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Notice and Grounds of Appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed December 24, 1934.

Essex County Circuit Court

SAMUEL WEINSTEIN, Assignee
of Franklin Washington
Trust Company, a corpora-
tion of New Jersey,

Plaintiff,

vs.

DAVID BOBKER,

Defendant.

*Action
at Law.*

*Notice and
Grounds
of Appeal.*

10

To Jacob Lipman, Esq.,
Attorney for Defendant.

20

SIR:

Please Take Notice, that Samuel Weinstein, Assignee of Franklin Washington Trust Company, a corporation of New Jersey, the plaintiff in the above entitled cause, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

30

1. Because the Circuit Court erred in striking out the complaint and the cause of action therein as sham.

2. Because the Circuit Court erred in giving the defendant summary judgment.

3. Because the Circuit Court had no power or jurisdiction to strike out the complaint as sham.

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Notice and Grounds of Appeal.

4. Because the Circuit Court erred in its finding that the plaintiff failed to show facts as entitled him to prosecute the cause of action set forth in the complaint.

10 5. Because the Circuit Court erred in entering an order on November 28, 1934, striking out the complaint and the cause of action therein, without designating in said order whether the said complaint was stricken with or without prejudice to the institution of another suit based on the same cause of action set forth in the complaint, said lack of designation being contrary to the statute in such case made and provided.

20 6. Because the Circuit Court's Order striking out the complaint and the cause of action therein and said summary judgment illegally deprive this plaintiff of a trial by jury.

7. Because the Circuit Court erred in entering an Order on December 20, 1934, denying the plaintiff's motion to vacate the order of November 28, 1934 and to vacate the judgment entered in this cause.

30 8. Because the cause of action set forth in said complaint is not sham.

9. Because the affidavits submitted by the plaintiff show that the cause of action set forth in said complaint is not sham.

10. Because the affidavits submitted on behalf of both plaintiff and defendant show that the cause of action set forth in said complaint is not sham.

40 11. Because the affidavits submitted on behalf of the plaintiff substantiate and support the cause of action set forth in said complaint.

Notice and Grounds of Appeal.

12. Because inferences permissible from the affidavits submitted on behalf of the defendant substantiate and support the cause of action stated in the complaint.

13. Because inferences permissible from the affidavits submitted on behalf of both plaintiff and defendant, substantiate and support the cause of action stated in the complaint.

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14. Because the affidavits submitted by defendant do not establish that the cause of action set forth in said complaint is sham.

15. Because the affidavits submitted by plaintiff controvert the affidavits submitted by the defendant.

16. Because the plaintiff was deprived of the right of cross examining the persons who made affidavits on behalf of the defendant.

20

17. Because the plaintiff is entitled to have a jury pass upon the truth of the allegations of the cause of action set forth in said complaint.

18. Because the plaintiff is entitled to have a jury pass upon the facts and inferences permissible from all the testimony.

19. Because it appears from the affidavits submitted on behalf of the defendant that the facts were not fully exposed.

30

20. Because the affidavits submitted on behalf of the defendant fail to state the belief of any person that the cause of action set forth in the said complaint is sham.

21. Because the affidavits submitted on behalf of the plaintiff did show facts as entitled him to

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Notice and Grounds of Appeal.

prosecute the cause of action set forth in the complaint.

22. Because the cause of action set forth in said complaint states a legal cause of action against the defendant.

10

Respectfully yours,

DAVID COOPERMAN,

Attorney of Plaintiff.

SAMUEL GEORGE COHEN,

Of Counsel.

Service of a copy of the within notice and grounds of appeal is hereby acknowledged this 24th day of December, 1934.

20

JACOB LIPMAN,

Attorney for Defendant.

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

30

DANIEL DEMAREST, JR., Special Deputy Sheriff of the County aforesaid, being duly sworn, on his oath deposes and says that on the 24th day of October, A. D. 1934, he delivered personally to the said defendant David Bobker a true copy of the within summons and complaint, with a ten days' notice endorsed thereon.

DANIEL DEMAREST, JR.

Subscribed and sworn to, this 25th day of October, A. D. 1934.

HARVEY W. KEOUGH,

Notary Public of N. J.

40

My Commission expires June 1, 1937.

Summons.

SUMMONS.

The State of New Jersey to David Bobker:

(L. S.) YOU ARE SUMMONED to answer the annexed complaint of Samuel Weinstein, Assignee of Franklin Washington Trust Co., a corporation of New Jersey in an action at law in the Circuit Court in and for the County of Essex. 10

And take notice that unless you file your answer to said complaint with the Clerk of said Court, at Newark in said County of Essex, aforesaid, within Twenty Days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 20

WITNESS, WILLIAM A. SMITH, Esquire, Judge of the Essex County Circuit Court, at Newark, this 23rd day of October, 1934.

JOHN H. SCOTT,
Clerk.

DAVID COOPERMAN,
Attorney.

30

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ESSEX COUNTY CIRCUIT COURT.

20 Plaintiff, residing in the City of Newark,
County of Essex and State of New Jersey, says
that:

30 2. The said note was presented at maturity and payment thereof was demanded and refused, and thereupon the note was duly protested.

3. The defendant, David Bobker, endorsed the note marked "Schedule A," before the delivery of said note, and the said David Bobker received due notice according to law of the presentment of said note, and of its dishonor by the maker, and of its protest.

4. Plaintiff has demanded payment of said
40 note together with interest and protest fees, but

Complaint.

defendant has refused and still refuses to pay the same.

Judgment will be claimed in favor of the plaintiff, Samuel Weinstein, and against the defendant David Bobker, in the sum of Nine Hundred (\$900.00) Dollars together with interest, protest fees and costs of this suit to be taxed. 10

DAVID COOPERMAN,
Attorney for Plaintiff.

SCHEDULE "A."

\$900.00/100 June 14 1929

Three weeks after date we promise to pay to the order of ourselves 20

Nine hundred and no/100.....Dollars at Weequahic Trust Co.

Value received with interest

B.-W. Holding Co. Inc.

M. Weinstein, Pres.

D. Bobker

No. 2644 Due July 5

ENDORSED: 30

M. Weinstein

D. Bobker

M. Weinstein

D. Bobker

Complaint.

UNITED STATES OF AMERICA, }
 STATE OF NEW JERSEY. } ss.:

On the 5th day of July in the year of our Lord one thousand nine hundred and twenty-nine at the request of FRANKLIN WASHINGTON TRUST COMPANY, WEEQUAHIC BRANCH, NEWARK, N. J.

10

I, HENRY SOMMERROCK, JR., a Notary Public in and for the State of New Jersey, duly appointed, commissioned and sworn, residing in the City of Newark, in the State of New Jersey, did present the original note made by B. & W. Holding Co., Inc., to the order of Ourselves payable at FRANKLIN WASHINGTON TRUST COMPANY, WEEQUAHIC BRANCH, NEWARK, N. J. for \$903/15 dated June 14, 1929, 3 weeks and hereunto annexed at the FRANKLIN WASHINGTON TRUST COMPANY, WEE-

20

QUAHIC BRANCH, NEWARK, N. J., at Newark aforesaid to bookkeeper thereof and of him demanded payment thereof, who then and there refused to pay the same, saying the maker was not present and had not there left funds for that purpose. Whereupon I, the said Notary, at the request of the aforesaid, did protest, and by these presents do publicly and solemnly Protest, as well against the maker and endorsers of the said note as against all others whom it doth or may concern

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for exchange, re-exchange and all costs, charges, damages and interest already incurred, and to be hereafter incurred for want of payment of said note and on the 5th day of July, 1929, I gave notice of said non-payment to the Maker and Endorsers thereof by depositing said notice in the Post Office at Newark, N. J., directed and addressed to them at their residences or places of business, with postage prepaid thereon before the 8 p. m. of said day, viz.:

40

Complaint.

{ B. & W. Holding Co.—205 Clinton Ave.
 { M. Weinstein
 { David Bobker

		Thus done and protested in	
Protest	\$903.15	the City of Newark and	
Protest fees	2.30	State aforesaid in the pres-	10
Postage	.06	ence of John Doe and Rich-	
	—	ard Roe, Witnesses.	
	\$905.51	In testimonium Veratatis	
July 5, 1929		Henry Sommerrock Jr. (L. s.)	
Recorded Book 87 page 65		Notary Public	

To David Bobker:

In case the within Summons and Complaint
 are served upon you personally, then take no-
 tice that if you intend to make a defense to this
 action, you must file an affidavit of merits within
 ten days from the date of service hereof upon
 you, and must file your answer within twenty
 days from the date of such service, and in de-
 fault of the filing of such affidavit and answer,
 judgment will be entered against you.

DAVID COOPERMAN,
 Attorney for Plaintiff.

Received October 26,— 30

JOHN H. SCOTT,
 Clerk.

Complaint.

Essex County Sheriff's Fee \$3.78 paid
10/13/34.

Received Louis E. Batchelor, Sheriff, October
23, 2:38 P. M., 1934, Essex County, N. J.

I hereby appoint and depute Daniel Demarest,
Jr. to serve the within writ.

10

Witness my hand and seal this 23rd day of
Oct. 1934.

LOUIS E. BATCHELOR,
Sheriff. (L. s.)

By W. F. HAAS,
Under Sheriff.

