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Notice of Appeal.

record thereof, and on the further ground that said decree was based upon an erroneous construction as a matter of law and equity of the agreement made between complainant and the defendants or some of them, dated June 9, 1923, and given in evidence under the designation Exhibit C. 6 or C. 6A.

Dated, September 29, 1927.

BURNETT & MURRAY,
Solicitors for and of Counsel with Complainant.

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

BURNETT & MURRAY,
Solicitors for and of Counsel with Complainant.

Consent to the filing of the within amended notice of appeal is hereby granted and service of said amended notice of appeal is hereby acknowledged this 30th day of September, 1927.

JOSEPH E. CONLON,
Solicitors for and of Council with Defendants.

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PETITION OF APPEAL.

Filed September 23, 1927.

New Jersey Court of Errors and Appeals

To the Honorable the Court of Errors and Appeals in the last resort in all causes: 10

The petition of Thomas M. Nickolopoulos, the 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 R. Walker, Chancellor of the State of New Jersey, bearing date the 13th day of September, in the year 1927, wherein the said Thomas M. Nickolopoulos was complainant and the said Angelo Serantis, Emanuel J. Kypros, George Ferris, Emauel Papatheodore and The Goody Sweet Shop, Inc., were defendants in these respects, to wit: 20

In that the said Court by said decree adjudges and decrees that:

1. The complainant is not entitled to the relief prayed for.

2. Dismisses complainant's bill of complaint and 30

3. Decrees that complainant pay the defendants their costs to be taxed, and your petitioner humbly appeals from all and from each and every part of the said decree of the Chancellor upon the ground that the same are erroneous:

1. In that the preponderance or weight of the evidence shows that the agreement between complainant and the defendants, or some of them, dated June 9, 1923, was entered into by all 40

Petition of Appeal.

parties thereto for the sole purpose of protecting complainant as a minority stockholder and director in the Goody Sweet Shop, Inc., from being outvoted by the defendants, or some of them, at stockholders' and directors' meeting, and that said agreement was not (as said Court adjudged and decreed) made for the protection of the complainant in respect to the money owing to him by said The Goody Shop, Inc.

2. The said agreement dated June 9, 1923, was, by its terms or by proper construction thereof, of perpetual duration and did not and was not intended by the parties thereto to terminate or cease to be operative and effective when the money owing to complainant by the said Goody Sweet Shop, Inc., was repaid.

3. The defendants failed to sustain the burden of proving and establishing their contention that said agreement, dated June 9, 1923, was to cease to operate and was to terminate when said money owing by the said The Goody Sweet Shop, Inc., to complainant was repaid.

There was no sufficient evidence to warrant the Chancellor or the Court of Chancery in adjudging and decreeing that said agreement, dated June 9, 1923, was intended by the parties thereto to operate and be effective only while said money owing by the said The Goody Sweet Shop, Inc., to complainant remained unpaid, or to warrant the Chancellor or the Court of Chancery in decreeing that complainant's bill be dismissed.

5. The Chancellor, or the Court of Chancery, misinterpreted and misconstrued the legal and equitable effect of said agreement, dated June 9, 1923, when it found, determined and decreed that by its terms its effective and operative duration

Petition of Appeal.

was limited to the period for and during which the money owing by said The Goody Sweet Shop, Inc, remained unpaid.

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

BURNETT & MURRAY,
Solicitors and of Counsel with Appellant.

I conceive that there is good cause for appeal in the above-stated cause.

NORBURY C. MURRAY,
Of Counsel with Appellant.

ANSWER TO PETITION OF APPEAL.

Filed October 20, 1927.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

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THOMAS M. NICKOLOPOULOS,
Complainant-Appellant,

vs.

ANGELO SERANTIS, *et al.*,
Defendants-Appellees.

*On Appeal
from the
Court of
Chancery.*

*Answer to
Petition of
Appeal.*

20 The answer of Angelo Sarantis, Emanuel J. Kypros and Emanuel Pappatheodore, the above-named appellees, to the petition of appeal of Thomas M. Nickolopoulos, the above-named appellant.

30 These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was, on September 7th, 1927, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, these appellees beg leave to refer thereto when the same shall be produced.

These appellees 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 taxed in favor of these appellees.

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JOSEPH E. CONLON,
Solicitor for and of Counsel with
Defendants-Appellees.

BILL OF COMPLAINT.

Filed June 8, 1926.

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey: 10

Complainant, Thomas M. Nickolopoulos, residing in the City of Newark, County of Essex and State of New Jersey, complains of the defendants and says:

1. That with the understandings and agreements hereinafter mentioned, between complainant and the defendants, Angelo Sorantis and Emanuel J. Kypros and one George Ferris, they together in their joint names procured from the Trustees of the Third Presbyterian Congregation, in Newark, a lease from the 1st day of May, 1923, to the 1st day of May, 1933, of the northerly store (and the basement thereunder) of premises known as #907-915 Broad street, in the City of Newark, for the purpose of operating therein a place for the manufacture and sale of candy and ice cream and also for the purpose of preparing and serving therein light lunches, food, soda water and other confections; that said lease was so procured by complainant and said other parties for the purpose and with the intention of incorporating a business so to be conducted in said premises; that by the terms of said lease it was assignable to a corporation to be formed by said parties, but that the said parties as lessees were, notwithstanding such assignment, to continue liable for the performance of the several agreements set forth in said lease. 40

Bill of Complaint.

2. That among other things it was agreed between the complainant and said other parties that complainant would, by means of a loan in the neighborhood of the sum of \$10,000, to be made by him to said corporation when formed, furnish said corporation temporarily with working capital.

3. That among other things it was agreed between complainant and said other parties, that each would purchase 25 shares of the stock of said corporation formed, for which each was to pay the sum of \$50 per share, and that complainant was at all times to have a voting power equal to the combined voting power of all the other stockholders, notwithstanding the fact that he was to hold but 25% of the original authorized total capital stock.

4. That among other things it was agreed between complainant and said other parties, that none of the 100 shares of the capital stock of said corporation to be formed, were to be assignable unless and until the corporation and each stockholder thereof had failed or refused to exercise a 30-day option to purchase the same from the then holder thereof.

5. That in attempting consummation of said agreements and understandings, complainant and said parties caused to be incorporated on or about the 5th day of April, 1923, a corporation under the laws of the State of New Jersey, having the name "The Goody Sweet Shop, Inc."; that a copy of the certificate of incorporation is hereunto annexed and made a part hereof and designated as Schedule A; that organization meetings were held and by-laws were adopted, to which by-laws in their entirety, for greater cer-

Bill of Complaint.

tainty complainant prays leave to refer if necessary so to do; that by-law #6 as adopted provided that the stockholders should elect by a plurality vote by ballot, a Board of Directors, and that each stockholder at such election is entitled to one vote for each share of stock standing registered in his name on the 20th day preceding the date of such annual meeting, exclusive of the date of mailing; that by-law #10 provided that the Board of Directors should consist of four directors to hold office for one year or until their successors are elected and qualify; that by-law #31 provided in part as follows: "The shares of stock of this corporation shall not be assignable until the shareholder, desiring to dispose of the same, shall first give a written notice to the corporation that he desires to dispose of the same; and this corporation and any stockholder thereof shall have an option for a period of thirty days to purchase the same before the said stock may be assigned to any outside party"; that by-laws #36 and #37 provide as follows:

"36. The stockholders, by the vote of a majority of the stock issued and outstanding entitled to vote, may, at any annual or special meeting, alter, amend or repeal these by-laws, if notice thereof be contained in the notice of the meeting.

"37. The board of directors, by a vote of three-fourths of its members, may alter or amend these by-laws at a regular or special meeting of the board; provided, ten days' notice in writing shall have been given to each of the directors of the proposed amendment."

that at the organization meeting held on the 21st day of April, 1923, the incorporators empowered the Board of Directors "to issue the entire capital stock of this company in such

Bill of Complaint.

amounts as from time to time shall be determined by the directors and as may be permitted by law, and to accept in full or part payment hereof, such property as the directors may determine shall be necessary for the business of the company"; that the Board of Directors at its first meeting held on the same day, adopted a form of capital stock certificate, a true copy of which is hereunto annexed and made a part hereof and designated as Schedule B, and elected complainant President and the defendants Emanuel J. Kypros and Angelo Sarantis Vice-President and Treasurer, respectively, and George Ferris, Secretary; that the last stockholders' meeting was held in the month of April, 1923, and the last meeting of directors was held in the month of April, 1923.

6. That each of the said parties paid to the corporation \$2,500 and received therefor a certificate for 25 shares of the capital stock of said corporation; that complainant's said certificate was stamped on its face with the legend "Not assignable except in accordance with the by-laws," and complainant believes and charges the fact to be, that all the other certificates bore the same legend.

7. That the aforesaid lease was by the said lessees assigned to the corporation on the 21st day of April, 1923, and it now owns, as lessee, said lease; that on the 27th day of April, 1923, complainant and said parties entered into an agreement, of which a true copy is hereunto annexed and made a part hereof and designated as Schedule C; that all monies heretofore advanced by complainant to said corporation have been by it repaid to him in full.

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Bill of Complaint.

8. That on and prior to the 9th day of June, 1923, complainant and said other parties discovered that there was nothing in the Certificate of Incorporation or the by-laws or minutes regarding the agreement as to complainant's having a voting power equal to the voting power of all the other stockholders combined; that complainant immediately brought the matter to the attention of said other parties, and thereupon and in an attempted carrying out of said agreement, complainant and said other parties entered into an agreement, a true copy of which is hereunto annexed and made a part hereof and designated as Schedule D.

9. That complainant has been in the candy and soda water business for 17 years and is well and favorably known in the City of Newark, and as a consequence has a credit standing which enabled said lessees to procure said lease without any deposit or other security; that none of said parties other than complainant had any experience in said business, except as employee at a soda water fountain and except as proprietors of a restaurant which they had operated unsuccessfully for a short time; that none of said other parties except complainant had any credit standing whatever; that since the formation of said corporation, complainant has been the active business manager thereof, the others acting as salesmen behind the counter.

10. That complainant knowing that the other three parties were friends, realized that unless he had a voting control in the corporation at least equal to their combined voting control, that he might be outvoted and outed from the corporation, which not only would cost him what time

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Bill of Complaint.

he devoted to the business and what monies he invested therein, but also might subject him to a heavy liability on account of his being personally liable on the lease as one of the original lessees; that as a consequence when complainant and said other parties first discussed the matter of entering into said business, he stated that he desired a 51% voting control; that he was subsequently prevailed upon to reduce it to a 50% voting control; that when the agreement of June 9, 1923 (Schedule D) was executed, complainant thought that that agreement would under any and all circumstances protect him in his said voting equality; as he intended it should.

11. That early in the year 1926, said other parties, acting in concert, at about midnight, together with the defendant Emanuel Papatheodore, procured from complainant, when he was not altogether certain of what he was doing, his signature to a certain paper or papers, the purport and contents of which he is ignorant, but which he believes to be, and which was represented to him as being a consent by complainant to the sale of the 25 shares of stock of the said George Ferris to someone other than the then stockholders, if the corporation did not elect to purchase it within the 30-day option period; that within a day or two thereafter, complainant suggested to the said Kypros, Sarantis and Ferris, that the corporation buy the stock of Ferris; that they, however, were unwilling to do so, with the result that the complainant was unable to force the corporation to purchase this stock; that on or about the 27th day of May, 1926, complainant received notice that the said Emanuel Papatheodore had acquired and become the owner of the 25 shares of stock formerly belonging to the said

Bill of Complaint.

George Ferris; that the said Emanuel Papatheodore had stated to complainant that when he acquired his stock he did not know anything about the aforesaid voting agreement regarding the 50% voting control, and that he would not recognize it or be bound by it; that on the 6th day of January, 1926, said Angelo Sarantis, Emanuel J. Kypros and Emanuel Papatheodore stated that between them they now had a 75% voting control; that they purposed to hold a meeting on Tuesday, June 8, 1926, at which they would elect a new president, thereby ousting complainant; and that if thereafter complainant worked in the store for 12 hours per day they would pay him \$15 per week as heretofore, but that, however, they would increase their own salaries from \$15 per week each to \$45 per week; that if complainant was willing to dispense with his salary that he need not come near the store except every three months and collect his dividends, if there are any to be collected; and that they purposed to do with the corporation as they pleased.

12. Complainant charges the fact to be that the defendants Emanuel J. Kypros, George Ferris and Angelo Sarantis have, together with the said George Ferris, schemed together and conspired from the very inception of said company, with a view eventually to repudiating, avoiding or evading the said agreement relating to the voting control for the purpose of ultimately ousting complainant from said business, and that the defendant Emanuel Papatheodore (who is a cousin to the said Emanuel J. Kypros and a close friend of said Angelo Sarantis and George Ferris) later on entered into said scheme and conspiracy, and that the obtaining as aforesaid

Bill of Complaint.

of complainant's consent to the sale of the said George Ferris' 25 shares of stock was for the ulterior purpose, not then known to, or suspected by complainant, of enabling the said Emanuel Papatheodore to acquire the same under such circumstances that he could assume the status of a purchase of said stock under the claim that he did not know of said voting control agreement and therefore was not bound by it; that complainant charges the fact to be that the said Emanuel Papatheodore did have full and complete knowledge of said agreement when he acquired said stock, and that he and said stock in his hands are wholly subject to said agreement; that the said Emanuel Papatheodore has since the business opened, been employed by said company as cook, at a salary of \$30 per week, which was later on increased to \$35, and then to \$40, and then to \$45 per week, which it now is; that the business conducted by the corporation on said premises is a wholly cash business and that unless complainant is in the store during business hours the defendants will be able to appropriate to themselves the cash intake of said business and thereby deprive the corporation thereof without the knowledge of complainant, and complainant charges the fact to be that the defendants intend to use the corporation as an instrument with which to defraud the complainant of his interests in the business, which his money, his credit and his experience and ability have established and placed on a profit making basis; that due to the fact that said stock certificates of the defendants bear no reference to the aforesaid agreement relating to the voting control, the said defendant can by disposing of their said stock to bona fide purchasers for value without

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Bill of Complaint.

notice, render said agreement nugatory and ineffectual and they can accomplish the same result in fact by transferring their stock to others who may, regardless of the fact, claim to be and stand ready to swear that they are, bona fide purchasers thereof for value without notice, even though they be not such in fact; that the said agreement with the defendants relating to the voting control was of a character which to be a legally effective protection to him thereafter, should have been made a part of the Certificate of Incorporation and should have been also made the subject matter of a by-law of the corporation; that so far as complainant is concerned this was not done because at first he assumed that the attorney who organized the corporation had properly protected him therein, and later on when he procured the written agreement relating to voting control, he assumed that that would give him a legally effective protection, when in fact it did not and does not.

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

1. That the defendants, Angelo Sarantis, Emanuel J. Kypros, George Ferris, Emanuel Papatheodore and The Goody Sweet Shop, Inc., who are made defendants to this suit, may answer this bill of complaint without oath and each statement therein made.

2. That the defendants, Angelo Sarantis, Emanuel J. Kypros, George Ferris and Emanuel Papatheodore each be perpetually enjoined and restrained from in any manner disposing of or encumbering any of the shares of stock or the certificates representing the same, owned or held

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Bill of Complaint.

by them, unless and until they shall, in co-operation with the complainant, have caused the subject matter of said voting control agreement or its legal equivalent to be incorporated in an amendment to the Certificate of Incorporation of said company to be adopted in accordance with the statute in such case made and provided, and that they be decreed so to adopt in co-operation with the complainant, such an amendment, and that they be likewise enjoined and restrained until the subject matter of said amendment when adopted be set forth on the face of each of said stock certificate or on the face of stock certificates to be issued in substitution for those presently held by the defendants and complainant.

3. That until the Certificate of Incorporation of said corporation shall have been amended as aforesaid, each of the defendants be restrained and enjoined from voting at any meeting of the stockholders of said corporation, an aggregate of more than 25 shares of all of the stock held by them.

4. That the corporation be decreed to adopt an amendment to its Certificate of Incorporation, and an additional by-law, embodying the subject matter of said voting control agreement or its legal equivalent and that it issue in place of the stock certificates now in the hands of complainant and the defendants, new stock certificates containing on their face the subject matter of such amendment to the Certificate of Incorporation.

5. That complainant may have such other and further relief in the premises as to this Court may seem meet and just.

Bill of Complaint—Affidavit.

6. That each of the defendants be decreed to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

BURNETT SORG, MURRAY & DUNCAN,
Solicitors for and of Counsel with Complainant. 10

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

THOMAS M. NICKOLOPOULOS, of full age, being duly sworn according to law, on his oath deposes and says:

I am the complainant named in the foregoing bill of complaint; I have read the same and the contents of said bill of complaint are true, except as to those matters and things alleged to be on information and belief, and as to those matters I verily believe them to be true. 20

In March, 1923, I had two candy and one delicatessen stores in the City of Newark; at that time I had been in the candy business upwards of fifteen years, and was successful in that business and had a good standing in the community with respect to honesty, fair dealing and ability in that line. The defendants Emanuel J. Kypros, George Ferris and Angelo Sarantis approached me and asked me to go into business with them; that with my help they could get a lease on the store in the premises known as 907-915 Broad street, on favorable terms, and that that was a good location for a candy, soda water and lunch business, and that they thought it would be profitable; that they did not have any necessary money to start the business, nor even to put up the security with the landlord necessary for them 40

Bill of Complaint—Affidavit.

to get a lease; that the business would need credit and also needed someone with experience, which they did not have. I told them that I was already running three stores and was not much interested in another one. They prevailed upon me, however, to agree to go in with them, and
 10 through my reputation and credit standing I was able to procure for all of us, the lease mentioned in the bill of complaint, without putting up any security. I agreed to temporarily furnish the working capital in the manner hereinafter mentioned.

All of us discussed the question of incorporating the business, and I said that if we did that I would want a 51% voting control, because I was the only one who was financially responsible and was the one who could procure credit for the concern, and that unless I could have voting control, I would not be interested; the individual defendants objected to that and we finally compromised and agreed that the three individual defendants should have a 50% voting control, and I should have the remaining 50% voting control. I insisted upon this because I knew the three individual defendants were old friends and I knew that in case of any dispute they would probably stand together against me.
 20

They retained their lawyer to prepare the incorporation papers and they or some of them went to his office and gave him instructions; when the papers were completed I assumed that the 50% voting control agreement had been properly put in the incorporation papers of the company, and I signed the necessary papers in that belief; I did not discover until later on that such voting control agreement had been omitted, and I then brought the matter to their attention,
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Bill of Complaint—Affidavit.

and the result was that my lawyer drew the written agreement for voting control, and the said three individual defendants and myself all signed it. I understood from my lawyer that that agreement would under all conditions, protect me in my voting control.

In the early part of 1926, the four individual defendants, one night about midnight, prevailed upon me to consent to George Ferris transferring his stock to the defendant Emanuel Papatheodore if the corporation did not wish to exercise its thirty day option to buy it; I signed some paper or papers which they told me was or were to that effect and I so believe, but I have not a copy of any such paper or papers.
 10

A day or two afterwards I talked to all of the defendants and asked that they all get together with me and have the corporation buy Ferris' stock, but they refused to agree to it and the result was that the corporation did not exercise its option.
 20

In May, 1926, I received notice that the defendant Emanuel Papatheodore had acquired Ferris' stock and also a demand from him demanding the issuance to him of a new stock certificate; a day or two after I received this written notice Emanuel Papatheodore asked me to give him a new stock certificate and I mentioned to him the fact that there was an agreement among all the stockholders about the voting control and I told him that the agreement was as stated, namely that I had one-half the voting control and that all the other stockholders combined had the other half of the voting control. He said he did not know anything about it and did not have anything to do with it; that he had his stock and wanted a new certificate.
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Bill of Complaint—Affidavit.

I attempted to have a meeting of all the corporation's stockholders, but no one attended at the time which I fixed for it. On Sunday, June 6, 1926, I talked with the defendants Emanuel Kypros, Angelo Sarantis and Emanuel Papatheodore and they told me that they had amongst
 10 them 75% of the voting control; that they proposed to have a meeting on Tuesday, June 8th and elect a new president in my place, and to raise their salaries from \$15 a week each to \$45 per week each, and that if I cared to stay in the store twelve hours a day, my salary would continue as before at \$15 per week, but that if I did not want any salary, it would not be necessary for me to stay in the store and that I could come
 20 once every three months and collect my dividends if there were any; that they proposed to change the account in the American National Bank and that hereafter they were going to run the business the way they wanted and demanded from me the keys to the cash register; this I refused to do.

The corporation's business is a wholly cash over the counter business, and as a result if I am not at the store during business hours, and the defendants are there, they can take whatever incoming cash they see fit, without any record of
 30 it being kept, and I will know nothing of it; the defendants have not the experience necessary to run the business property, or at a profit, and if they oust me, my interest in the business is wholly at the defendants' mercy, which was exactly the position I guarded myself against to the extent mentioned in exacting from the defendants the voting control agreement, as I would not under any circumstances have entered into the business or invested any money in the
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Bill of Complaint—Affidavit.

corporation as a minority voting stockholder. In fact, on numerous occasions in times past, when I have been absent and the store has been in charge of the defendants or some of them, I have found that the cash register had been opened and that the amount in the cash register did not agree with the sales which had been rung up. 10

The threat of the defendants is in the direct violation of their agreement with me regarding the voting control, and I now see that their prevailing upon me to consent to the transfer by Ferris of his stock, was the first move in a scheme which they had evolved as a means of getting rid of me as an active factor in the business.

I am advised by my counsel that if the shares of stock of any of the individual defendants reaches the hands of one who purchases it for value and without notice of the voting control agreement, that said agreement will not bind them, and that in such case I will always be in a position where I am subject to be out-voted as a minority stockholder. 20

THOMIS K. NICKOLOPULOS.

Sworn and subscribed to before
 me this 8th day of June, A. D. 30
 1926.

(Signature illegible.)

Notary Public of New Jersey.
 (SEAL)

Bill of Complaint—Schedule A.

SCHEDULE A.

CERTIFICATE OF INCORPORATION.

of

"THE GOODY SWEET SHOP, INC."

10 THIS IS TO CERTIFY, that we, the undersigned, do hereby associate ourselves into a corporation, under and by virtue of the provisions of an act of the Legislature of the State of New Jersey, entitled "An act concerning Corporations (Revision of 1896)," and the several supplements thereto and acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite our respective names.

20 FIRST: The name of the corporation is "The Goody Sweet Shop, Inc."

SECOND: The location of the principal office in this State is at 169 Market St. (Suite 16), Newark, Essex County.

The name of the agent therein and in charge thereof, upon whom process against this corporation may be served, is David E. Bernstein.

THIRD: The objects for which this corporation is formed are:

- 30 (A) To acquire and take over a lease to store 907 Broad Street, Newark, N. J.
- (B) To fit the same up for the sale of confectionery, sodas, cigars, cigarettes, and other tobaccos, and generally for a candy or confectionery store.
- (C) To acquire and dispose of the good will, business, rights, properties and assets of all kinds and descriptions and to assume the whole or any part of the liabilities of any person or persons, association or cor-
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Bill of Complaint—Schedule A.

poration, and to pay for the same in cash, stock, or other securities of this corporation or otherwise, as may be determined by the board of directors.

- (D) To conduct its business and have one or more stores, offices or places of manufacture, and unlimitedly and without restriction, to hold, purchase, lease, mortgage and convey real and personal property of any description, in or out of this state, and in such place or places as shall from time to time be found necessary or convenient for the company. 10
- (E) To manufacture, import, export, purchase or otherwise acquire, hold, own, mortgage, pledge, sell, assign, transfer, invest, trade and generally deal in and deal with goods, wares, merchandise and property of every kind, class or description. 20
- (F) Generally, to do any and everything necessary, convenient, or proper for the accomplishment of any of the purposes or objects herein enumerated or the accomplishment of any purpose or object arising incidentally to the purposes herein mentioned, or which may at any time appear desirable or proper for the protection or best interest of the corporation, either as holders of or interested in any property or otherwise; with all the powers now or which may hereafter be conferred by the laws of the State of New Jersey upon corporations under the act herein referred to. 30
- (G) The foregoing clauses shall be interpreted and construed both as objects and powers, and it is the intention that the powers 40

Bill of Complaint—Schedule A.

10 specified are not to be limited or restricted by the terms of any clause or paragraph herein contained, unless such restriction or limitation is expressed in terms, and it is hereby provided that the objects and powers herein specified are to be regarded as independent objects and powers, and are not to be held to limit or restrict in any manner the powers of the corporation.

FOURTH: The total authorized capital stock of this corporation is ONE HUNDRED THOUSAND DOLLARS (\$100,000.00), divided into two thousand shares of a par value of Fifty Dollars (\$50.00) each.

20 FIFTH: The names and the post office addresses of the incorporators and the number of shares subscribed for by each, the aggregate of which is FIVE THOUSAND DOLLARS (\$5,000.000) is the amount of capital stock with which this company will commence business, are as follows:

Name	Address	No. of Shares
Thomas K. Nickolopoulos	13 Holland Street, Newark, New Jersey.	25
30 George Ferris	122 Summit Street, Newark, New Jersey.	25
Emanuel Kypros	28 Nelson Place, Newark, New Jersey.	25
Angelo Sarantis	28 Nelson Place, Newark, New Jersey.	25

Sixth: The period of existence of this corporation is unlimited.

40 Seventh: The shares of stock of this corporation shall not be assignable until the share holder,

Bill of Complaint—Schedule A.

desiring to dispose of the same, shall first give a written notice to the corporation that he desires to dispose of the same; and this corporation and any stock holder thereof shall have an option for a period of thirty days to purchase the same before the said stock may be assigned to any outside party. 10

IN WITNESS WHEREOF, we have hereto set our hands and seals this fifth day of April, Nineteen Hundred and Twenty-three.

THA NICKOLOPULOS,
GEORGE FERRIS,
EMANUEL J. KYPROS,
ANGELO SARANTIS.

Signed, sealed and delivered in the presence of 20

DAVID E. BERNSTEIN.

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

BE IT REMEMBERED, That on this fifth day of April, A. D. nineteen hundred and twenty-three, before me, a Master in Chancery of New Jersey, personally appeared Thomas K. Nikolopoulos, George Ferris, Emanuel Kypros and Angelo Sarantis, who, I am satisfied, are the persons named in and who executed the foregoing certificate, and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed. 30

DAVID E. BERNSTEIN,
Master in Chancery of New Jersey. 40

Bill of Complaint—Schedule C.

SCHEDULE B.

NOT ASSIGNABLE EXCEPT IN
ACCORDANCE WITH BY LAWS.

Number	Shares
10	This certifies that The Goody Sweet Shop, Inc., is the owner of _____ shares of the capital stock of The Goody Sweet Shop, Inc., trans- ferable only on the books of the corporation by the holder hereof in person or by attorney, upon surrender of this certificate properly endorsed.
	IN WITNESS WHEREOF, the said corporation has caused this certificate to be signed by its duly authorized officers and to be sealed with the seal of the corporation this _____ day of
20	A. D. 19 _____ shares each

SCHEDULE C.

THIS AGREEMENT made and entered into the
twenty-seventh day of April, 1923, between,
Thomas K. Nickolopoulos, party of the first part,
George Ferris, party of the second part, Emanuel
Kypros, party of the third part, and Angelo
30 Sarantis, party of the fourth part, all of the City
of Newark, County of Essex and State of New
Jersey;

WITNESSETH: WHEREAS the aforesaid parties
have entered into an agreement heretofore to
form a corporation by the name of Goody Sweet
Shop, Inc.;

40 WHEREAS, the said corporation has been formed
and each of the above parties have subscribed
for twenty-five shares of a par value of Fifty
Dollars (\$50.00) amounting to the sum of one

Bill of Complaint—Schedule C.

thousand two hundred and fifty dollars (\$1,-
250.00) each or a total of five thousand dollars;

AND WHEREAS, the actual capital necessary to
commence business is about twenty-five thousand
dollars (\$25,000.00);

AND WHEREAS, the said Thomas K. Nicko- 10
lopoulos, in addition to his share of one thou-
sand two hundred and fifty dollars (\$1,250.00),
has advanced the sum of ten thousand dollars
(\$10,000.00), the remaining ten thousand dol-
lars (\$10,000.00) being represented by credit given
by various dealers in equipment, fixtures and
stock.

NOW THEREFORE, in consideration of the above
presents and of the sum of one dollar, each to
the other in hand paid, receipt of which is hereby 20
acknowledged, it is agreed as follows:

1. That the amount advanced by Thomas K.
Nickolopoulos, is to be repaid to him in the
following manner: Each of the other three
parties hereby agrees to give a personal promis-
sory note to the said Thomas K. Nickolopoulos
for one-fourth of the excess above one thousand
two hundred and fifty dollars (\$1,250) which the
said Thomas K. Nickolopoulos actually advanced.
The said notes are each to be dated April 1923, 30
and to be made payable on demand but to bear
an endorsement on the back that same may not
be demanded except in accordance with this agree-
ment; said notes to bear interest at the rate of
six per cent. per annum and to be made payable
at the American National Bank of Newark, New
Jersey.

2. It is understood and agreed that the said
sum so advanced by Thomas K. Nickolopoulos
shall be due and payable to him by each and every 40

Bill of Complaint—Schedule C.

one of the other three parties as soon as the larger obligations to outside creditors have been paid off, such as refrigerator and L. Barth & Son; but it shall not be necessary to wait for the entire payment of the soda fountain.

10 3. It is understood and agreed that all of the surplus capital ~~shall be used,~~ except *such* as is absolutely necessary for the conduct of the business and the payment of current bills, shall be used in reduction of the debt of the said Thomas K. Nickolopoulos. It is further understood and agreed that the parties herein ~~will~~ make this agreement not only as individually but as directors and stockholders of the aforesaid company and this agreement shall be binding not only upon the individual but also upon the corporation.

20 4. It is further understood and agreed that to secure the payment of this money the corporation will give a chattel mortgage to the said Thomas K. Nickolopoulos, covering the entire assets of the corporation, including fixtures, merchandise, equipment, good will, and all other goods and chattels owned by the corporation.

30 ~~5. It is further understood and agreed that this chattel mortgage is to be executed and delivered not later than June 1, 1923, at which time all disbursements will have been made and it will be known exactly what is the amount due to the said Thomas K. Nickolopoulos.~~

40 ~~6. It is also understood and agreed that together with the execution of the within agreement the said George Ferris, Emanuel Kypros, and Angelo Sarantis, will sign three promissory notes and the amounts are left open and such amounts are to be filled in on or before June 1st, upon as-~~

Bill of Complaint—Schedule D.

~~certaining the correct amount to which the said Thomas K. Nickolopoulos is entitled.~~

~~7. It is further understood and agreed that these notes are being left in escrow with David E. Bernstein, counsellor at law, who is to hold the same and is authorized to fill in the correct amount so ascertained to be due. Should the parties fail to agree upon the correct amount, the said David E. Bernstein is authorized to engage an accountant and ascertain the correct amount so due.~~

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

THA NICKOLOPULOS (L. S.)
 GEORGE FERRIS (L. S.) 20
 EMANUEL J. KYPROS (L. S.)
 ANGELO SARANTIS (L. S.)

Signed, sealed and delivered in the presence of

DAVID E. BERNSTEIN.

SCHEDULE D.

30 AGREEMENT, made this 9th day of June, 1923, between George Ferris, Emanuel Kypros and Angelo Sarants, all stockholders of Goody Sweet Shop, Inc., a corporation organized under the laws of the State of New Jersey, parties of the first part, and Thomas K. Nickolopoulos, party of the second part:

40 WHEREAS, parties of the first part are the holders of seventy-five shares of stock, and party

Bill of Complaint—Schedule D.

of second part the holder of twenty-five shares of stock;

10 AND WHEREAS, it is the desire of the parties of the first part to protect party of second part so that he may have a fifty per cent. vote on any and all propositions concerning the corporate business and which may be brought up at any corporate meeting:

NOW, THIS AGREEMENT WITNESSETH, despite any contrary provision in the certificate of incorporation or the by-laws:

20 Thomas K. Nickolopoulos is to be entitled to a fifty per cent. vote either at a stockholders' meeting or at a directors' meeting, in connection with any proposition or matter pertaining to the affairs of Goody Sweet Shop, Inc., and which may be brought up at any meeting of the stockholders or of the directors. The said Thomas K. Nickolopoulos shall have this fifty per cent. vote despite the fact that he is only the holder of twenty-five shares of the capital stock.

This agreement is signed by the parties as individuals and also as stockholders and directors.

30 IN WITNESSETH WHEREOF, the several parties have set their hands and seals, as individuals and as stockholders and directors, the day and year first above written.

Name	Stockholder's Residence	No. of Shares
George Ferris	(SEAL)	
Angelo Sarantis	(SEAL)	
Tha Nickolopulos	(SEAL)	
Emanuel J Kypros	(SEAL)	

Witness:
Carolyn Preuss.

AMENDED ANSWER AND CROSS-BILL.

Filed July 5, 1927.

IN CHANCERY OF NEW JERSEY.

