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Notice of Appeal.

In Chancery of New Jersey.

Between
WILLIAM FREILE, et al.
Complainants,
and
JOSEPH H. RUDIGER, et als.,
Defendants.

On Bill, &c.

10

To
Randolph Perkins, Esq.,
Solicitor of Complainants,
and
John Milton, Esq.,
Solicitor for Defendant, Joseph H. Rudiger.

20

TAKE NOTICE that the defendants Henry A. Oetjen and Solomon M. Schatzkin do hereby appeal to the New Jersey Court of Errors and Appeals in the last resort in all causes from the whole and every part of the final decree made in above entitled cause on the eighteenth day of February, 1918.

30

Respectfully yours,
McDERMOTT & ENRIGHT,
Solicitors of Defendants, Henry A.
Oetjen and Solomon M. Schatzkin.

40

I conceive there is good cause for appeal from the above stated decree.

JAMES A. CARPENTER,
Of Counsel.

Petition of Appeal.

(Served May 6, 1918.)

10 NEW JERSEY COURT OF ERRORS AND APPEALS.

	Between		} On Bill, &c. On Appeal.
	WILLIAM FREILE, et al.		
	<i>Complainants,</i>		
	<i>and</i>		
	JOSEPH H. RUDIGER, et als.,		
20	<i>Defendants.</i>		

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

The petition of Solomon M. Schatzkin and Henry A. Oetjen, defendants in the above entitled cause, respectfully shows :

30 That your petitioners find themselves aggrieved by a certain final decree made in the above entitled cause under date of February 18th, 1918, wherein and whereby the Chancellor doth adjudge that your petitioners are not entitled to the relief sought and prayed for in the cross-bill filed by them in above cause, and that said cross-bill be dismissed, and each and every part of said decree.

And your petitioners humbly appeal from the portion of the decree which does adjudge that a

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Petition of Appeal.

writ of injunction issue out of and under the seal of the Court of Chancery directed to petitioner Henry A. Oetjen, permanently enjoining and restraining him from proceeding with a certain suit in the New Jersey Supreme Court against the complainants.

And your petitioners humbly appeal from each and every part of said decree upon the ground that the same is erroneous and contrary to the evidence in the cause, inequitable and contrary to law. 10

Your petitioners therefore pray that the said decree of the Chancellor may be reversed, set aside and for nothing holden, and that your petitioners may have such further relief in the premises as to this Court shall seem meet.

McDERMOTT & ENRIGHT, 20
Solicitors for and of Counsel with
Defendants, Solomon M. Schatz-
kin and Henry A. Oetjen.

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Notice of Appeal.

(Served May 1, 1918.)

IN CHANCERY OF NEW JERSEY.

	Between	}	
	WILLIAM FREILE, et al.		
10	<i>Complainants,</i>		} On Bill, &c.
	<i>and</i>		
	JOSEPH H. RUDIGER, et als.,		
	<i>Defendants.</i>		

To

Randolph Perkins,
Solicitor of Complainants,

and

20

McDermott & Enright,
Solicitors for Defendants Henry A. Oetjen and
Solomon M. Schatzkin.

TAKE NOTICE that the defendant, Joseph H. Rudiger, hereby appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes from the whole and every part of the final decree made in the above entitled cause on the eighteenth day of February, nineteen hundred and eighteen.

30

Respectfully yours,

TREACY & MILTON,
Solicitors of Defendant Joseph H.
Rudiger.

JOHN MILTON,
Of Counsel.

Petition of Appeal.**NEW JERSEY COURT OF ERRORS AND APPEALS.**

<p style="text-align: center;">Between</p> <p style="text-align: center;">WILLIAM FREILE, et al.</p> <p style="text-align: center;"><i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">JOSEPH H. RUDIGER, et als.,</p> <p style="text-align: center;"><i>Defendants.</i></p>	}	<p>On Bill, &c. On Appeal.</p>	<p>10</p>
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To the Honorable Court of Errors and Appeals
in the last resort in all causes :

Petition of Joseph H. Rudiger, an appellant in
the above stated cause, respectfully shows :

That your 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 18th
day of February, 1918, wherein and whereby the
Chancellor doth adjudge that your petitioner is
not entitled to the relief sought and prayed for in
the cross-bill filed by him in the above cause, and
that the complainants, William Freile, P. Edward
Wisch and Anthony Michel are not liable on said
notes to the defendants Joseph H. Rudiger, Solo-
mon M. Schatzkin or Henry A. Oetjen or any or
either of them, and that a writ of injunction issue
out of and under the seal of this Court directed
to said Henry A. Oetjen perpetually enjoining and
restraining him from proceeding in said suit in
the New Jersey Supreme Court.

And your petitioner humbly appeals from that
part of the decree of the Chancellor which decrees

as aforesaid and from each and every part of said decree on the ground that the same is erroneous and contrary to the evidence, inequitable and contrary to law.

Your petitioner therefore prays that the said decree of the said Chancellor may be reversed, set aside and for nothing holden, and that your petitioner may have such further relief in the premises as to this Court shall deem meet.

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TREACY & MILTON,
Solicitors of Appellant.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

	Between	
	WILLIAM FREILE, et al.	
20	<i>Complainants-Respondents,</i>	}
	and	
	JOSEPH H. RUDIGER, et als.,	
	<i>Defendants-Appellants.</i>	On Bill, &c. On Appeal.

30 The answer of the complainants, William Freile, P. Edward Wisch and Anthony Michel, respondent to the petition of appeal of the above named defendants, Henry A. Oetjen, Solomon Schatzkin and Joseph H. Rudiger, appellants.

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are stated to be true, for answer thereto, nevertheless, say and admit that a final decree was made by the Court of Chancery of New Jersey by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 18th day

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of February, 1918, wherein the said William Freile et als. were complainants and said Joseph H. Rudiger et als. were defendants in the cause for that purpose mentioned in said petition as therein stated.

But as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said decree is agreeable to equity and they pray that the same may be affirmed with costs to be adjudged to these respondents. 10

RANDOLPH PERKINS,
Solicitor of Complainants-Respondents
of Counsel.

Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

To HIS HONOR, EDWIN ROBERT WALKER, Chancellor of the State of New Jersey: 20

Humbly complaining your orators, William Freile and Anthony Michel, both of the City of Jersey City, County of Hudson, and P. Edward Wisch, of the City of Plainfield, County of Union and State of New Jersey, respectfully shows:

1. That on October twenty-seventh, Nineteen hundred and thirteen, and for some time prior thereto, your orator, P. Edward Wisch, was President, and your orator Anthony Michel was Treasurer of a corporation of the State of New Jersey known as the Orpheum Amusement Company. Said Orpheum Amusement Company occupied a certain building in Jersey City owned by Phoenix Realty Company, of which the defendant, Solomon M. Schatzkin, was owner of practically all the stock and was in virtual control and management of said corporation. 30

Bill of Complaint.

2. That the Orpheum Amusement Company was in failing circumstances, and on the said twenty-seventh day of October, Nineteen hundred and thirteen, was insolvent and owed to the Phoenix Realty Company about the sum of Eighteen Hundred Dollars (\$1800) for rent, which it was unable to pay.

10 3. That the defendant, Joseph H. Rudiger, was on said last mentioned date a stockholder and largely interested in said Orpheum Amusement Company.

20 4. That your orators, Anthony Michel and P. Edward Wisch, on or about the last mentioned date called upon said Solomon M. Schatzkin and stated to him that the Orpheum Amusement Company was unable to pay its rent and would have to close the theatre building occupied by it as the tenant of the Phoenix Realty Company, unless the Phoenix Realty Company would permit the Orpheum Amusement Company to continue to occupy premises for a time without payment of rent.

30 5. That thereupon said Schatzkin informed your orators, Michel and Wisch, that he was endeavoring to sell the theatre building owned by Phoenix Realty Company, and that it would be disastrous to him and in all probability prevent a sale if the theatre was closed. He further informed your orators, Michel and Wisch, that the person to whom he was endeavoring to sell the theatre was one Albanesius, who was nominal President of the Phoenix Realty Company, and that if said Albanesius knew that the Orpheum Amusement Company was unable to pay its rent and was in failing circumstances that it in all probability would prevent a sale of said theatre building to him.

40 6. Said Schatzkin thereupon stated to your

Bill of Complaint.

orators, Michel and Wisch, that if the Orpheum Amusement Company would make and deliver to him a note for Twenty-five hundred Dollars (\$2500), he, the said Schatzkin, would advance the sum of the said Twenty-five hundred dollars (\$2500) to the Orpheum Amusement Company, to be used by the said Orpheum Amusement Company in the payment of its rent, and requested that said note be made payable to the defendant, Joseph H. Rudiger; and further requested your orators, Michel and Wisch, to endorse the note for the accommodation of said Schatzkin, who would be thereby enabled to discount said note with the endorsement of Joseph H. Rudiger and your orators, Michel and Wisch. 10

7. Your orators further show that said Schatzkin thereupon agreed with your orators that they would not be held liable to the payment of said note, and that their endorsements on said note were solely for the accommodation of said Schatzkin. 20

8. Your orators further show that thereupon and in accordance with said agreement the Orpheum Amusement Company made its note bearing date Jersey City, October twenty-seventh, Nineteen hundred and thirteen, payable three months after date at the Merchants National Bank of Jersey City to the order of Joseph H. Rudiger for Twenty-five hundred Dollars (\$2500), and that thereupon said Joseph H. Rudiger endorsed said note; that thereafter your orator, Anthony Michel, endorsed the note under the name of said Joseph H. Rudiger, and that thereafter your orator, P. Edward Wisch, endorsed his name under that of Anthony Michel; that said note was thereupon delivered to said Joseph H. Rudiger for delivery by him to said Schatzkin, it being understood and 40

Bill of Complaint.

agreed by and between said Schatzkin and all of the endorsers on said note that the endorsements were solely for the accommodation of said Schatzkin, and not for the accommodation of said Orpheum Amusement Company.

9. Your orators further show that thereafter said note was presented to your orator, William
10 Freile, by a representative of said Joseph H. Rudiger and Solomon M. Schatzkin, who requested your orator, Freile, to endorse said note for the accommodation of said Schatzkin; that your orator, Freile, at first refused to endorse said note, stating that he had had no interest in the Orpheum Amusement Company for upwards of a year. Thereupon said representative urged your orator, Freile, to endorse said note, and expressly
20 stated to him that the endorsement was for the accommodation of said Schatzkin and that there would be no liability whatever on the part of said Freile if he would endorse said note. Thereupon your orator, Freile, endorsed said note under the name of Anthony Michel, and he alleges that the endorsement was solely for the accommodation of said Schatzkin.

10. Your orators further show that said Schatzkin advanced to the Orpheum Amusement Company on said note the sum of Twenty-five hundred
30 Dollars (\$2500), a portion of which was paid to the Phoenix Realty Company by the Orpheum Amusement Company for arrears of rent on said theatre.

11. Your orators further show that after the maturity of said note the said Solomon M. Schatzkin possessed and owned said note, and that said note was afterwards delivered by said Schatzkin to Joseph H. Rudiger, who retained possession
40 thereof, and afterwards delivered possession to

Bill of Complaint.

Henry A. Oetjen, who instituted suit thereon in the New Jersey Supreme Court against your orators.

12. That said Oetjen in his complaint filed in said suit alleges that on the day the said note fell due, it was presented for payment at the place where it was payable and that it was dishonored and duly protested, and that on the twenty-eighth day of April, Nineteen hundred and fourteen, said Schatzkin by instrument in writing, under his hand and seal, duly sold, assigned, transferred and set forth said note and all sums due thereon to the plaintiff. 10

13. Your orators further show that the defendant, Henry A. Oetjen, is or was a clerk in the office of the attorneys of said Joseph H. Rudiger; that he does not hold said note for value, or for any valuable consideration, but is a mere dummy, acting either for said Schatzkin, or for said Rudiger. 20

14. Your orators further show that after the maturity of said note the said Schatzkin transferred the same to said Joseph H. Rudiger, and that while the same was in possession of said Joseph H. Rudiger, said Rudiger altered said note by writing under his name endorsed on the back of said note the words "without recourse"; that said alteration was either made by said Rudiger while he was the holder of said note, or by him as the agent with the authority of said Schatzkin while he was the holder of said note. 30

15. Your orators further show that although said note was endorsed by your orators, under the circumstances herein above set forth and solely for the accommodation of said Schatzkin, that said Schatzkin and said Rudiger have entered into an arrangement with one another in by which they are 40

Bill of Complaint.

endeavoring to collect from your orators, by means of said suit instituted by said dummy Oetjen, the full amount of said interest and protest fees.

10 16. Your orators further show that said Oetjen pretends to hold title to said note by assignment from said Schatzkin, but the truth is that said Schatzkin transferred said note over to said Joseph H. Rudiger, and that said Rudiger, after altering said note by writing under his endorsement "without recourse", delivered the same to his attorneys for collection against your orators, and that afterwards the attorneys of said Rudiger caused a paper writing in the form of an assignment to be signed by said Schatzkin, in and by which said Schatzkin pretended to transfer title of said note to said Oetjen, but that the fact is that at the time 20 the said Schatzkin signed said assignment he had no right, title or interest in said note, but that the same was in the possession and under the control and held by said Joseph Rudiger without value.

30 17. Your orators further show that the effect of the alteration of said note was to release them from any liability thereon and to cancel said note, but that the said Schatzkin and Rudiger now pretend that said Schatzkin was the owner of said note at the time the alteration was made, and that said alteration was made by said Rudiger without the knowledge or consent of said Schatzkin, and that title of said note passed immediately from said Schatzkin to said Oetjen, and that at no time was said Rudiger the owner of or holder of said note.

40 18. Your orators further show that said defendants, Schatzkin, Rudiger and Oetjen, are endeavoring to work a fraud upon your orators and collect said note with interest from your orators

Bill of Complaint.

for the benefit of said Rudiger, who your orators charge is the beneficial owner of said note. That discovery of the facts is necessary and material to enable your orators to prove the facts upon which relief is prayed.

19. In consideration of the premises and to the end that the said defendants may full, true and perfect answer make (without oath, the oath being waived) to all and singular the matters aforesaid as fully and particularly as if the same were again here repeated, and they severally particularly interrogated thereunto, and that they may set forth and disclose for whose benefit the said suit pending in the New Jersey Supreme Court on said note in the name of Henry A. Oetjen is brought, and who was the holder of said note at its maturity and who has been holder thereof since its maturity, and in what order, and what interest said Schatzkin has now in said suit and note and from whom and when acquired, and what interest said Rudiger now has in said note and suit and from whom and when acquired; and what interest, if any, the said Oetjen has in said note; and when, where and by whom and under what circumstances and upon whose authority the said note was altered and the words "without recourse" written on the back of said note under the name "J. H. Rudiger", and if the said words "without recourse" were written by said J. H. Rudiger under what arrangement and agreement between him and the said Schatzkin said words were written; whether the said Rudiger has paid said note to said Schatzkin or purchased it from him, and if so, when and upon what consideration, and whether the said Rudiger did not deliver said note to his attorneys for suit thereon against these defendants and whether he now has not control over said suit and what knowledge

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Bill of Complaint.

said Schatzkin has with reference to the alteration of said note and when and from whom acquired; and whether at the time of making said alteration said Schatzkin had any interest in said note and, if so, what that interest was, how and when and from whom acquired and how and when parted with and for what consideration, and whether at
 10 the time of making of said alteration in said note what interest, if any, said Rutiger had therein and how and when acquired and for what consideration and when parted with by said Rudiger and for what consideration. And that it may be decreed by this Honorable Court that the said note be surrendered up to these defendants for cancellation and that none of the defendants herein above named has any interest therein, and that the said
 20 defendants and all of them be enjoined and restrained from selling, transferring, conveying or encumbering said note or disposing of it pending this suit; and that the said Henry A. Oetjen may be perpetually enjoined from proceeding with said suit in the New Jersey Supreme Court, and that your orators may have such further and other relief in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience.

30 May it please your Honor the premises to consider to grant unto your orators not only the State writ of injunction, issuing out of and under the seal of this Honorable Court, to be directed to the said Henry A. Oetjen perpetually enjoining him from proceeding with the said suit in the New Jersey Supreme Court and restraining the defendants and each of them from transferring or assigning or otherwise dealing with the said note mentioned and described in this bill of complaint, but
 40 also the State writ or writs of subpoena issuing out of and under the seal of this Honorable Court,

Bill of Complaint.

to be directed to the said Joseph H. Rudiger, Solomon M. Schatzkin and Henry A. Oetjen, commanding them and each of them on a certain day and under a certain penalty to be therein expressed to be and appear before your Honor in this Honorable Court then and there to answer the premises and to stand to and abide by and perform such order and decree as to your Honor shall seem meet. 10

And your orators as in duty bound will ever pray, etc.

(Signed) RANDOLPH PERKINS,
Solicitor for Defendants.

(Sgd.) RANDOLPH PERKINS,
Of Counsel.

STATE OF NEW JERSEY }
County of Hudson } ss. : 20

ANTHONY MICHEL, of full age, being duly sworn, according to law on his oath, says :

That he is one of the defendants in the above entitled cause; that a suit is pending in the Supreme Court of New Jersey, wherein Henry A. Oetjen is plaintiff and this deponent, P. Edward Wisch and William Freile are defendants. Said suit is founded on a note made by the Orpheum Amusement Company, bearing date the 27th day of October 1913, to the order of J. H. Rudiger for \$2500.00, payable at the Merchants National Bank in three months; that deponent never received any consideration for his endorsement on said note; that at the time he endorsed said note he relied upon the endorsement of J. H. Rudiger, which was immediately above his signature, and that the words "without recourse" were not written under said Rudiger's endorsement; that no value whatever passed to the payee or endorsers of said note; 30 40

Bill of Complaint.

that deponent does not know who the true holder and owner of said note is, whether it be Schatzkin or Rudiger, but deponent was informed by J. H. Rudiger that he, Rudiger, wrote under his own endorsement, but after maturity of the note, the words "without recourse".

10 DEPONENT FURTHER SAYS, that he was present when said note was endorsed by Rudiger and P. Edward Wisch, and that at that time the endorsement of William Freile did not appear upon the note.

DEPONENT FURTHER SAYS, that he has no means of ascertaining who the true holder of the note is, or whether the words "without recourse" were written on said note by the owner or by his authority without the aid of the Honorable Court.

20 (Signed) ANTHONY MICHEL.

Sworn to and subscribed before }
me this 25th day of September, }
1914. }

(Signed) Walter G. Winne,
Attorney at Law of New Jersey.

STATE OF NEW JERSEY }
County of Hudson } ss. :

30 WILLIAM FREILE, of full age, being duly sworn, according to law on his oath, says:

That he is one of the complainants in the above entitled cause and one of the defendants in a suit pending in the Supreme Court of New Jersey, wherein one Henry A. Oetjen is plaintiff and Anthony Michel, P. Edward Wisch and William Freile are defendants; that said suit in the Supreme Court is founded upon a promissory note bearing date the 27th day of October 1913, made by
40 the Orpheum Amusement Company payable at the

Bill of Complaint.

Merchants National Bank of Jersey City, to the order of J. H. Rudiger for \$2500.; that deponent's endorsement on said note was procured under the following circumstances:

Said note was brought to deponent's office, 108 Palisade Avenue, Jersey City, by one Fred Cary; that at the time it was brought there it bore the endorsement of J. H. Rudiger and Anthony Michel, and, deponent is informed, that of P. Edward Wisch. 10

That at the time deponent endorsed said note said Cary stated that it was for the accommodation of Solomon H. Schatzkin. Deponent at first refused to endorse it, but upon the statement of said Cary that it was solely for the accommodation of said Schatzkin and that the deponent would not be held to any liability on said note, he endorsed the same. 20

That at the time deponent endorsed said note the words "without recourse" were not written on the back of the note under the name of J. H. Rudiger.

DEPONENT FURTHER SAYS, that he received no consideration whatever for the endorsement on said note, and that said note was endorsed by him in full belief that it was for the accommodation of Solomon M. Schatzkin under the agreement with said Cary, representing said Schatzkin, that deponent would not be liable other than as an accommodation endorser, and that said Schatzkin would take up said note upon maturity. 30

DEPONENT FURTHER SAYS, that he has no means of discovering the true holder and owner of said note, whether it be Rudiger or Schatzkin without the aid of the above Court.

That he is informed that said Rudiger took said note over from said Schatzkin and wrote under 40

Bill of Complaint.

his own endorsement the words "without recourse" while he was the holder thereof.

(Signed) WILLIAM FREILE.

Sworn to and subscribed before }
me this 25th day of September, }
1914. }

10 (Signed) Walter G. Winne,
Attorney at Law of New Jersey.

STATE OF NEW JERSEY }
County of Hudson } ss. :

P. EDWARD WISCH, of full age, being duly sworn according to law, on his oath deposes and says, that he is one of the complainants in the above entitled bill and that he has read said bill and that the statements therein contained are true to the best of deponent's knowledge, information and belief. That on the twenty-seventh day of October, nineteen hundred and thirteen, the Orpheum Amusement Company made its note to J. H. Rudiger for the sum of twenty-five hundred dollars, payable at the Merchants National Bank of Jersey City, in three months. That deponent signed said note as an accommodation for said Schatzkin.

Deponent further says that at the time he endorsed said note the words "without recourse" were not written under the endorsement of J. H. Rudiger.

Deponent further says that the statements contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of said bill are true of deponent's own knowledge.

Deponent further says that he is informed and believes it to be true that the words "without recourse" were written on said note while the same was held and in the possession of J. H. Rudiger by J. H. Rudiger, and that he believes it to be true

Bill of Complaint.

that previous to the writing of said endorsement on the back of said note, said Schatzkin transferred the note to said Rudiger and that said Rudiger claimed to hold the same as his own property.

Deponent further says that the name of William Freile was not endorsed upon said note until after the endorsement by deponent, and that deponent is not aware of the circumstances attending said Freile's endorsement. 10

Deponent further says that Henry A. Oetjen claims to hold said note under an assignment from said Schatzkin, bearing date April twenty-eighth, nineteen hundred and fourteen, and has instituted suit in the Supreme Court of New Jersey on said note against deponent, Anthony Michel, and William Freile. Said suit is now pending ready for trial. 20

Deponent further says that he has no means of discovering the facts in connection with the various transfers of said note and the alteration on said note excepting by a discovery of said Schatzkin and Rudiger.

Deponent further says that he signed said note solely as an accommodation for said Schatzkin and without any consideration whatever, and has never received any benefit or value therefrom. 30

Deponent further says that he is informed and believes it to be true that on the twenty-eighth day of April, nineteen hundred and fourteen, at the time of the assignment by said Schatzkin to said Oetjen, he, the said Schatzkin, was not the owner of said note and had not had possession thereof for some time past but executed said pretended assignment to said Oetjen for the purpose of enabling said Rudiger to recover the face of the note and interest from deponent and other defend- 40

ants in said suit pending in the Supreme Court of New Jersey.

(Signed) PAUL EDWARD WISCH.

Sworn to and subscribed before }
me this 25th day of September, }
1914. }

(Signed) Walter G. Winne,
Attorney at Law of New Jersey.

10

—•—

Answer.

IN CHANCERY OF NEW JERSEY.

Between :

WILLIAM FREILE et al.,

Complainants,

and

JOSEPH RUDIGER et al.,

Defendants.

On Bill, &c.

20

The Answer of Joseph H. Rudiger, one of the defendants herein named, to the Bill of Complaint of William Friele, Anthony Michel and P. Edward Wisch, Complainants :

1. This defendant, answering said Bill of Complaint, admits the allegations of the first paragraph thereof; excepting the statement that Solomon M. Schatzkin was the owner of practically all of the stock of the Phoenix Realty Company, and was in virtual control and management of said company. As to that allegation this defendant says he believes that a great majority of the stock of the Phoenix Realty Company, shortly prior to the said twenty-seventh day of October, 1913, had been exchanged by the owners and hold-

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Answer.

ers thereof for stock of the Realty & Commercial Company, a corporation of New York, which said stock was held by said corporation, in exchange for its stock.

2. This defendant further answering said Bill of Complaint, admits the allegations of the second paragraph thereof, and says that the Orpheum Amusement Company was indebted to the Phoenix Realty Company in a much larger sum than **10** eighteen hundred dollars, viz., in the neighborhood of ten thousand dollars (\$10,000).

3. This defendant admits the allegations of the third paragraph of said Bill of Complaint, that he was, on said twenty-seventh day of October, 1913, a stockholder in the said Orpheum Amusement Company, but denies that he was largely interested therein. **20**

4. This defendant, further answering said Bill of Complaint, says that he has no knowledge, information or belief as to the allegations of the fourth paragraph of said Bill of Complaint. **20**

5. This defendant, further answering, says he has no knowledge, information or belief as to the allegations of the fifth paragraph of said Bill of Complaint.

6. This defendant, further answering, says he has no knowledge, information or belief as to **30** the allegations of the sixth paragraph of said Bill of Complaint except as hereinafter stated.

7. This defendant, further answering, says he has no knowledge, information or belief as to the allegations of the seventh paragraph of said Bill of Complaint.

8. This defendant, further answering, says that he denies the allegations of the eighth paragraph of said Bill of Complaint, respecting the understanding and agreement by and between the de- **40**

Answer.

fendant, Shatzkin, this defendant and the complainants, as to the purpose for which the endorsements of the complainants and this defendant were placed upon the said note.

9. This defendant, further answering, denies the allegations of the ninth paragraph of said Bill of Complaint regarding the endorsement of the complainant, Friele, being for the accommodation of the said Schatzkin.

This defendant, further answering the eighth and ninth paragraphs of said Bill of Complaint, and the allegations thereof, as to the manner in which and the reasons and purposes for which said note was endorsed by the complainants, says:

The Orpheum Amusement Company is a corporation of the State of New Jersey, which was formed by the complainants in conjunction with other members. That said corporation was organized for the purpose of operating the theatre located in the building owned by the Phoenix Realty Company and situated on the corner of Summit Avenue and Cottage Street in Jersey City. That after the organization of said company this defendant was induced by the complainants to purchase stock therein in the amount of two thousand dollars. That the venture was not a success and the complainants and this defendant were required from time to time to advance other moneys to said company by way of loans. After this defendant had advanced by way of loans the sum of five thousand dollars he refused to have anything more to do with said company and endeavored to persuade the complainants to drop the venture and take their loss. They persisted in the belief that a success could be made and kept on with the operation of said company. Things went from bad to worse, until finally in the Fall of

Answer.

nineteen hundred and thirteen, the said company was in arrears for rent of said theatre building, which is known as the Orpheum Theatre Building, and also for arrears of a theatre building in Hoboken known as the Gayety Theatre, likewise owned by the Phoenix Realty Company in excess of the sum of ten thousand dollars, a portion of which sum had been assumed by the Orpheum Amusement Company at the time of leasing the Hoboken theatre. In the Fall of nineteen hundred and thirteen an advantageous proposition was made by the Realty & Commercial Company, which is a corporation of New York engaged in buying and selling real estate on a large scale, of exchanging its stock for stock of the Phoenix Realty Company. About ninety-five per cent. of the stockholders of the Phoenix Realty Company accepted the offer and the stock was exchanged, the Phoenix Realty Company continuing however to retain its assets. The Fall theatrical season of nineteen hundred and thirteen did not come up to the expectations of the complainants who were still endeavoring to keep the Orpheum Amusement Company going, and they were at the point where they had to give up the enterprise or raise money in order to pay the large arrears of rent due the Phoenix Realty Company. This defendant is informed that the officers of the Phoenix Realty Company had notified the complainants as officers and directors of said Orpheum Amusement Company, that they must vacate the premises if the rent were not paid forthwith. Believing that with the coming of cold weather the receipts of the theatre would increase, due to the desire of the people for indoor entertainment, the complainants were desirous of securing further time from the Phoenix Realty Company. Solomon Schatzkin, who is a controlling factor in the Realty & Com-

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Answer.

mercial Company, and who is a man of wealth and position, was approached by the complainant Michel and asked by Michel to advance the sum of twenty-five hundred dollars to the Orpheum Amusement Company. The said Schatzkin refused to advance said money unless the Orpheum Amusement Company secured the names of some reliable persons as endorsers of the note which the said Michel offered to give to Schatzkin. Michel, together with the other complainants Freile and Wisch, offered to endorse said note, but the said Schatzkin, who was not familiar with the financial responsibility of the complainants, refused to accept the note of the Orpheum Amusement Company with the endorsements of the complainants unless the Orpheum Amusement Company also secured this defendant to endorse said note for its accommodation. This defendant was approached by the said complainants and requested by them to endorse said note for their accommodation and for the accommodation of the said Orpheum Amusement Company. This defendant at first refused to do this, but finally, after persuasion, agreed to endorse said note if the complainants would relieve him from any liability thereunder. Said note was then prepared by the complainant Michel, who was secretary of the company, and by him handed to the bookkeeper of the said company with instructions to present the note to this defendant for endorsement. At the time the note was presented to this defendant it bore the endorsement of the complainant Michel, and the defendant endorsed said note and instructed the bookkeeper to present it to Wisch and Freile for their endorsement for the benefit of this defendant before discounting it with Mr. Schatzkin. The note was subsequently endorsed by Freile and Wisch and delivered to Schatzkin, who ad-

Answer.

vanced the money. The money was deposited in the bank account of the Orpheum Amusement Company in the Merchants' National Bank of Jersey City, and either all or a considerable portion of it paid to the Phoenix Realty Company on account of the arrears of rent.

10. This defendant believes that said Schatzkin advanced to the Orpheum Amusement Company on said note the sum of twenty-five hundred dollars; how much thereof was paid to the Phoenix Realty Company and the Orpheum Amusement Company for arrears of rent of said theatre, this defendant has no knowledge or information sufficient to form a belief. **10**

11. This defendant, further answering said bill of complaint, admits the allegations of the eleventh paragraph thereof, and says that the said Solomon M. Schatzkin became possessed of and owner of said note because he was required and obliged to take up said note by the banking institution with which he was discounting said note. **20**

12. This defendant, further answering, admits the allegations of the twelfth paragraph of the said bill of complaint.

13. This defendant, further answering, admits the allegations of the thirteenth paragraph of the said bill of complaint, respecting the employment of Henry A. Oetjen in the office of certain attorneys in this city; but he denies that the said Oetjen does not hold said note for value, nor for any valuable consideration, or that he is a mere dummy acting either for said Schatzkin or for this defendant. **30**

14. This defendant, further answering, denies the allegations of the fourteenth paragraph of the said bill of complaint and says that the true facts as to the writing of the words "Without **40**

Answer.

recourse" upon the back of said note are as follows: That said note was delivered to this defendant by Morris Hillquit, who is the New York attorney of Solomon M. Schatzkin, for the purpose of carrying the same as a messenger to Henry A. Oetjen, to whom the same was to be assigned. That this defendant, after leaving the office of the said Morris Hillquit, and while the note was in his possession, wrote the words "without recourse" above this defendant's name because he believed that in so writing said words they would operate as a discharge of any liability on his part on account of said note, it having been understood between him and the complainants herein that this defendant was not to be liable upon said note. That at the time said words were written this defendant was not the holder of said note nor the owner thereof nor were said words written by him as the agent of the said Schatzkin nor by his authority.

15. This defendant, further answering, denies the allegations of the fifteenth paragraph of said Bill of Complaint.

16. This defendant, further answering, denies the allegations of the sixteenth paragraph of said Bill of Complaint.

17. This defendant, further answering, denies the allegations of the seventeenth paragraph of said Bill of Complaint; and says, in fact and in truth, that Solomon M. Schatzkin was the owner of said note at the time the words "Without recourse" were written thereon by this defendant, and that said words "Without recourse" were written by this defendant without the knowledge or consent of said Schatzkin, and in truth and in fact, the title of said note passed immediately from said Schatzkin to said Oetjen, and that at

Answer.

no time was this defendant the owner or holder of said note.

18. This defendant, further answering, denies that he, in conjunction with Schatzkin and Oetjen, or either of them, or anyone else, is endeavoring to work a fraud upon the complainants, and to collect said note, with interest, from the complainants for his benefit; and he denies that he is the beneficial owner of said note. 10

19. This defendant, further answering said Bill of Complaint, says that neither at this time nor at any other time has he had any interest in said note, and the suit instituted thereon by the said Henry A. Oetjen; that the said note was altered and the words "Without recourse" written on the back thereof, under the name of this defendant by him; that the same were written without the knowledge or consent of the said Solomon M. Schatzkin, and without any arrangement or agreement between them. That this defendant has not paid said note and said Schatzkin purchased it from him. This defendant further answering says that he did not deliver said note to his attorneys for suit thereon against the complainants, and that he has not now control over said suit, and never, at any time, had any control over said suit; but in truth and in fact the said Schatzkin has assigned said note, by formal writing, dated on the day it was made, to the said Oetjen, the said Schatzkin being at the time of the execution of the said assignment the owner and holder of said note. 20 30

JOSEPH H. RUDIGER,
Solicitor for Defendant.

Cross Bill of Joseph R. Rudiger.
IN CHANCERY OF NEW JERSEY.

	Between :	
	WILLIAM FREILE et al.,	}
	<i>Complainants,</i>	
10	<i>and</i>	
	JOSEPH RUDIGER et al.,	
	<i>Defendant.</i>	On Bill, &c.

20 And this defendant by way of cross-bill against the complainant, P. Edward Wisch, William Freile and Anthony Michel says that he incorporates herein each and every part of his answer filed herein by him to the bill of complaint of said complainants.

30 In filing their cross bill herein against this defendant and the complainants the defendants Solomon M. Schatzkin and Henry A. Oetjen seek a decree that the complainants P. Edward Wisch, William Freile, Anthony Michel and this defendant pay to the said defendants Solomon M. Schatzkin and Henry A. Oetjen the sum of Two thousand five hundred dollars, (\$2,500.00) with interest from October twenty-seventh, Nineteen hundred and thirteen at six per cent per annum with protest fees on the promisory note referred to in said cross bill. It has therefore become necessary for this defendant in order to protect his rights to file this cross bill against the complainants.