20 Served the within Summons and Complaint
with ten days' notice endorsed thereon Oct. 24,
1934.

Personally upon David Bobker within named
defendant at his principal place of business Lef-
court Bldg., Newark, N. J.

LOUIS E. BATCHELOR,
Sheriff.

By D. DEMAREST, JR.,
Special Deputy.

30

40

Affidavit of Merits.

AFFIDAVIT OF MERITS.

Filed October 25, 1934.

ESSEX COUNTY CIRCUIT COURT.

SAMUEL WEINSTEIN, Assignee
of Franklin Washington
Trust Company, a corpora-
tion of New Jersey,

Plaintiff,

vs.

DAVID BOBKER,

Defendant.

10

*Action
at Law.*

*Affidavit
of Merits.*

DAVID BOBKER, being duly sworn, on his oath 20
according to law, deposes and says:

That he is the defendant in the above stated
cause and that he is informed and verily be-
lieves that he has a just and legal defense to
said action on the merits of the case.

DAVID BOBKER.

Sworn and subscribed to before me
this 24th day of October, 1934.

30

CAROLINE PREUSS,

A Notary Public of New Jersey.

40

*Demand for Bill of Particulars.***DEMAND FOR BILL OF PARTICULARS.**

Filed October 30, 1934.

ESSEX COUNTY CIRCUIT COURT.

10

SAMUEL WEINSTEIN, Assignee
of Franklin Washington
Trust Company, a corpora-
tion of New Jersey,

*Plaintiff,**vs.*

DAVID BOBKER,

*Defendant.**Action
at Law.**Demand for
Bill of
Particulars.*

20

To David Cooperman, Esq.,
Attorney for Plaintiff.

SIR:

PLEASE TAKE NOTICE that the defendant in the above entitled cause demands, within ten days from the date of service hereof, a bill of the following particulars of the plaintiff's claim as set forth in his complaint, as follows:

30 1. State whether the assignment, referred to in paragraph 1 of the complaint was in words or in writing.

2. If the assignment referred to in paragraph 1 of the complaint was oral, state the name of the person or persons by whom the said assignment was made on behalf of the Franklin Washington Trust Company.

40 3. If the assignment referred to in paragraph 1 of the complaint was oral, state the language

Demand for Bill of Particulars.

alleged to have been employed in effecting such assignment.

4. State whether the notice, alleged to have been received by the defendant, as set forth in paragraph 3 of the complaint, was in writing.

5. If the notice referred to in paragraph 3 of the complaint was not in writing, state when and how the same was received by the defendant, as alleged in said paragraph. 10

6. If the notice referred to in paragraph 3 of the complaint was not in writing, state the precise terms of the notice alleged to have been received by the defendant.

Yours respectfully,

JACOB LIPMAN,
Attorney for Defendant.

20

Service of a copy of the within demand for bill of particulars is hereby acknowledged this 24th day of October, A. D. 1934.

DAVID COOPERMAN,
Attorney for Plaintiff.

30

40

Notice.

NOTICE.

Filed November 7, 1934.

ESSEX COUNTY CIRCUIT COURT.

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SAMUEL WEINSTEIN, Assignee
of Franklin Washington
Trust Company, a corpora-
tion of New Jersey,

Plaintiff,

vs.

DAVID BOBKER,

Defendant.

*Action
at Law.*

Notice.

20

To: David Cooperman, Esq.,
Attorney for Samuel Weinstein,
Assignee of Franklin Washington
Trust Company, plaintiff,
17 Academy street,
Newark, N. J.

SIR:

30

PLEASE TAKE NOTICE that on Friday, November
9th, 1934, I shall apply to the Hon. Worrall F.
Mountain, Judge of the Essex County Circuit
Court, at the Court House, in the City of New-
ark, at ten o'clock in the forenoon or as soon
thereafter as counsel can be heard, or before
such other Judge as may then and there be sit-
ting, for an order requiring the plaintiff to
amplify the allegations of his complaint, as de-
manded by the defendant's demand for particu-
lars served upon the plaintiff on October 24,
1934, and for a more particularized statement of
40 answer No. 1, in response to demand No. 1 set

Notice.

forth in the defendant's demand for bill of particulars as aforesaid.

Dated: October 30, 1934.

Yours respectfully,

JACOB LIPMAN,
Attorney for Defendant.

10

Service of a copy of the within notice is hereby acknowledged this 30th day of October, A. D. 1934.

DAVID COOPERMAN,
Attorney for Plaintiff.

20

30

40

Order.

ORDER.

Filed November 10, 1934.

ESSEX COUNTY CIRCUIT COURT.

10	SAMUEL WEINSTEIN, Assignee of Franklin Washington Trust Company, a corpora- tion of New Jersey, <i>Plaintiff,</i>	} <i>Action</i> <i>at Law.</i> <i>Order.</i>
	<i>vs.</i>	
	DAVID BOBKER, <i>Defendant.</i>	

20 This matter coming on for hearing upon regular motion of Jacob Lipman, Esq., attorney for the defendant, in the presence of David Cooperman, Esq., attorney for the plaintiff, and it appearing that heretofore and to wit on the 24th day of October, A. D. 1934, a demand for particulars was served upon the plaintiff and that thereafter said plaintiff served upon the defendant a bill of particulars as will appear by reference to the record hereof; and it further ap-

30 appearing that the defendant is entitled to require the plaintiff to amplify the allegations of his complaint as demanded by his demand for particulars, and for a more particularized statement to answers 1, 2 and 3 in response to demands 1, 2 and 3 as set forth in the defendant's demand for particulars as aforesaid; it is on this 9th day of November, A. D. 1934,

40 ORDERED that the plaintiff furnish more particularized answers to the defendant's demand for particulars as attached to this order, and

Order.

that he have 10 days after service upon him of a true copy of this order within which to furnish said particulars; and it is further ORDERED that a copy of this order, and the particulars annexed thereto (which may be certified as true by Jacob Lipman, Esq., attorney for the defendant) may be served upon the plaintiff within 5 days from the date hereof. 10

WORRALL F. MOUNTAIN,
Judge.

1. State whether the assignment, referred to in paragraph 1 of the complaint was in words or in writing.

2. If the assignment referred to in paragraph 1 of the complaint was oral, state the name of the person or persons by whom the said assignment was made on behalf of the Franklin Washington Trust Company. 20

3. If the assignment referred to in paragraph 1 of the complaint was oral, state the language alleged to have been employed in effecting such assignment.

Service of a true copy of within order and particulars is acknowledged this 9th day of November, 1934. 30

DAVID COOPERMAN,
Attorney of Plaintiff.

Notice.

NOTICE.

Filed November 20, 1934.

ESSEX COUNTY CIRCUIT COURT.

10	SAMUEL WEINSTEIN, Assignee of Franklin Washington Trust Company, a corpora- tion of New Jersey, <i>Plaintiff,</i>	}	<i>Action at Law. Notice.</i>
	<i>vs.</i>		
	DAVID BOBKER, <i>Defendant.</i>		

20 To: David Cooperman, Esq., attorney for plain-
tiff.

SIR:

PLEASE TAKE NOTICE that on Wednesday, Nov-
ember 28, 1934, I shall appear at the Essex
County Circuit Court, at the Court House, in the
City of Newark, at ten o'clock in the forenoon,
or as soon thereafter as counsel can be heard,
before such Judge as may then and there be
sitting, and I shall then and there move that the
30 complaint filed herein be stricken out, as sham.

Appended hereto are copies of affidavits which
will be offered in support of such motion.

Respectfully yours,

JACOB LIPMAN,
Attorney for Defendant.

Dated: November 17, 1934.

Affidavit of David Bobker.

ESSEX COUNTY CIRCUIT COURT.

SAMUEL WEINSTEIN, Assignee
of Franklin Washington
Trust Company, a corpora-
tion of New Jersey,

Plaintiff,

vs.

DAVID BOBKER,

Defendant.

*Action
at Law.*

10

Affidavit.

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

DAVID BOBKER, being duly sworn upon his oath,
according to law, deposes and says:

20

1. I am the defendant in the above entitled
cause of action. Samuel Weinstein, the plaintiff,
is the son of Morris Weinstein who, together
with me, endorsed the promissory note which is
the subject matter of this action.

2. Following the institution of this suit, a
demand for a bill of particulars was served by
me through my attorney upon the defendant,
which said demand, together with proof of serv-
ice, is on file in this cause and is referred to in
the same manner as if the same were fully set
forth at length herein.

30

3. Thereafter, and in pursuance with said
demand, plaintiff served upon my attorney a bill
of particulars over the signature of his attorney,
the original of which will be offered in support
of a motion to strike the complaint filed herein,
and in which the particulars are set forth as
follows:

40

Affidavit of David Bobker.

1. The transfer and assignment of the said note was made by virtue of the delivery of the said note by the Franklin Washington Trust Company to Samuel Weinstein.
2. See Complaint and No. 1.
- 10 3. See Complaint and No. 1.
4. Notice was in writing.
5. See No. 4.
6. See No. 4.

4. Thereafter, upon motion duly made on my behalf, an order was entered in this cause on November 9, 1934, requiring the plaintiff to furnish more particularized answers to the demand served upon the plaintiff and identified as Nos. 1, 2 and 3, a copy of which order was served
20 upon the plaintiff on November 9, 1934, which said order and proof of service is on file herein and is referred to in the same manner as if fully set forth at length herein.

