lindabury & Depue wouldn't turn over the notes without my consent. I think my attorney, Mr. Donegan in New York asked them not to do so.

Q. When was the last time you saw Mr. Gibson? A. I don't remember.

Q. How long ago was it? A. I don't remember. 40

*H. Falkenstein. Called by Complainant. Cross.*

Q. Now, Mr. Falkenstein, you say you also instituted a suit against Gibson in the Union County Circuit Court on some other notes? A. Yes, sir.

Q. You started suit against Gibson and his wife, is that right? A. Exactly.

10 Q. So then, you had two suits pending against Gibson at the time—at the present time, the present suit and the suit pending in the Union County Circuit Court? A. At that time, when I started, I don't think this suit was started.

Q. What? A. I don't remember if I had two suits against Gibson. No. First, I started to sue for the money he owes me personally.

Q. Where was that? A. In Plainfield.

20 Q. In Plainfield your attorneys were McDonough & McDonough? A. McDonough & McDonough, exactly.

Q. Those were the suits on the notes your were suing Gibson and his wife for? A. Yes.

Q. And had nothing to do with the present suit? A. No.

Q. When did you start that Plainfield suit? A. I don't remember.

Q. Wasn't that suit pending at the same time this suit was pending? A. No.

30 Q. What? A. I don't think so. I started one suit first. No, I don't think so, no.

Q. Regardless of whether both suits were pending at the same time or not, when you had your suit pending against Gibson in Plainfield, you also in your own mind had a claim against him, against the notes involved in the present suit? A. Yes, sir.

40 Q. And in September, 1928, you executed a general release, didn't you, to Mr. Gibson (handing witness paper) is that your signature? A. This is my signature all right.

*H. Falkenstein. Called by Complainant. Cross.*

Q. It is your release, isn't it? A. Yes.

Q. Let me have it, please.

Mr. Nemser: I ask to have it marked for identification.

(Paper marked D-1 for identification.)

Q. Mr. Falkenstein, I want to call your attention to the fact that in this release, dated September 8, 1928, you released William P. Gibson and Phyllis M. Gibson, that is Mr. Gibson's wife, isn't it? A. Yes. 10

Q. And the release was executed by you individually and by Herman Falkenstein, Inc., a corporation? A. Yes, sir.

Q. As a matter of fact, your suit against the Gibsons in Plainfield was brought in the name of Herman Falkenstein, Inc.? A. Yes. 20

Q. It was not your own personal suit, the way the present suit is, that is correct? A. Yes.

Q. The corporation's suit of Gibson on the note? A. Yes.

Q. Who prepared this release marked D-1? A. This must be done by the attorney in Plainfield. That was only for that suit of \$2,600.

Q. I didn't ask you that question. I asked you who prepared it. A. It must be Donough—what is the name? 30

Q. McDonough & McDonough? A. McDonough & McDonough.

Q. Don't you know, as a matter of fact, it was prepared by your attorney in New York, Mr. Schneider, whose name appears on the release? A. I don't—

Q. Look at it. A. Why, this was for \$2,600.

*H. Falkenstein. Called by Complainant. Cross.*

Q. I am not asking you that question. I am asking you whether it was not prepared by your attorney in New York, Mr. Schneider, whose name appears on the release? A. I don't know. My attorney is here.

Q. Where did you sign it, in New York? A. Of course.

10 Q. Then you must have signed it in your attorney's office? A. Possibly.

Q. Who was your attorney in New York? A. Mr. Schneider.

Q. Is he in court? A. Right here.

Q. He is the same gentleman who took the acknowledgment on the notes? A. He will say if it is his writing.

20 Q. Don't you know his handwriting? A. I don't know his handwriting.

Q. Did you see him sign his name? A. I acknowledge my handwriting, but I don't know his handwriting.

Q. You acknowledged it before your attorney, Schneider in New York? A. Possibly.

30 Q. In September, 1928, the time that you executed this general release you had a suit pending against Gibson and his wife in Plainfield and you also had told Gibson that you were going to sue him on notes involved in the present suit, isn't that so? A. Right.

Q. Now, after you executed this release, you got a certain consideration from Gibson, didn't you? A. The \$2,600 was paid.

Q. Twenty-six what? A. Twenty-six fifty—around twenty-six hundred.

Q. Was paid by Gibson to you? A. Yes.

40 Q. You actually received that money? A. Yes, sir.

*H. Falkenstein. Called by Complainant. Cross.*

Q. And then after that was paid you commenced the present suit, which is now the subject of dispute, isn't that so?

Mr. Nemser: I withdraw that question.

Q. The release, Mr. Falkenstein, is dated September, 1928. Your present suit was instituted in January, 1929? A. Yes. 10

Q. Do you recall those dates now? A. Well, I don't recall those dates.

The Court: They are in evidence. I have the papers. I can tell you when the suit started.

Q. In addition to the release, there were some other papers executed between your attorney, Mr. Schneider, and Mr. Gibson's attorney in New York, weren't there? A. Yes. 20

Q. And you were present when that agreement was signed? A. Oh, yes.

The Court: January 31st. The original bill seems to have been filed January 31st.

Mr. Nemser: 1929?

The Court: 1929.

Mr. Nemser: That is correct. 30

The Court: Then there is a supplemental bill, an amended bill, I mean, July 11th, 1929.

Mr. Nemser: Yes. I think that is right, Vice Chancellor.

Q. Now, will you—were you present when this other agreement was drawn? A. Yes.

Q. The agreement of settlement? A. Yes. 40

*H. Falkenstein. Called by Complainant. Cross.*

Q. Where was that executed, do you know? A. Well, I went with my attorney to Mr. Cherkos' office.

Q. Who was Mr. Gibson's attorney? A. Yes, sir.

Q. And you arranged for a settlement? A. Yes —not for a settlement, it has been settled to have the—to have the release signed.

10 Q. And the terms of settlement were contained in a writing, isn't that so? A. Yes, sir.

Mr. Nemser: Have you got that there, Mr. Riker?

(Paper produced.)

20 Q. Mr. Falkenstein, I show you what is designated here as "escrow receipt and agreement", dated September 12, 1928, and ask you whether the words there "consented to Herman Falkenstein", is your signature? A. It is.

Mr. Nemser: Have you any objection to this going in evidence now?

Mr. Riker: No.

Mr. Nemser: I offer it.

(Paper marked Exhibit D-2.)

30 Q. Now, Mr. Falkenstein, D-2 is the document which contains the full terms of the settlement between you and Gibson? A. Yes, sir.

Q. That is so, isn't it? A. Let me look at it.

Q. Yes. (Handing paper to witness.) A. Yes, that is the document.

Q. After D-2, the terms of settlement were executed, did you ever see Mr. Cherkos, Mr. Gibson's attorney in New York? A. I had some other business with the gentleman, yes.

40

*H. Falkenstein. Called by Complainant. Redirect.*

Q. Did you ever see him with regard to the Gibson matter? A. No, the note was paid, some cash and some notes, after the notes had been turned over to me, I didn't see him any more.

Q. You never saw him again after that time, after the time of this visit of your attorney to Mr. Gibson's attorney's office? A. Not that I remember.

Q. And were the notes and cash represented in Exhibit D-2, turned over to you in your attorney's presence? A. I don't remember this. 10

Mr. Nemser: That is all.

The Court: That is all.

## REDIRECT EXAMINATION BY MR. RIKER:

Q. Mr. Falkenstein— A. Yes, counsellor.

Q. —this exhibit 2 in paragraph 3 refers to a letter which is delivered with it from Schneider & Groggins, acting for the plaintiff as local counsel, supplementing the general release heretofore referred to. A. Yes. 20

Q. When you say this agreement contains the whole settlement agreement, do you refer to the letter that this also refers to? A. There was a letter delivered to me which I delivered to Mr. Cherkos. This was given a little later date, I don't remember. 30

Q. Do you remember what that letter stated? A. I don't know. I don't remember.

Q. Did you deliver the letter personally? A. I did.

Mr. Riker: Can you produce the letter, September 11th?

(Letter produced.)

40

*H. Falkenstein. Called by Complainant. Recross.*

Q. I show you a letter dated September 11, 1928, and ask you if that is the letter you delivered with Exhibit D-2? A. That is the letter, yes.

Mr. Riker: I offer that in evidence.

(Letter marked Exhibit C-2.)

10 The Court: Now, what does the letter say?  
(Letter Exhibit C-2 read.)

Q. Did you deliver that letter and the agreement to Mr. Cherkos? A. I did.

Q. Did he say anything to you at the time concerning the limitation expressed in the letter? A. No. I delivered this, that is, all and he didn't say anything.

20 Mr. Riker: That is all.

REXCROSS EXAMINATION BY MR. NEMSER:

Q. Now, Mr. Falkenstein, isn't it a fact that during the entire time that settlement was made that Mr. Gibson was not present at all? Isn't that so?  
A. What is that?

30 Q. Isn't it a fact during the entire time that the settlement was pending and made, Mr. Gibson was never present? A. In the attorney's office? No, he never was present.

Q. He was not present when the release was drawn, was he? A. No.

Q. He was not present when the settlement statement was drawn? A. No.

Q. He was not present when this letter marked C-2 was written? A. I never met him.

40 Q. Never met him at all? His affairs were handled by Mr. Cherkos, an attorney in New York? A. Exactly.

*H. Falkenstein. Called by Complainant. Recross.*

Q. You say you delivered all these papers to Mr. Cherkos? A. Yes.

Q. The terms of settlement and the letter, which was just now read and nothing was said, is that right? A. Nothing was said.

Q. And what did Mr. Cherkos give you? A. Nothing.

Q. Did he give you the notes or cash? A. Oh, he give me the check. I think the first payment was \$500 and then additional notes of \$500 each, and the last was \$600, if I am not mistaken. 10

Q. I see. And I call your attention to Exhibit D-2 to the margin, certain words on the margin and ask you to read those words. A. Yes.

Q. Will you read those words, please? A. Yes, I do.

Q. Read them aloud, please. A. "Condition"— what is this, "empowered"? 20

Mr. Riker: "Imposed".

Witness:—"imposed subject to approval of my client, if not, the status quo to be revoked".

Q. "Restored". A. "Restored".

Mr. Nemser: Perhaps I should read it to make it clearer.

"Condition imposed subject to approval of my client, if not approved, the status quo to be restored." That was signed "S. C." that is Mr. Cherkos, Samuel Cherkos? 30

Witness: Yes, sir.

Q. And is that your initial right below it? A. That is my initial below it.

Q. So, when you delivered these papers to Mr. Cherkos there was something said about a—(inter- 40

*C. A. Schneider. Called by Complainant. Direct.*

rupted) A. My attorney was over—I left there, my attorney was right present when this was being done.

Q. Were you present? A. Absolutely.

Q. What was the purpose of Mr. Cherkos writing in? A. I don't know.

10 Q. Isn't it a fact that Mr. Cherkos said, "I cannot consent to any reservation on the general release"?

A. Well—

Q. And wasn't it understood that it would have Mr. Gibson's consent? A. This letter was written after.

Q. Wasn't it understood that it had to have Mr. Gibson's consent? A. Oh, yes, absolutely; it was said at that time.

20 Q. Do you know whether Mr. Gibson ever consented to a reservation of the release? A. I don't know.

Mr. Nemser: That is all.

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CHARLES A. SCHNEIDER, sworn for complainant.

DIRECT EXAMINATION BY MR. RIKER:

30 Q. Mr. Schneider, you are an attorney in New York? A. Yes, sir.

Q. Did you represent Herman Falkenstein in the fall of 1928? A. Yes, sir.

Q. Did it concern a dispute between him and Mr. Gibson, the defendant here? A. Yes, sir.

40 Q. What was the nature of the services that you performed in that matter? A. The preparation of an agreement, respecting the settlement of a dispute pending in the Union County Circuit Court,

*C. A. Schneider. Called by Complainant. Direct.*

between Mr. Falkenstein and Mr. Gibson and Mrs. Gibson.

Q. Is Exhibit D—the final agreement of settlement that was reached (handing witness paper)?

A. Yes; it embodies the entire understanding.

Q. That, together with Exhibit C-2 being the original letter? A. Yes, the instrument referred to in the exhibit you have just previously referred to are embodied. 10

Q. Did you accompany Mr. Falkenstein when these papers Exhibits C-2 and D-2 were delivered to Mr. Cherkos? A. Yes, sir.

Q. Was anything said by him concerning his obtaining the approval of his client, Mr. Gibson? A. Yes, sir.

Q. To this limitation? A. Yes, sir.

Q. What was said? A. Mr. Cherkos stated that he desired a release, general in form. A release had previously been drawn by me which contained a limitation as to the Green action. Mr. Cherkos stated that his client desired to have a release in general form. Mr. Falkenstein declined to settle his claim against Gibson save only on the condition that the limitation be contained in the release. Prior to the delivery and execution of the agreement of December 12 Mr. Cherkos and I had been in communication and in conference for several days; Mr. Cherkos then suggested, or, perhaps I suggested to Mr. Cherkos, that we could perhaps solve the problem by giving to Mr. Gibson a release, general in form, as had been insisted upon by Mr. Cherkos, but that reference would have to be made by separate instrument, simultaneously delivered and executed, to the effect that there had been between the parties the conditional limitation in the release. After that agreement had been 20  
30  
40

*C. A. Schneider. Called by Complainant. Direct.*

reached and the substance of it had been reduced to writing, as evidenced by the agreement of September 12, Mr. Cherkos said, "Well, now, I want to send it on to Mr. Gibson and have him definitely approve it". And I said that was agreeable to me, whereupon I made the marginal notation which was read by the last witness.

10 Q. Is that marginal notation in your handwriting? A. In my handwriting.

Q. Was— A. Thereafter—

Q. Go ahead. A. I perused the matter to initial that word was had from Mr. Gibson by Mr. Cherkos with respect to the acceptance of that limitation, and on the 21st day of September, 1928, I had a telephone conversation with Mr. Cherkos. Mr. Cherkos stated that the notes had been signed by  
20 Mr. Gibson only and not by Mrs. Gibson, as the terms of the settlements recited they were to be signed. And then I made inquiry also respecting the limitation as to whether or not it had been approved by Mr. Gibson and he stated it had been approved, that his client had taken no exception to the reference to that limitation in the letter and in the terms of settlement. I then addressed a communication to—I made—pardon me. I made a memorandum of this telephone conversation immediately after I had had it, in accordance with a  
30 practice in the office, and I have that memorandum before me. I then addressed the communication to Mr. Cherkos, confirming the telephone conversation that I had with him.

Q. What date was that? A. On September 21st, the date of the receipt of the telephone communication.

Q. Have you a copy of that letter? A. Yes, I  
40 have a copy here.

*C. A. Schneider. Called by Complainant. Cross.*

Mr. Riker: I call for the original.

Mr. Nemser: I haven't got it. We haven't the original.

I object, your Honor please, to the introduction in evidence of this letter on the ground it is a self serving declaration; it is a letter sent by Mr. Schneider's firm in New York to my client's attorney in New York, setting forth what they evidently thought was the import of the conversation. I do not see how it is binding on my client. 10

The Court: I will admit it.

(Letter (copy) marked Ex. C-3.)

(Letter, Ex. C-3 read.)