40 For sometime prior to the twenty-seventh day of October, Nineteen hundred and thirteen, the complainants were stockholders and directors of

Cross Bill of Joseph R. Rudiger.

the Orpheum Amusement Company, a corporation of this State, and had large financial interest therein; that prior to the said date the said company became financially involved and owed a large sum of money to the Phoenix Realty Company for rent of the theatre buildings occupied by it in Jersey City and Hoboken; that because of said indebtedness the said company was notified that it must give up possession of the Orpheum Theatre in Jersey City; that the same complainants were greatly desirous of having said company retain possession of said theatre and in order to bring about the further continuance of its lease the said complainants requested the defendant Schatzkin as an officer of The Phoenix Realty Company to allow said Orpheum Amusement Company to remain in possession of said theatre without paying rent.

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This defendant is informed and believes that said Schatzkin notified the complainants that he would be willing to advance them enough money to pay the rent due from the Orpheum Amusement Company upon the lease of said Orpheum Theatre building, if they would secure him by a note endorsed by some responsible person; the said complainants thereupon offered themselves as endorsers to said Schatzkin and he refused to accept them, saying he was not acquainted with their financial responsibility. Said Schatzkin further stated that he would accept the note of the company if it were endorsed by the complainants and also by this defendant; that said complainants Wisch and Michel thereupon came to this defendant and on their own behalf and on the behalf of the complainant Freile requested him to endorse for their accommodation and for the accommodation of the company and the said Freile a note of Two thousand five hundred dollars, so

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Cross Bill of Joseph R. Rudiger.

that they might discount the said note for the said Schatzkin and procure the money necessary to cover the rent due The Phoenix Realty Company,

10 This defendant stated to the said Wisch and Michel that he would endorse said note provided it was understood that he should not be liable on account of the same and if they and the complainant Freile would pay the note when it became due; to this the complainants Wisch and Michel agreed; to which agreement the said Freile subsequently assented.

20 A note for Two thousand five hundred dollars, (\$2,500.) was prepared by one Carey, the book-keeper of the said company, and submitted to this defendant for his endorsement; said note was dated October twenty-seventh, Nineteen hundred and thirteen, became due in three months from its date, was executed by the Orpheum Amusement Company, per P. Edward Wisch, president, and was made payable to the order of this defendant. This defendant upon the presentation of said note to him endorsed the same and delivered it to said Carey with instructions that it was not to be delivered to either or any of the complainants or not to be submitted to them for endorsement unless they agreed to assume liability therefor, in the event of the note being unpaid by the maker when it became due. Said Carey on behalf of this defendant secured from the complainants at the time of the presentation of said note to them an agreement to that effect.

30 The order of endorsement upon said note is as follows:—Joseph H. Rudiger, this defendant, Anthony Michel, William Freile and P. Edward Wisch. In the absence of any agreement to the contrary this defendant would be primarily liable after the maker of said note; that the said note

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Cross Bill of Joseph R. Rudiger.

was discounted with Schatzkin and protested when due; the same has never been paid and is wholly due and owing to said Schatzkin, the maker of said note. The Orpheum Amusement Company is insolvent and its affairs have been wound by the receiver appointed by this Court. That if a decree be made in this cause in favor of the defendants Schatzkin and Oetjen for the amount of said note, the parties who would be ordinarily called upon to pay would be (after the maker thereof) this defendant first, and then the complainants in the order named. 10

By reason of the existence of said agreement between the complainants and this defendant this defendant is entitled to have it decreed that said note be paid by the said complainants and not by him; that if he is required to pay the same by the said Schatzkin and Oetjen that he be subrogated to the rights of said Schatzkin and Oetjen as against the complainants herein. 20

This defendant therefore prays that should it be decreed by this Court that the said defendants Oetjen and Schatzkin are entitled to recover upon said note that the decree be so framed as to require the complainants to first pay said note before this defendant, and that if this defendant is compelled to pay the same he be subrogated to the rights of the defendants Oetjen and Schatzkin as against the complainants herein. 30

And that he may have such other and further relief in the premises as to Your Honor shall seem meet and as shall be agreeable to equity and good conscience.

TREACY & MILTON,
Sol'rs. Deft.
Joseph H. Rudiger. 40

JOHN MILTON,
Of Counsel.

Answer and Cross Bill.

(4) The defendant Solomon M. Schatzkin admits that the complainants Michel and Wisch called upon him in October, Nineteen hundred and thirteen and stated to him that the Orpheum Amusement Company was unable to pay its rent, and admits that they asked him to permit the Orpheum Amusement Company to continue to occupy the premises for the time without payment of rent, but this defendant denies that the said complainants stated to him that the Orpheum Amusement Company would have to close the theatre building, but on the contrary they requested this defendant to make them a loan of sufficient funds with which to pay the rent; this defendant requested the said Michel and Wisch to surrender their lease so that the Phoenix Realty Company might take over the theatre and run the same, which the said Wisch and Michel refused to do, the said Wisch stating to this defendant that he had invested a large sum of money in the business and intended to see it through.

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(5) These defendants deny that the defendant Solomon M. Schatzkin informed the complainants or any or either of them of the matters and things set forth in paragraph five of the bill of complaint.

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(6) These defendants admit that the defendant Solomon M. Schatzkin stated to the complainants Michel and Wisch that he would lend them the sum of Twenty-five hundred dollars, provided they would secure a good endorser on the note; they further admit that said Schatzkin requested that the note be endorsed by Joseph H. Rudiger, the defendant Schatzkin stating to the complainants Michel and Wisch that he did not know of their responsibility and would not make a loan

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Answer and Cross Bill.

on their endorsement, but that he did know Joseph H. Rudiger and that if he would endorse the note for the complainants he would make the loan. These defendants deny that the defendant Schatzkin requested the said Michel and Wisch or either of them to endorse the note for the accommodation of defendant Schatzkin, and deny
10 making any of the requests set forth in paragraph six of the bill of complaint.

(7) These defendants deny each and every allegation in paragraph seven of the bill of complaint.

(8) These defendants admit that the Orpheum Amusement Company made its note as recited in paragraph eight of the bill of complaint, but deny that it was made in accordance with the
20 agreement as alleged in the said bill of complaint, and deny that it was understood and agreed that the endorsements were for the accommodation of defendant Schatzkin and deny that it was for the accommodation of said Orpheum Amusement Company, but on the contrary aver that the note was given to the defendant Schatzkin as security for said sum of Twenty-five hundred dollars loaned by the defendant Solomon M. Schatzkin to the Orpheum Amusement Company and the
30 three complainants.

(9) These defendants deny each and every allegation in paragraph nine of the bill of complaint, and state that the note was not procured to be signed by any of the makers and endorsers by any agent or representative of either of these defendants, but that the same was presented to the defendant Schatzkin by a representative of the complainants and the Orpheum Amusement Company in order that the defendant Schatzkin
40 would advance the amount mentioned therein to

Answer and Cross Bill.

the complainants; that upon the said promissory note being presented to this defendant, Solomon M. Schatzkin, this defendant gave his check for the amount thereof, Twenty-five hundred dollars, to the agent of the complainants and which check was paid.

(10) These defendants admit the allegations in paragraph ten of the bill of complaint as to the advance of the sum of twenty-five hundred dollars on the said promissory not, but have no knowledge as to how the sum was disbursed by the Orpheum Amusement Company, except that these defendants believe that a part of said sum was used to pay the rent owing on said Theatre. 10

(11) These defendants admit the allegations in paragraph eleven of the bill of complaint, and aver the fact to be that the said note was protested for non-payment, was taken up by defendant Schatzkin from the bank where he had discounted same, and that the said Schatzkin delivered the said promissory note to the said Rudiger for the sole purpose of delivering the same to McDermott & Enright, his attorneys, 75 Montgomery Street, Jersey City, N. J., for the sole purpose of having suit brought thereon. 20

(12) These defendants admit the allegations in paragraph twelve of the bill of complaint. 30

(13) These defendants admit that the defendant Henry A. Oetjen is a clerk in the office of McDermott & Enright, attorneys of Solomon M. Schatzkin, and that the note was assigned to him for the purposes of collection only, and deny that McDermott & Enright are the attorneys of Joseph H. Rudiger, and aver that the said Oetjen is acting as assignee of the defendant Schatzkin, and is not and never has acted in any way for the defendant Joseph H. Rudiger. 40

Answer and Cross Bill.

(14) These defendants deny the allegations contained in paragraph fourteen to the effect that after the maturity of the said note it was transferred by the defendant Solomon M. Schatzkin to Joseph H. Rudiger, but aver that the said note after maturity was delivered to Joseph H. Rudiger to be delivered to McDermott & Enright, attorneys
10 of the said Schatzkin, to be sued upon, and admit that the said Rudiger while the same was in his hands and before he delivered the same to McDermott & Enright wrote under his name on said note the words "without recourse." These defendants, however, deny that said alteration was made by the said Rudiger while he was the holder of said note, and deny that it was made by the said Rudiger as agent of the defendant Schatzkin or
20 with the authority of the said Schatzkin, and on the contrary aver that it was made by Rudiger without the knowledge or consent of either of these defendants, and that the said alteration was made while the said Rudiger was entrusted with said note for the limited purpose of delivering it to McDermott & Enright for the purposes of suit.

(15) These defendants deny that they or either of them have entered into an agreement with the said Rudiger by which they are endeavoring to
30 collect from the complainants by means of the said suit in the New Jersey Supreme Court the amount of said note, but aver that the said suit in the New Jersey Supreme Court was brought by the said Schatzkin through Oetjen as his assignee in good faith for the purpose of collecting the said note from the complainants who are responsible in the full amount thereof to the defendant Schatzkin. Defendants further deny that Rudiger ever
40 held said note as alleged other than above set forth.

Answer and Cross Bill.

(16) These defendants admit that the said Oetjen is assignee of the said Schatzkin but for the purpose of collection only, and deny that the truth is that the said Schatzkin transferred said note to the said Rudiger and deny that he has any interest in the same. These defendants admit that before suit was commenced their attorneys drew an assignment in writing, which was in fact signed by the said Schatzkin, whereby the said Schatzkin did transfer his right, title and interest in said note to the defendant Oetjen, and they further aver that the fact is that from the time the said Schatzkin obtained possession of the said note to the date of the assignment he was the absolute and bona fide owner and holder thereof, and from the date of the assignment thereof to the said Oetjen, the said Oetjen became entitled to collect the said money from the said Schatzkin, and deny that the said note was ever in the possession or control of the said Rudiger or that he has any right, title or interest therein, and aver that same came to his possession solely for the purpose of delivering it to the attorneys of the said Schatzkin aforesaid for the purpose of commencing suit thereon. The defendant Schatzkin further avers that the alteration of said note was not made by him, nor has the sum of Twenty-five hundred dollars ever been re-paid to him in whole or in part, and his suit in the New Jersey Supreme Court was brought for the purpose of collecting the amount he loaned thereon.

(17) These defendants further deny that the effect of the writing of the words "without recourse" under the name of said Rudiger was to release the complainants from any liability on said note and to cancel said note, and aver the fact to be that the said Schatzkin was the owner of said

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Answer and Cross Bill.

note at the time of said alteration, and that the said alteration was made by the said Rudiger without the knowledge or consent of the defendant Schatzkin and that title to said note passed immediately from said Schatzkin to said Oetjen, and avers the fact to be that at no time was the said Rudiger the owner or holder of said note.

10 (18) These defendants deny each and every allegation of paragraph eighteen of the bill of complaint.

Wherefore these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

20 (19) These defendants by way of cross bill exhibited against the complainants and against the defendant Joseph H. Rudiger, here repeat the statements and allegations of the foregoing answer, and pray that the words "without recourse" written after the endorsement of Joseph H. Rudiger on the back of the promissory note aforementioned may be struck from said note, and that it may be decreed that the words "without recourse" written on the back of the said promissory note under the endorsement of Joseph H. Rudiger may be decreed to have been placed on the said note by the said Rudiger without the knowledge or consent or
30 authority of either of these answering defendants, and that the said promissory note may be decreed to be considered for all purposes as between the parties thereto as though the words "without recourse" had never been written thereon by the said Joseph H. Rudiger, and that it may be decreed that the writing of the words "without recourse" on the back of the said note do not in anywise effect the rights of the said Solomon M. Schatzkin and the said Henry A. Oetjen thereunder and do not
40 effect the liability of the said P. Edward Wisch,

Answer and Cross Bill.

William Freile, Anthony Michel, Joseph H. Rudiger and Orpheum Amusement Company on the said note, and that it may be ordered, adjudged and decreed that there is due and owing on said note to these defendants, Solomon M. Schatzkn and Henry A. Oetjen, the full amount evidenced thereby, to wit, the sum of Twenty-five hundred dollars, with interest from October twenty-seventh nineteen hundred and thirteen at the rate of six per cent per annum, together with protest fees and postage, and that it may be ordered, adjudged and decreed that the said P. Edward Wisch, William Freile, Anthony Michel and Joseph H. Rudiger, the prior endorsers of this defendant Solomon M. Schatzkin, pay to the said defendants, Henry A. Oetjen and Solomon M. Schatzkin the amounts aforesaid and that these defendants may have such other and further relief in the premises as to your Honor shall seem meet and as shall be agreeable to equity and good conscience.

And these defendants will ever pray &c.

MCDERMOTT & ENRIGHT,
Solicitors of Solomon M. Schatzkin
and Henry A. Oetjen,
Answering Defendants.

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**Answer to Cross Bill of Schatzkin
and Oetjen.**

IN CHANCERY OF NEW JERSEY.

	Between	
10	WILLIAM FREILE, et al., <i>Complainants,</i>	} On Bill &c.
	<i>and</i>	
	JOSEPH H. RUDIGER, et al., <i>Defendants.</i>	

The answer of Joseph H. Rudiger to the cross bill of Solomon M. Schatzkin and Henry A. Oetjen, defendants:

1. This defendant admits all of the allegations of the defendants' answers which are made a part of their cross bill, except that he denies that he is liable to pay said promissory note; that the same should be paid by P. Edward Wisch, William Freile, Anthony Michel and Orpheum Amusement Company.

And he humbly prays that he may be hence dismissed with his reasonable costs and charges in this suit sustained.

TREACY & MILTON,
Solicitors.

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Answer to Cross Bill.
IN CHANCERY OF NEW JERSEY.

<p style="text-align: center;">Between</p> <p style="text-align: center;">WILLIAM FREILE, et als,</p> <p style="text-align: center;"><i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">JOSEPH H. RUDIGER, et als,</p> <p style="text-align: center;"><i>Defendants.</i></p>	}	<p>On Bill. 10</p>
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The answer of the complainants to the cross bill exhibited against them by the defendants, Solomon M. Schatzkin and Henry A. Oetjen:

These complainants deny the allegations of the cross bill, and pray that the same may be dismissed, with costs. **20**

RANDOLPH PERKINS,
 Solicitor for and of counsel
 with Complainants.

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Testimony.
IN CHANCERY OF NEW JERSEY.

	Between	
	WILLIAM FREILE, et al.,	}
	<i>Complainants,</i>	
	<i>and</i>	
10	JOSEPH H. RUDIGER, et al.,	
	<i>Defendants.</i>	On Bill, &c.

For the Complainants, RANDOLPH PERKINS, Esq.,
 and George Link, Jr., Esq., of the New York
 Bar.

For the Defendants, Schatzkin and Oetjen, MES-
 SRS. McDERMOTT & ENRIGHT.

20 For the Defendant, Rudiger, JOHN MILTON, Esq.

Before HON. JOHN GRIFFIN, Vice Chancellor.
 Chancery Chambers, Jersey City, N. J.,

February 4, 1916.

MR. LINK: I would like to state now that
 the defendant, Schatzkin, has made certain
 concessions here, and on that condition we let
 him go.

MR. CARPENTER: Oh, I will have him back.

30 MR. LINK: Well, I want those concessions
 on the record now. He admitted that the de-
 fendant—

THE VICE CHANCELLOR: There will be no
 concessions noted unless counsel agree to
 them.

MR. LINK: Well, I have been deceived then,
 Your Honor.

MR. CARPENTER: I am going to admit them
 when the time comes. They asked that cer-

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Colloquy.

tain facts be conceded—now, they are conceded as being facts, but I do want to object to the competency, relevancy and materiality of them when the time comes, but so far there is not enough shown to pass upon whether they are competent, relevant or material, or not.

MR. PERKINS: We subpoenaed *duces tecum* Mr. Schatzkin to come here, and he begged pitifully to go away. 10

THE VICE CHANCELLOR: Is he here?

MR. PERKINS: No, we let him go on their statement that they would admit certain facts.

MR. LINK: It is admitted by Mr. Carpenter, on behalf of his client, that Mr. Schatzkin owned the majority of the stock of the Realty and Commercial Company and that he was the Treasurer of the Company— 20

MR. CARPENTER: He said he could not tell that this morning. I will admit that he was Treasurer of the Realty and Commercial Company at the time of the execution of the note in suit and that the Realty and Commercial Company owned a majority of the capital stock of the Phoenix Realty Company. Now, I want formally to object to the competency, materiality or relevancy of any of those facts. I do not think they are competent, relevant or material, and I move to strike the facts from the record. 30

THE VICE CHANCELLOR: I will overrule the motion for the present.

MR. LINK: This is an action of fraud; we allege fraud here, your Honor, and I have got to show the connection of these different parties.

THE VICE CHANCELLOR: Oh, well, I say I will overrule the objection for the present. 40

Paul Edward Wisch—Direct.

Counsel will call my attention to it later, when the case is closed.

MR. CARPENTER: I will do that. I only made the motion to protect my rights.

THE VICE CHANCELLOR: Oh, yes, of course.

10 PAUL EDWARD WISCH, sworn:

DIRECT EXAMINATION BY MR. LINK:

Q. Do you remember, on October 27th, 1913, Mr. Michel calling upon you? A. Yes, sir.

Q. Do you remember executing a note at that time? A. I do—I mean endorsing and signing a note.

Q. You signed the note as one—

20 MR. CARPENTER: I object. The note speaks for itself.

THE VICE CHANCELLOR: Produce the note.

MR. LINK: Well, now, Your Honor, I don't want to produce that note in evidence. That note has been altered; I do not want to introduce it in evidence.

THE VICE CHANCELLOR: Well, I don't know how you are going to prove the document unless you produce it

30 MR. LINK: Well, I am not going to try to prove the document; I am trying to prove the conversation that took place at the execution of the document.

Q. At that conversation with Mr. Michel you had a discussion with him about the note in suit?

MR. CARPENTER: I object, as immaterial.

THE VICE CHANCELLOR: I will overrule the objection.

40 A. About what?

Paul Edward Wisch—Direct.

Q. About the note in suit? A. I did, yes, sir.

Q. Will you state what that conversation was?

MR. CARPENTER: I object; it is not competent, relevant or material.

THE VICE CHANCELLOR: Who was Mr. Michel?

MR. CARPENTER: One of the complainants.

MR. PERKINS: He is a prior endorser.

MR. LINK: And one of the complainants.

MR. MILTON: How can that possibly bind Mr. Rudiger?

MR. CARPENTER: Or Mr. Schatzkin?

MR. LINK: This evidence is being introduced against Mr. Schatzkin. I will show this to Your Honor—I cannot show it all by one witness—that the Orpheum Theatre Company, who rented the Orpheum Theatre, which was owned by the Phoenix Realty Company, was in difficulties; that Mr. Wisch, among others, was financing the company, with Mr. Rudiger and Dr. Freile and the rest of them, and that they came to a time when they would not put up any more money, and Mr. Michel—

THE VICE CHANCELLOR: Well, I will admit the question for the present.

(Question repeated.)

A. Mr. Michel, who was the Treasurer of the Orpheum Amusement Company, came to my office on Monday, October 27th, after I had told him the previous week, (or I think it was on Saturday afternoon at the Theatre) that I would put up no more money, having put up several thousand dollars above what I had agreed to—

MR. CARPENTER: I object. I now call Your Honor's attention to this fact at this time, that this is testimony as to a conversation between two complainants here, and, as against

Paul Edward Wisch—Direct.

Mr. Schatzkin and Oetjen, it is certainly hearsay.

10 THE VICE CHANCELLOR: It is absolutely hearsay unless it is connected, but it might have something to do as between the parties themselves; it may ultimately become material, I don't know; counsel may connect it up; if they do not it may be entirely immaterial. Go on, I won't listen to any more argument.

20 A. (Resuming) When he came to my office he told me—we had had a discussion about possibly getting the Phoenix Company to forego rent for a time until business might improve—and when he came to my office on Monday he said that he and Rudiger had been to see Schatzkin at Rutherford the previous day, and he had told Mr. Schatzkin that I had refused to give any more money and that I wanted to have the rent foregone or I would close up the Theatre. So Schatzkin explained to him that he didn't care to have—

THE VICE CHANCELLOR: This is what Michel told you?

THE WITNESS: Yes; this is what he told me, when he came back on Monday.

THE VICE CHANCELLOR: He reported what Schatzkin told him?

30 THE WITNESS: Yes.

40 A. (Resuming) —he didn't care to have the Theatre closed up on account of the fact that he was then in negotiations with Doctor Albanesius of Jersey City to sell him the theatre, and that it would look bad if the rent payment was stopped, showing that the house wasn't making a living. And he put before me a note which was made payable to J. H. Rudiger and was endorsed by Rudiger,— “J. H. Rudiger, Anthony Michel and William Freile, M. D.” — at the time he explained to

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me that Schatzkin, provided we would turn the money in for rent, would furnish the Company \$2500. to keep the house open—eighteen hundred dollars of which was to go direct back into his pocket as rent. And he explained that the reason the note was made was that Mr. Schatzkin was not in a position to hand the money right out and wanted this note so that he could discount it and get the money for it. **10**

Q. Do you remember anything else he said to you about the note at that time? A. Well, he simply said that. He explained to me, when I looked at the note and saw Rudiger's name on it—

THE VICE CHANCELLOR: Well, now was Mr. Schatzkin present?

A. No, Michel and I were only alone. When he presented the note to me I looked at it and there was the name of Rudiger on it, and Doctor Freile, both of whom had long before that refused to furnish any more money, and they had left it to me to continue paying the money; and Michel explained to me "See, Rudiger and Freile are on the note; it is only accommodation for Schatzkin; he wants to raise this money; he don't want the theatre closed up just at the present time or probably Doctor Albanesius won't buy it". **20**

THE VICE CHANCELLOR: That line of testimony is different in principle from the other— **30**

THE WITNESS: That is the time—

THE VICE CHANCELLOR: One moment—still under the general statement that a motion will be made to strike it out later I will let that stand. In the first branch of his testimony he stated what Mr. Michel repeated to him had been said by Schatzkin, in this last testimony he simply is relating a conversation between **40**

Paul Edward Wisch—Direct.

himself and Michel, which Schatzkin knew nothing about, and which, to my mind at present, I do not see how Schatzkin can be charged with.

10 MR. CARPENTER: As to the rest of the testimony, Mr. Schatzkin was not present, as I understand it, when Mr. Michel and Mr. Wisch had this conversation.

THE VICE CHANCELLOR: True, but if Mr. Michel does not connect Mr. Schatzkin with the statement then, of course, I do not see what relevancy the testimony has.

MR. CARPENTER: Then I move to strike out that part of the testimony just given.

20 THE VICE CHANCELLOR: I am going to let it stand subject to your motion to strike it out later in the event it is not connected up with Michel's testimony.

MR. LINK: This note was endorsed to Mr. Oetjen after maturity—

THE VICE CHANCELLOR: I am not striking out that testimony now. When the motion is made to strike it out it is time enough then for you to answer it.

Q. Did Mr. Michel tell you that Mr. Schatzkin had told him what you have just testified? A. Yes, sir.

30 Q. Told it to you? A. Yes, sir; Schatzkin told it to Michel, you mean?

Q. Yes? A. Yes.

Q. Did you have any subsequent conversation with Mr. Schatzkin? A. No. I had no conversation with Mr. Schatzkin about this note until a short time prior to when a suit was brought against Doctor Freile, Michel and myself for this \$2500. On that occasion Mr. Rudiger—

40 MR. CARPENTER: When was that? I object until the time is fixed.

Paul Edward Wisch—Cross.

THE WITNESS: Immediately before the suit was brought—shortly—I should say two weeks, or so.

BY THE VICE CHANCELLOR:

Q. Two weeks before what suit was brought?

A. The original suit in the Supreme Court in this case.

Q. Go right on. A. Well, that day I was in my office and had a telephone call, and I recognized the voice of Mr. Rudiger, and he said over the telephone that he was in Mr. Schatzkin's office and would like to have me come down there as Mr. Schatzkin wanted to talk to me about this note. So I went down to Schatzkin's office in the Hudson Terminal Building, and as I went into the outer door I met Mr. Rudiger in the passageway to Mr. Schatzkin's private office, and Mr. Rudiger said to me that "Schatzkin wants to see you about this note; he wants you to pay it"; he says, "Now, don't you pay it; you are neither legally nor morally obliged to pay one cent of this note". Mr. Rudiger is the first endorser on the note, and, of course—

Q. No, no; go right on. A. Oh, excuse me. Well, then we waited in the hallway a few minutes when Schatzkin came back from some other office and we entered his office and he asked me what about the note, about the payment of the note. I said, "Certainly I am not going to pay that note; you know well enough that I wasn't supposed to pay that note; I am not responsible for that note; you advanced that money to the company, that is all". Well, he hemmed and hawed, and that is all there was to it, and I left.

CROSS EXAMINATION BY MR. MILTON:

Q. Mr. Wisch, the conversation with Michel which you have related, did that take place in the

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morning of October 27th? A. Yes, sir; about noon, around noontime.

Q. And that was the time you signed the note you have referred to? A. Yes, sir.

Q. Do you know Mr. Carry? A. Yes, sir.

Q. The young man in the light suit sitting in court here? A. Yes, sir.

10 Q. And you are quite sure that it was not Mr. Carry who presented the note in question to you for endorsement? A. Absolutely sure that it was not.

Q. Don't you know as a matter of fact that it was Mr. Carry who brought the note to you, and not Michel? A. Absolutely not; it was not Mr. Carry, it was Mr. Michel. I had all my dealings with Mr. Michel, on every occasion.

20 THE VICE CHANCELLOR: One moment. He is only asking you one thing—did Mr. Carry bring this note, and not Michel, to you to sign? Now, you have answered "No, he did not".

Q. You are certain it was Michel who presented that note to you on the morning of October 27th, about noon, for endorsement? A. Yes, I am.

Q. Just as certain about the rest of your testimony as you are about that?

30 MR. PERKINS: I object. That is not a proper question.

A. Yes, sir.

THE VICE CHANCELLOR: It is a very common way of asking the question.

MR. PERKINS: I know it is a very common way that lawyers have, but I do not think it is proper.

40 Q. Do you recollect the date of the conversation

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that you had with Mr. Schatzkin and Mr. Rudiger in Mr. Schatzkin's office about the note? A. No, I do not.

Q. I did not understand whether it was Schatzkin or Rudiger who said to you that you were not legally or morally obliged to pay it? A. Mr. Rudiger.

Q. Was that said in Mr. Schatzkin's presence? 10
A. No.

Q. Not in Schatzkin's presence? A. No, sir; it was while Schatzkin was out of his office, while we were waiting for him.

CROSS EXAMINATION BY MR. CARPENTER:

Q. What did you say that Mr. Schatzkin said to you when you were in his office at that time?

A. He asked me about—

Q. What did he say—not your conclusion, what did he say to you? A. I could not remember the exact words, but the purport of the visit was for him to ask me to pay that note. 20

Q. He said, "Mr. Wisch, I want you to pay this note", did he? A. I don't believe he said it in that way. He said, "Mr. Wisch, are you going to pay this note?" I said, "I certainly am not".

Q. He said, "this note"? A. No, he spoke about the note. The note was not in evidence at the time; he didn't have the note. 30

Q. He did not show you the note? A. No, he did not show the note. I did not know where the note was, even.

Q. You knew what he meant, though, when he said "this note"? A. I knew about the \$2500 note.

Q. You knew it went to protest, didn't you? A. I know it went to protest—that is the only reason I did not refer to that particular note. 40

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Q. You got a certificate of protest? A. I got a notice, yes, and paid no attention to it.

Q. When Mr. Schatzkin asked you if you were going to pay the note what did you say to him?

A. I said "no".

Q. Then what did he say? A. I don't know; I don't remember.

10 Q. Did he tell you he would sue you then? A. No.

Q. Nothing like that? A. Nothing like that.

Q. Did he tell you, "All right, I will hand it over to you"? A. He did not say a word.

Q. Did you ask him to surrender it to you? A. No, because there were a number of endorsers on there. I wasn't particularly interested in that note owing to the circumstances of it having been made.

20 Q. Did you ask him to strike your name off of it? A. No.

Q. Did you say anything more to him after he asked you for payment? A. I simply refused the payment of it.

Q. Then what did he say to you? A. Nothing, he didn't say anything about bringing suit at all.

Q. And when he brought suit, was that a big surprise to you?

30 MR. PERKINS: I object.

A. Not with a man of Schatzkin's type—not a bit of it.

THE VICE CHANCELLOR: That will do. I will strike the question and answer out.

Q. What did you reply to Mr. Rudiger when he had you on the 'phone and asked you to come over to Schatzkin's office, that Mr. Schatzkin would like to talk to you about the payment of the note? A.
40 I said, "All right, I will be right over."

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Q. How far is your office away from Mr. Schatzkin's office? A. Oh, just about two blocks.

Q. Two blocks away? A. Yes.

Q. Did you go right over? A. Yes, within a few minutes. I just didn't happen to have anything to do.

Q. Were you able to pay the note at that time, if you wanted to? 10

MR. LINK: I object to that; I think it is immaterial.

THE VICE CHANCELLOR: I will admit the question.

A. Was I? Yes.

Q. You had \$2500 in funds in your account, or in cash? A. I could get it, yes.

Q. And did you say anything more to Mr. Rudiger except, "I will be right over"? A. Over the telephone? 20

Q. Was that all you said? A. I didn't discuss it over the telephone.

Q. And he did not say anything more to you than you have told us? A. That is about all the conversation we had—just an instant in the hallway when Mr. Schatzkin came along.

Q. Now, then, when was it that Mr. Michel told you all of these things about this particular note—was it in the morning that you endorsed it? A. Sure, when he came in to get me to endorse it and explained the situation to me. 30

Q. At the time he brought it to you? A. Yes, he brought it to me.

Q. Now then, let me know whether you remember these things because you associate them with the occurrence of Michel bringing the note in to you for endorsement? A. Why, that is my recollection of the transaction. That is about the first time anybody had put up any money to keep the 40

Paul Edward Wisch—Cross.

theatre open, besides myself, for so long a time, that it quite impressed me.

Q. You had been putting up the money yourself for quite a while, hadn't you? A. For quite a while, yes.

Q. To keep the theatre running? A. Yes, I put up the money—yes.

10 Q. And you put up a lot of money, too, didn't you? A. Yes.

Q. Didn't you put up \$30,000 to keep that theatre open? A. I refuse to answer. That is immaterial.

Q. Oh, you do?

THE WITNESS: Is it not, your Honor?

MR. LINK: I object to it as being incompetent, irrelevant and immaterial, how much money he put up.

20

THE VICE CHANCELLOR: I will permit the question because it tends to negative the idea that they merely ran this theatre for the benefit of Mr. Schatzkin.

(Question repeated.)

A. I did not.

Q. How much did you put up yourself? A. I don't recollect the exact amount.

Q. Didn't you put up over \$30,000? A. No, sir.

30 Q. Didn't you put up over \$25,000? A. No, sir; I don't think so, I can't recollect that.

Q. You can tell pretty close now to the figure, can't you—you can tell me pretty close to the figure that you put up? A. I don't know what it is.

Q. Was it between \$20,000 and \$35,000? A. I don't really know the amount.

MR. LINK: Well, we will concede that he put up a large sum.

40

Paul Edward Wisch—Cross.

MR. CARPENTER: I want this man to testify, not his counsel.

A. I can't recollect the amount; I think, the whole amount, as near as I can figure it out, is about \$22,000, counting everything.

Q. Of course, the loss embarrassed you considerably, didn't it?

10

MR. LINK: I object to that as being immaterial.

THE VICE CHANCELLOR: I will overrule that question.

Q. Had you put up \$22,000 in this venture, up to the 27th of October, 1913? A. No, some of that I put in afterwards; even afterwards.

Q. But you put up most of it, I assume, before that date, didn't you? A. Yes, most of it, sure.

20

Q. You put the money up so the theatre would be kept running and your chances of realizing on your investment would be better? A. Not at all, because the original \$10,000 was put up on the stipulated condition with the Phoenix Realty Company that they were to put up \$5,000, which they promptly failed to do, under the management of Mr. Rudiger.

MR. CARPENTER: I move to strike out the latter part of it.

30

MR. LINK: Why, that is an answer to your question.

MR. CARPENTER: All right.

THE VICE CHANCELLOR: I will not strike it out.

Q. Now, do you remember how much you put up after the 27th of October, 1913, for the purpose of keeping the theatre open and running? A. I think it was \$15,000, after that.

40

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THE VICE CHANCELLOR: After what date?

A. After this October 27th.

Q. You did that for the purpose of keeping the theatre running, didn't you? A. Yes, sir; with the hope of getting my money back.

10 Q. Is it not a fact that the longer the theatre stayed open the more chance there was of the investment turning out to be good? A. Well, it got to look bluer and bluer every day, and I had wanted to see if I couldn't recoup some of my money.

20 Q. And that is the reason you kept putting up a little bit more in the hopes of— A. (Interrupting.) Well, it was only done—the giving of that \$1,000 was only done with the view of trying to get the thing continued so the Phoenix Company could operate the theatre afterwards, which they did; we turned the theatre over to the Phoenix Company, and instead of letting the talent go and not paying the money and giving the theatre property a black eye, I gave up another thousand dollars—that was a thousand dollars—I simply did it in the interest of the stockholders and everybody concerned. I was the angel for the proposition, you might say, being guided by Michel, the great manager.

30 Q. When was that?

THE VICE CHANCELLOR: When did you put up this thousand dollars to pay the actors?

A. That was around December, I think.

Q. Of what year? A. 1913.

Q. That was the December following the execution of the note? A. Yes, sir; after they had used up that money, you see, they came back for more.

40 Q. You were interested, were you not, in trying

Paul Edward Wisch—Cross.

to get the Phoenix Realty Company to forego their rent in the theatre for a time so it would give you more of a chance? A. Yes, sir.