<i>Between</i> THOMAS M. NICKOLOPOULOS, <i>Complainant,</i> <i>and</i> ANGELO SERANTIS, <i>et al.,</i> <i>Defendants.</i>	}	<i>On Bill, etc.</i> <i>Amended</i> <i>Answer and</i> <i>Cross-Bill.</i>	10
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The answer of Angelo Sarantis, Emanuel J. Kypros, George Ferris and Emanuel Pappatheodore, all of the defendants in the above-entitled cause. 20

These defendants, answering the bill of complaint, say that:

1. Paragraph 1 is admitted excepting that it is denied that said lease was obtained with the understandings and agreements mentioned in said bill.

2. Paragraph 2 is admitted. 30

3. Paragraph 3 is denied.

4. Paragraphs 4, 5, 6 and 7 are admitted.

5. Paragraph 8 is denied except that it is admitted that the agreement therein referred to was executed by the parties.

6. Paragraphs 9-10 are denied.

7. Paragraph 11 is denied excepting that it is admitted that the defendant George Ferris as- 40

Amended Answer and Cross-Bill.

signed his stock to Emanuel Pappatheodore for a valuable consideration and in accordance with the provisions of the corporation's by-laws.

8. Paragraph 12 is denied.

9. When the defendant George Ferris indicated a desire to dispose of his stock interest in accordance with the provisions of the by-laws he made a written offer thereof to the complainant and the defendants Sarantis and Kypros, which offer was never accepted. The defendant Pappatheodore was the chef of the restaurant and at the suggestion of the said Sarantis and Kypros the same offer was made to him and accepted. He paid \$11,000 to said Ferris for said stock and is now the owner thereof.

10. The agreement of June 9, 1923, attached to the bill of complaint was executed by the parties thereto for the sole purpose of insuring to the complainant the repayment of his loan of \$10,000 and to maintain the conduct of the business as to salaries, expenses and other disbursements—so that all possible profits might be applied to the payment of complainant's debt. In about January, 1926, complainant's debt was paid in full and the agreement of June 9, 1923, thereby terminated.

11. The defendant Emanuel Pappatheodore was never bound by the said agreement of June 9, 1923, both by reason of the fact that it was terminated before he purchased his stock as aforesaid, and that he was not a party to it.

12. The defendants have never conspired with each other or with any other person or persons to deprive the complainant of any of his rights in the corporation, but on the contrary the develop-

Amended Answer and Cross-Bill.

ment of the corporation's business has been seriously and financially retarded by the lack of any definite control thereof; for this reason the defendants insist that the welfare of the business demands that they be permitted to assert their rights and conduct the business in a legal and proper manner.

The defendants by way of cross-bill exhibited against the complainant, say:

1. On June 9, 1923, the complainant and the defendants, Angelo Sarantis, Emanuel J. Kypros and George Ferris entered into a written agreement, copy of which is attached to the bill of complaint filed herein and marked "Schedule D." It was the express understanding and agreement between all of the parties thereto that the said agreement should provide that complainant might have a fifty per cent. vote on any and all propositions concerning the corporate business and which might be brought up at any corporate meeting until and so long as there was due him from the Goody Sweet Shop, Inc., any part of the sum of \$10,000 which he advanced to the said corporation at the inception of its business.

2. Through inadvertence and error, the said agreement was drawn and executed without containing any provision as to the termination thereof upon the repayment to the complainant of his loan aforesaid.

The defendants are without adequate remedy in the courts of law and therefore pray that:

1. The complainant, Thomas M. Nickolopoulos may answer this cross-bill without oath and each statement therein made.

Amended Answer and Cross-Bill.

2. That a decree may be entered ordering that the terms of the said agreement of June 9, 1923, may be corrected and reformed to the com- therein a provision to the effect that the same shall terminate upon the repayment to the com- plainant herein of the \$10,000 cash loan made
10 by him to the defendants aforesaid.

JOSEPH E. CONLON,
Solicitor for the Defendants,
Angelo Sarantis, Emanuel
J. Kypros, George Ferris
and Emanuel Pappatheodore.

20

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REPLY TO AMENDED ANSWER AND ANSWER TO CROSS-BILL.

Filed July 16, 1927.

IN CHANCERY OF NEW JERSEY.

<i>Between</i> THOMAS M. NICKOLOPOULOS, <i>Complainant,</i> <i>and</i> ANGELO SERANTIS, <i>et al.,</i> <i>Defendants.</i>	}	<i>On Bill, etc.</i> <i>Reply to</i> <i>Amended</i> <i>Answer and</i> <i>Answer to</i> <i>Cross-Bill.</i>	10
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REPLY.

Complainant by way of reply to the amended
answer of defendants says that: 20

1. He denies each and every allegation set forth in paragraphs 1, 7, 9, 10, 11 and 12 of said amended answer and joins issue thereon with said defendants.

ANSWER.

By way of answer to defendants' cross-bill complainant says: 30

1. He denies paragraph No. 1 of said cross-bill except that part which admits the making of the agreement marked "Schedule D" in the bill of complaint filed herein.

2. He denies paragraph No. 2 of said cross bill.

BURNETT & MURRAY,
Solicitors for and of Counsel
with Complainant Thomas M. Nickolopoulos. 40

ORDER OF REFERENCE.

Filed November 30, 1926.

IN CHANCERY OF NEW JERSEY.

10

Between

THOMAS M. NICKOLOPOULOS,
Complainant,

and

ANGELO SERANTIS, *et al.*,
Defendants.

On Bill, etc.
Order of
Reference.

20 Upon reading the consent of the respective
solicitors hereunder written, to the making of
this order,

It is, on this 30th day of November, Nineteen
Hundred and Twenty-six,

ORDERED, that the above-entitled cause be, and
the same is hereby, referred to the Honorable
M. L. Berry, one of the Vice-Chancellors, to hear
the same for the Chancellor, and to advise what
order or decree should be made herein.

30

E. R. WALKER,
C.

We hereby consent to the entry of the fore-
going order.

BURNETT & MURRAY,
Solicitors for and of Counsel
with Complainant.

JOSEPH E. CONLON,
Solicitor for and of Counsel
with Defendants.

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OPINION OF COURT OF CHANCERY.

(Edwin R. Walker, Ch. by Maja Leon Berry,
V.-C.)

Filed September 12, 1927.

IN CHANCERY OF NEW JERSEY.

10

Between

THOMAS M. NICKOLOPOULOS,
Complainant,

and

ANGELO SERANTIS, *et al.*,
Defendants.

On Bill, etc.
On Final
Hearing.
61/154.

20 *Not to be printed or published in either the*
official or unofficial reports.

20

Burnett & Murray, for complainant.

Joseph E. Conlon, Esq., for defendants.

BERRY, *V.-C.*

The complainant, with the defendants Sar-
antis, Kypros and Ferris, agreed to engage in
the confectionery business and to organize a cor-
poration for that purpose. This was done in
April, 1923, each of the four contributing \$1,250.
for 25 shares of stock of the corporation of the
par value of \$50 each. The charter and by-
laws provided that no stockholder should sell or
transfer his stock to an outside party without first
offering it to the corporation and the other stock-
holders. The complainant was of greater finan-
cial responsibility than the other parties and he
loaned the company \$10,000 to start it in busi-
ness and took as security then, before the entire

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Opinion of Court of Chancery.

sum was advanced, a chattel mortgage in that amount, payable in one month. This mortgage proved defective and on June 9, 1923, a new chattel mortgage, payable in one year, was prepared and executed and the old mortgage was surrendered and cancelled. On the same date and at the same time an agreement was entered into by these four stockholders of the corporation in which it was provided:

“And whereas it is the desire of the parties of the first part to protect the party of the second part so that he may have a 50% vote on any and all propositions concerning the corporate business and which may be brought up at any corporate meeting:

Now this agreement witnesseth despite any contrary provision in the certificate of incorporation or the bylaws; Thomas K. Nickolopoulos is entitled to a 50% vote either at a stockholders' or at a directors' meeting, in connection with any proposition or matter pertaining to the affairs of the Goody Sweet Shop, Inc., and which may be brought up at any meeting of stockholders or of the directors. Said Thomas K. Nickolopoulos shall have this 50% vote despite the fact that he is only the holder of twenty-five shares of the capital stock.”

On January 21, 1926, Ferris notified the other stockholders that he desired to withdraw from the corporation and offered to sell his stock to the company or to any of the stockholders. At that time a paper containing the following writing was signed by all the parties to this suit:

Opinion of Court of Chancery.

“Newark,
January 21, 1926.

Today, I offer, to sell my share of the Goody Sweet Shop, 907 Broad Street, to the corporation as our paper reads, for one month, for today start.

George C. Ferris,
Mike Kypros,
Pappatheodore,
Nickolopoulos,
Angelo Sarantis.”

It is admitted that this paper represents Ferris' offer to sell his stock to the corporation and the individual stockholders in accordance with the provisions of the charter and bylaws. And it is claimed that the signing of same by the stockholders constituted a waiver of their individual rights of purchase. Whatever the purpose of this paper, it apparently was considered by all to be a consent to the sale to Pappatheodore. The bill alleges that complainant's signature was obtained by subterfuge and while he was “not himself”; and the complainant, by his testimony, sought to lead the Court to believe that at the time he signed the paper he was under the influence of liquor. There is nothing to support such an allegation or inference. The other stockholders declined to purchase and the corporation did not because the parties were not agreed and I do not find this decision to have been prompted by any fraudulent motive.

On May 27th following, Ferris sold his stock to the defendant Pappatheodore for \$11,000. The purchaser had notice of the restrictions in the charter and bylaws and of the agreement of June 9, 1923.

Opinion of Court of Chancery.

The complainant contends that the fifty per cent. voting agreement of June 9, 1923, was intended as security for his investment in stock of the complainant Company, as well as security for the payment of his chattel mortgage, and for all other liabilities assumed by him on behalf of the corporation and was intended to operate perpetually. The defendants contend that it was intended as additional security for the payment of the chattel mortgage, only, and had nothing to do with complainant's investment or other liabilities, and that it was intended to operate only until the chattel mortgage was paid. The agreement itself is silent both as to the reasons prompting it, its specific purpose, except that it was given as security, and the date of its termination. The complainant asks that the agreement as he construes it be enforced by compelling the stockholders to amend their charter and by-laws to express his understanding of its provisions and by such other action as may be appropriate. The defendants counter-claim and seek a reformation of the agreement so that it will provide for its termination upon the payment of the chattel mortgage.

The burden of proof, in the first instance, is on the complainant to show that his construction of the agreement is correct. He claims that as one of the inducements to engage in the enterprise he was at the outset promised a 50% or 51% vote, but the evidence is decidedly against him on this point. The first time this question came up for consideration was when it was thought advisable to have a new chattel mortgage executed.

In order to obtain a reformation of the agreement of June 9, 1926, the burden is on the defendants to show that through mutual mistake

Opinion of Court of Chancery.

or because of fraud it does not truly express the agreement of the parties.

Neither the complainant nor the defendants, in my judgment, have sustained the burden of proof necessary to meet these requirements. This leaves the language of the agreement to be considered and construed by the Court in the light of the circumstances.

"The real intent and agreement of the parties on the matter of duration, as the same is made to appear by the contract, is to be enforced just the same as the other provisions thereof, so that on this point, as upon all others, we look to the contract in all its parts and entirety, as the evidence of the intent of the parties. It is a fundamental and well-recognized rule that in construing contracts, courts may look not only to the specific language employed, but also to the subject matter contracted about, the relation of the parties thereto, the circumstances surrounding the transaction, or in other words, may place themselves in the same position that the parties occupied when the contract was entered into, and view the terms of the agreement in the same light in which the parties did when the same were formulated and accepted." *Robson v. Mississippi Logging Co.*, 43 Fed. 364, 369.

It has also been held that

"Apart from those contracts, which, from their inherent nature, imply a power of revocation, it would seem that the intention of parties to an agreement, that it should be perpetual and without limit as to duration, could not be more properly expressed than by silence as to any time limit, or power

Opinion of Court of Chancery.

of revocation." *Western Union v. Pennsylvania Co.*, 129 Fed. 849, 68 L.R.A. 968, at page 980.

10 This latter rule, however, is not one which can be applied generally to all contracts, the duration of which is not specifically limited. The surrounding circumstances, which suggest a reason for the agreement, must be considered in determining the intention of the parties as to duration, and

20 "a construction conferring a right in perpetuity will be avoided unless compelled by the unequivocal language of the contract, which involves the imposing of trust and confidence in the parties and hence involve the element of mutual satisfaction are held from their inherent nature to imply that they are terminable." 13 *Corpus Juris*, 604, Sec. 630.

30 It is quite plain to me, as I shall hereafter point out, that this agreement for the 50% voting power was intended as additional security for the payment of the chattel mortgage; and that because of the loan secured by the mortgage, the stockholders had sufficient confidence in the complainant to trust him with this unusual voting power. From the nature of the contract itself, therefore, it is "terminable". 13 *Corpus Juris*, *supra*; and the case of *Western Union v. Pa. Co.*, *supra*, does not support the complainant's case.

40 It seems to me that this contract should be construed in analogy to agreements wherein no time for performance is fixed. With respect to such agreements it is a well-known principle of law that it will be assumed that the parties meant it should be performed within a reasonable

Opinion of Court of Chancery.

time, and what is a reasonable time will, of course, depend upon the circumstances of each case.

10 It must be assumed that the contract was prepared and executed with these well-known principles of law in mind. It would have been a very easy matter for either side to this controversy to have had its version of the agreement incorporated therein in plain terms by the lawyer who drew it, if that version be correct.

20 There appears no reason here why one stockholder, as such, should have more protection than another, especially where it appears that stock which in 1923 was worth \$1,250 was in 1926 worth \$11,000. The liability of the complainant on the lease is advanced as a reason for additional security; but it does not appear that the complainant has assumed any greater responsibility in connection with that lease than the other three original stockholders. They all signed the lease personally and all are equally bound, notwithstanding its assignment to the corporation. It does not matter that the complainant is of greater financial responsibility than the others—it is not shown that they have none—and, so far as appears from the evidence, the corporation itself is well able to meet its obligations under the lease. There is no reason for greater security to the complainant as a stockholder on account of the lease than the others had, nor does it appear that the lease is a liability at all; indeed, it is argued by defendants that it is a valuable asset.

30 The complainant did not differ, materially, in his relations with the corporation, from the other stockholders, except that he had loaned the company \$10,000 in addition to his \$1,250 investment. It was only in this respect that he was 40

Opinion of Court of Chancery.

entitled to greater consideration and when the reason for the additional security ceased to exist, it became unreasonable that he should continue to hold it. The reason ended with the payment of the mortgage on February 2, 1926, and the agreement will be held to have terminated on that date.

The stock having been purchased by Pappatheodore on May 27, 1926, the fact that he took it with notice of the agreement of June 9, 1923, does not matter, as the agreement had then lost its vitality.

To either enforce or perform the agreement accordnig to the ideas of the contesting parties would require the Court to make an entire new agreement, which it will not do. A construction of the language of the agreement in the light of the circumstances out of which it grew, avoids the necessity of doing either. The bill will be dismissed with costs.

Decided September 7, 1927.

30

40

FINAL DECREE.

Filed September 13, 1927.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i> THOMAS M. NICKOLOPOULOS, <i>Complainant,</i> <i>and</i> ANGELO SERANTIS, <i>et al.,</i> <i>Defendants.</i></p>	}	<p><i>On Bill, etc.</i> <i>Final Decree.</i></p>	10
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This cause coming on to be heard in the presence of Burnett & Murray, solicitors for complainant, and Joseph E. Conlon, solicitor for the defendants, and the pleadings and proofs having been read, and the arguments of the respective counsel having been heard and considered, and the Court having duly considered the said pleadings, proofs and arguments, and it appearing to the Court that the complainant is not entitled to the relief sought and prayed for by him in his bill of complaint,

It is, on this 13th day of September, one thousand nine hundred and twenty-seven, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that the complainant's bill be and the same is hereby dismissed.

It is further ORDERED, that the said complainant pay to the said defendants, Angelo Sarantis, Emanuel J. Kypros, George Ferris and Emanuel Pappatheodore, the costs of this suit to be taxed, including a counsel fee of one hundred fifty dollars, which is hereby allowed to the said de-

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Final Decree.

endants, and that execution issue therefor according to law.

E. R. WALKER,
C.

10 Respectfully advised,
MAJA LEON BERRY,
V.-C.

We hereby consent to the form of the above decree.

Solicitors for Complainant.

A true copy.
20 THOMAS BARBER,
Clerk.

30

40

Opening.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between

THOMAS M. NICKOLOPOULOS,
Complainant,

10

and

ANGELO SERANTIS, *et al.,*
Defendants.

Transcript of testimony taken in the above-entitled cause before Hon. Maja Leon Berry, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, on Wednesday, May 18, 1927, at 10 A. M.

20

Appearances:

Mr. Norbury C. Murray, of Burnett & Murray, for complainant.

Mr. Joseph E. Conlon for defendants.

The Court: It is admitted that the defendant Papatheodore had knowledge of the voting agreement at the time he purchased the stock from one of the original stockholders.

30

It seems to me that this issue might be very considerably narrowed; I mean the issue of fact.

As I understand it, you are agreed to this extent: that these four men went into this business together, each of them putting in an equal amount of cash; that three of the defendants conceived the idea originally and then got the complainant to go in with them and furnish some additional capital over and above the amount that he put in the stock, namely, \$10,000, the se-

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Opening.

curity for which to took on chattel mortgage; that the charter contained a provision restricting the sale of stock, so that in the event that any one of the stockholders withdrew, they should first offer the stock to the others and to the corporation, and give them an opportunity to
 10 buy before selling it on the outside; that after the incorporation an agreement was entered into whereby complainant had a fifty per cent. voting power notwithstanding that he had only twenty-five per cent. of the stock. That voting power was given, as the complainant alleges, to secure him, not only for the money that he loaned, but also for the amount of his investment in the stock, and enabled him to direct the affairs of the company. As the defendant claims, it was
 20 given to him only as additional security for the money which he had loaned, which had nothing to do with the security of his investment in the stock, nor with his management of the corporation. That is your claim, I think.

Mr. Murray: We claim that the fifty per cent. voting agreement had nothing to do with the ten thousand dollar mortgage given as security at all.

The Court: Those facts, it seems to me, time
 30 ought not to be taken up to prove them, and in addition to that—

Mr. Murray: There is just one variation in that, as far as we are concerned. Our contention is that the fifty per cent. agreement was agreed upon verbally in the very first instance. That was one of the means by which they got the complainant into this.

The Court: That is denied on the other side. I was reciting merely the fact that there was an
 40 agreement entered into such as I have described.

Morton C. Noble, direct.

It is also agreed that subsequently Ferris decided to sell his stock, and that he did sell it to one of the other defendants, who purchased it with the knowledge of the existence of this fifty per cent. agreement.

I think there is some variance in your ideas as to the notice or the sort of a waiver that was signed. 10

Mr. Murray: I think counsel was correct in his version of it.

The Court: It is also agreed that prior to this sale of the stock written notice was given by the defendant Ferris to the three remaining stockholders, and that they in writing consented to this sale of the stock to a third party, or fourth party. 20

You may proceed with your testimony. I think with that recital of facts, you may curtail the testimony.

Mr. Murray: I will limit that testimony very much. I had a line of testimony to the effect that the complainant was the man of responsibility, and I think I will put on just one or two witnesses, very short, to that effect.

The Court: Is that admitted? 30

Mr. Conlon: No.

MORTON C. NOBLE, sworn for complainant.

Direct examination by Mr. Murray.

Q In 1925 you had charge of renting for the Third Presbyterian Church this property 907 Broad street? A I did.

Q And did you get in touch with, or did any of those connected with the Goody Sweet Shop 40

Morton C. Noble, direct.

get in touch with you regarding leasing it? A They did.

Q Who were they? A The Washington Realty Company and the young man sitting over there—Sarantis, I think—he came up to my house to see me about it.

10 Q Did you make any investigation at all as to the credit standing of any of them? A They asked me to meet them down at the Washington Realty Company the next day, and I met them there.

Q Who met there? A The whole four of them.

Q Then what did you do? A And then I asked him for security, or if they had any security, and they told me that I could investigate all of them.

20 Q Did you investigate any one? A I did; I investigated Mr. Nickolopoulos, the complainant. Mr. Pappas, I think it was, from the Washington Realty Company, said, "I got my car out there; I will take you up in Springfield avenue and South Orange avenue and show you Mr. Nickolopoulos' stores," and he took me over to the bank.

Q What bank? A I think the American National Bank—and I saw the cashier there, and I inquired as to his credit there.

Q Whose credit? A Mr. Nickolopoulos, and then he asked me if I wanted to go anywhere else; I said, "No, I will report this back to the Board of Trustees and abide by their decision," and they told me to let him have the store.

Q Then you entered into the lease? A Yes.

Q That is the lease (showing witness paper)? A Yes.

40

(Marked Exhibit C. 1.)

Morton C. Noble, cross.

Cross examination by Mr. Conlon.

Q You say you didn't investigate any of the other men? A No, I didn't; I just inquired from—where they had worked.

Q You never refused this lease to Sarantis or anybody else, did you? A No. 10

Q In other words, the first proposition that was offered to you was accepted? A I felt satisfied with the one, without going any further.

The Court: Was anything said at that conference which prompted you to investigate Nickolopoulos and not investigate the other three?

The Witness: No; I don't know why; his name came up first; he said he had his car there and would take me around and show me what he had. 20

THOMAS M. NICKOLOPOULOS, complainant,
sworn.

Direct examination by Mr. Murray.

Q Mr. Nickolopoulos, you are the complainant in this suit? A Yes. 30

Q In 1925, in the spring, the month of April, 1925, what was your business? A It was candy stores and delicatessen store: two stores on South Orange avenue and Tenth street—one was a delicatessen store and one was a candy store; and one candy store on 468 Springfield avenue.

Q You had three stores at that time? A Yes. 40

Thomas M. Nickolopoulos, direct.

Q How long had you been in that line of business? A Fifteen years.

Q How old are you? A Forty-eight.

Q At that time about what was your financial worth?

10 Mr. Conlon: I object to that; I don't think that is material.

The Court: I will hear it; I think it may be material.

A \$200,000.

Q In April, 1923, how long had you known Sarantis and Ferris and Kypros? A Four or five years.

Q Are any of them related to any of the others? A Mike Kypros and Mike Pappatheodore, they are first cousins.

20 Q In the spring of 1923 did the defendants Ferris, Sarantis and Kypros talk to you about opening another store, or starting another business? A Yes.

Q Where were you when they first talked to you about it? A 468 Springfield avenue, in my store.

Q And were they all there or only some of them at that time? A Pappatheodore, Angelo Sarantis and George Ferris.

30 Q What did they say? A They say if we can go together on business.

Q Did they say where? A If we can go and open a business together.

Q On what terms; did they say what terms? A No, I told them I have enough to do, and I have enough business on my hands, so I cannot open up another business.

40 Q What did they say? A They told me not to work inside, but take management of the place.

Thomas M. Nickolopoulos, direct.

Q What did you say to that? A I asked them—"you are three good friends since five or six years and go to work together, and I have not much protection if I go with you fellows. If I go with you fellows, I have not much protection, because you are too good friends, working all the time in Bamberger's and White Plains"—they opened up a place there together, the four fellows together. 10

Q Did they say anything about who was to put in the money and how much? A Certainly.

Q What did they say? A They said to put the money in the business.

Q Who? A Sarantis and Ferris; later on I met Kypros and he told me the same thing.

Q How much did they say they would put in? A They say about fifteen or twenty thousand dollars. 20

Q That they would put in? A They only got to put \$1,250.

Q They put in \$1,250 altogether or each? A Each. So I put in \$1,250 myself.

Q What was said about raising any more money? A They said they would give me a mortgage to secure that money.

Q Did they say anything about you loaning the money? A For any money I put in more, they should secure me by mortgage. 30

Q You started to say something that you wouldn't have much protection if you went in alone with the three friends, the defendants on the other side. A Yes, I said that from the beginning, from the time we started talking about it.

Q What did they say about that? A They told me they will secure me by fifty per cent working control in the business. 40

Thomas M. Nickolopoulos, direct.

Q What did you say? A Of course, they give me all those favors, so I connected with them.

Q You then agreed to go in with the defendants and start this business, did you? A Yes.

10 Q Was there anything said about having some legal papers drawn or a corporation formed? A They told me that they would form a corporation.

Q And you agreed to that? A Yes.

Q Who selected the lawyer to do the work? A They selected their own lawyer.

Q Who was he? A Bernstein.

Q Is he in court here? A No.

20 Q Did you ever know Bernstein before that? A No, I didn't know Bernstein before.

Q Never had seen him? A That was the first time I met him.

Q Bernstein then later on, or later you went to Bernstein's office, did you not? A Yes, after we start connecting the business.

Q What happened the first time you went to Bernstein's office? A We was there and draw the lease up and after that—

30 Q Is this the lease, C. 1 (witness shown paper)? A Yes.

Q And you all signed that lease personally, didn't you? A Yes.

Mr. Conlon: What is the date of the lease?

Mr. Murray: March 23, 1923, and assigned to the corporation on April 21, 1923.

40 Q I show you an agreement, a paper, and ask you if you signed that? A Yes, sir.

Thomas M. Nickolopoulos, direct.

Q Are the other signatures those of the defendants Ferris, Kypros and Sarantis? A Yes.

Q Who drew that agreement and where was it signed? A I don't know; maybe in Bernstein's office.

Mr. Murray: I offer that agreement in 10 evidence.

(Marked Exhibit C. 2.)

The Court: Have you the certificate of incorporation?

Mr. Conlon: I will admit the certificate of incorporation.

Mr. Murray: Do you admit the minute book?

Mr. Conlon: I have never seen the minute 20 book. What is the purpose of the minutes? I will admit on the record that the corporation papers contained the clause restricting the sale of the stock.

The Court: Who kept the minutes?

Mr. Conlon: We never saw them before.

Q Who had possession of this minute book before you gave it to me? A We got that in Mr. Bernstein's office, and after they come to Mr. Bobker's office, and from there come to your 30 office.

Q It came direct from Mr. Bobker's office? A I bring it to you.

Q Did you add anything to them or take anything out of them or change them in any way? A Nothing at all.

The Court: Who kept them?

Mr. Murray: There was nothing to be 40 kept.

Thomas M. Nickolopoulos, direct.

Mr. Conlon: If they are just the incorporation papers, I have no objection to them.

Mr. Murray: Suppose we admit the minutes up to June 7, 1923; the contents of the minute book up to and including the minutes of the meeting of June 7, 1923, together with the certificate of incorporation included in the minute book are offered in evidence by consent.

Mr. Conlon: That is agreed.

(Marked Exhibit C. 3.)

Q I show you another agreement and ask you if that is your signature of April 27th?

Mr. Conlon: I will admit that agreement. That is the defendant's signature.

(Agreement marked Exhibit C. 4.)

Q Do you remember what happened when this April 27th agreement was signed? That is the agreement regarding the mortgage, regarding you advancing \$10,000; do you remember who were there at that meeting? A All of us.

Q You were all there? A Yes.

Q Do you remember whether that meeting took place on the twenty-seventh or not? A I don't remember.

Q After you got this lease and got this corporation incorporated, what was the first thing that was done at the Goody Shop? A Sarantis and Ferris go to the lawyer to give order to form a corporation.

Q No, at the shop, what was done at the shop; what did you do to get the business going? A I started investing the money and giving the orders

Thomas M. Nickolopoulos, direct.

to different houses and make the place ready for business.

Q Who arranged to get the fixtures installed?

A I did.

Q And when was the shop opened for business? A In July, 1923.

Mr. Murray: The chattel mortgage is introduced and admitted in evidence by agreement made by the Goody Sweet Shop to the complainant on the property in question, which bears no date, but the affidavit to it bears date April 27, 1923, the same date as the second agreement, and that mortgage was recorded on April 28, 1923, and cancelled of record on February 18, 1924, the amount being \$10,000.

(Marked Exhibit C. 5.)

Mr. Murray: I offer in evidence, which is admitted by consent, another chattel mortgage made by the Goody Sweet Shop to the complainant, which bears date June 9, 1923, in the amount of \$10,000; the acknowledgment bears date 9th of June, 1923; the consideration affidavit bears the same date. It was recorded on June 11, 1923, and cancelled of record on February 2, 1926.

(Marked Exhibit C. 6.)

Q After these incorporation papers were signed, did you go to Bernstein's office again? A No, sir.

Q Listen to the question. After the incorporation papers were first signed, did you again go to Bernstein's office? A Yes, certainly.

Q How did you come to go to Bernstein's office? A He called me out of the place down on Broad street—

Thomas M. Nickolopoulos, direct.

Q At the shop? A Yes—and he told me to come over to his office; he want to see me there.

Q Did you go? A Certainly I go.

Q Who was there when you got there and what took place? A I was there and nobody else except Mr. Bernstein.

10 Q What did he say? A He said all the papers as drawn up is not correct not right, he told me.

Q Did he say what was the matter with it? A Yes, he said because you put a mortgage on the place down there, and the place is not open. You date it from April and the place will be open in July.

Q What else did he say? A Nothing else.

20 Q What did you do then? A The next day I called Mr. Sarantis and Mr. Ferris and Mr. Kypros, and I explained the proposition.

Q You called them where? A To Mr. Bernstein's office.

Q All of you went to Mr. Bernstein's office? A Yes.

30 Q What happened there? A I told him the papers were not right like we agreed before, so they asked me what is the matter with the papers, and I say, first of all, the mortgage—that is, Mr. Bernstein said is not good, and I cannot depend on Mr. Bernstein for any of the other papers that he draw. So I called Mr. Bobker to take care of the papers, and I asked him if there is any fifty per cent. control in the papers; Mr. Bobker told me no. So I called these fellows to talk about that. They say "You don't need it, the fifty per cent.; we will treat you right and we will not do no crooked business; we act on the level, you not need it, the fifty per cent. control."

40

Thomas M. Nickolopoulos, direct.

Q What did you say in reply to that? A I told him I need it; that is the talk we have from the beginning, because you are too good friends, and I cannot be without protection.

Q Did they finally agreed to that? A They agreed.

10 Q Did you say what you would do if they didn't agree? A No, we not talk about that point; we not go any further.

Q When they told you that you didn't need this agreement, did you say as to what you would do if they didn't give it to you? A No, they don't talk about that.

Q Did you tell them what you would do if you didn't get it? A No, sir.

20 Q What did Mr. Bobker do? A Mr. Bobker come over to Mr. Bernstein's office and we told him to take the papers and draw this piece of paper so that can give me the fifty per cent. control.

Q And was that agreement drawn? A Yes, that agreement was drawn in Mr. Bobker's office.

Q Is this the agreement you refer to? A Yes.

30 Mr. Murray: I offer in evidence agreement dated June 9, 1923.

(Marked Exhibit C. 6a.)

Q Did the corporation ever hold a meeting or the Board of Directors or stockholders of the corporation ever hold a meeting after that agreement was signed? A No, sir.

Q You opened your business in July? A Yes.

40 Q I mean the corporation opened its business in July? A Yes.

Thomas M. Nickolopoulos, direct.

Q And it continued and has continued and is continuing now? A Yes, sir.

Q From July, 1923, until January, 1926, what did you do at the shop? A Anything we agree I continue to do.

10 Q How many days a week did you go to the shop? A Five or six days a week.

Q How long did you usually stay there? A Two or three hours; sometimes more sometimes less.

Q What did you do while there? A I took care of the stock, bought the stock, go out to different houses, get the best material and a reasonable price, and give the orders.

Q Who signed the checks? A I signed and Mr. Sarantis.

20 Q Who made them out? A Some I make out and some Ferris and some Mr. Sarantis now.

Q Who made the deposits of the money in the bank? A I did it.

Q Who hired and discharged the employees? A Mr. Sarantis do that.

Q You had nothing to do with that? A He not ask me at all about that matter.

30 Q Did you take a vacation? You say you were away there five or six days out of every week?

The Court: He hasn't said that; he said two or three hours a days.

Q Did you take a vacation in the summer in any of those years between 1923 and 1926; if so how long? A A month.

40 Q In each year? Every summer, but I always come back to the store two or three times a week.

Thomas M. Nickolopoulos, direct.

Q Where did you go on your vacation? A To Brighton Beach.

Q You would come back here how many days a week? A Two or three times a week in the summer to take care of the stock and the money.

Q Do you remember when the discussion came up in regard to the sale of Ferris' stock; do you remember the occasion? A Yes. 10

Q About when was it? A January, 1926.

Q What time in the day did you meet? A At nighttime.

Q About what time? A After twelve.

Q Whereabouts? A They called me up to South Orange avenue to be down there, that they need me, so I go down there at half-past twelve.

Q What happened at that meeting? A They have closed the store—after twelve we closed the store; they sit down on the table, the three of them. 20

Q Which three? A Mr. Sarantis, Mr. Kypros and Mr. Ferris, and as soon as I was there, I was at the same table.

Q What did they say? A Well, we started a little other talk, so they couldn't agree with Mr. Kypros, one and the other, and me and Mr. Sarantis try to make him good friends and stay there. Ferris said "I cannot stay; I got to sell my share which belong to me, I got to sell it." He drew up a little piece of paper from an envelope and marked down the words you say before, and he offered it to me to sign. 30

Mr. Muray: Counsel and I have agreed—we cannot seem to find the original, but we agree that this was what was signed.

The paper just referred to by the witness as having been written on an envelope, reads as follows: 40

Thomas M. Nickolopoulos, direct.

“Newark, January 21, 1926.