Q. Was the endorsement of Mr. Gibson obtained on the note? A. I don't know. 20

Q. Did you have any reply to that letter of September 21, which is Exhibit C-3? A. No, sir.

Q. By telephone, or otherwise? A. No, sir.

Q. Did you have any further communication with Mr. Cherkos concerning this matter? A. No, sir.

Q. Did you prepare the release marked Exhibit D-1? A. May I see it? I don't recall. I don't believe I did.

Mr. Riker: That is all. 30

CROSS EXAMINATION BY MR. NEMSER:

Q. Mr. Schneider, the entire settlement between Falkenstein and Gibson took place just before the case was to be reached for trial in Plainfield, isn't that so, in Union County? A. I am not at all familiar with the action in Union County.

Q. I see, but you know there had been an action pending in Union County. A. Yes, sir. 40

*C. A. Schneider. Called by Complainant. Cross.*

Q. And did you know or were you told by anybody, that that action was about to be reached for trial? A. No, sir; didn't know anything about it.

Q. And you knew also, at that time, that Falkenstein was asserting a claim against Gibson on the notes involved in the present suit? A. Yes, sir.

10 Q. Now, during the entire negotiation of settlement, did you ever see Mr. Gibson yourself? A. No, sir.

Q. Was he ever present in Cherkos' office when you were there? A. Never saw Mr. Gibson until this moment.

Q. I see. Now, Cherkos told you that his client wanted a general release, didn't he? A. Yes, sir.

20 Q. Told you it was very important for you to make his peace with Falkenstein once and for all, isn't that so? A. No, he did not.

Q. Didn't you and Cherkos discuss the suit that Falkenstein was about to bring against Gibson on these Green notes? A. We did discuss the claim of Falkenstein against Gibson on the Green notes.

Q. Yes. A. I knew nothing about the prospective suit.

Q. But you knew that Falkenstein was asserting some sort of claim? A. Yes, sir.

30 Q. At the time you made the settlement with Cherkos, Cherkos told you that Gibson wanted to buy his peace so far as Falkenstein was concerned, once and for all, isn't that so? A. No, he did not.

Q. Was there anything said at all about the claim of Falkenstein on the Green notes? A. Yes, sir.

Q. What was said? A. Mr. Falkenstein stated to me and to Mr. Cherkos, too, in the course of our conversation, that he had this claim against Green.

40 Q. Yes. A. And that he sought to reserve his right to sue Mr. Gibson on the Green claim. Mr.

*C. A. Schneider. Called by Complainant. Cross.*

Cherkos stated that he had been instructed to receive a release in general form. He stated he knew about an existing claim that had been made by Mr. Falkenstein against Mr. Gibson on the Green note, but that, nevertheless, Mr. Gibson wanted to have the release in general form. I insisted that we would have to evidence the reservation in some form in writing and Mr. Cherkos, in turn, assented to the suggestion that I made that the release be drawn in blank form. It is my recollection the release had been drawn, previously, and it is my belief that it had been drawn either by Jersey counsel representing Mr. Gibson or by Cherkos. I don't believe I had anything to do with the release. That is borne out by the fact the release is dated on the 8th of September and the agreement is dated the 12th. The letter of the 11th, to which reference is made in the agreement of the 12th, and which, in turn makes reference to the Green notes, was part and parcel of a series of negotiations, which culminated in the agreement of the 12th.

Q. You say your client was insisting on a reservation— A. Yes.

Q. —so far as the Green notes were concerned? A. Yes.

Q. And Cherkos was insisting that Gibson wanted a general, absolute release? A. Yes. Mr. Cherkos quoted Mr. Gibson as stating that he knew of the existence of the Green claim.

Q. Yes. A. But he wanted a release general in from. He said those were his client's instructions, but that he would consult with his client with respect to the letter. It was apparently known to Mr. Cherkos.

Q. I see. Now, Falkenstein was present during all this time? A. Yes, sir; in fact, when I dealt

*C. A. Schneider. Called by Complainant. Cross.*

with Mr. Cherkos, and because in the proceeding in Union County other counsel was present and insisted upon the selection of the language employed in the contract—in the agreement of September 12, whereby Cherkos identified himself as being correspondent for Jersey counsel in that action and with full power to act on behalf of the defendant, Mr. Cherkos admitted he had power to act on behalf of Mr. and Mrs. Gibson.

10 Q. Also stating to you that he had no power to take anything but the general release? A. Yes. And that he would submit the question of the accompanying letter to Mr. Gibson for approval.

Q. Why wasn't this reservation that you claim was insisted upon put right into the release itself? A. The only reason that I can ascribe is the insistence, of Mr. Cherkos in quoting Mr. Gibson that the release be general in form. My desire was to settle the matter rather than to protract it any further. We had been negotiating for about four days and I yielded on the point that the general release be general in form, provided some reference was made, simultaneously in the agreement, to which I have made reference.

20 Q. Well, you knew, Mr. Schneider, that your client would not tolerate anything except a conditional release, isn't that so? A. That is correct.

30 Q. And that if a conditional release were not accepted the terms of settlement would be called off. A. That is true.

Q. Then wouldn't it have been the simplest thing to assert this general release? A. It would have been best, but expedition dictated that the course pursued be followed.

40 Q. Then, Mr. Schneider, everybody knew, that is, you and Falkenstein knew that Cherkos had to se-

*C. A. Schneider. Called by Complainant. Cross.*

cure the o.k. of his client, first, before the settlement could go through? A. Yes, sir.

Q. Cherkos did not want to take the responsibility of accepting a conditional release? A. That is true.

Q. And told you and Falkenstein very frankly that his client was insisting upon a general release? A. Yes, sir. 10

Q. Then, in order to protect himself, that is, in order for Cherkos to protect himself still further, these words in the margin of the Green agreement D-2, were inserted? A. Yes, sir.

Q. And you say those words, "Condition imposed subject to approval of my client, if not approved, the status quo to be restored" were written in your handwriting. A. Yes.

Q. And signed by Cherkos, S. C. A. Yes, and Mr. Falkenstein. 20

Q. And Mr. Falkenstein. A. Initialed by each.

Q. Then there cannot be any dispute, can there, Mr. Schneider, at the time Cherkos left Falkenstein's presence or your presence that the settlement had not as yet been consummated, that is true, isn't it? A. That is true.

Q. And the whole question hinged upon Falkenstein obtaining Gibson's consent to a conditional release; is that correct? A. To the reference in the letter, to the terms of the delivery of the release, general in form. 30

Q. In other words, there was not any complete settlement until Cherkos had Mr. Gibson's consent to the reservation? A. That is true. The instruments were deposited in escrow pursuant to the terms of agreement.

Q. Did Cherkos take away with him after that conference the release, the terms of settlement, in 40

*C. A. Schneider. Called by Complainant. Cross.*

this letter? A. May I say that the negotiations were made at Mr. Cherkos' office?

Q. I see. A. Both Mr. Falkenstein and I came to Mr. Cherkos' office.

10 Q. I see. Well, then, after the release was executed and Exhibit D-2, containing the terms of agreement were executed with the marginal notes and letter of September 11th, were all these papers left with Mr. Cherkos or were they taken away by you? A. Well, we each retained copies. Mr. Cherkos retained his copy and I retained mine.

Q. And who retained the general release? A. Mr. Cherkos did. He was signing this receipt for it.

20 The Court: Does the receipt say that a general release is held in escrow?

Witness: Yes, sir. If you will pardon me, I will just look and see and refresh my recollection.

Mr. Nemser: I think the Vice Chancellor probably refers to paragraph 3.

Mr. Riker: It is all in the exhibit.

The Court: Oh, it is all in the exhibit?

Mr. Nemser: Yes.

30 Witness: Yes, sir. The agreement recites the receipt of four instruments, and on page 2 of that agreement the recital reads: "The undersigned" meaning Mr. Cherkos "attorney for Mr. Gibson, agrees to hold the aforesaid instrument in escrow and not to deliver the same, etc."

40 Q. Now, Mr. Schneider, I call your attention to some other marginal notes on page 2 of Exhibit D-2. A. Yes, sir.

*C. A. Schneider. Called by Complainant. Cross.*

Q. (Continuing) And ask you to read those words to the Court. A. "Receipt of these notes not acknowledged, but to be obtained and delivered to Falkenstein". Signed "Herman Falkenstein" and initialled "S. C."

Q. What did that mean? A. That came about in this way, that, in fact, Mr. Cherkos did not have the notes did not have the notes at the time. 10

Q. You mean, the settlement notes? A. Yes, the settlement notes. And the recital would indicate, several of those marginal notations, that he had these notes, and, for clarity's sake, the marginal notation was made, that, in fact, he did not possess these notes.

Q. Then, summing it all up, Mr. Schneider, wasn't the understanding that if Gibson would not consent to a conditional release, that the status quo was to be restored? A. Yes, sir. 20

Q. According to your own sworn statement. In other words, that meant if Mr. Gibson did not consent to the suit in Plainfield with McDonough, the notes would be returned and the parties would be in the same position as if no settlement had ever been talked about, wasn't that the understanding?

Mr. Nemser: Suppose I put it the other way. Withdraw the question. 30

Q. What was your understanding of the word "status quo" "restoration, and status quo"? What was your intent in inserting those words? A. That the status that had existed at the time of the execution and delivery of the instrument be restored.

Q. In what event? A. In the event Mr. Gibson failed to approve the form or the terms of the substance embodied in the letter of the 11th, modifying the general release. 40

*C. A. Schneider. Called by Complainant. Cross.*

Q. And, of course, you knew at that time, and so did Falkenstein, that Cherkos lacked the authority, at that time, to make a final decision on it. A. Yes. I will say this, that the dispute did not arise, apparently, about the confirmation of the Green notes. It arose, apparently, solely as to the form of the release, in other words, my recollection of the conversation was that Cherkos said that Mr. Gibson wanted a release, general in form. It was purely his insistence that compelled me, ultimately, to agree to give a release to permit Mr. Falkenstein to sign the release, general in form, but in turn I said, "We must have some other reference simultaneously executed which will clearly indicate that Mr. Falkenstein did not yield up his claim against Mr. Gibson on the Green notes, and, apparently, the question related solely to the fact whether or not Mr. Gibson wanted to have any reference made in writing to it. Mr. Cherkos did not undertake to deny or affirm Mr. Falkenstein's claim. The question solely related to whether or not it was wise or advisable to reduce to writing the reference to the insistence of a claim.

Q. I see. Now, Mr. Schneider, this release was delivered according to its date, September 12, 1928?

A. I believe it was delivered on that day.

30 Q. Yes. And you did not hear again from Cherkos until when? A. Until the 21st.

Q. When you called him on the telephone? A. My memorandum indicates that he telephoned to me on that day.

Q. Yes. A. But it is my recollection that I had followed the matter up.

Q. I see. A. Probably a day or two before asking in each instance whether he had received word.

40 Q. I see. A. But I made no reference to the inquiries I made, for they were futile, bearing no

*C. A. Schneider. Called by Complainant. Cross.*

fruit, but I did make reference to the receipt of the message that I regarded as important.

Q. So, then, between September 12th and September 21, your client had not as yet received notes or cash on the terms of settlement, had he? A. That is true.

Q. And you were just waiting all that time for Mr. Cherkos to tell you whether Gibson consented to the condition in the release. A. That is true. 10

Q. So then, on September 21st, you say you spoke to Mr. Cherkos on the telephone. A. Yes, sir.

Q. And what was said in that conversation with reference to the cash and notes forming part of the settlement? A. That the notes had been signed by Mr. Gibson, but had not been endorsed by—

Q. Mrs. Gibson? A. —Mrs. Gibson, or—had been endorsed, rather, by Mr. Gibson, but had not been endorsed by Mrs. Gibson, these being notes of the corporation, as I recall. 20

Q. Between the 12th of September and the 21st of September did you see Falkenstein? A. I think he came to my office, perhaps once or twice. I have no definite recollection.

Q. Are you perfectly sure on September 21st, the time you had the conversation with Cherkos, your client, Falkenstein, had not as yet received the notes and cash spoken of in the terms of settlement? A. I am certain, because what I did was to deliver that letter of September 21st to Mr. Falkenstein for delivery by him to Mr. Cherkos. 30

Q. I see. A. I asked him to deliver that letter to Mr. Cherkos, which, apparently, he did.

Q. Do you know whether he did it or not? A. I don't know.

Q. Do you know whether Mr. Falkenstein ever received the \$2,630 settlement? A. Yes, that I do know. 40

*C. A. Schneider. Called by Complainant. Cross.*

Q. How do you know that? A. He stated that to me.

Q. When? A. I don't recall. Either that day or the following day.

Q. Then the truth of the matter is, Mr. Schneider, that Falkenstein went to Cherkos' office after you had this conversation with Cherkos of September 21st. A. Yes, on that day.

Q. To get this money? A. To receive the notes.

Q. And the cash? A. And the cash provided for in the agreement, yes, sir.

Q. What took place between Falkenstein, your client, and Cherkos on that day you don't know? A. I don't know, no, sir.

Q. I see. Did you ever see your client after September 21st? A. Oh, yes, I have.

Q. And did he tell you that he had received the notes and the cash from Mr. Cherkos? A. Referred to in the agreement of September—

Q. Yes. A. Yes, he did.

Q. And did Mr. Gibson ever signify his consent to the reservation by writing? A. I never received any such assent, save only through Mr. Cherkos.

Q. Then, did Mr. Falkenstein take Mr. Cherkos' word for it? A. Will you repeat that?

Q. Did Mr. Falkenstein take Mr. Cherkos' word that Gibson had consented to the condition? A. I don't know whether Falkenstein did. I took Mr. Cherkos' word received over the telephone and then confirmed it by the communication of the 21st of September.

Q. Did you ever receive any reply to this communication? A. No, sir.

Q. No reply. Now, isn't it true, Mr. Schneider, that what ultimately happened happened between Falkenstein and Cherkos in Cherkos' office? Do

*C. A. Schneider. Called by Complainant. Redirect.*

you understand the import of my question? A. I am sorry, I do not.

Q. You say that Cherkos—you say that you sent Falkenstein to Cherkos. A. Yes, with the letter of the 21st.

Q. According to your understanding, Falkenstein was to get his money? A. Yes, and the note.

Q. Because Cherkos had told you that Gibson had consented? A. That is true. 10

Q. So what actually happened, ultimately in Cherkos' office you don't know at all? A. I do not.

Q. Didn't you think it would have been advisable to have Gibson signify his consent by some letter or some writing of this reservation? Do you understand me? A. It would have been best, but the tenor of the conversation—series of conversations had with Mr. Cherkos indicated that Gibson apparently was determined, for some reason not made to me, to receive a release, general in form. 20

Q. I see. A. But did not object to having some supplemental writings.

Q. Did you ever see Mr. Cherkos after September 21st on any occasion at all? A. No, sir; I have not seen him.

Mr. Nemser: That is all. 30

The Court: That is all.

REDIRECT EXAMINATION BY MR. RIKER:

Q. Was the status quo restored? Was the status quo restored? A. I don't know anything about the Union County action save the proceedings I participated in.

*H. Falkenstein. Recalled. Direct.*

The Court: It could not have been restored if the notes were given.

Witness: Yes.

Mr. Riker: That is all. I want to recall Mr. Falkenstein for just one or two questions.

10

HERMAN FALKENSTEIN, recalled.

EXAMINED BY MR. RIKER:

Q. Did Mr. Schneider deliver to you the original of which Exhibit C-3 is a copy? A. Yes, that is the—I saw the letter then.