5. Thereafter on November 14, 1934, and in pursuance with the order referred to in the preceding paragraph, the plaintiff served upon my attorney a supplemental bill of particulars, over the signature of his attorney herein, which said
30 supplemental bill of particulars will be offered in support of a motion to strike the complaint which will be based upon this and other affidavits, and in which the particulars of the plaintiff's claim against me were set forth as follows:

1. The assignment was neither in words nor in writing, but was made by virtue of the delivery of the said note by Henry Sommerrock Jr. to Samuel Weinstein.
2. See No. 1.
- 40 3. See No. 1.

Affidavit of David Bobker.

6. Basing my statements upon the bill of particulars and supplemental bill of particulars hereinbefore referred to, I state as a fact that the promissory note upon which this action is based came into the possession of the plaintiff by physical delivery only and without words of assignment, on or about April 30, 1930, when the same had been fully paid and entirely satisfied to the holder thereof, the Franklin Washington Trust Company. 10

DAVID BOBKER.

Sworn and subscribed to before
me this 16th day of Novem-
ber, A. D., 1934.

CAROLINE PREUSS, 20
Notary Public of New Jersey.

30

40

Affidavit of Henry Sommerrock, Jr.

ESSEX COUNTY CIRCUIT COURT.

10	SAMUEL WEINSTEIN, Assignee of Franklin Washington Trust Company, a corpora- tion of New Jersey, <i>Plaintiff,</i>	<i>Action at Law. Affidavit.</i>
	<i>vs.</i>	
	DAVID BOBKER, <i>Defendant.</i>	

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

20 HENRY SOMMERROCK, JR., of full age, being duly sworn according to law, upon his oath deposes and says: On or about April 30, 1930, and thereafter, I was and still am Assistant Secretary and Assistant Treasurer of the Franklin Washington Trust Company, a corporation of the State of New Jersey, the alleged assignor of Samuel Weinstein, the plaintiff herein.

30 On or about October 29, 1934, I made an affidavit at the request of David Cooperman, Esq., attorney for the plaintiff herein, in which I stated that on or about April 30, 1930, Samuel Weinstein, called at the bank and informed me that he had purchased and paid for the promissory note, a copy of which is annexed to the complaint filed in the above entitled cause, and that he asked me to deliver same to him, and that I did so by handing it over to him.

Prior to April 30, 1930, the promissory note in question had been turned over to Milton M.

Affidavit of Henry Sommerrock, Jr.

Unger, Esq., our attorney, with instructions to take appropriate legal action thereon to enforce the payment thereof, and payments were made from time to time on account of the said note to Mr. Unger and turned over to us and credited to the account evidenced by the said promissory note. The manner in which the payments were received by the Franklin Washington Trust Company is particularly set forth in the affidavit signed by me on the plaintiff's behalf, and on the date of the last payment the obligation evidenced by the said promissory note was completely paid and discharged. 10

On the date that Samuel Weinstein called at the bank and informed me that he had purchased the said promissory note he did not inform me how, when or from whom he had purchased the same and I did not inquire inasmuch as neither I nor the bank were interested since the obligation evidenced by the same and arising therefrom had been fully paid and when, upon reference to the bank's records, I satisfied myself that the entire amount had been fully paid, I delivered the note to the said Samuel Weinstein without any comment whatever. 20

I at no time discussed the sale, transfer or assignment of the said note with the said Samuel Weinstein, and on the occasion of the delivery of the same to the plaintiff nothing was due thereon to the Franklin Washington Trust Company from either David Bobker, the defendant herein, the maker, or the endorser. 30

HENRY SOMMERROCK, JR.

Affidavit of Henry Sommerrock, Jr.

Sworn and subscribed to before
me this 9th day of November,
A. D. 1934.

SIDNEY B. HICKS,
Notary Public of New Jersey.

10 My Commission Expires (SEAL)
September 18, 1938.

Service of a copy of the within notice is hereby
acknowledged this 19th day of November, A. D.
1934.

DAVID COOPERMAN,
Attorney for Plaintiff.

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30

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Answering Affidavit of Samuel Weinstein.

ANSWERING AFFIDAVITS.

Filed November 26, 1934.

ESSEX COUNTY CIRCUIT COURT.

SAMUEL WEINSTEIN, Assignee of Franklin Washington Trust Company, a corpora- tion of New Jersey,	}	<i>Action at Law.</i>	10
<i>Plaintiff,</i>		<i>Affidavit.</i>	
<i>vs.</i>			
DAVID BOBKER,	}	<i>Defendant.</i>	

STATE OF NEW JERSEY, COUNTY OF ESSEX.	}	SS.:	20
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SAMUEL WEINSTEIN, of full age, being duly sworn according to law, on his oath deposes and says:

1. I am the plaintiff in the above entitled cause.

2. On or about February 21, 1930, I instructed my father, Morris Weinstein, to act as my agent and make arrangements with Milton M. Unger, attorney for Franklin Washington Trust Company, to purchase for me from the said Franklin Washington Trust Company, the note (a copy of which is annexed to the Complaint filed in this cause) together with a judgment entered on this note against B. W. Holding Co. Inc. and Morris Weinstein.

Answering Affidavit of Samuel Weinstein.

3. In accordance with my instructions, my father, Morris Weinstein, saw Mr. Milton Unger, and as the direct result of his negotiation on my behalf I delivered to my father on or about February 21, 1930 a check in the sum of \$350.00 to give to Mr. Unger as the first payment on account of the purchase price of said note and judgment. On or about April 14, 1930, I gave to my father a check in the sum of \$350.00 to give to Mr. Unger as the second payment on account of the purchase price of said note and judgment. On or about April 29, 1930, I gave to my father a check signed in blank with instructions to him to go to Mr. Unger's office and there fill in the proper amount to complete the purchase price of said note and judgment. The said check was subsequently returned to me by my bank showing that it had been made out for \$246.38.

This check represented the final payment of the purchase price for the said note and judgment.

4. Upon returning from Mr. Unger's office, my agent, Morris Weinstein, advised me that he had demanded the note of Mr. Unger after making final payment for the same, but Mr. Unger told him he did not have the note in his possession, and that the note was at the Franklin Washington Trust Company, and that he, Morris Weinstein, could obtain the note by going to the Franklin Washington Trust Company and requesting delivery of the said note.

5. As the result of this information from my father, I advised my father that I would go to the bank myself and get the note.

Answering Affidavit of Samuel Weinstein.

6. On or about May 1, 1930, I went to the Franklin Washington Trust Company, Weequahic Branch, Newark, New Jersey, where I saw Mr. Henry Sommerrock, Jr., the Assistant Secretary and Assistant Treasurer of the said Bank. I told Mr. Sommerrock that I had purchased the note and judgment from the Franklin Washington Trust Company by making three payments totalling \$946.38 evidenced by three checks drawn by me and given to the Franklin Washington Trust Company's attorney, Mr. Milton M. Unger, by my agent, Morris Weinstein. I further advised Mr. Sommerrock that my father, acting as my agent, had been to Mr. Unger's office and he had requested Mr. Unger to deliver the said note to him upon the tender of the final check of \$246.38 and that Mr. Unger advised my father that the note was at the Franklin Washington Trust Company, and that my father could obtain the said note by going to the bank and requesting delivery of said note.

7. I thereupon requested Mr. Sommerrock to give the note to me as I had bought and fully paid for the same. He told me to wait a few minutes as he had to call Mr. Unger on the telephone to verify my statements. Mr. Sommerrock then went to the rear of the bank and returned in a short while stating to me that everything was satisfactory as he handed the note and certificate of protest to me.

8. On or about April 30, 1930, I received an Assignment in writing of the judgment hereinbefore referred to from the Franklin Washington Trust Company.

SAMUEL WEINSTEIN.

Answering Affidavit of Morris Weinstein.

Sworn and subscribed to before
me this 26th day of November,
A. D. 1934.

PHILIP MINTZ,
An Attorney at Law of N. J.

10

ESSEX COUNTY CIRCUIT COURT.

20

SAMUEL WEINSTEIN, Assignee
of Franklin Washington
Trust Company, a corpora-
tion of New Jersey,

*Plaintiff,**vs.*

DAVID BOBKER,

*Defendant.**Action
at Law.**Affidavit.*

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

30

MORRIS WEINSTEIN, of full age, being duly
sworn according to law, on his oath deposes and
says:

1. I am the father of the plaintiff in the above
entitled cause.

2. On or about February 21, 1930 my son,
Samuel Weinstein authorized me, as his agent,
to negotiate with Milton M. Unger, attorney for
Franklin Washington Trust Company to pur-
chase for him, from the Franklin Washing-
ton Trust Company the note (a copy of which

40

Answering Affidavit of Morris Weinstein.

is annexed to the Complaint filed in this cause) together with a judgment entered on this note against B. W. Holding Co. Inc., and Morris Weinstein.

3. In accordance with my authorization I saw Mr. Unger and I arranged to buy the note and judgment for my son, Samuel Weinstein, by making installment payments for the same. Accordingly, on or about February 21, 1930, my son, Samuel Weinstein gave me a check in the sum of \$350.00 which I—turn delivered to Mr. Unger as the first payment on account of the purchase price of said note and judgment. On or about April 14, 1930, my son, Samuel Weinstein gave me a check in the sum of \$350.00 which I in turn delivered to Mr. Unger as the second payment on account of the purchase price of said note and judgment. On or about April 29, 1930, my son, Samuel Weinstein gave me a blank check signed by him with instructions to me to go to Mr. Unger's office and there fill in the proper amount to complete the purchase price of said note and judgment.