Today, I offer, to sell my share of the Goody Sweet Shop 907 Broad Street to the corporation as our paper reads, for one month, for today start.”

10 Then follow the names: George C. Ferris, Mike Kypros, Pappatheodore, Nickolopoulos, Angeloe Sarantis.

Counsel agree that they are the complainant and defendants.

(Marked Exhibit C. 7.)

Q Did Ferris or any of the others ever say why he wanted you to sign that paper? A Because he is going to sell his shares.

20 Q Did he say to whom he was going to sell them? A Yes, he promised to offer it to the corporation.

Q What did the others say about the corporation buying that stock, if anything? A They signed first and they offered it to me to sign after. I signed the last one, and Mr. Sarantis and Mr. Kypros say we come to agree and buy it ourselves the share—Ferris share, as soon as I sign. So the next day, the day after, I asked them; they say George Ferris.

30 Q You asked them what? A I asked them about that matter, the shares of Ferris.

40 Q What did you ask him about it? A What are we going to do about the shares, and Mr. Sarantis and Mr. Kypros told me, “Well, Ferris changed his mind; I don’t think he is going to sell his shares. He cannot get anybody to buy it outside, but is going to get in to connect with us three fellows, and he cannot get anybody to sell it, so he will stay in the business.” Both Sarantis and Kypros said that.

Thomas M. Nickolopoulos, direct.

Q Did you receive that paper from the defendant Pappatheodore? A Yes.

Mr. Murray: I offer that paper in evidence.

(Marked Exhibit C. 8.)

10 Q By this paper Pappatheodore request you to issue a new certificate of stock to him. A Yes.

Q When did you first learn that Pappatheodore had bought Ferris’ stock? A At the time he gave me that paper.

Q Exhibit C. 8? A Yes.

Q Did you say anything to him when he gave you that paper? A Yes.

20 Q What did you say? A I wish him luck, and I ask him if he knows the contracts and agreements we have in the corporation.

Q What did he say? A He said “Yes.”

Q Did you tell him, or did he say, or did you say what those agreements were? A Yes, I explained.

Q What did you tell him? A I told him the agreement made between the three of us. I invest in the company and I must have the right to buy the goods outside, and I have fifty per cent control on the voting control.

30 Q What did he say to that? A He said he knows all that.

Q Did you give him his certificate of stock as he asked you to do? A Yes, he asked me to give him new certificates on his name.

Q Did you do it? A No.

40 Q Why not? A I thought some scheme they play on me, and Mr. Sarantis come right over; he say “Yes, you are going to give him a new certificate and you lose your voting control, and he be the president.”

Thomas M. Nickolopoulos, direct.

Q Who would? A Mr. Sarantis, and he is going to make my salary \$15 a week, if I work twelve hours a day, and their salary will be \$45 a week.

10 Mr. Murray: I call your Honor's attention to the fact that one of the paragraphs of that agreement of the fifth of April, that was their first agreement, it says, "The party of the first, second, third and fourth parts are each to draw from the income of the place the sum of \$15 each, payable on Saturday evening of each week, until all mortgages and other debts of the corporation are settled. Then another paragraph says: "And whereas, the party of the second part and party of the third part and the party of the fourth part (they are the defendants) are to devote their entire time in the said business and the party of the first part (that is the complainant) is to devote a part of his time to said business."

20

Q What did you say to that when Sarantis told you that they were going—that you had lost your voting power and he was going to make himself president and raise their salaries and keep yours at \$15; what did you say? A I didn't say anything; I get a little mad, because I hear of that from Mr. Sarantis; he always called me Uncle, and right away he is talking to me the way he talked.

30

Q You say you got mad? A And the man, I saw him talk that way, and I go outside.

Q What did you do then? A I go over to the office.

Q Before you came to my office, did you undertake to call a meeting of the corporation? A

40

Thomas M. Nickolopoulos, direct.

That happened after I signed that paper, that piece of paper; I asked them to have a meeting, and they don't come in, so I sent them a registered letter to show up; they don't show up, and so I sent them a registered letter, if the corporation don't agree to buy Ferris' shares I can buy them myself and I return it to the corporation.

10

Q I show you a paper and ask you if you caused that notice to be sent calling a meeting?

A Yes, sir.

Q You had Mr. Bobker send that notice. A Yes.

Q That purports to call a meeting for May 25, 1926? A Yes.

Q Do you know whether the defendants received that or not? A Yes.

20

Q How do you know they received it? A It was a registered letter at that time.

Q Did you send it or did Mr. Bobker send it?

A I told him to write a letter to call a meeting and he sent it.

Q Did you hold a meeting on May 25? A No, sir.

Q Why not? A They don't care to come; they don't want to come.

30

Q They wouldn't attend a meeting? A No.

Q What was the date of the notice? A There seems to be date on it.

Mr. Conlon: We admit receiving the notice.

(Notice offered in evidence and marked Exhibit C. 9.)

The Court: How long before the 25th was that served?

40

Thomas M. Nickolopoulos, direct.

The Witness: I don't remember exactly the date.

Q A day or two or three days? A A day or two before maybe, I don't remember.

10 Q You received this paper from Mr. Ferris, did you? A Yes, I received it, being notice by Ferris to Nickolopoulos of the sale of his stock to the defendant Pappatheodore.

(Paper offered in evidence and marked Exhibit C. 10.)

Q Since this proceeding has been pending has there been any change in the methods of conducting of the business, except as to the salaries?

20 A No, Mr. Sarantis, they don't want me to order any goods outside. Mr. Sarantis told me not to order any goods outside.

Q He tried to stop you from buying goods? A Yes.

Q Did he succeed? A Yes, I sent orders and he refused it; he sent it back.

Q How many times a week have you been there? A Five or six times a week.

30 Q Right along? A Right along. Any time I am sick or any time I am on a vacation, I always come in two or three times a week, take care of the cash registers and the balance in the bank and check up the bills which has to be paid and pick up orders and deposit the moneys, and have the balances made.

Q About how many times did you say that it happened that Sarantis had refused to receive goods that you ordered? A Two times.

40 Q Was there any reason for it that you know of? A Yes, he say we have enough of that stock.

Thomas M. Nickolopoulos, cross.

Q Did you have enough of it? A No, if we had it, I wouldn't have to order it.

The Court: Do I understand that you are still going to this restaurant or candy shop and putting in sometime several days a week? 10

The Witness: Yes.

Q You are still the president? A Yes.

Q This is the certificate of the 25 shares of stock that you received? A Yes.

(Certificate offered in evidence and marked Exhibit C. 11.)

Mr. Murray: I offer the stock certificate book and stock book in evidence. 20

The Court: They can be marked; there is no dispute about that.

(Marked Exhibits C. 12 and C. 13.)

Cross examination by Mr. Conlon.

Q You have been going to this store five or six times a week? A Yes.

Q How much time do you spend there? A 30 Sometimes three hours, sometimes two hours, sometimes five hours; sometimes one hour.

Q How many hours do you think you average a week? A I never counted.

Q Have you spent any more time there since this suit was started than you did before the suit was started, or about the same? A I continue the same.

Q Sarantis was there all the time when you were there? A Not all the time. 40

Thomas M. Nickolopoulos, cross.

Q Were you ever there during the day when Sarantis was not there? A Sometimes.

Q How many times? A Sometimes he is there and sometimes he is out.

Q How many times was he out when you were there during the day? A Five or six times a week. 10

Q Isn't it a fact that you were there on an average of once or twice a week since January, 1926? A No, sir.

Q Or since June, 1926? A No, sir.

Q And isn't it a fact that on practically every one of those occasions you didn't stay there more than an hour? A I took care of the checks and the books.

Q Answer the question. (Last question repeated.) A Yes, I have been more than an hour and more than four hours. 20

Q Did you have your lunch there? A Sometimes.

Q How often? A Three or four times a week.

Q And that was part of the time that you spent on the business of this company? A Sometimes I go in the morning and sometimes in the afternoon.

Q When you met Sarantis in 1923, you had known him for four or five years? A Yes. 30

Q You knew Kypros? A Yes.

Q And you knew Ferris? A Yes.

Q You knew Sarantis had been manager of the Tea Shop in Bamberger's? A Yes.

Q You knew he had been very successful there? A Yes.

Q You knew he left there of his own accord? A Yes.

Q You knew that from there he went to White Plains and opened up a store with the other boys? A Yes. 40

Thomas M. Nickolopoulos, cross.

Q You knew that they made a substantial profit on that store within three or four months?

A I don't know about that.

Q They told you so? A Yes.

Q You believed it? A Maybe.

Q Did you or didn't you believe it? A I am not refuting it. 10

Q And they were talking about opening up a store in Newark, is that right? A Yes.

Q You were interested in those boys? A Yes.

Q You asked them what their plans were; what they planned to do? A Yes.

Q And you gave them advise? You advised them as to how to go about opening up the store? A No. 20

Q Didn't you suggest where they might get their fixtures and what kind of a store to open? A That happen after we come all together.

Q Isn't it a fact that you suggested that you go in with them? A Yes.

Q Isn't it a fact that you suggested to them that you go in with them on this store?

The Court: Do you know what he is asking you. You testified that they came to you and asked you to go in with them. He is asking you if the fact isn't that you went to them and asked them if you could go in. 30

The Witness: No, they come to me.

The Court: And asked you to come in?

The Witness: Yes.

The Court: That was the first you knew of it, when they came to you?

The Witness: Yes. 40

Thomas M. Nickolopoulos, cross.

The Court: You didn't go to them and ask them for the privilege?

The Witness: No.

Q They didn't suggest that you come in with them the first time you saw them? A They come
10 up to my store and offered me that proposition.

Q Before that hadn't they talked to you about this store they were going to open up? A No, sir.

Q Are you related to any of those boys? A No.

Q You are not Sarantis' uncle? A No.

Q He always called you uncle? A Yes.

Q You told these boys that you were anxious to help them out; is that right? A Yes.

20 Q You figured out that they would need about \$25,000 to start this store? A Not as much as that.

Q Between the cash and credit, and they told you that they had \$1,250 each? A Yes.

Q And you agreed that you would put in \$1,250, too? A Yes.

Q That would make \$5,000? A Yes.

30 Q Then as to this \$10,000 they asked you if you would put that up, is that right? A Yes, they asked me to invest that money.

Q You said you would put up money to the amount of \$10,000? A Yes.

Q You never actually took \$10,000 and gave it to them? A No.

Q After the fitting up of the store was started you paid bills? A No, I invested the money before we opened the store.

40 Q Did you ever put \$10,000 in the corporation bank account? A We opened an account in the bank, we put that \$10,000 in the bank—no,

Thomas M. Nickolopoulos, cross.

before we opened up the account, in the bank, I paid out my own checks, which I give them there.

Q That is all I want to know; you paid out money from time to time? A Yes.

Q And finally you paid out about \$10,000? A Yes.

Q Do you know just how much you paid? A 10 I paid that much money.

Q Is it more than \$10,000? A Not more than ten, less than ten; the balance I put up cash in the bank and opened up an account for the store.

Q That \$10,000 practically all went to buy the fixtures and stock for this store? A To open up the business.

Q And before your \$10,000 was spent, the \$5,000 that they and you had put in was spent, wasn't it? You first spent the \$5,000? A Yes. 20

Q The deposit on the lease and buying fixtures? A They gave me that \$1,250, each fellow, to keep and pay any bills that is necessary to be paid.

Q And that was used to pay bills? A Yes.

Q Before you put your money in, did you put the \$10,000 in? A I put my money in, too.

Q Before you put your \$10,000 in? A I put the \$10,000 with that money, too. I have a check made \$3,000 to one party, and \$4,000 to one party, 30 Barth & Son.

Q They gave you their check for \$1,250 each. Did they give you their check for \$1,250 each? A Yes.

Q You took that money and put your \$1,250 in also? A Yes.

Q And then you spent that money buying things for the store? A Yes.

Q And after you spent that money then you used this \$10,000 of yours? A Yes—no, before, 40 too.

Thomas M. Nickolopoulos, cross.

Q But at any rate, when you got all through, you had spent it all? A Yes. Some of that money, the balance, we used to open an account in the bank in the name of the Goody Sweet Shop.

Q And Mr. Bernstein incorporated this company? A Yes.

10 Q Had you known him before that? A No, sir.

Q You were in his office how many times? A The time we signed the lease and the time we tried to get the lease.

Q You signed the lease March 23? A Yes.

Q Do you remember where you signed it? A And that was before.

Q You were in Mr. Bernstein's office before that? A Yes, go with those fellows.

20 Q Did you, at that time, tell Mr. Bernstein the plan you had of developing this business? A No.

Q You did not? A No, we not talk.

Q When did you first tell Bernstein your plan of developing this business? A After Mr. Sarantis and Mr. Ferris gave the order to form the corporation.

Q That was after the lease was signed? A Yes.

30 Q On the occasion that the lease was signed, did you say anything to Mr. Bernstein about you having a controlling vote in this corporation? A No.

Q At the time you went to Bernstein's office to incorporate the company, do you remember that? A Yes.

Q Did you say anything to Bernstein on that occasion to the effect that you were to have the controlling vote in the corporation? A We

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Thomas M. Nickolopoulos, cross.

talked that after the lease was signed and before, too.

Q Answer that question Yes or No. (Last question repeated.) A No.

Q On April 5th, when you went to Mr. Bernstein's office and you signed this agreement setting forth the terms as to the repayment of your indebtedness, did you say anything to Mr. Bernstein on that occasion as to your having a controlling vote in the corporation? A No.

Q When you went to Mr. Bernstein's office on April 27 and signed the second agreement containing the provisions for the repayment of your loan, did you say anything to Mr. Bernstein on that occasion as to your having a controlling vote in the corporation? A No.

Q And after April 27, you were all busy in fixing up this store? A Yes.

Q As a matter of fact, the store opened for business in the latter part of June—the last week in June? A No, the third of June—30th day of June, 1923.

The Court: June 3rd.

Q Did you ever see that book before? A Yes.

Q Does that contain the entries of your cash record? A June 30, 1923.

Q That is the day you opened business? A Yes.

Q When you began to get your fixtures and stock in the store? A We began from April.

Q So by the ninth of June you had considerable of the stock and fixtures in the store? A Pretty near all.

Q You had signed a chattel mortgage in Bernstein's office, or rather Sarantis', and the others had signed a chattel mortgage in Bern-

40

Thomas M. Nickolopoulos, cross.

stein's office on April 28 to secure your \$10,000?

A Yes.

Q And that was the same day that the last agreement was signed, was it? A Not the last day.

10 Q The agreement of April 27, which was the second agreement, providing for the repayment of your indebtedness, and the first chattel mortgage were both signed on the same day? A Yes.

Q And the first chattel mortgage contained a provision for the repayment of your \$10,000 in one month, is that correct? Do you remember that?

The Court: Does not that speak for itself?

20 Q Do you remember that? A I don't remember.

Q And don't you remember that when Sarantis discovered that, he objected to it? Do you remember that? A No, sir.

Q And don't you remember that it was at Sarantis' request that Mr. Bernstein drew up another chattel mortgage, which provided that your \$10,000 should be paid in December, 1924? Do you remember that? A No.

30 Q Don't you remember that it was for the purpose of signing the second chattel mortgage that Mr. Bernstein asked you to come to his office on June 9th? A He called me to come over to his office.

Q To sign the chattel mortgage? A No, to tell me about my papers is not right.

Q What papers were not right? A The mortgage.

40 Q And when you got there he told you that he had drawn a new mortgage? A Yes.

Thomas M. Nickolopoulos, cross.

Q To take the place of the old one? A Yes.

Q Did he say anything to you about the fifty per cent vote before you spoke about it? A That is the time I asked.

Q I mean before you spoke about it, did Bernstein say anything about it? A No.

Q Or did Sarantis say anything about it? A 10 No.

Q You came to Mr. Bernstein's office that day with Mr. Bobker? A No, the day before I was in Mr. Bernstein's office.

Q With Mr. Bobker? A No, alone.

Q I am talking about this time when you signed the chattel mortgage, did you have Mr. Bobker there that day? A The last day?

Q Yes. A The last day I called Mr. Bobker to come over. 20

Q And that was the day you signed the chattel mortgage? A Yes.

Q And that as the first time Mr. Bobker had represented you in this transaction? A Yes.

Q And this was on June 9th? A Yes.

Q And up to that time you had said nothing to Bernstein about your fifty per cent vote, had you? A I asked Mr. Bernstein if the fifty per cent voting power is—

Q When did you ask him that? A On that 30 day.

Q That is June 9th? A The day he called me out, when I was to his office.

Q Is that the day you signed the last chattel mortgage? A The day before.

Q That was June 8th? A On June 8th.

Q That is the first time you spoke to Bernstein about this fifty per cent voting control? A Yes.

Q He told you there was no such provision in the papers? A Yes. 40

Thomas M. Nickolopoulos, cross.

Q Then did you meet with Bobker and go the next day to Mr. Bernstein's office with Mr. Bobker? A I called Sarantis, Kypros and Ferris to Mr. Bernstein's office.

Q And you went there with Mr. Bobker? A We called up from Mr. Bernstein's office Mr. Bobker.

Q And he came over representing you? A Yes, to represent me about the papers.

Q Then what did you say about this voting control? A I asked Mr. Bobker if there is any protection on that paper for me, and Mr. Bobker looked at the papers and said "No"; so I told the corporation why they don't put the fifty per cent control in.

Q We were talking at that time about fifty per cent or fifty-one per cent? A Fifty per cent.

Q Did you ever speak of fifty-one per cent? A After I saw the papers drawn, I said right away, "We not start business"; I see some tricks, so I endeavored to have it fifty-one. They don't want to give it to me; they say "All right, we give you fifty."

Q You say you saw some tricks? A Yes, because I trust Mr. Bernstein—

Q (Last question repeated.) A Yes.

Q What tricks did you see? A I see them go to the lawyer and give the order to draw the corporation, and they don't put what is necessary to put on the papers.

Q And what was necessary; about this fifty per cent voting? A Yes.

Q Did you see any other tricks? A And the mortgage was not right.

Q What made you a little suspicious was the fact that you had to go back there and have this mortgage withdrawn? A No, the mortgage was

Thomas M. Nickolopoulos, cross.

wrong because the place was not opened at that time, and we drew the mortgage in April.

Q It was in connection with this mortgage that you spoke to Sarantis about this voting control? A No.

Q When was it? A That mortgage was signed; I don't remember; maybe that day; but we did not mention any mortgage that day; we only mentioned the fifty per cent control.

Q You remember the day the last chattel mortgage was signed, do you? A I don't remember exactly.

Q You don't remember whether or not that was the same day that this agreement was signed as to the voting control? A Yes, the last day we have had the papers from Mr. Bernstein's office.

The Court: What is the date of the last chattel mortgage?

Mr. Conlon: It is dated June 9th.

Q Where was this agreement of June 9th signed by Sarantis and the others? A In Mr. Bobker's office.

Q As a matter of fact he refused to sign it in Mr. Bobker's office? A Who?

Q Sarantis and the others? A No.

Q Why didn't they sign it in Mr. Bernstein's office? A Because I said I couldn't trust Mr. Bernstein any more.

Q Wasn't the agreement drawn when you came to Mr. Bernstein's office? A No.

Q Where was it drawn? A In Mr. Bobker's office.

Q When you suggested this voting agreement did they sign right away? A They tell me. "You not need the fifty per cent voting."

Thomas M. Nickolopoulos, cross.

Q You said you were putting in \$10,000 more than they were? A No.

Q You didn't mention the \$10,000? A We don't mention any \$10,000.

Q The \$10,000 wasn't mentioned in connection with this voting agreement? A No, that was only for the voting control. 10

Q In other words, you had enough security in your chattel mortgage for your \$10,000, is that right? A Yes, that secured my \$10,000, the mortgage.

Q That secured it satisfactorily to you? You were satisfied by that mortgage? A From the mortgage, yes, I was satisfied.

Q Then why did you insist upon a fifty per cent voting control? A Because I know from the beginning Sarantis and Kypros and Ferris was all line one man, good friends. 20

Q And that is your only reason? A Yes.

Q Did you have any reason to suspect them of doing anything dishonest? A I don't know them fellows before. I never do any business before to find out exactly, but I thought three fellows good friends; some day some argument would come.

Q Then you had a meeting about Ferris selling his stock; that was held right after the store closed at night? A Yes. 30

Q You frequently met there at that hour to talk things over? A I was not there at the time they closed the store; I was up to South Orange avenue.

Q They called you up and you came down? A Yes.

Q And Ferris told you he was going back to Greece? A No, he said he was going to sell his share to the corporation. 40

Thomas M. Nickolopoulos, cross.

Q Did he tell you he was going back to Greece and pay a visit? A No, he didn't tell me where he was going.

Q As a matter of fact, he has gone back? A I don't know what he meant.

Q As a matter of fact he has gone to Greece, hasn't he? A He was in Greece after he sold his shares. 10

Q He did go to Greece after he sold his shares, didn't he? A Yes.

Q You and Sarantis and Kypros talked about buying the stock from Ferris? A Mr. Sarantis and Mr. Kypros.

Q And Mr. Sarantis told you he couldn't buy it because he didn't have any money? A No.

Q And Mr. Kypros said he couldn't but it because he didn't have any money? A No; we have enough money in the bank— 20

Q I am not talking about the corporation, but them personally. A No, I don't hear such talk.

Q Was there any talk about your buying the stock personally? A No.

Q Sarantis never suggested that to you? A No.

Q You say the first time you heard of Pappatheodore buying Ferris' stock was the time you got this notice of the transfer? A Yes. 30

Q You mean to say Sarantis didn't come to you and say that they would sell the stock to Pappatheodore so he would be more interested in the business? A No.

Q You never heard such talk before the transfer of the stock? A No.

Q Never? A Never.

Q I want to read you a part of a paragraph in your affidavit that you filed in this case: "The corporation business is wholly cash over the 40

Thomas M. Nickolopoulos, cross.

counter, and as a result, if I am not at the store during business hours, and the defendants are there, they can take whatever incoming cash they see fit, without any record of it being kept, and I will know nothing of it. The defendants have not the brains necessary to run the business at a profit, and if they oust me my interest in the business is wholly at the defendants' mercy." I want to ask you to tell me one thing that Sarantis, Kypros or Pappatheodore has done in that business that in your opinion has been dishonest, which led you not to trust them. Tell me one thing they have done. A I trust them.

Q Do you remember Sarantis coming to you and telling you—this was after your \$10,000 had been paid—it has been paid? A Yes.

20 Q You have got all the money paid back to you? A Yes.

Q Your only interest in this corporation is this \$1,250 which you invested in it? A Yes, \$1,250 cash.

The Court: He has twenty-five shares of stock.

Q You put in \$1,250 for that? A Yes.

30 Q Do you remember Sarantis coming to you and telling you, after your debt had been paid, that he couldn't live on \$15 a week any more. A Never.

Q Do you remember his telling you that his wife had to work in order to help support them? A Never.

Q Do you remember him suggesting to you that the salaries be increased? A No.

40 Q Do you remember refusing to increase the salaries? A I never told him that.

Thomas M. Nickolopoulos, re-direct.

Q And isn't it a fact that that is the reason that the break came between you and Sarantis?

A No, sir.

Re-direct examination by Mr. Murray.

Q Did you have any objection to the salaries being raised, provided yours was raised also? 10

A No objection to that.

Q You say you trust the defendants; what do you mean when you say that? A Well, they work there; I work; if not one trust the other, we don't have to stay.

The Court: He says "I work there and if we cannot trust one another, we ought not to work together." 20

Q When you say you trust him, you mean with regard to the cash that comes into the business? A The business system is no good; we have no good cash system and no system in the business.

Q What is the matter with the system? A It is not right, because Mr. Sarantis put his wife in there without asking me.

Q What does she do there? A Take the cash from the business. 30

Q When you are not there Sarantis or Kypros or members of their family take in all the cash? A Yes.

Q You don't know whether it is all turned over to the corporation or whether it is not? A No.

Q When you say you trust them, you mean you cannot prove that you should not trust them?

A Certainly. 40

Thomas M. Nickolopoulos, re-direct.

Q At the time this sale of the Ferris stock came up, the corporation did or did not have enough money to buy it? A The corporation have enough money to buy it.

Q What reason did Sarantis and Kypros give for not having the corporation buy it? A Because they want to put his cousin in there. 10

The Court: What reason did they give for the corporation not buying the stock?

The Witness: I don't know.

Q I show you two batches of checks apparently signed by you; are they signed by you? Are those your checks? A Yes, sir.

Q And did they go through the bank? A Yes. 20

Q What do they represent? A That is the checks which I invest for the place.

Q That represents money that you paid out for the concern; is that right? A Yes.

Mr. Murray: The only purpose of the offer is to give the Court—

The Court: I think I understand it. He said that he paid all the bills up to a certain point and the balance of \$10,000 that he hadn't paid out, he turned over to the company and they opened a bank account with it. 30

Mr. Murray: I offer to show that a good deal of the money had been advanced as early as the middle of May, long before this final chattel mortgage of June 9th, and I offer the checks only for that purpose.

(Marked Exhibit C. 11a.)

Thomas M. Nickolopoulos, re-cross.

Re-cross examination by Mr. Conlon.

Q You say you wanted the corporation to buy Ferris' stock? A Yes.

Q And Sarantis and Kypros didn't want to do that? A No, sir.

Q And the reason they gave you was that they wanted the chef in there? A Yes. 10

Q The reason they gave you for not wanting the corporation to buy Ferris' stock was because they wanted the chef to be the stockholder? A Maybe that and maybe not; I cannot say that.

Q I ask you what they told you; did they tell you that? A No, they don't tell me that.

Q Didn't you testify before, in answer to a question by Mr. Murray, "Why didn't they want the corporation to buy the stock?" you said because they wanted their cousin in there? A They don't mention his name. 20

Q Did you answer that way? (No answer.)

Q Whom did you mean by his cousin? Did you mean Pappatheodore? A Yes.

Q He was the chef there? A Yes.

Q You are talking about Mrs. Sarantis being at the cash register. As a matter of fact she fills in there in the rish hour? 30

The Court: Why take up the time with that?

Q You have never objected to that? A They never asked me.

Q You never objected to it, did you? A No, but they never asked me.

Thomas M. Nickolopoulos, by the Court.

Examination by the Court.

Q This paper which you signed at the time Ferris told you he wanted to sell his stock, was signed on January 21, 1926, wasn't it? A Yes.

10 Q You knew that under your agreement you had thirty days from that time in which to buy the stock, didn't you? A Yes.

Q You knew also that the corporation had thirty days, under your agreement, in which to buy the stock? A Yes.

Q Now, you say that the other papers, Kypros and Sarantis, didn't want the corporation to buy the stock? A They didn't want it.

Q Did you say anything to them about it? A I did.

20 Q After January 21st? A I did.

Q How soon after January 21st did you talk to them about it? A Two days after.

Q Is that the last you talked to them about it? A More.

Q How long after? A A week after.

Q Is that the last time you spoke to them about it? A Yes.

Q Then you knew a week after January 21st that the corporation wasn't going to buy it?

30 A No, because they told me Ferris changed his mind.

Q Did Ferris tell you he had changed his mind? A These fellows and Ferris don't say anything; I asked Ferris how he going to sell it.

Q When? A After we signed that paper.

Q When? A January 15th, later, about ten days after.

40 Q Was it before or after you had had the conversation with Kypros and Sarantis about the corporation buying the stock? A After.

William Nickolopoulos, direct.

Q They told you that Ferris wasn't going to sell? A Yes.

Q Then you went to Ferris and he told you he wasn't going to sell? A The same thing; he said he changed his mind and stay.

Q Did you ask him to sell it to you? A No.

10 Q And the reason you didn't, as I understand it, is that Ferris told you he wasn't going to sell it at all? A Yes.

WILLIAM NICKOLOPOULOS, sworn for complainant.

Direct examination by Mr. Murray.

Q You are a relative of the complainant? A 20 Yes; he is my uncle.

Q In the spring of 1923 were you working for him? A Yes.

Q Whereabouts? A 468 Springfield avenue.

Q Did you hear any conversation between the complainant—between your uncle, on the one hand, and Sarantis and Kypros and Ferris, on the other? Hear any talk about this proposed business before it started? A Yes.

30 Q What did you hear? A There was talking they are going to open a store in Broad street.

Q Who was doing the talking? A The four together.

Q Who was proposing to open the store? A Sarantis, Kypros and Ferris and Nickolopoulos.

40 Q What did you hear? A They was talking there, they said—he always called him Uncle—the fellows ain't got enough money to start a place in Broad street, because a place in Broad street needs a lot of money, and so, Uncle,

William Nickolopoulos, direct.

you are going to put the money in, and us fellows will take care of the place. The only thing we want you to take care for us and buy the goods outside and manage the place." They don't want him to work in the store, just to take the management of it.

10 Q What did he say? A He said "All right"; he comes to agreement.

Q Did they make a proposition to him? A What do you mean?

Q Did they say what terms they would come in on? A Yes.

Q What did you hear them say about that? A He will be the president of the corporation; he will be the head man in the corporation, and give him fifty per cent voting power.

20 Q How much were Sarantis and Ferris and Kypros to put in, and how much was Nickolopoulos to put in? A I don't know how much each one put in.

Q What did they say about it; did they talk about it and fix a definite amount that each one was to put in, which you heard? A Each fellow got a thousand dollars to put in and Nickolopoulos will put that in.

30 Q Were you ever at Bernstein's office? A Yes.

Q How many times? A Once.

Q When you were there, who was there? A Mr. Sarantis, Kypros and Mr. Ferris, and I went down with Mr. Nickolopoulos, my uncle.

Q How did you come to go there? A He take me along; he said, "Let us go down to the office, because they are going to sign papers," so I went down with him.

40 Q What happened there? When was that; do you remember? A I cannot remember what time; it was in the morning.

William Nickolopoulos, direct.

Q What happened there at that meeting?

Mr. Conlon: I object.

The Court: When was it?

Q Who was there? A There was the four of them—Mr. Sarantis, Mr. Kypros and Mr. Ferris, and the lawyer, Mr. Bernstein. 10

Q Were the papers signed there? A No, they had a little argument there on account of the fifty per cent. vote, so some one go to work and call Mr. Bobker over.

Q What was the argument about? A About the fifty per cent. vote not being in the papers.

Q What did Nickolopoulos say to that? A Mr. Bobker took all the papers and went to Mr. Bobker's office. They left Bernstein's office; they took the papers and went up to Mr. Bobker's office. 20

Q Did they go up there right away, to Bobker's office, or the next day or sometime later? A No, they went about right away, about an hour and a half or hour after they finished the argument, because Mr. Bobker said, "I am in a hurry, I cannot wait with you fellows, I got to go," and Mr. Bobker went, and the whole bunch went to Mr. Bobker's office. 30

Q How long did this argument about this voting power last before Bobker was called? A About half an hour—an hour or so.

Q What did Sarantis or Ferris or Kypros say about that? A They say, "Uncle, we will not do any crooked business; we got to work straight and nice, we will not fool you."

Q Did Nickolopoulos say what he would do if that agreement wasn't made? A He said, "I want to have the fifty per cent. vote, be- 40

William Nickolopoulos, cross.

cause you fellows are like good friends and like brothers; how do I know what will happen tomorrow?

Cross examination by Mr. Conlon.

10 Q Did you hear anything said to the effect that this fifty per cent. vote was to protect Nickolopoulos on his \$10,000 loan? A No, I didn't hear that.

Q Did you hear Nickolopoulos say that if he didn't get the fifty per cent. vote, that he would withdraw from the proposition? A I didn't hear that.

20 Q Did you hear Nickolopoulos say that if he didn't get the fifty per cent. vote that he would get out of the deal? A I don't hear that, I say.

Q Did you hear Sarantis and the other boys say at the end of the argument—finally say, "Well, it is too late to get out, we will have to give you what you want?" A They said, "We give you the fifty per cent."

Q That was after a long argument? A It was about half an hour or hour, I don't know exactly.

30 Q Did you hear them tell Nickolopoulos that the only reason they agreed to that was because they had gotten in so deep that they couldn't get out? A No, I don't hear that.

Q You are in business with Nickolopoulos? A Yes.

Q He is your partner? A Yes.

Q Where did you hear this first conversation you were telling us about a little while ago?

A That conversation was right in my place.

40 Q Where? A At 468.

William Nickolopoulos, cross.

Q When? A At that time; it was during business.

Q When? A I don't remember what time or what day it was, or what year.

Q Do you know what time of the day it was? A I don't remember exactly what day it was.

10 Q Do you remember what year it was? A Everything was done in my place, there was all the salesmen and contracts and everything was signed there. All the orders are given in my place.

Q I am talking about this conversation that you said Sarantis and the others had with your uncle; where did that take place? A There was 468 Springfield avenue.

20 Q Whereabouts in your place? A 468 Springfield avenue, in the store.

Q What part of the store? A Some place, sitting at a table, they were talking.

Q How long did they talk about it? A Every day; I was right there and talking with him.

Q Were you testifying to one conversation or to more than one?

The Court: Were they there more than once? 30

The Witness: Every day. After they agreed to open the store, they were there every day, because all the salesmen come in; it was like a headquarters.

Q When you were in Bernstein's office on the last occasion when Mr. Bobker came in, did you say anything? A I have nothing to say.

40 Q What were you there for? A I just went down with my uncle.

David Bobker, direct.