Q. This is a different letter than you saw before? This is September 21. You saw September 11th?  
20 A. Yes, I did.

Q. What did you do with the original? A. I delivered it to Mr. Cherkos.

Q. On the same day? A. On the same day I received it, yes, sir.

Q. Did you have any conversation with him at that time? A. I delivered—no.

Q. What did you do with it? A. I went over to Mr. Cherkos and gave him the letter.

Q. Is that all? A. Well, we spoke a little and I went away.  
30

Q. Did you say anything about this particular matter? A. I said in case the five hundred—the check I had, he could have any time back in case it doesn't go through as my attorney wants it.

Q. That was all that was said? A. That was all that was said.

40

*H. Falkenstein. Recalled. Cross.*

EXAMINED BY MR. NEMSER :

Q. Anything said about whether Mr. Gibson had agreed as to the reservation of the release? A. Nothing said at all. I told Mr. Cherkos repeatedly he could have the five hundred back if Mr. Gibson did not agree to my attorney's terms.

Q. Isn't it a fact that Cherkos told you in his office that he would not give you the notes and the cash unless there was a general release? A. He did not. 10

Q. You knew that the whole dispute, that is, the whole delay from the 12th of September to the 21st was caused by the fact—or argument about that general release, isn't that so? A. It was their argument, that is the reason I took my attorney along. I didn't want to sign a general release. 20

Q. When you went to Cherkos office you went alone? A. To deliver this letter.

Q. After your attorney had conversed with Mr. Cherkos over the telephone? A. Yes, sir.

Q. And you were present while your attorney was talking to Mr. Cherkos? A. Yes, sir.

Q. Then you went to Cherkos' office? A. To deliver the letter, yes.

Q. You just delivered the letter? A. Yes.

Q. And the check and notes? A. Yes, sir. 30

Q. He didn't say anything about Mr. Gibson? A. He didn't say anything at all.

Mr. Nemser: That is all.

The Court: Anything further?

Mr. Riker: That is all. That is the complainant's case, your Honor.

Mr. Nemser: Mr. Gibson.

*W. P. Gibson. Called by Defendant. Direct.*

WILLIAM P. GIBSON, sworn for defendant.

DIRECT EXAMINATION BY MR. NEMSER :

Q. Where do you reside, Mr. Gibson? A. Plainfield, New Jersey.

10 Q. How long have you been residing there? A. Seven years.

Q. Where did you live before that? A. Jersey City.

Q. How many years? A. Thirty-three.

Q. And what is your business? A. I am an accountant.

Q. How long have you known Mr. Falkenstein? A. I would say five or six years, sir.

20 Q. And did you have any business transactions with him? A. Indeed.

Q. Now, will you tell us as briefly as possible, how the notes, the Green notes came to be delivered to you by Mr. Falkenstein? A. There were many mixed and varied business transactions— (interrupted).

30 The Court: I don't think that has anything to do with the case at all. What we want to try to find out is about this supplemental agreement and the letter. Evidently there was some settlement about the Green note and some settlement with Mr. and Mrs. Gibson's note. Now, the whole crux of this situation is did this general release cover both these settlements or is Mr. Falkenstein entitled to have an accounting for the Green money? I do not care how the Green money came— (interrupted).

40 Mr. Nemser: All right: I will confine myself then to the question of the release.

*W. P. Gibson. Called by Defendant. Direct.*

Q. Now, Mr. Gibson, do you recall during the month of September, 1928, there was an effort made to settle the disputes between you and Falkenstein?

A. All disputes, yes, sir,

Q. And at that time Falkenstein, Inc., was suing you in the Union County Circuit Court? A. Yes.

Q. On certain notes? A. Yes, sir.

Q. Suing you and your wife? A. Right. 10

Q. And at that time was Falkenstein asserting any claim against you on the Green notes, if you can recollect? A. There was considerable controversy about it, Mr. Nemser.

Q. And at the time you made your settlement or you authorized your attorney to make a settlement, did these Green notes form any important part of the settlement in your mind? A. They did, and there were other matters that—sums of money that he owed me that I disposed of all in one general satisfaction. 20

Q. Your attorney was Mr. Samuel Cherkos of New York? A. Yes, sir.

Q. And he was representing you in the consummating of the form of the settlement with Falkenstein? A. Yes, he was.

Q. And did you hand any money and notes over to your attorney? A. I did, sir.

Q. What did you hand him? A. At that time, I believe I handed him \$500 and a series of notes in the aggregate of \$2,500 or \$2,600 and I told him I wanted all of this litigation cleaned up once for all. I had a headache on it. As soon as I would go on a trip Mr. Falkenstein would file an attachment on my house, called me an absconding debtor, and one thing another, and I was sick and tired of it, and Mr. Cherkos said he would enter into a negotiation which he did do, and, on several oc- 30 40

*W. P. Gibson. Called by Defendant. Direct.*

casions thereafter he told me he thought he could reach some reasonable basis of settlement, and that is all I can do, and if here is any more money involved, I will go out and get it some place, but I must have my family left at peace. Subsequently he called me up and said he had entered into an escrow agreement of some sort, conditioned—

10

The Court: Well, now, was Mr. Falkenstein there then?

Witness: Sir?

The Court: Who was there?

Witness: This was a conversation between Mr. Cherkos and myself, your Honor.

The Court: All right. Go on.

20

The Witness: And that in this escrow agreement I was to do certain things and Mr. Falkenstein and Falkenstein, Inc., were to do certain things. I said, "Mr. Cherkos, I will leave it entirely in your hands. I am willing to abide by my agreement. I want a general and absolute release from anything and everything."

Q. Did you ever authorize Mr. Cherkos, your attorney, to accept a reservation on that release? A. No, sir.

30

Q. Did you ever tell your attorney some time around September, 1928, it was perfectly all right, so far as you were concerned, to accept a conditional release from Falkenstein? A. No, sir.

Q. Did you know at the time you turned over the notes and cash to your attorney, to be turned over to Falkenstein, that Falkenstein reserved his right to sue you on the Green notes? A. No, sir; I hadn't any knowledge of it.

40

Q. Did you ever see Exhibit C-2, the terms of settlement? A. I have seen that, yes, sir.

*W. P. Gibson. Called by Defendant. Direct.*

Q. When was the first time you saw it? A. I believe Mr. Cherkos first mentioned it to me and subsequently showed it to me.

Q. At what date, do you recall? A. It must have been around the time he was negotiating in September.

Q. I see. And what did you say after reading that over? A. I think my language, in effect, was this, that in any event, if I could not make up my mind—there was a question came up, Mr. Nemser, at that time, about getting more cash into the picture. 10

Q. You mean into the settlement? A. Yes. That was a question between Mr. Cherkos and myself.

Q. I see. A. It was about getting more cash over and above the \$500, and I told him at that time I would see what I could do, and he told me about this escrow agreement; it was at a subsequent date that I saw him in his office and he then spoke to me and said, "I am afraid we cannot get a general release." I said, "Sam, if I cannot get a general and absolute release, I want my money back." 20

Q. I see. Did you pay all these notes, forming the terms of settlement? A. Every one of these notes were paid, sir.

Q. And the total amount that Falkenstein received was how much from you? A. The original notes, Mr. Nemser, it developed Mr. Cherkos—after I had concluded all of this and received the general release which you showed me here, Mr. Cherkos called me up and asked me if there was some way that I could help Mr. Falkenstein out on the balance of those notes, that he needed some cash and I said I would be very glad to do so, that is, these notes which had not yet matured in the settlement. 30

Q. I see. A. And I just went ahead and negotiated the loan, and I think at the time that Mr. 40

*W. P. Gibson. Called by Defendant. Cross.*

Cherkos paid over the balance of the notes there was a slight concession made in order to retire them for all cash.

Q. I show you Exhibit C-2, letter dated November, 1928, and ask you if you ever saw that? A. I saw that letter here in court this morning.

10 Q. Did you ever see that in Cherkos' office? A. He never showed it to me.

Q. When you paid \$2,630 it was your understanding you were through with Falkenstein once and forever? A. I knew I was, because I got a general release.

CROSS EXAMINATION BY MR. RIKER:

20 Q. What date did you first see Exhibit D-2, this settlement agreement? A. I have no recollection, Mr. Riker. It was some time during that period of September.

30 Q. When you saw it did your attorney, Mr. Mr. Cherkos say anything about the question of whether or not you would receive a general release in form? A. He told me there was some question about—I think he called it a modification, and I said, "Sam, I don't know anything about it. What I want is a general and absolute release, or I don't want anything. I want my money back."

Q. Did you notice the marginal note here, the condition imposed subject to approval of client? A. Mr. Cherkos discussed that with me, Mr. Riker. He said, "Of course, if we can't get what we want then I will have to return the \$500 you gave me."

40 Q. This Exhibit D-2, in Paragraph 3, refers to a letter from Schneider. Did you ask to see that letter? A. No. I left that entirely in my lawyer's hands, sir. He was handling the situation.

*W. P. Gibson. Called by Defendant. Cross.*

Q. Did you ask what that letter was? A. He mentioned to me that there was a question about some modification of the general release.

Q. Did you ask him what the letter said, which is referred to in Exhibit D-2? A. I did not read that in detail, sir.

Q. You did not read it? A. I did not read this in detail.

10

Q. You merely looked at it and did not read it? A. He showed it to me, the same as I saw it just now, and he told me what it contained.

The Court: Did he tell you what it contained?

Witness: Yes, sir; he told me what it contained.

Q. What did he say? A. He told me there was a question about getting a general release. In the meantime there was no harm done, the whole matter was in escrow, and that, if I could not get the general release, I was to get my money back.

20

Q. Did he say anything about the Green matter? A. No, sir.

Q. Was not mentioned at all? A. He said that there was some other question that Mr. Falkenstein had mentioned that he had another claim against me. I said, "That is nothing, Mr. Cherkos, I have several against him. All I want to do is to wind them all up."

30

Q. Did you give him a general release? A. Mr. Cherkos took a declaration of some assets I turned over to him. I took his word for it.

Q. Did you execute and deliver to him a general release? A. I have no recollection of doing so. I was not suing him. He was suing me.

40

*W. P. Gibson. Called by Defendant. Cross.*

Q. Mr. Cherkos was your attorney? A. Yes, sir.

Q. Authorized by you to handle this matter with Mr. Schneider? A. Yes, sir. He was authorized by me to go out and wind up all the litigation with Mr. Cherkos and get me a general and absolute release.

10 Q. He was authorized to wind up the particular litigation in the Circuit Court in Union County, wasn't he? A. That was one of the considerations, sir.

Mr. Riker: That is all.

The Court: That is all.

Mr. Nemser: That is all.

20 Your Honor please, Mr. Cherkos, the attorney in New York was supposed to be here at ten o'clock this morning. He told me last night over the telephone that he expected to be on trial in the Supreme Court on a case in which he waited for two weeks. I think his testimony is of the utmost importance. I think I can get him here at two o'clock.

The Court: I am perfectly satisfied to come to my conclusion now.

30 I think that this settlement applies clearly and solely to the Plainfield note. It is perfectly clear in my mind that both parties understood that that was the settlement of those notes and had nothing whatever to do with the Green notes, and I will so hold and refer the accounting to a special master.

Mr. Nemser: Will you Honor hear me? Of course, your Honor has made up his mind, I cannot change that. I would like to have had Mr. Cherkos' testimony here and also to comment on the testimony.

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The Court: If Mr. Cherkos was to have testified in this suit he should have been here on time. The other New York lawyer was here and testified. It is too late for you now to ask for an adjournment.

I might have seriously considered that if you had made the application at the opening of the case.

Comments on the testimony are absolutely unnecessary because I just this minute heard it and it is merely a question of fact and I have made up my mind as to the fact. I think this settlement was on the Plainfield notes and nothing else. 10

I will refer it to John Bernhard, Special Master.

20

30

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**Exhibit C-2.**

SCHNEIDER & GROGGINS  
 Counselors at Law  
 52 Chambers Street  
 New York  
 Telephone Canal 6080

10 CHARLES A. SCHNEIDER  
 STANLEY S. GROGGINS

September 11, 1928.

Samuel Cherkos, Esq.,  
 67 W. 44th St.,  
 New York City.

Re: Faulkenstein vs. Gibson.

20 Dear Sir:

Supplementing general release bearing date September 8th, 1928, and modifying said general release, this letter shall serve as a record of the reservation made by Herman Faulkenstein and Herman Faulkenstein, Inc. of the rights both civilly and criminally he or it may have against William P. Gibson by reason of the failure on the part of said Gibson to turn over to said Faulkenstein and/or the said corporation the sum of \$3500, or such other additional sums as said Gibson has collected from one Henry Green on an indebtedness amounting to \$8,000. The conditional delivery of the release as provided for in the escrow receipt and agreement, bearing even date herewith, is without prejudice to the rights of Faulkenstein and the Faulkenstein corporation against Gibson as aforesaid.

40

It is understood that you will apprise your client of this reservation and that your client will consent to the limitation imposed on the general release by this letter.

Please acknowledge receipt.

Yours very truly,

SCHNEIDER & GROGGINS,  
By Charles A. Schneider. 10

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30

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**Exhibit C-3.**

September 21, 1928.

Samuel Cherkos, Esq.,  
67 W. 44th St.,  
New York City.

Faulkenstein vs. Gibson.

Dear Sir:

- 10 Referring to telephone conversation had with you today concerning the agreement dated September 12, 1928, and the accompanying letter dated September 11, 1928, I note that you have informed me that you have obtained the series of notes called for in the agreement but that these notes are executed and endorsed by Mr. Gibson only and not by Mrs. Gibson. I also note that you have advised me that you have informed Mr. Gibson of the contents of the
- 20 letter of September 11, 1928 and that Mr. Gibson has assented to the limitation thus imposed on the release.

I communicated your message to Mr. Falkenstein. He declines to accept the notes unless Mrs. Gibson joins in executing and endorsing the notes.

- 30 You will please retain in escrow the instruments delivered to you on September 12th, 1928, until such time as there shall have been a full compliance with the terms of the agreement. If you are unable to obtain Mrs. Gibson's signatures on the notes you will please advise me to that effect, whereupon refund of the \$500 heretofore delivered to Mr. Falkenstein will be made and the status of the parties will be restored quo ante.

Yours very truly,

SCHNEIDER & GROGGINS,  
By

40 CAS-MP

**Exhibit D-1.**

## GENERAL RELEASE.

TO ALL TO WHOM THESE PRESENTS SHALL COME OR  
MAY CONCERN,

GREETING; KNOW YE, THAT Herman Falkenstein 10  
and Herman Falkenstein, Inc., a corporation with  
offices at 155 East 42nd Street, in the Borough of  
Manhattan, City of New York, for and in considera-  
tion of the sum of Twenty-six hundred and thirty  
dollars (\$2630.00) lawful money of the United  
States of America to us in hand paid by WILLIAM  
P. GIBSON and PHYLISS M. GIBSON, the receipt  
whereof is hereby acknowledged, have remised, re-  
leased and forever discharged, and by these presents 20  
do for ourselves, our heirs, executors, administra-  
tors and assigns, remise, release and forever dis-  
charge the said WILLIAM P. GIBSON and PHYLISS  
M. GIBSON, their heirs, executors, administrators  
and assigns, of all and from all manner of action  
and actions, cause and causes of action, suits, debts,  
dues, sums of money, accounts, reckonings, bonds,  
bills, specialties, covenants, contracts, controversies,  
agreements, promises, variances, trespasses, dam-  
ages, judgments, extends, executions, claims and de- 30  
mands whatsoever, in law or in equity, which  
against WILLIAM P. GIBSON and PHYLISS M. GIB-  
SON, we ever had, now have or which we or our  
heirs, executors, administrators and assigns, here-  
after can, shall or may have for, upon or by reason  
of any matter, cause or thing whatsoever from the  
beginning of the world to the day of the date of  
these presents.