4. I went to Mr. Unger's office and the check was filled in there by typewriter in the sum of \$246.38. This check represented final payment of the purchase price for the said note and judgment. I delivered this check to Mr. Unger and then requested him to deliver the said note to me but Mr. Unger told me he did not have the note in his possession, advising me that the note was at the Franklin Washington Trust Company and I could obtain the same by going to the Franklin Washington Trust Company and requesting the Franklin Washington Trust Company to deliver the said note to me.

Answering Affidavit of Henry Sommerrock, Jr.

5. I informed my son, Samuel Weinstein relative to my conversation with Mr. Unger with reference to securing the note. My son, Samuel Weinstein thereupon told me that he would go to the Franklin Washington Trust Company himself and demand the delivery of the said note to him.

MORRIS WEINSTEIN.

Sworn and subscribed to before
me this 26 day of November,
A. D. 1934.

JACOB R. ORETSKY,
An Attorney at Law of N. J.

20

ESSEX COUNTY CIRCUIT COURT.

SAMUEL WEINSTEIN, Assignee
of Franklin Washington
Trust Company, a corpora-
tion of New Jersey,

Plaintiff,

vs.

DAVID BOBKER,

Defendant.

*Action
at Law.*

Affidavit.

30

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

HENRY SOMMERROCK, JR., being duly sworn according to law on his oath deposes and says:

I am an assistant secretary and assistant treasurer of Franklin Washington Trust Company, a corporation of the State of New Jersey.

40

Answering Affidavit of Henry Sommerrock, Jr.

Franklin Washington Trust Company, on July 5, 1929, was the holder of a note made by B. W. Holding Co., Inc. for \$900.00 dated June 14, 1929, payable three weeks after date, to the order of "Ourselves" at Weequahic Trust Company. A true copy of said note is attached hereto and made a part hereof and marked Schedule "A". 10

The defendant, David Bobker endorsed the said note marked Schedule "A" before delivery, and on June 14, 1929 after delivery, the said note was discounted by the maker with the Franklin Washington Trust Company, and the proceeds thereof placed to the credit of the maker of said note. The said David Bobker was an officer of the B. W. Holding Co. Inc., at the time the said note was discounted by the maker as aforesaid. 20

On Friday, July 5, 1929, said note fell due, was presented for payment, and payment was refused, and thereupon I, as a Notary Public of New Jersey, did protest said note against the maker and endorsers thereof, and did give notice of non-payment to the maker and endorsers thereof on that day.

The said notices were mailed by me to the maker and endorsers of the said note to No. 205 Clinton avenue, Newark, New Jersey. 30

The said address of 205 Clinton avenue, Newark, New Jersey having been given to the said Franklin Washington Trust Company by the maker of the said note, B. W. Holding Co., Inc., a corporation of the State of New Jersey.

A true copy of my certificate of Protest is annexed hereto and made a part hereof.

I am familiar with the signatures of all the parties to said note and I know that the signa- 40

Answering Affidavit of Henry Sommerrock, Jr.

ture of D. Bobker thereon is a true and genuine signature, and that David Bobker is the same person as D. Bobker, the endorser of the said note, and the defendant herein.

10 On July 5, 1929 the due date of said note there was due thereon the sum of \$900.00 with interest and protest fees amounting in all to \$905.51.

On or about April 30, 1930, Mr. Samuel Weinstein called at the Franklin Washington Trust Company, Weequahic Branch, Newark, New Jersey, and informed me that he had purchased and paid for the note marked Schedule "A". He asked me to deliver the said note to him. I advised him that he would have to wait until I checked our records in this matter. According to our records the said note was paid as follows:
 20 During the month of February, 1930, by check the sum of \$350. During the month of April, 1930, by check the sum of \$350. During the month of April, 1930, by check the sum of \$246.38. All of the above checks were received from the office of Milton M. Unger, attorney, who represented the bank in this matter. The note marked Schedule "A" together with the certificate of protest was thereupon handed by me to the said Samuel Weinstein.

30

HENRY SOMMERROCK, JR.

Sworn to and subscribed to before me this 30th day of October, 1934.

SIDNEY P. HICKS,

(SEAL)

Notary Public of N. J.

My commission expires
 September 18th, 1938.

40

Answering Affidavit of Henry Sommerrock, Jr.

SCHEDULE "A"

\$900.00/100

June 14, 1929

Three weeks after date we promise to pay to
the order of ourselves

Nine hundred and no/100.....Dollars
at Weequahic Trust Co. 10

Value received with interest

B.-W. Holding Co. Inc.

M. Weinstein, Pres.

D. Bobker

No. 2644

Due July 5

ENDORSED:

M. Weinstein

D. Bobker.

M. Weinstein

D. Bobker.

20

UNITED STATES OF AMERICA, }
STATE OF NEW JERSEY. } ss.:

On the 5th day of July in the year of our Lord
one thousand nine hundred and twenty-nine at
the request of FRANKLIN WASHINGTON TRUST
COMPANY, WEEQUAHIC BRANCH, NEWARK, N. J. 30

I, HENRY SOMMERROCK, JR., a Notary Public of
in and for the State of New Jersey, duly ap-
pointed, commissioned and sworn, residing in the
City of Newark, in the State of New Jersey, did
present the original note made by B. & W. Holding
Co., Inc., to the order of Ourselves payable at
FRANKLIN WASHINGTON TRUST COMPANY, WEEQUA-
HIC BRANCH, NEWARK, N. J. for \$903.15 dated June
14, 1929, 3 weeks and hereunto annexed at the
FRANKLIN WASHINGTON TRUST COMPANY, WEE- 40

Answering Affidavit of Henry Sommerrock, Jr.

QUAHIC BRANCH, NEWARK, N. J., at Newark aforesaid to bookkeeper thereof and of him demanded payment thereof, who then and there refused to pay the same, saying the maker was not present and had not there left funds for that purpose. Whereupon, I, the said Notary, at the request of the aforesaid, did protest, and by these presents do publicly and solemnly Protest, as well against the maker and endorsers of the said note as against all others whom it doth or may concern for exchange, re-exchange and all costs, charges, damages and interest already incurred, and to be hereafter incurred for want of payment of said note and on the 5th day of July, 1929, I gave notice of said non-payment to the Maker and Endorsers thereof by depositing said notice in the Postoffice at Newark, N. J., directed and addressed to them at their residences or places of business, with postage prepaid thereon before the 8 p. m. of said day, viz.:

{ B. & W. Holding Co.—205 Clinton Ave.
 { M. Weinstein
 { David Bobker

		Thus done and protested in
Protest	\$903.15	the City of Newark and
Protest fees	2.30	State aforesaid in the pres-
30 Postage	.06	ence of John Doe and Rich-
	—	ard Roe, Witnesses.
	\$905.51	In testimonium Veratatis
July 5, 1929		Henry Sommerrock Jr (L. s.)
Recorded Book 87 page 65		Notary Public

Service of copies of the within affidavits is hereby acknowledged this 26th day of November, 1934.

Order.

ORDER.

Filed December 1, 1934.

ESSEX COUNTY CIRCUIT COURT.

SAMUEL WEINSTEIN, Assignee
of Franklin Washington
Trust Company, a corpora-
tion of New Jersey,

Plaintiff,

vs.

DAVID BOBKER,

Defendant.

10

*Action
at Law.*

Order.

It appearing by affidavit filed in this cause that the complaint exhibited by the plaintiff herein is sham, and the plaintiff, after due notice, having failed to show facts as entitle him to prosecute this cause of action; it is on this 28th day of November, A. D. 1934,

20

ORDERED that the complaint filed herein be struck out.

JOSEPH L. SMITH,
Circuit Court Judge.

30

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Judgment.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

67456

10 SAMUEL WEINSTEIN, Assignee
of Franklin Washington
Trust Company, a corpora-
tion of New Jersey,

Plaintiff,

vs.

DAVID BOBKER,

Defendant.

*Action
at Law.*

*On Order
Striking Out
Complaint
by Order of
the Court.*

20 Judgment entered December 1, 1934.
Costs \$55.85.

Judge Joseph L. Smith.

Jacob Lipman, attorney for defendant.

30 Judgment on Order striking out complaint by
order of the Court in the above entitled action
was rendered on the Twenty-eighth day of No-
vember, A. D. Nineteen Hundred and Thirty-
four in favor of the defendant David Bobker
and against the plaintiff Samuel Weinstein, as-
signee of Franklin Washington Trust Company,
a corporation of New Jersey for the sum of
Fifty-five Dollars and Eighty-five Cents Costs of
Suit.

Judgment signed November 28, 1934.

Judgment entered December 1, 1934.

CHAS. W. PARKER,

A. J.

40 Book 123, page 45, Circuit Court Judgments.

Notice.

NOTICE.

Filed December 19, 1934.

ESSEX COUNTY CIRCUIT COURT.

SAMUEL WEINSTEIN, Assignee
of Franklin Washington
Trust Company, a corpora-
tion of New Jersey,

Plaintiff,

vs.