Q Why did you go? A My uncle tell me, "I go down to sign the papers; let us go down," so I had to go with him.

Q Did you go any other time with him when he signed the other papers? A No.

Q Why did you go on this particular day?

10 A Because they had the papers and hadn't them right, so he told me, "Come down and see what is going on."

Q Did he ask you to go down to act as a witness for him? A No, he was my uncle and I had to go down with him.

Re-direct examination by Mr. Murray.

20 Q Before your uncle agreed to go into this business did Sarantis and Ferris and Kypros talk to you in your store once or more than once, that you heard? A They was talking more than once.

Q How many times? A Every day, to find a store and open up.

30 Q About how many times did they talk to you about it in your store, that you heard, before he finally agreed to go into the business? A I don't remember exactly. I can tell you five or ten, because they were talking like good friends every day to find a store to start business.

DAVID BOBKER, sworn for complainant.

Direct examination by Mr. Murray.

40 Q You are a member of the bar of New Jersey of a number of years' standing? A Yes.

David Bobker, direct.

Q You represented the complainant Thomas Nickolopoulos in part of the transaction relating to the Goody Shop? A I did.

Q Will you state to the Court just what your connection with it was, when it was, and what you did and how you came to do it, as nearly as you can? A What is the date of the agreement? 10

The Court: June 9th.

A (Continuing.) My recollection is that several days prior to June 9, 1923, Mr. Nickolopoulos called at my office and informed me that he had received a call from Mr. Bernstein's office to the effect that some change or changes had been made with relation to the chattel mortgage, and he asked me to go to Mr. Bernstein's office with him. My recollection isn't clear whether I actually went to Mr. Bernstein's office or just called up Mr. Bernstein's office, or Mr. Nickolopoulos finally delivered all of the corporation records to me. Either I got them at Mr. Bernstein's office or he brought them to my office. He asked me whether the chattel mortgage had to be changed, and I examined the mortgage, and it is my recollection that I told him that if the time for payment of the \$10,000 was incorrectly set forth, that they probably would have to alter the chattel mortgage, and I also think I called attention to the fact that the mortgage wasn't dated, but I told him it wouldn't make any material difference, and he then asked me to look through the corporation papers and let him know whether or not he was fully protected, and I asked him just what he meant by that, and he told me that when he agreed to advance the 20 30 40

David Bobker, direct.

\$10,000 to get that business started, that the other gentlemen, whom I had not as yet met, told him, or rather agreed with him, that he was to have a fifty per cent.—

10 The Court: This is not in the presence of the other—

Mr. Conlon: I don't want to object if it is of any use to the Court.

The Court: I understood this conversation took place when they were all present. Your recital of the conversation between you and your client is objectionable, unless the others were there. You should know that without anybody telling you.

20 The Witness: The object of that recital is to lead up to the reason why I examined the corporation records for him.

A (Continuing.) At all events I examined the corporation records for him, and told him that there was no fifty per cent. voting agreement among the records, and apparently the matter had been overlooked. I think it was a day or two prior to the preparation of this voting—
30 fifty per cent. voting agreement, dated June 9, 1923, that Mr. Nickolopoulos and the three gentlemen who signed the agreement, called at the office—Mr. Ferris and Mr. Sarantis and the third gentleman, and I told all of them that it was advisable, in view of what Mr. Nickolopoulos had informed me concerning the fifty per cent. voting trust arrangement, that an agreement should be prepared embodying their original vote on the proposition. Mr. Nickolopoulos stated that he wanted this fifty-one per cent. agreement prepared, and they objected to it. I then sug-
40

David Bobker, direct.

gested that the original fifty per cent. agreement be carried into effect, and that the chattel mortgage be withdrawn, and they discussed the fact that the \$10,000 was to be payable in eighteen months from the day of the advances, except the one month, as the original chattel mortgage called for, and it is my recollection that
10 they came back, either the same day or the following day, and finally told me that they would sign this fifty per cent. voting trust agreement, and that they would also sign the new chattel mortgage. On June 9, 1923, there were prepared in my office a new chattel mortgage and the fifty per cent. voting trust agreement, and those papers were signed and executed in my office. When those papers were signed up, that closed the transaction as far as I was concerned.
20

Q This conversation at which you told them that this fifty per cent. agreement ought to be made a matter of record, was that at your office or at Mr. Bernstein's office or somewhere else?

A That was at my office, as far as I can recall; they were all present at my office.

Q Did you tell them what Nickolopoulos had told you regarding the original arrangement for the fifty per cent. voting agreement? A When they first called at my office, I directed my atten-
30 tion to the facts as they were told to me by Mr. Nickolopoulos.

Q What did you say to them, then? A I told them that it was due to the fact that Nickolopoulos had advanced the \$10,000, that they were able to start this new project; that they had originally intended to protect him with his fifty per cent. agreement, and the matter had been overlooked by some one, and that their agreement should be carried into effect; that
40

David Bobker, direct.

Nickolopoulos wanted the fifty-one per cent. agreement and then they finally compromised on the fifty per cent. agreement.

Q Did you say to them whether the voting control agreement was for the protection of the mortgage or the mortgage money or that it was for the protection of him as a minority stockholder, or what purpose did you state? What did you state the purpose of that was? A The voting trust agreement had absolutely nothing to do with the chattel mortgage.

Mr. Conlon: I object as being improper.

The Court: I will allow it.

A (Continuing.) I told them that this fifty per cent. voting agreement was there for his protection as a minority stockholder.

Q When was that agreement actually drawn; was it drawn on that occasion which you have just mentioned, or was it drawn a few days later when they came in and agreed to sign? A It was drawn on the same day that it was signed, as far as I can recall. I don't know whether they were all present at the same time when the agreement was signed up or whether they called at different intervals, but the agreement and the mortgage I recall were prepared in the morning, and I think all papers were signed that afternoon.

The Court: What did they say—that is, any one of the three say, when you told them that Mr. Nickolopoulos claimed that they had a fifty per cent. agreement?

The Witness: They said that they wanted to protect him, that he had advanced the \$10,-

David Bobker, cross.

000 in order to get them started in this new venture, and they never voiced any objection to the fifty per cent. agreement, but they did object to the fifty-one per cent. agreement.

Q Did they deny or—

10

The Court: He said they didn't.

Q Can you say positively one way or the other, whether you ever met any of those defendants in Bernstein's office or not; or has the matter gone from your recollection entirely? A My recollection is that I did not. I may have gone to Mr. Bernstein's office with Mr. Nickolopoulos, but my recollection isn't distinct on that point.

20

Q Was a copy of this voting agreement given to each of the defendants, do you know? A They each received a copy.

Q At the time it was signed? A Yes, sir.

Cross examination by Mr. Conlon.

Q Mr. Bobker, you said when they first came into your office, that you told them what Nickolopoulos had told you; do you remember that? A Yes.

30

Q Then in answer to Mr. Murray's question, you said something to this effect: "I said to them that on account of Nickolopoulos advancing them the \$10,000 and making it possible for them to start this business, that I felt that he was entitled to additional protection." Did you say that? A No, I don't recall making that statement.

40

David Bobker, cross.

(The following question and answer read:)

10 "Q What did you say to them then? A I told them that it was due to the fact that Nickolopoulos had advanced the \$10,000, that they were able to start this new project; that they had originally intended to protect him with his fifty per cent. agreement, and the matter had been overlooked by some one, and that their agreement should be carried into effect; that Nickolopoulos wanted the fifty-one per cent. agreement and then they finally compromised on the fifty per cent. agreement."

Q Is the statement just read from the record correct? A That is positively correct.

20 Q Don't you remember going to Mr. Bernstein's office in response to a telephone call and finding Mr. Bernstein and Sarantis and Nickolopoulos and the whole crowd there? A I may have called at his office in connection with the chattel mortgage before I actually received the corporation records and papers. I may have been there.

30 Q Don't you remember there was an argument going on there as to whether these defendants should sign this fifty per cent. agreement? A No, to the contrary, my recollection is that this fifty per cent. proposition was discussed at my office, after I got all the records from Mr. Bernstein, because at that time I didn't know what the corporation records contained.

40 Q Don't you recollect that they refused to sign the agreement in Mr. Bernstein's office, and then you went back to your own office and later in the day they came in and eventually did sign it? A No, I don't recall such a situation.

David Bobker, re-direct.

Q Do you remember if Mr. Bernstein was ever in your office? A No, he was never in my office.

Q You are not sure of that? A I am positive he wasn't in my office; as I say, I may have been at his office. The more I think about the matter, the more positive I am of the fact that the fifty per cent. proposition was talked over at my office, and I don't think it was ever talked over in Mr. Bernstein's office. 10

Q Would you say positively that if you saw Mr. Bernstein in connection with this transaction, that it was at his office and not at your office? A I am in a position to make a positive statement that this fifty per cent. proposition was only discussed at my office.

Q If you saw Mr. Bernstein at all in this transaction, it was at his office, and not at your office? A Yes, that is so. 20

Q You are sure of that? A Yes.

Q As a matter of fact, your recollection of this isn't too clear at all? A My recollection is very distinct on this entire proposition, because they did agree at my office that this man Nickolopoulos got them started in this affair and they wanted to give him what he was supposed to get. They told me that. The minor detail as to whether I was at Bernstein's office or he at my office, I don't recall, but there was only one dispute there; Nickolopoulos wanted fifty-one per cent., and they said he was entitled to fifty, and that is what they finally signed up. 30

Re-direct examination by Mr. Murray.

Q Was there anything said by any one at your office, when they were there, to the effect that this voting control agreement had any con- 40

Frank Sobel, direct.

nection with the fact that Mr. Nickolopoulos was the holder of the mortgage on the property?

A No, that didn't enter into the transaction at all. It wasn't even discussed in connection with the agreement, except that they wanted him to extend the time for the payment of the \$10,000, and he said, "All right, I will give you eighteen months," which he did.

Q Other than that, the two things were not discussed in connection with each other at all?

A No, sir.

Re-cross examination by Mr. Conlon.

Q Didn't you just verify the statement that you had made in answer to Mr. Murray's previous question, that when you first started to talk about this thing, you gave as one of your arguments to this question as to why they should sign this agreement, that Nickolopoulos had put up this \$10,000 and put them in a position where they could go into business; isn't that correct?

The Court: Why stress that? It appears on the record.

30

FRANK SOBEL, sworn for complainant.

Direct examination by Mr. Murray.

Q What is your business? A Office manager of Schwartz & Son.

Q What business are they in? A Corporation selling confectionery, fountain supplies and cigars.

40

Frank Sobel, direct.

Q And they were in that business for a number of years prior to 1923? A Yes.

Q Up to that time had you ever dealt with Nickolopoulos? A We did.

Q For how many years? A Ten or fifteen years.

Q How did he stand with you as to credit? A Very good.

Q Did you ever sell to the Goody Sweet Shop? A Yes.

Q How did you come to do that? A On the strength of Mr. Nickolopoulos being one of the owners.

Q Whom did you charge the goods to? The company or to him, or both of them, or how? A If I may refer to records I have in my pocket, I can tell you.

Q Look at them.

Mr. Conlon: I don't see how this is material; we are not arguing the fact that—

The Court: Do you admit that goods were sold to the Goody Shop on the credit of Nickolopoulos?

Mr. Conlon: No.

A We sold to Tom Nickolopoulos, Angelo Sarantis and George Ferris, trading as the Goody Sweet Shop, Inc.

Q Did you know any of them except Nickolopoulos? A I knew Mr. Sarantis when he was purchasing agent for Bamberger's Fountain.

Q Did you sell these goods on his credit? A On the strength of Mr. Nickolopoulos' credit.

Q Have you been doing business with the Goody Sweet Shop since then? A Yes.

40

Frank Sobel, cross.

Q Do you know who has done the buying?
A No.

Cross examination by Mr. Conlon.

Q What do you mean that you sold these
10 goods on Nickolopoulos' credit? A I mean to
say on the strength of having done business with
Nickolopoulos.

Q You did business with Sarantis, too? A
Only as a buyer for L. Bamberger & Co.

Q Have you any guarantee from Nickolopou-
los for the corporation's account? A No.

Q You know this is a corporation? A Yes.

Q You know that Nickolopoulos is not per-
sonally liable on these things? A Yes, but I
20 knew he was morally reliable.

Q Did you think that the others were not
morally liable? A I knew nothing about their
credit.

Q Then your answers are directed to the
moral responsibility of Nickolopoulos? A Yes.

Q And not to his financial responsibility? A
Right.

Q As a matter of fact, you have nothing to
do with the business that is conducted with the
30 Goody Sweet Shop, have you; you don't have
any direct contact with it? A Except we know
that the bills are to be paid when due, and O. K.
the credit for the orders that come in.

Q The bills are paid when they come due?
A Yes.

Q And when the account with the Goody Shop
was opened and you extended them credit, you
made no request upon Nickolopoulos of a per-
sonal guarantee from him? A No.

B. Frank Fox, direct.

B. FRANK FOX, sworn for complainant.

Direct examination by Mr. Murray.

Q What is your business? A Credit mana-
ger for the Lamont Corlis Co.

Q Did you act as such in the spring of 1923? 10
A Yes.

Q Did you know Thomas Nickolopoulos, the
complainant in this suit, at that time? A Yes;
I have known him for twelve years.

Q How did he stand with you as a credit risk?
A Very good.

Mr. Conlon: I object. The question isn't
fair, how he stood as a credit risk.

The Court: I will permit it. The ob- 20
jection is overruled.

Q Did you sell goods to the Goody Sweet
Shop or supply goods to them? A Yes.

Q On whose credit? A On Mr. Nickolopou-
los' credit.

Q Have you got any bills here that go to
show how the credit was handled? A Yes.

Q What do they show? A Nickolopoulos
30 Goody Sweet Shop; Thomas Nickolopoulos Goody
Sweet Shop, and Goody Shop, Thomas Nick-
olopoulos.

Q What does that mean when you say that?

Mr. Conlon: I object.

Q There were two purchasers or one? A
Joint purchasers; Nickolopoulos was the respon-
sible party in it. I knew only Mr. Nickolopoulos
and on the strength of his connection with the
40 Goody Shop is the reason we extended credit

B. Frank Fox, direct.

to him. I didn't know either of the other gentlemen existing in the Goody Shop.

Q Has the Goody Shop been buying goods from you since 1923? A Yes.

Q Do you know who has done the buying for that concern? A Mr. Nickolopoulos and I have not seen all the orders or had them go through me.

Q Those you had seen were? A Yes.

Q Do you know any orders that were ordered by any one else? A No.

Q How many orders a year did you get from the Goody Sweet Shop? A Probably fifteen or twenty.

Q Isn't it closer to four or five? A No; I have three here.

Q You are the credit manager? A Yes.

Q You know that the Goody Sweet Shop is a corporation? A I do.

Q And did you get any personal guarantee from Mr. Nickolopoulos? A No.

Q So that you didn't depend upon his financial end of it? A Yes; but I knew Mr. Nickolopoulos for twelve years.

Q You had confidence in him as a moral risk? A Yes.

Q But you had no guarantee from him financially? A No.

RECESS.

Henry Gottschalk, direct.

HENRY GOTTSCHALK, sworn for complainant.

Direct examination by Mr. Murray.

Q What is your business? A Member of Gottschalk & Morley. 10

Q In the spring of 1923 did you know Mr. Nickolopoulos, the complainant in this case? A I did.

Q And had you done any business with him up to then? A I did.

Q How long had you known him? A About twenty years.

Q How long had you done business with him? A About eighteen years.

Q What is the nature of your concern's business? A Confectioners' supplies. 20

Q What was the nature of your dealings with Nickolopoulos during the eighteen years? A In regard to what? What I sold him?

Q You sold him supplies? A Yes.

Q How did he rate with you as a credit risk? A In the very early part, a little slow, but the last ten years quite satisfactory, a good account.

Q And did you sell any material or merchandise to the Goody Sweet Shop? A In 1923, Mr. Nickolopoulos come to our office; I then was vice-president and general manager in charge of Charles J. Stevenot & Co. He ordered some goods. 30

Q Did he buy some goods? A Yes.

Q How did you charge; to him or the company. A No, we charged them to Mr. Nickolopoulos direct.

Q Did you do any business with the Goody Sweet Shop after 1923? A Yes. 40

Henry Gottschalk, cross.

Q Have you any idea about how many transactions you had with him after 1923—with the Goody Sweet Shop? A Without records, I would say about five or six.

Q Who did the buying and ordering in those transactions? A Mr. Nickolopoulos only.

10 Q Did you charge those goods to the company or to Nickolopoulos or who? A We charged them to Nickolopoulos only, and his name only showed on the account.

Q Was there anything to indicate that they were for the Sweet Shop or for Nickolopoulos' other business? A They were indicated by him personally; when he come in 1923 he asked me to ship some goods to the Sweet Shop; I said, "Who is he?" He said, "The concern I am
20 interested in." I said, "We want some reference." He then said, "Bill to me"; I said, "All right," and I billed to him.

Cross examination by Mr. Conlon.

Q You have five or six transactions with them since 1923? A Yes.

Q You sold them five or six bills? A Yes.

30 Q How much did your bills amount to altogether? A Without records I cannot say, because he had so many stores.

Q For this particular store, have you any idea? A I presume about sixty or seventy dollars an item.

Q The last order you delivered there was ordered by Mr. Sarantis on the telephone? A That I cannot say, sir.

40 Q As a matter of fact, the amount of your business for the last year with the Sweet Shop has been about \$60? A Without the records, I cannot say exactly what they were.

Henry Gottschalk, re-direct.

Q Have you any written guarantee from Nickolopoulos of the Sweet Shop account? A I didn't ask for it.

Q You know that is a corporation? A I did not know.

Q Do you know now? A I do know now.

Q How long have you known it? A What I
10 just heard in court here.

Re-direct examination by Mr. Murray.

Q Did you go to the Sweet Shop personally recently? A Oh, a matter of less than two weeks ago I was over here soliciting business, I go to Nickolopoulos' store.

Q Which store? A On Springfield avenue. His relation, I believe a nephew of his—he told
20 me—

Q Where did you go from there? A To the Broad street store, the Goody Shop.

Q Whom did you see there? A This gentleman sitting over there (indicating Mr. Sarantis).

Q What did you say to him at the time? A I asked him if Mr. Nickolopoulos was there; I called him "Nick."

Q What did he say? A He said he didn't know. I asked him; he didn't know. He said,
30 "What do you want him for?" I said, "I would like an order." He said "Mr. Nickolopoulos has nothing to do with the store any more, and he don't do the ordering here." I said, "You don't need to holler so loud, because I am sorry if I done anything wrong here; I didn't know." I only knew he was ordering goods there.

Q How long ago was that? A Less than two weeks.

Edwin Fay, direct—cross.

EDWIN FAY, sworn for complainant.

Direct examination by Mr. Murray.

A What is your business? A Office salesman for Wood & Selick.

10 Q What line of goods is that concern engaged in? A Eggs and confectioners' supplies.

Q Have you ever sold goods to the Goody Sweet Shop? A Yes.

Q For your concern? A Yes.

Q And when you did, with whom did you deal? A Mr. Nickolopoulos.

Q Did you ever deal with anyone else? A Except on one occasion, a phone order was given by someone else, that I recall; just that one.

20 Q Mr. Nickolopoulos, then, so far as you were concerned, did all the buying from your concern? A Yes.

Cross examination by Mr. Conlon.

Q What is your position with the concern? A Office salesman.

Q What do you mean by that? A I am in the office taking care of these customers that come in or call up.

30 Q You don't go out of the office? A No.

Q You only take care of the telephone orders? A As they come in.

Q That is what you mean? A Yes.

Q The sales were made over the telephone? A Yes.

Q Do you know Mr. Beck connected with your concern? A Yes.

Q He is salesman in this district? A Yes.

40 Q He sells to the Goody Sweet Shop? A Recently.

Gus Poulis, direct.

Q You don't know who he deals with? A No.

Re-direct examination by Mr. Murray.

Q Did you ever get written orders? A No.

Q When they order by telephone, do they follow it up by a written order? A No. 10

GUS POULIS, sworn for complainant.

Direct examination by Mr. Murray.

Q What is your business? A Confectioner.

Q In business for yourself? A Yes.

Q Where? A I have a place at 361 South Orange avenue and one on Springfield avenue, 20 194.

Q Do you know George Ferris? A Yes.

Q Just answer this question Yes or No. Sometime in 1925 did you see and talk to Mr. Ferris? A Yes.

Q About when was it? A It was in the summer of 1923.

Q Do you remember about the month? A I made a mistake; it was during 1926.

Q What month; do you remember? A It was 30 between May and August, because I left the place in August, so I can recall it was a month or two, what I recall.

Q Don't answer this question until the Court rules on it. What did Mr. Ferris say to you when you met him at that time?

Mr. Conlon: I object. Ferris at that time parted with his interest in this corporation. 40

Gus Poulis, direct.

The Court: He is one of the defendants to the suit; I will admit it.

Mr. Conlon: Ferris is in Greece, and at that time he had parted with his interest in the company, and there is no relief prayed against Ferris.

10 The Court: Why was he made a party?

Mr. Murray: One of the conspirators against whom we ask relief, as one of the parties who perpetrated, if there was anything that he could do, to—

The Court: His answer may bind him, but I won't admit it for the purpose of binding anybody else. I won't consider it. If it is an admission on his part, I am perfectly willing to admit it as far as binding him is concerned, but I won't admit it for the purpose of binding someone else, unless the others were there.

20

Mr. Murray: My theory is that it would bind the predecessor of his stock, not the other defendants, being an admission by Ferris, who was the former owner of his stock.

The Court: It won't be binding on him unless he knew of it.

30

Mr. Murray: Suppose I ask this question, and then the Court can rule.

Q Will you tell me what Mr. Ferris said to you when you met him? A I had several conversations with Mr. Ferris and went over this matter. I only had one conversation.

Q This was in 1926? Are you sure of the year? Think a moment and get the year correct.

40

A It was the year that I went in business; I

Gus Poulis, direct.

went in business in August, 1925; it was 1925; it is my mistake.

Q Are you friends of any of Nickolopoulos?

A I know Mr. Nickolopoulos, yes.

Q Are you a relative of his? A No.

Q Ever had any business dealings with him?

A Not until recently.

10

Q What is the nature of your business dealings now? A I bought the store off him, one of the stores I own.

Q You own one of his stores? A Yes.

Q It was 1925? A Yes.

Mr. Murray: That brings it before the sale.

The Court: He said about two months before August, when he went in business.

20

Q What did Mr. Ferris say to you? A It was at the place where I was working—that is 583 Broad street; it used to be the Sweet Shop.

Q Another Sweet Shop? A Yes; I was in charge of the fountain and he roomed there and he was visiting the place often, once every two weeks or every month, and we had different conversation over business.

30

The Court: Cut out all that and tell us what he said about this matter.

A (Continuing.) I asked him how many were in the corporation of the Goody Sweet Shop; he told me there were four of them. So we were talking along from that, and he said each one had twenty-five shares in the place, each partner, but he said "The only difference is that Mr. Nickolopoulos—we gave Mr. Nickolopoulos the voting

40

Thomas Sofos, direct.

power of fifty per cent, but now," he said, "we repent for giving it to him, and we will find a way to eliminate it off him."

Q Is that all he said? A Yes.

Cross examination by Mr. Conlon.

10

Q Do you owe Mr. Nickolopoulos any money?

A I paid Mr. Nickolopoulos monthly notes.

Q You are now paying him monthly notes?

A Yes.

Q You bought a store from him? A Yes.

Q When? A It was February, 1926.

Q You are still paying for it? A Yes.

Re-direct examination by Mr. Murray.

20

Q Any of your notes in arrears? Are you behind in any of your notes? A No, sir; they are all paid but the last one.

THOMAS SOFOS, sworn for complainant.

Direct examination by Mr. Murray.

30

Q You were a candy maker in the Goody Sweet Shop at one time? A Yes.

Q Are you still there? A No.

Q Where are you now? A I work for someone else.

Q Do you work for Nickolopoulos now? A No.

Q Or any of his relatives? A I work no place now.

Q When did you leave the Sweet Shop? A A year ago.

40

Thomas Sofos, cross.

Q What month? A The day we have the trouble.

Q What trouble? A On account of that trouble.

Q What trouble? A The time they got the signatures I went.

10

Q You left then? A Yes.

Q Up to the time you left how often was Nickolopoulos there in the Goody Sweet Shop? A Before or after?

Q Before you left; while you were there. A Before, he used to come three or four times a week.

Q How long was he usually there? A Between two and three hours.

Q How long was he there when he did come? A He stayed about two or three hours. Sometimes one hour. He come down and look at the store; a lot of times he ask me how much we need, and look if we have stock in the store.

20

Cross examination by Mr. Conlon.

Q Where did you make the candy? A I made it in the back room and afterward moved downstairs.

Q You were downstairs making candy? A Yes.

30

Q You were discharged by Mike Nickolopoulos? A I help him one or two hours in the kitchen.

Q He discharged you, or Kypros fired you? A No.

Q Why did you quit? A Mike refuse to give me the help I want.

Q Did you spend all your time in the cellar making candy?

40

Thomas Sofos, re-direct.

Re-direct examination by Mr. Murray.

Q Where did you keep the stock? A Downstairs.

Q Where you were? A Yes.

10 Q Did Nickolopoulos come down there? A Yes.

Mr. Murray: We rest.

May I ask counsel to state at this time whether his defense is based on a reformation of this instrument of June 9th, voting agreement? The reason I ask counsel questions are in along that line and there is nothing in the answer containing prayer for reformation.

20 The Court: I didn't hear him say anything about reformation. You are not asking for reformation?

Mr. Conlon: No. It is for the Court to consider the agreement. I understand you may go into the intention of the parties where the agreement may be ambiguous.

30 The Court: I don't see anything ambiguous about it on the face of it. What have you to say to this? Where general terms are used, isn't it to be considered to be general? If it was intended to be specific—a security for the mortgage, shouldn't the parties have said so? If it was intended to be security for both mortgage and stock, the words which were used are appropriate.

40 Mr. Conlon: I think if it were intended to be general, it should have said so. This bill is in effect filed to specifically perform this agreement.

Motion to Amend Answer.

The Court: I think you had better go ahead with your testimony and leave the question of argument to afterwards, as to the legal effect of the agreement.

Mr. Murray: I think my position will have to be this, that inasmuch as the agreement speaks for itself, the testimony to show the intention of the parties is inadmissible. I have been trying this on the theory that there will be a bill for reformation. I cannot see how evidence extraneous of the agreement is possibly admissible on any theory except a reformation, because the agreement speaks for itself. It is not ambiguous on its face, and I do not see how any outside evidence is admissible, and if counsel wants to put in a bill for reformation, on his side, I have no objection to his amending his papers right now and trying the case on that basis.

Mr. Conlon: I make the request that we be allowed at a future time to file an amended answer by way of cross bill to reform this agreement, so that the word "protection" applies to the mortgage alone by the complainant to the corporation.

30 The Court: You make a motion now to amend your answer by annexing a cross bill praying a reformation of the contract to specify particularly that the fifty per cent voting agreement was made as security for the loan only, the \$10,000 mortgage as additional security for that amount, and that was to terminate upon the payment of the mortgage. You don't object to the amendment, and the amendment will be allowed.

Angelo Sarantis, direct.

ANGELO SARANTIS, sworn for defendants.

Direct examination by Mr. Conlon.

Q What is your name? A Angelo Sarantis.

Q How long did you work in Newark? A
10 Sixteen years.

Q And how long did you work for Bam-
berger? A A little over seven years.

Q When? A Up to 1922—from 1915 up to
1922.

Q What were you doing in Bamberger's when
you left? A I was clerk for a buyer for a little
over two years and then I was promoted to a
buyer.

Q What were you doing when you left Bam-
20 berger? A Mr. Kypros and Mr. Ferris—

Q What was your position in Bamberger's?
A Buyer.

Q In what department? A In soda, candy
and restaurant.

Q And where did you go from Bamberger's?
A We went to White Plains, New York.

Q Who went with you? A Mr. Kypros, Mr.
Ferris and Mr. Papatheodore.

Q You opened a store there? A No, we
30 bought the place already open.

Q How long did you run it? A Practically
five months.

Q What did you pay for it? A We paid
\$9,500.

Q You said it for how much? A For \$14,000.

Q You then came back to Newark? A Yes.

Q And when you came back to Newark, what
did you plan to do? A Our plans was to look
for a place in the City of Newark, as we had con-
40 fidence in knowing many people.

Angelo Sarantis, direct.

Q Did you look for a place? A I did.

Q And did you find a place? A I did.

Q Where was the place? A At the present
place where we are now.

Q Up to the time you found that place had
you talked to Mr. Nickolopoulos? A No, sir,
not until three or four weeks after we met him
10 accidentally.

Q When you met him you had a conversation
with him? A Yes.

Q Who was present? A Mr. Ferris and my-
self.

Q What did he say to you and you to him? A
He asked us what we were doing and I immediate-
ly told him that we were about to start business
in the City of Newark, and his answer was, and
this was at the end of 1922, in December some-
20 time—his answer was that conditions were not
quite right, and he advised us to be very careful,
but he said, "Come up to the store and see me
anyway." I knew Mr. Nickolopoulos.

Q Anything said on that occasion about his
going in with you? A Absolutely not, until we
went up to the store.

Q When did you go up to the store? A I
cannot say that; we went immediately. We
talked it over with Mr. Ferris and Mr. Kypros
and we went up there, whether the same night or
30 night after; we were not doing anything at that
time.

Q You had a conversation then with him? A
Yes.

Q What did he say to you and you to him?
A We started to talk, a long story about it,
and we told him how much money we had and he
said, "Well, I don't think that the money that
you boys have is sufficient," and of course we
40

Angelo Sarantis, direct.

never broached—we didn't have the nerve to approach—if he will loan us money; we never went to him for any money. In fact, I was promised by Schwartz & Son that I could go in business and they would be willing, also the Haussling Manufacturing Company, that they would back us.

10 Q What did Nickolopoulos say to you about going in business with him? A He asked us how much money we had; we told him, and he said, "I will loan you the money and we will go in business together."

Q Did he say what he would loan you? A He said all that is necessary.

20 Q What happened? A We immediately went up to the Washington Realty Company and we closed the deal,—Mr. Noble, and myself and Mr. Kypros. Before that Mr. Noble had to know who the four of us were, and the first one that he inquired about was Mr. Nickolopoulos.

Q Did you close a deal for the lease? A Yes, Mr. Ferris gave him the check, the first deposit, out of my money.

Q And then when did you form the corporation? A It was in Mr. Bernstein's office.

30 Q How long after the lease was signed? A I should think it was a few days after.

Q How did Mr. Bernstein get into the transaction? A It was just because the deal was closed through the Washington Realty Company that Mr. Bernstein happened to be there; we never knew him before.

Q Did he represent the Washington Realty Company? A That is it.

Q Did you know Mr. Bernstein before that? A I never met the gentleman.

40 Q And he incorporated you? A Yes.

Angelo Sarantis, direct.

Q Where were the incorporation papers signed? A They were signed right there in Bernstein's office.

Q Who was there? A The four of us, Mr. Bernstein and perhaps a couple of clerks, which I cannot recall.

10 Q By "the four of us", you mean Nickolopoulos and you and Mr. Ferris? A Yes, and Mr. Kypros.

Q Was there any conversation on that day as to Nickolopoulos having fifty per cent voting power in the corporation? A Is this the first—

Q The day you incorporated the company? A No.

Q Had anything been said to that effect up to that time? A No.

20 Q After you incorporated the company, did you go to Mr. Bernstein's office? A Yes, we did.

Q And you signed the agreement? A Yes.

Q I show you Exhibit C. 2 and ask you if that is the agreement you signed? A That is right.

Q Where was that signed? A This was signed in Mr. Bernstein's office.

Q Was Mr. Nickolopoulos there? A Yes.

30 Q Was there anything said on that occasion about his having fifty per cent voting power in the corporation? A We did not say anything.

Q Did you sign another agreement in Mr. Bernstein's office? A I believe I signed something, but we were too excited.

Q I show you Exhibit C. 4 and ask you if you remember signing that in Mr. Bernstein's office? Look at the signature. Was this signed in Bernstein's office? A Yes. I cannot recall this, whether signed there or at Mr. Bobker's; it was signed, I think, to my estimation, in Bernstein's office.

Angelo Sarantis, direct.

Q Did you meet Mr. Bobker before June 9?
A No, sir.

Q Do you remember whether or not on April 27, when this agreement was signed, wherever it may have been signed, whether or not there was anything said about Nickolopoulos having a fifty
10 per cent vote in the corporation? A No.

Q Do you remember signing a chattel mortgage; do you remember when that was signed?
A I should think it was signed around the month of May, or something like that, in between this month.

Q And that chattel mortgage was later on executed, was it not? A Yes.

Q Why?

20 The Court: That was cancelled and a new one given.

Q The first mortgage was cancelled and a new one given? A Yes.

Q Why? A Mr. Nickolopoulos called our attention that we had to go back to Mr. Bernstein's office, because the papers or mortgages were not drawn right, so we went back the next morning. He spoke to us sometime in the afternoon, and the next morning we went to Bernstein's office.
30

Q You went to Bernstein's office the next morning? A Yes.

Q That was when you met Mr. Bobker? A Yes.

Q You remember that date? A No, not the exact date.