IN WITNESS WHEREOF, We have hereunto set our hand and seal the 8th day of September in the year one thousand nine hundred twenty-eight.

Sealed and delivered in the presence of  
CHARLES A. SCHNEIDER.

HERMAN FALKENSTEIN.

10 HERMAN FALKENSTEIN, INC.,  
By HERMAN FALKENSTEIN,  
(Seal) President.

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STATE OF NEW YORK, }  
 COUNTY OF NEW YORK, } ss.:

On this 12th day of September in the year one thousand nine hundred and twenty-eight, before me personally appeared HERMAN FALKENSTEIN, to me known, and known to me to be the same person described in and who executed the within instrument and acknowledged to me that he executed the same.

10

CHARLES A. SCHNEIDER  
 Notary Public, N. Y. Co. #929

STATE, CITY & COUNTY OF NEW YORK, ss.:

On the 12th day of September, 1928, before me came HERMAN FALKENSTEIN, to me known, who, being by me duly sworn, did depose and say that he resides 3505 Decatur Avenue, in the Borough of Bronx, City of New York, that he is the President of Herman Falkenstein, Inc. the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

20

30

CHARLES A. SCHNEIDER  
 Notary Public, N. Y. Co. #929

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**Exhibit D-2.**

UNION COUNTY CIRCUIT COURT.

HERMAN FAULKENSTEIN,  
Plaintiff,

vs.

PHYLLIS M. GIBSON and WILLIAM  
P. GIBSON,  
Defendants.

10

The undersigned, acting as correspondent for Sol Nemser of Jersey City, N. J., attorneys for the above named defendants, and with full power to act on behalf of the defendants, hereby acknowledges receipt of the following instruments:

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1: Stipulations (original and duplicate) discontinuing the above entitled action.

2: General release dated September 8th, 1928 from HERMAN FAULKENSTEIN and HERMAN FAULKENSTEIN, INC. to WILLIAM P. GIBSON and PHYLLIS M. GIBSON.

30

Condition imposed subject to approval by client. If not approved, status quo to be restored.

3. Letter from SCHNEIDER & GROGGINS acting for the plaintiff as local counsel only, supplementing the general release heretofore referred to.

4: Four notes, three dated August 9th, 1926, one in the sum of \$1732.50, a second in the sum of \$900 and a third in the sum of \$500, and the fourth dated October 19, 1926, in the sum of \$200.

40

The undersigned agrees to hold the aforesaid instruments in escrow and not to deliver same over

to the defendants or to any other person save on the express condition that the full sum of \$2630 be first paid to HERMAN FAULKENSTEIN, the plaintiff in the above entitled action, said sum to be paid by the defendants PHYLLIS M. GIBSON and WILLIAM P. GIBSON, in the following manner:

\$500 by check of the undersigned, delivered at the time of the signing of this escrow receipt, the receipt whereof is hereby acknowledged by HERMAN FAULKENSTEIN.

10

\$500 by note dated this day due October 10th, 1928, bearing interest at the rate of 6% per annum.

\$500 by note dated this day due November 10th, 1928, bearing interest at the rate of 6% per annum.

\$500 by note dated this day due December 10th, 1928, bearing interest at the rate of 6% per annum, and

\$630 by note dated this day due January 10th, 1929, bearing interest at the rate of 6% per annum, and which said notes have been executed by the Gibsons.

Receipt of these notes not acknowledged, but to be obtained and delivered to Faulkenstein.

20

Herman Faulkenstein.

In the event the Gibsons shall fail to pay any of the aforesaid notes on the respective due dates thereof FAULKENSTEIN may, at his election, if the default continues for five days, without any further or other notice to the Gibsons, demand of the undersigned the return of the aforesaid instruments and may continue the action now pending in the Union County Circuit Court of New Jersey, crediting the Gibsons in said action with the amounts actually received and charging the Gibsons with the differ-

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ence between the original amount sued for and the amounts actually received, in which event Falkenstein is to return the unpaid notes last above described, to the undersigned.

Dated, New York, September 12th, 1928.

SAMUEL CHERKOS.

10 Consented to

HERMAN FALKENSTEIN,  
Plaintiff in Person.

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30

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**New Jersey Court of Errors and Appeals**

HERMAN FALKENSTEIN,  
 Complainant-Respondent,

and

WILLIAM P. GIBSON,  
 Defendant-Appellant.

On Appeal  
 From the  
 Court of  
 Chancery.

**BRIEF FOR APPELLANT.**

**Statement of Case.**

This is an appeal from a final decree entered in the Court of Chancery on February 28th, 1930, in favor of the respondent against this appellant, which final decree, among other things, orders and adjudges, that there is due to the respondent, the sum of Twenty-three Hundred and Thirty-three Dollars and Thirty-four Cents (\$2,333.34), together with interest thereon from the twenty-sixth day of July, 1927, and forever enjoining the appellant from setting up as a defense to the complainant's alleged cause of action, a certain general release dated September 8th, 1928, executed by the respondent in favor of the appellant.

The complainant-respondent filed his original bill on January 31st, 1929 and by consent thereafter filed an amended bill of complaint on July 16th, 1929, charging in substance, that he was the owner of twelve certain promissory notes (copies of which are annexed to the amended bill of complaint) which had been executed to him by one Henry W. Green during the months of October and Novem-

ber, 1926. (The total amount of the twelve notes is Eight Thousand, Six Hundred and Forty-two Dollars and Fifty Cents (\$8,642.50); that the respondent desiring to collect the amount due on these notes and about to depart from the country, entered into a certain arrangement with the defendant-appellant whereby the defendant-appellant was, during the absence of the complainant-respondent and as his agent to endeavor to collect for the complainant-respondent, the amount due on the Green notes, and that in pursuance to this arrangement the defendant-appellant obtained possession of the notes in question and instituted a suit against the maker thereof, viz, Henry W. Green, in the New Jersey Supreme Court in May, 1927, and that thereafter in July, 1927, the suit brought by the appellant against Green was discontinued; that certain sums of money were collected by Gibson, the appellant, from Green, for which it is charged Gibson refused to account to the complainant-respondent, and complainant-respondent thereupon prayed for an accounting of the monies alleged to have been collected by Gibson from Green, and that Gibson may be ordered to pay to Falkenstein, the complainant, the amount of money which it is alleged Gibson collected from Green.

The bill further alleges that prior to the month of September, 1928, complainant-respondent had instituted an action at law in the Union County Circuit Court against William P. Gibson, the defendant-appellant, and Phyllis M. Gibson, who is the wife of the said William P. Gibson, which alleged cause of action arose out of facts *other* than those alleged in the present bill of complaint; that the suit in the Union County Circuit Court was finally settled and a general release executed by Herman Falkenstein, the complainant-respondent herein, and the plaintiff in the suit in the Union

County Circuit Court, to both Gibson and his wife; that although the release executed by Falkenstein to the Gibsons was general and absolute in form, it is charged in the present bill of complaint that as a matter of fact, the general release was *limited, modified and affected by a certain reservation* contained in a letter dated September 11th, 1928 (a copy of which letter is annexed to the amended bill of complaint), in accordance with which the complainant-respondent alleged that he had *reserved* whatever rights he had against William P. Gibson to collect from the said Gibson the amount of money it is alleged Gibson collected from Green on the twelve promissory notes, forming the basis of the present suit.

To the amended bill of complaint, the defendant-appellant filed an answer and counterclaim, setting forth in substance that complainant-respondent, Falkenstein, had executed and delivered to Gibson a general release which constituted a complete bar to the complainant-respondent's present suit and denying that he had ever acquiesced in or consented to the alleged reservation on the general terms of the release, as contained in the letter of September 11th, 1928. *The appellant in his answer also set up as a defense that the complainant-respondent had a complete and adequate remedy at law.* In his counterclaim the defendant-appellant prayed for a rescission of a certain settlement agreement marked Schedule "C" annexed to the amended bill of complaint, and prayed for the restoration of the *status quo* and the return to him of the sum of Twenty-six Hundred and Thirty (\$2,630.00) Dollars which he had paid to Falkenstein in settlement of the suit pending in the Union County Circuit Court, against himself and wife.

The Learned Vice Chancellor held that the general release was limited by the reservation con-

tained in the letter dated September 11th, 1928, and was not a bar to the present suit.

William P. Gibson, the defendant below, now appeals to this Honorable Court and respectfully urges that the general release admittedly executed by Falkenstein to him, is a complete bar to the present suit and if it is not, that the *status quo* should be restored and the settlement agreement should be rescinded and the consideration paid by Gibson to Falkenstein should be restored to Gibson. The defendant-appellant further urges that Falkenstein has an adequate remedy at law and the Court of Chancery lacks jurisdiction to entertain the present suit.

#### POINT I.

**The general release dated September 8th, 1928, executed and delivered by Falkenstein to Gibson is a complete bar and defense to the present suit.**

On September 12th, 1928, the suit instituted by Falkenstein against Gibson and his wife, in the Union County Circuit Court was settled pursuant to the terms of a written agreement wherein he, Gibson, agreed to pay (and did pay) Falkenstein the total sum of Twenty-six Hundred and Thirty (\$2630.00) Dollars, part cash and part notes (Ex-D-2, p. 94). *The present suit had not as yet been instituted.* The settlement agreement was signed by Herman Falkenstein in person and by one Samuel Cherkos, who was Gibson's New York attorney. Gibson was not present (p. 68, ll. 9-14).

A general absolute release was executed by Falkenstein individually and by Herman Falkenstein,

Inc., a corporation, to Gibson and wife. The execution and delivery of this general absolute release is admitted by Falkenstein (p. 56, l. 35; p. 57, ll. 1-10), and Falkenstein also admits that at the time of the settlement of the suit pending in the Union County Circuit Court, Falkenstein had in mind his claim against Gibson arising out of the twelve Green notes, forming the subject matter of the present bill of complaint in Chancery (p. 56, l. 31). As a matter of fact, the suit in the Union County Circuit Court was not brought in Falkenstein's individual name, but in the name of a corporation known as "HERMAN FALKENSTEIN, INC." (p. 57, l. 18). The general release, however, was executed by both Herman Falkenstein, individually and by Herman Falkenstein, Inc., a corporation (Ex. D-1, p. 91). The entire settlement agreement of the suit pending in the Union County Circuit Court took place in New York, in the office of Mr. Schneider, a New York attorney representing Falkenstein, and Samuel Cherkos, a New York attorney representing Gibson. Falkenstein admits that in September, 1928, he had told Gibson he was going to sue him (Gibson) on the twelve Green notes involved in the present suit (p. 58, l. 26). Falkenstein admits that he secured the Twenty-six Hundred and Thirty (\$2630.00), Dollars which Gibson paid under the settlement agreement (p. 58, ll. 32-40). Falkenstein was present at the time the settlement agreement was executed. The settlement agreement was also called "Escrow Receipt and Agreement" (p. 59, l. 35 to p. 60, l. 29).

Schneider, Falkenstein's attorney, admits that at the time of the settlement of the suit pending in the Union County Circuit Court, Falkenstein was asserting a claim against Gibson on the notes involved in the present suit and that as a matter of fact, Schneider and Cherkos, both being New York

attorneys, discussed Falkenstein's claim against Gibson on the Green notes at that time (p. 68, ll. 1-28). Schneider also testified (p. 68, ll. 33-38) that his client, Falkenstein, stated to him, in the presence of Cherkos, that he had a claim on the Green notes.

While Falkenstein in the present suit concedes the execution and delivery of the release, general and absolute in form, to Gibson, he seeks to overcome and destroy the general and absolute words and terms of the release by insisting that the general release was limited and effected by the contents of a certain letter dated September 11th, 1928, (Ex. C-2, p. 88), written by Falkenstein's attorney in New York to Cherkos, Gibson's New York attorney, wherein there is contained what purports to be a reservation, modifying and limiting said general release so as to permit prosecution by Falkenstein of his claims against Gibson arising out of the Green notes. The letter also contains the following paragraph, viz.,

"It is understood that you will apprise your client of this reservation and that your client will consent to the limitation imposed on the general release by this letter."

Falkenstein and his attorney, Schneider, testified and contended in the court below, that the general release was effected and limited by the letter dated September 11th, 1928. Falkenstein and his attorney Schneider knew that when the escrow receipt and settlement agreement were drawn that Cherkos, Gibson's New York attorney, had no authority whatever to accept anything but a general release, and that Cherkos' lack of authority was understood and well known to them, and that the entire settlement was contingent upon Gibson's acquiescence and approval.

Schneider testified as follows (p. 65, l. 15; p. 66, l. 9):

"Q. Was anything said by him concerning his obtaining the approval of his client, Mr. Gibson? A. Yes, sir.

Q. To this limitation? A. Yes, sir.

Q. What was said? A. Mr. Cherkos stated that he desired a release, general in form. *A release had previously been drawn by me which contained a limitation as to the Green action. Mr. Cherkos stated that his client desired to have a release in general form. Mr. Falkenstein declined to settle his claim against Gibson save only on the condition that the limitation be contained in the release. Prior to the delivery and execution of the agreement of December 12 Mr. Cherkos and I had been in communication and in conference for several days; Mr. Cherkos then suggested, or, perhaps I suggested to Mr. Cherkos, that we could perhaps solve the problem by giving to Mr. Gibson a release, general in form, as had been insisted upon by Mr. Cherkos, but that reference would have to be made by separate instrument, simultaneously delivered and executed, to the effect that there had been between the parties the conditional limitation in the release. After that agreement had been reached and the substance of it had been reduced to writing, as evidenced by the agreement of September 12, Mr. Cherkos said, "Well, now, I want to send it on to Mr. Gibson and have him definitely approve it." And I said that was agreeable to me, whereupon I made the marginal notation which was read by the last witness.* (Italics mine.)

and on page 68, line 15:

"Q. I see. Now, Cherkos told you that his client wanted a general release, didn't he? A. Yes, sir."

and on page 69, lines 25-48:

"Q. You say your client was insisting on a reservation— A. Yes.

Q. So far as the Green notes were concerned? A. Yes.

Q. And Cherkos was insisting that Gibson wanted a *general, absolute release*? A. Yes. *Mr. Cherkos quoted Mr. Gibson as stating that he knew of the existence of the Green claim.*

Q. Yes. A. But he wanted a release general in form. *He said those were his client's instructions*, but that he would consult with his client with respect to the letter. It was apparently known to Mr. Cherkos." (Italics mine.)

and on page 70, lines 12-15:

"Q. Also stating to you that he had no power to take anything but the general release? A. Yes, and that he would submit the question of the accompanying letter to Mr. Gibson for approval."

and on page 70, line 39; page 71, line 38:

"Q. Then, Mr. Schneider, everybody knew, that is, you and Falkenstein knew that Cherkos had to *secure the O. K. of his client, first, before the settlement could go through*? A. Yes, sir.

Q. *Cherkos did not want to take the responsibility of accepting a conditional release*? A. *That is true.*

Q. *And told you and Falkenstein very frankly that his client was insisting upon a general release*? A. Yes, sir.

Q. Then, in order to protect himself, that is, in order for Cherkos to protect himself still further, these words in the margin of the Green agreement D-2, were inserted? A. Yes, sir.