DAVID BOBKER,

Defendant.

10

*Action
at Law.*

Notice.

To: Jacob Lipman, Esq.,
Attorney for Defendant.

20

SIR:

PLEASE TAKE NOTICE that on Wednesday, December 19, 1934, I shall appear at the Essex County Circuit Court, at the Court House, in the City of Newark, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, before Judge Joseph L. Smith, and I shall then and there move that the judgment heretofore entered in favor of the defendant be vacated on the ground that the said judgment was entered as the result of the filing of an irregular and improper Order. I shall further move to vacate the Order entered by the Circuit Court, said Order having been signed by the Circuit Court on November 28, 1934, on the ground that said Order was irregular, improper and contrary to the Statute in such case made and provided.

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Notice.

Attached hereto and made a part hereof is a copy of an Order which will be presented to the Honorable Joseph L. Smith, Circuit Court Judge, for signature, at the above place and time.

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Respectfully yours,

DAVID COOPERMAN,
Attorney of Plaintiff.

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Proposed Order.

PROPOSED ORDER.

ESSEX COUNTY CIRCUIT COURT.

SAMUEL WEINSTEIN, Assignee
of Franklin Washington
Trust Company, a corpora-
tion of New Jersey,

Plaintiff,

vs.

DAVID BOBKER,

Defendant.

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*Action
at Law.*

Order.

This matter coming on for hearing upon mo-
tion of David Cooperman, Esq., attorney of
plaintiff, in the presence of Jacob Lipman, Esq.,
attorney of defendant, and it appearing that an
Order signed by this Court on November 28,
1934, was irregular, incorrect and improvid-
ently filed;

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AND IT FURTHER APPEARING that a judgment
was entered in favor of the defendant upon the
filing of said Order,

IT IS THEREFORE on this nineteenth day of De-
cember, 1934, ORDERED that the Order aforesaid
be and the same is hereby VACATED; AND IT IS
FURTHER ORDERED that the Judgment aforesaid
be and the same is hereby VACATED.

30

Circuit Court Judge.

Due and legal service of a copy of the within
Notice of Motion is hereby acknowledged this
19th day of December, 1934, as of time.

JACOB LIPMAN,
Attorney for Defendant.

40

Order.

ORDER.

Filed December 20, 1934.

ESSEX COUNTY CIRCUIT COURT.

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SAMUEL WEINSTEIN, Assignee
of Franklin Washington
Trust Company, a corpora-
tion of New Jersey,

Plaintiff,

vs.

DAVID BOBKER,

Defendant.

*Action
at Law.*

Order.

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This matter coming on for argument upon due application of the plaintiff, in the presence of David Cooperman, Esq., attorney for the plaintiff, and Jacob Lipman, Esq., attorney for the defendant, upon motion to vacate an order entered herein striking out the complaint as sham, upon the ground that the said order was improper, irregular and contrary to the statute in such case made and provided; and upon the further ground that the judgment entered herein was alleged to have been irregular and improper, and the Court having heard and considered the arguments of counsel, and the plaintiff having failed to satisfy the Court that the said order or the judgment entered herein was improper or irregular or contrary to the statute in such case made and provided; it is on this 20th day of December, 1934,

30

ORDERED that the plaintiff's motion to vacate the order striking plaintiff's complaint and to

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Order.

set aside the judgment entered in favor of the defendant herein, be and the same is hereby denied without costs.

JOSEPH L. SMITH,
Circuit Court Judge.

Approved as to form:

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JACOB LIPMAN,
Attorney for Defendant.

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*Clerk's Certificate.***CLERK'S CERTIFICATE.**

ESSEX COUNTY CLERK'S OFFICE.

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

- 10 I, JOHN H. SCOTT, Clerk of the Circuit Court,
 in and for the County of Essex in the State of
 New Jersey, Do HEREBY CERTIFY that the fore-
 going is a true and correct copy of the notice of
 appeal and transcript of all the pleadings in
 the case of Samuel Weinstein, assignee of Frank-
 lin Washington Trust Company, a corporation
 of New Jersey, plaintiff *v.* David Bobker, de-
 fendant and judgment recorded December 1,
 1934 in Book 123, page 45 of Circuit Court
 20 Judgments and the same is taken from and
 compared with the original papers and records
 filed and entered in the County Clerk's Office
 and as the same now remains on the files of said
 court.

IN TESTIMONY WHEREOF, I have hereunto set
 my hand and affixed the official seal of said Court
 and County at Newark, N. J., this Second day
 of January, A. D. 1935.

30

(SEAL)

JOHN H. SCOTT,

Clerk.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

SAMUEL WEINSTEIN, Assignee of
Franklin Washington Trust
Company, a corporation of
New Jersey,

Plaintiff-Appellant,

vs.

DAVID BOBKER,

Defendant-Respondent.

*Action
at Law.*

*On Appeal
from Essex
County
Circuit
Court.*

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT.

(Italics ours unless otherwise noted.)

This is an appeal from a judgment of the Essex County Circuit Court (page 36) entered upon an order of the Essex County Circuit Court striking the complaint as sham (page 35).

Statement of Facts.

This is a suit on a promissory note by the holder of the note against an endorser of said note. The complaint (page 6) contains one count. The gist of the complaint is that the plaintiff, Samuel Weinstein, who was not a party to the note either as maker, payee, or endorser thereof, acquired the note (page 7) by transfer and assignment from the Franklin Washington Trust Company, a corporation of the State of New Jersey, for value and then sued David Bobker, defendant, who was an endorser of the said note. The defendant served a demand for particulars on the plaintiff (page 12). The plaintiff then served a bill of particulars on the defendant.

The defendant then served a notice on plaintiff that he would apply for an order to compel the plaintiff to furnish more particularized answers in response to the aforesaid demand for particulars (page 14). An order was entered directing plaintiff to furnish more particularized statements in the bill of particulars (page 16). Plaintiff then served a supplemental bill of particulars on the defendant in compliance with this order. The defendant served notice upon the plaintiff of motion to strike the complaint as sham (page 18).

Affidavits on this motion were duly served and filed by the defendant (pages 19, 22) and by the plaintiff (pages 25-34), and at the hearing of the motion and upon considering the affidavits and argument of counsel the Court entered an order striking the complaint as being sham (page 35). Judgment was then entered against the plaintiff (page 36). Plaintiff then moved to vacate the aforesaid order and judgment (page 37). An order denying this motion was duly entered (page 40).

ARGUMENT.

POINT I.

Because the Circuit Court erred in striking out the complaint and the cause of action therein as sham.

It is apparent from an examination of the complaint that it is regular on its face. It is a suit on a note. It shows that the plaintiff received the note by transfer and assignment from the Franklin Washington Trust Company, a corporation of New Jersey. The note was presented at maturity and payment thereof was demanded

and refused, and thereupon the note was duly protested. The defendant, David Bobker, endorsed the note before delivery, and he received due notice of the presentment of said note, and of its dishonor by the maker, and of its protest. Plaintiff demanded payment of the said note, together with interest and protest fees, but defendant has refused and still refuses to pay the same. Wherefore the plaintiff demands judgment.

Three affidavits were submitted on behalf of the plaintiff. The affidavit of Samuel Weinstein (page 25) shows that he is the plaintiff in the suit. That on or about February 21, 1930, he authorized his father, Morris Weinstein, to purchase for him, from the Franklin Washington Trust Company, the note and a judgment entered on this note against B. W. Holding Co., Inc., and Morris Weinstein. In accordance with this authorization Morris Weinstein made arrangements to buy the note and judgment for his son, Samuel Weinstein. The plaintiff then delivered three checks to Morris Weinstein, which checks were in turn delivered by him to Mr. Milton M. Unger, attorney for the Franklin Washington Trust Company. These three checks represented full payment for the purchase price of the note and judgment. That on or about May 1, 1930 he went to the Franklin Washington Trust Company where he saw Henry Sommerrock, Jr., an official of the Bank, and he advised Mr. Sommerrock that he, Samuel Weinstein, had purchased and fully paid for the note and judgment from the Franklin Washington Trust Company. Samuel Weinstein related to Mr. Sommerrock the negotiations which took place between Morris Weinstein and Mr. Unger relative to the purchase of the note and judgment.

Samuel Weinstein thereupon made a demand upon Mr. Sommerrock for the note. Mr. Sommerrock delivered the note and certificate of protest to him. On or about April 30, 1930 an assignment of the judgment, in writing, was given to Samuel Weinstein by the Franklin Washington Trust Company.

Affidavit of Morris Weinstein (page 28) shows that he is the father of the plaintiff. That on or about February 21, 1930 his son, Samuel Weinstein authorized him to negotiate for the purchase of the note and judgment from the Franklin Washington Trust Company. In accordance with instructions, he saw Mr. Unger, attorney for the Bank, and delivered to him three checks totalling \$946.38, which checks he received from his son, Samuel Weinstein, said checks representing full payment for the purchase price of the note and judgment. That he made a demand upon Mr. Unger for the note, that Mr. Unger advised him he could get the note at the Bank. That he advised his son, Samuel Weinstein, about the note, and that his son told him he would get the note himself.