Q If I show you the agreement, will that refresh your recollection? Is that the agreement you signed on that day (Exhibit C. 6)? A I should think this was signed about two weeks
40 before.

Angelo Sarantis, direct.

Q Look at the date of the agreement and see if that refreshes your recollection. A June, 1923; that is right.

Q Was the second chattel mortgage executed the same day? A The very same day.

Q Where? A We started at Bernstein's office—we couldn't seem to agree upon it, and Mr. Nickolopoulos and Mr. Bobker—
10

Q Where was it signed? A It was signed in Mr. Bobker's office.

Q Up to June 9th had you heard anything said by anybody in reference to Nickolopoulos having a fifty or fifty-one per cent voting power in the corporation? A No, sir, I did not.

Q When was the first time that you heard that question raised? A When we were asked the second time to come up and sign different
20 papers that were to be drawn the second time for the mortgage, that was the time I heard about it.

Q That is the time you are talking about now? A Yes, June 9th.

Q How far had you gone in the preparation of the business—opening the business? A It was really practically everything completed to start the business, but some little details kept us back. We opened the business about three weeks
30 after.

Q How many of the fixtures did you have in the store? A We had practically everything.

Q How much money had you and Ferris and Mike put in? A We put in all the money we had.

Q How much? A Approximately \$3,800, \$3,700 or \$3,800.

Mr. Murray: Among the three of you?

The Witness: Yes, beside Mr. Nickolopoulos.
40

Angelo Sarantis, direct.

Q You say you went to Mr. Bernstein's office on June 9th, at Mr. Nickolopoulos' request? A Yes.

Q And with whom did you go there? A With Mr. Ferris and Mr. Kypros and myself.

Q Who was there when you got there? A
10 When I got there Mr. Nickolopoulos—no, Mr. Bernstein and a couple of other clerks.

Q Did Mr. Nickolopoulos come in? A With Mr. Bobker—no, he come in with his nephew and then he called Mr. Bobker on the telephone.

Q You had a conversation at that time? A Yes.

Q What was the conversation about? A About the papers were not drawn right, and Mr. Nickolopoulos wanted to make new papers, and they also brought up the point which we didn't
20 understand well.

Q What was that? A The point was the fifty-one per cent power, which I didn't even think about until Mr. Ferris objected to—

Q Did Mr. Ferris object to it? A He objected to it.

Q What did you say about it? A I couldn't say anything; I said, "The best thing for us to do is to see if we can find another lawyer and get the thing straight." We thought that it was
30 between the lawyers, that they were working the thing up.

Q Was there anything said there as to the purpose in giving Nickolopoulos his fifty or fifty-one per cent. vote? A It was because—I think—

Mr. Murray: I think he should state what was said.

The Court: What was said?
40

Angelo Sarantis, direct.

The Witness: It was said—it was mentioned among Mr. Nickolopoulos and the two lawyers that we should give him the fifty per cent voting power for loaning us the \$10,000 for the business.

Q Do you remember how long the first chattel mortgage was to run? A A month period, something like that. 10

Q Do you remember how long the second chattel mortgage was to run? A Eighteen months; we finally got it to run that long.

Q What did you do when this discussion started in Bernstein's office? A Mr. Bobker and Mr. Nickolopoulos they walked downstairs.

Q Did you sign any agreement before they walked downstairs? A No. 20

Q Did you agree to anything before they walked downstairs? A No, it was all broken up.

Q Then what did you do? A Then Ferris, Kypros and myself, we went down, and Mr. Bobker said that when you boys make up your mind and decide to do what is right, you may come to my office at such a place. In an hour we followed.

Q Did you go to his office? A Yes.

Q What did you do there? A Then I was to do whatever they asked me to. 30

Q What was that? A That we should be—that we should give Mr. Nickolopoulos fifty per cent of the voting power.

Q For how long? A That was brought up and everybody said that it was until you pay your debts.

Q What do you mean "everybody said"; who said it? A Those and my partners, that is Kypros and Ferris. 40

Angelo Sarantis, direct.

Q What do you mean by "those"? Who said it? A It was—I heard it there, someone said it, I don't know who it was exactly, whether Mr. Nickolopoulos or Bobker or Bernstein; I cannot recall.

Q And then you signed the agreement? A Yes. 10

Q Did you sign the chattel mortgage? A Yes.

Q And then you started in business? A Yes.

Q How much salary did you draw? A Fifteen a week.

Q That was in accordance with your agreement? A Yes.

Q How much time were you putting in the business? A From eight and nine in the morning until the latest up until twelve at night.

Q And you paid Mr. Nickolopoulos the \$10,000 that he advanced? A We did. 20

Q Pay him interest on his money? A We did.

Q Who has been conducting that business? A The three of us. Mr. Nickolopoulos did part of it, and he didn't do what he was supposed to do.

Mr. Murray: I object to that.

30 *Examination by the Court.*

Q Tell us what he did, what Mr. Nickolopoulos did? A For instance, he would go to New York, and if he needs stuff for his other store, which he has, and he probably will order some stuff for us without knowing if we need it or not. Even at that, we kept it, as long as he ordered it, until the time we found out that the stuff that he was ordering wasn't satisfactory, 40 and naturally we told him about it.

Angelo Sarantis, direct.

Q Who did the buying? A Well, I have—I can prove—

Q Who did the buying; did he do it or you do it? A He did it.

Q All of it? A Seventy-five per cent.

Q What was Mr. Nickolopoulos supposed to do? A He was supposed to do all the buying. 10

Q Why didn't he; do you know? A Because—there is stuff that has to be—that has to be bought two or three times a day, such as eggs, butter and meat and different things, going to the market and so forth.

Q Why didn't he buy those? A He never did.

Q Why? A Because he said that—he agree with us that he is not able to devote all his time to the business, that he is doing all he can. 20

Q You knew he wasn't going to devote all his time? A Yes.

Q It wasn't expected of him? A It was expected, that is why—

Q You had it in your agreement that he wasn't supposed to put in all his time? A It was expected that he would help us. He said he would devote part of his time, in the agreement, to us, but he didn't do it. 30

Q Wasn't he there at all? A No, sir.

Q Not at all? A He was there two hours a week, three at the very most.

Q Three hours a week. How many times a week? A I have the record; every Wednesday and every Sunday he would come in for an hour to take the money, and that is all.

Q That was from the time of your starting in business until the present time? A Until the present time. 40

Angelo Sarantis, direct.

Q Do you remember when the suit was started in this case? A Yes; it was started on June 17th, I believe.

Q Did Mr. Nickolopoulos come into the store oftener or less before the suit than after? A He come in after the suit for about a week or
10 two weeks more than he ever did before, for practically—

Further direct examination by Mr. Conlon.

Q Since then for the last year? A For the last year he did for a week; he come in for maybe an hour or two hours practically every day, for a week, since June 17, 1926; but after that he is doing the same thing that he was doing
20 before.

Q And did you at my request keep a record of the time that he spent there? A I did.

Q And have you that record? A Yes. This is in his own handwriting.

Q You say this book is in his own handwriting? A Yes.

Q What are the entries in this book? A Every time he comes in the store and he takes the money he has to mark it down how much money he has taken.

Q Did he do that every time he came into the store? A No. That is whenever he did come in there three or four times, which is an average of twice a week.

Q Whenever he did come into the store, he took the money? A Yes.

Q Does this book contain an entry on every day that he came into the store? (Showing witness another book.) A This book—

Q What is that book? A It shows the number of hours he was in there.
40

Angelo Sarantis, direct.

Q Who kept this book? A I kept it.

Q What hours were you in the store? A Fourteen hours a day.

Q Will you refer to this book, this last book you produce, and tell me if you have tabulated the number of hours that he spent in the store since last June? A Yes, I did it; so it would
10 be practical and easily to go over this.

Q You did that at my request? A Yes.

Q How many days did you keep track of the total number of days? A The total number of days since June 17, 1926, this Monday is 335 days.

Q Out of how many of those days was he in the store? A He was 102 days present; out of the 335 he was present 102 days.
20

Q How long did he stay there on each day? A I have 95 days one hour per day; seven days, two hours per day.

Q Was he ever more than two hours? A No, sir; I have proof that he wasn't.

Q Do you remember when George Ferris sold his stock? A Yes.

Q Were you present on the ninth when that agreement was signed—the offer was signed? A That was the day—it was in the afternoon.
30

Q What time? A Between five and six.

Q Who was there? A Mr. Ferris, Mr. Nickolopoulos and Mr. Kypros.

Q What was said? A After they had this signed?

Q Before they had signed, what was said; what did Ferris say? A He said that he show us the paper; that is all he said. But previous to that he was sick and tired to be in the business, and he said, "I want to sell my share."
40

Angelo Sarantis, direct.

Q Was Nickolopoulos present on those occasions? A Oh, yes, a number of times. He begged him to stay and he told him, "You had better—you will get over this."

Q How much was Ferris drawing at that time? A \$15 a week.

10 Q Had Nickolopoulos been paid in full for his debt? A Yes.

Q At the time this offer was signed, what was said by Ferris or Nickolopoulos or anybody else? A There was nothing said.

Q You mean there was no conversation at all? A We simply thought that he was—felt like was getting cold; we couldn't say nothing. I tried to make him change his opinion, but he said, "Nothing doing," as he had a right—that he didn't like the idea that Mr. Nickolopoulos was use us, and on the other hand he felt kind of—he said he want to go on the other side to see his people.

Q He wanted to go to Greece? A Yes.

Q Did you have any conversation with Nickolopoulos after that offer was signed, about the corporation buying Ferris' stock? A The four of us together.

30 Q Where was that conversation had? A In the store.

Q How long after the offer was made? A Approximately between eighty and eighty-five days.

Q What was said then? A It was said that—Mr. Nickolopoulos said the same as I did, and Kypros said the same thing as he did, so Ferris finally made up his mind and he wants to go, and immediately we were looking at each other, what we were going to do. Mr. Nickolopoulos said that—"I suggest that we buy George Fer-

40

Angelo Sarantis, direct.

ris' share," and I immediately answered, without thinking anything of the amount; I wasn't in a position to buy his share, except I approximately estimate what his share would be worth, and I couldn't very well do it. So I said that "I am not in a position to buy this share, but if you two wish to buy his share, you can do it." 10 Mr. Kypros also said the same thing, that he didn't care to buy it. Then the thing was left to Mr. Nickolopoulos and I made this remark, "Why don't you buy it? You have plenty of money, and all we want is to put a man in his place. That is all."

Q In Ferris' place? A Yes.

Q Then what happened? A Then everything was left right there, with the understanding—perhaps everybody surmised that the next day we will forget all about it. 20

Q What eventually happened? A A couple of days later, Mr. Ferris come up to me, smiling, and he said to me, "I wonder if you boys will object if I tell you that Mike the chef, he has my shares." Well, we were delighted to hear that.

Q Mike, the chef, is Pappatheodore? A Yes. We were delighted, and immediately called Mr. Nickolopoulos and told him about it. Mr. Pappatheodore called Mr. Nickolopoulos and told him he had bought out Ferris, and I don't know if he notify him through a lawyer or what. 30

Q Do you know how much Pappatheodore paid for Ferris' stock? A The whole total is \$11,000.

Q Did he pay that in cash? A He paid that—at first I think he paid \$6,500 and Mr. Ferris— 40

Angelo Sarantis, cross.

Q Who? A Mr. Pappatheodore—\$500, and the balance was to be in two notes, in July and August.

Q Did Ferris ever tell you that he had changed his mind and wouldn't sell his stock?

A No, he wanted to retire from the business altogether. 10

Q Did you ever tell Nickolopoulos that Ferris had changed his mind and was not going to sell his stock? A No.

Q Did you ever hear Nickolopoulos make that statement? A No.

Q Did Nickolopoulos ever tell you that Ferris made such a statement? A No, sir.

Q Did you and Ferris and Pappatheodore and Kypros, or any of you, ever scheme and conspire together to cheat Nickolopoulos? A No, sir. 20

Cross examination by Mr. Murray.

Q You said that when you went to Mr. Bernstein's office to sign the corporation papers, you were too excited; what did you mean by that; too excited about what? A I wasn't a bit excited. Pardon me, but among the Greeks, one was talking Greek and the other English, and that caused a lot of excitement. 30

Q You were not excited; the others were? A I was in a way, because I knew there was something to happen, because I put in a lot of money. I had an idea now that perhaps I wouldn't have anything left, and everything would go—

Q To what? A If we don't come to some kind of an agreement.

Q In regard to what? A What they were talking about. 40

Angelo Sarantis, cross.

Q They were talking about what at that time?

A Mr. Nickolopoulos told us the previous day that the papers were not drawn right, and we should come up there, and we thought that it was something wrong.

Q And Mr. Bernstein told you that something was wrong? A He did not tell me that. 10

Q Mr. Bobker did? A Sure, he told us.

Mr. Murray: I think this is confusing the witness. It is admitted Bobker was not there on that day.

The Court: He is talking about the time when they were in Bernstein's office to re-execute some papers.

Q Mr. Bobker told you there was something wrong with the papers? A He didn't tell it to me. He said it to Mr. Nickolopoulos. 20

Q You heard him? A Yes.

Q Did Mr. Nickolopoulos, in your hearing, or Mr. Bobker say what was wrong with the papers? A Yes.

Q What did they say? A They said that that mortgage was due and we have to give the money. I understood that we have to give the money in another month. I said, "That is impossible; we cannot do that. That is why you are up here now, to fix the thing up." 30

Q What else was said? A Then they told us about that we have to sign these papers, and Mr. Ferris was the first one, he is pretty smart, and he looked the thing up, and he didn't like the way about the fifty per cent. power or fifty-one.

Q This was in Bernstein's office? A Yes. 40

Angelo Sarantis, cross.

Q You say they looked at the papers? And said they didn't like the idea of a fifty-one per cent. agreement? A That was said.

Q And Ferris said he didn't like the idea of fifty-one per cent. agreement? A Yes.

10 Q And did Ferris say that he wouldn't sign it; that he would quit rather than sign it? A Yes.

Q He said he would get out? A He said he will quit.

Q Did Nickolopoulos say that he would quit if it wasn't signed? A Mr. Nickolopoulos said everything will go to pieces. That is when I commenced to think of my little money that I had.

20 Q Nickolopoulos said that if the agreement wasn't signed, that he would quit, is that right? A He said he wasn't going to help us or give us any money, and that was the time that I felt excited.

Q You had signed this lease personally? A Yes.

Q You had put in—the three of you had put in all the money you had? A Yes.

30 Q And so then you thought if Ferris backed out or if Nickolopoulos backed out, that the whole thing would go up in smoke, and you would lose all you put in? A Yes.

Q The reason you signed the voting agreement was not because you wanted to, but because you felt that if you didn't, the whole project would fall? A Naturally, I was compelled to do anything then.

40 Q Now, then, before you signed it, did Nickolopoulos or Ferris express his views of this proposed fifty per cent. voting agreement? A We all did.

Angelo Sarantis, cross.

Q You all sided with Ferris except Nickolopoulos? A No, we didn't side, but among themselves; we thought there was something wrong there and we wanted to go out and get another lawyer.

10 Q Mr. Nickolopoulos wanted fifty-one per cent. voting power? A Yes.

Q You thought there was something wrong about that? A Yes.

Q And you said Mr. Bobker and Mr. Bernstein went downstairs together? A Yes.

Q There had been no agreement up to that time? A No, Mr. Bobker said, "When you boys make up your mind and decide, come over to my office and we will get it straightened out.

20 Q You went over there about half an hour later? A Yes.

Q What did you do in the meantime? A We walked after them, and we were at the corner of Market and Broad for a few minutes, fifteen or twenty minutes.

Q You and Ferris and Kypros? A Yes, and Mr. Nickolopoulos' nephew.

Q Was Bernstein there? A He was at his office; we were out in the street.

30 Q You stood on the corner? A And his nephew came along and he said, "I don't think this is fair; people will be laughing at you people; you should come to some conclusion." This was his nephew who was on the stand today, and then we went to Bobker's office."

Q What were you talking about while standing on the corner? A I don't recall.

Q You were talking about the voting agreement? A I didn't even know what that meant.

40 Q They were talking about whether you should give Nickolopoulos a fifty per cent. or

Angelo Sarantis, cross.

fifty-one per cent. voting agreement or whether you should not make any agreement? A We were talking; we left the whole matter up to God, if there was anything wrong, we said, if there was anything wrong—that is what I thought at that moment. We said, “Whatever happens, it is up to God to help us.”

Q When you were standing on the corner of Market street, the three of you, you didn't talk about whether you should give this agreement to Nickolopoulos or not? A That is all there was about it.

Q That is what the talk was about when you were standing on the corner? A Yes.

Q You had left Bernstein's office, and you hadn't agreed and stopped on the corner and talked it over, and then you finally concluded you would leave it up to God and trust to luck and sign it up and take the consequences? A No, Ferris said, “If we do a thing like that, I don't think it is right, but all right, anyway we will work hard and we pay up for the store and everything will be all right.”

Q When you were talking on the corner, were you talking about fifty per cent. or fifty-one per cent. voting power to Nickolopoulos? A Nickolopoulos wasn't there.

Q Were you talking on the corner of Broad and Market street about whether he should have fifty or fifty-one per cent. agreement? A No, sir.

Q You talked about the agreement, didn't you? You talked about what you were going to do? A We were talking about what predicament we were in.

Q You said a moment ago you talked about the—Nickolopoulos' demand; you finally made

Angelo Sarantis, cross.

up your mind to agree to it; that is correct? A Yes.

Q Why did you make up your mind to agree to, fifty-one per cent. or fifty per cent.? A No, fifty per cent.

Q You made up your mind to fifty per cent., because Ferris wouldn't stand for fifty-one per cent.? A Absolutely.

Q Then you went to Bobker's office? A Yes.

Q Bernstein with you? A No.

Q What happened when you got to Bobker's office? A Mr. Bobker had all the papers, practically all, ready for us to sign.

Q They had all been drawn when you got there? A Not all of them, but we had to wait a little while.

Q Then they were drawn and then what happened? A Then we signed.

Q You each got a copy? A Yes, we have.

Q You got it then, didn't you? A Yes.

Q Now, Mr. Sarantis, I understood you to say that nothing was said by any one at all about any voting agreement until a day or two before June 9th; is that right?

Mr. Conlon: I object to that; he didn't say that. The witness distinctly said there was nothing said until June 9th, at Bernstein's office.

Q Until June 9th? A That is right.

Q When you got to Bobker's office was Nickolopoulos there? A Yes.

Q Did you talk about it there? A Yes.

Q You just sat there and waited until Bobker drew the contract, and then it was signed? A Yes.

Angelo Sarantis, cross.

Q Then the only talk you ever had about this was in Bernstein's office before you went to Bobker's office? A When we got to Bobker's office, he tried to convince us and tell us that everything was all right, boys, and at that moment if I knew what this meant, I wouldn't
10 have signed it; if I knew what this fifty per cent. agreement meant.

Q When they were talking about the matter in Bernstein's office, did anybody say as to what the purpose of it was? A I understood them to say that it was for the amount of money that he was loaning us.

Q On your direct examination a moment ago I understood you to say, that you ought to give Nickolopoulos this agreement, because he had
20 loaned you \$10,000; is that right? Did you testify to that a few moments ago? A Testify to what?

Q Did you say a few moments ago that at that meeting some one said that Nickolopoulos ought to have this voting agreement because he had loaned the concern \$10,000? A Yes, that is how I understood it.

Q And he had also assisted you with advice as to how to open this thing, hadn't he? Nickolopoulos had also helped you by giving advice
30 on how to handle this proposition? A Yes.

Q He had helped you all the way through in a number of ways? A Yes.

Q You felt quite grateful to him? A Yes.

Q And you felt that because he had treated you so well that you ought to do something for him in return and give him protection? A Yes.

Q And you knew, didn't you, that if the three of you each had twenty-five votes in the corpora-
40 tion to twenty-five of Nickolopoulos, that you

Angelo Sarantis, cross.

would have him in your power so far as his stock rights were concerned, did you not? A I did not know those things.

Q You didn't know anything about it? A I didn't know there would be such a thing until we started this thing last year, that we could do such a thing, putting the man out of the
10 business.

Q When did you find that out last year? A Immediately after Ferris sold his stock to Mr. Pappatheodore.

Q You found that out right after this stock of Ferris' was sold; where did you find that out? A He told me that himself.

Q Who did? A Mr. Nickolopoulos.

Q And did Mr. Ferris say anything about it? A No, sir.
20

Q You first talked over this concern with Nickolopoulos in 1922? A Yes.

Q You went to talk it over in his store? A Yes.

Q And his nephew was there, wasn't he? A No; he met us downtown at the Prudential Building, at the Fidelity Union Trust Company.

Q After that you went to his store and talked that over with him, didn't you? A We were asked to go up and see him and then he would
30 advise us what to do.

Q And his nephew was there then, wasn't he? A At the very same day?

Q Yes. A I cannot recall that, but his nephew was waiting on the street.

Q Your lease was not signed until March? A Yes.

Q Between December and March you were up there a number of times talking to Nickolopoulos at his store about this proposition?
40 A Yes.

Angelo Sarantis, cross.

Q And did you come to an agreement on it the first day you were at the store, or did you all agree to go into it at some later time when you were at Nickolopoulos' store? A It would be agreeable when we get the proper time; when the right time was to go in the business, we
10 went.

Q In March? A Yes.

Q In the meantime you were up there a number of times talking it over? A Yes.

Q You knew that you needed a good deal more money than \$3,800 to open that? A Up until that time, until we give the money into Mr. Nickolopoulos we had a little more than that.

Q How much more did you have in December, 20 1922? A We had practically \$6,000.

Q Did you have any more than \$5,000? A Yes, more than \$5,000; it was nearly \$6,000.

Q You knew that you needed more than \$6,000 to open business? A Yes.

Q You didn't know anybody else to go to, but Nickolopoulos? A Oh, yes.

Q How much did you think you needed altogether? A According to the kind of a place that we would put up.

Q The kind of a place that you expected to put up in this 907 Broad street, how much did you think you were going to need in the way of money? A Approximately \$10,000.

Q Altogether? A Altogether.

Q You were going to get your fixtures and working capital and take care of your lease payments while repairs were going on, and that only \$10,000 would be required? A That is my way of figuring.

40

Angelo Sarantis, cross.

Q The rest of you thought you needed more?
A No, all of us; my way of figuring; we went in business before with a great deal less than that, and we figured we would have a little money and go into another business.

Q You signed the agreement on April 27th in which you said you needed \$25,000? A Yes. 10 Mr. Nickolopoulos said, if necessary, if we need \$25,000, and Mr. Burnstein he asked us approximately how much the place will cost.

Q Let me read you the part of the agreement you signed,

“And whereas, the actual capital necessary to commence business is about \$25,000; and whereas, the said Thomas K. Nickolopoulos in addition to his share of \$1,250 has 20 advanced the sum” &c.

In other words, in April you had determined already that you had to have \$25,000?

Mr. Conlon: I object, the word “capital” is used there. I think the whole agreement should be read.

The Court: This is cross examination.

30

A No.

Q You didn't know of any one except Mr. Nickolopoulos that would loan you \$10,000? A I cannot say now—yes.

Q Did you approach anybody but him? A I didn't approach any one and we were not intending to approach any one.

Q How did you come to mention it to him at all? A We met at the Prudential Building and he asked us what our intentions were, and we 40

Angelo Sarantis, cross.

told him and then he asked us to come up and see him about it. He was the one that approached us, and he told us that he will help us to any extent.

Q How did he know that you were thinking about going into this business? A Because I told him that we have the location and the store, we have the place.

Q You told him that first? A Yes.

Q What did you tell him that for? A Because we went to the Washington Realty Company and told him we were looking at a store, and the lease would expire five months after; we had to wait four months until the lease expired, in order for us to have a chance to get the lease, first of all. We knew that the store was to be rented four months after.

Q Why did you tell Nickolopoulos about it? He wasn't concerned with the Washington Realty Company? A No, but he asked me what we were doing. I didn't have to tell him, but I told him the truth what we were doing.

30

40

Angelo Sarantis, cross.

IN CHANCERY OF NEW JERSEY.

Continuation of proceedings in the above cause before Hon. Maja Leon Berry, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, on Tuesday, May 24, 1927, at 3 P. M. 10

Appearances.

Mr. Norbury C. Murray for complainant.

Mr. Joseph E. Conlon for defendants.

ANGELO SARANTIS, resumes the stand for

Further cross examination by Mr. Murray.

Q Did it make any difference to you whether you gave a fifty-one per cent. or fifty per cent. voting agreement to Mr. Nickolopoulos? A To me? 20

Q Yes. A Of course, yes.

Q How? A Well, naturally that would be an injustice, I would think.

Q How would it be unjust? A Figuring that he would have that much.

Q I am not talking about the amount of stock, but about the voting power. A Figuring that probably that he would have more vote than all of us. 30

Q That is why you objected to giving the fifty-one per cent.? Was that what you understood? A As far as I understood.

Q So that at that time you understood the effect of a stockholder having voting power in a corporation? A I didn't get the thing clear until after we already agreed. I was in such a predicament that I didn't even know what the 40

Angelo Sarantis, cross.

thing was; we simply—I myself signed, not knowing what the thing meant.

Q You knew what it contained, didn't you?

A Now I do.

Q You did then, didn't you? A I did afterwards.

10 Q You did then, didn't you, when you signed it? A Not when I signed it I didn't, because at that moment, as I said before, I couldn't even read and I couldn't even see what was in front of me.

Q You understood—you said a moment ago that you understood the difference between a fifty-one per cent. voting power and a fifty per cent.? A I stop to think myself that fifty-one leaves forty-nine, not fifty-fifty, or half and half. That is the difference, what I understood.

20 Q When you had your business in White Plains, you had a corporation to operate that business? A Yes.

Q Who was the president? A I was.

Q Who was the secretary and treasurer? A Mr. Ferris.

Q You operated that business how long? A For four and one-half months.

30 Q You gained some knowledge, did you not, in the course of running that corporation as to the effect of voting power? A We had a lawyer that took care of everything.

Q When you and Nickolopoulos and your friends agreed to form this corporation, one of you went to Mr. Bernstein and retained him to form it for you? A No, no one.

40 Q One of you went, didn't you, to him? Who talked to Mr. Bernstein about it first? A I never met Mr. Bernstein until Mr. Pappas, of the Washington Realty Company calls us and until we meet Noble.

Angelo Sarantis, cross.

Q And the next move was to get a lawyer?

A But he was right there in the room.

Q Who talked to the lawyer about forming this corporation? A Mr. Nickolopoulos and all of us together.

Q At first? A Yes.

Q You were all there together? A Yes. 10

Q You had a book with some records in, which you said was a record of times when Mr. Nickolopoulos was in the Goody Sweet Shop? A Yes (producing same). It will be hard for you to make it out. I can read them off, and I have the total here.

Q What do these crosses mean? (Indicating.)

A From the beginning crosses indicate that he was not in.

Q And the straight lines indicate when he was there? A An hour or two or three, as it is marked. 20

Q They indicate the days he was there? A Yes.

Q Why did you commence to keep this on June 16th, when you hadn't kept it before? A It was because of that complaint he made against us, that he was the whole thing in this business, and I felt bad about it, because I was there all the time from nine in the morning until twelve, and that was to my mind—I thought it was a bad remark to make, that he was there, when he wasn't, and so in order to prove this, I suggested to my lawyer, and he said yes. 30

Q You received the notice of meeting in May, did you not, from Mr. Bobker? A Yes.

Q Did you attend that meeting? A No, sir, I did not.

Q Why not? A Because Mr. Ferris was going out of the corporation, everything was all 40

Angelo Sarantis, cross.

upset; he said, "I don't have to attend," and naturally he didn't stay, as much as he should have stayed.

Q Who didn't? A Mr. Ferris. These two or three days previous to that he was pretty disgusted, especially with Mr. Nickolopoulos.

10

Mr. Murray: I ask that that be stricken out.

A (Continuing.) And these particular days he was in two or three hours, and Mr. Kypros and I could not leave the store alone at that time to attend this meeting, we say to Mr. Nickolopoulos we can have it some other time, not just now, because we didn't have any for the past four years.

20

Q At the time this Ferris stock was sold, the corporation had enough money to buy it? A I think we had. Do you want the exact amount we had?

Q Yes. A Yes, we had \$5,000 or four and one-half, approximately.

Q Nickolopoulos said he wanted the corporation to buy the stock, didn't he? A Yes, the four of us; we were together there discussing it.

30

Q Did you say you were willing to have the corporation buy Ferris' stock? A I told him yes, that he could have the preference.

Q Who objected to it? A Mike didn't object; he didn't say nothing. He wanted us to buy it and the thing was left in that manner. I said "I don't want to buy it, because I cannot afford to." I had reasons which—

Q You mean you personally? A Yes, and then Mike—Kypros, rather, he said the same thing and Mr. Nickolopoulos also answer the

40

Angelo Sarantis, re-direct.

same thing, but he suggested we should buy it, all of us, and that we should put in the money to buy it; I said I couldn't do it, as I could show why I didn't want to do it.

Re-direct examination by Mr. Conlon.

10

Q At the time that Nickolopoulos put in this agreement to put in this \$10,000, prior to that had you tried to get anybody to invest in it?

A No, we did not.

Q When you started business how much cash did you have in bank, do you remember? A When we first went out looking for a place?

Q When you started business? A When we went to White Plains?

Q When you opened the store? A We had, I think, \$5,000 in the bank balance, after June, something, in cash. 20

Q You mean the corporation? A The corporation had \$5,000 left in the bank after the business was established, that is, ready to do business.

Q And up to that time you had made no effort to get anybody else to invest? A No, sir.

Q Had you intended to get someone else to invest before Nickolopoulos had spoken to you? A Yes; if necessary, we could get money, if we need any more. 30

Q Mr. Bernstein was the attorney for the Washington Realty Company? A Yes.

Q That was the landlord of this property; they made the lease to you? A Yes.

Q You met him when you were negotiating about the lease? A Yes.

Q Had you known him before that time? A Mr. Bernstein? 40

Angelo Sarantis, re-direct.

Q Yes. A I did not, only coming into the Washington Realty Company, in the same room, but I never spoke to him until the owner consented—the landlord consented that we can sign the lease; that is when I met him.

10 Q Mr. Pappas represents the Washington Realty Company? A Yes.

Q Where is the office in reference to Bernstein's office? A Alongside.

Q Who suggested that Papatheodore buy this stock from Ferris? A I don't know.

Q When you first learned about it, what did you say to Nickolopoulos about it? A I heard it at a meeting between the four of us.

20 Q When did you first learn that Papatheodore was considering buying this stock? A Two days after the meeting we had, that I find out.

Q Did you speak to Nickolopoulos about that then? A Yes.

30 Q What did you say to him then? A I told him that it was proper for us, it will help a great deal, because we have been having a lot of trouble in getting the right kind of a man in the kitchen, and he would work harder than I would, and harder than George Ferris to keep up the business. It would be advisable to put him in as a partner. And Mr. Nickolopoulos said why we should buy it, and then if we want to sell it to him, we can sell it; that was all.

Q And Papatheodore's position was what? A Chef.

40 Q How long had he been there? A Ever since the place had been opened, a week or week and a half after.

Angelo Sarantis, re-direct.

Examination by the Court.

Q After Mr. Nickolopoulos suggested that the company buy the stock, why didn't the company buy the stock? A Your Honor, personally I couldn't buy it.

Q Not personally; I mean the company. You 10 said that Mr. Nickolopoulos suggested that the company buy the stock? A The corporation.

Q Why didn't it? A Kypros, he also refuse; I do not know his reasons.

Further re-direct examination by Mr. Conlon.

Q How much did Ferris want for his stock? A He asked \$12,000 at first.

Q How much cash did the corporation have 20 in bank? A Five thousand—four and a half or five thousand; I am not positive about that.

Mr. Murray: It could borrow money, could it not?

The Witness: Yes. Mr. Nickolopoulos offered the money, for a fact, to us, if we need it, but I told him that I couldn't afford it.

30 Q He offered to loan you the money personally? A He offered to loan it to the corporation so we can buy Ferris' stock, but I told him with my obligations to my family affairs I could not put any more debts on my shoulder. That is why I didn't want to buy it.

Emanuel J. Kypros, direct.

EMANUEL J. KYPROS, sworn for defendants.

Direct examination by Mr. Conlon.

Q You are one of the original stockholders in the Goody Sweet Shop? A Yes.

10 Q You were up at White Plains with Sarantis and Ferris? A Yes.

Q Do you remember the conversation with Nickolopoulos about his putting money into the company? A Yes.

Q Will you tell us what those conversations were, before you went to the lawyer's office, before you went to Bernstein's office? A Mr. Ferris and Mr. Sarantis, they meet Mr. Nickolopoulos on the street—I wasn't there at the time—and
20 we was looking to get a location between Branford Place and Hill street; we come up to the Washington Realty Company. They show the place where we are now, and he said to us this place will be empty about May 1st. That was before we know anything about Nickolopoulos—only Ferris and Mr. Sarantis. We was ready to get that place, and one day Ferris and Sarantis, they go up on Broad street; they come over to me and they say—

30 Q Had you met Mr. Nickolopoulos? A Yes.

Q Did you subsequently see Mr. Nickolopoulos? A I didn't see him until everything was finished.

Q Where did you see him first? A In Bernstein's office.

Q When was that; the day the corporation was formed? A The day we made the lease on the place.