Q. And they had refused to make the extension, hadn't they? A. They hadn't refused, other than Schatzkin, according to Michel's statement—

Q. Just answer the question? A. What is that?

Q. Whether they had refused to give you the extension you asked for—can you say "yes" or "no" to that? A. Well, you can look at it two ways, I cannot answer it, yes, or no, and answer it correctly. 10

THE VICE CHANCELLOR: Well, then, just say you can't answer it yes, or no. I appreciate that there are such questions that cannot be answered by yes or no.

A. Well, I cannot answer it directly. 20

Q. You say you had no talk with Mr. Schatzkin at all about this note until after it had fallen due?

A. Yes, sir.

Q. You did not have any talk with them about lending this particular \$2500? A. Never.

Q. Had you yourself asked Mr. Schatzkin to forego the rent on the theatre? A. No, sir.

Q. Well, who did that for you? A. Mr. Michel.

MR. LINK: May I interpose just one question to save confusion? 30

THE VICE CHANCELLOR: No, your turn will come later.

Q. Did you call Mr. Schatzkin on the telephone about that? A. About what?

Q. About foregoing the rent for the saloon? A. No, sir.

MR. MILTON: There were one or two questions I omitted to ask. 40

Paul Edward Wisch—Cross.

BY MR. MILTON:

Q. Mr. Wisch, the Saturday in October preceding the endorsement of this note, that you have referred to, you put up six thousand dollars in cash to keep the theatre open, didn't you? A. I don't recollect.

10 Q. Are you willing to swear that you did not?
A. Oh, no, I won't swear that I did not, no.

Q. Did you recollect that on Tuesday, October 28th, 1913, after you endorsed this note, you got the \$600 back that you had advanced to the theatre on the preceding Saturday? A. That I got it back?

Q. Yes. A. No, sir; I did not.

Q. Out of the proceeds of that note? A. No, sir.

20 Q. Do you mean you did not? A. I never got a dollar back—

THE VICE CHANCELLOR: One moment, you have answered the question.

Q. Do you mean that you cannot recollect that you got the money back, or that you say positively you did not get the money? A. I positively did not get it. I never got a dollar back out of the Orpheum Amusement Company of all the money I put into it.

30 Q. Are you trying to now? A. No, sir. That is not a proper question, neither.

THE VICE CHANCELLOR: Well, I will pass upon that; you just answer questions and be respectable on the stand.

Q. I think you said, Mr. Wisch, that when Mr. Michel came to you on that Monday morning he had this note which bore the endorsement of himself and Freile? A. And Rudiger.

40 Q. Those names were all on it at the time you

Paul Edward Wisch—Cross.

saw this note? A. Rudiger, Michel and Freile.

Q. You are quite sure about that, are you? A. They were there.

Q. Is this your signature (showing the witness paper)? "P. Edward Wisch" is what I want you to look at? A. Yes, sir.

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

MR. MILTON: I show the witness now, for the record, an affidavit made by him before one Walter G. Winne, an attorney-at-law of New Jersey, verified September 25, 1914, and annexed to the original bill of complaint in this cause.

Q. I call your attention, Mr. Wisch, to this statement in this affidavit, "Deponent further says that the name of William Freile was not endorsed upon said note until after endorsement by deponent, and that deponent is not aware of the circumstances attending said Freile's endorsement"—now, is the note referred to in this affidavit the same note that you have referred to on the stand? A. Yes.

Q. Now which of your statements is correct? A. The one I am telling now on the stand. That affidavit, I understand, was hastily drawn and was drawn under a misapprehension.

Q. You mean that your counsel, Mr. Perkins—I assume he is the one who drew the affidavit? A. Yes.

Q. —drew this affidavit under a misapprehension as to what the fact was? A. I presume so.

MR. PERKINS: Well, it is true that he did ask me to correct it.

THE WITNESS: I asked him to change certain things in these affidavits, and that apparently has not been done.

Paul Edward Wisch—Cross.

Q. You mean to say that you knew that misstatements had been made in affidavits filed in this cause, and that you have done nothing to correct that situation? A. I certainly have done all I could; I called my attorney's attention to it.

Q. What other misstatements have you made in affidavits that you have made, or by anybody else
10 in this case? A. I don't know.

Q. What did you mean by your previous statement that there were other mistakes in affidavits, which you called your attorney's attention to? A. I did not say that, did I?

Q. What did you say? A. I said there was some mistakes in the affidavits that were not corrected, or something to that effect.

THE VICE CHANCELLOR: That is about what
20 he said; now, the question is what other mistakes do you recall that were made in the affidavits?

A. I don't recall that. I haven't been able to pay much attention to that.

BY MR. LINK:

Q. When you said "you"—you refer to you doing certain things—you mean the Orpheum Amusement Company? A. Yes.

Q. You acted as President of the Company? A.
30 I was simply acting as President of the Orpheum Amusement Company.

Q. So when you say "you"— A. It was always the Orpheum Amusement Company, because it was always the business of the Orpheum Amusement Company.

Q. These conversations in this affidavit you have testified to, you spoke to Mr. Perkins about those before they were executed, didn't you? A. Yes,
40 sir.

Q. Called his attention to them? A. Yes, sir.

Randolph Perkins, Esq.—Direct.

Q. Was it before or after you signed it? A. Oh, after I signed it. I read them afterwards and told him afterwards.

RANDOLPH PERKINS, ESQ., SWORN:

DIRECT EXAMINATION BY MR. LINK:

10

Q. You are the attorney for the complainants?

A. Yes, I am the solicitor and counsel for the complainants.

Q. You heard Mr. Wisch testify that he directed you to make certain corrections in the bill of complaint and affidavit? A. I heard his testimony, yes.

Q. Is that true? A. I might state just what happened.

Q. Will you just state to the Court what happened? A. The bill and the affidavits were drawn very hurriedly because the case in the Supreme Court was pending; there was some conflict between the statement of Mr. Wisch and Mr. Michel, according to my recollection, as to how the signatures went on, and when I dictated the affidavits I think I dictated after Mr. Michel's memory, and when it was signed (Mr. Wisch signed it before Mr. Winne and read it over) he said that ought to come out; but in the haste of getting before the Vice Chancellor the paragraph was not stricken out; but from the time the bill was drawn to the present time Mr. Wisch has always insisted that that paragraph should come out of his affidavit—in fact, there are one or two other slight changes, too—he insisted that his name should come out of paragraphs 4, 5 and 6 of the bill.

20

30

Q. And also I think paragraph 9? A. There was a little conflict; I had the three gentlemen before me and I dictated the bill and affidavits in

40

Dr. William Freile—Direct.

accordance with the conversation as they gave it to me, and I rather followed Mr. Michel's memory than Mr. Wisch's and when it was finally cast into form and before Mr. Wisch had signed it and looked it over, then he said that ought to come out, and he asked me to make the amendment, but due to a multitude of things, I really never got around
 10 to it. I intended to make a motion to do it to-day.

NO CROSS EXAMINATION.

DR. WILLIAM FREILE, SWORN:

DIRECT EXAMINATION BY MR. LINK:

Q. You are one of the complainants in this action? A. I am.

20 Q. Will you state to the Court the facts attending your placing your signature on the back of the note in suit here? A. On this morning in October, nineteen hundred and—

MR. MILTON: Just a moment. It seems to me this is clearly in contravention of the rule that prohibits oral testimony being received as to the contents of a written instrument.

30 MR. PERKINS: That don't apply in a case where fraud is charged, and where we are trying to change the instrument.

THE VICE CHANCELLOR: There is no evidence, so far as I understand it, as to any note but some note that is up in the air and not connected with this suit at all.

MR. MILTON: Well, the counsel says "the note in suit".

THE VICE CHANCELLOR: Well, counsel cannot say "the note in suit" without producing it.

40 MR. MILTON: I object, then, to this witness being permitted to testify.

Dr. William Freile—Direct.

THE VICE CHANCELLOR: The other witness in no manner, as I understand, attempted to connect this note with the note in suit. He testified to "a note"—now, what that note is I don't know.

MR. MILTON: Well, until the relevancy of it or anything connecting it with the issues involved here appears, I think his testimony is inadmissible. 10

THE VICE CHANCELLOR: Unless it is connected I shall so regard it—having been properly objected to.

MR. LINK: I understood, your Honor that Mr. Wisch was testifying to the note in suit, that was the understanding.

THE VICE CHANCELLOR: Oh, no; so far as the general reference to it is concerned, that is one thing; but as to anything tending to identify a particular note, the note has got to be shown the witness and be asked if that is his signature. I do not see, for the life of me, how it is going to bind you in the least bit to show the note. It need not be marked in evidence. 20

MR. CARPENTER: It is all admitted, anyhow. I don't see how there can be any possible question of it.

THE VICE CHANCELLOR: Is there a copy of the note annexed to the bill? 30

MR. CARPENTER: No, but it is sufficiently identified.

(Mr. Carpenter thereupon produced the note in question and handed it to Mr. Link.)

Q. I show you a note dated October 27, 1913; is that your signature? A. That is my signature.

(The note referred to is marked C-1 for Identification.) 40

Dr. William Freile—Direct.

10 MR. MILTON: Now, I may be anticipating what Mr. Link is going to do, but until this note is offered in evidence I do not see how any evidence can be admitted with reference to the state of the paper. It seems to me that the witness is called for the purpose of identifying the paper; that can be done, but no further inquiry can be made into that paper unless it is in evidence.

THE VICE CHANCELLOR (to Mr. Link): You are trying to restrain a suit on this very note, aren't you? And you want to have it delivered up for cancellation?

MR. PERKINS: That is right. It ought to go into evidence.

20 THE VICE CHANCELLOR: How can you ask for any such relief without offering it in evidence?

MR. PENKINS: I think it should go in evidence. It is not in evidence as an obligation, it is only in evidence as a piece of paper in this record.

THE VICE CHANCELLOR: You do not concede anything as to its validity by offering it in evidence. It is the very paper you attack for the purpose of setting it aside.

30 MR. LINK: Then I offer in evidence note of the Orpheum Amusement Company, endorsed by Joseph H. Rudiger, Anthony Michel—

MR. CARPENTER: Read all there is on there.

MR. LINK: I offer in evidence the following note:

"Jersey City, N. J., October 27th, 1913.
\$2500.00—"

40 THE VICE CHANCELLOR: Oh, why not just offer the note in evidence for what it is worth?

MR. LINK: I offer this note in evidence.

Dr. William Freile—Direct.

(The note is admitted without objection and marked Exhibit C-1.)

Q. I show you Complainant's Exhibit C-1; will you state whether the name William Freile, M. D., is your signature? A. That is my signature.

Q. Will you state the circumstances surrounding the execution of that note and the placing of your signature on the back of the note? 10

MR. CARPENTER: I object to it, on the ground that it is incompetent, irrelevant and immaterial; and certainly not admissible as against Mr. Schatzkin, who is a holder for value in good faith.

THE VICE CHANCELLOR: Well, I don't know. They cannot offer all their evidence in one word. It may be they will connect the note with it. I will admit it in evidence and allow the question. It may be that it will have to be stricken out later, if it is not shown that Mr. Schatzkin had knowledge of it. The motion, of course, can be renewed later on that. 20

A. On this morning in October, 1913, Mr. Fred Carry, who is present in court, came to my office. He stated that Mr. Rudiger had sent him down to my office with this note and requested me to endorse it. I demurred and said to him, "Fred, you know that I have had my dose of medicine in this thing, and I don't care to put my name on any further pieces of paper". He then said to me that Mr. Rudiger had advised him to tell me that it was simply a matter of accommodation to Mr. Rudiger so that he could raise some money for the continuation of the theatre project, and on that representation I endorsed the note. 30

Q. Will you state whether or not— 40

Dr. William Freile—Cross.

10 MR. MILTON: I move to strike out (on behalf of Mr. Rudiger) the statement alleged to have been made by Carry that he was instructed by Mr. Rudiger to say it was simply a matter of accommodation for him so that he might continue the theatre project, on the ground that there is no charge in the pleadings that this witness or any other witness executed this note for Rudiger's accommodation.

THE VICE CHANCELLOR: I will let it stand. I won't strike it out; I do not see that it goes to the crux of the case particularly.

MR. CARPENTER: I wish to join in that objection.

THE VICE CHANCELLOR: Yes.

20 Q. Did you have any conversation subsequently with Mr. Rudiger regarding this note? A. None whatever.

Q. Or with anybody connected with Mr. Rudiger or Mr. Schatzkin? A. No.

THE VICE CHANCELLOR: I do not understand he had any conversation with Mr. Rudiger—he had a conversation with Mr. Carry, as coming from Mr. Rudiger.

30 THE WITNESS: That is the only conversation I had on the topic.

Q. Did you receive any money, or property, or anything of any kind, for the execution of that note? A. Nothing whatever.

CROSS EXAMINATION BY MR. MILTON:

40 Q. Doctor, you had been a stockholder and officer of the Orpheum Amusement Company? A. I had been prior to six or eight months before the dating of this note.

Dr. William Freile—Cross.

Q. You had been an officer? A. An officer.

Q. At the time of the endorsement of this note you were still a stockholder? A. Yes, sir.

Q. How many shares of stock did you hold? A. I really don't remember; I know that I lost about six thousand dollars on the transaction.

Q. You had been investing money from time to time in the Orpheum Amusement Company, in an endeavor to keep the dying horse on its legs? A. With others, I had, up to the time that I resigned the Presidency, which was, I think, six or eight months prior to this note in question. 10

Q. You understood, at the time the note was tendered to you, that the proceeds of it were to be used for the purpose of paying the rent due to the Phoenix Realty Company? A. That was my understanding, yes.

Q. And that if the rent were paid the theatre would be allowed to remain open, and the Orpheum Amusement Company be allowed to conduct it? A. That was my conception of it. 20

Q. Doctor, are you quite sure that Mr. Carry did not say to you that Mr. Rudiger sent him to you because he, Mr. Rudiger, would not endorse the note unless it was understood by you and Michel and Wisch that he was not to be liable on it? A. I do not recall any such statement, Mr. Milton.

Q. You do not recall that? A. No, sir. 30

Q. Do you recall when it was that Mr. Carry brought the note to you—what day it was? A. I am a little bit in doubt about that; I think, to the best of my knowledge, it was either a Sunday or a Monday.

Q. Your recollection of this transaction is a little hazy, is it not? A. It is hazy as to the question of the absolute date on which the note was presented; that I will admit. 40

Q. Is that the only point on which it is hazy,

Dr. William Freile—Cross.

Doctor? A. No, my recollection of the other facts is reasonably definite.

Q. Well, is your recollection definite as to whose names were on the note when you signed it?

A. It is quite definite.

Q. It is quite definite? A. Yes, sir.

10 Q. Well, are you definitely clear and certain that Mr. Wisch's name was on the note at the time you signed it? A. Mr. Wisch's name was not on the note at the time I signed it.

Q. When did you become definite about that? A. Well, that is just simply my definite recollection about it.

20 Q. I see. Well, have you any recollection of acquiring a definite recollection—if I may put it that way—about Mr. Wisch's name being on the note when it came to you? A. Well, I simply do not recall seeing Mr. Wisch's name on the note when it was presented. I saw only two names on it at the time, that is, Mr. Rudiger and Anthony Michel, to the best of my knowledge.

Q. Are you certain, now, that Mr. Wisch's name was on it? A. I do not think it was.

Q. You do not think it was? A. No; I do not think it was at the time it was presented to me for signature.

30 Q. Would you go so far, Doctor, as to swear now that Wisch's name was not on the note?

MR. PERKINS: I object; I think it is wholly immaterial. Here are the last two endorsers on the note—how can it possibly affect the liability, or the responsibility of the holder of the note, or anyone else?

40 THE VICE CHANCELLOR: Why, they are liable in the order in which they endorse, and the proof of the order on the back of the instrument governs, unless there is an agreement

Dr. William Freile—Cross.

to the contrary. All this witness has testified to is his recollection (as definitely as any man can, as I see it). The mere fact that he says he is "prepared to swear, etc.," is not so material; he is now under oath testifying as to what he recalls of the transaction.

MR. MILTON: Yes, sir; the examination is being conducted for the purpose (it may not be accomplishing it, but at least it is being conducted for the purpose) of demonstrating that the witness's recollection of what took place at the time he signed the note is very weak and indistinct. I think we have an honest witness—no question about that—but the witness's recollection as to what took place at the time he signed the note is not clear, and is not good. 10

THE VICE CHANCELLOR: Well, now, just examine him so as to clear up that recollection, if you can. 20

Q. (Last question repeated.) A. I would answer that by saying, to the best of my recollection, it was not.

Q. It was not on the note? A. To the best of my recollection. I am absolutely trying to recall these things as well as I can.

Q. I call your attention, Doctor, to a statement made in the affidavit which you made in this case on the 25th day of September, 1914, before Walter G. Winne, Attorney-at-Law of New Jersey—the name "William Freile" being your signature, I presume? A. That is mine. 30

Q. I call your attention to this statement "Said note was brought to deponent's office, 178 Palisade Avenue, Jersey City, by one Fred Carry; that at the time it was brought there it bore the endorsement of J. H. Rudiger and Anthony Michel, and, 40

Dr. William Freile—Cross.

the deponent is informed, that of Edward P. Wisch"? A. Yes; I say "deponent is informed."

Q. Who told you that? A. I think that statement arose out of the conferences down in Mr. Perkin's office; and while my recollection was that Mr. Wisch's name was not then present, the gist of the argument seemed to suggest that it really was.

Q. And the fact is, then, that while in Mr. Perkins' office, in the act of preparing this affidavit, you were not certain whether Wisch's name was on that note, or not? A. I say I was informed that it was on it—"the deponent is informed."

Q. And you were not certain at that time that Wisch's name was on it? A. No, I am simply saying that, to the best of my recollection, it was not.

20 Q. As I understand it, Doctor, you now testify that Mr. Carry, when he brought Exhibit C-1 to you (that being the note) for endorsement, he said to you that your endorsement was sought for the accommodation of Mr. Rudiger? A. That is my recollection of it.

Q. I see. Let me ask you, was that all he said about "accommodation"? A. That is all I recall.

Q. I see. Let me ask you, Doctor, what you meant by this statement in the same affidavit—
30 "that at the time deponent endorsed said note said Carry stated that it was for the accommodation of Solomon M. Schatzkin"—was that true? A. Well, I could not really swear, just at this moment, how this accommodation thing was assumed. I presumed, when Mr. Rudiger sent the note down to me, that he was negotiating the whole thing.

Q. I see. Then you really presumed, when Carry brought the note to you and said he came from Mr. Rudiger, that you were doing this thing
40 for Rudiger's accommodation? A. I did.

Dr. William Freile—Cross.

Q. Yet, notwithstanding that presumption, you made this affidavit that Carry said to you that it was for Schatzkin's accommodation—is that right?

A. I really could not be absolutely certain about it.

Q. Now, Doctor, is it not the real fact that your recollection of what Carry said to you is so hazy and indistinct that you are not certain just what Carry said to you? A. Well, it is a very difficult matter to recall some of these transient conversations of three years ago, Mr. Milton. **10**

Q. Well, would you be apt to say that this affidavit, that was made in September, 1914 (which was a little short of a year after the note was endorsed) was more reliable as to your recollection than what you are now testifying to—in other words, were not the facts, in September, 1914 fresher in your recollection than they are now? **20**

A. Well, the facts are a year older, of course.

Q. Yes; and you were gathered together at the time you made this affidavit, in Mr. Perkins' office, for the purpose of preparing this bill of complaint to prevent the trial of the suit at law, weren't you? A. That is true.

Q. Don't you think, really that the facts as you stated them in September, 1914, are nearer the truth than you are now stating them? A. It seems to me the only question at issue is the question of the name in the accommodation proposition. **30**

Q. Well, that may be so, in your mind. A. The only thing I am clear on is that the note was sent to me, that Carry brought the note, and he stated that it came to me from Mr. Rudiger. That I am clear about.

Q. Beyond that, it is a hazy mist, is it? A. And the question of the accommodation thing is hard to recall. **40**

Dr. William Freile—Re-Direct.

CROSS EXAMINATION BY MR. CARPENTER:

Q. You knew Carry pretty well, didn't you, Doctor? A. Yes, I had seen him before at the Orpheum Theatre.

Q. What was his position there? A. I believe he was in the box office there.

10 Q. You knew that, didn't you? A. Yes, I did.

Q. You knew his connection with the theatre just as well as you knew you were a stockholder in the Company? A. I did.

Q. And you observed right off that this was a note made by the Orpheum Amusement Company, too, didn't you? A. Yes, sir.

Q. Did you call up Mr. Rudiger on the telephone? A. I have never spoken to Mr. Rudiger in association with this note at any time.

20 Q. Well, I mean, did you call up any other men whose names were on the note? A. No, sir.

Q. You could have got them on the telephone within a few minutes, couldn't you, as far as you knew?

MR. LINK: I object to that. It is immaterial.

THE VICE CHANCELLOR: What is the difference?

30 MR. CARPENTER: All right; that is all.

RE-DIRECT EXAMINATION BY MR. LINK:

Q. For eight months you had refused to lend any financial assistance to the Orpheum Theatre Company? A. I had. I had refused.

Q. That is, for eight months prior to the time of the execution of the note? A. Yes, sir.

BY MR. CARPENTER:

40 Q. Doctor, will you tell me how long it was before this note was signed that you had seen

Dr. William Freile—Re-Direct.

Mr. Wisch? A. I really cannot recall that.

Q. Was it the Saturday before? A. It might have been, I cannot recall that.

Q. It might have been the day before? A. It might have been the previous day, for that matter.

Q. Did you, at that time, refer to the Orpheum Amusement Company, or its affairs? A. At what time? 10

Q. When you saw him just before this note was endorsed?

MR. LINK: I object. He did not say so.

THE VICE CHANCELLOR: He did not say so.

Q. You say you saw him a day or two before the note was endorsed? A. No, I say it might have been a day or two before; I cannot place those things.

Q. Well, was it within a week before? A. I 20
really do not know, Mr. Carpenter.

Q. Well, what is your best recollection? A. I haven't any on it. We had so many meetings in those days that one cannot clarify those things at all.

Q. Did you have meetings with him and Mr. Michel, and talk over the Orpheum Amusement Company affairs continuously from the time that you stopped putting up money until this note was signed? A. To the best of my knowledge, I at- 30
tended some of those meetings for two or three months subsequent to my giving up the Presidency.

Q. You were present, were you? A. For those first few months, yes.

Q. After that, right on down to the time the theatres were closed, or the Amusement Companies stopped running them, you talked with those gentlemen about the affairs of this company, didn't you? A. We met together casually under oth- 40

P. Edward Wisch—Direct.

er circumstances, and discussed things occasionally, yes.

THE VICE CHANCELLOR: Where is the order directing the complainant to give a bond? I do not find any on file.

MR. PERKINS: The bond was prepared.

10 THE VICE CHANCELLOR: Well, I mean the order to give the bond.

MR. PERKINS: Well, I have a copy of it, your Honor (examining counsel's papers)—no, that is a copy of the original order that I have. The bond itself was drawn in Mr. Carpenter's office; I have his copies here with his backs on them.

20 THE VICE CHANCELLOR: Just see if it is there among the papers (handing to Mr. Perkins the original files).

MR. PERKINS: (After examining the files.) The only order I see is the order to show cause, the original order to show cause.

P. EDWARD WISCH, recalled.

DIRECT EXAMINATION BY MR. LINK:

30 Q. I show you complainant's exhibit C-1 and ask you is that your signature? A. Yes, sir.

Q. And the testimony which you have given just a few moments ago was in reference to the execution of this note, Complainant's Exhibit C-1? A. Yes, sir.

Q. You never received any money for the execution of this note? A. Not one cent.

Q. Or property? A. Nothing.

NO CROSS EXAMINATION.

40

Colloquy.

MR. LINK: I think we served notice to produce on the other side, asking them to produce certain contracts and agreements between Schatzkin and Rudiger.

MR. MILTON: Not on me.

MR. CARPENTER: Yes, I have been served with it.

MR. LINK: (To Mr. Carpenter.) Have you got them? 10

MR. CARPENTER: Between Rudiger and Schatzkin?

MR. LINK: Yes, the agreements.

MR. CARPENTER: Do you ask me to produce everything that you called for?

MR. LINK: I ask you to, yes.

MR. CARPENTER: All right; I will give you all I can, and I will ask the stenographer to mark them in evidence. I produce the assignment from Schatzkin to Oetjen— 20

THE VICE CHANCELLOR: One moment; you cannot get them in evidence that way. You are called upon to produce certain papers. Now, counsel, in answer to the notice, produces certain papers.

MR. CARPENTER: I produce the assignment from Schatzkin to Oetjen.

MR. LINK: Let me look at it.

THE VICE CHANCELLOR: Well, I don't know that you are entitled to look at it. 30

MR. PERKINS: We are entitled to see whether we called for it, your Honor.

THE VICE CHANCELLOR: Certainly.

MR. PERKINS: Where, under our notice to produce, does it call for that paper?

MR. CARPENTER: "All letters, paper writings or contracts in any way relating to the subject-matter of this suit; the check or checks given by you in payment of said note," etc. 40

Colloquy.

MR. PERKINS: Have you produced those papers?

MR. CARPENTER: Everything we have got.

MR. PERKINS: You cannot select a certain number of papers and make us put them in evidence, and hold back other papers.

10 MR. MILTON: We had to produce that paper. We produce a paper they ask for, and now they say they did not ask for it; we say that they did.

MR. LINK: Well, we will offer this assignment in evidence.

(Assignment admitted and marked Exhibit C-2.)

20 MR. CARPENTER: We now produce check dated Oct. 27, 1913, to the order of J. H. Rudiger, signed by S. M. Schatzkin, for \$2462.50, endorsed "Pay to the order of Orpheum Amusement Company," signed "J. H. Rudiger," "For deposit, Orpheum Amusement Company, Anthony Michel, Treasurer," and with the bank stamps thereon. I think it goes in automatically.

THE VICE CHANCELLOR: No; in answer to your notice to produce you say you have got it. Now, it rests with him to offer it in evidence.

30 MR. LINK: Well, I will offer it in evidence. (The check is admitted and marked Exhibit C-3.)

MR. CARPENTER: Now, I produce the note and certificate of protest, which are already in evidence; and those are all the papers I have.

40 MR. PERKINS: No, but the notice to produce directed to you, and the subpoena *duces tecum* directed to Schatzkin, requires the production of a variety of papers, a great many papers.

Colloquy.

THE VICE CHANCELLOR: Not specified by any date, and not described in any manner.

MR. PERKINS: Yes, they are. They are described this way: We want the contract of settlement between Mr. Schatzkin and Mr. Rudiger, whereby they settled their affairs.

THE VICE CHANCELLOR: (To Mr. Carpenter.) Where is that? 10

MR. CARPENTER: Mr. Perkins is asking me for something I have never seen or heard of.

MR. PERKINS: Well, where are your clients, to say they never heard of it?

MR. CARPENTER: Well, call them on the stand.

MR. LINK: Where is Mr. Schatzkin?

MR. MILTON: You subpoenaed him and excused him.

MR. LINK: I know; but we excused him on the assumption that he was coming back. 20

MR. CARPENTER: We will have him here at two o'clock.

THE VICE CHANCELLOR: We will adjourn now until two o'clock, and see if counsel cannot get over this difficulty on their notice to produce.

RECESS UNTIL 2 P. M.

30

AFTERNOON SESSION.

Hearing of the matter resumed at 2 o'clock P. M.

MR. CARPENTER: Those papers that I have produced, gentlemen, are all that I know of, that are in existence.

THE VICE CHANCELLOR: Where is the order under which the bond was given? 40

MR. CARPENTER: I do not know.

Colloquy.

THE VICE CHANCELLOR: Who took the order?

MR. PERKINS: I do not think I ever took the order.

THE VICE CHANCELLOR: On whose motion was it made?

10 MR. PERKINS: The bond was given on his motion.

MR. CARPENTER: It was a bond that was allowed after the hearing on the rule to show cause, and I understood that Mr. Perkins got the order.

20 MR. PERKINS: This is what happened: I got the restraint on the 28th of September, and they came in and answered and said they had no objection to us coming from the court of law to the court of chancery, but that we ought to give a bond, and your Honor said we should give a bond, and we prepared the bond and had it executed.

THE VICE CHANCELLOR: There should have been an order.

MR. PERKINS: Well, I suppose that the man that wants a bond would be the man who naturally would take the order that the bond be given.

30 MR. CARPENTER: I am sure it was in the same order that continued that restraint, which required them also to give a bond. Now, that is my recollection.

THE VICE CHANCELLOR: It would naturally be in that order.

MR. CARPENTER: (Upon examining Mr. Perkins' papers.) Here is the original copy of the proposed order, which apparently has not been signed.

40 MR. PERKINS: It says "Not used"—that was not used. The question is whose duty it was to take the order.

Joseph H. Rudiger—Direct.

THE VICE CHANCELLOR: I don't know whose duty it was, I want to know what the record shows. Where is the signed order?

MR. PERKINS: There is no order, as far as I know, except the original order of restraint in this case.

THE VICE CHANCELLOR: Well, we won't bother with it now; we will go on with the case. 10

MR. CARPENTER: My recollection must have been right, because in this proposed order drawn by Mr. Perkins it says——

MR. PERKINS: Well, that was never before the Court.

MR. CARPENTER: I am only giving my recollection of what happened.

THE VICE CHANCELLOR: Well, is that going to aid the Court any? You had better find out about it; it may be it was mailed to Trenton. Counsel can look into it. There should be an order here authorizing the giving of the bond and continuing the restraint. You may proceed, Mr. Perkins. 20

JOSEPH H. RUDIGER, sworn.

DIRECT EXAMINATION BY MR. LINK: 30

Q. You are Joseph H. Rudiger, the payee on the note, Complainant's Exhibit C-1? A. Yes, sir.

Q. On October 27th, 1913, you were President of the Realty and Commercial Company? A. I really do not know whether I was or not. I was previous to that; possibly I was at that time, but I would not be positive, though.

Q. When did you cease to become President? A. If I knew that I could tell you whether I 40

Joseph H. Rudiger—Direct.

was at that date or not; I would have to look that up; I could not tell you as to dates.

Q. Well, I have seen the books of the Realty and Commercial Company, and you did not resign until the following year. A. Well, then, I was President.

10 THE VICE CHANCELLOR: Well, that, of course, don't make evidence.

MR. LINK: Well, I just wanted to refresh his recollection.

A. I was President until the time I resigned, whatever date that was.

Q. But at the time of the execution of this note you were President of the company—around that time? A. I am not clear about that, whether I was, or not.

20 Q. When did you resign as President of the Phoenix Realty Company? A. Sometime in 1913.

Q. Well, immediately upon your resignation from the Phoenix Realty Company didn't you become President of the Realty and Commercial Company? A. I think previous to that.

Q. Previous to that resignation? A. In my recollection.

Q. You were President of both companies? A. Yes, sir.

30 Q. Were you president of the Realty and Commercial Company at the time the Orpheum Theatre Building was sold to Dr. Albanesius? A. No, sir.

Q. Well, how long before that did you resign?

THE VICE CHANCELLOR: Why waste time on that? The record will show it. You have the records, haven't you?

MR. LINK: I haven't the record here.

40 MR. PERKINS: We subpoenaed somebody to produce them.

Joseph H. Rudiger—Direct.

MR. LINK: But that man is out of town.

THE VICE CHANCELLOR: Have you given notice to produce, or subpoenaed their production?

MR. LINK: They are a New York corporation.

MR. PERKINS: They are not parties to the suit. We could not give notice to our adversaries to produce them because they are not in their possession. 10

MR. MILTON: We have no objection to their supplying them and putting it in Mr. Rudiger's testimony, that he undoubtedly was President of both companies, and we can ascertain when his office ceased in both of them.

MR. LINK: Well, the records of the company show that he resigned about January 1914.

THE VICE CHANCELLOR: Well, you have not got the record here, and the mere statement of counsel is not evidence. 20

THE WITNESS: If I knew you wanted that I surely would have brought it, because I have a record of it.

THE VICE CHANCELLOR: Well, go on to some other branch of the examination. The record can be supplied later.

Q. Have you produced any papers relating to your connection with the Realty and Commercial Company and the Phoenix Realty Company, and the stock showing your interest in those companies? 30

MR. MILTON: It does not appear that Mr. Rudiger was asked to do so.

MR. LINK: There was a subpoena served on Mr. Rudiger. This subpoena calls for the production of "all paper writings between you and Solomon M. Schatzkin pertaining to or 40

Solomon M. Schatzkin—Direct.

relating to the sale to said Schatzkin of stock or interest in the Realty and Commercial Company, or Phoenix Realty Company; or relating to the note described in the bill of complaint.”

THE WITNESS: There are no such papers in existence.

10 MR. MILTON: Will you specify any paper that you think Mr. Rudiger has, Mr. Link?

MR. LINK: No, I cannot—not at the present time.

COMPLAINANT RESTS.

THE CASE FOR THE DEFENDANTS.

20 SOLOMON M. SCHATZKIN, SWORN.

DIRECT EXAMINATION BY MR. CARPENTER:

Q. You are a resident of this State? A. Yes, sir.

Q. Residing in Rutherford? A. Yes, sir.

Q. Are you an officer of Burns Brothers? A. Yes, sir.

Q. What position do you hold there? A. Vice President.

30 Q. This is your signature, and your check, is it not, dated October 27, 1913, to the order of Joseph H. Rudiger, for \$2462.50? (Showing the witness Exhibit C-3.) A. Yes, sir.

Q. Can you state what that was given in payment of, or what it was drawn for? A. That was in payment of a note. This is the note, for \$2500, less the interest.