Affidavit of Henry Sommerrock, Jr., (page 30) shows that he is the assistant-secretary of the Franklin Washington Trust Company. That the Bank was the holder of this note. That the note was endorsed by the defendant before delivery and the note after delivery was discounted by the maker and the proceeds placed to its credit. That David Bobker was an officer of the maker at the time the note was discounted by the maker. That on July 5, 1929, the note fell due, was presented for payment, payment was refused, and thereupon the note was protested and notices of protest were mailed to the maker and endorsers on that day. *That on or about April 30, 1930*

Mr. Samuel Weinstein called at the Bank and informed him that he had purchased and paid for the note marked Schedule "A" (page 33). Plaintiff demanded delivery of the note to him. Plaintiff was advised by Mr. Sommerrock that the records would have to be checked. The records were checked. The records disclosed that the note was paid by three checks totalling \$946.38. All checks were received from the office of Milton M. Unger, attorney, who represented the Bank in this matter. The note and the certificate of protest was thereupon handed by Henry Sommerrock, Jr. to Samuel Weinstein.

There were two affidavits submitted on behalf of the defendant. Affidavit of David Bobker (page 19) shows that he is the defendant and that he endorsed the note. That plaintiff served a bill of particulars, the original of which will be offered in support of a motion to strike the complaint herein. That plaintiff served a supplemental bill of particulars, the original of which will be offered in support of a motion to strike the complaint herein. That the note had been fully paid and satisfied to the Franklin Washington Trust Company before the note came into the possession of Samuel Weinstein.

Affidavit of Henry Sommerrock, Jr. (page 22) shows that plaintiff called at the Bank and informed him that the plaintiff had purchased the note but did not inform him how, when or from whom he had purchased the note. That he did not inquire because neither he nor the Bank were interested since the note had been paid. That upon reference to the Bank's records the note had been paid and he delivered the note to Samuel Weinstein. That nothing was due on the note to the Bank at the time of the delivery of the note to Samuel Weinstein.

So, it is clear that the plaintiff, a *stranger* to the note, *purchased the note from the Bank with his own funds*. His affidavit is fully corroborated by the affidavit of Morris Weinstein. The affidavit of Henry Sommerrock, Jr. (page 32) admits that "Mr. Samuel Weinstein called at the Franklin Washington Trust Company, Weequahic Branch, Newark, New Jersey, and informed me that he had purchased and paid for the note marked Schedule 'A.' " Sommerrock admits that Weinstein told him he purchased the note but swears that he was not interested to see if Samuel Weinstein was the proper party to receive the note. If we believe Sommerrock on this point, *a perfect stranger could have come into the Bank and demanded the note, and received the note from Sommerrock so long as the note was paid for on the books of the Bank.*

Is it not reasonable to believe that *Samuel Weinstein told Sommerrock that he had purchased the note from the Bank*. Otherwise, why would *Samuel Weinstein demand delivery of the note from the Bank?* Of course, nothing was due to the Bank at the time of the delivery of the note to Samuel Weinstein, because *Samuel Weinstein had bought and paid for the note, the Bank having received the money for the note from Samuel Weinstein*. The affidavit of David Bobker admits that *the note came into the possession of the plaintiff when the same had been fully paid and entirely satisfied to the holder thereof, the Franklin Washington Trust Company*. Nowhere in any of the affidavits submitted on behalf of the defendant is it suggested that *any person other than Samuel Weinstein bought and paid for the note which is the subject matter of this suit*. The affidavit of Henry Sommerrock (page 22) third paragraph admits that *payments were*

made to Mr. Unger which in turn were given by Mr. Unger to the Bank. This corroborates the plaintiff's affidavits.

The striking of the complaint and the summary judgment deprived the plaintiff of his constitutional right to a trial by jury. A jury trial would give the plaintiff an opportunity to cross examine the persons who made affidavits on behalf of the defendant and thus show that these affidavits do not fully expose all the facts. It further would give the jury the opportunity to pass on the truth of the allegations of the complaint and the facts and inferences from all the testimony.

The defendant's affidavits do not state that the cause of action set forth in the complaint is sham. An examination of both plaintiff's and defendant's affidavits clearly show that the cause of action set forth in the complaint is not sham. These affidavits and the inferences permissible from them substantiate and support the cause of action set forth in the complaint. The plaintiff's affidavit did disclose sufficient facts as entitled him to prosecute the cause of action set forth in the complaint. All the allegations of the complaint are corroborated by both the plaintiff's and defendant's affidavits. The affidavits of the plaintiff controvert the affidavits of the defendant.

Solomon v. Salins, 108 N. J. L. 214, opinion of the Court delivered by the late Chief Justice Gummere. The headnote reads as follows:

"Where the facts set forth in affidavits submitted by the plaintiff on a motion to strike out an answer or counterclaim, as sham, are not contradicted and demonstrate that the defense is sham or that the counterclaim is without factual support, the court is justified in granting the motion; but where

the affidavits submitted by the defendant on such motion set forth facts that are diametrically opposed to the facts set forth by the plaintiff and support the answer and counterclaim the court cannot determine which set of facts are true and the question of fact so raised must be determined by a jury."

West v. Marritz, 109 N. J. L. 321, decided by this Court, the headnotes read as follows:

1. Where, upon a motion to strike out an answer the facts alleged therein, if true, would present a valid defense or call for the relief prayed for, *and the proofs before the Court are in controversy as to their truth or it appears that the facts are not fully exposed*, it is error to strike the answer, and in such a case the cause should go to trial or final hearing. 2. To warrant the Court in striking out a plea it must be so *palpably* false or insufficient in law as to enable the court to conclude that the defendant is seeking delay or trifling with the process of the law.

Jaeger v. Naef, 112 N. J. L. 417, Justice Heher delivered the opinion. The first three headnotes read as follows:

1. On a motion to strike a pleading on the ground that it is sham and frivolous, it is not the province of the Court to determine which of the parties was telling the truth in their affidavits submitted on the motion. When the proofs are sharply in conflict, questions of fact should be determined by a jury.

2. The power to strike out a pleading on the ground that it is false or sham is inherent in the Court, and the Statute purporting to create such power merely confers what was exercised at common law.

3. A motion to strike a pleading as frivolous, sham or false will not be granted, unless it appears to be clearly and palpably

so, and the power should be cautiously exercised. The duty of the Court is to determine whether an issue of fact is presented, and not to try the issue.

And Mr. Justice Heher says as follows on page 421:—

The Statute does not alter the rule at common law in respect of the striking out of sham pleadings. Such a pleading can be struck out only when it is *palpably* false. When its falsity merely seems *probable*, reasonable terms may be imposed as a condition to further proceedings, *but the party cannot be deprived of his constitutional right to proceed to a trial by the customary method*. It follows that there was error in striking out the complaint, and entering judgment for defendant. (The words *palpably* and *probable* are italicized by the Court.)

Torricelli v. Sebastini, 112 N. J. L. 458, opinion of the Court delivered by Justice Heher. Headnote No. 2 reads as follows:

Where, upon a motion to strike an answer as sham, the affidavits submitted by defendant in opposition to the motion set forth facts sufficient to entitle him to defend, the motion should not prevail. The duty of the court is to determine whether an issue of fact is presented, and not to try the case on the affidavits for and against the motion.

And on page 462 Justice Heher says:

If an issue of fact is exhibited, the parties tendering it cannot be deprived of the benefit of a trial in the ordinary mode. The court will not try the case on affidavits.

Kamm v. Flink, 113 N. J. L. 582, decided by this Court, and the opinion was delivered by Justice Heher. On pages 595-596:

The mere *ex parte* denial of this allegation is entitled, for manifest reasons, to

little or no weight on a motion of this character. It may be that, when the proofs submitted by the parties are subjected to the tests prescribed by law, by the process of trial in the ordinary mode, the ultimate result will be favorable to respondents; but the issue of fact must be determined by the tribunal in which that authority is vested. This is patently a case for a jury. The parties will then be required to submit to cross examination, or subject their conduct to the inferences that may properly be drawn by a contrary course. And it will be for the jury to determine the inferences warranted by the established facts.

The falsity of the pleading must be apparent. The power to strike out a pleading, as frivolous, sham or false will not be exercised, unless it appears to be clearly, palpably so. It is a power that has always been cautiously exercised. It was not the province of the court below, on this motion, to determine the veracity of the respective parties. That was a question of fact to be determined by a jury. The duty of the court, on a motion to strike out a pleading as sham, is to determine whether an issue of fact is presented, and not to try the issue. If an issue of fact is exhibited, the parties tendering it cannot be deprived of the benefit of a trial in the ordinary mode. The court will not try the case on affidavits. It is only where the matters set up in the affidavits submitted on the part of the defendant, on a motion such as this, are not controverted, and demonstrate that the cause of action pleaded is a sham, and is without factual support, that the court is justified in granting the motion. A contrary rule would work a deprivation of the constitutional right of trial by jury.

Finnegan v. The Goerke Co., 106 N. J. L. 59, decided by this Court, headnote No. 3 reads as follows:

Where fair-minded men may honestly differ as to the conclusions to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury, although the opinion of the judge upon the evidence might be otherwise.

This rule has been followed in the case of *Jackson v. D., L. & W. R. R.*, 111 N. J. L. 487, decided by this Court.

3 *Ruling Case Law* 966, paragraph 174, says:

A note payable to bearer passes by mere delivery, and the holder claims his title to the note by virtue of being its bearer and of the promise and contract between the maker and bearer.