40 Q That was before the corporation was formed? A Yes.

Emanuel J. Kypros, direct.

Q And did you have a conversation with Nickolopoulos at that time? A Not the first time.

Q When was the first conversation you had with him? A The time he come up in the office with Mr. Bobker.

Q I mean the first time that you spoke to Nickolopoulos about his connection with the corporation? A I didn't speak to him at all about his connection with the corporation, only Mr. Ferris, and Mr. Sarantis spoke to him. 10

Q Were you present; were you there? A I wasn't there then.

Q The first time you remember is the time that Mr. Bobker was there? A Yes.

Q Tell us what happened on that occasion; who was there, when you met him with Mr. Bobker? A I met him before, when we put the lease on the place. 20

Q Met him several other times in Bernstein's? A Yes.

Q You had some papers signed there? A Yes.

Q Was there talk going on between Ferris and Sarantis and Nickolopoulos and Bernstein? A Yes.

Q What was the conversation; what did they talk about? A I cannot recall exactly what they talked about; I cannot remember. 30

Q Do you remember when Bobker was there? A Yes.

Q Where did you see Mr. Bobker? A Up in Bernstein's office.

Q Who else was there? A William Nickolopoulos.

Q Who else? A Mr. Nickolopoulos, I, Ferris, and Mr. Sarantis. 40

Emanuel J. Kypros, direct.

Q What was the conversation at that time?

A Mr. Nickolopoulos wanted to get fifty-one per cent. out of us.

Q Had you ever heard of that proposition before? A No, sir.

10 Q And what did Sarantis and Ferris and you say about that? A Sarantis and Ferris—

Q What was said about it? A We told him we got our papers all O. K. fixed; we come here not to do any other papers, only just to fix up the mortgage.

Q The chattel mortgage? A Yes, the day it was due.

Q What did Nickolopoulos say to that? A He said, "If you don't sign this paper, I will not put my \$10,000 in there."

20 Q And what was said as to the length of time he was to have this fifty per cent. vote, if anything? A He said to us, "No, you sign this—please give me fifty per cent. vote, and it is not to be forever; until just you pay this money, the debt of the store."

Q Did you sign any agreement in Bernstein's office about that? A I cannot remember.

30 Q Do you remember whether or not you went to Bobker's office? A I remember after that we was in Bobker's office; we had an argument and after that we went to Bobker's office.

Q When you got there what did you do then? A Mr. Bobker and Nickolopoulos said, "This cannot be forever; this can only be until you pay your mortgage off."

Q Did you sign any papers there? A Yes, I did.

40 Q I show you Exhibit C. 6a; is that the paper that you signed in Mr. Bobker's office? A Yes.

Emanuel J. Kypros, direct.

Q Was there ever any intention on your part to give to Nickolopoulos a fifty per cent power of vote in this corporation as long as he held stock there? A No, sir; he never asked it before, anything like that.

10 Q Listen to the question. Did you ever have any intention to give him fifty per cent vote in this corporation as long as he held stock there? A I couldn't understand that exactly what it would mean.

Q How long did you intend at that time, that his fifty per cent vote should continue; how long was he to have the fifty per cent. vote? A Until the mortgage was paid off.

Q The mortgage is paid off? A Yes.

20 Q You remember the time when Ferris decided to sell his stock? A It was some time—I cannot recall exactly the date.

Q You remember that he did want to sell, do you? A Yes.

30 Q And did you talk it over with Nickolopoulos and Sarantis? A Nickolopoulos said if the corporation want to get Mr. Ferris' shares—I said, I don't want it for my part; we haven't enough money to buy it; we don't want to borrow any money from anybody."

Q Who bought Ferris' stock? A Mr. Papatheodore.

Q After, when you signed this agreement in Mr. Bobker's office, was Mr. Bernstein there? A No, sir.

Q Did you show that agreement to anyone before you signed it? A No, sir.

40 Q When did you first show it to anyone after you signed it? A I didn't show it; I got it in my safe.

Emanuel J. Kypros, cross.

Q Who was the first attorney who saw it after you signed it; do you remember? A I cannot remember that.

Cross examination by Mr. Murray.

10 Q After you had the argument in Bernstein's office, when Bobker was there, how long was it after that before you went to Bobker's office? A About half an hour after that.

Q You stopped on the corner of Broad and Market street with Sarantis and Ferris and Papatheodore? A No, Papatheodore wasn't there.

Q With Sarantis and Ferris, then? A Sarantis, Ferris, I and William Nickolopoulos.

20 Q A nephew of Thomas? A Yes; he told us—

Q You stopped, corner of Broad and Market street; how long did you stay there? A About fifteen minutes.

Q What did you stop there for? A We don't want to sign the papers.

30 Q What papers? A The voting paper, the fifty per cent voting. We said "All right, we will give him fifty per cent voting." He said, "This will not be forever; only until you pay the money."

Q Who said that? A William Nickolopoulos.

Q Did Ferris agree to that? A No.

Q What did Ferris say? A He said no, he wouldn't sign it.

Q Did he say why he wouldn't sign it? A No.

40 Q Did he give any reasons? A I don't recall about that.

David E. Bernstein, direct.

Re-direct examination by Mr. Conlon.

Q Who runs the business over there at the Goody Shop? A Mr. Sarantis is the manager.

Q How much time has Nickolopoulos spent there in the last year? A I cannot remember exactly, but I know he never spent in the store more than an hour and sometimes two hours, but most of the time he come there for fifteen minutes and take the money and go out. 10

Q Who does the buying? A Seventy-five per cent buying is made by Mr. Sarantis.

Q Do you do any buying? A Yes. I go sometimes in the market.

Re-cross examination by Mr. Murray.

20 Q Nickolopoulos wasn't supposed to spend all his time in the store, was he? A He was supposed to spend part of his time.

Q Did he spend more of his time there after last June than he did before? A No, sir, he spent the same time he did all the time, after the trial and before the trial.

Q You mean before the suit started? A Yes.

30 DAVID E. BERNSTEIN, sworn for defendants.

Direct examination by Mr. Conlon.

Q You were attorney for the Washington Realty Company in 1923? A Yes.

Q Did you draw the lease for the premises that are now occupied by the Goody Shop? A I would like to see it. (Witness shown lease). Yes. 40

David E. Bernstein, direct.

Q And at the time that that lease was signed, had you known any of these defendants—Saran-tis and Kypros, or any of the others? A Pre-vious to that time?

Q Yes. A I don't think so.

Q You knew the purpose for which they were
10 renting this store? A Yes.

Q You incorporated that business, did you.
A Yes.

Q Do you remember who was present—I show you the certificate of incorporation, which is in evidence—at the time the company was incor-porated? A They were all present, the uncle and the three boys.

Q You mean Mr. Nickolopoulos? A Yes, the elder Mr. Nickolopoulos.

Q You were representing all of the parties,
20 were you? A Yes.

Q Was there anything said to you by any person on the date of the execution of the lease or the day of the incorporation of the company, as to Nickolopoulos having fifty or fifty-one per cent voting power in the corporation? A No, sir.

Q I show you an agreement (Exhibit C. 2) and ask you if you drew that agreement? A Yes.

Q And do you remember whether or not that
30 was drawn on the date it bears? A It must have been either that date or very near that date.

Q The date of it is April 5, 1923? A Yes.

Q Can you tell us positively, Mr. Bernstein, whether or not anything was said to you by any of these parties, on or about that time, as to Nickolopoulos, the complainant herein, having a fifty or fifty-one per cent voting power in this company? A Absolutely not.

Q Who gave you the terms that were set forth
40 in that agreement? A They were all around

David E. Bernstein, direct.

the office at one or more times, and it was by mutual agreement with Mr. Nickolopoulos and the boys.

Q I show you agreement, Exhibit C. 4, which purports to be the agreement made by these parties, dated April 27, 1923, executed and wit-
10 nessed by you, and ask you if you remember drawing that agreement? A Yes, I remember drawing that. Yes, I remember that well now.

Q Can you tell us positively, Mr. Bernstein, whether anything was said prior or at the time of the execution of that agreement, by any of these parties, as to Mr. Nickolopoulos having fifty per cent voting power in this corporation? A Absolutely not. If you want me to explain, I can say that his protection consisted in that
20 chattel mortgage.

Q I show you Exhibit C. 5, which is a cer-tified copy of a chattel mortgage from the Goody Sweet Shop, Inc., to Thomas Nickolopoulos. Will you look at that and tell me whether you drew and executed the original of that?

The Court: Had it executed, you mean?

A My name is on there; I suppose I did. Yes, that is the first chattel mortgage that was drawn,
30 I believe.

Q I show you Exhibit C. 6, which is the second chattel mortgage, and which was recorded in the Essex County Register's Office, and now appears cancelled of record, and ask you to ex-plain to us why there were two chattel mort-
40 gages drawn in this case. A It comes back to me now. There was a chattel mortgage drawn originally for \$10,000, and it seems to me that that money was not actually advanced right in

David E. Bernstein, direct.

the beginning by Mr. Nickolopoulos, and was being advanced during the course of the alterations and completion of the building; so that I think there was some adjustment to be made at the time of the completion of the store as to the amount that was coming to him. Furthermore, 10 it came to my notice after the chattel mortgage was on record, that there had been an omission of the date through a stenographic error, and that the mortgage itself was somewhat defective. I remember writing a letter to Mr. Nickolopoulos about it, and I think perhaps to the other boys, asking them to come in, to go over the chattel mortgage, and to write up a new one, for the several reasons, that in the first place, there was a little error in the chattel mortgage; and in the 20 second place, because there was also another feature about it—the mortgage was due after a month. They were unable to agree in the beginning upon any due date, and so they finally agreed that the chattel mortgage should be temporarily drawn for \$10,000, on account of the uncertainty in the amount, and for one month.

I remember explaining, too, that there was a certain amount of danger in making the chattel mortgage due so quickly, but they explained that 30 Mr. Nickolopoulos was a sort of an uncle of theirs, and that the highest degree of confidence prevailed between the parties, and so it was agreed that it was to go through that way.

After I had written that letter about changing the chattel mortgage, they came to my office with Mr. Bobker, and Mr. Bobker injected into the situation the proposition of voting power, voting trust. After that interview they never came to my office again.

40

David E. Bernstein, direct.

Q You remember who came to the office with Mr. Bobker? A I remember the group generally; I cannot say whether one of them was missing or whether more than one was missing; I know that Mr. Nickolopoulos was there and I think Mr. Sarantis was there, and as to the others, I wouldn't be sure which one of them 10 was also there.

Q Do you remember who Mr. Bobker was representing? A He appeared to be representing Mr. Nickolopoulos.

Q Do you know whether or not they came to your office at that time in answer to your letter in reference to the chattel mortgage? A Yes, it was shortly after that. I believe it was due to that.

Q You say on that occasion they injected this 20 proposition of fifty per cent vote? A That was the first time it was ever brought up.

Q Had you ever heard anything about it before then? A I have no recollection of the matter ever having been brought up before. It is over three years—four years ago.

Q Will you tell us to the best of your recollection the proposition that was made in reference to this fifty or fifty-one per cent. vote; the purpose of it, and so forth? This is in your 30 office at the time Bobker was there? A Yes. That was when I was in the Prudential Annex. The whole thing hinged on the amount of that chattel mortgage and the necessity of protecting Mr. Nickolopoulos for the money that he had put in, in excess of what they had put in. That is my recollection of the matter.

Q Was there any agreement arrived at at your office? A I don't think there was. I don't remember it very well. Not having come 40

David E. Bernstein, cross.

to my office thereafter, the thing sort of dropped out of my mind, until very lately, when I was called up about this.

Q Did you go to Mr. Bobker's office at any time in reference to this transaction? A No, never.

10 Q I show you Exhibit C. 6a, which is the agreement of June 9, 1923, witnessed by Caroline Price; did you draw that agreement? A No.

Q Did you ever see that agreement before? A I don't think so.

Q Were you ever consulted by any of the parties as to whether it was proper for them to sign that agreement? A No; as I said before, they never came to my office after that, nor did I ever speak to them about it after that
20 interview with Mr. Bobker.

Cross examination by Mr. Murray.

Q How did you discover—who called your attention first to the defect in the chattel mortgage? A I really don't remember whether Mr. Bobker drew my attention to that, or whether my clerk did; I don't know who.

30 Q It couldn't have been Mr. Bobker, because he didn't appear on the scene until you had written to these various parties? A That is right.

Q And then called their attention to it? A It might have been when I got it back from the Register's office.

Q Your recollection isn't very clear on this as to the details? A Not to all details, no.

40 Q Then the purpose of the meeting, so far as you are concerned, was the correction of this

David E. Bernstein, cross.

chattel mortgage in the various parts which you have mentioned? A That is how the thing came up—drawing up a new chattel mortgage.

Q That was the matter that was uppermost in your mind? A Yes.

Q And that is a matter that would naturally linger in your mind the clearest? A Yes. 10

Q Did Nickolopoulos come in your office after he got your letter, after the letter had been sent to him, before he brought in Mr. Bobker? A I cannot say that whether he did or didn't.

Q Mr. Nickolopoulos has testified that he heard from you to the effect that there was a defect in the chattel mortgage and that you wanted to see him, and in response to that he went to your office, and he further testified that he asked you what the trouble with the mortgage was, and he then also asked you whether the fifty per cent. voting agreement was in the corporation papers. Does that bring anything to your mind? A I am quite sure that it wasn't anything about any fifty per cent. voting agreement at that time. 20

Q Did he come to your office before he brought Mr. Bobker and after you had sent him a letter? A I wouldn't say that he didn't, but I don't recall that particular occasion. 30

Q Then if you are not sure that he was there at all, you are not sure whether he mentioned the fifty per cent. voting power, if he was there? A I do know this, that that is a subject which I know was never brought up. Upon glancing through these papers, the thing comes back to me, and I am quite sure there never was any such intention.

Mr. Murray: I ask that that be stricken out. 40

David E. Bernstein, cross.

Q I ask you whether you can say positively that if Nickolopoulos came to your office after you sent him that letter and before he brought in Mr. Bobker, if he came during that interval, can you say whether or not he mentioned to you a fifty per cent. voting agreement or fifty-one
10 per cent. voting agreement?

Mr. Conlon: I object to the question: "if he came there, did this happen?"

The Court: It is cross examination.

A The only thing that I can answer to that is that I don't have any recollection of any matter of that sort, I mean the fifty per cent. voting or
20 fifty-one per cent. voting proposition ever having been brought up, until the end there.

Q But you are not sure but that he might have, at that time? A I say I have no recollection of having that brought up.

Q When Mr. Nickolopoulos came to your office the first time with Mr. Bobker, and mentioned this fifty per cent voting agreement, didn't they say, or didn't Mr. Nickolopoulos say or Mr. Bobker say, that the voting agreement to which they then referred, had been agreed upon long before
30 by Mr. Nickolopoulos and these present defendants? A I don't remember whether he said that.

Q Do you think you would remember if it had been said? A I don't know whether I would remember whether he said it that way.

Q At that time you were mostly concerned in ironing out the defects, and curing the defects in this mortgage which you had drawn? A Yes,
40 I think so.

David E. Bernstein, cross.

Q You were not so much concerned with this talk about the voting agreement, because you hadn't had anything to do with it? A There never had been such a matter brought up with me before.

Q You were not much interested? A I wouldn't say whether I was interested or not. At that time I felt that I represented these folks to a certain extent, and at the time that Mr. Bobker came, it seemed that he had taken over the representation of Mr. Nickolopoulos, and my recollection is that I was still in the position of acting for the three other boys, so that I think it would have interested me very much. 10

Q You were a little chagrined at finding these defects in the mortgage which you had drawn? A Naturally. 20

Q And you were concerned with getting these defects corrected more than you were with anything else? A I was very much concerned in getting them corrected, yes.

Q And most of your conversation with them was designed to effecting an agreement between them as to the maturity of the mortgage? A Maturity, and I think there was some question as to the amount. 30

Q Was there anything said as to how this voting control agreement would add anything to the protection with Nickolopoulos had under the then or the new chattel mortgage? A There probably was some conversation as to the adding of that as an added protection.

Q Was there anything said as to how that would effect any additional protection? A There probably was a great deal said about it by Mr. Bobker. 40

David E. Bernstein, cross.

Q Not "probably," to your knowledge; to your present recollection. A I have no exact recollection as to the form of the language or the manner in which it was stated. My recollection can only go generally as to the topics that were taken up. I have had a great many things
10 happen in my office since that time.

Q When you said that voting control agreement hinged on the chattel mortgage, that is a sort of a hazy recollection on your part? A The whole thing is more or less hazy in my mind, yes. There are only a few things that stand out in my recollection.

Q And those two things are that the chattel mortgage was to be corrected and that something was said about giving Nickolopoulos a voting
20 control agreement? A Yes, and that was the first time that was brought up.

Q And what the connection between them was you don't know now, if any? A Yes, I do know that the connection had to be on the topic of the protection of his money there. That was the whole reason for the chattel mortgage.

Q Who said so? A I said so.

Q You are the only one? A That is the way that the matter was brought up to me. They
30 were to be equal partners in this company, but temporarily he was financing them.

Q And had equal control? A They were to have equal control as is evidenced by the agreements that were drawn.

Q Equal partners and equal control? A Absolutely. The certificate of incorporation and the agreements drawn up clearly show that. There should not be any testimony needed on
40 that.

David E. Bernstein, cross.

Q What do you mean by "equal partners"?

A These four men were to be equal partners in this business. These three young men did not have their share to put up. He was a sort of an uncle of theirs, or a real uncle; I don't know what his relationship is, but he was there to put them into business, to assist them in going into
10 business. He was in the position of a sort of a friendly relative, putting in an additional amount, for which he was to be protected while it was being paid back to him out of the profits. The agreement very clearly brings that out, which shows the intention of the whole proposition, that in order to protect his additional moneys, which were to be paid to him out of the profits in a certain manner, he was to receive a chattel mortgage as security.
20

Q He wasn't to receive anything else as security, was he? A I don't think so; he had a one month chattel mortgage on that business.

Q Mr. Nickolopoulos didn't have over twenty-five per cent of the stock? A No; he wasn't to have any more than that.

Q And he wasn't to draw more than twenty-five per cent. of the profits, was he? A I don't think so. Not up to the point that I left this proposition.
30

Q At the time of the conference in your office when Bobker was there, did anybody say anything as to how the fifty per cent. voting control agreement would add anything to the protection which Nickolopoulos already had under his mortgage? A He might have said that; I don't know that exactly.

Q Did anybody say it? A I don't remember the exact conversation as to how it would add to it. The adding of any additional protection would help the situation, from Mr. Nickolo-
40

David E. Bernstein, re-direct.

poulos' standpoint, for the protection of his money.

Q What agreement had they reached with reference to this fifty per cent. voting matter when they left your office? A None so far as I know.

10 Q They didn't come to an agreement there?
A Oh, no.

Q The present defendants took one attitude that they wouldn't give any such agreement, and Nickolopoulos said that they ought to, didn't he?
A As far as I remember they didn't come together on the proposition.

20 Q What arrangement was reached as to who was to redraw this chattel mortgage? A I don't think there was any agreement made there; the only thing I knew, that the thing simply dropped out of my office after that point, and I never heard from them after that.

Q They had a discussion and never came back? A I don't remember anything definite having come out of it.

Re-direct examination by Mr. Conlon.

30 Q Do you know whether you drew the second chattel mortgage? A I don't think I did, no. This is dated in June; I think I was out of the transaction by that time. My name isn't on it.

Q Do you know whether or not Nickolopoulos received any notes for this indebtedness? A It is hard for me to remember that; I don't remember. I have a vague recollection that he did, but I wouldn't be sure about it.

40 Q At the time of this conference in your office, when Mr. Bobker was there, was there any agreement presented to the parties for execution? A I cannot say absolutely.

Emanuel Pappatheodore, direct.

Q Would you say that that agreement of June 9th was not presented to them? A I think this all happened before June 9th at my office.

Q Will you look at the agreement of June 9th? A I don't think I ever saw it.

Mr. Murray: What was the date of the conference at your office? 10

Witness: I cannot fix the exact date, but I am merely assuming that it was sometime in May, about the time that the first chattel mortgage expired.

Mr. Murray: I referred in the last question to the time when they had the argument and went away and Bobker was there.

Witness: Yes. 20

EMANUEL PAPPATHEODORE, sworn for defendants:

Direct examination by Mr. Conlon.

Q You are the chef in the Goody Shop? A Yes.

Q How long have you been a chef there? A I think a week or week and a half after the place opened. 30

Q You have been chef ever since? A Yes.

Q Do you remember the time that George Ferris got out of there? A Yes.

Q You were chef then? A Yes.

Q Who bought George Ferris' stock? A Myself.

Q How much did you pay for it? A \$11,000.

Q How much cash did you give him? A \$6,500, and he owed me \$500, that made \$7,000, and I paid \$4,000 in notes. 40

Emanuel Pappatheodore, cross.

Q Have you paid those notes since? A Yes.

Q Do you own that stock absolutely now? A Yes.

Q The stock is yours? A Yes.

Q The full \$11,000 has been paid? A Yes.

10 Q You had no connection with the corporation itself before that time, did you? A No.

Q Who has been running the business there the last year or two; who has been managing the business? A Sarantis.

Q How much time has Nickolopoulos been spending there? A He comes down twice a week and spends one or two hours when he comes down.

20 Q And who does the buying? A Sarantis, he does the most of the buying. Very few Mr. Nickolopoulos buy, and I do the buying in the kitchen, everything.

Q Did you know about the agreement that Ferris had with Nickolopoulos about offering the stock to the corporation and the other partners before he could sell it to a stranger? A Mr. Ferris, he told me, and he showed the paper that they signed; he gave them ninety days. If they didn't ask him to sell it to them, then he had the right.

30 Q And after that you bought it from him? A Yes.

Cross examination by Mr. Murray.

Q When did you buy it; when did you buy this stock? A I think it was the twenty-seventh of May, 1926, if I am not mistaken; sometime in May.

Q Where is your stock certificate now? Where do you keep your stock certificate now?

40 A I got it in the safe.

Emanuel Pappatheodore, cross.

Q In the store? A No, sir.

Q Your own safe? A Yes.

Q Whereabouts? A In the bank.

Q What bank? A Fidelity.

Mr. Conlon: Did you pay Ferris \$6,500 the first day, or pay a deposit at first? 10

Witness: When Mr. Ferris he transfer his stock to me, I gave him check for \$6,500.

Q You went to Mr. Nickolopoulos and asked to have this stock transferred to your name, didn't you? A Yes.

Q You gave him this paper (witness shown paper), didn't you? A Yes.

Q Was there anything said about the voting agreement then? A Yes. 20

Q About the fifty per cent. voting agreement then? A He told me, but I don't sign any agreement about the voting.

Q What did you say when he mentioned it to you? A He told me that he don't know me at all.

Q When he mentioned the voting agreement to you, what did you say to him about that? A I told him that have nothing to do with me; I don't sign no paper about the voting part of it. 30

Mr. Conlon: At the time you gave that notice, you had all of your stock?

Witness: Yes, all.

Q You said you were going to vote your twenty-five shares regardless of that agreement, didn't you? A Mr. Ferris told me that.

Q You told Mr. Nickolopoulos you were going to vote your twenty-five shares, agreement or no agreement, didn't you? A I don't understand. 40

Emanuel Pappatheodore, cross.

Q You told Mr. Nickolopoulos you were going to vote your twenty-five shares whether there was a fifty per cent. voting agreement or not, didn't you? A No.

Q What did you say about voting your stock?
A He told me he don't know me at all, and
10 that stopped the conversation. He said, "I don't know you at all; I don't know who you are."

Mr. Conlon: That is my case, except on this line of proof; I have employees from the store to show the relative amount of work that these different parties did; I also have a number of salesmen who dealt with this store, to show the conduct of the business. That testimony will take some little time. I don't feel that it is very material, except there was such testimony offered by the
20 complainant.

The Court: The agreement provided that Nickolopoulos was to spend only a portion of his time there; the others were to spend all the time there.

Mr. Conlon: The only purpose was to controvert his statement that he was the manager of the business, as he testified, and that he was running the business.
30

The Court: I don't see how that has very much bearing.

Mr. Murray: I only put it in, to avoid any possible inference to the effect that because Nickolopoulos had a fifty per cent. voting agreement, that he simply neglected the affairs of the corporation entirely. I put it in to rebut any possible inference along that line.

40 We have no rebuttal.

Complainant's Exhibits.

The Court: Mr. Murray, you may submit your brief or memorandum a week after receiving the testimony, and Mr. Conlon will have a week to reply.

Exhibit C. 1. 10

Lease.

(Summary of Pertinent Provisions)

Dated March 23, 1923.

Leased by owner to complainant and defendants, Sarantis Ferris and Kypros as individuals, "being partners" of 907-915 Broad Street, Newark, N. J. for purpose of confectionery and luncheon business from May, 1923 to May 1, 1933 for \$8500. per year payable monthly.
20

The lease contains a provision that it may be assigned to a corporation being formed by the lessees but that "the liability of the party of the second part (i. e. lessees) is to continue."

Exhibit C. 2. 30

THIS AGREEMENT made and entered into the fifth day of April, Nineteen Hundred and Twenty-three, BETWEEN: Thomas K. Nickolopoulos, party of the first part, George Ferris, party of the second part, Emanuel Kypros, party of third part, and Angelo Sarantis, party of the fourth part, all of the City of Newark, County of Essex and State of New Jersey.

WITNESSETH: WHEREAS the aforementioned parties have heretofore procured a lease for a
40

Complainant's Exhibits.

store at #907 Broad Street, Newark, New Jersey, to be used as a confectionery shop;

10 AND WHEREAS the aforementioned parties are today incorporating themselves in a body corporate under the name of the Goody Sweet Shop, Inc., for the purpose of conducting the business of manufacturing, buying and selling of confectionery, sodas, candies, etc.;

AND WHEREAS, the party of the second part, the party of the third part and the party of the fourth part are to devote their entire time in the said business and the party of the first part is to devote a part of his time to the said business.

20 NOW THEREFORE, For One Dollar and other valuable considerations, each to the other in hand paid, receipt of which is hereby acknowledged and mutual promises and covenants hereinafter set forth, it is agreed as follows:

1. The party of the first, second, third and fourth part are each to draw from the income of the business the sum of Fifteen Dollars (\$15.00) each and every week, payable on Saturday evening of each week, until all mortgages and other debts of the business are settled.

30 2. It is understood and agreed that all disbursements are to be made and checks signed by Thomas K. Nickolopoulos and Angello Sarantis.

3. It is understood and agreed that Thomas K. Nickolopoulos, party of the first part, is to loan to the corporation the amount needed for the complete setting up of the business and that he is to receive, therefore, promissory notes of the corporation and a chattel mortgage to secure the said notes covering all of the assets of the corporation including the lease. These notes and the chattel mortgage are to be executed as soon

40

Complainant's Exhibits.

as the said store is fully equipped and the amount of the said loan is determined.

4. After the commencement of business, it is understood and agreed that the party of the second part, party of the third part and party of the fourth part, are not to engage in any other line of business but will give their entire time and attention to the promotion of the welfare of the said business. 10

5. It is further understood and agreed that no shares of stock of the corporation are to be sold to any outsiders, excepting upon the following condition: The said stock shall first be offered to the corporation and to the other stockholders and the said corporation and stockholders shall have an option for a period of thirty days in which to purchase the same. If this option is not taken and the stock purchased, then the same may be sold to any outside person. The corporation shall have the first option or preference in the purchase of said stock. In the event of such a sale or attempted sale, an account and investory shall be taken of the assets of the corporation and the true value of each share shall be ascertained and the said corporation and the stock-holders or any of them, shall have the option of purchasing the said shares at the true value of the shares shall be ascertained and the said corporation and the stock-holders or any of them, shall have the option of purchasing the said shares at the true value of the shares computing the increase in the sale above the par value and the good will of the business may also be taken in consideration in estimating such sale. In the event of a dispute, a Board of Arbitration shall be appointed, consisting of three men, one man to be appointed by the proposed seller of the stock, one man to be appointed by the cor- 20 30 40

Complainant's Exhibits.

poration and these two men and these two men to employ a third man as umpire, and a majority of this board shall decide all questions as aforementioned.

6. It is further understood and agreed that an inventory and account be taken every three months and profits shall be apportioned at such times equally between the partners.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above written.

Tha. Nickolopoulos,
George Ferris,
Emanuel J. Kypros,
Angelo Sarantis.

20 Signed, Sealed and Delivered
in the presence of,

DAVID E. BERNSTEIN

Exhibit C. 3.

(Corporation Minute Book)

(Summary of Pertinent Portion of Contents)

30 1. Contains copy of certificate of incorporation of the "Goody Sweet Shop Inc." dated and acknowledged April 5, 1923, signed by complainant, George Ferris, and defendants Kypros and Serantis; by the terms of such certificate the corporation is empowered to acquire a lease on 907 Broad Street, Newark and at that address and elsewhere to operate a confectionery business, and to buy, sell and deal in merchandise of all kinds; by the terms of such certificate the

40

Complainant's Exhibits.

corporation was authorized to issue 2000 shares of common stock of a par value of \$50. each, the four incorporators subscribing for 25 shares each, the aggregate of which (\$5000.) constituted the capital with which it commenced business; the certificate of incorporation contained the followed provision.

10

"SEVENTH: The shares of stock of this corporation shall not be assignable until the share holder, desiring to dispose of the same, shall first give a written notice to the corporation that he desires to dispose of the same; and this corporation and any stock holder thereof shall have an option for a period of thirty days to purchase the same before the said stock may be assigned to any outside party."

2. The by laws provided for a board of four directors elected by the stockholders, each of whom should have one vote for each share of stock held.

20

3. The officers consisted of President, a Vice-President, a Secretary and a Treasurer, all to be "appointed" by the Board, the first two of whom should be members of the Board and the latter two who need not be; a majority of the members of the Board to constitute a quorum.

30

4. The by laws contain the following provision:

"31. Shares of the capital stock of the company shall be transferred only on the books of the company by the holder thereof in person, or by his attorney, upon surrender and cancellation of certificates for a like number of shares. The shares of stock of this corporation shall not be assignable until the share holder, desiring to dispose of the same, shall first give a written

40

Complainant's Exhibits.

notice to the corporation that he desires to dispose of the same; and this corporation and any stockholder thereof shall have an option for a period of thirty days to purchase the same before the said stock may be assigned to any outside party."

- 10 5. The minutes show that the proper organization meetings were duly held and that complainant and the defendants Ferris, Kypros and Serantis were elected directors, and that complainant was elected President, Kypros, Vice President, Ferris, Secretary and Sarantis, Treasurer (all of whom so far as the minute Book shows are still such officers and directors); that Board of Directors was authorized from time to time in its discretion to issue entire capital
20 stock of corporation and that the Board authorized the officers to issue stock certificates "of the full paid capital stock of this company to the amount of Five Thousand Dollars (\$5000.)."

Exhibit C. 4.

THIS AGREEMENT made and entered into the
30 Twenty-seventh day of April, 1923, between THOMAS K. NICKOLOPOULOS, party of the first part, GEORGE FERRIS, party of the second part, EMANUEL KYPROS, party of the third part and ANGELO SARANTIS, party of the fourth part,
all of the City of Newark, County of Essex and State of New Jersey;

40 WITNESSETH: WHEREAS the aforesaid parties have entered into an agreement heretofore to form a corporation by the name of Goody Sweet Shop, Inc.;

Complainant's Exhibits.

WHEREAS, the said corporation has been formed and each of the above parties have subscribed for twenty-five shares of a par value of Fifty Dollars (\$50.00) amounting to the sum of One Thousand Two Hundred and Fifty Dollars (\$1250.00) each or a total of Five Thousand Dollars; 10

AND WHEREAS, the actual capital necessary to commence business is about Twenty-five Thousand Dollars (\$25,000.00);

AND WHEREAS, the said THOMAS K. NICKOLOPOULOS, in addition to his share of One Thousand Two Hundred and Fifty Dollars (\$1250.00), has advanced the sum of Ten Thousand Dollars (\$10,000.00), the remaining Ten Thousand Dollars (\$10,000.00) being represented by credit given by various dealers in equipment, fixtures and stock. 20

NOW THEREFORE, in consideration of the above presents and of the sum of One Dollar, each to the other in hand paid, receipt of which is hereby acknowledged, it is agreed as follows:

1. That the amount advanced by Thomas K. Nickolopoulos, is to be repaid to him in the following manner: Each of the other three parties hereby agrees to give a personal promissory note to the said Thomas K. Nickolopoulos for one-fourth of the excess above One Thousand Two Hundred and Fifty (\$1250) which the said Thomas K. Nickolopoulos actually advanced. The said notes are each to be dated April
30 1923 and to be made payable on demand but to bear an endorsement on the back that same may not be demanded except in accordance with this agreement; said notes to bear interest at the rate of six per cent. per annum and to be made payable at the American National Bank of Newark, New Jersey. 40

Complainant's Exhibits.

2. It is understood and agreed that the said sum so advanced by Thomas K. Nickolopoulos shall be due and payable to him by each and every one of the other three parties as soon as the larger obligations to outside creditors have been paid off, such as refrigerator and L. Barth & Son; but it shall not be necessary to wait for the entire payment of the soda fountain.