Q. Referring to Exhibit C-1? A. Yes, sir.

40 Q. I would like you to explain to the Court just

Solomon M. Schatzkin—Direct.

what the circumstances were under which you bought this note? A. Mr. Michel—he was, I believe, the Secretary or something, or the Manager of the Orpheum Amusement Company, a corporation operating at the theatre owned by the Phoenix Realty Company—and Mr. Rudiger, they came to my house—

Q. Michel and who else? A. Michel and Mr. Rudiger. Michel told me the story that they need money to pay their help, or the actors and other people, and they haven't got any money to pay with, and they will have to fail if they cannot get it, but if they could get \$2500 that would see them through, and at that time Mr. Wisch—who was one of the officers, I believe, of the Orpheum Amusement Company—would be in a position to repay it, to repay me the note; or if I would lend them \$2500, that they would bring me or give me a company's note, and Mr. Wisch and Dr. Freile and some others, I think, would endorse it. I said, "I don't know those gentlemen; I heard their names, but I don't know their responsibility, and I don't see why I should go and make any loans. They argued with me that as I am indirectly interested in the building I ought to do them the favor and lend them the money so that they could fulfil their contract. Mr. Rudiger said to me, he said, "I know those parties are good; they are responsible for anything they will put their name on that is within reason."

Q. Do you know whether, up to that time, Mr. Rudiger was named as one of those who was to endorse this proposed note? A. No, sir.

MR. LINK: I object to that question as leading. I think the witness is competent to testify to just what happened. You have not exhausted his recollection yet of the conversation.

Solomon M. Schatzkin—Direct.

THE VICE CHANCELLOR: Counsel was a little slow in objecting. I will strike out the question and answer. The question was leading.

10 Q. Who were the men that were to endorse this proposed note of the Orpheum Amusement Company, for \$2500, as disclosed by the persons who asked you if you would loan twenty-five hundred dollars on such a note?

THE VICE CHANCELLOR: Let him tell the conversation.

MR. PERKINS: May it be fixed, first who were present at the conversation?

THE VICE CHANCELLOR: He can state that.

20 A. Mr. Michel said, "You can ask Mr. Rudiger; you know him well enough; he will tell you that the people are responsible"; and Mr. Rudiger said, "Yes, they are good enough for that loan, and that is perfectly safe, if the company will not be able to pay; and Mr. Wisch and Dr. Freile are responsible enough for the amount of the note." I said, "If you think they are good and responsible, and know it——"

30 MR. LINK: I object to the testimony of this witness regarding Dr. Freile and Mr. Wisch, because they were not present at this conversation, and there is no testimony of record showing that Mr. Michel was authorized to speak for them.

THE VICE CHANCELLOR: I am going to admit this testimony just the same as I admitted what you offered, subject to being stricken out.

40 A. (Resuming.) I said, "If you think they are good enough to recommend to make the loan, if

Solomon M. Schatzkin—Direct.

you will endorse it, I will make the loan—if you will endorse it.”

BY THE VICE CHANCELLOR:

Q. That is, to Rudiger? A. To Mr. Rudiger. He at first declined; he said, “I don’t want to have anything to do with it; I won’t put in another dollar, or go on any papers; I am through with it.” I said, “Well, if you think it is good, you should not be afraid to put your name to it.” And at first he objected; then he had a talk with Mr. Michel, and he said, “Well, I think they are good enough; I can always get the money from them; I will endorse it.” I said, “Well, if you will endorse it I will get the check”; I said, “Send a man to my office in the morning and bring the note, and I will make out the check to you, less the interest,” which I did. 10 20

Q. Now, who were present when this conversation took place? A. Only the parties I mentioned, Mr. Michel, Mr. Rudiger and myself.

BY MR. CARPENTER:

Q. That note came along, then in the ordinary course, and you bought it?

MR. PERKINS: I object to the leading form of the question.

MR. CARPENTER: That has already been testified to, anyhow. 30

MR. PERKINS: Then why ask such a foolish question?

THE VICE CHANCELLOR: That question, of course, will be stricken out.

Q. After you got this note and paid for it, when did you next hear from them? A. From whom?

Q. Well, what did you do with the note after 40

Solomon M. Schatzkin—Direct.

you bought it? A. I don't remember exactly if I discounted it, or just handed it into bank for collection.

THE VICE CHANCELLOR: Well, you have not connected up the giving of the note yet.

10 MR. CARPENTER: If you read the last part of his statement there, you will see that he said he bought it.

THE WITNESS: A young man came in the next morning and brought me the note, and I gave him the check.

Q. Is this the check, marked Exhibit C-3 (showing the witness the same)? A. Yes, sir.

Q. And the note is Exhibit C-1 (showing the witness the same)? A. Yes, sir.

20 Q. Did you have a talk with Mr. Wisch after the note fell due, in which you demanded payment from him? He testified here this morning, in your absence, that after the note fell due and was protested, Mr. Rudiger telephoned for him to come to your office, and that he came there, and you asked him if he was going to pay the note, or would pay it—do you remember that conversation?

30 MR. PERKINS: I object; it is a compound and complex question. You will have to strike out the former question to get the record right. Your Honor will easily see, if the question is read by the stenographer, what a mixed-up question it is.

THE VICE CHANCELLOR: No, he is giving a recital of what the witness (Wisch) said.

(The question was repeated by the stenographer.)

40 THE VICE CHANCELLOR: The fore part of the question can be stricken out.

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Q. Do you remember such a conversation? A. No, I can't recollect the exact conversation. I believe there was a demand made, to ask him to pay, and he said he wouldn't pay, or something; I don't recollect it exactly.

MR. PERKINS: Well, I move to strike out the belief, then, when he says he don't recollect. 10

THE VICE CHANCELLOR: That may be stricken out.

Q. After that what efforts did you make to collect the note?

MR. LINK: I object to that, as being immaterial.

THE VICE CHANCELLOR: Well, you may ask him if he had any conversation with these people afterwards about paying the note. 20

MR. CARPENTER: That is not my purpose; my purpose is to show how this note got into our hands for collection, and to explain this writing of the words "without recourse" there. I do not want to ask a leading question about it.

THE VICE CHANCELLOR: You may go ahead; ask the question.

(Question repeated.)

30

A. When I found out that the endorsers, that is, Mr. Wisch and Dr. Freile, refused to pay the note, I went to Mr. Rudiger and demanded payment from him as the man I looked to, practically when I gave the money; and he said, "I suppose—"

MR. PERKINS: I object to this.

THE VICE CHANCELLOR (to the witness): You cannot state what Mr. Rudiger said un- 40

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less in the presence of the other complainants,
or the other parties sought to be bound.

Q. Did you, after that, place the note in the
hands of attorneys for collection?

MR. PERKINS: I object to that, as leading.

THE VICE CHANCELLOR: I will strike it
10 out.

Q. After that did the note leave your hands?

A. Yes, sir.

Q. Whom did you give it to? A. I gave it to
my attorneys, Hilquit & Levene, a New York firm,
for collection, to try to get the money.

Q. Now, I show you the words, under the signa-
20 ture "Joseph H. Rudiger" on the back of the note,
"Without recourse"—were those words on the note
when you gave it to Hilquit & Levene for collec-
tion? A. No, sir.

Q. Were they put there by you? A. No, sir. I
heard about this endorsement after they brought
suit, and I heard from somebody saying there was
such a thing put in, but that was put in after it
was turned over to Mr. Rudiger.

Q. Was it put there with your knowledge? A.
No, sir.

Q. With your consent? A. No, sir.

30 Q. Did you know anything about it until after
suit had been brought? A. No, sir; not until
afterwards.

Q. Do you know how it got into the hands of
Mr. Rudiger? A. Yes, sir; Mr. Rudiger had—

MR. PERKINS: Well, if it is of his own
knowledge.

BY THE VICE CHANCELLOR:

40 Q. Do you know, of your own knowledge, how it
came to the hands of Mr. Rudiger? A. Yes, sir.

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Q. All right, then; you may state it—that is, not what someone else told you, but what you know yourself. A. I ordered my attorneys to deliver the note to Mr. Rudiger.

BY MR. CARPENTER:

Q. For what purpose?

(Objected to.)

10

THE VICE CHANCELLOR: Just state what you said when you ordered them to deliver it over.

A. Mr. Rudiger had a claim for an even amount of \$2500 for some insurance, which he came to me and tried to collect; and I told him, I said, "You owe me \$2500 for the note; deduct the amount you owe me on the note, \$2500, to cover one amount for the other." He said, "Well, I suppose I will be responsible, anyway, if it can't be collected from them," and we had an understanding that if I can't collect the note from Mr. Wisch or the other endorsers, then I shall deduct it from the amount due him; and in case I do collect the note, then I shall have to turn him over the \$2500 for the claim he had; that was some insurance that was assigned to him from Read & Miller, I think, against the Phoenix Realty, or something of the kind.

20

30

Q. At any rate, it was a \$2500 debt? A. Yes, which nominally I owe him now, and I hold him responsible for the note. That was understood between us, that one should offset the other; if I collect here I pay him his money, and if not, it should be deducted.

Q. That is what you told him you would do about it? A. Yes, sir. Then I gave him the note, or instructed my attorneys to deliver the note to him and commence suit; and if the money will be

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collected I will pay him, and if it is not collected I deduct it. That is the way the note got to him.

Q. In other words, now—

MR. PERKINS: I object.

THE VICE CHANCELLOR: Objection sustained. Ask him another question, Mr. Carpenter.

10

MR. CARPENTER: Well, the premature objection of counsel has driven it out of my mind. I am in the habit of having objections made after the questions are asked.

Q. In other words, can you say whether or not it was the agreement, or it was stated by you, that you would not pay Mr. Rudiger the debt you owed him until after you had been able to collect or not on this note?

20

MR. PERKINS: I object; the question, in the beginning, is leading—

THE VICE CHANCELLOR: The objection is sustained, but I think the thing is very plain as the witness puts it; as I understand it, Mr. Rudiger had a claim of \$2500 against Mr. Schatzkin, or some like amount, and Mr. Schatzkin had a claim against Mr. Rudiger for the same amount, \$2500; now, they had an understanding that if Mr. Schatzkin could recover from the other endorsers on this note the \$2500, then he would pay Rudiger; but if he could not, then he was going to use Rudiger's money to pay this note.

30

MR. CARPENTER: That is what I wanted to prove.

THE VICE CHANCELLOR: In other words, as I see it as this stage of the case, this looks like a suit between Rudiger and the other endorsers, in which Mr. Schatzkin is very little involved or interested.

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MR. PERKINS: We do not think he is involved at all.

THE VICE CHANCELLOR: I am only taking it now from the way it looks to me at this time; I am not saying what my ultimate conclusion will be.

MR. CARPENTER: I understand that.

Q. Did you, at the time you told Mr. Rudiger to take this note to Jersey City, or to counsel for suit, or gave instructions to your attorney to turn it over for that purpose, authorize him to write the words "without recourse" on the back of this note? A. No, sir.

10

Q. Did you say anything to him about that? A. No, sir.

Q. Did you ever tell him you would release him from liability on his endorsement? A. No, sir.

20

Q. Or did you ever intend to do that?

MR. PERKINS: I object to his intention.

MR. CARPENTER: I want to show the utmost good faith, as far as Mr. Schatzkin is concerned, in that endorsement "without recourse"—that is the sole purpose of it.

MR. PERKINS: The man cannot testify to his intention; that is purely a matter of psychology; it is a matter of the operation of the mind.

30

THE VICE CHANCELLOR: He can testify to what he said and what he did. He gave this note to Mr. Rudiger, under the circumstances of their agreement, for the limited purpose of turning it over to the attorneys to sue for the purpose of collecting it; or that is as I understand it now, subject to correction, what was done in pursuance of the agreement between Schatzkin and Rudiger.

40

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Q. Have you been paid anything whatsoever on account of this note? A. No, sir.

MR. LINK: I object to that, as calling for a conclusion. He has already testified—

THE VICE CHANCELLOR: Oh, no, it is not. When a man says he has not been paid, that is not a conclusion, that is a very positive fact.

CROSS EXAMINATION BY MR. PERKINS:

Q. Mr. Schatzkin, when you made this loan your understanding was that you were making it to Mr. Rudiger, is that right? A. No, sir.

Q. Well, why did you draw your check to Mr. Rudiger? A. So that I could hold him as endorser, because I did not know the other parties.

20 Q. Why didn't you draw the check to the Orpheum Amusement Company? A. I thought I could hold him as endorser better if I gave it to him direct, so there will be no question in case they don't pay it.

Q. You anticipated, then, that there might be some question as to the accommodation endorsers? A. I did not know the other parties; I knew Mr. Rudiger, and I wanted to be sure that if I gave the money I would get it back some day.

30 Q. Well, then, when you said that you would take the note if Rudiger endorsed it, and when you drew the check with which you purchased the note, making the note payable to J. H. Rudiger, your understanding was that it was a transaction between you and Rudiger? A. No, sir; it was done for the accommodation of the Orpheum Amusement Company, or their endorsers; but I wanted to get security, to be secured, and Mr. Rudiger guaranteed the payment of it.

40 Q. Well, in what way did he guarantee it? How did he guarantee it? A. By endorsing it.

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Q. That is, by endorsing the note? A. Yes.

Q. I am talking about the check now—why did you draw the check to him? A. Well, so it would show that I gave the money to him.

Q. So that it would show that the financial transaction was between you and Rudiger? A. No, I don't think it is that way.

Q. Well, what was it? 10

MR. MILTON: Counsel has asked that question three times, and it has been answered.

THE VICE CHANCELLOR: I think it is rather clear what he had in mind. Counsel may go further if he wants to. As I see it, the idea Mr. Schatzkin means to convey is this, that Rudiger asked him to make this loan, he did not know the other endorsers—

MR. CARPENTER: No, Rudiger was present with Michel, and when Michel asked for the loan Rudiger said they were all right. 20

THE VICE CHANCELLOR: Yes; and he only knew Rudiger and in order to preserve evidence of the fact that he loaned the money on this note on the strength of Rudiger's endorsement, he made the check to the order of Rudiger. Was Rudiger connected with the Company?

MR. LINK: Yes—the Orpheum? 30

THE VICE CHANCELLOR: Yes.

MR. LINK: He was a stockholder, and, I think, a director at one time.

MR. MILTON: Yes, at one time he was a director.

MR. PERKINS: May I ask that Mr. Link continue the examination?

THE VICE CHANCELLOR: Certainly.

BY MR. LINK: 40

Q. At the time of the execution of this check of

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yours, October 27th, 1913, Mr. Rudiger was President of the Realty and Commercial Company, wasn't he? A. I am not sure; I think he was; he sent in his resignation, I believe, before that, but I believe it was not acted on at the time this transaction took place.

10 Q. Subject to the execution of this note the Realty and Commercial Company sold the Orpheum Theatre to Dr. Albanesi, did it not?

MR. MILTON: How is this cross examination?

MR. LINK: I have a right to make him my witness on this point, if I want to.

THE VICE CHANCELLOR: On your own case, but not now.

MR. LINK: I will withdraw the question.

20 Q. You never had any conversation, prior to October 27th, 1913, with either Mr. Wisch or Dr. Freile, regarding the execution of the note, Complainant's Exhibit C-1? A. You mean between the time of the making of the note and the time it came due?

Q. I mean before the making of the note—before the making and delivery of the note, Complainant's Exhibit C-1, you never had any conversation? A. No, sir; not pertaining to this 30 transaction. I believe I did speak to him something pertaining to the theatre.

Q. But not pertaining to this transaction? A. I don't think so.

Q. So when, in your complaint, you allege that you had such a conversation—I mean in your answer you allege that you had such conversation—that is an error? A. I believe so; I do not remember speaking to Mr. Wisch at all before the note.

40 Q. In your answer you allege—

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MR. MILTON: It is perfectly obvious what happened. The word "to" is used instead of the word "of" (referring to the language of the answer). Mr. Carpenter's stenographer very likely took it down "to" instead of "of".

MR. LINK: Are you testifying, Mr. Milton, or Mr. Schatzkin?

THE VICE CHANCELLOR: Well, you are confronting the witness with a statement in his answer, where he has made an apparent misstatement. Counsel is showing that the mistake is well founded. 10

MR. LINK: This is not his own counsel.

THE VICE CHANCELLOR: I know; but counsel has the right to correct you, if you do not state correctly the answer.

MR. LINK: Well, I will read the answer to him; I want it correct, that is all. 20

THE VICE CHANCELLOR: Well, read the portion of the answer to him where you say he stated something contrary to what he now states.

Q. Mr. Schatzkin, regarding that arrangement which you had with Mr. Rudiger, were there any writings on the subject? A. I believe so; I believe there was something, but I do not recollect, and do not know what I did with it. 30

Q. You have been served with a subpoena, and your counsel has been served with a notice to produce those writings? A. Yes, sir.

Q. Why haven't you produced them? A. I think there was such a writing; my recollection is that there was something, but whether it was something that I gave to Mr. Rudiger and he kept it, or I kept it, I do not recollect; and I cannot find it. In my mind it was a settled affair.

Q. Well, where is that writing? When did you 40

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last see the writing? A. Oh, only at the time we made this arrangement that he shall hold his claim until I either collect on the note, or not be able to collect, and then it should be settled.

Q. Now, what I would like to know is where is that writing? A. If there is such a writing made I have not got it.

10 Q. Well, when did you see the writing the last time? A. Only at the time it was made.

Q. Well, what did you do with it then? A. I do not recollect. It was to me just like a thing which is settled and wound up, and I never paid any more attention to it until the case came up.

20 Q. Did you give the writing to Mr. Rudiger? A. I believe it was some little stipulation, maybe it was written on the bill which he had for insurance, that I put on it "I will pay it if I collect the money on the note"—something like that. I believe it was written but I cannot recollect definitely.

Q. Did you give it to Hilquit & Levene, your attorneys? A. I do not think so.

Q. Was there only one copy of the agreement made?

MR. MILTON: May I ask what this has to do with the case?

30 MR. LINK: It has a very important bearing on the case.

MR. MILTON: I do not see how it has, at all.

THE VICE CHANCELLOR: It may have a great deal to do in connection with Mr. Rudiger, on his cross bill.

MR. LINK: Why, we have subpoenaed this document.

40 THE VICE CHANCELLOR: And on the question of the right of this plaintiff in the suit at law.

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MR. MILTON: But I fail to see how the existence of that paper—if there is such a paper—could possibly affect the rights of any of the parties to this suit.

THE VICE CHANCELLOR: It could not, if it was no more than what has been stated in the testimony of the witness. If it was reduced to writing, it ought to be produced. Suppose there was an agreement made, signed by Mr. Schatzkin and Mr. Rudiger, and mutual releases executed whereby Mr. Schatzkin released his claim against Rudiger, and Rudiger released his claim against Schatzkin, and then he turned over to Rudiger this note, Rudiger could then write on this note (under or over his signature, where it properly should be), “without recourse”, and then seek to hold the others, if he was the last endorser. Now that may have been the course pursued with him as a first endorser. In other words, the question is raised whether or not this suit at law should not be between Rudiger and these complainants.

MR. MILTON: We were never parties to the suit at law.

THE VICE CHANCELLOR: Of course you were not; and this man may have no title to this very note that is in litigation now.

MR. CARPENTER: You cannot say that Rudiger has. If this man has not, nobody has; because Mr. Rudiger cannot get it from us until it is paid.

THE VICE CHANCELLOR: If Mr. Schatzkin and Mr. Rudiger had sat down and executed mutual releases, whereby Mr. Schatzkin surrendered this note—

MR. CARPENTER: Oh, there is no doubt about that.

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THE VICE CHANCELLOR: Well, that is what we want to find out. Where is this agreement that was signed?

Q. You say your counsel, Hilquit & Levene, have not got it? A. I doubt it; I doubt it. That may be inquired for.

10 Q. Who prepared the agreement? A. I don't remember the transaction; I believe there was something in writing saying that he shall hold the bill until—

MR. LINK: I object to what it said.

THE VICE CHANCELLOR: I will sustain it, until we find out that he cannot produce the writing.

20 THE WITNESS: My recollection is that when Mr. Rudiger claimed the \$2500—

MR. LINK: I object to that.

BY THE VICE CHANCELLOR:

Q. One moment. The question is, who drew this agreement in writing—did you write it up, or did Mr. Rudiger, or did some lawyer do it?

A. I don't recollect, your Honor.

BY MR. LINK:

30 Q. Is it not a fact that Hilquit & Levene prepared that agreement and had Mr. Rudiger sign it? A. I think not; but it is possible, though; I would have to inquire. I asked Mr. Levene, who was handling different cases, I asked him if he has any papers in connection with this transaction, to produce them in court according to that demand, and he says he hasn't got any. Now, that is as far as I know about it.

40 Q. Well, you sent Rudiger down to Hilquit & Levene's office to get that note, didn't you? A. The note, yes, sir.

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Q. And they were your counsel, weren't they?

A. Yes.

Q. Didn't you also send him down there for the purpose of signing a paper? A. As far as my recollection goes, there was something—I believe it was written right on the bill—that this bill should be held until I either collect or don't collect on the note; that is the way my recollection goes; but it is possible I am mistaken. And I think it was done in my office, between us, just as a matter that I didn't consider was necessary to have lawyers for, or anything like that. It was just between man and man. 10

Q. You did not think it was wise to have attorneys in the transaction?

MR. CARPENTER: I object to that.

Q. What did you do with this bill that you had then? A. What bill? 20

Q. (By the Vice Chancellor.) Where is the bill that Rudinger rendered to you for \$2500? A. Oh, I don't know; I haven't got it.

Q. (By Mr. Link.) You keep your bills, don't you? A. No, not small bills.

Q. Is a \$2500 bill a small bill? A. No. This was, in my mind, a transaction which was practically, in a way, settled, or would be settled, and it was not a bill against somebody. 30

Q. This was an important memorandum, wasn't it? A. I didn't consider it so.

Q. What was the idea of the memorandum, if you did not think it was important? A. Not remembering the case, I can't say.

Q. What was your idea of the memorandum if you were willing to destroy it immediately?

MR. MILTON: Objected to, because it don't appear in the case that the witness was will- 40

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ing to destroy it. It is based on an unwarranted assumption of fact.

THE VICE CHANCELLOR: I will strike out the question.

10 Q. What was the purpose, what was the necessity of this agreement, if you were relying on each other's words? A. Personally, I don't know; personally, I didn't see any necessity; maybe it was rather for Mr. Rudiger's benefit, to know that I will pay the insurance bill, which was not against me personally, in a way; it was in an indirect way against me.

Q. Whose obligation was it—that bill? A. It was an original obligation of the Phoenix Realty Company, I believe.

Q. For what? A. For insurance.

20 Q. On what? A. On some of the buildings of the Phoenix Realty Company—on three or four buildings.

Q. What buildings, do you know? A. No, I do not.

Q. Was it on the Orpheum Amusement Company building? A. I don't know.

30 Q. Or the Orpheum Theatre? A. I think it was on the Gaiety, or on the Hof Brau, because I believe Michel had the other insurance on the other buildings; but I am not sure which; and it seems that I had guaranteed that the Phoenix will pay the bill, and they came around claiming it from me personally, that they would not write insurance for the Company if I will not guarantee; and, if I remember right, Mr. Rudiger had some claim against the brokers for some money which was due him, and the brokers turned it over to him—he took this in payment, the bill against the Phoenix Realty Company—then he came to me
40 and tried to collect it. I said, "Well, if I am re-

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sponsible, if I have promised to pay, I will have to pay it; but then there is a note which you have endorsed, and I want to collect the money on the note." He says, "Well, if you will not be able to collect the money on the note, I have endorsed it and I am responsible"; and we decided simply to let the bill go until the settlement of the note.

MR. LINK: I move to strike out what they decided. 10

THE VICE CHANCELLOR: That can be stricken out. What you agreed to is another thing.

Q. Well, did not Mr. Rudiger take that memorandum away with him? A. It is possible; I cannot state positively.

Q. You stated that the memorandum was made for his protection? A. There was some memorandum made. 20

Q. You have stated that the memorandum was made for his protection?

MR. CARPENTER: I object; my recollection is there was nothing of the kind said.

Q. Did you state that the memorandum was made for the protection of Mr. Rudiger? A. I said it was possible he may have wanted it. You asked me why there was such a memorandum made. 30

Q. Just answer the questions, now, and we will get along much better. A. Well, I told you, I said it was possible that it was done for his protection, as I didn't recollect the transaction plainly.

Q. When did you make a search for this paper? A. Well, in the last few days.

Q. What search did you make? A. Well, looked through my desk; looked in the files where I have 40

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some personal papers, and I couldn't find it; then I called up Hilquit & Levene and asked if they have any papers; they said they haven't.

Q. Did you ask Mr. Rudiger if he had it? A. No, sir; I did not see Mr. Rudiger since I was subpoenaed.

Q. Didn't you see him in court this morning?

10 A. This morning, yes; I will take that back, then.

Q. Did you ask him then whether he had this paper? A. No, sir; I did not speak to him.

20 MR. MILTON: I want to correct the impression that I am trying to conceal something, or suppress anything. I think that if we are going to get anywhere in the progress of this trial, we have got to conduct it in an orderly manner, and in accordance with the issues raised by the pleadings. I can conceive of no possible theory upon which any evidence as to the existence of an agreement between Mr. Schatzkin and Mr. Rudinger is material or relevant. They charge that a certain note was given, that it was fraudulently, and without their consent, altered, and altered by someone who was an agent of Mr. Schatzkin, and, as the result thereof, they are discharged. Now, what has a mutual satisfaction or compromise between Schatzkin and Rudiger got to do with that?

30

MR. PERKINS: The answer is this: This is a bill for discovery; and it may be that this paper writing, this agreement between Schatzkin and Rudiger, by means of which Rudiger got possession of the note, provided that Mr. Rudiger was the agent of Schatzkin. Now, they have shown that there was an agreement between Schatzkin and Rudiger with reference to the handing over of the note and some

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insurance matters; and, on cross examination, we have shown that it was reduced to writing; and we are certainly entitled to inquire into it until they produce it.

THE VICE CHANCELLOR: I think the circumstances under which this note was changed after it left the possession of Mr. Schatzkin, and the fact that there is a suit at law on this note, and that the complainants pray for discovery as to this transaction between Mr. Schatzkin and Mr. Rudiger, should open the door for an inquiry into this matter to see whether or not Mr. Schatzkin is really the owner of this note, or whether he is acting for Mr. Rudiger; and that, of course, may lead up to the fact that these words "without recourse" were written on with the assent of Mr. Schatzkin.

MR. CARPENTER: The other side have brought out the fact that there was some memorandum written on the insurance premium, or something of that kind; but Mr. Schatzkin has not seen it since, and does not know where it is, and thinks, if anybody has got it, Mr. Rudiger has. It seems to me that all they can possibly do now, under the ordinary rules, is to prove its contents by Mr. Schatzkin or somebody else who knows what its contents were.

THE VICE CHANCELLOR: I think that suggestion is well made. I think he says he does not know anything about it, and the inquiry should be pursued with Mr. Rudiger to find out whether he has it; then, if neither one has it, the contents may be proved by secondary evidence.

Q. Is not this what happened, Mr. Schatzkin:

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Mr. Rudiger presented that insurance bill to you, and you said to him, "All right, Rudiger, you give me a receipted bill for this insurance, and I will give you this note"—now, is not that exactly what happened? A. No, sir.

Q. Wasn't that bill receipted by Rudiger at that time? A. No, sir; I believe I have explained the
10 situation. That is what I wanted, in fact, I said, "Let us—"

Q. (Interrupting.) You wanted a receipted bill? A. He said to me (I remember the conversation), he said, "If you cannot collect from the other endorsers I will pay you, or I will deduct it; on the other hand, if you collect the note, you will have to pay me the interest", and, in the
20 meanwhile, he will not press his claim until the case of the note will be settled. That was practically the understanding, which I can recollect, that there was.

Q. Then you directed your attorneys to deliver the note to Rudiger? A. Yes, sir.

Q. And it was then you said, "Mr. Rudiger, I will direct my attorneys to deliver the note to you"? A. Yes, sir.

Q. That is what you said? A. Yes, sir.

Q. You had not personally engaged any attorneys at that time, had you, in New Jersey? A.
30 Indirectly; yes, sir.

Q. At that time? A. Not directly.

Q. But through Mr. Rudiger you retained attorneys? A. Yes, sir; that is right.

Q. Mr. Schatzkin, you stated that conversation out there at Rutherford—who were present at that conversation? A. The parties mentioned—Mr. Michel and Mr. Rudiger and myself.

Q. And you told them that you did not know
40 that Dr. Freile was financially responsible, nor that Mr. Wisch was financially responsible—was that right? A. Yes, sir.

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Q. Now, didn't you know, Mr. Schatzkin, that Mr. Wisch and Dr. Freile had put up large sums of money to run the Orpheum Amusement Company? A. That rather strengthened my opinion of their not being responsible.

Q. Well, did you know that? A. Well, I knew something about it.

10

RE-DIRECT EXAMINATION BY MR. CARPENTER:

Q. Mr. Schatzkin, is it not a fact that you have always considered that whatever amount is collected by McDermott & Enright on this note, if anything, is payable to you?

MR. PERKINS: I object to the leading question.

THE VICE CHANCELLOR: I sustain the objection.

20

Q. As between you and Mr. Rudiger, who is entitled to receive from the attorneys trying to enforce the payment of this note, whatever sum is realized in the connection proceedings?

MR. PERKINS: I object.

THE VICE CHANCELLOR: The objection will be sustained. He stated the arrangement very plainly. The money will go to Mr. Schatzkin, and Mr. Schatzkin will put it in his pocket, or, rather, turn it over to Mr. Rudiger in payment of his bill, and have the bill against Mr. Schatzkin discharged.

30

BY MR. MILTON:

Q. Mr. Schatzkin, when you directed your attorneys, Hilquit & Levene, to turn the note over to Mr. Rudiger (meaning Exhibit C-1), did you state to your attorneys, or to Mr. Rudiger, for what purpose the note was to be handed to him?

40

A. I believe so.

Solomon M. Schatzkin—Re-Direct.

Q. What was it you said? A. He was to take it over to an attorney in Jersey and bring suit. That was the understanding I had with Mr. Rudiger. I said "Take it over to some attorney whom you know in Jersey, and let him bring suit and try to collect it"

Q. Did you have any attorneys in Jersey City?

10 A. Not regularly. I know a number of them.

BY MR. CARPENTER:

Q. You haven't got that memorandum that you spoke of, or paper that was spoken of? A. I don't think I have. If it is absolutely necessary I may make another hunt for it.

Q. You spoke to me at your office yesterday, when we tried to find all the papers under this notice to produce and subpoena—

20 MR. LINK: I object to that.

THE VICE CHANCELLOR: Oh, what is the difference? The witness may say what he did, which may or may not show such proper search that the law will presume that it cannot be found, and justify the admission of secondary evidence of the contents of the paper.

BY MR. LINK:

30 Q. You left it to Mr. Rudiger to take it to any attorney he wanted to, is that the idea? A. Yes, sir. He knows them better.

(The witness thereupon left the stand).

MR. CARPENTER: May I ask another question of Mr. Schatzkin about this insurance bill?

40 MR. PERKINS: We object. The witness steps down from the stand, and counsel has a consultation with him, and desires to replace him on the stand to straighten out something.

Joseph H. Rudiger—Direct.

THE VICE CHANCELLOR: No, as a matter of fact, I saw the witness call over the counsel and say something to him, which is just the other thing. I will permit Mr. Schatzkin to be recalled.

(The witness resumed the witness-stand.)

BY MR. CARPENTER:

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Q. Mr. Schatzkin, when was it that Mr. Rudiger presented that bill for insurance premiums to you and asked you to pay it, as near as you can recollect? A. That must have been a week or two before suit was brought on the note.

Q. And it was of course, then, after the protest of the note? A. Yes, sir.

JOSEPH H. RUDIGER, recalled.

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DIRECT EXAMINATION BY MR. MILTON:

Q. Mr. Rudiger, did you have any claim against Mr. Schatzkin for insurance premiums that you paid? A. Will the Chancellor permit me to make the statement my own way?

THE VICE CHANCELLOR: No, answer the question, just as it was put.

A. There was a time when the Phoenix Realty company was not in a position to pay its bills; there was insurance premiums due, and the companies threatened to cancel the insurance. Mr. Miller, the agent, went to Mr. Schatzkin, and requested him to pay the bills because they would be cancelled if they were not paid. Mr. Schatzkin requested me to advance the money on those policies, which was \$2245.90, or something like that. I paid that money. It was three or four or five months that I carried that money and

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Joseph H. Rudiger—Direct.

never received it back from Mr. Schatzkin or the Phoenix Realty Company. There was a time when Mr. Schatzkin was about to sell this Theatre and the buildings on which these premiums had been paid, and the purchaser of those buildings insisted upon having those policies. I refused to turn the policies over to the Phoenix Realty Com-

10 pany or Mr. Schatzkin, unless I was secured for the money which I had paid out for them. Mr. Schatzkin then gave me a paper, which was drawn by Mr. Levene, to the effect that in thirty days—

Q. Never mind that. Where is that paper? A. I have that paper, but under this request here, where I said I had no papers between Mr. Schatzkin and myself, I claim now that this paper has nothing to do with the transaction.

20 BY THE VICE CHANCELLOR:

Q. Where is the paper? A. I have the paper in my safe—this which I call a note due from Mr. Schatzkin to me for the amount of the premiums which I paid to the agent of the insurance companies, which was long before even this other note here was ever thought of.

BY MR. MILTON:

30 Q. Now, why didn't you produce that paper today? A. I did not produce that paper, because I thought it had absolutely nothing to do with this case. That is a transaction which stands separate and distinct by itself.

Q. Are you perfectly willing to produce it? A. Any time. I will go and get it now, if necessary.

Q. Is it in your safe at your home, or at your office? A. In my home.

Q. Can any member of the family open that safe? A. They cannot.

40 Q. Mr. Rudiger, Mr. Wisch testified that about

Joseph H. Rudiger—Direct.

two weeks before the institution of the suit at law upon the note C-1, he met you at Mr. Schatzkin's office in New York City, and at that place, and upon that occasion, you said to him that he was neither morally nor legally obliged to pay this note and should not pay it—did you ever make any such statement? A. Never in my life.