Q. And you say those words, 'Condition imposed subject to approval of my client, if not approved, the *status quo* to be restored' were written in your handwriting. A. Yes.

Q. And signed by Cherkos, S. C. A. Yes, and Mr. Falkenstein.

Q. And Mr. Falkenstein. A. Initialed by each.

Q. Then there cannot be any dispute, can there, Mr. Schneider, at the time Cherkos left Falkenstein's presence or your presence that the settlement had not as yet been consummated, that is true, isn't it? A. That is true.

Q. And the whole question hinged upon Falkenstein obtaining Gibson's consent to a conditional release; is that correct? A. To the reference in the letter, to the terms of the delivery of the release, general in form.

Q. *In other words, there was not any complete settlement until Cherkos had Mr. Gibson's consent to the reservation?* A. That is true. The instruments were deposited in escrow pursuant to the terms of agreement." (Italics mine.)

and page 73, lines 31-41:

"Q. What was your understanding of the words '*Status quo*' '*restoration*', and '*status quo*'? A. That the status that had existed at the time of the execution and delivery of the instrument be restored.

Q. In what event? A. In the event Mr. Gibson failed to approve the form or the terms of the substance embodied in the letter of the 11th, modifying the general release."

and page 73, lines 18-21:

"Q. Then, summing it all up, Mr. Schneider, wasn't the understanding that if Gibson would not consent to a conditional release, that the *status quo* was to be restored? A. Yes, sir."

Schneider also admits that in the event that Gibson did not consent to the terms of the escrow receipt and settlement agreement, the *status quo* was to be restored (p. 73, ll. 18-21).

There cannot be any question but that Falkenstein and his attorney, Schneider, and Gibson's attorney, Cherkos, were *all* aware of the fact that Gibson was insisting upon a general release and that Gibson's attorney, Cherkos, had no authority whatever to accept anything but a general release, and they all realized unquestionably, that before Cherkos could accept the contents of the letter dated September 11, 1928, as a reservation or modification of the terms in the general release, it was essential that Gibson be apprised of the reservation and that Gibson consent to the limitation attempted to be imposed on the general release by the letter.

With this situation confronting Falkenstein, Schneider and Cherkos and realizing the importance of obtaining Gibson's consent to a conditional release, and realizing that under the express terms of the letter of September 11, 1928, and of the settlement agreement itself, and especially of the marginal words written on the settlement agreement—realizing all the foregoing, what did Falkenstein and his attorney, Schneider, do?

It seems nothing was done from September 12, 1928 (the date when the general release was delivered until September 21, 1928 and then Schneider says that he called Cherkos, Gibson's attorney, on the telephone (p. 74, l. 30). During all this time, the consideration of the settlement agreement, viz., Gibson's notes and the cash were still in Cherkos' possession and had not as yet been delivered, and Schneider was waiting to hear from Cherkos as to whether Gibson had consented to the reservation on the release (p. 75, ll. 2-11). Schneider says that Cherkos told him over the telephone that Gibson had consented to the reservation on the release and that pursuant to the conversation, Schneider wrote Cherkos a letter dated September 21, 1928, which was admitted in evidence over the objection of Gib-

son's solicitor in the court below (p. 66, l. 13 to p. 67, l. 18). Schneider admits that he never received any reply to the letter he alleges he sent on September 21, 1928 to Cherkos (p. 67, l. 20). Schneider then says that he gave the letter of September 21, 1928 to his client, Falkenstein (p. 77, l. 3) and Falkenstein testifies that he went to Cherkos' office with the letter written by Mr. Schneider, delivered the same to Cherkos, and obtained from Cherkos the check and the notes that were being held by Cherkos all the time in escrow, in accordance with the terms of the settlement agreement (p. 63). Schneider says that he took Cherkos' words over the telephone that Gibson had consented to the reservation in the general release (p. 76, l. 29).

Falkenstein says that when he delivered the letter of September 21, 1928 to Cherkos that nothing was said between him and Cherkos as to whether Gibson had consented to the reservation on the release (p. 62, l. 16; p. 63, ll. 1-5).

It is strange indeed that the reservation or modification of the terms of the general release *were not inserted in the general release itself*. Schneider admits that it would have been better if the reservation had been inserted in the general release itself, but his reason for *not doing so* does not appear to be either logical or sensible and it is strange indeed that Gibson's alleged consent to the reservation on the terms of the general release was *never obtained in writing*, which would have settled the question beyond any doubt. All the parties knew of the importance of obtaining Gibson's consent and approval. The simplest way would have been for Gibson to signify his consent and approval in a *written memorandum*. This was never done and Gibson never signified his consent *in writing* that a reservation be imposed on the general terms of the

release, nor did he consent orally, as shall be shown hereafter.

Schneider testifies (p. 77, ll. 15-23) :

“Q. Didn’t you think it would have been advisable to have Gibson signify his consent by some letter or some writing of this reservation? Do you understand me? A. It would have been best, but the tenor of the conversation—series of conversations had with Mr. Cherkos indicated that *Gibson apparently was determined*, for some reason not made to me, *to receive a release, general in form.*” (Italics mine.)

and again on page 76, Schneider testifies :

“Q. And did Mr. Gibson ever signify his consent to the reservation by writing? A. I never received any such assent, save only through Mr. Cherkos.

Q. Then, did Mr. Falkenstein take Mr. Cherkos’ word for it? A. Will you repeat that?

Q. Did Mr. Falkenstein take Mr. Cherkos’ word that Gibson had consented to the condition? A. I don’t know whether Falkenstein did. I took Mr. Cherkos’ word received over the telephone and then confirmed it by the communication of the 21st of September.

Q. Did you ever receive any reply to this communication? A. No, sir.”

Why Schneider and Cherkos, both being New York attorneys, and representing the contending parties, and both realizing the importance of obtaining Gibson’s approval to a reservation on the terms of the general release, should have consummated the transaction in the manner indicated, without obtaining Gibson’s consent *in writing*, is incomprehensible; and why the attempted reservation was not inserted in the general release itself, is difficult to understand, to say the least.

Was Gibson imposed upon? Were his rights properly protected? Did Gibson *really* consent to the pretended reservation? Was he apprised fully and fairly of everything taking place?

The answer to the latter inquiry may be found in Gibson's testimony.

Gibson testified (pp. 80, 86) that Herman Falkenstein, Inc. in September 1928, was suing Gibson and his wife in the Union County Circuit Court and that there was considerable controversy at the same time about Falkenstein's assertions based on the Green notes, the subject matter of the present suit in the Court of Chancery (p. 81, l. 11). It seemed that Gibson also contended that Falkenstein owed him certain sums of money on other transactions and that Gibson was desirous of disposing of all matters in difference, as he expressed it, in "one general satisfaction" (p. 81, l. 21).

Gibson's reasons for desiring to dispose of *all* disputed matters, is apparent from a persual of the following testimony given by Gibson, viz. (p. 81, l. 30; p. 82, l. 25) :

"Q. What did you hand him? A. At that time, I believe I handed him \$500 and a series of notes in the aggregate of \$2,500 or \$2,600 and I told him I wanted all of this litigation cleaned up once for all. I had a headache on it. As soon as I would go on a trip Mr. Falkenstein would file an attachment on my house, called me an absconding debtor, and one thing another, and I was sick and tired of it, and Mr. Cherkos said he would enter into a negotiation which he did do, and, on several occasions thereafter he told me he thought he could reach some reasonable basis of settlement, and that is all I can do, and if there is any more money involved, I will go out and get it some place, but I must have my family left at peace. Subsequently he called me up and said he had entered into an escrow agreement of some sort, conditioned—

The Court: Well, now, was Mr. Falkenstein there then?

Witness: Sir?

The Court: Who was there?

Witness: This was a conversation between Mr. Cherkos and myself, your Honor.

The Court: All right. Go on.

The Witness: And that in this escrow agreement I was to do certain things and Mr. Falkenstein and Falkenstein, Inc., were to do certain things. I said, 'Mr. Cherkos, I will leave it entirely in your hands. I am willing to abide by my agreement. *I want a general and absolute release from anything and everything?*' (Italics mine.)

*Gibson absolutely denies that he ever authorized his attorney to accept a reservation on the release.*

Q. Did you ever authorize Mr. Cherkos, your attorney, to accept a reservation on that release? A. *No, sir.*

Q. Did you ever tell your attorney some time around September, 1928, it was perfectly all right, so far as you were concerned, to accept a conditional release from Falkenstein? A. *No, sir.*

Q. Did you know at the time you turned over the notes and cash to your attorney, to be turned over to Falkenstein, that Falkenstein reserved his right to sue you on the Green notes? A. *No, sir; I hadn't any knowledge of it*" (p. 82, ll. 26-38). (Italics mine.)

Gibson says that the terms of the settlement agreement, Exhibit D-2 were shown to him by his attorney, Cherkos, sometime in September and that Cherkos told him, he (Cherkos) was afraid he could not get general release and Gibson answered, "*Sam, if I cannot get a general and absolute release, I want my money back*" (p. 83, ll. 20-25).

*The letter of September 11th, 1928, containing the pretended reservation on the general release*

*was never seen by Gibson until he saw it in court on the day of the trial, and was never shown to him by his attorney, Cherkos* (p. 84, ll. 4-14). Gibson paid the Twenty-six Hundred and Thirty (\$2630.00) Dollars under the terms of the settlement agreement and it was his understanding that he was through with Falkenstein for once and for ever, because he had obtained a general release. On cross examination Gibson was asked (p. 84, l. 22) when his attorney Cherkos showed him the terms of the settlement agreement (Ex. D-2, p. 94), whether anything was said by Cherkos about whether or not Gibson would receive a general release in form. Gibson said that Cherkos told him there was some question about the modification, and Gibson said

“Sam, I don’t know anything about it. What I want is a general and absolute release, or I don’t want anything. I want my money back” (p. 84, ll. 18-30).

Gibson was further asked on cross examination “What did he (Cherkos) say?” (p. 85, l. 20). Gibson answered, that Cherkos told him that there was a question about getting a general release and that in the meantime there was no harm done, the whole matter was in escrow and if a general release could not be obtained, Gibson was to get his money back; and that Cherkos said there was some other question, that Falkenstein had mentioned, about, another claim that Falkenstein asserted against Gibson (p. 85, l. 29). Gibson replied, “That is nothing, Mr. Cherkos, I have several against him. All I want to do is to *wind them all up.*”

As to Cherkos’ express authority from Gibson in representing him in the litigation brought by Falkenstein the court’s attention is invited to the testimony on page 86 as follows:

“Q. Authorized by you to handle this matter with Mr. Schneider? A. Yes, sir. *He was authorized by me to go out and wind up all the litigation with Mr. Cherkos and get me a general and absolute release.*

Q. He was authorized to wind up the particular litigation in the Circuit Court in Union County, wasn't he? A. That was *one* of the considerations, sir.” (Italics mine.)

It is submitted that the mere production of the general release from Falkenstein to Gibson was at least *prima facie* evidence that Falkenstein's present suit was barred. The burden then rested upon Falkenstein to show that the general release was limited and effected by the alleged reservation and modification contained in the letter of September 11th, 1928 *and* that such reservation was known to Gibson and consented to by him.

The words alleged to have been spoken over the telephone by Cherkos to Schneider, to the effect that Gibson had consented, was not binding upon Gibson. *All the other terms of the settlement had been committed to writing.* The general release was in writing. The letter of September 11th, 1928 containing the alleged reservation *was in writing.* *Gibson's alleged consent to the reservation, it is conceded, was never obtained in writing* (p. 76, l. 24).

In view of all the circumstances, the failure of Falkenstein's attorney and Gibson's own attorney to obtain Gibson's consent to the reservation, *in writing*, is strongly indicative, and might be said to be conclusive evidence, *that Gibson never knew of the pretended reservation and if he did know, never consented to the same, but expressly disapproved thereof.*

Cherkos who was representing Gibson had only a limited authority. He was bound by Gibson's

express instructions. Falkenstein cannot say, and in fact does not say, that he was misled by Cherkos' *apparent* authority, so as to work a possible estoppel against Gibson. Falkenstein and his attorney, Schneider, both knew, that Cherkos' express authority was to obtain *only* a general and absolute release and nothing else. Yet, both Falkenstein and his attorney knowing that Cherkos' only authority was to obtain a general release, were content to consummate the settlement solely upon *Cherkos' alleged representations over the telephone to Schneider.*

It is significant that the general release is executed by both Herman Falkenstein and Herman Falkenstein, Inc. The suit in the Union County Circuit Court was brought by Herman Falkenstein, Inc. If it were the intention of the parties to release the Gibsons' only from the subject matter of the suit in the Union County Circuit Court, why wasn't the release executed *only* by Herman Falkenstein, Inc.? Why did Herman Falkenstein *individually* join in the execution of the release? The only logical answer is that the parties intended to also release Falkenstein's *individual* claim on the Green notes, the subject matter of the present suit in Chancery; otherwise, there was no necessity of Herman Falkenstein, *individually* joining in the execution of the general release. Herman Falkenstein, Inc., a corporation, was asserting a claim in the suit instituted in the Union County Circuit Court and *not Herman Falkenstein, individually.* Herman Falkenstein, individually, was asserting a claim based on the Green notes and not Herman Falkenstein, Inc. Why then did both Herman Falkenstein, individually and Herman Falkenstein, Inc. join in the execution of one general release, if it were not the intention to release Gibson from any and all claims that might have existed, including the claim on the Green notes?

It is apparent that various claims were being asserted by Falkenstein against Gibson. Gibson was being harassed. It was entirely probable that Gibson wanted to purchase his peace and to effectually settle once and for all all disputed matters existing between himself and Falkenstein, and for that reason expressly instructed and authorized his attorney to accept nothing but a general and absolute release.

If Cherkos did tell Schneider over the telephone that Gibson had been apprised of the terms of the alleged reservation and had consented to it, then he was clearly exceeding his *limited* authority and Cherkos's representations over the telephone are clearly not binding upon Gibson. Even assuming that Falkenstein and his attorney relied upon Cherkos' representations over the telephone, and even assuming that Cherkos did say to Schneider over the telephone that Gibson had consented to the reservation, and assuming further that Schneider did write the letter dated September 21st, 1928, and that this letter was delivered by Falkenstein to Cherkos—still Falkenstein and his attorney, Schneider, acted at their peril in relying upon the alleged words of Gibson's attorney, *when they knew from what had already transpired that Cherkos had only a limited authority and that was, to obtain a general and absolute release.* Falkenstein and his attorney were bound to ascertain under the circumstances the exact authority of Cherkos. They acted with Cherkos at their own risk, knowing the limits of Cherkos' express authority, viz., to obtain a general release and nothing else.

There is not an iota of testimony in the case to contradict Gibson's testimony that he authorized his attorney, Cherkos, to obtain only a general and absolute release. Gibson's testimony on this point stands alone, uncontradicted. Gibson's testimony

has all the imprint of truth. Gibson's version of what took place has a stronger ring of probability and credibility than the version rendered by Falkenstein and his attorney; nor is there anything in the circumstances surrounding the entire transaction to render Gibson's story improbable. His conduct was such as any other ordinary, reasonable person would have pursued under the same circumstances. He wanted to end *all* the matters with Falkenstein once and for all. Even though Falkenstein had not as yet instituted the present suit, at the time of the settlement in September, 1928, Falkenstein's attorney admits that the subject matter of the Green notes was discussed and was in the minds of Falkenstein, Schneider and Cherkos at the time. It was also in Gibson's mind when he paid Twenty-six Hundred and Thirty (\$2630.00) Dollars to Falkenstein. Why, then, should Gibson have settled one claim and left another open against him?