3. It is understood and agreed that all of the surplus capital, except such as is absolutely necessary for the conduct of the business and the payment of current bills, shall be used in reduction of the debt of the said Thomas K. Nickolopoulos. It is further understood and agreed that the parties herein make this agreement not only as individually but as directors and stockholders of the aforesaid company and this agreement shall be binding not only upon the individual but also upon the corporation.

4. It is further understood and agreed that to secure the payment of this money the corporation will give a chattel mortgage to the said Thomas K. Nickolopoulos, covering the entire assets of the corporation, including fixtures, merchandise, equipment, good will, and all other goods and chattels owned by the corporation.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

THA. NICKOLOPOULOS (SEAL)
 GEORGE FERRIS (SEAL)
 EMANUEL J. KYPROS (SEAL)
 ANGELO SARANTIS (SEAL)

Signed, Sealed and Delivered
 in the presence of

DAVID E. BERNSTEIN.

*Complainant's Exhibits.***Exhibit C. 5.**

(Summary of chattel mortgage)

Dated (no date) made by the Goody Sweet Shop Inc. to complainant to secure payment of \$10,000. in one month with interest. It covers the lease on 907 Broad Street, the good will of the business and the mortgagor's chattels on the leased premises. It was proved before David E. Bernstein April 27, 1923, recorded in Essex County Registers office April 28, 1923; was cancelled of record February 18 1924. The consideration affidavit by complainant shows that the consideration of the mortgage was \$10,000. cash over the amount paid by him for his 25 shares of stock, advanced by him to the mortgagor "with which to enter into said business at 907 Broad Street, Newark, N. J."

Exhibit C. 6.

(Summary of chattel mortgage)

Dated; June 9, 1923, made by the Goody Sweet Shop Inc. to complainant to secure payment of \$10,000. on December 9, 1924, with interest at 6% from April 7, 1923. It covers the mortgagor's chattels at 907 Broad Street, Newark, the lease and good will and other present and after acquired assets of the mortgagor. It was proved June 9, 1923 before David Bobker and was recorded Essex County Register's office, June 11, 1923 and was cancelled of record February 2, 1926. The consideration affidavit shows that the consideration thereof was \$10,000. advanced by him to the mortgagor by way of vari-

Complainant's Exhibits.

ous payments by him on its behalf for fixtures, merchandise and other assets acquired by it (names of the recipients of such payments the several dates and amounts thereof are set forth in the mortgage and aggregate \$10,000.)

10

Exhibit C. 6a.

AGREEMENT, made this 9th day of June, 1923, between GEORGE FERRIS, EMANUEL KYPROS and ANGELO SARANTIS, all stockholders of Goody Sweet Shop, Inc., a corporation organized under the laws of the State of New Jersey, parties of the first part, and THOMAS K. NICKOLOPOULOS, party of the second part:

20

WHEREAS, parties of the first part are the holders of seventy-five shares of stock, and party of second part the holder of twenty-five shares of stock;

AND WHEREAS, it is the desire of the parties of the first part to protect party of second part so that he may have a fifty per cent vote on any and all propositions concerning the corporate business and which may be brought up at any corporate meeting:

30

NOW, THIS AGREEMENT WITNESSETH, despite any contrary provision in the certificate of incorporation or the by-laws:

Thomas K. Nickolopoulos is to be entitled to a fifty per cent. vote either at a stockholders' meeting or at a directors' meeting, in connection with any proposition or matter pertaining to the affairs of Goody Sweet Shop, Inc., and which may be brought up at any meeting of the stockholders or of the directors. The said Thomas K.

40

Complainant's Exhibits.

Nickolopoulos shall have this fifty per cent. vote despite the fact that he is only the holder of twenty-five shares of the capital stock.

This agreement is signed by the parties as individuals and also as stockholders and directors.

IN WITNESS WHEREOF, the several parties have set their hands and seals, as individuals and as stockholders and directors, the day and year first above written.

10

Name	Stockholder's Residence	No. of Shares.
GEORGE FERRIS	(SEAL)	
ANGELO SARANTIS	(SEAL)	
THA. NICKOLOPOULOS	(SEAL)	
EMANUEL J. KYPROS	(SEAL)	

Witness:

CAROLINE PREUSS.

20

Exhibit C. 7.

Exhibit C. 7—was read into the testimony by consent of counsel, due to the fact that the original could not be found—it is as follows—

See Page 62 of testimony. Newark, January 21, 1926.

30

Today, I offer, to sell my share of the Goody Sweet Shop Inc. 907 Broad Street to the corporation as our paper reads, for one month, for today start.

Then follow the signatures:

George C. Ferris

Mike Kypros

Poppatheodore

Nickolopoulos

Angeloe Serantis

40

*Complainant's Exhibits.***Exhibit C. 8.**

Newark, N. J.
May 27, 1926.

10 Goody Sweet Shop, Inc.
907 Broad Street,
Newark, N. J.

Gentlemen:

I have this day purchased the shares of stock in the above named Company from George Ferris, his certificate being #2 bearing date April 21, 1923 for 25 shares.

I have his certificate in my possession and request that you issue a new certificate to me so that I may surrender the old one.

20 EMMANUEL PAPATHEODORE.

Exhibit C. 9.

TO THE STOCKHOLDERS OF GOODY SWEET SHOP,
INC.:

30 KINDLY TAKE NOTICE that the annual meeting of the stockholders will be held at the office of David Bobker, 972 Broad Street, Newark, New Jersey, on Tuesday, May 25, 1926 at 3:30 P. M.

At said meeting, directors are to be elected, officers are to be elected and such other business is to be transacted as shall be deemed necessary.

DAVID BOBKER,
Attorney for Goody Sweet Shop, Inc.

*Complainant's Exhibits.***Exhibit C. 10.**

Newark, New Jersey,
May 27th, 1926.

Goody Sweet Shop, Inc.,
907 Broad Street,
Newark, N. J.

10

Gentlemen:

I have this day assigned to Emanuel Pappathodore all of my stock in the above named company and therefore wish to tender my resignation as Secretary, to take effect immediately.

GEORGE FERRIS.

Exhibit C. 11.

20

(Summary of complainants stock certificate)

Certificate No. 1 for 25 shares of capital stock of The Goody Sweet Shop Inc., dated April 21, 1923, in the usual form without mention of any restriction on its transfer or of any pre-emptive right thereto by the corporation except that on the face thereof there is stamped by a rubber stamp the unsigned legend "NOT Assignable except in accordance with By Laws." It was signed by complainant and by defendants Kypros, Ferris and Serantis without any designation of the capacity in which or reason why, they so signed.

30

Complainant's Exhibits.

Exhibit C. 11A.

Consists of a series of complainant's paid checks dated from April 7, 1926 to May 28, 1926 by which, in fact, complainant disbursed the proceeds of the loan of \$10,000 made by him to the corporation secured by the chattel mortgages (Exhibits C. 5 and C. 6).

10

Exhibit C. 12.

(Summary of Stock Transfer Book)

Shows nothing as it had never been written up and no entries were ever made therein.

20

Exhibit C. 13.

(Summary of Stock Certificate Book.)

By its stubs shows that on April 21, 1923 there was issued to complainant and the defendants Kypros, Serantis and Ferris twenty-five shares each of the capital stock of the corporation bearing certificate Nos. 1 to 4 both inclusive and that there were never any other certificates issued.

30

40

New Jersey Court of Errors and Appeals

THOMAS M. NICKOLOPOULOS,
Complainant-Appellant,

vs.

ANGELO SERANTIS, *et al.*,
Defendants-Respondents.

On Bill, etc.

On Appeal.

COMPLAINANT-APPELLANT'S BRIEF.

The above matter comes before this Court on appeal by complainant from decree of Court of Chancery dismissing the bill.

The bill was filed to compel specific performance of the following agreement:

"AGREEMENT, made this 9th day of June, 1923, between GEORGE FERRIS, EMANUEL KYPROS and ANGELO SARANTIS, all stockholders of Goody Sweet Shop, Inc., a corporation organized under the laws of the State of New Jersey, parties of the first part, and THOMAS K. NICKOLOPOULOS, party of the second part:

WHEREAS, parties of the first part are the holders of seventy-five shares of stock, and party of second part the holder of twenty-five shares of stock;

AND WHEREAS, it is the desire of the parties of the first part to protect party of second part so that he may have a fifty per cent. vote on any and all propositions concerning the corporate business and which may be brought up at any corporate meeting:

NOW, THIS AGREEMENT WITNESSETH, despite any contrary provision in the certificate of incorporation or the by-laws:

Thomas K. Nickolopoulos is to be entitled to a fifty per cent. vote either at a stockholders' meeting or at a directors' meeting,

in connection with any proposition or matter pertaining to the affairs of Goody Sweet Shop, Inc., and which may be brought up at any meeting of the stockholders or of the directors. The said Thomas K. Nickolopoulos shall have this fifty per cent. vote despite the fact that he is only the holder of twenty-five shares of the capital stock.

This agreement is signed by the parties as individuals and also as stockholders and directors.

IN WITNESS WHEREOF, the several parties have set their hands and seals, as individuals and as stockholders and directors, the day and year first above written."

"Name	Stockholder's Residence	No. of Shares
"GEORGE FERRIS	(SEAL)	
"ANGELO SARANTIS	(SEAL)	
"THA NICKOLOPOULOS	(SEAL)	
"EMANUEL J. KYPROS	(SEAL)"	

"Witness:
CAROLINE PREUSS."

Outline of Facts.

Complainant, and three of the defendants (Kypros, Sarantis and Ferris) formed a corporation called the Goody Sweet Shop, Inc., to conduct a luncheon and confectionery business. Each owned twenty-five (25) shares of the one hundred (100) shares of stock which comprised its capital, for which each paid twelve hundred and fifty dollars (\$1,250).

Complainant asserts and defendants deny, that from the beginning he refused to embark on the enterprise because as the three defendants were friends (two of them relatives) he would be in the position of a minority stockholder, and that they, to remove this objection, agreed that he should have a voting power equal to their com-

bined voting power (although he would hold only one-fourth ($\frac{1}{4}$) of the stock) and that he should be the President.

It was agreed that the corporation and each stockholder should have a pre-emptive right in respect to the shares of each, as against an outside purchaser thereof. This was made a part of the certificate of incorporation and by-laws (pp. 171-172).

Complainant loaned the corporation ten thousand dollars (\$10,000) with which to commence business. This was secured by a mortgage on all of the corporation's assets (Exhibit C. 5, p. 175). This was discovered to be defective and was cancelled. A new mortgage was given (Exhibit C. 6) and was paid and cancelled.

Complainant, when preparations were under way for the commencement of business, but before it had actually commenced, discovered that the lawyer (Mr. Bernstein) who had attended to the drawing of all papers had omitted the voting agreement.

Complainant then demanded that such an agreement be signed and it was signed by the three defendants. (See Exhibit C. 6a, p. 176.)

Subsequently, the defendant, Ferris, desiring to sell his stock, procured complainant's consent, with the understanding with the remaining two original stockholders and complainant that the corporation would buy his, Ferris', stock. Having obtained complainant's consent to the sale, Ferris stated that he had changed his mind and did not intend to sell. Several weeks later, Ferris, without complainant's knowledge, sold his stock to the defendant, Pappatheodore, for eleven thousand dollars (\$11,000). The latter,

it is admitted, bought with full knowledge of the voting agreement. Papatheodore then denied that he was bound by the agreement, and demanded of complainant, as President, of the corporation, that he transfer the stock on its books and he and the other defendants threatened to out-vote and oust complainant from an active participation in the affairs of the corporation and called a meeting of the stockholders (Exhibit C. 9, p. 139). Complainant refused to transfer the shares and filed his bill.

POINT I.

The voting control agreement (Exhibit C. 6a, page 176) fixes no time when it is to terminate. It is, therefore, perpetual in its operation.

Complainant contends that as the agreement was to protect him as a minority stockholder (and not as a holder of the chattel mortgage) it continues in perpetuity.

Defendants contend that the agreement was to protect him only as the holder of the chattel mortgage, and that as the chattel mortgage has been paid, the voting agreement is terminated.

Complainant seeks to enforce the agreement as written.

Defendants seek its reformation by having written into the same a clause whereby it terminates on payment of the chattel mortgage.

The rule is:

“Every contract is *prima facie*, permanent and irrevocable, and it lies on a person who says that it is revocable or determinable to show either some expression in the contract itself or something in the nature of the contract from which it is reasonably to be implied that it was not intended to be per-

manent and irrevocable but was to be in some way or other subject to determination.” (Corp. Jur. 13, p. 628. Citing *St. Barnabas Hospital v. Minn., etc., Co.*, Minn. 254, 70 N. W. 1126; 40 L. R. A. 388; *Llanelly v. Landon, etc., R. R. Co.*, L. R. 8 Ch. 942.)

“Apart from contracts, which from their inherent nature, imply a power of revocation, it would seem that the intention of the parties to an agreement, that it should be perpetual and without limit as to duration, could not be more properly expressed than by the silence as to any time limit, or power of revocation. Although there appears to be some authority to the contrary, the rule seems to be that when no limitation is expressed in the agreement, neither party can terminate it without the consent of the other, unless the nature of the contract itself indicates with sufficient clearness that the parties must have intended some other determination.” (R. C. L. 6, p. 895.) (Citing *West. Un. Tel. Co. v. Penn. Co.*, 129 Fed. 849, 64 C. C. A. 285; 68 L. R. A. 968; *McKell v. Chesapeake, etc., Co.*, 175 Fed. 329, 99 C. C. A. 109.)

The court below erroneously held (p. 40) that the burden rested on complainant to prove that the agreement was perpetual.

The very absence of a time limit makes it perpetual. The burden rested on defendants, if they would limit its duration, to marshal sufficient evidence to entitle them to have the agreement reformed. This the court below expressly held (p. 41) they failed to do.

The agreement in question must be distinguished from those contracts dealing with what is essentially a personal relationship, such as contracts of employment, of partnership and of principal and agent, and the like. This was the class of contracts to which the excerpt (Corp. Jur. 13-604-630) quoted by the Court below (on p. 42) related.

The leading cases on the subject are: *West. Un. Tel. Co. v. Penn. Co.*, 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968; *McKell v. Chesapeake Co.*, 175 Fed. 329; 99 C. C. A. 109.

In the former of those cases, the Court said, in respect to the rule of implied terminability:

"All the contracts are, so far as I know, contracts which involve more or less trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct; more or less personal relations between the parties. But I am of the opinion that no such consideration applies to a case in which there is a grant or easement in the nature of a grant, of a 'way-leave' or of running powers, which is only another mode, according to my view of it, of expressing a 'way-leave.'"

The voting control agreement in question does not involve the personal equation or any relation of trust and confidence. In fact, that agreement was born of fear and distrust by complainant of his associates, the defendants. It was in the nature of an agreement "running with" the stock. (For discussion of this phase of the matter, see Point IV.)

The voting control agreement, in its essence, is a continuing negative covenant to refrain from out-voting complainant. It is not to be confused with agreements which call for affirmative performance, such as, construction of buildings, delivery of goods, conveyance of real estate and the like. In such contracts the question arises as to when such act or acts of performance are to take place. If the time therefore is not fixed by the contract, it is necessarily assumed that the parties intended it to take place within a "reasonable time." Continuing negative cove-

nants, such as the agreement in question, stand on a wholly different footing. Performance in such cases takes the form of mere inaction or inertness. In affirmative performance contracts, the question is "when" is performance to be made. In negative continuing covenants, the question is "how long" is such inaction to continue.

To the former class the "reasonable time" doctrine is applicable and answers the question "when." To the latter class, it is inapplicable, and is no answer at all to the question "how long."

While the question was not directly passed upon, it was touched upon by this Court in the case of

Weinstein v. Sheer (98 N. J. L. 511, 120 Atl. 679).

Covenants of restriction relating to land and covenants not to engage in a given business, are familiar illustrations of continuing negative covenants. It could hardly be questioned that such covenants containing no limitation of time would be deemed perpetual.

The Court below was clearly in error in applying (p. 42) the doctrine of "reasonable time" to the contract. It reached its decision by applying that doctrine and then finding (pp. 43, 44) that the life of the chattel mortgage was the "reasonable time" for which the voting control agreement would continue.

The "reasonable time" doctrine eliminated, there is nothing short of its reformation, on which the termination of the agreement can possibly be predicated, and the Court below expressly found (pp. 40, 41) that the evidence

adduced was not sufficient to entitle the defendants to reformation. (For discussion of Reformation, see Point III.)

The Court below, at the final hearing, at conclusion of complainant's testimony on the main case (p. 112) considered the agreement perpetual, or, as the Court below expressed it, "general."

Complainant's counsel then stated that his position in the matter would be to object to all testimony as to the meaning of the agreement on the ground that there was no ambiguity therein and that such evidence would violate the parol evidence rule.

Defendants' counsel then by consent procured leave to file a cross-bill or counter-claim for reformation, and the case was continued with on that theory. It is apparent that the Court below, when it came to consider, and render a decision in, the case, after the hearing, was in error as to the application of the "reasonable time" doctrine, and that that led it to depart from its original view as to the proper construction of the agreement.

POINT II.

While not express as to its duration, the phraseology of the voting control agreement (Exhibit C. 6a, page 176) is such that it implies that it is to be of perpetual duration.

No reference is made to a mortgage. The reference is to stock.

It first recites that the parties of the first part (defendants) hold seventy-five (75) shares and that the party of the second part (complainant)

holds twenty-five (25) shares, and states as its purpose:

"To protect the party of the second part so that he may have a fifty per cent. vote on any and all propositions concerning the corporate business and which may be brought up at any corporate meeting."

The obvious intent was to prevent him from being out-voted. Following as it does the recital as to the disparity between the parties as to stock ownership and consequent voting power, the word "protect" obviously relates to and is designed to remove that disparity.

It provides that it shall operate in respect to "*any and all* propositions concerning the corporate business and which may be brought up at *any* corporate meeting." (Italics ours.)

Those expressions convey clearly the thought of permanence. This Court held *Breiner v. Marshall*, 19 N. J. Eq. 537, that a covenant not to dig "any marl" was "general both as to time, place and persons" (p. 547). If there was any doubt before, it is removed by the clause "The said Thomas K. Nickolopoulos shall have this fifty per cent. vote despite the fact that he is only the holder of twenty-five shares of the capital stock."

The purpose of the agreement is thereby expressly stated. The disparity of voting power, which the agreement was aimed at is a permanent condition. The agreement which remedies it must, therefore, be deemed to be equally permanent.

The silence of the agreement as to a time limit speaks as loudly and eloquently as words that the parties intended it to be perpetual. It is not uncertain or ambiguous in its meaning.

The Court below (p. 44) said in effect that to enforce the agreement would be to make an entire new agreement for the parties and that it could not do. We submit that it did that very thing when it read into the agreement a time limit, *i. e.* date of payment of the mortgage and in so doing it was in error.

(*Kuppersmith v. Del. Ins. Co.*, 84 N. J. L. 271 at p. 1912):

"The law will not make a better contract for the parties than they themselves have seen fit to enter into, or alter it for the benefit of one party, and to the detriment of the other. The judicial function of a court of law is to enforce a contract as it is written."

POINT III.

The preponderance of the evidence showed that the voting control agreement (Exhibit C. 6a) page 176) was intended by all as a permanent protection to complainant against being out-voted in the corporate affairs by the defendants.

Erroneously conceiving that the burden of establishing the permanent character of the agreement rested on complainant, the Court below found that he did not sustain that burden.

Properly conceiving that the burden of establishing to the point of certainty the defendants' alleged right to reformation rested on defendants, the Court below properly found that they failed to sustain that burden.

The rule as to the circumstances under and proof on which reformation will be granted is:

"The doctrine that a contract or deed will not be reformed for mistake, in the absence of fraud or imposition, unless the mistake was mutual, that is, reciprocal and common to both parties, where each alike was under

the same misconception as to the terms of the written instrument, is the settled doctrine of Courts of Equity.

"Courts of Equity do not grant the high remedy of reformation upon a probability; nor even upon the mere preponderance of evidence, but only upon a certainty of error."

Giammares v. Allemannia Fire Ins. Co., *et. al.*, Errors and Appeals 1919, 108 Atl. 237 at p. 239 (91 N. J. Eq. 114).

An analysis, weighing and balancing of the testimony shows that not only did the defendants fail to establish their case to a certainty and beyond a doubt, but the complainant has actually established his version of the matter by a great preponderance of the evidence.

Complainant says that he is a man of upwards of forty-eight years and of wide business experience, and that when the matter was first talked over, was operating three confectionery stores, and that he was worth in the neighborhood of two hundred thousand dollars (\$200,000) and in the enjoyment of considerable business credit (pp. 51, 52, 99, 101, 103); that defendants were fairly young men of practically no experience, possessed of no business credit and of little cash; the defendants admit that they did not have over six thousand dollars (\$6,000) among them in December, 1922, which had dwindled to three thousand, eight hundred dollars (\$3,800) by March or June of 1923 (pp. 114, 119, 136, 142); that the defendants called complainant "Uncle" in recognition of his superior age, ability and business experience (p. 85). The testimony of Noble, Sobel, Fox and Gottschalk shows that it was because of complainant's connection with the concern that credit was extended to it.

Defendants do not deny any of those facts, except that they claimed to have had considerable business experience. It was developed on cross examination, that such experience consisted of some experience in Bamberger's, in connection with the soda-water-candy-lunch department, and five months' operation of a restaurant in White Plains (p. 114). Complainant says that the defendants approached him (pp. 52, 53, 69, 70) and urged him to join them, and that the matter was talked over many times before he agreed to do so; this is corroborated (p. 85) by complainant's nephew, William Nickolopoulos, who was the manager of the store where these talks were held. Defendants deny this and say that complainant urged them to take him into the enterprise (pp. 115, 116, 135).

It is impossible to believe that defendants' version on that point is correct, in view of the fact that they, in their own agreements, admitted that the concern needed twenty-five thousand dollars (\$25,000) in order to open, and that they had something less than six thousand dollars (\$6,000) all told.

In further corroboration of complainant's version on this point, we call attention to the fact that the first agreement (Exhibit C. 2) expressly provided that complainant was not to give his entire time to the business, while the defendants expressly or impliedly, were bound to do so.

Complainant says that in the course of the first discussion of the proposition, that complainant demanded (pp. 52, 53) and William Nickolopoulos (p. 86) says that the defendants offered, as one of the inducements to complainant, a 50% voting agreement.

The defendant Sarantis says (pp. 119, 133) that the subject of such agreement was never brought up by any one until June 9, 1923. The defendant Kypros says it was brought up for the first time on the day of Mr. Bobker's visit (Bobker was complainant's counsel) to Mr. Bernstein's office (Bernstein incorporated the company) (p. 148); Mr. Bernstein says that the first he heard of such agreement was on the day of Bobker's visit to his office (p. 154). In this conflicting state of the testimony, we have three outstanding facts which tend strongly to prove, as a matter of probability, the truth of complainant's statements:

1. Ordinary business prudence, born of his experience, required that with a minority stockholding, he, complainant, have adequate protection, in some form, against being ousted by a combination of the defendants, and
2. Complainant, of large financial responsibility, *was personally liable on the lease for the rent* (see lease Exhibit C. 1), which responsibility, in the terms of dollars, amounted to eighty-five thousand dollars (\$85,000).
3. The voting control agreement could add nothing to the security afforded to complainant by the mortgage as it covered all of the corporate assets. It could and did, however, very effectually protect him as a minority stockholder.

We now come to the circumstances which led directly up to the signing of the voting control agreement.

Complainant says (pp. 57, 75) that Bernstein called him to his office on June 8th (the day before the agreement was signed) and explained

that the mortgage was defective and that it would be necessary to redraw it, and that he, complainant, finding that the mortgage was defective, felt that (p. 77) "he could not trust Bernstein any more" and (p. 58) "I cannot depend on Bernstein any more," and that he retained Mr. Bobker to represent him. Bernstein is not certain (p. 157) whether complainant called on him before Bobker was retained or not. Sarantis (p. 129) admits that complainant told him on June 8th what he had learned from Bernstein that the mortgage was defective, but insists that the meeting was not until next day. Complainant says (p. 76) that on June 8th, when Bernstein mentioned to him the matter of the mortgage, that he at once asked Bernstein whether the 50% agreement was in the corporation papers.

The fact that the 50% agreement was not in the original papers, is accounted for by the fact that some of the defendants gave Mr. Bernstein the instructions regarding the organization of the company, and that the complainant trusted the matter to them and Mr. Bernstein (pp. 54, 76).

All agreed that on June 9th the three defendants (the original stockholders) complainant, the latter's nephew and Mr. Bobker, met in Mr. Bernstein's office.

As to what happened at that meeting, complainant testifies as follows (pp. 58, 76):

That he told Bernstein (pp. 15, 16) in the presence of the others, that the mortgage was defective, and "that the papers were not right like we agreed before," and that he asked Bobker "if there is any fifty per cent. control in the papers," and that Bobker had told him that

there was none, and complainant says that the defendants present then told him "You don't need it, the fifty per cent.; we will treat you right and we will not do no crooked business; we act on the level, you not need it, the fifty per cent; control," and that he, complainant, insisted on it as he "needed protection" and reminded them "that is the talk we have from the beginning because you are too good friends." Complainant denies that he made any threats as to what he would do if the agreement was not signed, except the remark "we not start business," hereinafter mentioned, and that they finally agreed to the 50% voting agreement; that it was drawn by Mr. Bobker and signed in the latter's office. On cross examination (p. 76) complainant said that "we not start business; I see some tricks, so I endeavor to have it fifty-one; they don't want to give it to me; they say 'all right, we give you fifty.'" Complainant further says that voting agreement was not mentioned in connection with the mortgage, and that he was satisfied with the mortgage as the only security so far as the ten thousand dollars (\$10,000) was concerned (p. 78).

William Nickolopoulos says of this occurrence (pp. 86, 87, 88) that they had an argument of about one and a half hours in length, in Bernstein's office, regarding the voting agreement; that Bobker left before the matter was settled, and that complainant said he wanted the agreement because "you fellows are all like good friends and like brothers; how do I know what will happen tomorrow." William Nickolopoulos denies that anything was said to the effect that the purpose of the agreement was to furnish further security for the loan, and also denies that complainant threatened to quit if the agreement was not made.

Mr. Bobker says (pp. 91 and 92) that when complainant came to him, he, at the request of complainant, looked through the papers and found that there was no voting agreement contained therein; that (p. 92) he told Bernstein and the others, that the mortgage was defective, and that because the original understanding between the parties in regard to the voting agreement had been overlooked by some one (pp. 93, 94, 96) that it ought to be reduced to writing; that complainant then wanted a 51% voting agreement, and that he, Bobker, suggested that the original agreement should be adhered to; that they finally compromised on the 50% agreement. Bobker positively denies that that agreement had anything to do with the ten thousand dollar (\$10,000) loan (p. 98) and says that he told them (p. 94) "that this 50% voting agreement was there for his protection as a minority stockholder"; that they did not object to the 50%, but did object to the 51% voting agreement (p. 59) and that they each received a copy of the agreement as signed (p. 97). Admitted by Sarantis (p. 133).

The defendants' version, and particularly that of Sarantis, comes very close to admitting Bobker's version. Sarantis says (p. 121) "it was mentioned * * * that we should give him the 50% voting power for loaning us the ten thousand dollars (\$10,000) for the business," and again (p. 134):

"Q He had helped you all the way through in a number of ways? A Yes.

Q You felt quite grateful to him? A Yes.

Q And you felt that because he had treated you so well that you ought to do something for him in return and give him protection? A Yes."

Sarantis admits throughout his testimony that there was considerable debate as to whether the voting agreement should be signed. He says (p. 120) "The point was the 51% power, *which I didn't even think about until Mr. Ferris objected to * * **" (P. 100) "that Ferris did not like the 51% agreement, and that he would quit rather than sign it, and that Nickolopoulos said 'everything would go to pieces,'" and that (p. 130):

"Q *And so you thought if Ferris backed out or if Nickolopoulos backed out, that the whole thing would go up in smoke, and you would lose all you put in?* A Yes.

Q *The reason you signed the voting agreement was not because you wanted to, but because you felt that if you did not the whole project would fail?* A *Naturally I was compelled to do anything then."*

That was the conclusion which Sarantis and the other two defendants had reached after having stood on the corner of Broad and Market streets talking the matter over for fifteen or twenty minutes after having left Bernstein's office (p. 131)!!!

Sarantis further says (pp. 133, 139) that he made up his mind to sign a fifty, but not a fifty-one per cent. agreement, and that he felt that he was in a "predicament," and that (p. 132) "we left the whole matter up to God, we said if there was anything wrong—that is what I thought at that moment—we said whatever happens it is up to God to help us."

While Sarantis tries to make it appear that he did not understand what he was doing, it is apparent from his testimony that in fact he did understand thoroughly. He testifies (p. 139):

"Q Did it make any difference to you whether you gave a 51% or a 50% voting

agreement to Mr. Nickolopoulos? A To me?

Q Yes. A Of course, yes.

Q How? A Well, naturally, that would be an injustice I would think.

Q How would it be unjust? A Figuring that he would have that much.

Q I am not talking about the amount of stock, but about the voting power? A Figuring that probably that he would have more vote than all of us.

Q That is why you objected to giving the fifty-one per cent.? Was that what you understood? A As far as I understood."

and (p. 140):

"I stop to think myself that fifty-one leaves forty-nine, not fifty-fifty, or half and half. That is the difference, what I understood."

Sarantis also admitted (p. 140) that he had been president of the defendants' corporation in White Plains.

It is inconceivable that all of the possible pros and cons and legal effect of such an agreement were not discussed at length in the hour and a half debate in Bernstein's office and the fifteen or twenty minutes spent by the defendants on the corner of Broad and Market streets on the way to Bobker's office to sign the agreement.

Bernstein's testimony as to whether or not the voting agreement was connected with the mortgage, is flatly contradictory to that of Bobker. Bernstein's recollection is to be greatly discounted because he says (p. 156): " * * * the thing sort of dropped out of my mind, until very lately, when I was called up about this." He could not remember (p. 158) whether Bobker said that the voting agreement had been previously agreed to or not, and when asked (pp.

159, 160) as to whether anything was said as to how the voting agreement would add anything to the protection, in respect to the ten thousand dollar (\$10,000) loan, afforded complainant by the mortgage, he at first said "probably" and when finally pinned down, said "I have no exact recollection as to the form of the language or the manner in which it was stated. *My recollection can only go generally as to the topics that were taken up.* I have had a great many things happen in my office since that time."

"Q When you said that voting control agreement hinged on the chattel mortgage, that is a sort of hazy recollection on your part? A *The whole thing is more or less hazy in my mind, yes.* There are only a few things that stand out in my recollection."

Mr. Bernstein's testimony is unconsciously colored by his very evident desire to assist the defendants. He says, (p. 160): "Yes, I do know that the connection *had* to be on the topic of the protection of his money there." That is clearly a conclusion on Mr. Bernstein's part. He admits (pp. 158, 159) that he was chagrined at finding the mortgage which he had drawn defective, and that he was "mostly concerned in ironing out the defects and curing the defects in this mortgage."

"Q And most of your conversation with them was designed to effect an agreement between them as to the maturity of the mortgage? A Maturity, and I think there was some question as to the amount."

Kypros' (p. 148) testimony is extremely illuminating, because of an unconscious admission. He testified (p. 148) (referring to the voting agreement):

"Q And what did Sarantis and Ferris and you say about that? A Sarantis and Ferris?

Q What was said about it? A *We told him we got our papers all O. K. fixed; we come here not to do any other papers, only just to fix up the mortgage.*

Q The chattel mortgage? A Yes, the day it was due."

That shows conclusively that Kypros understood perfectly that the voting agreement was something outside of, in addition to and independent of the mortgage transaction.

As to the circumstances, under which the voting agreement was signed, we have the probable and reasonable testimony of the complainant, which was not thrown in doubt in the least by cross examination, corroborated by William Nickolopoulos and explained in detail, clearly, reasonably and positively by Mr. Bobker. Opposed to that, we have the testimony of Sarantis, with his damaging admissions, Bernstein with his "hazy recollection" and Kypros with his admitted understanding that the voting agreement was something outside and independent of the mortgage.

There is a very strong piece of circumstantial evidence to explain away, and no attempt was made by the defendants so to do, namely:

As each of the three defendants had a copy of the agreement, and the defendant, Pappatheodore, was informed of it when he bought Ferris' stock, why did the three defendants wait three years before raising the question which they now raise, in regard to it, in view of the fact that each of them admitted was given a copy thereof immediately upon its execution?

We now come to the circumstances relating to the sale of Ferris' stock. That is important. First, because it shows a scheme to evade the voting agreement, with a view to ousting com-

plainant, and secondly, because it explains why the defendants kept silent for three years before raising any question as to the purpose of the voting agreement. We contend that the explanation is that they did not have any idea that they could evade the voting agreement or the effect thereof, until Ferris talked about selling his stock, and then it occurred to them that by so doing, they could, through the intervention of Pappatheodore, defeat the operation of the agreement.

As to the circumstances surrounding the sale of Ferris' stock:

Complainant says (p. 61) that in January, 1926, he had a meeting with three of the defendants and that Ferris stated that he, Ferris, couldn't agree with Kypros and wanted to sell his stock, and that (p. 62) he promised to sell them to the corporation, and that when complainant signed, they agreed to get together later and have the corporation buy the stock; that (pp. 62, 84, 78) within a day or two later, he asked them about it and they told him that Ferris had changed his mind and did not intend to sell and that (p. 62) the next he heard of the matter was when Pappatheodore appeared with the formal notice (Exhibit C. 8) on May 27th, stating that he had purchased the stock. He denied (p. 79) that he knew that Pappatheodore intended to buy the stock.