Q. At the time, or just prior to the time you endorsed this note, will you state the circumstances which led up to its endorsement by you? A. There was a meeting in the office of Mr. Schatzkin, between Mr. Michel, Mr. Wisch and myself, possibly a week or five days before this note was executed. At that time Mr. Michel and Mr. Wisch came there to see Mr. Schatzkin for the purpose of having him allow them to run the theatre for a certain length of time without paying any rent. He objected to that, because at that time he had the theatre under a contract for sale, and he did not want to see it closed; and then they suggested him loaning that money—that is, that Schatzkin was to lend the money to them so they could pay their rent; and Schatzkin refused at that time. That matter dropped then; and then on that following Sunday Mr. Michel and myself went out to Mr. Schatzkin's house, and the same matter was brought up by Mr. Michel again; and then Mr. Schatzkin said "I will lend you that money provided Mr. Rudiger endorses the note." After a lot of talk when I told him, I say, "Why you can take the note of Mr. Wisch and Dr. Freile and Mr. Michel, it is perfectly good," he says, "Well, if you think it is so good, why don't you endorse it?" "Well," I says, "it is a long time ago since I put money in there, and I have advised no one else to put money in." But Mr. Wisch insisted on carrying it through; and I refused to endorse

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Joseph H. Rudiger—Direct.

the note but he prevailed so long, least on me, that I said at last "All right, I will endorse the note provided Mr. Freile, Mr. Michel and you will endorse below me and secure me on my endorsement." The note was drawn; I endorsed it; I then handed it to Mr. Carry to take to Mr. Michel, Mr. Freile and Mr. Wisch and have them endorse
 10 below me; and the instructions that I gave to Mr. Carry at the time was "Don't have these—

MR. LINK: I object to this instruction to Mr. Carry.

THE VICE CHANCELLOR: One moment: His instructions to Mr. Carry can be proven by what Mr. Carry told Mr. Wisch and Dr. Freile and Mr. Michel.

MR. LINK: I do not see how the instructions of Mr. Rudiger are competent.
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THE VICE CHANCELLOR: It is ruled out for the present. It will be time enough to rule again when the question is raised.

Q. Now, Mr. Rudiger, after you endorsed the note to whom did you give it? A. To Mr. Carry.

Q. Who is Mr. Carry? A. He was employed, I believe, as Superintendent, or in some capacity, in the Orpheum Amusement Company—bookkeeper.
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Q. Is he in court? A. He is.

Q. What did you say to Mr. Carry, if anything, to say to Messrs. Wisch, Michel and Freile? A. I instructed Mr. Carry to tell them that I endorsed this note on the request of Mr. Schatzkin—

MR. LINK: I object to what he instructed him.

THE VICE CHANCELLOR: Why don't you object soon enough? I will sustain the objection, unless it was communicated to these gentlemen.
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Joseph H. Rudiger—Direct.

MR. MILTON: I propose to show that Mr. Carry, in pursuance of those instructions, conveyed them.

THE VICE CHANCELLOR: Well, I know; Mr. Carry can testify to all that, can he not?

MR. MILTON: Possibly he can.

THE VICE CHANCELLOR: I think we had better deal with it in the legal way. Mr. Carry can testify to what he told the others. This witness can testify that he gave instructions to Mr. Carry to do certain things, or say certain things; and then let Mr. Carry say what he told him. 10

MR. MILTON: Well, that is all that I am asking him.

THE VICE CHANCELLOR: But you are asking him to tell what he told Mr. Carry. 20

Q. Did you give any instructions to Mr. Carry relating to the execution or endorsement of this note by Freile, Wisch and Michel? A. I did.

Q. After the check was received (referring to Exhibit C-3) by you, if it was so received by you to whom did you turn that check over? A. This check was brought to me by Mr. Carry.

BY THE VICE CHANCELLOR:

Q. And what did you do with it? A. I endorsed it "Pay to the order of the Orpheum Amusement Company, Joseph H. Rudiger," for the simple reason I wanted to show by that— 30

MR. LINK: I object to that.

THE VICE CHANCELLOR: The check shows for itself.

BY MR. MILTON:

Q. Then did you give it to anybody? A. I gave it back to Mr. Carry. 40

Joseph H. Rudiger—Direct.

Q. Did you get any part of the proceeds of the note, C-1, or the check C-3? A. None whatever.

Q. Did you have any conversation with either Mr. Wisch or Mr. Michel, yourself, in relation to the endorsement upon this note, other than the one that was had in Schatzkin's office? A. Yes, with Mr. Michel.

10 Q. And what was that conversation? A. The conversation was that after Mr. Michel requested me to endorse the note under the suggestion of Mr. Schatzkin, I said "I will, under this one condition, that the note will be endorsed by you, Mr. Freile and Mr. Wisch to secure my endorsement."

Q. Was there anything said about your not being held liable on the note? A. Yes, sir.

20 Q. What was that? A. Well, that I was not to be responsible for any part of the note if it came due and was not paid by the Orpheum Amusement Company.

Q. Now, Mr. Rudiger, after this note came due did you secure the note from anybody? A. After the note became due and was paid by Mr. Schatzkin I secured the note from Mr. Hilquit.

Q. Who was Mr. Hilquit? A. He is of the firm of Hilquit & Levene, lawyers for Mr. Schatzkin in New York, 50 Church Street.

30 Q. For what purpose did you procure the note?

MR. LINK: I object to that, as calling for a conclusion.

THE VICE CHANCELLOR: The objection will be sustained. He may say what was said and done.

40 Q. After you procured the note from Hilquit & Levene, what did you do with it? A. I took it over to the office of the Realty and Commercial Company, which is across the room, and got pen

Joseph H. Rudiger—Cross.

and ink there, and put the words on "without recourse" below my name.

Q. Why did you do that? A. Because I was instructed by Mr. Schatzkin to take this note to a lawyer in Jersey City, or to any lawyer that I saw fit, and have them bring action on this note to collect the same: and as I felt that I was not responsible for anything, I thought by putting the words "without recourse" on there it would save me the trouble of being sued in this matter, as I felt that I did not owe anything on that note; that I was merely an accommodation endorser. As I did not want to be sued, I put the words "without recourse" on that note. 10

Q. Now, did you communicate to anyone information as to your intention to write the words "without recourse" on that note? A. To nobody whatever. 20

Q. Did you purchase that note from anyone?

MR. PERKINS: I object. That is a conclusion.

THE VICE CHANCELLOR: I think that is right; it is a conclusion. I will strike out the question.

MR. MILTON: A conclusion as to whether the man purchased it, or not?

THE VICE CHANCELLOR: Yes; he can state the transaction, and the court can tell then whether it was a bargain and sale. 30

Q. To whom was the note delivered, Mr. Rudiger, if anyone? A. To the office of Messrs. McDermott & Enright.

CROSS EXAMINATION BY MR. LINK:

Q. What banking institutions have you been connected with? A. With the Merchants National Bank, of Jersey City. 40

Joseph H. Rudiger—Cross.

Q. And what was your position there? A. Director.

Q. Were you not Acting President at one time? A. I was Vice President.

Q. Did you hold any other position? A. What do you mean—in that bank?

Q. Yes? A. I was on the committees?

10 Q. You were on the committees? A. Yes.

Q. How long were you connected with that bank? A. I should say, a year and a half.

Q. And you saw lots of notes, in your connection with the bank, and you passed upon discounting them, didn't you? A. Yes.

Q. Now, you say that your arrangement, out at this conference with Mr. Schatzkin, where Michel was present, was that you were to be an accommodation endorser for Mr. Michel, Dr. Freile
20 and Mr. Wisch—that is right? A. Yes, sir.

Q. Well, then, why did you have Complainant's Exhibit C-1, made payable to your order? A. I had no jurisdiction on that; I did not order it made that way.

Q. Well, why did you endorse it that way? A. Because it was drawn to my order.

Q. Well, didn't you know that when you were the payee on that note, and that your signature was the first signature, that other people would
30 have the right to rely on your signature? A. I thought I was dealing with gentlemen when I endorsed that; that there would not be any objections about paying it.

THE VICE CHANCELLOR: That is not the question.

(Question repeated).

A. Yes, I know that.

40 Q. You had no conversation with Dr. Freile

Joseph H. Rudiger—Cross.

that you would be his accommodation endorser?

A. Only by instructions through Mr. Carry.

Q. And you had no personal conversation with him? A. No.

Q. You had no personal conversation with Mr. Wisch that you should be his accommodation endorser? A. I did.

Q. That you should be his accommodation endorser? A. I did. 10

Q. When? A. A week previous, or about a week before the note was made.

Q. Didn't you testify that Mr. Wisch and Mr. Michel asked for the loan, but that Schatzkin would not give it to them? A. Yes.

Q. And that that ended the conversation? A. No, I did not say that.

Q. Well, now, will you tell me the whole of that conversation? A. Yes. The conversation was that they wanted Mr. Schatzkin to allow them to run along there with that theatre without paying any rent; and he objected to that; and he made the proposition to loan them some money; and Mr. Wisch objected at that time to making a note; and then the question came up at that time about whether Mr. Schatzkin could discount a note with Mr. Wisch, Mr. Freile and Mr. Michel's endorsements on it; and he claimed he could not, that he had to have somebody on there who was known; and at that time there came up the question of my endorsing that note. 20 30

Q. Well, that was prior to the execution of the present note—one week? A. One week, prior, yes.

Q. That had nothing to do with the execution of the present note? A. It related to the present note.

Q. Well, what was said about your endorsing 40

Joseph H. Rudiger—Cross.

the present note, at that time? A. Well, I have just stated.

Q. Well, now, tell me again what was said about your endorsing the note, Complainant's Exhibit C-1, one week before it was executed? A. Because it was the week before that they looked for this amount and tried to make the arrangement to
 10 keep the theatre open.

Q. Just answer my question.

THE VICE CHANCELLOR: I think he has answered it. The trouble is that you are referring to the note, which was not made, instead of referring to the transaction which was to result in the making of the note a week later.

BY THE VICE CHANCELLOR:

20 Q. What was said in this conversation in which the making of a loan was discussed, about a week before the note was made, regarding the borrowing of money for the theatre? A. Well, as I stated, Mr. Wisch and Mr. Michel requested Mr. Schatzkin to allow them to run ahead with the theatre without paying any rent, and he objected to that, for the reason that he had the theatre in
 30 course of sale at that time, and he did not want to see it closed down, and he wanted to show the receipt of this rent; but he proposed then to loan them the money, so they could pay the rent—Mr. Schatzkin did—and Mr. Wisch objected to making a note; he said he had got enough money in it now, and he would not make any more notes; and he left the matter lay. At last Mr. Schatzkin said "If you make a note, Mr. Rudiger will have to endorse that note, for the simple reason that I want to use that note in my business, and you people are not known, and I can use that note
 40 as readily as money." And I objected to doing

Joseph H. Rudiger—Cross.

it, and the thing dropped there; and Sunday morning Mr. Michel came to see me and asked me to go out to Mr. Schatzkin's house and take this matter up again; and then was when he prevailed on me to endorse that note.

BY MR. LINK :

Q. After that conversation which you now testify to—it took place at Mr. Schatzkin's office, didn't it? A. The first conversation; yes, sir. 10

Q. Now, after the conversation with you and Michel and Schatzkin at Rutherford, was there anything said by you to Mr. Wisch regarding the execution of this note, Complainant's Exhibit C-1? A. Not after that date; not after that Sunday when we were up there.

Q. Not after that Sunday? A. I did not see Mr. Wisch after that, no. 20

BY THE VICE CHANCELLOR :

Q. When was the note made?

MR. LINK: October 27, 1913.

A. It was dated October 27, 1913.

Q. What day of the week was it made? A. The note was drawn, the body of the note, was drawn on Sunday, and I endorsed it on Sunday, at my house. Mr. Michel and Mr. Carry were my guests that day, and that day the note was drawn, and I endorsed the note that day; and Mr. Carry took it with him that night to have it endorsed by the other people the next day. 30

BY MR. LINK :

Q. Are you sure that it was not taken down to Dr. Freile that same day to have it endorsed? A. Mr. Carry never left my house until half-past ten that night. 40

Joseph H. Rudiger—Cross.

Q. Then, was Anthony Michel's name put on there on Sunday? A. I hardly think so.

Q. But your name and the body of the note was all made out on Sunday? A. Not the entire body of the note.

10 Q. With the exception of the signature, "Orpheum Amusement Company, P. Edward Wisch, President, Anthony Michel"? A. Only the amount was inserted in the note, nothing else—only the amount.

Q. Well, your name was inserted, wasn't it?

MR. MILTON: Not inserted, no.

A. My name was not inserted.

MR. LINK: I am questioning the witness.

MR. MILTON: I will withdraw the remark.

20 MR. LINK: It is too late now.

THE WITNESS: I insisted on the amount being in there, because I did not want to endorse any other note for any other amount. That was all that was in the note at the time.

BY THE VICE CHANCELLOR:

30 Q. Was it signed on Sunday by the Orpheum Amusement Company? A. No, sir; there was merely the amount in figures and writing in the note when I endorsed it.

Q. And it was all written and endorsed out at Schatzkin's house? A. No, sir; at my house, after we came back from Mr. Schatzkin's.

BY MR. LINK:

Q. In whose handwriting is the name "J. H. Rudiger" there? A. Well, as near as I know that handwriting, that is the handwriting of Mr. Carry—all of it.

40 Q. The whole of it? A. Yes, the whole of it.

Joseph H. Rudiger—Cross.

Q. This note was made out, then, immediately after you returned from Rutherford that Sunday morning? A. Oh, no, we had our dinner first, and we had our supper that evening, before that note was made out. It was made out shortly before Mr. Michel left, I believe.

Q. Before Mr. Michel left? A. Yes.

Q. I thought you just testified that the note was given to Mr. Carry? A. It was given to Mr. Carry. 10

Q. It was signed by Mr. Michel there at that time? A. No, sir; it was not signed by Mr. Michel; it was made out at his suggestion so Mr. Carry would have it in the morning to go around, as I am not an early riser. They needed the money very bad that morning; they had to have it.

Q. Are you positive that Michel did not sign it that night at your home? A. Quite positive. 20

Q. Well, did you see Michel all the time he was in there, and did you see him leave? A. I did.

Q. Were you all together when the note was drawn—you and Carry and Michel? A. No, I think we spoke about the note, and Mr. Carry filled in the figures, and we went out into my den, and I think I endorsed it there at my desk; I don't know as Mr. Michel was there at that time; he was in the house, though. 30

Q. Then, how did you expect to hold Dr. Freile and Mr. Wisch liable on this note when you were the first endorser, and you had not had any conversation with either of them regarding the execution of this document? A. Because my instructions to Mr. Carry were such that he was to inform them to the effect that my endorsement was placed on there providing they put their endorsement below mine, to insure me that I did not have to pay that note when it comes due. 40

Joseph H. Rudiger—Cross.

Q. So you relied entirely on your instructions to Mr. Carry, is that right? A. To carry them out, yes.

Q. Now, Mr. Rudiger, do you remember my being present at the office of James E. Duross about some time last June? A. I recollect you being present, yes, on several occasions.

10 Q. Do you remember my speaking to you about this note at that time? A. I recollect you spoke about a note to me, yes.

Q. And about your placing the words "without recourse" on the note after the execution of the note? A. I do not. You spoke to me about a note there, however.

Q. And don't you know that I suggested to you that that might be forgery in New York? A. I do not recollect that.

20 Q. And don't you remember then that you told me that you put it in the note after a conversation or after instructions from Mr. Levene of Hilquit & Levene? A. I positively never said that. I may have said that I put it on after a conversation with Mr. Hilquit, if I spoke at all, because that is when I put it on, after a conversation with Mr. Hilquit, after I got the note from him.

30 Q. Didn't you tell me that, pursuant to the instructions of Mr. Levene or Mr. Hilquit, you wrote on that note the words "without recourse"? A. No, sir; I could not have told you that.

Q. Didn't you in substance, tell me that? A. No. You must have misunderstood me.

Q. What did you say to me about it? A. If I said anything I could have only told you what actually took place. I was sent by Mr. Schatzkin to Mr. Hilquit to get the note. I went down
40 to Mr. Hilquit to get the note, and Mr. Hilquit

Joseph H. Rudiger—Cross.

said, "Why, I cannot give you that note; Mr. Schatzkin has placed that note in my hands for collection." "Well," I said, "Mr. Hilquit, do you think I would come down here and request that note off of you unless I had instructions from Schatzkin to get it?" He said, "what are you going to do with it?" I said, "Mr. Schatzkin told me to take it to Jersey and bring it to a lawyer and have it sued on." I then said to Mr. Hilquit, "I am on this note, and I am not a bit responsible"; I said, "These gentlemen below me endorsed that note for my protection; now, what can I do to prevent myself from being sued on it?" Mr. Hilquit made the remark, he said, "In New York State, if we want to eliminate our responsibility, we put on 'without recourse.' " That was all he said; and I said, "Good day," and I walked across the hall into the Realty and Commercial Office, and I took a pen and ink, and wrote the words "without recourse" on it, never thinking any further.

Q. You were a bank vice-president. weren't you?

A. Not at that time, I believe.

Q. You were before that time, weren't you?

A. Well, that is what I would have to look up, whether I was before that; but nevertheless I knew when I put that there that would have no effect as regards—

Q. (Interrupting) Excuse me; you were a bank vice-president before you became President of the Realty & Commercial Company, weren't you? A. No, sir; I was not.

Q. Right at the time you became President? A. Long after.

Q. How long after. A. Oh, years after.

Q. Just what time after? A. Two years, three years after.

Joseph H. Rudiger—Cross.

Q. Well, what year were you a bank vice-president?

MR. MILTON: What difference does it make? He testified on cross examination, on the opening of the cross examination, that he had been a bank vice-president.

10 MR. LINK: Do you object to the question?

MR. MILTON: Yes, I do. I think you are wasting time.

THE VICE CHANCELLOR: I think I will permit the question, to show what he knew about the contract of endorsement.

A. Prior to the making of this note. It was made in 1913, and I was prior to that.

Q. You were a vice-president at that time? A. Yes.

20 Q. And yet, after the execution of this note, and without any conversation with the subsequent endorsers, you deliberately put in the words "without recourse"?

THE VICE CHANCELLOR: He says he did.

A. I did.

Q. And that was for the purpose so that when the suit was brought on this note you would not be sued for it, that you would have no further liability under it? A. Certainly.

Q. And that was your intention? A. I was under the impression, and I feel to-day, that I have no responsibility under that note.

Q. That was your intention in putting those words on there? A. Not to be sued, or to be made to pay part of that note, because I had no interest in that note at all—

Q. You have answered the question.

40 MR. MILTON: I think the witness should be allowed to finish his answer.

Joseph H. Rudiger—Cross.

THE VICE CHANCELLOR: What difference does it make what he says? He cannot teach me what the law of this case is. He simply put the words on the back of that note with the idea of escaping responsibility. It is too plain to waste time over.

Q. To what firm did you deliver this note? 10

THE VICE CHANCELLOR: He said McDermott & Enright.

Q. What member of the firm did you give the note to? A. I believe I gave it to Mr. Eichmann.

Q. What conversation did you have with Mr. Eichmann? A. I said, "I bring this note over here by request of Mr. Schatzkin, and would like you to sue on it."

Q. Did you tell them what you had done to the note? A. I did. 20

Q. You told them you had placed the words "without recourse" on the note? A. I did, right then and there.

Q. And can you tell me just what date that was? A. No, I could not. It would be very hard for me to do that.

Q. Well, how long before the suit was instituted, the law suit? A. Oh, I suppose that the suit was instituted within a week after I had brought the paper there. 30

Q. Well, about how long?

THE VICE CHANCELLOR: He said within a week.

A. Within a week.

Q. Was it less than a week? I would like to get the date as near as I can, your Honor.

THE VICE CHANCELLOR: Well, you can get the exact date if you ask counsel. 40

Frederick W. Carry—Direct.

MR. LINK: (Addressing Mr. Carpenter) What date was the note brought to your office, do you know?

MR. CARPENTER: It was a day or two before the 28th of April, 1914. If you want to call me, I will testify to it.

10 MR. LINK: I do not want to call anybody; it is just a question if you know.

MR. CARPENTER: It was a few days, I think, before the 28th of April, 1914. Perhaps I can give you a better date than that. (Examining his papers) I will change the date of that. Apparently we knew about that on the 24th of March, 1914, when we wrote to each of the defendants asking them to pay, otherwise we would begin suit. That was on the 24th of March.

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FREDERICK W. CARRY, SWORN.

DIRECT EXAMINATION BY MR. MILTON:

Q. You were formerly employed by the Orpheum Amusement Company? A. Yes, sir.

Q. In what capacity? A. As Treasurer of the Gaiety Theatre in Hoboken.

30 Q. Where was the office of the Orpheum Amusement Company? A. At the Orpheum Theatre building.

Q. In Jersey City? A. At the Five Corners, Jersey City.

Q. And did your duties as Treasurer require you to keep the books of the company? A. Why, I kept the books of the company, or I tried to.

40 Q. Do you recollect going to Rutherford with Mr. Rudiger in the month of October, 1913? A. No, I did not go with him.

Frederick W. Carry—Direct.

Q. You did not go? A. No, sir.

Q. You met Mr. Rudiger after they returned?

A. Yes, sir.

Q. Where did you meet him? A. At his home.

Q. Were you there when they came? A. I was.

Q. Do you recall any transaction relative to a note on that night? A. Yes, I do.

Q. Will you state what the transaction was? A. 10
Why, Mr. Michel and Mr. Rudiger came from Rutherford, where they had been visiting Mr. Schatzkin. They told me what they went there for, which was to get a loan or an accommodation to secure the rent of the theatre, in order to keep it open. We had our meal some time after two o'clock. We sat around, and I think it was towards evening that Mr. Rudiger and I went into his den, and in doing personal matters for him I looked through the desk. He told me he wanted 20
a note made out. I filled a note for the amount, which I knew to be \$2500, and filled the spaces on the bottom where the secretary and treasurer were to sign.

Q. And was the note endorsed by anybody? A. That night?

Q. That night? A. Yes, Mr. Rudiger.

Q. Now, did you present the note to anyone else for their signature or endorsement? A. That day?

Q. On that day? A. Mr. Michel. 30

Q. Did you present the note to Mr. Wisch? A. I did not.

Q. Afterwards? A. Yes, on Monday.

Q. On Monday? A. The 27th.

Q. Where? A. New York, at his office.

Q. Mr. Wisch, when he says that Mr. Michel presented this note to him, is mistaken, is he not? A. He certainly is.

Q. Do you recall at about what hour it was that you presented the note to Mr. Wisch, Mr. Carry? 40

A. It was around noon, or before noon.

Frederick W. Carry—Direct.

Q. I see. And who was president of the Company, Mr. Carry? A. Paul Edward Wisch. Mr. Michel was the treasurer.

Q. Now, what, if anything, did you say to Mr. Wisch regarding the execution of the note by him as President, and the endorsement of the note by him?

10

MR. CARPENTER: Do you mean at the time he gave it to him?

MR. MILTON: At the time he presented it to him, on Monday, October 27th, 1913.

A. If his name was not on as President, the note would have never gone through the bank; naturally, if he put it on the face of the note, he would have to put it on the back of the note.

20 Q. That is quite true, but what I am after is what, if anything, did you say to Mr. Wisch about the endorsements on the back? A. He knew—in fact, I told him—that Mr. Rudiger's name was in the body of the note, and on the back, as an accommodation.

BY THE VICE CHANCELLOR:

Q. What else? A. And that, naturally, Mr. Rudiger would not be held responsible, or was not to be held responsible.

30 BY MR. MILTON:

Q. Now, was what you said to Wisch the result of any instructions given to you by anyone? A. Yes, by Mr. Rudiger.

Q. What did Mr. Wisch say to you in answer to that? A. Well, as near as I can recollect, the only thing was he put his name on it and let it go, because he saw Mr. Rudiger's name and Mr. Michel's name on it.

40

Q. The note had been endorsed by Mr. Michel

Frederick W. Carry—Direct.

before it was presented to Mr. Wisch? A. Most certainly.

Q. Now then, after Mr. Wisch had signed it and endorsed it, did you go to anyone else? A. Dr. Freile.

Q. Where? A. 108 Palisade Avenue. I think that is the number.

Q. Jersey City? A. Jersey City. 10

Q. On the same day? A. Yes, sir.

Q. And did you personally present the note to Dr. Freile? A. I did.

Q. What, if anything, did you say to Dr. Freile about the endorsement of the note? A. I told him the note was made out to secure the rent, and that we wished his endorsement on it, and it was to secure the rent, and Mr. Rudiger's name was on there as an accommodation, and it would be discounted by Mr. Schatzkin. 20

Q. Well, now, was anything said in reference to holding Mr. Rudiger free from liability?

MR. LINK: I object to that question as leading and improper.

THE VICE CHANCELLOR: I sustain the objection. Just state all you said to Dr. Freile.

Q. Well, have you stated all the conversation you had with Dr. Freile? A. No, Dr. Freile demurred at first, because I had been going there off and on with different notes of the company, and, as he said before, he was just about through signing notes; and I told him that his signature was absolutely necessary, because I had instructions from Mr. Rudiger not to take this note for discount unless the names of Messrs. Wisch, Freile and Michel were on the back of the note, and that Mr. Rudiger was not to be held responsible. 30

Q. And after you communicated that to Dr. Freile, what did he do? A. He signed the note. 40

Frederick W. Carry—Cross.

Q. He was not demurring any longer? A. No, he was not.

Q. When you went to Wisch's office, Carry, were you accompanied by Michel, or anybody else? A. No, I was alone, because it was on Monday.

10 CROSS EXAMINATION BY MR. LINK:

Q. When you left in Jersey City for Mr. Freile's office what time was it? A. When I left Jersey City for Mr. Freile's office?

Q. Mr. Wisch's office, I mean? A. It was early in the morning.

Q. About what time? A. About nine o'clock, or so.

20 Q. You got there about noon? A. He was not in when I got there.

Q. But you waited until noon for him? A. I went away and came back again.

Q. You got back about noon? A. About noon.

Q. Where is his office? A. As near as I can recollect, I think the number is 171 Broadway, near Cortlandt Street. The entrance is on the side street.

Q. Was there anybody present in the room beside Mr. Wisch and yourself? A. Not that I know of.

30 Q. You have never talked this case over with anybody, have you? A. What do you just mean by that?

Q. Well, I say you have never talked it over with anybody?

MR. CARPENTER: We will admit that he has talked—

MR. LINK: I object to that, Your Honor.

MR. CARPENTER: What do you object to?

40 THE VICE CHANCELLOR: Why, counsel

Frederick W. Carry—Cross.

should not interfere when a question is asked that way.

A. I have talked it over several times.

Q. Of course you have. With whom? A. For instance with Mr. Carpenter.

Q. Why did you hesitate about it? A. I don't have to hesitate.

Q. You spoke about it with Mr. Carpenter? A. 10
Naturally; and Mr. Michel, for instance.

Q. How many times have you spoken about it to Mr. Carpenter? A. Why, I came on from Pittsburgh, twice, I think.

Q. To talk it over with Mr. Carpenter? A. When the case was supposed to come up and he couldn't get me in time, and I was on my way; and naturally I stopped in to talk with Mr. Carpenter.

Q. What notice did you get to come on? A. A 20
telegram.

Q. From whom? A. Mr. Rudiger.

Q. Mr. Rudiger? A. Certainly.

Q. Did Mr. Rudiger pay your expenses? A. Once; and the other time the firm paid for it—McDermott & Enright.

Q. McDermott & Enright paid for it once? A. Once; and the other time Mr. Rudiger paid for it.

Q. Did he pay you in cash, or by check? A. 30
By check.

Q. How much did you get? A. The actual fare, plus berth.

Q. Did you get nothing for meals? A. No, because I lived home.

Q. And when you came on here did you report to Mr. Rudiger? A. He don't get up when I am in town—

Q. I mean, you told him you were here? A. 40

Frederick W. Carry—Cross.

Why, no; I went down to Mr. Carpenter of McDermott & Enright.

Q. You went down to Mr. Carpenter? A. Sure, because when I got in from Pittsburgh I got in around eight o'clock, and Mr. Rudiger don't get up until about ten.

10 Q. You have never spoken to John Milton about this case, have you? A. In a casual way.

Q. I mean, you never had a conference with John Milton? A. Yes, I did, on Tuesday evening, I think it was, February 2nd.

Q. That was the first conference you ever had with John Milton? A. That is absolutely the first.

Q. Who was present at that conference? A. Mr. Rudiger and Mr. Mitchel and myself, and Mr. Milton, of course.

20 Q. Mr. Michel was there? A. I said that.

Q. And at that time did not Mr. Michel disagree with your story? A. He did, in one respect.

Q. And that is, that you had not called at Mr. Wisch's office, that he called—is not that right? A. That is the way he disagreed with me, but that doesn't say he is right.

30 Q. That is all; just answer my question. And what were the dates you came on before from Pittsburgh, at the request of Mr. Rudiger and McDermott & Enright? A. Well, I just couldn't tell you the dates; I suppose one was—I couldn't recall the dates.

THE VICE CHANCELLOR: Well, I do not see that it is very material.

40 MR. LINK: Well, I think it is rather important. Here is a witness coming on from Pittsburgh twice, and he does not report to Mr. Rudiger's attorney at all, never has a conference with him; the only man he reports to is Mr. Schatzkin.

Frederick W. Carry—Cross.

THE VICE CHANCELLOR: He has said it.
You have got it now for all it is worth.

Q. And you left Mr. Wisch's office about noon?

A. I did.

Q. And then you went to Dr. Freile's office again? A. I did.

Q. And are you quite sure that you did not go to Dr. Freile's office first? A. I am quite positive. 10

Q. And then after you got to Dr. Freile's office you came back to Mr. Schatzkin's office—is that right? A. That is right. It is only at 30 Church Street.

Q. I know; but you came to New York, and went back to Jersey, and went back to New York? A. Yes.

Q. What time did you get back to Dr. Freile's office? A. Oh, it must have been somewhere around one o'clock, or after. 20

Q. And what time did you get down to Schatzkin's office? A. Well, I wouldn't say just what time; anywheres between some time after one and after two.

Q. So you left Dr. Freile's office, you are quite sure, at about one o'clock? A. Sometime around after one.

Q. It was after one? A. Yes.

Q. Well, just as near as you can state, was it between one and two, or one and one-thirty? A. Oh, I will say it was nearer between one and one-thirty than between one and two. 30

Q. Were there any patients around there? A. Yes, there were.

Q. And you saw Dr. Freile personally on that occasion? A. I had to, to get his signature.

Q. And you said to Dr. Freile, "Doctor Freile, Mr. Rudiger sent me down with this note and wants to get your endorsement on it; that his en- 40

Frederick W. Carry—Cross.

dorsement is an accommodation"—is that right?

A. Something to that effect, yes.

Q. Then Dr. Freile said he did not want to endorse it? A. He said he didn't want to, because he had been signing quite some.

Q. Then you said to him, "Well, you needn't worry; you won't have to pay it"—is not that
10 what you said to him? A. No, I did not.

Q. You wanted to persuade him to sign the note? A. I did not use persuasion, because I did not benefit by it.

Q. Well, if he demurred to signing it, and finally signed it, then you must have said something that led him to sign it, didn't you?

MR. MILTON: I object to the question, as argumentative.

20 THE VICE CHANCELLOR: I will permit the question.

A. Certainly.

Q. Now, what did you say that led him to sign it then? A. Why, the mere fact that I told him that his signature was necessary, and there was a possibility of the theatre turning out; Mr. Wisch had intended financing it.

Q. You did not testify before that you said Mr. Wisch intending financing it—you did not say that
30 in your conversation? A. I did not think it was necessary.

Q. But you told us before you testified to everything; now you say you also told him that Mr. Wisch intended to finance it? A. Well, I might have said something to that effect.

Q. Now, will you tell me everything you said to Dr. Freile from the time you went into his office?

A. That was two years ago.

Q. Tell me everything you now can remember?
40 A. Now?

Frederick W. Carry—Cross.

Q. Now. A. As much as I said before, plus the little things.

Q. Well, now, just repeat it to me? A. I told him Mr. Rudiger's name was in the body of the note and on the back as accommodation endorser, and he was not to be held responsible; Mr. Wisch and Mr. Michel were to sign the note, and Dr. Freile; otherwise, the note would not be accepted by Mr. Schatzkin for discount. 10

Q. And then Dr. Freile said no, he had signed too many notes, he was through, didn't he? A. Oh, he said that before that time, too. By just looking at the note he said that.

Q. Well, he said that again then, didn't he? A. Maybe he said it three times.

Q. Well, on that occasion he said it, didn't he? Now, you have just testified that he did. A. I just said he said it two or three times. 20

BY THE VICE CHANCELLOR:

Q. On that day—at the time of your visit? A. Yes, sure.

BY MR. LINK:

Q. And then what did you say to him after he said that? A. Why, I just left it up to him.

Q. Did you say, "I will leave this up to you; if you don't want to sign it, don't"—is that what you said to him? A. Why, simply— 30

Q. No—

THE VICE CHANCELLOR: Counsel should let the witness answer the question; counsel will not force down the throat of the witness the answer he wants him to give.

BY THE VICE CHANCELLOR:

Q. What did you say to Dr. Freile at that time, if anything, which induced him to sign that note? State the whole conversation. A. Well, I don't 40

Frederick W. Curry—Cross.

think I said anything that would induce him to sign the note.

Q. Well, what did you say to him? A. As near as I recollect, that it was an absolute necessity that his name should be on this note; otherwise, the theatre would close.

10 Q. Did you say that to him? A. As much as I recollect, yes.

Q. Now, do you recall what he said in reply to that? A. Why, not just the exact words; but I know the note was signed by him.

BY MR. LINK:

Q. This is all in your handwriting, is it not—all that, even that (showing the witness the note in question)?

20 MR. CARPENTER: Read the words, please.

MR. LINK: "\$2500." "October 27th, 1913."

A. Yes; and "Three months," "We", "J. H. Rudiger," "Twenty-five hundred dollars," "The Orpheum Amusement Company," "President"—outside of that, nothing.

Q. And this was written by you on Sunday night, before you took the note?

30 MR. MILTON: I object to the question, because there has been stated on this record now several portions of this note which appear in the handwriting of this witness. If counsel had deliberately framed a question to deceive the witness in giving him an answer which suits his case he could not have done it better than by the word "this".

MR. LINK: I will re-draft the question, your Honor.

40 MR. MILTON: He said he did write in the figures on Sunday night. Now, whether he means by that word "this" the figures in writ-

Frederick W. Carry—Cross.

ing, or all the words, I do not know. Now, how does the witness know?

THE VICE CHANCELLOR: Well, ask the question. Stop the argument.

MR. LINK: Well, he has practically suggested the answer now.