An attorney cannot waive a substantial right of his client without his consent. *Terhune vs. Colton*, 10 N. J. Eq. 21, at page 33.

*Dickerson vs. Hodges*, 43 N. J. Eq. 45, 47. (Citing with approval *Howe vs. Lawrence*, 2 Zab. 99, to the effect that an attorney or solicitor may make valid agreements relating to the conduct of a suit, yet, even in such matters he cannot surrender a substantial right of his client, without his client's consent.)

*Trenton Street Railway Co. vs. Lawler*,  
74 N. J. Eq. 828, at page 831;

*Faughnan vs. City of Elizabeth*, 58 N. J. L.  
309;

6 Corpus Juris, 641, Sec. 146;

6 Corpus Juris, 659, Sec. 175.

As to construction, operation and effect of release, see 34 Cyc. 1075.

Gibson's testimony is inherently sound and highly probable and far more credible than the testimony of Falkenstein and Schneider. Falkenstein has not borne the burden of showing by a fair preponderance of the testimony that Gibson was apprised of and consented to the limitation alleged to have been imposed on the general release in the letter of September 11th, 1928. It is clear that the facts and circumstances surrounding the entire transaction disclose beyond any question that Gibson never consented to any reservation on the general release and that if his attorney consented for him, said attorney exceeded his express authority and waived a substantial right that belonged to Gibson, viz, the right to obtain a general and absolute release free from any limitation or reservation thereon. It was therefore, error to provide in the final decree, that Gibson be estopped and forever enjoined from setting up the said general release dated September 8th, 1928, as a defense to the action.

## POINT II.

**The chancellor over the objection of the defendant erroneously permitted the introduction in evidence of Exhibit C-3 offered by complainant.**

Exhibit C-3 (p. 90) is a letter of September 21st, 1928, alleged to have been written by Falkenstein's attorney to Gibson's attorney. This letter is a *self-serving declaration*, and not binding on Gibson. It's admission in evidence constitutes error.

### POINT III.

#### **Complaint has an adequate remedy at law.**

Gibson was acting as Falkenstein's agent in bringing suit on the Green notes. The relationship between Falkenstein and Gibson on the matter of the Green notes was one of principal and agent. Falkenstein had placed the Green notes in Gibson's hands for the purpose of collection, and to bring suit if necessary—all for Falkenstein's benefit.

If Gibson, as Falkenstein's agent, had collected certain monies which should have been turned over to Falkenstein, Falkenstein had the right to sue Gibson at law, in an action for money had and received. There was nothing *complicated* or *intricate* about the matter. According to Falkenstein's assertion, Gibson had collected a certain amount of money rightfully belonging to Falkenstein. If this is true, it is a debt. The mere fact that Falkenstein did not know how much Gibson had collected would not make any difference as he could have ascertained the same by interrogatories, bill of particulars, or by an examination before trial in the Law Action. There was no necessity of resorting to a Court of Equity for an accounting. There were no intricate or complicated accounts or mutual transactions between the parties at all.

The mere relation of principal and agent, without more—the relation not being merely fiduciary in its nature, and no obstacle intervening to a recovery at law,—is insufficient to enable a principal to maintain the action against his agent. 5 Pomerooy, Second Addition, page 5218, Section 2359.

The township of *Franklin vs. Crane*, 80 N. J. Eq. 509 (quoting with approval on p. 513 from

Volume I, Pomeroy's Equity Jurisprudence, Section 178).

The general rule as to the right to bring suit for an accounting in equity, where the relationship is that of principal and agent is stated in 31 Cyc. p. 1609. The rule is stated as follows:

"It is a well established rule that the bare relation of principal and agent is not sufficient to entitle the principal to go into Equity for an accounting from the agent, where there is complete and adequate redress at law."

It is submitted that Falkenstein had a complete and adequate remedy at law to recover any monies that Gibson had collected on the Green notes. As a matter of fact, the sum received by Gibson on the Green notes was Twenty-three Hundred and Thirty-three Dollars and Thirty-four Cents (\$2,333.34) net. Why Falkenstein had to resort to a court of equity for an accounting to recover this sum is not clear. His remedy at law was adequate and simple. It was an action for money had and received. Clearly the Court of Chancery has no jurisdiction.

### CONCLUSION.

It is respectfully submitted that the decree of the Court of Chancery is erroneous and that the same should be reversed.

SAUL NEMSER,  
Of Counsel with Appellant.

## New Jersey Court of Errors and Appeals

HERMAN FALKENSTEIN, <i>Complainant-Respondent,</i>  <i>and</i>  WILLIAM P. GIBSON, <i>Defendant-Appellant.</i>	}	<i>On Appeal from the Court of Chancery.</i>
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### BRIEF FOR RESPONDENT.

#### Statement of Case.

This is an appeal from a final decree entered in the Court of Chancery on February 28, 1930, in favor of the respondent against the appellant, which final decree, among other things, orders and adjudges that there is due to respondent the sum of Two Thousand Three Hundred Thirty-three Dollars and Thirty-four Cents (\$2,333.34), together with interest from the 26th day of July, 1927, and adjudges that the appellant is estopped and enjoins him forever from setting up as a defense to the plaintiff's cause of action, a certain written release dated September 8, 1928, by the respondent in favor of the appellant.

The complainant-respondent filed his original bill on January 31, 1929 and by consent thereafter filed an amended bill of complaint on July 16, 1929, charging in substance that he was the owner of twelve promissory notes, of which copies are annexed to the amended bill of complaint, made in his favor by one Henry W. Green during the months of October and November of 1926; that the respondent desiring to collect the amount due on these notes and being about to depart from the country entered into a certain agree-

ment with the appellant whereby the defendant-appellant was to act, during the absence of the complainant-respondent, and as his agent to endeavor to collect from the complainant-respondent, the amount due on the Green notes and that in pursuance of this arrangement, the defendant-appellant obtained possession of the notes in question and instituted a suit against the maker thereof, namely, Henry W. Green in the New Jersey Supreme Court on May 1927 and that thereafter in July 1927, the suit brought by the appellant against Green, was discontinued upon payment of certain moneys by the said Henry W. Green, for which the defendant-appellant refused to account to the complainant-respondent.

The bill further alleges that prior to the month of September, 1928, the complainant-respondent had instituted an action-at-law in the Union County Circuit Court against William P. Gibson, the defendant-appellant, and Phyliss M. Gibson, who is the wife of the said William P. Gibson, which cause of action arose out of facts *other* than those alleged in the present bill and that the suit in the Union County Circuit Court was settled and that in connection with the settlement thereof, a release, general in terms, was signed and sealed by Herman Falkenstein, the complainant-respondent, herein, and delivered by his New York attorney, one Charles A. Schneider, who handled for him the settlement thereof, to one Samuel Cherkos, accompanied by a letter, a copy of which was annexed to and made a part of said amended bill of complaint, and accepted by the said Samuel Cherkos, acting as attorney for the defendants Phyliss M. Gibson and William P. Gibson, as appears by the escrow receipt and agreement, a copy of which is also annexed to and made a part of the amended bill of complaint, under an

agreement effected by virtue of which letter and escrow agreement, that the delivery and complete execution of said release was made subject to the defendant-appellant's being advised that the complainant-respondent reserved from the terms of said release his right of action arising out of the facts set forth in said amended bill of complaint, and having been so advised, accept the same and agree not to make use of the release in defense of this action, in default of which consent, the complainant-respondent's said attorney agreed to return said release and the other papers and documents delivered to him therewith, and restore the parties to their original position; that the defendant-appellant did, with knowledge of said reservation, approve of it and did thereby agree not to use the said release as a bar to this action and that having completed the settlement of the other litigation and secured what he bargained for, he should not now be permitted to use, but should be declared to be estopped and should be enjoined from using, said release in bar of this action.

The complainant-respondent thereupon prayed for a judgment that the defendant-appellant be estopped from using said release in bar of this action and be forever enjoined from using it and introducing it into evidence and for an accounting of the moneys collected from said Henry W. Green and for a decree that the defendant-appellant be ordered to pay to the complainant-respondent, the moneys found to have been collected by the defendant-appellant from the said Henry W. Green.

To the amended bill of complaint, the defendant-appellant filed an answer and counter-claim, setting forth in substance that the complainant-respondent, Falkenstein, had executed and

delivered to Gibson a general release which constituted a complete bar to the complainant-respondent's present suit; that he had never acquiesced in or consented to the reservation from the terms of the general release contained in the letter of September 11, 1928 and that the complainant-respondent's remedy at law was complete and adequate.

In his counter-claim, the defendant-appellant prayed for rescission of the agreement marked "Schedule C" and annexed to the amended bill of complaint and prayed for the restoration of *status quo* and the return to him of the Two Thousand Six Hundred Thirty Dollars (\$2,630.00) which he had paid to the complainant-respondent in the settlement of the suit pending in the Union County Circuit Court against himself and his wife, tendering and offering therein to restore to the complainant-respondent, upon decree of this Court that said settlement agreement be rescinded, any and all property, documents and chattels which were delivered by the complainant-respondent to the defendant-appellant in connection therewith.

The complainant-respondent's reply to said answer and counter-claim joined issue on the answer and denied the ability of the defendant-appellant to make good such tender.

Upon the issues joined, proof was offered of the allegations of the complainant-respondent's bill and, with respect to the giving of the general release dated September 8, 1928, the situation disclosed by the testimony and the exhibits is as follows:

A corporation named Herman Falkenstein, Inc. was suing the defendant and his wife on notes. The case was shortly to be tried. Both parties

engaged New York counsel to effect a settlement. Both parties and their attorneys had in mind the claim upon which this suit is based. The terms of the settlement were the subject of negotiations between the attorneys, lasting several days. The amount to be paid by Gibson and his wife and the manner of its payment (cash and notes of both defendants payable in time) were agreed upon. A discontinuance of the pending action and the notes upon which it was based were to be delivered in escrow to the Gibsons' New York attorney and not turned over to Gibson and his wife until full payment was made by Gibson and his wife. Cherkos, acting for the Gibsons, asked for a general release from the plaintiff corporation and the complainant to the defendant and his wife. The complainant, desiring still to proceed against Gibson on the cause of action set forth in the complaint, refused to give a general release. Cherkos insisted then that the Gibsons wanted a release general in form, and that Gibson would not accept a release containing an exception of Falkenstein's claim on the Green notes, which is the subject of the present litigation, but might not object to a supplemental agreement not to use such release in bar of Falkenstein's present claim. It was then arranged between the attorneys that Herman Falkenstein, Inc. and Herman Falkenstein execute a release general in form to both of the Gibsons, provided that collaterally Gibson individually agrees not to use the release to bar the action against him only for moneys collected by him on the Green notes.

The general release, so prepared, was delivered with a discontinuance of the then pending suit and the notes on which that suit was based to Gibson's attorney, with a letter in which the

delivery of these papers was made to him upon the condition that he discuss with Gibson his agreeing that the present cause of action survive, notwithstanding the release, and secure his consent thereto. Cherkos acknowledged receipt of the release, the discontinuance and the notes and of this letter, and agreed to make known to his client the condition upon which the delivery was made and to return the release, the discontinuance and the notes if Gibson did not approve of it.

Thereafter Cherkos and Gibson discussed the matter—Cherkos exhibiting to Gibson, and explaining to him the contents of, the escrow receipt and agreement and explaining to him the contents of the letter of September 11th. According to Gibson, he did not then or ever approve of any limitation of the terms of the general release. Meanwhile Schneider, acting for Falkenstein, telephoned Cherkos at intervals. On September 21, 1928, nine or ten days after the delivery of the papers to Cherkos, Cherkos told him that Gibson had been made acquainted with the condition upon which the settlement might go through and had assented to the reservation by Falkenstein from the release of his right to proceed against Gibson on the present claim in accordance with the letter of September 11, 1928. Schneider immediately embodied the substance of this conversation in a letter, admitted in evidence over the objection of the defendant's solicitor, which was delivered to Cherkos by Falkenstein, to which no response was made. Thereafter no further negotiations between the parties or their solicitors were had. Falkenstein got the settlement notes and they were paid. Gibson got the release of himself and wife, the discontinuance of the suit against himself and his wife and the notes upon which the suit was based.

The complainant contended and the learned Vice-Chancellor who heard the testimony and advised the decree appealed from, found that Gibson had agreed not to use the release in bar of this action and should be declared estopped and enjoined from using the release by reason of his agreement to that effect. From this decree the defendant appeals, urging that the general release is a complete bar to the present suit and that if it is not, the *status quo* should be restored and the settlement agreement should be rescinded and the consideration paid by Gibson to Falkenstein should be restored to Gibson and further that Falkenstein has an adequate remedy at law and that the Court of Chancery lacks jurisdiction to entertain the present suit.

#### POINT 1.

The general release dated September 8, 1928, executed and delivered by Falkenstein to Gibson is not a bar or defense to the present suit.

The learned Vice-Chancellor, who heard the testimony and advised the decree appealed from, found as a fact that Gibson had agreed not to use Falkenstein's release of himself and his wife in bar of Falkenstein's claim against him alone for the moneys collected on the Green notes. At the close of the hearing he said:

"I think that this settlement applies clearly and solely to the Plainfield note. It is perfectly clear to my mind that both parties understood that that was the settlement of those notes and had nothing whatever to do with the Green notes," (p. 86, ll.23-33) and "it is merely a question of fact and I have made my mind up as to the fact. I think that this settlement refers to the Plainfield notes;" (p. 87, ll. 11-14)

and in the recital in the decree appealed from:

“the general release delivered by the complainant to the defendant under date of September 8, 1928, was delivered upon the condition and with the reservation that it should not operate to release any claim that the complainant might have against the defendant on account of the money received by the defendant in settlement of the said action-at-law against Henry W. Green, and that the defendant should be estopped and enjoined from setting up said general release as a defense to this cause of action *by virtue of his agreement to that effect*” (p. 6, ll. 30 etc. to p. 7, l. 3). Italics ours.

It does not appear from either of these statements of his finding as of what time this understanding existed or this agreement was effected, that is, whether as of September 21, 1928, when Gibson's attorney represented to Falkenstein's attorney that Gibson had agreed, or as of some later date when, with knowledge of the facts, he accepted from his attorney the papers including the release which he knew he might not have unless he did so agree.

There is no direct evidence that Gibson did in fact on or about September 21, 1928, assent to the condition imposed by Falkenstein upon the delivery of the release. Such assent, if made, was communicated to this attorney, who did not testify. However Gibson's attorney was, by his own admission, employed by him to effect a settlement of the suit then pending and shortly to be tried in Union County, New Jersey, against himself and his wife (p. 86, ll. 1-12); and held himself out (p. 70, ll. 10-11) and was permitted by Gibson to hold himself out to Falkenstein and his attorney, Schneider, as having “full power to act on behalf of the defendant” (Exhibit D. 2, p. 94, ll. 17, 18). Gibson did not communicate

with either Falkenstein or Schneider (p. 68, ll. 9-14; p. 62, ll. 24-40). Any information Schneider or Falkenstein had as to the extent of or limitations upon Cherkos' authority in the matter came from Cherkos himself (p. 68, ll. 15, 16), whose written representation to them, known by Gibson to have been made (p. 86, l. 18 to p. 85, l. 24), was that "he had full power to act on behalf of" Gibson. Cherkos discussed with Gibson the terms and conditions upon which the settlement might be effected and particularly the fact that the settlement could not go through unless Gibson assented to a limitation upon the terms of the release. In this conference, Cherkos exhibited to Gibson and discussed with him the escrow receipt and agreement, introduced into evidence, and the substance of the letter of September 11, 1928, the receipt of which is acknowledged in the escrow receipt and agreement. We quote the testimony:

"Q What date did you first see Exhibit D. 2, this settlement agreement? A I have no recollection, Mr. Riker. It was some time during that period of September.