Coffin v. D. W. May Inc., 104 N. J. L. 347:

Where payee indorses instrument in blank, title passes by delivery. Negotiable Instruments Act, paragraph 34 (3 Compiled Statutes 1910, page 3739).

Hutchings v. Low, 13 N. J. L. 246 says:

An assignment does not necessarily imply or require writing; and when alleged of any subject, it should always be construed in connection with the law of transfer, applicable to that particular subject matter. A note payable to bearer is negotiable by delivery, and this creates a property in the assignee or bearer.

2 *Ruling Case Law* 616, paragraph 23 provides:

The manual delivery of the instrument is the proper method of assigning the debt or transferring title to the property which it represents.

8 *Corpus Juris* 176, paragraph 301.

A note may be made payable to the maker's order, and this rule is reiterated by the Negotiable Instruments Law, and a note by two persons may be made payable to the "order of Myself." Such a note is in effect payable to bearer, when endorsed in blank by the maker, but it is of no effect until so endorsed.

A note payable to maker and endorsed by him in blank is payable to bearer.

It is therefore respectfully submitted that the note which is the subject matter of this suit became a "bearer instrument" upon the endorsement by the maker of this note. Being a "bearer instrument" this note could be and was negotiated by delivery.

3 *Ruling Case Law* 1286-87, paragraph 519, provides as follows:

Where, after a note has become due, a stranger calls upon the holder and pays the amount due upon it, declines having it cancelled, and takes it away with him, *nothing being said about buying it*, this, it has been held, is a payment and satisfaction of the note, so as to prevent a suit being brought thereon by a person receiving it from the stranger. But in many cases a stranger paying a note has been held to be a purchaser; and this is the rule it seems, *where the transaction itself shows an intention at the time to become such purchaser, and this coupled with a power in the holder to sell and transfer the instrument*. 52 L. R. A. 872. So it has been held that when a note is taken up by a stranger, who is neither a party to the paper nor bound in any way for its payment, the transaction is a purchase, and not a payment, where it clearly appears from the evidence that he did not intend to satisfy or discharge the note, but to purchase it as an investment. 32 *Southeastern Reporter*

791. *Indeed, recent authority asserts that the payment of a note by a stranger and its delivery to him should be held to be a purchase of it in the absence of evidence to the contrary.* 109 Southwestern 1163 (17 L. R. A. New Series 838).

Kelly v. Briggs, 290 Southwestern Reporter 105, says:

When a stranger to a note takes it up from holder, transaction is deemed "purchase" and not a payment, nothing more appearing.

8 *Corpus Juris* 588 provides:

If a bill or note is paid after its maturity by a stranger to the paper, it will in general be held to be a purchase and not a payment of the instrument. Whether it is a payment or a purchase is, however, a question of intention to be determined as a fact from the acts and declarations of the parties and from the surrounding circumstances.

8 *Corpus Juris* 589 provides:

When one who is not the maker of a note tenders to the holder the amount due, expressing his intention and purpose to be to "take up the note and carry it," and requests that the note be not stamped "paid," and the holder thereupon accepts the money and delivers the note uncanceled, without expressing any objection to transferring it, the transaction is a sale of the note. It is of no consequence that the transferor did not know that the legal definition and effect of the transaction was that of a sale, so long as he understood the facts of the transaction.

Where a stranger to a note pays his money therefor and takes it up, the presumption is that he has bought it.

Wing v. Union Central Life Insurance Co., 168 Southwestern Reporter 917, says:

When a stranger pays his money for a note and takes it up, the presumption is that he has bought it, and not that he has paid it off. And when he manifests an intention at the time to obtain and hold the note as his own, he becomes a purchaser thereof, and it is not paid off or extinguished.

Cosmopolitan v. Leonard, 143 Northeastern Reporter 827, says:

A valid assignment of a promissory note may be made by words or acts which fairly indicate an intention to make assignee owner.

Stockgrowers National Bank v. Crosby, 273 Pacific Reporter 679, says:

Note may be assigned without writing to transfer ownership to assignee and enable assignee to sue thereon without indorsement. An assignment of note may be effectuated in informal manner without writing sufficient to transfer interest in note and enable assignee to sue thereon as real party in interest without any indorsement on note. Admission by defendant sued on note that note was transferred by payee to plaintiff was sufficient to shown assignment and sustain plaintiff's allegation of ownership of note.

Beneficial Loan Ass'n v. Hillery, 95 N. J. L. 271.

It is true that the plaintiff is not a holder in due course within the meaning of the Statutory definition, in that it did not acquire the instrument before maturity; but that fact is entirely immaterial in determining the plaintiff's right. The holder of a promissory note which comes into his hands after maturity takes it subject to all legal defenses which the maker may have against its enforcement, but with that exception his right

of recovery is as complete as if he was a holder in due course.

Hare & Chase, Inc. v. Englander, 125 Atlantic Reporter 313, Supreme Court of New Jersey, decision by Justice Lloyd.

Being drawn to bearer, the note might have been passed by mere delivery, as is usual in such cases where personal liability of endorsement is to be avoided; but it is not the only way in which negotiable paper may be transferred. We think it may be as well by assignment. Either method is a mere conduit whereby the note itself is transferred in its ownership from one holder to another, and it is immaterial in what form that transfer may be. Our Negotiable Instruments Act of 1902 (3 Compiled Statutes 1910, page 3738, paragraph 30) declares that: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof."

² *Ruling Case Law* 626, paragraph 35. Assignments implied by operation of Law.

Under certain circumstances there may be an implied equitable assignment of a chose in action. Thus if a note is made payable to the cashier of a bank, and presumably to its use, on his ceasing to be connected with the bank there is an equitable assignment of the note to the institution. One form of equitable assignment implied by operation of law is the transfer of a chose in action through the application of the equitable doctrine of subrogation. The right of subrogation is said to be not founded on contract but to depend on the existence of facts and circumstances such that, *on principles of natural justice*, it is equitable that a person furnishing money to pay a debt of another should be substituted in the place of a creditor and allowed to avail himself of the rights and defenses which such creditor had in reference to the debt.

Garford Motor Truck Co. v. Buckson, 143 Atlantic Reporter 410, Superior Court of Delaware, on page 411, paragraph three,

“The modern authorities not only hold that a chose in action may be assigned in a Court of Equity, but that an equitable assignment of a chose in action is recognized in a court of law and that such assignments may be made either in writing or by parol.” Citing *N. J. Produce v. Gluck*, 79 N. J. L. 115, and *Hutchings v. Low*, 13 N. J. L. 246.

Therefore in view of the authorities cited the plaintiff is entitled to have his day in Court. It must be noted that the plaintiff was a *stranger to the note* and that *he purchased the note*. This is clearly shown by all the affidavits. That the plaintiff *exercised an intention to buy the note* is not denied; that he did *buy the note from the Bank* is not denied; that there were *conversations and negotiations between the Bank's attorney and the plaintiff's agent relative to the purchase of the note prior to the delivery of the note to the plaintiff* is not denied. Of course, no words of *assignment* were used by Henry Sommerrock, Jr., *at the time of the delivery of the note to Samuel Weinstein*. *No words of assignment were necessary at that time*. The cases heretofore cited clearly show that *the delivery of the note* was sufficient to vest title in the plaintiff.

It is significant to note that although the Affidavit of David Bobker (page 19) says the originals of the bill of particulars and supplemental bill of particulars “will be offered in support of a motion to strike the complaint herein” we find nevertheless, *that they were neither offered nor filed by the defendant and therefore do not form part of the record*.

The plaintiff's contention, that *the transaction with the bank was a purchase* of the obligation and not a *payment* by the plaintiff and the plaintiff's *intention* that such should be the case and the *bank's agreement to such purchase*, is further evidenced by the very fact *that the bank executed a written assignment of the judgment obtained by it, to the plaintiff and did not question plaintiff's right to demand or receive such assignment instead of a warrant for satisfaction.*

POINT II.

Because the Circuit Court erred in entering an order on November 28, 1934, striking out the complaint and the cause of action therein, without designating in said order whether the said complaint was stricken with or without prejudice to the institution of another suit based on the same cause of action set forth in the complaint, said lack of designation being contrary to the statute in such case made and provided.

The Circuit Court erred in entering the order of November 28, 1934 (page 35), for the following reasons: It is the duty of the Court to indicate in its order striking a complaint whether the said complaint is stricken with or without prejudice.

Section 15 of the Practice Act of 1912 (Pamphlet Laws 1912, page 380) Compiled Statutes Supp. Paragraph 163-291) provide that:

"Subject to rules, any frivolous or sham complaint, or any frivolous or sham counterclaim heretofore filed, or which may hereafter be filed, or any portion or count of any such complaint or counterclaim, may be struck out; or if it appear probable that the complaint or counterclaim is frivolous or sham, the plaintiff or counterclaimant

may be allowed to proceed therewith on terms. A plaintiff whose complaint, or counterclaimant whose counterclaim, has in part only been struck out, may, after final judgment, appeal from such order. Whether the striking out of any such complaint or counterclaim, or any part or count thereof, *shall be with or without prejudice to the institution of another proceeding at law*, based on the same cause or causes of action as were set forth in such complaint or counterclaim, or in the portion or count thereof so stricken out, *shall be in the discretion of the court. Such discretion shall be exercised by the court and indicated in the order striking out such complaint or counterclaim or portion or count thereof."*

Having failed to comply with the statute, the Court's order was void and therefore the judgment entered on said order was also void.