Q. Is it not the fact that all the writing appearing on the face of the note, Complainants' Exhibit C-1, except the signatures "Edward Wisch" and "Anthony Michel, Treasurer," were written by you on that Sunday? A. With the exception of those two things, the entire surface of the note is in my handwriting. 10

Q. And was written by you on that Sunday night, with the exception of "9/3", "2/3", "January 27" and "Edward Wisch"? A. Was written on Sunday night in two sections. The "Twenty-five hundred dollars" I wrote to show Mr. Rudiger that it was going to be twenty-five hundred dollars. 20

Q. But it was written on Sunday night in two sections? A. Yes.

Q. And Michel signed his name on Sunday night, too, didn't he? A. Sure—after Mr. Rudiger signed it.

Q. And he also endorsed it on that Sunday night, didn't he? A. Sure. That might be contradicting Mr. Rudiger's statements. 30

BY THE VICE CHANCELLOR:

Q. That is, the whole face of the note was written up on Sunday night, excepting the words "9/3" "2/3", &c. (referring to the due-date), and it was signed by the President and Treasurer of the Company? A. No; understand me correctly, your Honor: The "Twenty-five hundred dollars" was put in, and then Mr. Rudiger signed it to be sure that that amount would be twenty-five hundred dollars. 40

Frederick W. Carry—Re-Direct.

Q. I don't care about that. Was this signed on Sunday night by Wisch? A. No, not by Wisch.

Q. When did he sign it? A. Mr. Wisch signed it on Monday.

BY MR. LINK:

Q. But Michel signed it Sunday night? A. After Mr. Rudiger; but I don't know whether Mr.
10 Rudiger was in the room, or not, when Michel signed the note. That saved a trip down to Jersey City.

Q. And Michel endorsed it on the back on Sunday night? A. Yes.

Q. And Mr. Rudiger endorsed it on the back on Sunday night—is that right? A. That is right.

Q. (By the Vice Chancellor.) But the Treasurer, you say, signed on Monday? A. The President, Mr. Wisch.

20 Q. The President signed on Monday? A. Yes.

RE-DIRECT EXAMINATION BY MR. MILTON:

Q. Mr. Carry, the proceeds of this note, C-1, and the check, C-3, do you know what became of them? A. Yes.

Q. What did? A. The note Mr. Schatzkin kept. I received a check for a sum less than \$2500, which I knew was to be the interest for three months. I
30 think it was a six per cent. rate.

Q. What did you do with the check? A. The check I brought over. Mr. Rudiger just endorsed it, and then I put down on the top "Pay to the Order of The Orpheum Amusement Company", to be sure—

THE VICE CHANCELLOR: Well, you put that on it, and it went into the account of the Orpheum Amusement Company—their bank account?

40 A. Yes, sir.

Frederick W. Carry—Re-Direct.

Q. Now, do you know whether or not any part of the proceeds of this check went to Mr. Wisch?

A. Any of the proceeds went to Mr. Wisch?

Q. Yes. A. Of the check?

Q. Yes—whether Mr. Wisch got from the Orpheum Amusement Company, on the 27th, or the succeeding day, a check for any sum of money?

A. I knew that there was a sum of money that Mr. Wisch had advanced, I think the Saturday before, and if I am not mistaken, the sum was \$600— 10

MR. LINK: I object, if he says he don't know.

THE VICE CHANCELLOR: One moment. (To the witness.) Do you know whether any sum of money was paid to Mr. Wisch after this check was deposited? 20

A. There was a check made out—whether the check was ever presented to Mr. Wisch, I don't know.

Q. For how much money?

MR. PERKINS: I object to that as immaterial.

A. Six hundred dollars.

THE VICE CHANCELLOR: It is all right. It may be proven later. It proves nothing without delivery. 30

MR. CARPENTER: We might as well put on the record the admitted fact that the note in question was protested and notice given to each of the three complainants.

MR. LINK: Well, I don't know about but two of them—Wisch and Freile; I don't know about Michel.

MR. CARPENTER: Mr. Michel admits that also. 40

Anthony Michel—Direct.

MR. MICHEL: Yes.

ANTHONY MICHEL, SWORN.

DIRECT EXAMINATION BY MR. MILTON:

10 Q. Mr. Michel where do you live? A. 183 Fair-
view Avenue, Jersey City.

Q. You are an officer of the Orpheum Amuse-
ment Company? A. I was.

Q. You were the Manager of the theatre? A.
Yes.

Q. And had active charge of the affairs of the
Orpheum Amusement Company? A. I did.

Q. You were also Treasurer of the Company?
A. I was.

20 Q. And do you recollect being at Mr. Schatz-
kin's office about a week before the note C-1 was
signed? A. I do.

Q. With Mr. Wisch and Mr. Rudiger? A. I do.

Q. Was there a conversation there at that time
relative to the negotiation of a note for some
\$2500? A. There was.

30 Q. What was the conversation, please? A.
Why, we went to Mr. Schatzkin's office for the pur-
pose of telling him that the Orpheum Amusement
Company was in distress financially, that we did
not have the money for the purpose of meeting the
running expenses of the theatre and the rent.
There was a demand made on us for back rent
and we were threatened to be dispossessed if that
rent was not paid at once, and we tried to get Mr.
Schatzkin to forego the rent—hold off and not dis-
possess us. Mr. Schatzkin refused to do that; and
he made a counter-proposition agreeing to pay us
\$2500 on a note to be endorsed; and Mr. Wisch
40 objected to endorsing any notes at that time, and

Anthony Michel—Direct.

so did I because we had both gone as far as we could financially and we did not care to incur any further liability; and Mr. Schatzkin said that was the only way that he would help us; if we came to him for help, that we would have to accept the help in the way he wished to make it. And we told him that unless something was done that the theatre would have to close. On Saturday night I had to meet \$1250 to pay for the vaudeville help alone at the Orpheum Theatre; and, of course, that was only a very small portion of the amount of money needed; and I told him I could not manage the theatre without having the money to do it and knowing where it was coming from. So Mr. Schatzkin said, "well, he didn't want to forego the rent at that time for the reason that there were negotiations pending for the sale of the theatre, and that he preferred to advance us the money and have us meet the rent. So there was nothing done at that meeting. We objected, as I stated, about it, and we left. This conference, I think part of it was at Mr. Schatzkin's office and part of it at the Machinery Club in the same building. Mr. Wisch and Mr. Rudiger were present on this occasion.

Q. Was there something said there about Mr. Rudiger endorsing the note?

MR. LINK: I object to that as a leading question.

THE VICE CHANCELLOR: Just state the whole conversation.

A. Why, in connection with this note proposition that Mr. Schatzkin suggested, he stated that the note would have to be endorsed and I stated to him that the only one that would probably endorse the note would be Mr. Wisch. He men-

Anthony Michel—Direct.

tioned Doctor Freile; and he mentioned Mr. Rudiger, who was present there on that occasion, and I said that Mr. Wisch was the only one that would endorse this note because he was the only one at that time who was financing the theatre; and Mr. Rudiger was there for himself, and stated that he would not be responsible and not be liable to pay
 10 any note.

MR. LINK: Mr. Wisch was not present at that conversation?

THE WITNESS: Mr. Wisch was present on this occasion. This was, I don't remember the exact date—it was that week previous to the Sunday on which we went out to Mr. Schatzkin's home. And I think that was about all. There might have been more, but that was the substance of it,
 20 anyway. There wasn't anything done, and we left there that day with the thing undecided.

Q. Now, then, Mr. Michel, you did later on endorse Exhibit C-1? A. The note—yes.

Q. Did you present this note to Mr. Wisch for endorsement and signing by him? A. I did not, no, sir.

Q. You have stated, have you not, to Mr. Perkins, and perhaps to Mr. Link, that on the 27th of October, you did call up Wisch's office? A. I did,
 30 yes.

MR. LINK: I object to this, on the ground that he is now trying to impeach his own witness.

THE VICE CHANCELLOR: He has answered the question. Go right on, Mr. Milton.

Q. Did you, in fact, call at the office of Mr. Wisch on that day? A. I did not.

Q. You have, I suppose, called on Mr. Wisch a
 40 great many times? A. I have, yes.

Anthony Michel—Direct.

Q. And the information conveyed to Mr. Perkins about being at Mr. Wisch's office the next day was a mistake? A. That was an error.

Q. Mr. Michel, do you recollect about the payment to Mr. Wisch of some money out of the proceeds of the check that was received from Mr. Schatzkin, Exhibit C-3? A. Well, my recollection about that is not altogether clear. The Saturday before I went to Mr. Schatzkin's office, because nothing had been settled, and I was supposed to manage the theatre, and it was impossible to manage it without funds; and as I stated before, we had to have this money on Saturday night, and there was no money in the account to meet the running expenses of the theatre; so I went to Mr. Wisch, who was the President of the Company and the one who was the largest investor in the Company, and I told him that something had to be done that day to get in some money to meet the expenses that night. So Mr. Wisch gave me a check for \$600 on that night, and there was some talk about getting it back the following week. There was a check drawn to Mr. Wisch's order the following week but whether the conditions were such that the business did not warrant the—

THE VICE CHANCELLOR: Well, you don't know whether the check was delivered?

A. No, I do not.

Q. A check for \$600 was made out and signed—do you know whether it was given to Mr. Wisch?

A. There was a check for \$600, but whether Mr. Wisch ever received it or not, I couldn't swear to that.

Q. What agreement, Mr. Michel, if any, was there between you and Mr. Rudiger as to Mr. Rudiger's exemption from liability under this endorsement?

Anthony Michel—Direct.

MR. PERKINS: I object, on the ground that it calls for a conclusion of the witness.

MR. MILTON: Well, this witness can bind himself by a conclusion. That is what I am asking him to do.

BY THE CHANCELLOR:

10 Q. Well, did you have any conversation with Mr. Rudiger as to his liability, or your liability, on this note? A. We had a conversation in Rutherford that Sunday when we went to Mr. Schatzkin's house.

Q. Was that the only conversation you had regarding the liability? A. We did have another.

Q. Well, state that conversation? A. We went to Mr. Schatzkin's house that Sunday—that was by arrangement and at the suggestion of Mr. 20 Wisch—Mr. Wisch stated that—

Q. Well, you are called on to state what the conversation was that you had, now, at Rutherford touching the liability of the various endorsers, if there was such a conversation? A. We went to Rutherford to see Mr. Schatzkin and try to get Mr. Schatzkin to forego the rent, which he again refused, and he again made this proposition stating that he would advance the money on a note to Mr. Rudiger because he knew Mr. Rudiger and didn't know the responsibility of any of the 30 others who might become endorsers on the note and he said that that was the only way in which he would advance the money to the Orpheum Amusement Company, that if the Orpheum Amusement Company wanted the money the note would have to be made payable to Mr. Rudiger.

BY MR. MILTON:

40 Q. What was said by Mr. Rudiger regarding that? A. Mr. Rudiger objected to it; he said he didn't see what he had to do with the transaction,

Anthony Michel—Cross.

that he wasn't interested in it, and didn't care whether the theatre was opened or closed, and that he didn't care to incur any responsibility on this note transaction and would not assume any responsibility on the note.

Q. Did he say anything as to what you must do regarding it? A. Why, yes; he made the remark out there that he wouldn't do this unless the endorsement of Mr. Wisch and myself was on the note. As to Doctor Freile, I do not recall whether his name was mentioned or not. 10

CROSS EXAMINATION BY MR. LINK:

Q. Is that your signature (showing the witness affidavit of Anthony Michel annexed to the original bill)? A. Yes, sir.

Q. In this affidavit, among other things, you said "that at the time he" (meaning Anthony Michel) "endorsed said note he relied upon the endorsement of J. H. Rudiger which was immediately above his signature, and that the words 'without recourse' were not written under said Rudiger's endorsement"—now, is the statement which you have just testified to that you were to make the note to Rudiger for the Orpheum so, or is this statement in your affidavit true? A. That was made under a misapprehension—that statement there (referring to the affidavit). The statement I am making now is true, absolutely true. 20
30

Q. The statement that you are now making is absolutely true? A. Yes, that was——

Q. Just answer my questions. Then, if the statement you now make is absolutely true, why did you become a party complainant in this bill asking that the note be cancelled and that you become freed from liability? A. Why, for this reason: When this suit was first started there was a suit 40

Anthony Michel—Cross.

started against us as endorsers on this note, and at that time I did not think that I had any defense, and I did not care to put in any defense, and the other endorsers on the note, Doctor Freile and Mr. Wisch, thought there was a defense to this note, and they stated to me that if I did not put in a defense the judgment would be against me for the
 10 full amount, and I did not relish that idea; and they seemed to think there was a defense; and I thought if there was any defense to it that I certainly would like to be a party to it.

Q. And so you were willing to perjure yourself in order not to be stuck for the whole amount of it? A. No, I did not have that idea—

THE VICE CHANCELLOR: Strike that out. The witness may have "sworn" according to the legal phrase; but, not being a lawyer was
 20 ignorant of legal liability.

Q. You spoke to me the other day about this matter, didn't you? A. I did.

Q. Have you got that statement you told me you had then? A. Yes, I have.

Q. Will you let me have that now? A. (Witness produces a paper, which he handed to cross examining counsel.)

30 Q. This is a copy of a statement which you sent to Mr. Perkins several months ago—is not that so? A. Yes, that is right.

(The paper is marked for Identification R. P. 1.)

Q. When I asked you a few days ago to tell me the circumstances surrounding this entire transaction, you gave me this, and told me those were the exact facts—is not that so? A. Yes, I made that statement; but there was one point there—
 40

Q. Just answer my question. A. Yes, I made that statement to you at that time.

Anthony Michel—Cross.

Q. Then I examined you at length and you repeated and reiterated the facts in Complainant's Exhibit for Identification, R. P. 1? A. Yes.

Q. And you reiterated and told me that time and time again—is not that so? A. Yes; at that time I believed the statements in there were true, and I told you that they were true at that time.

Q. Now, that was the last hearing about a week ago Thursday, a week ago yesterday? A. Why, it was about that time. I do not recall the exact day. 10

Q. And at that time you stated to me that "on the following day" (that is, after the Sunday you were at Mr. Schatzkin's) "the following day" I called at Mr. Wisch's office in New York City in company with Mr. Moore, and explained the situation fully. I also stated to Mr. Wisch that when the note became due in three months—— 20

MR. CARPENTER: I object. This statement speaks for itself, if they offer it in evidence. I object to the reading of this statement, the contents of which speaks for themselves. And it is not in evidence anyhow.

Q. In substance you told me as follows, is it not so, Mr. Michel——

THE VICE CHANCELLOR: He says he told you what was in that paper. 30

MR. LINK: I know, but there is a lot of extraneous matter in this which is entirely immaterial.

THE VICE CHANCELLOR: Well, if counsel object to one part going in without the whole, you will have to put in the whole.

MR. CARPENTER: All right; go ahead.

Q. You stated to me, in the presence of Mr. Perkins that "I called at Mr. Wisch's office the day 40

Anthony Michel—Cross.

after the note was executed, in company" (that is, the day after the Sunday you were in Mr. Schatzkin's house) "with Mr. Moore, and explained the situation to him"—that is, you told Mr. Wisch that when the note became due in three months it would be not necessary to pay it off; that all he would have to do would be to reduce it ten per cent. and make a renewal and so on, from time to time as the note was paid; and that thereupon Mr. Wisch put his endorsement on the back of it—
 10 now, is that true? A. That is the statement I made to you at that time.

Q. But that is not true? A. No, that is not true; I was mistaken about that. It was so long ago that my mind was a little hazy as to how the note finally got to Mr. Wisch.

Q. But you also made that statement at the time the bill was filed, didn't you? A. Yes, at that time; but I thought that was the circumstances.
 20

Q. Now, why is it your recollection is better at the present time than it was when this suit was brought, then?

MR. MILTON: How can this be cross examination, the witness practically admits——

THE VICE CHANCELLOR: It goes to his credibility, generally.
 30

MR. MILTON: He admits, practically, that this was a mistake.

THE VICE CHANCELLOR: It may go deeper than that.

Q. (Question repeated.) A. Why, I never had any talk about this with Mr. Carry (and Mr. Carry, I knew, was the one who handled this matter, this note transaction) since this suit has been pending until a few days ago. Mr. Carry
 40 was in town, and I met Mr. Carry, and——

Anthony Michel—Cross.

Q. You were at that little dinner affair?

THE VICE CHANCELLOR: Let him answer the question.

Q. Go ahead. A. I mean since this suit—that was a year and a half ago—but since then I have never had any talk with Mr. Carry—

THE VICE CHANCELLOR: Why don't you continue your story? You say you met Mr. Carry and had a talk with him. 10

A. I met Mr. Carry and we talked over this matter regarding the circumstances which led up to the signing and endorsing of this note; and Mr. Carry said that I was mistaken, that I never went over to Mr. Wisch's office to get that note signed.

Q. Who were present at the time you had your conversation with Mr. Carry? A. Why, just Mr. Carry and I. 20

Q. Was not Mr. Milton there? A. He was not on that occasion; that was before that, that was another occasion that we had a meeting at Mr. Milton's office.

Q. Now, where did Mr. Carry talk to you—give me the exact date. A. The exact day? Well, now, I don't know what the exact day was.

Q. Well, about the exact day? A. I don't know, really. 30

Q. Well, was it a week ago? A. It was within a week, yes.

Q. Within a week? A. Within a week, yes.

Q. And you cannot remember the exact date? A. No, I cannot remember the exact day. It was within a week.

Q. Where did you meet him? A. I don't know where we met. I met him, because it was by accident.

Q. You don't know where you met? A. Not on 40

Anthony Michel—Cross.

this first occasion; I don't know now where we met, whether we met on the street or where.

Q. But you met within a week, you don't remember the time? A. Yes; we met twice.

Q. But the time of this occasion that caused you to change your statement you met him within a week? A. Yes.

10 Q. But you do not remember the time, nor the place? A. I do not on the first occasion, indeed. The second time I met Mr. Carry——

Q. (Interrupting.) When did you change your statement—on the first or the second occasion? A. I was very much in doubt about it on the first occasion, and then I wanted to go over this thing with him again.

Q. Then you went over it with him on the first occasion? A. Yes, on the first occasion, too, I
20 went over it with him.

Q. But he did not then convince you you were wrong? A. No, he did not quite convince me I was wrong.

Q. On the second occasion who went over it again? A. Mr. Rudiger, Mr. Milton and myself.

Q. And Mr. Carry? A. And Mr. Carry.

Q. Where was that? A. That was at Mr. Milton's office.

Q. And when was that? A. That was one
30 evening last week; I don't know what evening it was.

Q. What evening was it last week? The last time this was on was a week ago Thursday? A. Well, I really don't know, I think Mr. Milton can determine that.

Q. Well, was it Friday night? A. I really don't know. I did not charge my mind with what evening it was.

40 MR. LINK: This is the most remarkable thing I have ever heard.

Anthony Michel—Cross.

THE VICE CHANCELLOR: No, it is not. The man may have his memory refreshed. Do not argue it. Go on and ask the witness a question.

Q. You don't remember the occasion of that second visit? A. Well, it was at Mr. Milton's office in the evening.

Q. You don't remember what day? A. No, I don't. 10

THE VICE CHANCELLOR: He said so half a dozen times.

Q. And at that occasion you decided you would change your testimony—is that the idea? A. On that occasion I became convinced that I was mistaken in thinking that I had gone to Mr. Wisch's office to get his signature. I had even forgotten that I had come from Rutherford to Mr. Rudiger's house and had dinner at his house on that Sunday. And we went over the whole situation; our minds were refreshed as to the condition of the weather, and many other things; and these things came back to me, and I had made a mistake. 20

Q. Are you now testifying from what Mr. Carry told you, or what you know of your own recollection? A. From what I know now from my own knowledge, not from what Mr. Carry stated to me in the matter. If Mr. Carry had not succeeded in convincing me that I was in error in making this statement, I wouldn't have changed my testimony or be testifying as I am now. 30

Q. You do not recollect that Monday, October 27th, 1913, do you? A. Yes.

Q. You do? A. Yes.

Q. What did you do that morning? A. That morning I was very busy at the Orpheum Theatre—on that Monday morning. 40

Anthony Michel—Cross.

Q. That particular morning, now? A. On that particular morning.

Q. You were very busy at the theatre? A. Very busy, indeed; I hadn't time for anybody on Monday morning.

Q. Now, on October 27th, 1913—— A. On this
 10 October 27th I was very busy; that is the reason I gave it to Mr. Carry; that is the reason why Mr. Carry went to Mr. Wisch's office.

Q. What did you do in the afternoon of that day? A. I witnessed the performance, which I had to do at the vaudeville performances; and we get new acts in every Monday and I had to be there and see that everything ran right because if it didn't I would have to cancel acts that were not satisfactory.

Q. But you recollect everything vividly that
 20 happened almost three years ago on that Monday, October 27th? A. No, I don't say I do.

Q. And you cannot remember, what day you called at Mr. Milton's office, and that was within a week? A. Well, perhaps I would refresh my mind on that if I was to think real hard.

Q. If you were to see Mr. Carry you might refresh your mind on that? A. Maybe he could refresh my mind about that. That is only natural.

30 MR. LINK: If the Court thinks it necessary to rebut that testimony that Mr. Wisch received the \$600——

THE VICE CHANCELLOR: Mr. Wisch has denied it.

MR. MILTON: Yes, sir.

THE VICE CHANCELLOR: Now, you have some exhibits to offer.

40 MR. MILTON: We were to find out the date that Mr. Rudiger resigned as President of the Realty and Commercial Company and the Phoenix Realty Company.

MR. CARPENTER: And Mr. Rudiger is to get that agreement that he says he has in his safe.

MR. LINK: We don't want it. That is not the agreement Mr. Schatzkin testified to. Mr. Schatzkin said it was something on a bill.

MR. MILTON: Now, I move to strike out—

THE VICE CHANCELLOR: I will hear you on that on the argument of the case.

MR. CARPENTER: I have a motion to make, too, on the testimony which was introduced this morning. 10

THE VICE CHANCELLOR: I will hear counsel on that on the argument of this case. Counsel can come prepared to argue the matter.

The case was thereupon set for argument on Thursday, February 17, 1916, at Chancery Chambers, Jersey City, at 10 o'clock A. M.

Opinion. 20

IN CHANCERY OF NEW JERSEY.

Between:

WILLIAM FREILE, et als.,

Complainants,

and

JOSEPH H. RUDIGER, et als.,

Defendants.

On Bill, etc. 30

Submitted June 27, 1917; decided November 22, 1917.

RANDOLPH PERKINS, ESQ., for Complainants.

MESSRS. TREACY & MILTON, for Jos. H. Rudiger, Defendant.

MESSRS. MCDERMOTT & ENRIGHT, for Solomon M. Schatzkin and Henry A. Oetjen, Defendants.

GRIFFIN, V. C.: 40

Opinion.

The bill in this cause is filed for discovery in aid of a suit at law against the complainants, William Freile, Anthony Michel and P. Edward Wisch, upon a promissory note made by Orpheum Amusement Company (upon which the complainants are endorsers subsequent to the defendant Rudiger (who is payee and first endorser), and
10 for a perpetual injunction against the suit at law, and for a decree that the note be delivered up for cancellation, and for other relief. The note, at maturity, was protested for non-payment by Schatzkin, the holder thereof.

It seems that after the note had been protested, Schatzkin delivered the same to Rudiger, the payee and first endorser, to hand to his, Schatzkin's attorneys for collection, under circumstances
20 hereinafter stated. Rudiger, who was a director and Vice President of a bank, who knew the order of liability between endorsers, wrote after his name the words "without recourse" and handed the note to the attorneys of Schatzkin. The bill contains numerous prayers for discovery, one of which called on the defendants Rudiger, Schatzkin and Oetjen to discover what interest either of them had in the note, and what interest Schatzkin or Rudiger had in the suit at law. The defendant
30 Rudiger, answering this prayer denied that "he is the beneficial owner of the note," or "that neither at this time nor at any other time has he had any interest in said note and the suit instituted thereon by the said Henry A. Oetjen."

The joint answer of Schatzkin and Oetjen denies that Rudiger has any right, title or interest in said note, but does not state whether he has any interest in the suit at law. These answers, in the respects above stated, are not strictly true,
40 because Mr. Rudiger was the one most vitally interested in the suit at law.

Opinion.

Schatzkin and Oetjen also filed an answer by way of crossbill against the complainants and Rudiger, praying that the words "without recourse" be stricken from the endorsement of Rudiger, and that the complainants and Rudiger be decreed to pay to them the amount due upon the note.

Three questions are presented for consideration: First, was there an agreement between the complainants and the defendant Rudiger that complainants should be liable on the note prior to Rudiger? Second, was the suit at law instituted for the benefit of Mr. Schatzkin, or Mr. Rudiger, the payee? Third, was there such a material alteration made in the note after its delivery to Schatzkin that, under the Negotiable Instrument Act, it is void as to the complainants? 10

First. Was there an agreement between the endorsers that the liability of the complainants should be prior to that of the defendant Rudiger? 20

In *Polhemus vs. Prudential Realty Corporation*, 74 N. J. Law, 570-577, the Court of Errors said, "When there are several parties to a bill or note who have become such for the benefit of another, their status, not only as to the holder for value, but *inter sese*, is, in the absence of relevant proof to the contrary, that which is shown by the paper upon which they have placed their names." In the present case, the evidence offered for and against an agreement varying the contract raised by the order of endorsement is so vague, indefinite and contradictory that the Court cannot find that such contract existed and, as the burden of proof is on Rudiger to show a contract different from that raised by the endorsements, and as he has not sustained that burden, he fails. 30

As to the second and third questions: Schatzkin says that when the note was not paid he de- 40

Opinion.

manded payment of Rudiger; and then an arrangement was entered into between them, which, in answer to a question of his counsel, Schatzkin explained as follows:

10 "A. Mr. Rudiger had a claim for an even amount of \$2500 for some insurance, which he came to me and tried to collect; and I told him, I said, 'You owe me \$2500 for the note; deduct the amount you owe me on the note, \$2500, to cover one amount for the other'; he said, 'Well, I suppose I will be responsible anyway, if it cannot be collected from them,' and we had an understanding that if I can't collect the note from Mr. Wisch or the other endorsers, then I shall deduct it from the amount due him, and in case I do collect the note, then I shall have to turn him over the \$2500 for the claim he had.

20 "Q. At any rate, it was a \$2500 debt? A. Yes, which nominally I owe him now, and I hold him responsible on the note. That was understood between us, that one should offset the other if I collect here, I pay him his money, and if not, it should be deducted."

Pursuant to this agreement the note was delivered to Rudiger to take to Schatzkin's attorneys for collection. Rudiger thereupon wrote, under his endorsement, the words "without recourse" and delivered it to an attorney connected with Schatzkin's attorneys, at the same time advising him that he had written the words "without recourse" after his signature.

30

Schatzkin assigned the note to one Oetjen, a clerk in said attorneys' office, for the purpose of suit only. Oetjen had no beneficial interest either in the note or the moneys collected thereon.

Oetjen sued on the note in the Supreme Court. Rudiger was not made a party defendant.

40 After the commencement of the suit at law Schatzkin learned of the alteration, but did not object until his answer was filed herein.

Opinion.

On the foregoing facts, it is quite apparent that Mr. Schatzkin and Mr. Rudiger, in answering the above prayers for discovery, were untruthful. It is quite plain that Mr. Schatzkin was only nominally interested; that the real plaintiff and the one for whose benefit the suit was brought was Rudiger, and that his purpose in writing the words "without recourse" after his name was to avoid the liability imposed on him by law according to the order of endorsement. 10

If Schatzkin should be regarded as the person beneficially interested in the suit at law, and he failed, after knowledge of the facts, to disavow the alteration, he ratified Rudiger's act; and the alteration being material, changing the rights and liabilities of the endorsers, *inter sese*, operates as a discharge of the complainants from liability. *Bodine vs. Berg*, 82 N. J. Law, 662-669; *Gray vs. Williams* (Vermont), 99 A. R. 735; *Crawford's Annot. Neg. Inst. Law*, p. 196, sec. 120, and cases cited. 20

The parties having gone to hearing, and having stated on the record that they desired the whole controversy to be decided, the Court, in its discretion, will retain jurisdiction and decide the issues. *Lehigh Zinc & Iron Co. vs. Trotter* 43 N. J. Eq., 185-204; *Van Horn vs. Demarest*, 76 N. J. Eq., 386-391; *Knikel vs. Spitz*, 74 N. J. Eq., 581-584; *Varick vs. Hitt*, 66 N. J. Eq., 442-444; *Mertens vs. Schlemme*, 68 N. J. Eq., 544-548; *Coast Co. vs. Spring Lake*, 56 N. J. Eq., 615-627. 30

The decree will be for complainants, the form of which may be settled on notice. What decree Mr. Schatzkin may be entitled to against Mr. Rudiger may then be considered. 40

Final Decree.**IN CHANCERY OF NEW JERSEY.**

Between:

	WILLIAM M. FREILE, et als.,	} On Bill.
	<i>Complainants,</i>	
	<i>and</i>	
10	JOSEPH H. RUDIGER, et als.,	
	<i>Defendants.</i>	

20 This cause coming on to be heard on pleadings and proofs in the presence of Randolph Perkins, Esq., of counsel with complainants, John Milton, Esq., of counsel with defendant, Joseph H. Rudiger and James D. Carpenter, Esq., of Messrs. McDermott & Enright of counsel with the defend-

30 ants, Solomon M. Schatzkin and Henry A. Oetjen, before his Honor, the Chancellor, whereupon and upon reading the pleadings and proofs, and the Chancellor having duly considered the same and the argument of the counsel thereon, and the parties to this cause having agreed to the hearing without objection, and the issues raised calling for a determination of the whole controversy, and it having been stated on the record that the parties desired the whole controversy to be decided in this present cause, and the Court having retained jurisdiction to decide the whole controversy, and it appearing that on or about the 27th day of October, 1913, the Orpheum Amusement Company, a corporation executed its promissory note in sum of Twenty-five hundred (\$2500.00) dollars to the order of defendant, Joseph H. Rudiger, payable three months after date, and that said note was endorsed first by said Joseph H.

40

Final Decree.

Rudiger, secondly, by Anthony Michel, thirdly, by William Friele, fourthly by P. Edward Wische, and that the three last named endorsers endorsed for the accommodation of Joseph H. Rudiger or Solomon Schatzkin, and it further appearing that at the time of the delivery of the note to Solomon H. Schatzkin he was indebted to the defendant, Joseph H. Rudiger in a sum equal to the amount due on the said note, and that Schatzkin and Rudiger agreed that if Schatzkin recovered on the note from the other endorsers, he would pay Rudiger the amount owing to him, otherwise he would apply it in discharge of the liability of Rudiger on the note, and it further appearing that Rudiger is primarily liable on the said note, and that the complainants are entitled to have the debt due from Schatzkin applied in discharge of the note, and it further appearing that the said defendant, Rudiger, after obtaining possession from Schatzkin of said note, and in order to avoid liability thereon wrote after his signature, "without recourse," and that it was a material alteration, and discharged the complainants from liability thereon, 10

IT IS on this 18th day of February, 1918, ORDERED, ADJUDGED and DECREED, and the Chancellor does hereby ORDER, ADJUDGE and DECREE that the complainants, William Freile, P. Edward Wisch, and Anthony Michel, are not liable on said note to the defendants, Joseph H. Rudiger, Solomon Schatzkin or Henry Oetjen, or any or either of them, and 20 30

IT IS FURTHER ORDERED, ADJUDGED and DECREED that a writ of injunction issue out of and under the seal of this Court directed to said Henry A. Oetjen perpetually enjoining restraining him from proceeding with said suit in the New Jersey Supreme Court. 40

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the said complainants be paid their costs of this action by, the defendants Joseph H. Rudiger, Solomon Schatzkin, and Henry A. Oetjen, together with a counsel fee of \$250.00 to be taxed in the costs,

IT IS FURTHER ORDERED, ADJUDGED and DECREED execution issue out of and under the seal of this Court with the purpose of making the moneys aforesaid.

E. R. WALKER,
C.

Respectfully advised.

JOHN GRIFFIN,
V. C.

Exhibit C-1.

\$2500.00/100 Jersey City, N. J., Oct. 27th 1913.

Three months after date we promise to pay to the order of.....J. H. RUDIGER..... Twenty-five Hundred and.....00/100 Dollars at THE MERCHANTS NATIONAL BANK OF JERSEY CITY, N. J.

Value Received Orpheum Amusement Co.
No. 9323 Due Jan. 27. P. Edw. Wisch, Pres.
Anthony Michel, Treas.

ENDORSED:

J. H. Rudiger,
Without Re-Course.
Anthony Michel
William Freile, M.D.
P. Edw. Wisch

UNITED STATES OF AMERICA, }
State of New Jersey, } ss.:

On the twenty-seventh day of January, in the

year of our Lord, one thousand nine hundred and fourteen, at the request of the MERCHANTS NATIONAL BANK OF JERSEY CITY, I, FRANCIS V. MANY, Notary Public, of New Jersey, duly commissioned and sworn, dwelling in Red Bank, N. J., and having an office at 1 Exchange Place, Jersey City, N. J., did present the original note hereto annexed, for \$2500. payable three months after date to Merchants National Bank, Jersey City, N. J., and demanded payment of the same but the said Bank refused, saying not good. 10

WHEREUPON, I the said Notary, at the request aforesaid, did PROTEST, and by these presents do publicly and solemnly PROTEST as well against the Makers and Endorsers of the said note as against all others whom it doth or may concern, for exchange, re-exchange and all costs, damages and interest already incurred, and to be hereafter incurred, for want of payment of the same. 20

THUS DONE AND PROTESTED, in Jersey City aforesaid, in presence of

John Doe and Richard Roe, witnesses.

Francis V. Many,
Notary Public, N. J.

In Testimonium Veritatus

Exhibit C-2.

For value received, I hereby assign to Henry A. Oetjen of Jersey City, Hudson County, New Jersey, a certain promissory note dated October 27, 1913, made by Orpheum Amusement Company, a corporation, to the order of J. H. Rudiger for twenty-five hundred (\$2500) Dollars, and endorsed to me, payable three months after date. 30

S. M. Schatzkin (Seal)

April 28th, 1914.