Q When you saw it did your attorney, Mr. Cherkos say anything about the question of whether or not you would receive a general release in form? A He told me there was some question about—I think he called it a modification, and I said, 'Sam, I don't know anything about it. What I want is a general and absolute release, or I don't want anything. I want my money back.'

Q Did you notice the marginal note here, the condition imposed subject to approval of client? A *Mr. Cherkos discussed that with me, Mr. Riker.* He said, 'Of course, if we can't get what we want then I will have to return the \$500 you gave me.'

Q This Exhibit D. 2, in paragraph 3, refers to a letter from Schneider. Did you ask to see that letter? A No. I left that en-

tirely in my lawyer's hands, sir. He was handling the situation.

Q Did you ask what that letter was? A He mentioned to me that there was a question about some modification of the general release.

Q Did you ask him what the letter said, which is referred to in Exhibit D. 2? A I did not read that in detail, sir.

Q You did not read it? A I did not read this in detail.

Q You merely looked at it and did not read it? A He showed it to me, the same as I saw it just now, and he told me what it contained.

The Court: Did he tell you what it contained?

The Witness: Yes, sir; he told me what it contained.

Q What did he say? A He told me there was a question about getting a general release. In the meantime there was no harm done, the whole matter was in escrow, and that, *if I could not get the general release, I was to get my money back*" (p. 84, l. 18 to p. 85, l. 24). Italics ours.

We respectfully submit from a reading of this testimony that Gibson knew that the consummation of the pending settlement depended upon his consenting to Falkenstein's reserving, notwithstanding the release, the right to proceed against him on some claim and knew or is chargeable with knowledge that it was the present claim which was being reserved and that his attorney might not deliver the release or other papers to him in the settlement unless Gibson did assent to Falkenstein's retaining, notwithstanding the release, the right to proceed against him on the present claim and in the absence of such assent, was obligated to return the papers to Falkenstein.

His attorney then told Schneider that Gibson had, with knowledge thereof, approved of the limitation imposed on the delivery of the release by the letter of September 11, 1928 (p. 66, l. 16 to p. 67, l. 18; Exhibit C. 3, p. 90, ll. 18-22). Thereafter the negotiations ceased and there was no further communication between the parties or their attorneys (p. 67, ll. 21-25).

Gibson, at present, denies such assent (p. 82, ll. 26-32), but the inference is unescapable that he knew that such assent would have to be made by him before his attorney could deliver the release to him (p. 84, l. 18 to p. 85, l. 33). His attorney was not produced to testify to the truth of the statement that he represented that Gibson had so assented and it is uncontradicted that Cherkos did tell Schneider that Gibson had assented (p. 66, l. 16 to p. 67, l. 18; Exhibit C. 3, p. 90, ll. 18-22). Nor was Gibson's attorney produced to testify as to whether his statement to Schneider that Gibson had assented was true or false.

Aside from the serious doubt which this fact situation casts upon the truth of Gibson's present denial of such assent, the representation made by his attorney whom he permitted to hold himself out as clothed in full power to act for him is binding upon him.

In the case of *O'Brien v. Paterson Brewing & Malting Co.* (69 N. J. E. 117), a suit was instituted by the maker of a note to restrain an action at law upon the note. It appeared that the note and a mortgage were given by O'Brien to the defendant. At the time of its delivery the agent who acted for the defendant said to O'Brien:

"You will never have to pay that note or mortgage."

The defendant offered testimony establishing the fact that its agent had no authority to make such a statement and argued that it was not bound thereby. The Court said at page 127:

“But the plain answer is that the defendant is suing on a contract procured by its agent by means of the very pledge in question and must therefore take the contract subject to the pledge. It cannot approbate and reprobate.”

Paraphrasing the language of the Court and applying it to the fact situation in the case at bar, the defendant is attempting to set up as a bar to this action, a release procured by his attorney for him by the very representation in question that he had agreed not to use it in bar of this action and must, therefore, take the release subject to his attorney's representation. He cannot approbate or reprobate; he cannot offer the release in bar of this action and thereby affirm the act by which his attorney got it for him and seek to avoid the effect of the act so affirmed.

Gibson now contends that when confronted with the escrow receipt and agreement and acquainted with its contents, he refused to assent to Falkenstein's reserving, notwithstanding the release, the right to proceed against him on the present claim (p. 84, ll. 22-30) and that he, at no time, assented thereto (p. 82, ll. 27-29). The outstanding fact is that he is in possession of (p. 84, ll. 13, 14) and has pleaded and introduced into evidence that very release, despite his knowledge that his attorney was obligated to return all documents to Falkenstein and not to deliver them to Gibson unless he did assent and that his attorney could not retain them for delivery to him without at least representing to Falkenstein

or Schneider that Gibson's assent had been secured.

With knowledge of the conditions upon which his attorney had the release, he neither himself notified Falkenstein or Schneider that he did not approve of the condition nor instructed his attorney either to do so or to return the papers to Falkenstein or Schneider, but accepted them and the benefits of the settlement effected by his attorney.

Both his failure promptly to repudiate any settlement not giving him an absolute release of all claims, unhampered and unencumbered by any condition annexed to the delivery thereof, by communicating or causing his attorney to communicate with Falkenstein or Gibson and return the release, the discontinuance and the notes, as well as his acceptance of the benefits of the settlement, made with full knowledge of the condition attached by Falkenstein thereto, make his attorney's representation binding upon him by his ratification thereof.

The situation involved in this case is quite similar to that involved in the case of *Lyle v. Addicks* (62 N. J. E. 123), in which there was involved an agreement for the settlement of the affairs of an insolvent corporation, which was drafted substantially in accordance with the terms of a letter giving an attorney authority to execute the agreement. As drafted, the agreement provided for interest on certain notes to be given in the settlement. The letter did not authorize the attorney to bind his principal to pay interest. The agreement was executed by the attorney with the understanding that if the principal repudiated that part of the agreement which obligated him to pay interest, the other

party would not insist upon it. The attorney informed his principal of the execution of the agreement. The principal questioned his attorney's authority to agree to certain other of the terms of settlement but made no objection to the interest item. The Court said at page 126:

"There does not appear to have been any direction by the defendant to Mr. Dickinson (his attorney) to notify the complainant of any objection and no objection to the release was communicated or made either by the defendant or by Mr. Dickinson to the complainant, or anyone on his behalf."

In the meantime the other party went ahead with his part of the agreement and tendered performance thereof. The suit was for specific performance and the defense was want of authority for the attorney to sign the agreement. The Court said at page 127:

"My conclusion is that the defendant's failure, upon his being informed within a few days by Mr. Dickinson of the execution of the agreement, to notify defendant of his repudiation, either of the entire agreement or of the interest clause, and his keeping silent upon his objection to the agreement on the score of want of authority, while action on his offer was pending, and while complainant was, to his knowledge, acting on the belief of the validity of the agreement, amounted to a sufficient subsequent ratification of the authority to sign the agreement. Defendant having obtained the benefit of the complainant's services, in relation to the acceptance of the offer, rendered under a belief that the agreement was executed with authority, is now estopped from repudiating it."

Similarly in the case of *Tooker v. Sloan* (30 N. J. E. 394), a mortgagee sought to avoid the effect of a release of a part of the mortgaged premises from the lien of her mortgage, executed by an attorney-in-fact who had authority from

her only to accept the principal and interest due on the mortgage. After executing and delivering the release, the attorney in fact sent her the \$500.00 consideration paid for the release and although she was dissatisfied with the act of her attorney in releasing a portion of the mortgaged premises, she retained the \$500.00 with knowledge of what it was paid for. The Court said at page 403:

“She ought, if she had intended to repudiate the act of her agent, to have done so as soon as it came to her knowledge. She did not do so, but, on the contrary, received and retained, with full knowledge of the facts, the consideration of the release, and it was not until after she returned from Europe that any dissatisfaction was expressed in regard to it and on October 9, 1875, about ten months after the release was given, she allowed the consideration money of the release in her agent’s account. She has acquiesced in her agent’s action in giving the release, and she cannot now be permitted to repudiate it to the damage of the purchaser or the mortgagee, the former of whom, in reliance upon it, has made expenditures upon the property, and the latter, in like confidence, has loaned her money on the security of the premises.”

Similarly Gibson, if he intended not to comply with Falkenstein’s condition, should have instructed his attorney to return to Falkenstein the release and discontinuance and the notes. He did not do so. On the contrary, he received and retained the release and discontinuance and the notes, with full knowledge of the fact that his attorney could not give them to him without at least representing to Falkenstein that his approval of the reservation had been secured. He acquiesced in his attorney’s action in representing that he had consented and should not now

be permitted to repudiate his attorney's action to the damage of Falkenstein, who, in reliance upon his attorney's action, made no effort to secure the return to him of the release and discontinuance of the earlier litigation and the notes upon which it was based.

Turning now to the argument advanced by the defendant-appellant, attention is respectfully directed to the fact that in several places in his brief, the defendant-appellant refers to the release as admittedly executed and to Falkenstein as having admitted the execution thereof (pp. 4, 5 and 6 of Brief for Appellant). Insofar as the "executed" imports "signed, sealed *and delivered*," Falkenstein's testimony does not justify the use of the term "executed" with reference to it. On the contrary, he testified as follows:

"Q And in September, 1928, you executed a general release, didn't you, to Mr. Gibson (handing witness paper) is that your signature? A This is my signature all right" p. 56, ll. 36-40).

Insofar as the "executed" imports also delivery, the testimony is that the release is admittedly signed and sealed by Falkenstein but its delivery is not admitted except as qualified by the testimony in the case.

With this exception, the inferences drawn from the testimony as contained on pages 4 to 10 of the defendant-appellant's brief, are substantially accurate and may be summarized as follows: The general release delivered by the plaintiff to the defendant's attorney under date of September 8, 1928 was so delivered upon the condition and with the reservation that it should not operate to release any claim which the plaintiff might have against the defendant on account of the money

received by the defendant on the settlement of the action at law against Henry W. Green. The defendant's attorney did not know and Falkenstein and Schneider knew that he did not know whether Cherkos could accept such a condition, his instructions having been to secure a release general in form. Gibson's attorney agreed, however, to take the matter up with Gibson, advise him of the terms upon which the release was delivered and if Gibson did not approve of settlement on such terms, return the release together with the other papers delivered to him in escrow.

Of course, it was important, from Falkenstein's standpoint, that Gibson's consent to the settlement on Falkenstein's terms be secured. An attempt is made to minimize the effect of Schneider's testimony as to the conversation with Cherkos, subsequent to the delivery of the release, in which Cherkos stated as a fact that Gibson, advised of Falkenstein's terms, had approved of them by attempting to impute carelessness and indifference to Schneider. The defendant-appellant at page 10 of his brief says:

"It seems that nothing was done from September 12, 1928 (the date when the general release was delivered) until September 21, 1928."

This statement is not justified by the evidence. On the contrary, Schneider, quite alive to the necessity of securing Gibson's consent and of getting Falkenstein's papers back from Cherkos, if that consent was not secured, telephoned Cherkos at frequent intervals between September 12th and September 21st, inquiring about the matter (p. 66, ll. 13-17; p. 74, l. 30, to p. 75, l. 2) and, on September 21st, learning in response to the last of several inquiries, that Gibson had

consented (p. 66, ll. 21-28), made a memorandum of this conversation (p. 66, ll. 28-32) and embodied the substance of it in a letter addressed to Cherkos (p. 66, l. 32, to p. 67, l. 14), delivered by him to Falkenstein (p. 75, ll. 31-35) and by Falkenstein delivered to Cherkos on the same day (p. 78, ll. 15-29). This testimony is uncontradicted. No response was made by Cherkos to Schneider's letter (p. 67, ll. 20-25; p. 76, ll. 36, 37). The carelessness and indifference, if any, were on the part of Cherkos in not repudiating if it was untrue in any particular, the statement to him by Schneider in this letter as to Schneider's understanding of their conversation.

Schneider admits, of course, that it would have been advisable and even "best" to have secured Gibson's written consent not to employ Falkenstein's release as he is now attempting to employ it (p. 77, ll. 17-20), but his failure to do so, justified by the fact that he was dealing with Gibson's recognized representative and had been dealing with him for many days in the compromise of the then pending suit, does not at all impeach his present and uncontradicted testimony that Cherkos represented to him that Gibson did assent. It is further uncontradicted that absolute reliance was placed by him in Cherkos' statement that Gibson's assent had been secured. He testified as follows:

"Q Did Mr. Falkenstein take Mr. Cherkos' word that Gibson had consented to the condition? A I don't know whether Falkenstein did. I took Mr. Cherkos' word received over the telephone and then confirmed it by the communication of the 21st of September.

Q Did you ever receive any reply to this communication? A No, sir" (p. 76, ll. 30-37).

As to the failure of the parties to insert the proposed limitation in the release, it appears that a release containing a reservation of Falkenstein's right on the Green notes was in fact prepared and tendered in the course of the negotiations (p. 65, ll. 21-23). Falkenstein refused to give up his claims on the Green notes and Gibson insisted upon a release general in form "but did not object to have some supplemental writings" (p. 77, ll. 24, 25).

Attention is called to the fact that the defendant-appellant in his brief (p. 12) quotes Schneider's testimony as follows:

"Q Didn't you think it would have been advisable to have Gibson signify his consent by some letter or some writing of this reservation? Do you understand me? A It would have been best, but the tenor of the conversation—series of conversations had with Mr. Cherkos indicated that Gibson apparently was determined, for some reason not made to me, to receive a release, general in form."

If this were a complete quotation, it would justify the inference sought to be drawn from it that Schneider's reason for not inserting Falkenstein's reservation in the release itself does not appear to be either logical or sensible. It happens, however, that at this point the defendant-appellant's solicitor interposed an "I see," interrupting the witness, after which the witness continued with his testimony as follows:

"Q I see. A But did not object to have some supplemental writings" (p. 77, ll. 24, 25).

The partial quotation of Schneider's testimony contained in the defendant-appellant's brief, at the place mentioned, is not a fair statement even of that portion of the witness' testimony which

is quoted much less all of his testimony on this point. At other places in his examination he testified as follows:

“Prior to the delivery and execution of the agreement of December 12th, Mr. Cherkos and I had been in communication and in conference for several days; Mr. Cherkos then suggested, or perhaps I suggested to Mr. Cherkos, that we could perhaps solve the problem by giving to Mr. Gibson a release, general in *form*, as had been insisted upon by Mr. Cherkos, but that reference would have to be made by separate instrument, simultaneously delivered and executed, to the effect that there had been between the parties the conditional limitation in the release.” (Italics ours.) (P. 65, ll. 28-40.)

Again

“Q What was said? A Mr. Falkenstein stated to me and to Mr. Cherkos, too, in the course of our conversation, that he had this claim against Green.