Sarantis admits (pp. 127, 142, 145) that Nickolopoulos wanted the corporation to buy the stock, and that complainant even went so far as to offer to loan the corporation enough money to enable it to do so. Sarantis is contradictory as to his reasons as to why the corporation did not buy it. At first (p. 127) he said that he wasn't

in a financial position to do so. (In fact, that was no reason at all, in view of the fact that complainant offered to advance the money.) He next gave as the reason (p. 127) that they wanted a man in Ferris' place, (it is significant that Sarantis inferentially admits that as complainant testified, the first that complainant knew of this was when "Mr. Pappatheodore called Mr. Nickolopoulos and told him *he had bought out Ferris and I don't know if he notify him through a lawyer or not.*") ; then he says: (p. 142) that he, Sarantis, was willing to have the corporation buy the stock, that Kypros didn't object and that Kypros didn't wish to buy it personally, and finally, failed to give a direct, or in fact any, answer to the very pointed question by the court below (p. 145): "Why didn't it?" (meaning why didn't the corporation buy the stock.) "Kypros he also refuse; I do not know his reasons," and finally (p. 145) that his reason for not having the corporation buy it was "my obligations to my family I could not put any more debts on my shoulders."

Whatever the reasons, the fact stands out strongly, that complainant wanted the corporation to buy the stock and that the defendants refused or failed to agree to it and permitted, if they did not actively connive at its sale to Pappatheodore.

It is difficult indeed, under the circumstances, to believe that the sale to Pappatheodore was primarily actuated by the desire to have him a member of the concern. We contend that the ulterior motive in effecting such sale was the intent to evade the voting agreement, which they thought it would accomplish, as was the thought in Ferris' mind, at least, when he remarked (pp. 109, 110) "We will find a way to eliminate him." Their idea that they could evade the agreement through the sale to Pappatheodore, is clearly

shown by the latter's remark (p. 165) "I told him that *i. e.*, the voting agreement) have nothing to do with me; I don't sign the paper about the voting part of it."

Pappatheodore says (p. 164) that he bought the stock in May, 1926; this corroborates complainant's statement that that was the first he heard of the matter after the matter of the sale was first broached in January. It was also corroborated by Sarantis himself when he said (p. 126) that the talk about the corporation buying the stock was eighty or eighty-five days after the offer, January 21, 1926 (p. 62), was made. The sale to Pappatheodore must have been after that.

It is very apparent that having received complainant's waiver (p. 62) defendants by dragging, or letting the matter drag along several months, lulled complainant into a false sense of security, and then without notice suddenly sprang on him the sale to Pappatheodore, whereupon, thinking their purpose accomplished, Sarantis said (p. 63) "You lose your voting control and he (Sarantis) be president."

We contend that the great preponderance of both the direct and the circumstantial evidence favors the conclusion that all parties knew when they signed the voting agreement exactly what they were doing and its legal effect.

Whatever view may be taken as to the *defendants'* intentions and understandings, there is absolutely no doubt but that the *complainant* understood and intended to have the voting agreement, as it does in fact, run perpetually. Moreover, he has acted on the agreement as drawn, for upwards of three years, and in that time has changed his position so that he cannot be restored to *status quo ante*. In view of that, it

would be a monstrous thing now, at this late date, to take away from him the protection which the voting agreement gives him as a minority stockholder, and place him at the mercy of the defendants. A somewhat analogous situation existed in *First Pres. Church v. State Bank*, 57 N. J. L. 27, affirmed 58 N. J. L. 406. The Court said:

“The contract may or may not have been a wise one for the bank to make, but the illustration I have given shows that, having made it, every consideration points to its enforcement in favor of the party who in reliance upon it, has at all times been in the full execution of it.”

The retention of the voting agreement in its present form, will serve to afford complainant and the defendants only the protection which in right they ought to have. All other considerations aside, such a balancing of the equities renders it imperative that the defendants claim for reformation be denied.

POINT IV.

The voting control agreement binds the defendant Pappatheodore, who although not a party to it, bought his stock with full knowledge of its existence.

It is admitted the defendant, Pappatheodore (p. 47), bought his shares of stock from the defendant, Ferris, with full knowledge of the voting control agreement which Ferris had entered into with complainant, and the other defendants with respect to it. Pappatheodore is, therefore, bound by it.

The rule is clearly laid down in Pomeroy's *Equity Jurisprudence*, Volume 2, second Ed., Sect. 688, p. 958:

“The third, and in its practical effects by far the most important, rule is that a party

taking with notice of an equity takes subject to the equity. The full meaning of this most just rule is, that the purchaser of an estate or interest, legal or equitable, even for a valuable consideration, with notice of any existing equitable estate, interest, claim, or right, in or to the same subject-matter, held by a third person, is liable in equity to the same extent and in the same manner as the person from whom he made the purchase; his conscience is equally bound with that of his vendor, and he acquires only what his vendor can honestly transfer. The applications of this rule are as numerous as are the various kinds of equitable interests.”

Murphy, et al. v. Christian Press Ass'n Pub. Co., (Supreme Court of New York, Appellate Division, 1899. 38 App. Div. 426; 56 N. Y. Supp. 597).

“The agreement on the part of the defendant's predecessor in title, though technically a personal one, related to the use of its property, the copyrights, and the plates, and obligated all who might acquire that property with notice of the agreement. This is the settled doctrine of the Court of Appeals where the agreement relates to real estate. *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335; *Lewis v. Gollner*, 129 N. Y. 227, 29 N. E. 81. We can see no reason why the same rule should not apply in the case of personal property, nor are we wanting in authority to sustain the proposition. *New York Bank Note Co. v. Hamilton Bank Note & Printing Co.*, 83 Hun. 593, 31 N. Y. Supp. 1060; *Id.*, 28 App. Div. 411, 50 N. Y. Supp. 1093; *Littlefield v. Perry*, 21 Wall. 205.”

Conclusion.

For the reasons discussed in the four foregoing points, we respectfully submit that the decision and decree of the court below should be reversed

and vacated, and that the court below should be directed to enter a decree pursuant to the prayer of complainant's bill.

Respectfully submitted,

BURNETT & MURRAY,
Solicitors for and of Counsel
with Appellant.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THOMAS M. NICKOLOPOULOS, <i>Complainant-Appellant,</i>	}	<i>On Bill, etc.</i> <i>On Appeal.</i>
<i>vs,</i>		
ANGELO SARANTIS, <i>et al.,</i> <i>Defendants-Respondents.</i>		

DEFENDANTS-RESPONDENTS' BRIEF.

The above matter comes before this Court on appeal by complainant from decree of Court of Chancery dismissing the bill.

Outline of Facts.

Defendants (Kypros, Sarantis and Ferris) having been successful in conducting a luncheon and confectionery business in White Plains, N. Y., desired to open a place in Newark, N. J. They found a suitable location at 907 Broad street. Complainant was admitted and a corporation formed called the Goody Sweet Shop, Inc., and complainant was elected president. Each owned twenty-five (25) shares of the one hundred (100) shares of stock which comprised its capital for which each paid twelve hundred and fifty dollars (\$1,250).

It was agreed that the corporation and each stockholder should have a preemptive right in respect to the shares of each, as against an outside purchaser thereof. This was made a part of the certificate of incorporation and by-laws (Case, pp. 171-172).

Complainant loaned the corporation ten thousand dollars (\$10,000) with which to commence

business. This was secured by a mortgage on all of the corporation's assets (Exhibit C. 5, p. 175). This was discovered to be defective and was cancelled. A new mortgage was given (Exhibit C. 6, p. 175) and was paid and cancelled.

At the time the new mortgage (Exhibit C. 6) was prepared for execution, defendants assert and the complainant denies, that the complainant then insisted that defendants execute a voting agreement whereby he would have a voting power equal to their combined voting power, although he would hold only one-fourth ($\frac{1}{4}$) of the stock, as security for his loan.

Defendants desirous of protecting complainant on his chattel mortgage (Exhibit C. 6) did then execute such agreement (Exhibit C. 6A, p. 176).

Subsequently, the defendant, Ferris, desiring to sell his stock, procured the consent of the other shareholders (including complainant, Exhibit C. 7, p. 177). Ferris then waited for the corporation, or any or all of the remaining shareholders to exercise their right of option to purchase said stock, but they failed to do so. He then on May 27, 1926, three (3) months after the optional period expired, sold said stock to the restaurant's chef, one Emanuel Papatheodore for \$11,000. Papatheodore thereupon gave complainant notice of said purchase and requested that a new certificate be issued. (Exhibit C. 8, p. 178.)

Complainant refused to transfer the shares and filed his bill, requesting this Court to declare that the voting agreement (Exhibit C. 6A, p. 176) is to exist perpetually.

Defendants contend that the legal and equitable construction of this agreement was that the vot-

ing agreement was collateral security for the loan, and should continue in effect only and so long as the chattel mortgage for \$10,000 held by the complainant or any part thereof should remain unpaid, and that this mortgage having been paid in full the voting agreement terminated.

The Court below found, in effect, that the voting agreement was entered into by the parties as further security to the complainant for his loan of \$10,000 and that upon repayment of this loan in full on February 2, 1926, this agreement terminated and the bill was dismissed.

Grounds Stated in Bill of Complaint for Relief Prayed.

Before entering into argument of the law it would seem that attention should be called to the ten following allegations in the bill upon which relief was sought and upon which a restraining order was granted against the defendants:

1. "The complainant * * * has a credit standing which enabled said lessees to procure said lease without any deposit or other security" (Case, p. 11, l. 21).

Morton C. Noble, renting agent for the landlord, called by the complainant as a witness testified that he never refused a lease to the defendants and never even investigated them (Case, p. 51, ll. 1-12).

2. "That none of said parties (defendants) had any experience in said business, except as employees at a soda water fountain and except as proprietors of a restaurant which they had operated unsuccessfully for a short time" (Case, p. 11, l. 23).

The testimony was uncontradicted that Serantis had been head buyer in the soda, candy and restaurant (soda shop) for L. Bamberger & Co.

in Newark and that he and the other defendants had bought a store in White Plains, New York, for \$9,500 and sold it within five months for \$14,000 (Case, p. 114, ll. 1-35).

3. "That none of said other parties except complainant had any credit standing whatever" (Case, p. 11, l. 28).

In this respect the learned Vice-Chancellor said "It does not matter that the complainant is of greater financial responsibility than the others—it is not shown that they have none" (Case, p. 43, l. 25).

4. "Since the formation of said corporation, complainant has been the active business manager thereof, the others acting as salesmen behind the counter" (Case, p. 11, l. 30).

Sarantis testified that complainant did practically nothing in connection with the actual conduct of the business. He kept a record of complainant's attendance from June 17, 1926, to the day of the hearing (May 18, 1927). There were 335 days. Complainant appeared at the place of business on 102 days. On 95 days he stayed one hour and on 7 days he stayed 2 hours (Case, p. 124, l. 1 & *seq.*). During those hours he admitted that he sometimes had lunch (Case, p. 68, l. 22).

5. "That * * * unless he had a voting control" he might not only lose "what monies he invested therein, but also might subject himself to a heavy liability on account of his being personally liable on the lease" (Case, p. 12, l. 1).

It is an uncontradicted fact that Ferris, like complainant, invested \$1,250 in the business. Shortly before the filing of the bill Ferris sold his stock to Papatheodore for \$11,000.

As to the lease, the learned Vice-Chancellor said, "There is no reason for greater security to

the complainant as a stockholder on account of the lease than the others had, nor does it appear that the lease is a liability at all; indeed, it is argued by the defendants that it is a valuable asset" (Case, p. 43, l. 30).

6. "That early in the year 1926, said other parties, acting in concert, at about midnight, together with the defendant, Emanuel Papatheodore, procured from complainant, when he was not sure what he was doing, his signature"—to Exhibit C. 7 (Case, p. 12, l. 18).

In this respect the learned Vice-Chancellor said: "The bill alleges that complainant's signature was obtained by subterfuge and while he was "not himself"; and the complainant, by his testimony, sought to lead the Court to believe that at the time he signed the paper he was under the influence of liquor. **THERE IS NOTHING TO SUPPORT SUCH AN ALLEGATION OR INFERENCE**" (Case, p. 39, l. 25).

7. "Complainant charges that the defendants schemed together and conspired from the very inception of said company, &c.," to avoid the voting agreement (Case, p. 13, l. 27).

8. That defendant Papatheodore "later on entered into said scheme and conspiracy," &c., to obtain complainant's consent to the sale of Ferris stock for the purpose of avoiding the voting agreement (Case, p. 13, l. 36).

9. That "the defendants will be able to appropriate to themselves the cash intake of said business and thereby deprive the corporation thereof without the knowledge of the complainant" (Case, p. 14, l. 26).

10. "Complainant charges the fact to be that the defendants intend to use the corporation as an instrument with which to defraud the complainant of his interests in the business" (Case, p. 14, l. 29).

In respect to these last four allegations the Court's attention is respectfully called to the following question and answer in the cross examination of the complainant (Case, p. 79, l. 38):

Q I want to read you a part of a paragraph in your affidavit that you filed in this case: "The corporation business is wholly cash over the counter, and as a result, if I am not at the store during business hours, and the defendants are there, they can take whatever incoming cash they see fit, without any record of it being kept, and I will know nothing of it. The defendants have not the brains necessary to run the business at a profit, and if they oust me my interest in the business is wholly at the defendants' mercy." I want to ask you to tell me one thing that Sarantis, Kypros or Papatheodore has done in that business that in your opinion has been dishonest, which led you not to trust them. Tell me one thing they have done. A I trust them.

It is submitted that by reason of the untrue, unfair and dishonest allegations contained in the complainant's bill of complaint, it is clear that the bill was not filed in good faith and therefore, should be dismissed.

POINT I.

Complainant's contention that as the voting control agreement (Exhibit C. 6A, p. 176) fixes no time when it is to terminate it is, therefore perpetual in its operation, is contrary to the very principles of equity.

This Court in *International Radio Tel. Co. v. Marconi W. Tel. Co.*, 90 N. J. Equity 271, affirming *International Signal Company v. Marconi & Co. of Amer.*, 89 N. J. Equity 319, held:

"In construing a contract the cardinal rule is to ascertain the intention of the

parties. If the intention is doubtful or obscure, the most fair and reasonable construction, imposing the least hardship on either of the contracting parties, should be adopted."

Corp. Juris 13, page 604, par. 630.

"But a construction conferring a right in perpetuity will be avoided unless compelled by the unequivocal language of the contract, which involves the imposing of trust and confidence in the parties and hence involve the element of mutual satisfaction are held from their inherent nature to imply that they are terminable."

Complainant in his brief cites the following cases:

St. Barnabas Hospital v. Minn., etc. Co., 68 Minn. 254, 70 N. W. 1126:

"The defendant took one of its employees, who had been seriously injured, to plaintiff hospital, and at its request and upon its promise to pay for his care and treatment the plaintiff accepted and received him as a patient for an indefinite period, no length of time being mentioned. Subsequently, and while the patient was yet incapable of being removed or discharged from the hospital without great danger to his life or health, the defendant gave notice that thereafter it would not be responsible for his care or treatment.

Held: that defendant had no right to thus terminate its liability; that, under the circumstances, it was an implied condition of the contract that the defendant could only terminate it by removing the patient or when he could be dismissed by the plaintiff without serious danger to his life or health."

Llanelly v. London, etc. R. R. Co., L. R. 8 Ch. 942.

"A contract was made between two railroad companies for giving to one of them running power over the lines of the other,

and making permanent provisions for the exercise of such power, but without mentioning any limit of time or any mode of terminating the power, and it was held that, considering the perpetuity of the legal personality of the contracting parties and of the subject matter, the contract must have an indefinite duration, according to the *prima facie* construction of its terms and that there was no implied condition to terminate it by notice or otherwise."

The above cases do not help the complainant's point, as the Court did not decide the contracts upon their express terms, but took all the surrounding circumstances into consideration to decide when the contracts shall terminate.

In *Maddock & Co. v. Biardot*, 81 N. J. Equity 233, at page 236, Chancellor Walker cites *Bache v. Central Leather Co.*, 78 N. J. Equity 484, wherein Vice-Chancellor Howell, at page 486, says:

"I am of the opinion that it is unlawful, and a gross violation of the public policy of this state, to permit or contract for a separation of the voting power of corporate stock from its ownership."

Since the agreement was silent as to its duration, the burden of proof is on the complainant to show that his construction of the agreement is correct (Case, p. 40, l. 28) and the Court must look into the surrounding circumstances to see if such construction is warranted by the real intention of the parties.

"The real intent and agreement of the parties on the matter of duration, as the same is made to appear by the contract, is to be enforced just the same as the other provisions thereof, so that on this point, as upon all others, we look to the contract in all its parts and entirety, as the evidence of the intent of the parties. It is a fundamen-

tal and well-recognized rule that in construing contracts, Courts may look not only to the specific language employed, but also to the subject matter contracted about, the relation of the parties thereto, the circumstances surrounding the transaction, or, in other words, may place themselves in the same position that the parties occupied when the contract was entered into, and view the terms of the agreement in the same light in which the parties did when the same were formulated and accepted." *Robson v. Mississippi Logging Co.*, 43 Fed. 364, 369.

As a matter of fact the complainant had the utmost confidence in the future of the corporation and the defendants, for by the terms of the chattel mortgage (Exhibit C. 4, p. 172) they bind themselves individually to the complainant and the corporation is bound, including "the entire assets of the corporation." This clearly shows that complainant regarded the lease as an asset and not a liability.

Regardless whether the agreement was a negative or affirmative one, there remained the question of "time" as to performance. The complainant, in asking this Court to read the word "perpetual" into the agreement, is seeking to place a fixed time on same. It is therefore necessary to decide whether the time "perpetual" is a reasonable time according to all the surrounding circumstances involved, and after considering all the evidence the Court below (p. 42, l. 23) said:

"It is quite plain to me, as I shall hereafter point out, that this agreement, for the fifty per cent. voting power was intended as additional security for the payment of the chattel mortgage; and that because of the loan secured by the mortgage, the stockholders had sufficient confidence in the complainant to trust him with this unusual voting

power. From the nature of the contract itself, therefore, it is 'terminable.'"

POINT II.

The complaint is erroneous in his construction that "the phraseology of the voting agreement (Exhibit C. 6A, p. 176) is such that it implies that it is to be of perpetual duration."

It recites:

"And Whereas, it is the desire of the parties of the first part to protect party of second part so that he may have a fifty per cent. vote on any and all propositions concerning the corporate business and which may be brought up at any corporate meeting."

There is nothing in the instrument to indicate why the parties of the first part desire to protect complainant, nor can anything be found, therein, to show why he is entitled to such protection.

"To determine the intention of the parties, if the meaning is not clear, it is necessary that regard shall be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view, for which purpose parol evidence is admissible." 9 Cyc., page 587.

Applying the above rule we look to the surrounding evidence and find that complainant was advancing \$10,000 by way of chattel mortgage to the corporation, and therefore, desired a vote equal to the other stockholders combined.

The clause, "The said Thomas K. Nickolopoulos shall have this fifty per cent. vote despite the fact that he is only the holder of twenty-five shares of the capital stock," does not show the intention of permanence, but expresses a clear intent to give complainant a fifty per cent. vote control.

The Court below (p. 44, l. 16) said in effect that to enforce the agreement would be to make an entire new agreement for the parties and that it could not do. We submit that that is the very thing the complainant is asking this Court to do. For this Court to read the word "perpetual" into the agreement, would be the making of a new contract, contrary to the real intentions of the parties, and the laws of this State.

POINT III.

The preponderance of the evidence shows that the voting control agreement (Exhibit C. 6A, p. 176) was not intended as a permanent protection but was to continue only during the existence of the chattel mortgage (Exhibit C. 6, p. 175).

The evidence clearly shows that defendants had considerable experience and were successful in the conducting of a soda-water-candy-lunch business. That the business in White Plains was purchased for \$9,500 and sold five months later for \$14,000 (p. 114, l. 35). The complainant knew of their ability, experience and success in that line (p. 68, l. 35).

The testimony of Noble does not show that the lease was obtained only because of complainant's financial responsibility. The testimony of Sobel does not show that complainant was the primary factor in obtaining credit for the corporation. The testimony of Fox and Gottschalk clearly shows that complainant at no time obligated himself personally to them on orders placed for the corporation. None of the testimony (above referred to) shows that they regarded the defendants as a poor credit risk.

That complainant had the utmost confidence in the ultimate success of the venture is evidenced

by the fact that he was ready and willing to make loans to the corporation and that he regarded the defendants as a good risk is evidenced by the fact that he required their individual liability upon the agreement entered into for the loan of ten thousand dollars (Exhibit C. 4, p. 172).

That complainant had the utmost confidence in the defendants is further evidenced by his answer to a question calling upon him to state one thing which the defendants did which was dishonest the complainant testified: A I trust them (p. 79, l. 38).

There is nothing in the evidence to show that upon the complainant's failure to join the venture, it would result in a failure.

The agreement (Exhibit C. 2, p. 167) shows that the complainant relied upon the defendants' ability and experience for the success of the business for they were bound to give their entire time to the business.

The defendants contend and the plaintiff denies that the plaintiff requested them for the opportunity to join in the business venture. Be that as it may, the facts stand undisputed that, after the lease was signed they desired to incorporate and retained Mr. Bernstein (with whom none of them had any prior dealing) to act as their attorney.

He drew up the necessary papers including the chattel mortgage (Exhibit C. 5, p. 175) and states that at no time, while he represented the parties was a question of a voting agreement mentioned or discussed.

Testimony of Bernstein (p. 152):

Q You were representing all of the parties, were you? A Yes.

Q Was there anything said to you by any person on the date of the execution of the lease or the day of the incorporation of the company, as to Nickolopoulos having fifty or fifty-one per cent. voting power in the corporation? A No, sir.

Q I show you an agreement (Exhibit C. 2) and ask you if you drew that agreement? A Yes.

Q And do you remember whether or not that was drawn on the date it bears? A It must have been either that date or very near that date.

Q The date of it is April 5, 1923? A Yes.

Q Can you tell us positively, Mr. Bernstein, whether or not anything was said to you by any of these parties on or about that time, as to Nickolopoulos, the complainant herein, having a fifty or fifty-one per cent. voting power in this company? A Absolutely not.

The testimony then continues on page 153:

Q I show you agreement, Exhibit C. 4, which purports to be the agreement made by these parties, dated April 27, 1923, executed and witnessed by you, and ask you if you remember drawing that agreement? A Yes, I remember drawing that. Yes, I remember that well now.

Q Can you tell us positively, Mr. Bernstein, whether anything was said prior or at the time of the execution of that agreement, by any of these parties, as to Mr. Nickolopoulos having fifty per cent. voting power in this corporation? A Absolutely not. If you want me to explain, I can say that this protection consisted in that chattel mortgage.

The testimony of complainant (pp. 72 and 73) substantiates the testimony of Mr. Bernstein.

Q When did you first tell Bernstein your plan of developing this business, A After Mr. Sarantis and Mr. Ferris gave the order to form the corporation.

Q That was after the lease was signed?

A Yes.

Q On the occasion that the lease was signed, did you say anything to Mr. Bernstein about you having a controlling vote in this corporation? A No.

Q At the time you went to Bernstein's office to incorporate the company, do you remember that? A Yes.

Q Did you say anything to Bernstein on that occasion to the effect that you were to have the controlling vote in the corporation?

A We talked that after the lease was signed and before, too.

Q Answer that question yes or no. (Last question repeated.) A No.

Q On April 5th, when you went to Mr. Bernstein's office and you signed this agreement setting forth the terms as to the repayment of your indebtedness, did you say anything to Mr. Bernstein on that occasion as to your having a controlling vote in the corporation? A No.

Q When you went to Mr. Bernstein's office on April 27th and signed the second agreement containing the provisions for the repayment of your loan, did you say anything to Mr. Bernstein on that occasion as to your having a controlling vote in the corporation? A No.

The complainant's contention that he is a minority stockholder, and needs adequate protection is groundless. Each of the defendants are minority stockholders as against the rest, each of them invested an equal amount with the complainant, excepting the advancement made by complainant to the corporation, and for which he was pledged the entire assets of the corporation, plus the individual liability of the defendants, and there is no reason why he should be entitled to a greater vote than any of the other stockholders, especially since his chattel mortgage has been paid.

The fact that the complainant was personally liable on the lease gives him no greater right against those (the defendants) who were under the same legal obligations.

"The liability of the complainant on the lease is advanced as a reason for additional security; but it does not appear that the complainant has assumed any greater responsibility in connection with that lease than the other three original stockholders. They all signed the lease personally and all are equally bound, notwithstanding its assignment to the corporation. It does not matter that the complainant is of greater financial responsibility than the others—it is not shown that they have none—and, so far as appears from the evidence, the corporation itself is well able to meet its obligations under the lease. There is no reason for greater security to the complainant as a stockholder on account of the lease than the others had, nor does it appear that the lease is a liability at all; indeed, it is argued by defendants that it is a valuable asset." From the opinion of the Court below (p. 43).

That the lease is an asset and not a liability is evidenced by the price paid for Ferris' stock by Papatheodore.

The evidence further shows that subsequently complainant engaged Mr. Bobker to act as his legal representative and at that time the question of a fifty per cent. voting control first came up.

Testimony of complainant (p. 75):

Q That was June 8th? A On June 8th.

Q That is the first time you spoke to Bernstein about this fifty per cent. voting control? A Yes.

(Continuing on p. 77):

Q Wasn't the agreement drawn when you came to Mr. Bernstein's office? A No.

Q Where was it drawn? A In Mr. Bobker's office.

As the voting control agreement was executed at a subsequent date to all other arrangements, the complainant has the burden to show, since he claims that the agreement was an independent element, that there was consideration for the execution of same. He has failed to do so. The testimony fails to show even a request or a promise for consideration.

Complainant is erroneous in his conclusions that the testimony of Sarantis (p. 130) shows that they feared a collapse of the venture unless complainant joined and as an inducement they offered him the fifty per cent. voting control. On the other hand, the evidence shows that defendants (and complainant) had put in \$1,250 apiece, that that sum had already been spent (p. 71) and unless a loan was obtained immediately that investment would be wiped out. The complainant was just as anxious to save his original investment but seeing the opportunity for an unusual advantage told them " * * * everything will go to pieces" (p. 130). The defendants were facing a situation that demanded immediate action. Seeing a possibility of their investment being destroyed and being equally liable with complainant on the lease, they had to assent to a fifty per cent. voting control in favor of complainant.

The complainant received his stock certificate without any protest or mention of the agreement to be incorporated in same. He retained the certificate in his possession, later the chattel mortgage is paid off and cancelled and now complainant seeks to insert a condition into the stock certificate that is contradictory to all the intentions, evidence and acts of the parties.

That brings us to the question involving the disposal of Ferris' stock to Papatheodore. The

complainant suggests ulterior motives on the part of the defendants in not consenting to the corporation's acquiring Ferris' stock. The following facts stand out strongly and undisputed:

That complainant had actual knowledge that Ferris wanted to sell his stock (p. 78) and he (complainant) wanted the corporation to buy same (p. 83). He also knew that he had thirty days from that time (Jan. 21, 1926), when agreement authorizing sale was signed in which to buy the stock (p. 84) and that the defendants didn't want the corporation to acquire it (p. 83).

Why, then did not complainant purchase the stock himself? He had the option to do so, and there is nothing in the evidence to show that he made an attempt to purchase. In fact he admits that he did not even ask Ferris to sell him the stock (p. 85).

These facts clearly show that complainant did not want to invest \$11,000 more in corporation stock (market price at that time (p. 163)) although he did want defendants to do so.

They further show that if he were able to induce the defendants to have the corporation acquire said stock it would thereby eliminate 25% of the voting. That clearly shows that the voting control agreement (Exhibit C. 6A, p. 176) was not to be perpetual, but on the contrary if it was to be perpetual complainant wouldn't care who purchased the stock.

"The right of a stockholder to sell his stock cannot be defeated by any provision contained in the by-laws of a corporation.

"Where the by-laws of a corporation provide that the 'right to assign or transfer the common stock of the company shall be subject to the company's option to purchase from the stockholder of record written

twenty days on written notice of the desire of said stockholders to sell, assign or transfer the same' this does not amount to a restriction on the power of sale, but is an agreement under which he holds his stock and is enforceable as an option." *Baumohl v. Goldstein*, 95 N. J. Equity 597.

Since the corporation refused to purchase Ferris' stock he had a perfect legal right to dispose of same at the best market price available and complainant cannot object to same. He had his right of option and allowed that to lapse.

The complainant's contention that the taking away of the voting agreement will place him at the mercy of the defendants is unfounded. On the other hand the evidence clearly shows that the defendants, with an aggregate vote of fifty per cent. are at the mercy of the complainant and that the removal of the voting agreement will place them all on an equal footing.

Complainant cites the case of *First Presbyterian Church v. State Bank*, 57 N. J. L. 27, affirmed in 58 N. J. L. 406. In that case the bank agreed to pay the Church a certain sum yearly as long as they refrained from extending certain buildings so as not to obstruct the light on the south side of the banking building (with certain exception). In this case the bank reaps a benefit as long as the church carries out the terms of the agreement, and the church benefits so long as it refrains from building, but what benefits do the defendants reap by allowing the complainant to have a voting control? He has been paid on the chattel mortgage.

"The complainant did not differ, materially, in his relations with the corporation, from the other stockholders, except that he had loaned the company \$10,000 in addition to his \$1,250 investment. It was only in this respect that he was entitled to greater con-

sideration and when the reason for the additional security ceased to exist, it became unreasonable that he should continue to hold it. The reason ended with the payment of the mortgage on February 2, 1926, and the agreement will be held to have terminated on that date."

"The stock having been purchased by Papatheodore on May 27, 1926, the fact that he took it with notice of the agreement of June 9, 1923, does not matter, as the agreement had then lost its vitality." (From opinion of lower court, p. 44.)

For reasons as stated by the lower Court in the above paragraph, the agreement has no effect on Papatheodore.

POINT IV.

For this Court to grant the complainant a perpetual voting control would be contrary to the equities of the case.

At the formation of the corporation complainant invested \$1,250 in capital stock and when Ferris disposed of his holdings the market value of that \$1,250 stock had risen to \$11,000.

The corporation is a closed one, no stock being on the market, and there is no set market price on same, but owing to the lucrative business the corporation has been enjoying, the original \$1,250 stock has increased greatly in value.

The lease of the corporation is a valuable asset indeed, as evidenced by the prosperity the corporation has been enjoying since its formation, and the price paid for Ferris' stock.

In this state of things it would be a gross violation of the principles of equity to grant the complainant the unjust relief that he prays for.

It is respectfully submitted that what happened was this: So long as the complainant was in possession of a blanket chattel mortgage payable in one month, he was perfectly satisfied. He could then crush this corporation at will, because he well knew—and it is so stated in the agreements—that the corporation could not pay his debt except out of profits. But when on June 8, 1923, Sarantis insisted that the chattel mortgage be made payable in one year so that there might be a reasonable time in which to accumulate such profits, the complainant insisted upon the additional security of the voting agreement. And now since the efforts of the defendants—industrious and honest as is admitted—has increased the value of its stock nearly tenfold, the complainant is attempting through this cause of action to put himself in a position where his stockholdings will be of infinitely greater value than the stock of the three men whom he now pretends to have assisted out of friendship.

POINT V.

That perpetual voting agreements are prohibited by the laws of this State.

P. L. 1896, p. 289, provided as follows:

“Unless otherwise provided in the charter, certificates or by-laws of the corporation, at every election each stockholder, whether resident or non-resident, shall be entitled to one vote in person or by proxy for each share of the capital stock held by him, but no proxy shall be voted on after three years from its date * * * ”

In 1926 the Legislature amended the Corporation Act by enacting the following:

“In the case of any corporation organized under this act one or more stockholders may, by agreement in writing, deposit capital

stock with or transfer capital stock to any person or persons, or corporations authorized to act as trustee, for the purpose of vesting in said person, persons or corporations the right to vote thereon, or for such other lawful purposes as may be agreed, for any period of the time determined by such agreement, not exceeding ten years, upon terms and conditions stated in such agreement, pursuant to which such person, persons or corporations shall act. * * * ”
(P. L. 1926, Chapter 318, p. 532.)

As will be observed from the above, voting proxies (prior to 1926) were allowed only for a term not exceeding three years, and in 1926, the Legislature legalized a voting trust for a term of not more than ten years. We submit that at no time was a perpetual voting agreement valid.

We further submit that perpetual voting agreements are contrary to the very principles of equity, and also that this Court should not read the word “perpetual” into the voting agreement (Exhibit C. 6A, p. 176) as that would be the granting of a voting control for a period expressly prohibited by the laws of this State.

Conclusions.

For the reasons discussed in the five foregoing points, we respectfully submit that the evidence in the case clearly shows that the decree of the Court below was equitable and just and that the decree of the Court below dismissing complainant's bill should be affirmed.

Respectfully submitted,

JOSEPH E. CONLON,
Solicitor for and of Counsel with Respondents.