Dated, Jersey City, N. J.

Exhibit C-3.

UNITED STATES MORTGAGE & TRUST COMPANY
55 Cedar Street

New York, Oct. 27th, 1913. No.

Pay to the
order of.....J. H. Rudiger.....
Twenty-four hundred and sixty-two 50/100....
Dollars.

10 \$2462.50/100 S. M. SCHATZKIN.

Endorsed:

Pay to the order of the
Orpheum Amusement Co.
J. H. Rudiger.

For Deposit
Orpheum Amusement Co.,
Anthony Michel,
Treas.

20 Mr. Jos. H. Rudiger:

In consideration of your having turned over
to me the receipts for the premiums on the fol-
lowing policies to wit:

No. 16463	Phoenix
28102	Hamburg-Bremen
9667	Firemens
108864	Colonial
8458	Aetna
4867451	Scottish U. Nat.
1684053	North River

30 I agree to pay to you within thirty days from
date the sum of \$2240.90/100.

N. Y. Jan 29, 1914.

S. M. Schatzkin.

J.D.C. 1 for identification.

New Jersey Court of Errors and Appeals.

Between

WILLIAM M. FREILE, et al.,

Complainants-Respondents,

and

JOSSEPH H. RUDIGER, et al.,

Defendants-Appellants.

On Appeal
from
Chancery.

10

**MEMORANDUM FOR APPELLANT
JOSEPH H. RUDIGER.**

20

This appeal is taken from final decree advised by Vice-Chancellor Griffin in favor of the respondents. The decree (see Case, p. 156) adjudges that the respondents William Freile, P. Edward Wisch and Anthony Michel are not liable to Joseph H. Rudiger on a certain note dated October 27, 1913, and made by the Orpheum Amusement Company to the order of appellant Rudiger, for \$2,500—said note being endorsed first by said Rudiger, secondly by Michel, thirdly by Freile and fourthly by Wisch.

30

Facts.

The Orpheum Amusement Company was organized for the purpose of operating a theatre in the building owned by the Phoenix Realty Company and situated at the corner of Summit Avenue and Cottage Street, in Jersey City. After its organization, the appellant Rudiger was induced by

40

respondents to purchase \$2,000 worth of stock. The venture was not a success and respondents and appellant Rudiger were required from time to time to advance other moneys to said company by way of loans.

After appellant Rudiger had loaned the sum of \$5,000, he refused to have anything further to do with the company and endeavored to persuade respondents to drop the venture and take their
10 loss. They persisted in their belief that success would come, and kept on. Things went from bad to worse until finally in the fall of 1913, said company was in arrears for rent of said theatre building (known as the Orpheum Theatre Building) and also in arrears for rent of the Gayety Theatre in Hoboken, likewise owned by the Phœnix Realty Company, in excess of \$10,000, a portion of which sum had been assumed by the said company at
20 the time of leasing the Hoboken theatre.

The fall theatrical season of 1913 did not meet the expectations of the respondents, and they were at the point where they had to give up the enterprise or raise money in order to pay the arrears of rent due—respondents having been notified, in the latter part of October that they must vacate the two theatre buildings if the arrears were not paid. Believing that, with the coming of cold
30 weather, the receipts of the theatre would increase, due to the desire of the people for in-door entertainment, respondents sought to secure an extension of time for the payment of the rent. The appellant Schatzkin, being the controlling factor in the Phœnix Realty Company and a man of wealth and position, was approached by the respondent Michel and asked by Michel to advance \$2,500 on a note to the Orpheum Amusement Company (See Case, p. 138, l. 22 et seq.). Schatzkin refused to lend the money unless the company furnished a reliable
40 endorser. Respondents Freile and Wisch offered to

endorse the note, but Schatzkin refused to accept their endorsement alone and insisted upon the appellant Rudiger endorsing, as he, Schatzkin, was familiar with Rudiger's financial responsibility. Thereupon the appellant Rudiger was requested by respondents to endorse the note for their accomodation, and for the accomodation of the company. He at first refused to do this but finally, after persuasion, agreed to do so if the respondents would guarantee him against loss and assumed the payment of the note (See Case, p. 112, l. 20). That testimony is corroborated by the witness Carry (Case, p. 126, ll. 28 et seq.); also Case, p. 127, ll. 28 et seq.).

10

The note was endorsed under those circumstances and discounted by Schatzkin, the proceeds being deposited in the bank account of the Orpheum Amusement Company. Upon its maturity, the respondents failed to meet it, and Schatzkin had to pay the note.

20

Schatzkin desiring to collect on said note, delivered it to his attorneys, Hillquit & Levene, of New York City. It was found that no action could be brought in New York, inasmuch as all the endorsers lived in New Jersey. Rudiger, being desiruous of having the note paid, requested that suit be instituted upon it so that the liability of the respondents to pay the note might be determined. Rudiger offered to place the note in the hands of McDermott & Enright for collection. For that purpose, he was authorized by Schatzkin to secure the note from Hillquit & Levene. Upon delivery of the note to Rudiger, and without the knowledge or consent of Schatzkin, he wrote upon the back of it, above his signature, the words "without recourse", believing that, inasmuch as he was not to be liable to the other endorsers, he was entitled to do that.

30

40

Suit was instituted upon the note in the New Jersey Supreme Court by Henry A. Oetjen, as assignee. After issue joined, the bill in this case was filed for the purpose of enjoining the action at law and seeking a discovery as to the manner in which the words "without recourse" were placed upon the note in question. To the bill, answers were filed and, on behalf of the appellant Rudiger, a cross-bill against his co-endorsers, setting out the above facts and praying that the respondents be required to first pay the said note before the appellant Rudiger, and that, if he were compelled to pay the note, he be subrogated to the rights of Oetjen and Schatzkin, as against the respondents.

ARGUMENT.

The decree (See case p. 157, line 30) adjudicates that the respondents Freile, Wisch and Michel are not liable on the note to the appellants Rudiger, Schatzkin and Oetjen or any or either of them. Such adjudication or finding is predicated upon four or five recitals in the decree as follows:

1. That respondents endorsed the note for the accommodation of Rudiger or Schatzkin.

2. At the time of the delivery of the note Schatzkin was indebted to Rudiger in a sum equal to the amount of the note, and they agreed that if Schatzkin recovered on the note he would pay Rudiger the amount due him, otherwise he would apply it in discharge of Rudiger's liability on the note.

3. That Rudiger is primarily liable on the note and respondents are entitled to have the debt due from Schatzkin applied in discharge of the note.

4. That Rudiger materially altered the note by writing upon it the words "without recourse" and as a result discharged respondents from liability.

I.

**That respondents did not endorse for
accommodation of Rudiger or Schatz-
kin.**

Nowhere in the case is there any evidence to be found sustaining such a conclusion. The learned Court below misconceived what the witnesses testified to. For illustration: The respondent Michel, p. 140, line 5: 10

“I said that Mr. Wisch was the only one that would endorse this note because he was the only one at that time who was financing the theatre; and Mr. Rudiger was there for himself, and stated that he would not be responsible and not be liable to pay any note. *
* *

Line 13: Mr. Wisch was present on this occasion. 20

Case p. 142, line 25: We went to Rutherford to see Mr. Schatzkin and try to get Mr. Schatzkin to forego the rent, which he again refused, and he again made this proposition stating that he would advance the money on a note to Mr. Rudiger, because he knew Mr. Rudiger, and didn't know the responsibility of any of the others who might become endorsers on the note, and he said that that was the only way in which he would advance the money to the Orpheum Amusement Company, that if the Orpheum Amusement Company wanted the money, the note would have to be made payable to Mr. Rudiger. 30

Line 40: Q. What was said by Mr. Rudiger regarding that? A. Mr. Rudiger objected to it; he said he didn't see what he had to do with the transaction, that he wasn't interested in it, and didn't care whether the theatre was opened or closed, and that he didn't care to incur any responsibility on this note transaction, and would not assume any responsibility on the note. * * * 40

Page 143, line 10: He made the remark out there that he wouldn't do this unless the endorsement of Mr. Wisch and myself was on the note.

10 Witness Carry, Case p. 133, line 3: I told him (Dr. Freile) Mr. Rudiger's name was in the body of the note, and on the back as accommodation endorser, and he was not to be held responsible; Mr. Wisch and Mr. Michel were to sign (endorse) the note and Dr. Freile; otherwise the note would not be accepted by Mr. Schatzkin for discount.

20 Respondent Freile, Case p. 67, line 16: Q. You understand at the time the note was tendered to you that the proceeds of it were to be used for the purpose of paying the rent due to the Phoenix Realty Company? A. That was my understanding, yes. Q. And that if the rent were paid the theatre would be allowed to remain open, and the Orpheum Amusement Company be allowed to conduct it? A. That was my conception of it"

The respondent Freile changed his position with reference to the fact as to whose accommodation the note was for (See Case p. 70, line 30) and when pressed upon this point finally admitted that he could not recall what the Witness Carry said to him (See Case p. 71, line 35).

30 Respondent Wisch, Case, p. 56, line 28: "I was the angel for the proposition, you might say, being guided by Michel. * . *"

Line 40: Q. You were interested, were you not, in trying to get the Phoenix Realty Company to forego their rent in the theatre for a time so it would give you more of a chance? A. Yes, sir.

Page 57, line 28: Q. Had you yourself asked Mr. Schatzkin to forego the rent on the theatre? A. No, sir.

40 Q. Well, who did that for you? A. Mr. Michel."

As additional light on this question we have

the testimony of the appellant and Carry. Rudiger is quite positive that he was not interested in whether the theatre remained opened or closed. He had washed his hands of the affair, and merely endorsed the note as a friendly act for the respondents. His instructions to Carry were to notify each of the other endorsers that unless they endorsed for Rudiger's accommodation the note would not be delivered. The witness Carry is not affected in any way, not interested, and his testimony is, it seems to us, dispositive of this question.

10

When all of the circumstances are considered, in view of the fact that the respondents were struggling to keep the theatrical venture alive, and were desperately trying to prevent themselves from being dispossessed, and in view of the further fact that the proceeds of the note went into the treasury of the Orpheum Amusement Company and were then used to pay the arrears of rent, how it can be said that Rudiger was to be primarily liable, and that the respondents endorsed for his accommodation, we cannot understand.

20

II.

Schatzkin's indebtedness to Rudiger.

While it might be true that Schatzkin was entitled to set off as against his liability to Rudiger for insurance premiums the amount of the note, how could that possibly affect the liability of the respondents on the note in question?

30

We submit that under the pleadings as framed this question was not at issue and the court below erred in finding that Schatzkin was only nominally interested; that the real plaintiff and the owner for whose benefit the suit was brought was Rudiger. Even assuming that Schatzkin was entitled to set off as against the insurance

40

premiums the amount due on the note there was still due Schatzkin a substantial balance. Rudiger had not acquired title to the note by reason of any understanding (if there was one) between him and Schatzkin with reference to the payment of the insurance premiums.

III.

10 **Rudiger not primarily liable.**

Wisch, Freile and Michel are irregular endorsers of the note in question. The parties endorsed the note under the circumstances related above. Before its execution Carry took the note to respondent Wisch who signed his name upon the face of it as president and then endorsed it. It was entrusted to Carry to be presented to Freile. Until Freile endorsed it and not until then, was there any delivery of the note to the payee Rudiger.

20 Section 64 of Negotiable Instruments Act, Compiled Statutes, page 3742 provides:

“Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable as indorser in accordance with the following rules:

30 “1. If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties;

“2. If the instrument is payable to the order of the maker or drawer or is payable to bearer he is liable to all parties subsequent to the maker or drawer;

“3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.”

Section 68 of same Act, Compiled Statutes, p. 3743 provides:—

40 “As respects one another endorsers are

liable prima facie in the order in which they endorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise."

See *Wilson vs. Hendee*, 74 N. J. Law, p. 640.

It is respectfully urged that by force of the Negotiable Instruments Act as construed in the case above cited notwithstanding the order in which the names appear on the note, it was competent for Rudiger to prove an agreement among the endorsers, that they should be liable in some other order. 10

IV.

As to the alteration.

Section 124 of the Negotiable Instruments Act, Compiled Statutes, p. 3749 provides:

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent endorsers. 20

"But when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration he may enforce payment thereof according to its original tenor."

What is there in this case to show that Schatzkin, the owner and holder of the note, had ever assented to the writing of the words "without recourse" by Rudiger? Not only is the case bare of proof on that point, but it is likewise free from any evidence tending to show that Schatzkin even had knowledge of Rudiger's act until some time afterward. Rudiger testified, Case page 121, line 10— 30

"I then said to Mr. Hillquit, I am on this note, and I am not a bit responsible; I said, 40

these gentlemen below me endorsed that note for my protection; now, what can I do to prevent myself from being sued on it. Mr. Hillquit made the remark, he said, "In New York State if we want to eliminate our responsibility we put on 'without recourse'". That was all he said and I said, "Good day," and I walked across the hall into the Realty and Commercial Office, and I took a pen and ink, and wrote the words "without recourse" on it, never thinking any further.

10

Schatzkin, Case, p. 88, line 21—

Q. Were they "without recourse" put there by you? A. No, sir. I heard about this endorsement after they brought suit, and I heard from somebody saying there was such a thing put in, but that was put in after it was turned over to Mr. Rudiger.

Q. Was it put there with your knowledge?

A. No, sir.

Q. With your consent? A. No, sir.

20

Q. Did you know anything about it until after suit had been brought? A. No, sir, not until afterwards.

The learned court below in its opinion says after the commencement of the suit at law Schatzkin learned of the alteration but did not object until his answer was filed herein. What could he have done? What should he have done? The cases referred to by the Court below in support of its conclusion that Schatzkin had ratified the act of his agent (for that is what the court assumes Rudiger to have been) are not analagous to the present case.

30

In *Radine v. Berg*, 82 N. J. Law, the bank not only did not disavow the act of its officer, but accepted payment on account of the note. We insist that Schatzkin has done nothing to ratify Rudiger's act, and that the court below erred in holding that the alteration in question discharged respondents from liability.

40

V.

Rudiger's relief not predicated upon note.

If it be conceded that the effect of the alteration by Rudiger is to avoid the instrument, it is contended that the relief he seeks is not based or predicated upon the instrument itself. His rights arose out of an independent agreement made by the respondents to hold him harmless or indemnify him from loss by reason of his endorsement. In the absence of a fraudulent motive or intent in making an alteration, the sole effect is to avoid the instrument, the original cause of action remaining. *Hunt v. Gray*, 35 N. J. Law, pp. 227-234. 10

It is respectfully submitted that the action of the court below should be reversed and it be directed that a decree be entered adjudicating that the respondents are liable to Schatzkin upon the note, as well as Rudiger, and that Rudiger is entitled to be subrogated to Schatzkin's rights as against the respondents, and that the respondents be compelled to pay to Rudiger the amount of said note. 20

TREACY & MILTON,
Solicitors for Appellant Joseph
H. Rudiger.

JOHN MILTON,
Of Counsel. 30

Hediger's school not protected upon
the ground of public policy

It is held that the fact that the school is
not a charitable institution is not a bar to its
being protected under the provisions of the act.
The respondents in both this case and in
the other case are the trustees of the school.
In the absence of a trust instrument or other
instrument, the school is held to be a trust
in making an appropriation of the school funds
to the respondents, the original trustees of the
school. West. Case, 12 N. J. Law, 227.

It is respectfully submitted that the school is
not a charitable institution and that it is di-
rected that a decree be entered adjudicating that
the respondents are liable to satisfy upon the
note as well as Hediger, and that Hediger is en-
titled to be subrogated to Hediger's rights as
against the respondents and that the respondents
be compelled to pay to Hediger the amount of
the note.

TERRY J. HEDIGER
Solicitor for Applicant Joseph
H. Hediger
JOSEPH HEDIGER
Pl. Hediger

JOSEPH HEDIGER
Pl. Hediger
JOSEPH HEDIGER
Pl. Hediger
JOSEPH HEDIGER
Pl. Hediger

New Jersey Court of Errors and Appeals

Between

WILLIAM M. FREILE, *et als.*,
Complainants-Respondents,

and

JOSEPH H. RÜDIGER, *et als.*,
Defendants-Appellants.

*On Appeal
from
Chancery.*

Brief of McDermott & Enright for Appellants Henry A. Oetjen and Solomon M. Schatzkin.

This appeal is from the whole and every part of a final decree in Chancery advised by Vice-Chancellor Griffin in favor of the complainants. All the defendants appeal.

Defendant Oetjen, assignee of defendant Schatzkin for the purpose of collecting the amount of a promissory note held by Schatzkin for value, brought suit on the note in the Supreme Court against all the complainants, Freile, Wisch and Michel. Complainants were endorsers on the note. The note was made by Orpheum Amusement Company, payable to order of defendant Rudiger, and endorsed by Rudiger, Michel, Freile and Wisch, in the order named (Ex. C. 1, p. 158, Case). After being thus endorsed the note was presented to defendant Schatzkin, who purchased same for the face value, less three months' interest, which he deducted. (See check of Schatzkin, Ex. C. 3, p. 160, Case.) The check was made payable to Rudiger, the payee, because it was Rudiger's endorsement that Schatzkin relied upon in lending the money (p. 93, Case).

The note upon maturity was protested for non-payment.

The note matured January 27, 1914. On about January 29, 1914, Mr. Rudiger called upon Schatzkin to pay him \$2,240.90, the amount of some insurance premiums owing by a corporation in which Schatzkin was largely interested, and which premiums Schatzkin had personally agreed to pay. (Schatzkin, p. 89; Rudiger, pp. 107-8.) Schatzkin in writing agreed to pay the amount to Rudiger within 30 days (Ex. bottom p. 160). At a subsequent conversation Schatzkin said to Rudiger that as the \$2,500 note of the Orpheum Amusement Co. had not been paid which Rudiger had endorsed, he, Schatzkin, would not pay Rudiger the \$2,240.90 until the note was paid. Schatzkin had already placed the note in the hands of his New York attorneys, Hilquit & Levine, for collection. Thereupon Schatzkin and Rudiger agreed that if the note could not be collected from the other endorsers, who as between all the parties were primarily responsible for payment, one debt would be set-off against the other; but that if collection were made by Schatzkin, Schatzkin would pay Rudiger the amount due him (p. 89, ll. 10-30; p. 113, ll. 3-20; p. 121).

Schatzkin thereupon instructed Hilquit & Levine to deliver the note to Rudiger, and instructed Rudiger to deliver the note to attorneys in Jersey City for suit. Rudiger called at the offices of Hilquit & Levine and procured the note for the purpose aforesaid. When Mr. Hilquit delivered the note Rudiger said to him: "I am on this note and am not a bit responsible. These gentlemen below me endorsed that note for my protection; now what can I do to prevent my being sued on it?" Mr. Hilquit replied: "In New York state, if we want to eliminate our responsibility, we put on 'without recourse'." Rudiger left, crossed the hall to the offices of Realty & Commercial Co., a company in which he was an officer, and wrote under his signature on the back of the note the words "without recourse."

Rudiger testified that he did so without the knowledge, consent or approval or authority of anyone. Schatzkin testifies that at the time he knew nothing of Rudiger's act, that he had given him no authority to write anything on the note, and that the limit of Rudiger's authority was to take the note to attorneys in Jersey City for the purpose of having suit brought upon it. Schatzkin had no attorneys in New Jersey. He told the attorney: "I bring this note over here by request of Mr. Schatzkin and would like you to sue on it." He then related how he had without authorization written the words "without recourse" on the note (p. 123).

Rudiger testified that when he wrote those words on the note "I was under the impression, and I feel today, that I have no responsibility under that note."

It was at Mr. Schatzkin's request that the note was assigned to Mr. Oetjen, a clerk in the offices of the attorneys (Ex. C. 2, p. 159). Schatzkin did not know of the alteration on the note until some time after the suit was brought on the note. Suit was brought in the Supreme Court in the name of Oetjen, the assignee, against Wisch, Michel and Freile on the endorsements on the note. This left the rights of these three endorsers against Rudiger unimpaired, either to have him added as a party, or to sue him after they had taken up the note.

After issue joined, and before trial, complainants filed a bill in Chancery, praying for discovery as to how the alteration came to be made in the note, that the note be surrendered for cancellation, and that the suit in the Supreme Court be restrained.

Rudiger, a defendant in the equity suit by answer (pp. 20-27) made full discovery as to how he had made the alteration and what actuated him, and he filed a cross bill in which he prayed that if it should be decreed that Schatzkin was entitled to relief against all defendants, the decree be so framed that complainants be first compelled to pay the note, and that if Rudiger be compelled to pay same he be subrogated to the rights of Oetjen and Schatzkin against complainants.

Oetjen and Schatzkin filed a cross bill, in brief alleging that the writing of "without recourse" on the note by Rudiger was without authority and unauthorized, and praying that the words "without recourse" might be struck from the note, that it be decreed that the writing of the words did not affect the liability of the maker and

endorsers to Schatzkin and Oetjen, and that the endorsers are compelled to pay the note to Schatzkin and Oetjen.

The case went to final hearing on February 4, 1916; on November 22, 1917, the Vice-Chancellor filed his opinion and the decree was made February 18, 1918. The Court below held that Rudiger was primarily liable on the note, that the writing the words "without recourse" discharged the liability of complainants on the note because it was a material alteration. The decree perpetually enjoined the suit at law, and required costs of suit to be paid by the defendants to complainants.

POINT I.

Schatzkin, having purchased the note for value before maturity, is entitled to a decree compelling payment to him by Michel, Freile, Wisch, and Rudiger, irrespective of the rights of those endorsers among themselves.

There can be no question that Schatzkin purchased the note in question for value and before maturity. The note for \$2,500.00 and the check to the order of Rudiger for \$2,462.50, the amount of the note less three months' interest fully establish this fact (Exs. C. 1 & C. 3). The check was endorsed by Rudiger to the order of Orpheum Amusement Co., and went into the account of that company (p. 136).

The Vice-Chancellor held that when Schatzkin turned the note over to Rudiger to have it sued upon Schatzkin owed Rudiger an amount equal to the amount that Rudiger as endorser was indebted to Schatzkin. This finding was error. Rudiger testified that the amount Schatzkin has promised to pay him for the insurance premiums was \$2,245.90 (pp. 107, 138) or something like that. When Schatzkin testified about the transaction on cross examination, without any previous thought about the matter he said the amount was \$2,500.00 (p. 89). He insisted, however, that the memorandum between himself and Rudiger had been reduced to writing and that this established the fact (p. 95, l. 25 to p. 97, l. 25). Mr. Rudiger said he had the writing home in his safe and did not bring it to court because he did not think it had anything to do with the transaction, but would produce it at any time (p. 108, ll. 10 to 38). Counsel offered at the close of the case, p. 151, to produce the paper. Mr. Link said, "We don't want it. That is not the agreement Mr. Schatzkin testified to. Mr. Schatzkin said it was something on a bill." The paper was produced on the argument and offered by counsel for Mr. Rudiger and was given an exhibit number for identification, but the Trial Court reserved decision as to whether it should be received. The action of the Court does not appear in the record. The exhibit is printed (bottom of page 160), and we submit should be considered on this appeal. This establishes that Schatzkin owed Rudiger \$2,240.90 or five dollars less than Rudiger recollected when he testified. Schatzkin is entitled to withhold from Rudiger out of the proceeds of the note, \$209.10 in excess of the amount due on the note when the accounts are finally balanced, and Schatzkin and Rudiger have their settle-

ment. The Exhibit JDC. 1, was called for by complainants, was produced and examined, and consequently automatically went in evidence.

The learned Vice-Chancellor certainly erred in taxing costs and awarding a counsel fee against Schatzkin and Oetjen. They were guilty of no wrong in any aspect. Schatzkin had not been paid the note; neither had Oetjen, his assignee. The Court below evidently thought that the whole transaction was for the benefit of Schatzkin, and that since Rudiger owed him more money than he owed Rudiger some sort of justice would be done by discharging the real debtors and by punishing Schatzkin for making the assignment, or for suing on the note, all because of Rudiger's foolish, but innocent act in altering the note to conform to what Rudiger believed to be the true situation. There was at no time any effort whatsoever to conceal what Rudiger had done. He admitted his act at once and at no time attempted to conceal it. Schatzkin is blamed by the Vice-Chancellor for doing nothing when he learned of the alteration after suit was brought on the note. What, pray, could he have done? What could his attorneys have done? They sued the three next endorsers as the names appeared on the note. They could not strike off the words "without recourse" without themselves altering the note. We submit that after the alteration was made nothing could have been done which was not done. When complainants started the action in equity Oetjen and Schatzkin by cross bill asked that the words, put on without their knowledge or consent, might be judicially struck off. That was the proper procedure.

POINT II.

If the alteration made the note conform to the intention of the parties it did not affect its validity.

The vital questions in this case are: for what purpose was the note given and as between the endorsers and Schatzkin who in fact are liable for its payment? Was the note made for the accommodation of Schatzkin, as charged in the bill; or was it for the accommodation of the Orpheum Amusement Company? Did Rudiger endorse the note for the accommodation of the company, Wisch, Michel and Freile, or was the note made for the accommodation of Rudiger alone?

A careful examination of the evidence is imperative in order that these questions may be correctly answered. It is charged in paragraphs 7 and 8 of the bill that "their endorsements on said note were solely for the accommodation of said Schatzkin." The affidavit of complainant Michel, verifying the bill, says "no value whatever passed to the payee or endorsees of said note" (bottom p. 15). Wisch swore in his affidavit, "Deponent further says that he signed said note solely as accommodation for said Schatzkin and without any consideration whatever, and has never received any benefit or value therefrom."

The evidence shows how false are these statements, and proves the allegations made in the answers of both defendants.

Wisch was president of the Orpheum Amusement Co., Michel was its treasurer and manager, Freile and Rudiger were stockholders. Long before the note was made the amusement company had proven a failure as a business venture. Freile and Rudiger had, with the other stockholders, put good money after bad into the venture. Some six months before the note was made Rudiger and Friele had both told the others that they were through and would put up no more money. Wisch had sunk about \$17,000.00 in the venture up to the date the note was given. He put in over \$5,000.00 after the note was given, hoping against hope that the company would experience a change of fortune and he would recoup his losses. He testified that he was the "angel" and was guided by "Michel, the great manager."

The amusement company was operating a new theatre near the Five Corners, Jersey City, in a building owned by the Phoenix Realty Company. Mr. Schatzkin was largely interested in the Phoenix Company. He had no interest whatever in the Orpheum Company. At the time the note was given the only ones who were doing anything at all with the Orpheum Company were Wisch, who was badly involved in it, and Michel, who had a job as its treasurer and manager which he did not want to lose.

About a week before the note was executed Wisch, Michel and Rudiger met in Schatzkin's office (Michel, pp. 138, 139; Rudiger, p.). They went there to tell Schatzkin that the amusement company was in distress financially and did not have funds to meet the running expenses and the rent (Michel, p. 138). Schatzkin demanded the rent and threatened to dispossess if it was not paid. They asked him to forego the rent, but Schatzkin refused. Schatzkin offered to lend \$2,500.00 on a note securely endorsed, but Rudiger refused to endorse. Michel says that on Saturday night he had \$1,250.00 to pay for vaudeville help alone and that was only a small part of the money needed.

On Sunday Michel called at Rudiger's home in Jersey City and had Rudiger take him to Schatzkin's home in Rutherford. Michel there asked Schatzkin again for help. Michel told Schatzkin that if he would lend the company \$2,500.00 he and Freile and Wisch would endorse the note. Schatzkin replied that he was not satisfied with these endorsements. Rudiger then told Schatzkin that these endorsers were perfectly good and that they were able to pay the \$2,500.00. Schatzkin then replied: "If they are so good and you know they are good, you endorse, too, for I know you are good" (Rudiger, pp. 109-110; Schatzkin, p. 85; Michel, p. 142). Rudiger then said he would endorse to secure Schatzkin, but that the others would have to be responsible for the payment of the note to him (Rudiger, top p. 110; Schatzkin, p. 92, ll. 30-42; Michel, top p. 140, bottom p. 142, top p. 143). The note was prepared that Sunday night at Rudiger's home by Mr. Carry, an employee of the amusement company, the amount was inserted and Rudiger, as payee, endorsed it. The note was taken by Carry, at once endorsed by Michel, and signed by him as treasurer, and Carry left with the paper.

Rudiger gave Mr. Carry instructions as to what to do with the note at the time he endorsed it and delivered it to Carry (pp. 110-111). Carry testifies that he took the paper first to Mr. Wisch in his office in New York; he told Mr. Wisch, pursuant to Rudiger's instructions, that "Mr. Rudiger's name was in the body of the note, and on the back, as an accommodation," and that Mr. Rudiger "was not to be held responsible" (p. 126, ll. 20 to 30). He said that he told Wisch that on Mr. Rudiger's instructions. Wisch then signed and endorsed the note (p. 126, l. 33). After Wisch signed and endorsed the note, Carry took it to Dr. Freile at his office in Jersey City, where he told Dr. Freile that Mr. Rudiger's name was on the note as an accommodation (p. 127, l. 20), and the note would be discounted by Schatzkin (p. 127, l. 20). He also told him that he "had instructions from Mr. Rudiger not to take this note for discount unless the names of Messrs. Wisch, Freile and Michel were on the back of the note, and that Mr. Rudiger was not to be held responsible (p. 127, ll. 20 to 40). Dr. Freile signed the note (p. 127, l. 40). Carry then took the note to Schatzkin at his office in New York. Schatzkin drew his check to the order of Rudiger for the amount, less the interest; gave the check to Carry, who took it to Rudiger; Rudiger endorsed it payable to the Amusement Company, and Carry deposited the amount in the bank account of the Orpheum Amusement Company (p. 136).

The testimony of Mr. Wisch is illuminating on the question of who was really liable. He says (p. 47, ll. 20 to 30):

"When he presented the note to me I looked at it and there was the name of Rudiger on it, and Doctor Freile, *both of whom had long before that refused to furnish any more money, and they had left it to me to continue paying the money.*"

Wisch said that it was Michel who brought the note to him to be signed (p. 47), and denied on page 50 that Carry brought the note to him. Carry said that he personally took the note to Wisch (p. 125, l. 35), and Michel testified that he did not present the note to Wisch (p. 140, l. 25).

Wisch said (p. 53, l. 40):

"That is about the first time anybody had put up any money to keep the theatre open, besides myself, for so long a time, that it quite impressed me.

(P. 54.) Q You had been putting up the money yourself for quite a while, hadn't you? A For quite a while, yes.

Q To keep the theatre running? A Yes, I put up the money—yes."

Wisch said (p. 55), when asked the amount that he had sunk in the venture:

"I can't recollect the amount; I think the whole amount, as near as I can figure it out, is about \$22,000, counting everything.

Q Had you put up \$22,000 in this venture up to the 27th of October, 1913? A No; some of that I put in afterwards; even afterwards.

Q But you put up most of it, I assume, before that date, didn't you? A Yes, most of it, sure."

Again he testified.

“Q Now, do you remember how much you put up after the 27th of October, 1913, for the purpose of keeping the theatre open and running? A I think it was \$15,000, after that (p. 55, ll. 37 to 40).

Q You did that for the purpose of keeping the theatre running, didn't you? A Yes, sir; with the hope of getting my money back.

Q Is it not a fact that the longer the theatre stayed open the more chance there was of the investment turning out to be good? A Well, it got to look bluer and bluer every day, and I had wanted to see if I couldn't recoup some of my money (p. 56, ll. 2 to 15). I was the angel for the proposition, you might say, being guided by Michel, the great manager” (p. 56, ll. 28-29).

Wisch even put up \$1,000 in December, 1913.

“Q That was the December following the execution of the note? A Yes, sir; after they used up that money, you see, they came back for more” (p. 56, ll. 36 to 40).

Wisch admits in the following question and answer that he was the one who was interested in trying to get Phoenix Realty Company to forego their rent and getting the \$2,500 on this note.

“Q You were interested, were you not, in trying to get the Phoenix Realty Company to forego their rent in the theatre for a time so it would give you more of a chance? A Yes, sir” (bottom p. 56, top p. 57).

Wisch admits that Michel acted for him in getting Schatzkin to forego the rent (p. 57, l. 29).

This testimony on the part of Mr. Wisch is almost a demonstration that he was the one who was primarily interested in borrowing the \$2,500 and that Michel was his agent in trying to raise the money, or have the landlord forego the rent. According to Wisch, Rudiger, Freile and Michel had long before dropped out of the proposition. If Rudiger, the week before the note was actually signed at the conference in Schatzkin's office, and also at Schatzkin's house, when Schatzkin agreed to lend the money, when he signed his name on the paper and when he delivered the note to Carry, made his intention clear not to be primarily liable, but only acted as guarantor that Wisch, Michel and Freile would pay the note if the Amusement Company did not, he as between the endorsers would not have to pay Schatzkin unless the others did not, and if Rudiger did pay the intention of the parties was that Rudiger should recover from the others.

If this is the situation, as the evidence conclusively shows, Schatzkin's decree should have been against all of the endorsers, with the right of subrogation in Rudiger's favor.

An alteration made on a note without the authority of the holder does not bind the holder.

Rudiger was entrusted with the note for the limited purpose of delivering it to some New Jersey attorney for collection. He was Schatzkin's agent for that purpose only. His act in writing on the words "without recourse" under his endorsement does not bind Schatzkin.

Hunt v. Gray, 35 N. J. L. 230; 3 Comp. Stat. 3749.

See *Negotiable Instruments Act*, Sec. 124.

In *Wallace v. Tice*, 51 Pac. 733 (Ore. 1898), a suit in equity to restore a note which had been materially altered by complainant, innocently, to affectuate what she thought was the intention of the parties, there was a decree for the complainant, the Court stating:

"When the alteration is prompted by honest and pure motives for a purpose of correcting the instrument to correspond with what the party honestly and in perfect good faith believed to be the true engagement of the parties at the time of the execution, the act does not destroy the legal efficacy of the note, and recovery may be had upon it when restored."

In *Lewis v. Schenck*, 18 N. J. Eq. 459, the holder of a note altered it by adding the words "with interest from date," thinking this was the original understanding. On bill filed the Court found that the alteration was made under a misapprehension of fact, stated that the note was avoided at law, but that the original note under the execution remained, and though recovery on this debt could be had in an action at law, still equity had jurisdiction in cases of mistake, and the Court decreed payment of the amount due.