Q Yes. A And that he sought to reserve his right to sue Mr. Gibson on the Green claim. Mr. Cherkos stated that he had been instructed to receive a release in general *form*. He stated he knew about an existing claim that had been made by Mr. Falkenstein against Mr. Gibson on the Green note, but that, nevertheless, Mr. Gibson wanted to have the release in general *form*. I insisted that we would have to evidence the reservation in some form in writing and Mr. Cherkos, in turn, assented to the suggestion that I made that the release be drawn in blank form. It is my recollection the release had been drawn, previously, and it is my belief that it had been drawn either by Jersey counsel representing Mr. Gibson or by Cherkos. I don't believe I had anything to do with the release. That is borne out by the fact the release is dated on the 8th of September and the agreement is dated the 12th. The letter of the 11th, to which reference is

made in the agreement of the 12th, and which, in turn makes reference to the Green notes, was part and parcel of a series of negotiations, which culminated in the agreement of the 12th." (Italics ours.) (P. 68, l. 35 to p. 69, l. 24.)

Again

"Q Why wasn't this reservation that you claim was insisted upon put right into the release itself? A The only reason that I can ascribe is the insistence, of Mr. Cherkos in quoting Mr. Gibson that the release be general in *form*. My desire was to settle the matter rather than to protract it any further. We had been negotiating for about four days and I yielded on the point that the general release be general in *form*, provided some reference was made, simultaneously in the agreement, to which I have made reference." (Italics ours.) (P. 70, ll. 16-27.)

At another place

"—the dispute \* \* \* arose, apparently, solely as to the *form* of the release, in other words, my recollection of the conversation was that Cherkos said that Mr. Gibson wanted a release, general in *form*. It was purely his insistence that compelled me, ultimately, to agree to give a release to permit Mr. Falkenstein to sign the release, general in *form*, but in turn I said, 'We must have some other reference simultaneously executed which will clearly indicate that Mr. Falkenstein did not yield up his claim against Mr. Gibson on the Green notes, and, apparently, *the question related solely to the fact whether or not Mr. Gibson wanted to have any reference made in writing to it.* The question solely related to whether or not it was wise or advisable to reduce to writing the reference to the insistence of a claim. (Italics ours.) (P. 74, ll. 4-26.)

The substance of Schneider's testimony is that Cherkos was insisting that Gibson was insisting

upon a release general in form but conceded the possibility of securing a collateral agreement reserving Falkenstein's right to proceed on the claim sought to be enforced in the present suit.

With a complete reading of the testimony offered by the complainant's witness Schneider, both on direct and on cross examination, as to why the limitation was not embodied in the general release, it is not unaccountable, as the defendant-appellant would have it, that the reservation from the release was not embodied therein.

An attempt is made in the defendant-appellant's argument on this point to exhibit Gibson as the innocent victim of his own attorney's double dealing. At page 13 of the defendant-appellant's brief the following appears:

"Was Gibson imposed upon? Were his rights properly protected? Did Gibson really consent to the pretended reservation? Was he apprised fully and fairly of everything taking place?"

In support of an affirmative answer to these questions, the testimony is then referred to as establishing that Gibson now denies ever having authorized his attorney to accept any but a general and unqualified release of all of Falkenstein's claims and ever having assented to Falkenstein's reserving the present one.

The defendant-appellant counter-claimed, asking for a rescission of the settlement agreement (p. 37, l. 12 to p. 39, l. 24) and tendered to return to Falkenstein all papers and documents secured by *him* in the settlement (p. 38, ll. 30-40). The defendant-appellant made as one of his grounds of appeal in his petition of appeal, that the relief prayed for in the counter-claim should have been granted (p. 3, ll. 33, 34). At the end of the defendant-appellant's statement of the case, the

defendant-appellant urges that if the release is held not to be a bar to the present suit, the *status quo* should be restored, the settlement agreement rescinded and the consideration paid by Gibson to Falkenstein ordered repaid (p. 4 of Brief for Appellant). Lest it appear by silence that this point is ignored, although the defendant-appellant does not argue it except by inference, we respectfully call the Court's attention to the fact that any argument in favor thereof would be predicated upon an admission of Cherkos' representation to Schneider that Gibson had agreed not to use the release in bar of this action and a contention that Cherkos was not authorized to make such a representation and *imposed upon and did not properly represent Gibson in making it*, and, further, in view of Gibson's admitted knowledge of the condition Falkenstein imposed, that Cherkos continued to deal fraudulently with the matter entrusted to him by further representing to Gibson, when delivering the release to him, that Falkenstein had waived the reservation made. There is an utter lack of proof of such a situation or of facts from which such a situation might be inferred, with the single exception of Gibson's present denial of ever having assented to the condition imposed by Falkenstein—a denial inconsistent with his present possession of the release.

Further, although the complainant-respondent denied the defendant-appellant's ability to make good his tender and restore the parties to the *status quo* (p. 45, ll. 6-12), the defendant's case was closed without any proof whatsoever of Gibson's present ability to make good his tender. From the testimony in the case, it appears at least improbable that the defendant could have restored the status enjoyed by the parties prior to the settlement agreement.

Herman Falkenstein, Inc., had then pending and shortly to be tried in the New Jersey Supreme Court, Union County, an action at law against Gibson and Gibson's wife on notes made or endorsed by them. In the settlement, the notes upon which this suit was brought, were surrendered, not to Gibson but to an attorney representing not Gibson alone but Gibson and Gibson's wife. The suit against not Gibson alone but against Gibson and Gibson's wife was discontinued and a release not of Gibson alone but of Gibson and Gibson's wife was given. To restore the *status quo*, it would be necessary that Gibson and Gibson's wife return to Falkenstein, the notes on which the earlier suit was based; it would be necessary that the suit against Gibson and Gibson's wife be revived and that the release of Gibson and his wife be returned to Falkenstein and Herman Falkenstein, Inc., with the consent of Mrs. Gibson. It is to be noted that Mrs. Gibson did not join in the tender nor was a tender made by Gibson to return to Falkenstein anything but what Gibson alone got in the settlement, nor though issue was joined denying the defendant-appellant's ability to restore to the parties their *status quo*, was any evidence introduced manifesting Mrs. Gibson's willingness to give up such rights as she may have acquired under the settlement sought to be rescinded.

The case made out by the defendant-appellant shows neither grounds for a rescission nor any tender or possibility of a tender which would justify a rescission.

It is the fact, of course, as urged by the defendant-appellant, that Gibson now denies ever having authorized Cherkos to accept anything but a general and absolute release without limitation and qualification and that he never as-

sented to the reservation made by Falkenstein. Human nature being what it is, he could hardly be expected to do anything else; he presented no other defense to the complainant's action. It is conceded also that the burden is upon Falkenstein to show that Gibson was apprised that he could not have the release unless he agreed not to use it in bar of this action, and having been so apprised, he did so agree, but it is respectfully submitted that that burden has been sustained by Falkenstein. Reference is made to the main argument on this point at pages 7-16 of this brief.

The failure of Gibson's attorney or Falkenstein's attorney to obtain Gibson's consent in writing is no evidence at all that Gibson had not been apprised of the reservation, particularly in view of his admission that he *did* know of it (p. 82, ll. 8-10; p. 84, l. 18; p. 85, l. 24), nor is it evidence that he did not approve of it, in view of his present possession of the release, notwithstanding his knowledge that he could not have it without such consent.

Further, we take a different view of the significance to be attached to the fact that the release was from Herman Falkenstein, Inc., and Herman Falkenstein, individually, to Gibson and Gibson's wife. The defendant's contention is that the suit in Union County being by Herman Falkenstein, Inc., and not by Herman Falkenstein, individually, it may be inferred that Falkenstein's personal joinder in the release was intended to bar all of his personal claims against Gibson, without which it would be unnecessary that he join in such a release. It is not the complainant-respondent's contention that the parties intended by the release "to release the Gibsons only from the subject matter of the suit in the

Union County Circuit Court'' (p. 17, Brief for Appellant). It is the complainant-respondent's contention that the parties intended thereby to release both of the Gibson's from all claims of Falkenstein and his corporation against either of them excepting the one asserted by Falkenstein individually against Gibson alone in the present suit. It is equally inferable from a reading of the release, together with the testimony, that Herman Falkenstein's individual joinder in the release had as its purpose, the disposition of all of his personal claims against Gibson *and against Gibson's wife*, except only the present claim against Gibson.

As to Cherkos' authority to bind Gibson, is sufficient to refer to the main argument and to reiterate what is there stated that any knowledge that Falkenstein or Schneider had as to limitations upon Cherkos' authority came not from Gibson but from Cherkos himself, whose representations to them were that Gibson wanted a release, general in form, but would probably not object to supplemental writings reserving Falkenstein's present claim and that he had full power to act on behalf of Gibson, which last representation was known by Gibson to have been made.

It is conceded to be the law as contended by the defendant-appellant that an attorney, by mere virtue of his being retained, may not either waive a substantial right of his client or bind his client by contract, without express additional authority or subsequent ratification. But it cannot successfully be contended that Cherkos did waive any substantial right of his client in the sense which the term is used in any of the cases cited by the defendant-appellant. In the case of *Terhune v. Colton* (10 N. J. E. 21), a

solicitor agreed that the proceeds of the sale of mortgaged premises under the decree of the Court of Chancery, be so distributed after sale that his client, who was by the decree first in priority, be paid last. The case of *Decker v. Hodges* (42 N. J. E. 45) was a case involving the propriety of a disclaimer, signed only by the solicitor of a party made defendant in a mortgage foreclosure suit by virtue of an attachment against the owner of the premises. *Trenton Street Railway Co. v. Lawler* (74 N. J. E. 828) is a case in which an attorney for the railway company agreed to pay \$1,850.00 in settlement of a claim against it. *Faughnan v. City of Elizabeth* (58 N. J. L. 309) involves a warrant for satisfaction of a judgment executed by an attorney upon payment of less than what there was due thereon.

It is respectfully submitted that Cherkos did not waive any existing and substantial right of his client—that all he did was to fail to secure for his client a defense against the assertion by Falkenstein, of a right of action against him and that his failure to do so and his settlement of the then pending litigation without doing so, was either expressly authorized by Gibson despite his present denial or was ratified by him by his failing, after knowledge thereof to repudiate the settlement and his subsequent acceptance of the benefits thereof.

We respectfully submit, therefore, that the general release, dated September 8, 1928, is not a bar to the present suit and that the decree of this Court advised by the learned Vice-Chancellor who heard the testimony, that Gibson is estopped and should be enjoined from pleading the release in bar of this action or introducing it in evidence, is correct and should be affirmed.

**POINT 2.**

The admission in evidence over the objection of the defendant of the complainant's Exhibit C. 3 is not reversible error.

The admission of a self serving declaration in evidence is not an error, if, in the language of the New Jersey Supreme Court in the case of *Duysters v. Crawford* (69 N. J. L. 614-616) "it constitutes a part of the *res gestae*." The evidence is that on the day of the telephone conversation referred to in said exhibit, said exhibit was written and delivered by Mr. Schneider to Falkenstein, who delivered it to Cherkos, to whom it was addressed, immediately after the conversation therein referred to and with no opportunity for any afterthought (p. 66, ll. 32-37; p. 75, ll. 30-37; p. 76, ll. 7-10; p. 78, ll. 15-24; p. 79, l. 21).

The letter merely corroborates what Schneider previously stated in his testimony that Cherkos told him in a conversation immediately prior to the writing of the letter that Gibson had been apprised of and had agreed to Falkenstein's reserving, notwithstanding the release, the right to sue on the cause of action involved in the present suit. Being corroboration only of a fact Schneider testified to fully, without objection or contradiction, that Cherkos had stated to Schneider that Gibson had so assented, its admission into evidence does not injure the defendant; nor would its exclusion have resulted in any determination other than the one arrived at by the learned Vice-Chancellor who heard the testimony and advised the decree appealed from.

The letter, in other words, is evidence not of Gibson's assent nor direct evidence of Cherkos's representation to Schneider with relation there-

to, but is evidence of notice to Cherkos that Schneider had been told by him that Gibson had assented. It proves by its delivery to Cherkos that Cherkos knew that Schneider believed and was relying upon his statement that Gibson had assented. It is proper evidence to charge Cherkos, Gibson's recognized attorney, with knowledge of Schneider's understanding of and reliance upon their conversation.

### POINT 3.

**The complainant has no adequate remedy at law.**

Independently of the need of injunctive relief against the use of the general release in bar of this action, anticipated in the complainant's amended bill of complaint, the amended bill of complaint presents and the complainant-respondent's proofs exhibit a case cognizable in the Court of Chancery.

Continuing the quotation from 31 Cyc. (p. 1609) commenced in the defendant-appellant's brief (p. 22) the rule applicable to this class of cases is as follows:

"But a suit in equity for an accounting may be maintained by a principal against his agent, where the agency is so fiduciary in its nature as to constitute the agent a trustee or quasi-trustee for the principal, or where equitable discovery is asked and is material to and inseparably connected with the relief sought, the facts relating to the execution of the agency being peculiarly within the knowledge of the agent, and not at the command of the principal."

To the same effect Pomeroy, Equity Jurisprudence, Section 1421n, says:

"When the relation is such that a confidence is reposed by the principal in his

agent and the matters for which an account is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction."

It should be noted that an agency for the collection of accounts has been held to be fiduciary in its character. *Pickett v. Pickett* (17 Vt. 470)—a statement of law not at all weakened in its force by the case of *Franklin v. Crane* (80 N. J. E. 509), cited by the defendant-appellant at page 21 of the brief submitted by him, in which the relief sought (that money collected by but not paid over by a township collector be accounted for) was denied upon the ground that a public office and the duties of the public officer do not rest upon contract and therefore do not give rise to such a trust as equity will enforce. The Court said at page 512:

"The trusts which equity will enforce are mainly expressed or implied in law, exhibited generally in writings or verbal only, except so far as forbidden by the statute."

It is respectfully submitted that the relations between the complainant and defendant having arisen out of contract, the doctrine of the case cited is not applicable.

The relation between Gibson and Falkenstein was such that a confidence was reposed by Falkenstein in Gibson (p. 52, ll. 4-14); that confidence was abused and Falkenstein had no knowledge or means of ascertaining the terms upon which Gibson settled with Green, the amount paid by Green, the amount paid by Gibson to his attorneys for legal fees and the amount received from them by Gibson. These matters were all within Gibson's knowledge. We respectfully submit, therefore, that the Court of Chancery has jurisdiction to grant to the complainant-respondent the relief prayed for.

The mere fact that the courts of law have by statute adopted equitable remedies such as interrogatories, examination before trial and other proceedings for discovery, does not deprive the courts of equity of jurisdiction in matters of account (*Bellingham v. Palmer*, 54 N. J. E. 136, 141).

In addition thereto, it is obvious that the complainant-respondent would be unable to secure in a court of law the injunctive relief prayed for against the use of the general release by the defendant-appellant in bar of his action and having taken jurisdiction to grant the complainant that relief, equity's jurisdiction to retain the cause to dispose of the whole dispute, even to the point of making a decree for the payment of money, is also clear (*Melick v. Cross*, 62 N. J. E. 545, 562).

#### CONCLUSION.

It is respectfully submitted that the decree of the Court of Chancery is correct and that the same should be affirmed.

RIKER & RIKER,  
Solicitors for Respondent.

IRVING RIKER,  
ROBERT W. BRADY,  
Of Counsel.

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