See also 2 *Cyc.* 186; 2 *Corpus Juris.* 1184, Sec. 19, notes 4, 5, 6.

POINT IV.

Under Negotiable Instruments Act all endorsers are liable to Schatzkin and Oetjen, and the others are liable to Rudiger.

Section 64 of this act provides (Comp. Stat. Vol. 3, p. 3742):

"Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as endorser in accordance with the following rules:

(1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties."

Under this section of the act, since Wisch, Michel and Freile placed their signatures on the note in blank before delivery, they are liable to Rudiger and Schatzkin.

Wilson v. Hendee, 45 Vr. 640, construes this section of the act.

Section 124 of the act provides:

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except

as against a party who has himself made, authorized or assented to the alteration and subsequent endorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

Section 125 provides that a material alteration is

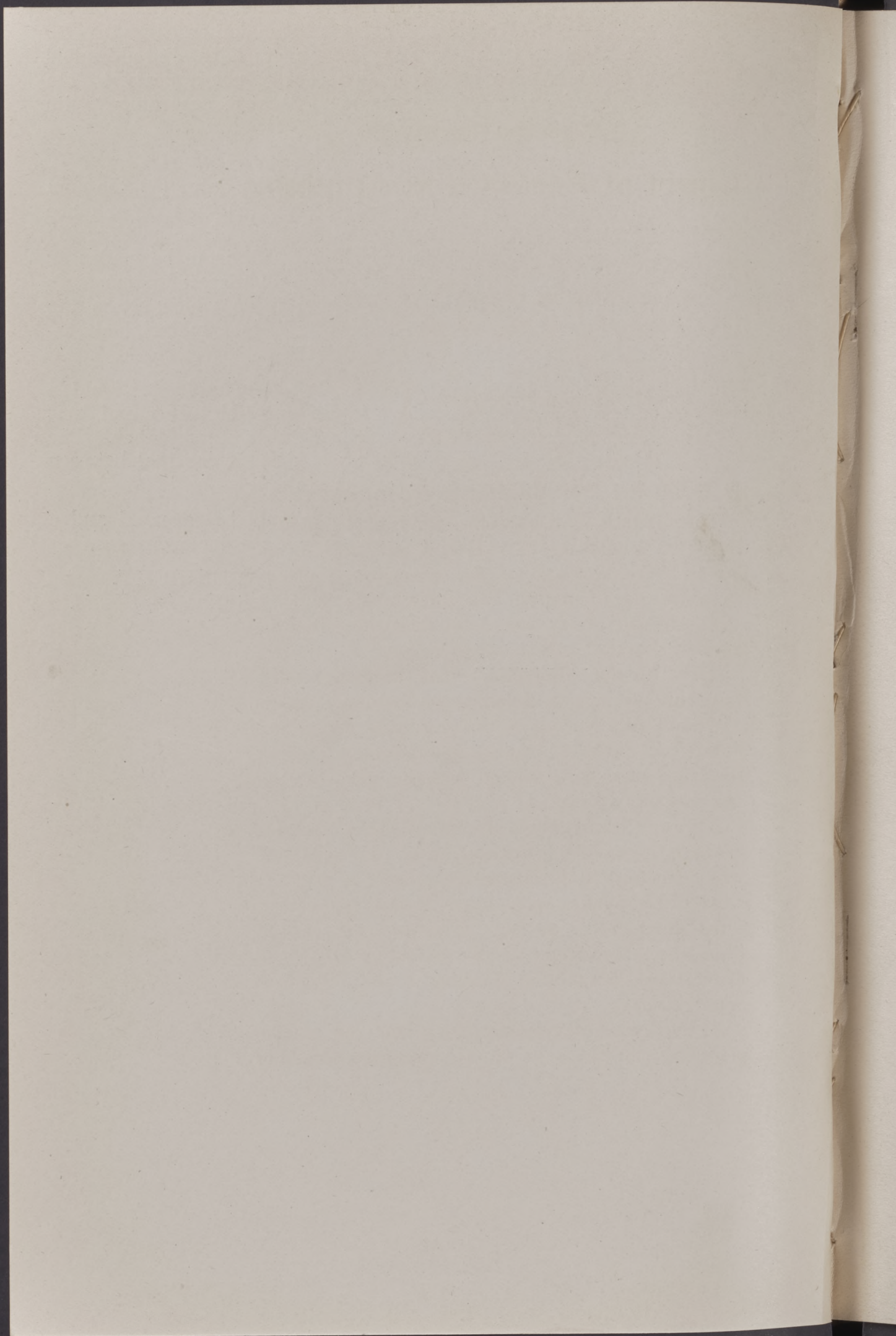
"Any alteration which changes: (1) the date; (2) the sum payable, either for principal or interest; (3) the time or place of payment; (4) the number or the relations of the parties; (5) the medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration."

Since Schatzkin is not a party to the alteration, under section 124 he may enforce payment according to its original tenor, and that payment is demanded from Rudiger, Michel, Freile and Wisch. The rights of Rudiger against the others is a matter of contract between them and controlled by section 64 of the statute.

We respectfully submit that the decree should be reversed and a decree entered in favor of Schatzkin against the other endorsers.

McDERMOTT & ENRIGHT,
Attorneys for Oetjen and Schatzkin, Appellants.

JAMES D. CARPENTER, JR.,
Of Counsel.



New Jersey
Court of Errors and Appeals.

BETWEEN

WILLIAM FREILE ET ALS.,
Complainants-Respondents,

and

JOSEPH H. RUDIGER, ET ALS.,
Defendants-Appellants.

*On Appeal
from
Chancery.*

Brief for Complainants-Respondents.

The bill in this cause was filed for discovery against Rudiger, Schatzkin and Oetjen, in aid of a suit at law. There is a prayer for cancellation of the note sued on, injunction and other relief.

The defendants answered and filed counter-claims against complainants.

All of the defendants requested the Court below to retain the cause and determine the issue raised.

Upon a full hearing on the merits, a decree was entered in favor of the complainants, adjudging that they were not liable on the note and restraining the suit at law.

Before entering upon a discussion of the merits of the case, it may be useful to look at the situation which made the bill for discovery necessary.

All of the parties (except Oetjen) had been interested, financially, in the Orpheum Amusement Company, operating a theatre owned by the Phoenix Realty Company, a creature of the defendant Schatzkin.

At the time of making the note in suit, the Amusement Company was in failing circumstances, and

about to close the theatre and quit business. It owed considerable arrears of rent, to the Phoenix Realty Company. Just at this time, Schatzkin was negotiating for the sale of the theatre (p. 46, l. 30) and was anxious not to have it closed "showing that the house was not making a living" (Wisch, p. 46, l. 36).

Rudiger and Michel (the latter has experienced a change of heart, since the filing of the bill) went to Schatzkin's residence in Rutherford and tried to get him to forego the rent (Michel, p. 142, l. 25).

"Schatzkin said he would advance the money on a note to Mr. Rudiger because he knew Rudiger and didn't know the responsibility of any of the others who might become endorsers on the note, and he said that that was the only way in which he would advance the money to the Orpheum Amusement Company that if the Orpheum Amusement Company wanted the money the note would have to be payable to Mr. Rudiger."

Schatzkin confirms this (p. 85, l. 16) "I said, "Well, if you (Rudiger) will endorse it I will get the check," and p. 93, l. 2:

"Q. Why did you draw the check to him (Rudiger.) A. Well, so it would show that I gave the money to him."

As a result of the conference between Rudiger, Michel and Schatzkin, a note for \$2,500, dated October 27th, 1913, was made by the Orpheum Amusement Company to the order of Rudiger and endorsed by Rudiger and Michel.

The next day it was taken to Dr. Friele by a Mr. Fred Carry. He stated that "Mr. Rudiger had "sent him down to my office with this note and requested me to endorse it. I demurred and said to

“him: ‘Fred, you know that I have had my dose
 “of medicine in this thing, and I don’t care to put
 “my name on any further pieces of paper.’ He then
 “said to me that Mr. Rudiger had advised him to
 “tell me that it was simply a matter of accom-
 “modation to Mr. Rudiger and on that representa-
 “tion, I endorsed it.” (Friele, p. 65, l. 28).

Then Michel took the note to Wisch and explained. “See, Rudiger and Friele are on the
 “note; it is only accommodation for Schatzkin; he
 “wants to raise the money; he don’t want the theatre
 “closed up just at the present time or probably Dr.
 “Albanesius won’t buy it” (Wisch, p. 47, l. 25). The
 result was that Wisch endorsed under Friele, making
 the order of endorsements, Rudiger, Michel, Friele
 and Wisch.

Schatzkin discounted the paper, and paid it when
 it fell due; after it was dishonored he sent for Rudi-
 ger, who telephoned from Schatzkin’s office to Wisch,
 asking him to come. Wisch refused to pay the
 note and left. No demand was ever made by Schatz-
 kin or Rudiger upon Dr. Friele for payment.
 (Schatzkin, p. 87, L. 30).

“When I found out that the endorsers, that
 “is Mr. Wisch and Dr. Friele refused to
 “pay the note, I went to Mr. Rudiger
 “and demanded payment from him as
 “the man I looked to practically when
 “I gave the money.”

Schatzkin then placed the note in the hands of his
 New York attorney for collection (p. 88, l. 10 ; Later
 a settlement between Schatzkin and Rudiger was
 effected under which the note was turned over to
 Rudiger.

This settlement apparently took place January 29,
 1914 (p. 160, l. 30), two days after the note fell due.

“Mr. Rudiger had a claim for an even amount of \$2,500 for some insurance, “which he came to me and tried to collect; and I told him I said, You owe me \$2,500 for the note; deduct the amount you owe me on the note \$2,500 to cover one amount for the other” (Schatzkin, p. 89, l. 15).

A writing was entered into between Schatzkin and Rudiger, which was not produced at the trial although subpoenaed.

Schatzkin's idea of the situation was perfectly clear. “It was to me just like a thing which was settled and wound up, and I never paid any more attention to it until this case came up” (Schatzkin, p. 95, l. 33). “I think there was such a writing; my recollection was that there was something, but whether it was something I gave to Mr. Rudiger and he kept it, or I kept it I do not recollect; and I cannot find it. In my mind it was a settled affair” (p. 94, l. 38).

Rudiger, upon receiving the note, wrote under his endorsement the words “without recourse,” and placed it in the hands of an attorney in Jersey City for collection against the remaining endorsers.

On March 24, 1914, demand was made by the attorney upon the three last endorsers for payment.

On April 28th suit was begun by Oetjen against the complainants.

Of course, neither Rudiger nor Schatzkin was a party to the suit at law. It was evident that Oetjen was merely a dummy for either Schatzkin or Rudiger.

Complainants learned that Schatzkin and Rudiger had entered into an agreement for the settlement of the note and other transactions, the result of which was that Rudiger had obtained possession

of the note, and had written under his endorsement the words "without recourse," and had then caused a suit to be brought upon the note in the name of a dummy. Inasmuch as Rudiger and Schatzkin were not parties to the law suit, a situation arose which made the bill for discovery necessary.

Both Schatzkin and Rudiger have filed answers and counter-claims.

In his opinion the Vice Chancellor finds that their answers in some respects "are not strictly true" (Opinion, p. 152, l. 39).

Rudiger's counter-claim prays:

"that it should be decreed by this Court that the said defendants, Oetjen and Schatzkin, are entitled to recover upon said note * * * and if this defendant is compelled to pay the same, he be subrogated to the rights of the defendants, Oetjen and Schatzkin, as against the complainants" (p. 31, l. 25).

Schatzkin and Oetjen file a joint answer and counter-claim and pray that the words "without recourse" * * * may be struck from said note (p. 38, l. 25), and that it be adjudged that complainants and Rudiger pay to Oetjen and Schatzkin the full amount of the note and interest (p. 39).

Their answer states that the note was assigned by Schatzkin to Oetjen "for the purposes of collection only" (p. 35, l. 33).

There was a settlement between Schatzkin and Rudiger under which Rudiger became the owner of the note.

No matter what form the settlement between the two men took, Schatzkin's evidence not only

justifies but compels the conclusion that so far as he was concerned * * * "it was a settled affair." Or, to put it in the cogent words of the Court, at page 78, "In other words, as I see it at this stage of the case, this looks like a suit between Rudiger and the other endorsers, in which Mr. Schatzkin is very little involved or interested."

What Schatzkin did after that settlement is just what any business man would have done. He directed his attorneys, Hillquit & Levene, to turn over the note to Mr. Rudiger (p. 99). Be it observed he did not turn the note over *before* his settlement with Rudiger. Mr. Schatzkin is a careful man and does not take unnecessary chances even with his friends, as witness: He drew the check to Rudiger "So that I could hold him as endorser."

After the settlement Mr. Schatzkin never paid any more attention to the matter; he didn't see Wisch again and demand payment as he had before. He did not bother Michel or Freile about it. He acted exactly in accordance with his view that "It was a settled affair. It was to me just like a thing which is settled and wound up, and I never paid any more attention to it until the case came up."

After the settlement he at once notifies his attorneys, who had the note for collection, to deliver it to Rudiger.

He not only gave up possession of the note, but dismissed the matter from his mind.

Every act of Mr. Schatzkin after this settlement is consistent with Rudiger's possession and ownership of the note.

If Schatzkin owned the note, why would he part with it to the very man he expected to hold responsible on it? Why would he, a resident of New Jersey, give it to Rudiger to select an attorney to sue on it? Why would he sue in the name of a dummy rather than in his own name?

Why would his attorney, who had it for collection, upon handing the note to Rudiger, advise him how to avoid liability on it?

Schatzkin knew of Rudiger's having written "without recourse" after his name (p. 88, l. 22). "I heard about this endorsement after they brought suit, and I heard from somebody, saying there was such a thing put on it, *but that was after it was turned over to Mr. Rudiger.*"

And with this knowledge in his mind his conduct still continues consistent. He "never paid any more attention to it."

If he were the owner of the note, what would his conduct naturally have been upon learning that Rudiger, to whom he had drawn the check, so that he could hold him as endorser (p. 87, l. 35), had written under that endorsement "without recourse?" Would he have remained silent and satisfied, and "never pay any more attention to it?" Mr. Schatzkin is a business man and takes care of his own.

Having drawn the check to Rudiger's order so that he might hold him as endorser, would he have permitted the dummy to sue the three last endorsers that he did not know, and leave Rudiger out?

After the settlement Schatzkin's conduct is always consistent—consistent with Rudiger's ownership of the note—and wholly inconsistent with Schatzkin's ownership.

What can be said of Mr. Rudiger's conduct after that settlement? Was it consistent? Let us see.

The first thing Rudiger did was to obtain possession of the note from the lawyer who held it for collection. The next thing he did was to end his liability as endorser, first asking the attorney's advice as to the legal way to end his liability. He

did this intentionally and without the slightest question as to his authority.

When Rudiger asked Hillquit, Schatzkin's attorney, for the note, he, Rudiger, had already in his mind a complete and definite intention to cancel his endorsement. He immediately asked Hillquit, "What can I do to prevent myself being sued upon it" (p. 121, l. 15)? Hillquit held the note as Schatzkin's property and for collection and was directed to turn it over to the person primarily liable on it. He knew that Rudiger was going to take it to Jersey City to have suit brought on it. Rudiger did not hesitate to ask Schatzkin's attorney how to cancel his responsibility. He did not conceal his intention, but on the contrary laid it bare. The situation with respect to ownership and control of the note was such that there was no reason why Rudiger should conceal from Schatzkin's attorney that he was entitled to cancel his liability as endorser, notwithstanding that suit was to be brought on the note.

Rudiger's conduct throughout is consistent with his ownership of the note. Rudiger has the right to possession; the right to cancel his endorsement; the "right to select any lawyer that I saw fit, and have them bring an action on the note to collect same" (p. 113, middle); the right to select and sue in the name of a dummy. When he delivered the note to Mr. Eichman for suit he selected the persons to be sued and told the attorney "right then and there" that he had placed the words "without recourse" on the note (Rudiger, p. 123, l. 24). This conduct is all perfectly natural and consistent. Natural that he should want the others to pay the note and escape himself—and consistent throughout—consistent with his ownership of the note, and with no other theory whatever.

The idea of suing in the name of a dummy was apparently the offspring of the necessities of the case. Rudiger, the owner of the note, could not appear as plaintiff. He was the one primarily liable on the note. He had erased his endorsement by writing "without recourse." Schatzkin had been settled with and was out of it. So for his purposes it was absolutely necessary to sue in the name of a dummy.

Suit was threatened against Wisch, Freile and Michel by the attorneys on March 24, 1914 (Carpenter, p. 124, l. 15). When suit was found necessary Oetjen was selected as the dummy. Being a clerk in the attorney's office, he was probably selected just before suit was brought, April 28, 1914.

It was then clear to the attorneys that Oetjen could not make title to the note through Rudiger, so in order to make title in Oetjen an assignment was procured from Schatzkin. That assignment bears date May 14, sixteen days after the suit was brought. The assignment was an afterthought pure and simple. Why was it necessary to prepare a formal *assignment*?

Up to the time the suit at law was brought, the conduct of Schatzkin and Rudiger is always consistent. Every act apparently legal and with authority. Every act on the part of Schatzkin perfectly consistent with his testimony that "In my mind it was a settled affair." Every act consistent with Rudiger's ownership of the note; the right to do with it as he pleased; to select any attorney he pleased; to sue the other endorsers if he pleased; to pick out any dummy he pleased. Every act on the part of Rudiger up to the time suit was brought is perfectly consistent—consistent with his ownership.

After suit, however, we constantly come into contact with "Afterthoughts." Why? There was no difficulty before. Schatzkin and Rudiger, two business men were perfectly capable of settling their

mutual demands. Perfectly capable of cancelling the insurance claim of \$2,500 held by Rudiger for the note of \$2,500 held by Schatzkin.

Of course, Schatzkin was willing to see Rudiger get the note out of the other endorsers. Rudiger was at least an acquaintance and connected with him in the Phoenix Realty Company, and "he did not know the other parties." Quite naturally Rudiger intended to make the others pay because he felt he was not responsible. "I am on this note, and I am not a bit responsible" (p. 121, l. 12).

All the inconsistencies arise after the law suit is brought.

Rudiger, being a layman, had not foreseen the difficulty in the way of making collection from the other endorsers.

These difficulties have given rise to a number of *afterthoughts*, all designed to alter and correct the legal situation as it existed at the time of the institution of the suit at law.

In what situation did Freile, Wisch and Michel find themselves upon being served with summons

Oetjen, with whom they had no relations whatever, was suing on a note. His relation to Schatzkin or Rudiger was not disclosed. Whether he was acting for himself or as a puppet for others who were hiding behind the scenes, they did not know. Information had reached them that a settlement had been effected between Schatzkin and Rudiger under which Rudiger was permitted to cancel his endorsement. Furthermore, they claimed that the note was given to accommodate Schatzkin who was anxious to keep the Orpheum theatre going, while he was unloading it on Albanesi.

The collusive conduct of Schatzkin and Rudiger called forth the bill of discovery.

It is the office of this ancient equity procedure to cast light in dark places. When the Court of

Chancery grants discovery—then come explanations and afterthoughts—and sometimes cross-bills to get from the Court of conscience what the defendants failed to get through connivance.

First Schatzkin found it necessary to have the words “without recourse” erased from the note.

He was not worried nor did he pray to that effect, while the law suit was proceeding merrily along. He knew that “without recourse” was placed there by Rudiger. “I heard about this endorsement after they brought suit and I heard from somebody saying there was such a thing put in, *but that was after it was turned over to Mr. Rudiger.*”

How delightfully naive—“after *they* brought suit”—not after *I* brought suit—he heard it from somebody—it seems not to matter whom—somebody saying “there was such a thing put in.” Not of much importance apparently—just “such a thing,” but “that was after it was turned over to Mr. Rudiger.” Clearly the witness thinks it’s Rudiger’s affair, not his. He feels no concern about this mutilation and voiding of the note. Why? Because it occurred *after it was turned over to Rudiger.*

It is obvious that the prayer of Schatzkin’s cross-bill comes from the head, not the heart. He is simply doing what he can to help Rudiger collect from the last endorsers.

Schatzkin who, on the 14th of May, 1914, under his hand and seal, solemnly sold, assigned, transferred and set over the note to Oetjen, now asks to have a decree against complainants and Rudiger for the amount due on the note.

What conception can this gentleman possibly have of the rules governing the conscience of the Court of Chancery?

Mr. Schatzkin, who is not a party to the suit at law, by reason either of his lack of interest in the

subject matter or his own choice, being haled into this Court to discover his secret arrangement with one of the endorsers, says: "I know I settled the matter with Rudiger. I know I assigned the note to Oetjen; I know that Rudiger mutilated the note after it was turned over to him, and I knew before I was invited by the Court of Chancery to tell what I know; I knew about this endorsement after they brought suit, but that was after it was turned over to Mr. Rudiger; I know that the note is in suit and that I am not a party to that suit; I know that the defendants have given a bond to Oetjen for \$3,000 to stay that suit; I know that there is no prayer asking to have the assignment set aside; I know that there is not a scratch of evidence in this case to show or indicate that Oetjen did not pay me full consideration on May 14, 1914, when I assigned the note to him; I know all these things, and in the full, open face of them all, I pray the Court of Chancery to forget all the rules of evidence, all the proofs, all the law and all the equity of this case and give me a decree against the complainants for the amount due on the note." Magnanimous man!

What right or claim has Mr. Rudiger to come to this Court with a cross-bill? In virtue of a subpoena ad respondendum, he comes here by special request of the Court, not to get but to give.

He is not a party to the suit at law. He does not even own up to being interested in that suit. Why should he be so anxious to have the Court of Chancery retain this cause for decision? He ought to be happy on that day when the bill is dismissed. Neither the plaintiff at law nor a defendant, he ought to pray for the status quo ante.

And again, if the note be cancelled it lets him out. So if Rudiger stands where he pretends to stand, he has developed great generosity.

He seems to be the man out of the case. First he cancels his endorsement; then he is let out by not being sued at law; and lastly if the note be cancelled in the present action, he escapes once more. For an uninterested bystander, he is certainly exhibiting an unusual degree of concern over the cancelling of the note.

There is just one possibility of Rudiger being interested, viz., if he cancelled his claim against Schatzkin on the insurance matter. If this claim was paid or cancelled, then Mr. Rudiger has a real and vivid interest in the outcome of this litigation. And that accounts for all his activity and afterthought. Mr. Rudiger is interested, Mr. Rudiger exhibits concern, because he is the owner of the note, and everything he did up to beginning the law suit proves it.

Furthermore, everything he has done since indicates it. He is the man *in the case*, and not *out of the case*. That is why he is asking this court to retain the case and decide it. Now that we have had discovery his position has been so smoked out, that he lifts up his hands and cries loudly for help from the Court of Equity. Undoubtedly, he feels that there is no chance for him by the strict rules of the common law.

If he were not the owner of the note, why would he not be pleased to have the law suit go on. What prompts him to humbly petition this Court to retain and decide this case? Nothing but self-interest—the fact that he has \$2,500 and interest at stake.

Mr. Rudiger's ownership of the note explains every step in the whole transaction.

It explains—

- (a) Unqualified delivery of possession to him by the attorney who held it for collection.

- (b) His frankness in asking Hillquit how to prevent liability.
- (c) His endorsing "without recourse" without objection by Schatzkin; in fact, with his countenance, if not positive consent.
- (d) His power ad lib to select any attorney that pleased his fancy.
- (e) It makes legal this act which otherwise would be under the New York Law forgery in the second degree.
- (f) Suit by a dummy instead of a real owner.
- (g) The belated date on Schatzkin's assignment.
- (h) His present willingness to keep the cause away from the Court of law.
- (i) His efforts to show that the complainants are not entitled to relief by cancellation of the note.
- (j) His cross-bill asking for subrogation.

What a marvelous prayer is that of Rudiger! Here is a payee and first endorser primarily liable on a note, claiming that the other endorsers agreed that he should not be liable. His prayer is as follows:

"This defendant therefore prays that it should be decreed by this Court that the said defendants, Oetjen and Schatzkin, are entitled to recover upon said note"
(p. 31, l. 25),

and then continues asking that the decree be framed as to require the complainants to pay the note first and if the defendant is compelled to pay that he be subrogated.

Think of this, defendant making a prayer in favor of his adversaries. Why should Rudiger

pray that it be decreed that Oetjen and Schatzkin are entitled to recover? The only reason is that Oetjen is Rudiger's dummy and Schatzkin is lending his name to help the matter through.

Rudiger did not need subrogation while the law suit was moving toward a judgment against his fellow endorsers. He did not need subrogation when he had absolute and unqualified possession, with the right to select his own attorneys and dummies and his own forum.

But now that discovery has been had he needs something he did not think of before.

How significant it is. Before the Court of Chancery cast its searchlight into the secret arrangement between these defendants, Schatzkin rested contented with the status quo. He was willing to let Rudiger do whatever Rudiger pleased. Rudiger could have the possession; he could write whatever he wished on the note; he could select his own forum; select any attorney; any dummy; and he could sue any one, two or all the other endorsers; he could have control of the suit and not be a defendant himself; all this was perfectly satisfactory to the unmurmuring Schatzkin. Moreover, Rudiger himself was contentedly pursuing his way unperturbed by thoughts of subrogation. He had nothing to complain of nor to pray for. He was eminently satisfied to have Oetjen subrogated by the assignment of May 14; he was pleased with the progress of the law suit—in fact he was neutral and did not care which one of the other endorsers paid the note to him.

Rudiger was satisfied with the proceeding at law where the real facts were unknown and could not be developed. As soon as a bill for discovery is filed in the Court, which threatens to destroy Rudiger's secret ownership of the note, Rudiger, assisted by Schatzkin immediately begins to pray for relief.

Schatzkin tries to rub out the "without recourse" endorsement alleging that he did not know of it and that it was done against his consent. He tries to wipe out his settlement with Rudiger and begins to take notice of everything to which he formerly paid no heed.

Rudiger starts his "honest mistake" explanation of his endorsing "without recourse." Both Rudiger and Schatzkin overlook the fact that the title to the note in question is vested in Oetjen. They have not challenged Oetjen's title nor can they. They have treated themselves as defendants with an interest in the note, rather than as defendants to a bill for discovery.

The prayer of complainant's bill for the cancellation of the note was properly granted. The proofs justify only one conclusion, that the note was paid by Rudiger and that the present law suit is being pressed in his behalf by a dummy—Rudiger is the real plaintiff in the law suit.

After the settlement with Schatzkin, Rudiger voided the note by endorsing thereon, under his name "without recourse." Even if the Court gives full faith to the flimsy explanation that the note was given to Rudiger with a string attached to it we maintain that the note should be cancelled because Schatzkin had knowledge of the endorsement of "without recourse" and acquiesced therein.

Furthermore, if the Court should hold that Oetjen was Schatzkin's dummy the note is void because by

instituting an action upon an altered instrument the plaintiff is taken to have ratified the alteration where it is shown that he had knowledge of the alteration.

Schatzkin admits that he knew about the alteration and Rudiger says that on delivery of the note he told Oetjen's attorneys that he had altered it, describing the manner.

“By suing on an altered instrument, in its altered form, plaintiff will be taken to have ratified the alteration.”

Corp. Juris, Vol. 2, p. 1260.

Also

“Ordinarily the plaintiff cannot avoid the effect of the alteration of which he is chargeable with knowledge after he has brought suit upon the instrument in its altered form, since by suing upon the altered instrument he is deemed to have ratified the alteration.”

Corp. Juris, Vol. 2, p. 1258, and cases cited.

It must be kept in mind that Schatzkin knew at the time of instituting suit that the note had been altered and *that he ratified the alteration by omitting Rudiger as a defendant in the law suit.* When Schatzkin made the assignment of May 14, 1914, he had full knowledge of the alteration of the instrument. When Oetjen began suit on the 28th day of April, 1914, he had full knowledge of the alteration. The fact that Rudiger was left out of the law suit as a party defendant conclusively proves that no matter who was the owner of the note it was the owner's intention to ratify the cancellation of Rudiger's endorsement.

Rudiger's cross-bill goes on the theory that there was an agreement among the endorsers whereby he

was to be let out. This would be nudum pactum. There is no question that Rudiger endorsed before the other endorsers; when they endorsed they received nothing from Rudiger or any one else. Rudiger's liability had already been fixed when the alleged agreement was made so that there would be no consideration for any such agreement, but the testimony does not bear out that there was such an agreement. Read Carry's testimony first as to Wisch's endorsement (p. 126, l. 35): "He (Wisch) knew—in fact, I told him—that Mr. Rudiger's name was in the body of the note, and on the back as an accommodation" (Carry, p. 126, l. 23).

It is admitted by everybody that all of them were accommodation endorsers. There is no evidence by Carry, or any one else, that Wisch agreed with Rudiger that Rudiger would not be held liable. Wisch expressly denies it.

As to Freile's endorsement, read Carry's testimony (p. 127, l. 15):

"Q. What, if anything, did you say to Dr. Freile about the endorsement of the note?"

"A. I told him the note was made out to secure the rent, and that we wished his endorsement on it, and it was to secure the rent, and Mr. Rudiger's name was on there as an accommodation, and it would be discounted by Mr. Schatzkin.

Q. "And you said to Dr. Friele, Doctor Friele, Mr. Rudiger sent me down with this note and wants to get your endorsement on it; that his endorsement is an accommodation—is that right?"

"A. Something to that effect" (Carry, p. 131, l. 38).

Rutiger's right to subrogation is entirely disposed of by the case of *Kling v. Kehoe*, 58 N. J. Law, 529, decided by Judge Garrison, in our Supreme Court. The parties to the suit were accommodation endorsers on a note which was paid by Kehoe who sued Kling for contribution. The plaintiff was permitted to prove against the objection of the defendant that, at the time of the making of the note they verbally agreed with each other that if Donoughey did not pay the note when it fell due they were each to pay half of it. * * * *

"It cannot be denied that the note in question creates a definite contract between these parties, by which, as between them, the maker, Kehoe, became primarily liable to pay the note, and Kling, as endorser, became liable only in case the maker failed to meet it at maturity; and that the admission of evidence, showing the existence of a contemporaneous oral agreement, such as was testified to on the trial below, tended to materially alter the terms of that contract. It is insisted, * * * that the evidence which was admitted, was not offered for the purpose of contradicting or varying the terms of a written contract, but solely for the purpose of proving the existence of the agreement sued upon. The fallacy of this contention lies in the fact that it assumes that these parties, at one and the same time, entered into two separate agreements relating to the same subject-matter, each equally binding, by one of which Kehoe became primarily liable to pay the whole note, and Kling liable only in the event of Kehoe's failing to perform his contract; while, by the other, they each became liable to pay one-half of the money due upon it at maturity. Two such agreements are absolutely inconsistent with each other, and cannot by any possibility be both effectuated. If one

stands, the other must fall. It was to meet this very condition of affairs that the rule was adopted which prohibits the introduction of oral evidence to vary or alter the terms of a written contract, complete in all its parts, and a recovery upon the oral agreement sued upon in this case, can only be sustained by disregarding that rule.

“* * * An example of the application of that rule, under circumstances similar in many respects to those in the case now before the Court, will be found in *Johnson vs. Ramsey*, 14 Vroom, 280. In that case an accommodation endorser upon a promissory note, in a suit brought against him by his endorsee, attempted to show that there was an oral agreement between them, made at the time of putting their names to the paper, that, in case either of them was compelled to pay the note, the other would contribute one-half of the amount paid. The Court, after carefully considering and discussing those cases which hold that, as between an accommodation endorser and endorsee, the form of the note is not conclusive, and that in that connection parol evidence is admissible, declares the true rule to be that an accommodation endorser, by force of his prior endorsement, agrees in writing to pay the whole of the note, so far as his endorsee is concerned, and that he cannot alter that contract by proof of the existence of a contemporaneous oral agreement creating a joint instead of a successive liability.”

Sec. 64 of Negotiable Instruments Act, quoted in both Rudiger's and Schatzkin's briefs, has no application.

No claim was made during the trial that complainants signed in blank and there is no evidence to that effect.

Rudiger's testimony is to the contrary (p. 119,

l. 30): "Q. How did you expect to hold Dr. Freile and Mr. Wisch liable on this note when you were the first endorser, and you had not any conversation with either of them regarding the execution of this document. A. Because my instructions to Mr. Carry were such that he was to inform them to the effect that my endorsement was placed on there providing they put their endorsement below mine, to insure me that I did not have to pay that note when it comes due."

(Wisch. p. 47, l. 20): "When he presented the note to me, I looked at it and there was the name of Rudiger on it * * * (Freile, p. 68, l. 21); to same effect (Michel, p. 142, l. 28 and p. 143, l. 20), Sec. 124 of Negotiable Instruments Act, does not apply.

The alteration of the note was made after the settlement between Schatskin and Rudiger. Schatskin now claims that he assigned the note to the dummy Oetjen for the purpose of collection only. Rudiger resides in New Jersey and had no occasion to assign, if he wanted to sue. The Courts were open to him. Suit was begun April 28, 1914, by Oetjen and on May 14, Schatskin assigned the note to him.

Schatskin knew of the alteration before suit and before he assigned the note, but "It was to me just like a thing which is settled and wound up, and I never paid any more attention to it, until the (this) case came up" (Schatskin, p. 96, l. 13).

Schatskin loaned the money on the strength of Rudiger's endorsement. Suit was brought, not against Rudiger, but the three other endorsers. It is evident that Rudiger was not to be held on his

endorsement. Schatzkin was satisfied to have the suit brought without recourse to Rudiger, "In my mind it was a settled affair" (Schatzkin, p. 95, l. 39).

After the suit at law, after the assignment, after complainant put up a \$3,000 bond to Oetjen, after the discovery, it is too late for Rudiger or Schatzkin to erase "without recourse."

It was put there by the owner of the note, who had been a banker. It was put there by the advice of Schatzkin's New York Attorney. It was satisfactory to them all until they got into a court of conscience, and that court will not now assist them in their effort to correct their scheme to impose a liability upon the complainants, that Rudiger should rightfully bear.

It is respectfully submitted that the decree of the Court of Chancery should stand.

RANDOLPH PERKINS,
Solicitor for and of Counsel
with Complainants-Respondents.

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