POINT III.

Because the Circuit Court erred in entering an order on December 20, 1934, denying the plaintiff's motion to vacate the order of November 28, 1934 and to vacate the judgment entered in this cause.

The Circuit Court erred in entering the order of December 20, 1934 (page 40), for the reasons set forth under Point II and further for the reason that the Court was duty bound to vacate the judgment entered in this cause.

Harrison v. Dobkin, 11 N. J. Miscellaneous page 892 Circuit Court Judge Jayne: On page 895:

The present application, however, presents a situation where a judgment has been irregularly entered in disregard of the requirements of the statute in that the affidavit is in its essential substance insuffi-

cient to justify the entry of the judgment. If the affidavit is not in substantial compliance with the statute, the duty of the court on an application by the defendant to set aside the judgment so irregularly entered has been regarded as imperative rather than discretionary.

"It was an appeal to the legal judgment of the court, and if the party making that appeal had the legal right to do so; and if upon inspecting the record, there was error; then the court had no discretion to grant or refuse the motion, but were bound *ex debito justitiae*, to set aside the judgment." *Evans v. Adams*, 15 N. J. L. 373, 378.

It is respectfully submitted that the admitted facts not only bring about a question for a jury to pass upon, but prove the plaintiff's cause of action.

CONCLUSION.

In conclusion, it is respectfully submitted that the judgment of the Court below should be set aside and for nothing holden, with costs to the appellant on this appeal.

Dated: January 15th, 1935.

DAVID COOPERMAN,
Attorney of Plaintiff-Appellant.

SAMUEL GEORGE COHEN,
Of Counsel.

New Jersey Court of Errors and Appeals

SAMUEL WEINSTEIN, Assignee of Franklin Washington Trust Company, a corporation of New Jersey, Plaintiff-Appellant, vs. DAVID BOBKER, Defendant-Respondent.	}	Action at Law On Appeal from Essex County Circuit Court.
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BRIEF ON BEHALF OF DEFENDANT-RESPONDENT.

Introductory.

This appeal involves two propositions; First, a review of the conclusion of the court below, and Second, its validity as to form in so far as it might be affected by the interpretation and application of Section 15 of the Practice Act of 1912 as amended, the pertinent provisions of which are set up verbatim by the appellant in his brief, under Point II.

In the court below, it would seem that the proceedings were in the nature of a trial of the appellant's cause of action, governed by the usual principles incident to trial, a conception which, it is submitted, has not impressed itself upon the appellant. The court below simply appraised the appellant's cause of action by accepting those elements admissible by the laws of evidence and relevant to the issue, and those conclusions inferable by the law and the ordinary processes of

reasoning, and rejected such additional material as appellant offered and concluded that the appellant's cause was wanting and was therefore without foundation in fact.

The appellant, in his complaint, alleged that on April 30, 1930, approximately ten months after maturity, he acquired by assignment from the Franklin Washington Trust Company, a corporation, the holder thereof, a promissory note dated June 14, 1929, maturing three weeks thereafter, endorsed by the defendant and/or Morris Weinstein, the father of the appellant.

The mechanics of the assignment were developed by the respondent in the form of a demand for a bill of particulars (St. of Case, p. 12) and an order of the court below requiring appellant to amplify the allegations of his complaint by more particularized answers to the respondent's demand for particulars (St. of Case, p. 16) from which, as will appear by the appellant's brief (pp. 2 and 5) and the affidavit of David Bobker (p. 20, St. of Case) it developed that the assignment was "neither in words nor in writing but was made by virtue of the delivery of the said note by Henry Sommerrock, Jr., to Samuel Weinstein". Respondent thereupon on motion to strike filed his affidavit charging that the appellant acquired the promissory note in the manner alleged in his bill and supplemental bill of particulars and Henry Sommerrock, Jr., the person referred to by the appellant deposed that "on the date of the last payment the obligation evidenced by the said promissory note was completely paid and discharged" and that he "at no time discussed the sale, transfer or assignment of said note with the said Samuel Weinstein and on the occasion of the delivery of the same to the plaintiff nothing was due thereon to the Franklin Washington Trust

Company from either David Bobker, the defendant herein, the maker or the endorser". (St. of Case, p. 23). The lower court thereupon limited the scope of appellant's evidence accordingly and rejected so much of the appellant's assertions of fact from which it appeared that his claim rested not upon the transaction related in his bill and supplemental bill of particulars but a new and irrelevant transaction with one Milton M. Unger, with whom nothing more is claimed by the appellant than that he made "arrangements" (St. of Case, p. 25) to purchase the note in question together with a judgment, through his father, Morris Weinstein, who also deposed that he "arranged" to "buy the note and judgment for my son, Samuel Weinstein". (St. of Case, p. 29).

The lower court, it is submitted, properly excluded the affidavit of Samuel Weinstein as hearsay and stripped the affidavit of Morris Weinstein of conclusions of law, hearsay statements and assertions irrelevant to the issue as created by the appellant through his bill and supplemental bill of particulars, and since the appellant failed to establish affirmatively the particulars required for the maintenance of his action as limited by his bill of particulars and supplemental bill of particulars, properly concluded that the appellant's cause of action was untrue in fact and therefore struck the complaint as sham.

Appellant, under Point I, argues that on May 1, 1930 he went to the Franklin Washington Trust Company and he advised Henry Sommerrock, Jr., an officer of the bank, that he, Samuel Weinstein, had purchased and fully paid for the note and judgment from the Franklin Washington Trust Company. Appellant argues that he there related "the negotiations which took place between Morris Weinstein and Mr. Unger relative to the

purchase of the note and judgment", (p. 3) an assertion which is not borne out by his affidavit which simply stated "I further advised Mr. Sommerrock that my father, acting as my agent, had been to Mr. Unger's office and he had requested Mr. Unger to deliver the said note to him upon the payment of the final check of \$246.38 and that Mr. Unger advised my father that the note was at the Franklin Washington Trust Company and that my father could obtain the same note by going to the bank and requesting delivery of the note." (St. of Case, p. 27). There appears to be no justification for the statement contained in the appellant's brief and it is noteworthy that although the affidavit of Henry Sommerrock Jr. was used by the appellant in support of his complaint, that nowhere is there an unequivocal statement, either by him or by Mr. Milton M. Unger, or any other person, of the "details" of the "Arrangement" from which it might have been possible to conclude whether a transfer of title had been either intended or effected.

Notwithstanding these assertions, it is respectfully submitted that the details of this transaction with Milton M. Unger were irrelevant and were properly excluded by the lower court in its consideration of the problem, since it did not appear that title was to be claimed through the attorney for the bank. The appellant argued that he acquired the note from an attorney charged with the prosecution of the law suit, overlooking his legal capacity as special agent, and his consequent limited authority.

No evidence was presented indicating that the payee's attorney was in fact authorized to effect the assignment and in the absence of such proof it is submitted that the trial court properly declined to infer the same.

The only proof before the court established that nothing was due on the obligation on the occasion of its physical surrender and the trial court properly declined to infer the contrary.

The plaintiff's right in the instrument is at best highly unsettled and doubtful and appellant has failed to establish by a scintilla of evidence that the Franklin Washington Trust Company, by a proper officer, intended to effect an assignment by mere delivery. Henry Sommerrock, Jr., the officer through whom it is asserted the assignment was effected, impressively distinguished between the indebtedness subsisting between the parties and the evidence thereof and unequivocally stated that "on the date that Samuel Weinstein called at the bank and informed me that he had purchased the said promissory note, he did not inform me how, when or from whom he had purchased the same and I did not inquire inasmuch as neither I nor the bank were interested since the obligation evidenced by the same and arising therefrom had been fully paid and when, upon reference to the bank's records, I satisfied myself that the entire amount had been fully paid, I delivered the note to the said Samuel Weinstein without any comment whatever", (St. of Case, p. 23) and there is no denial of this assertion, except the vague effort, through the affidavit of Samuel Weinstein, who said "I told Mr. Sommerrock that I had purchased the note and judgment from the Franklin Washington Trust Company by making three payments * * * given to Franklin Washington Trust Company's attorney, Mr. Milton M. Unger, by my agent, Morris Weinstein". (St. of Case, p. 27).

At most there is presented nothing more than a dubious claim by an assignee, based upon his own testimony, wholly unsupported by the assignor and subject to the limitations imposed by his

particulars, leaving, it is submitted, an unsupported cause as an impelling basis for the conclusion of the Court below.

The principles quoted and authorities cited by the appellant present no problem except application in which, it is submitted, the validity of the lower court's conclusion finds complete support.

POINT I.

The subject-matter of the suit is not subject to the Negotiable Instruments Act. C. S. 1910, p. 3732.

Appellant's theory appears to be an *a fortiori* indebtedness of the respondent based upon what is described as a negotiable promissory note. It should follow, therefore, that his conclusions are not sustained except and until his major premise is established.

It will be noted that in the instrument sued upon, the makers appear in the following manner: (St. of Case, p. 7):

B-W. Holding Co., Inc.
M. Weinstein, Pres.
D. Bobker

and was endorsed (St. of Case, p. 7):

M. Weinstein
D. Bobker
M. Weinstein
D. Bobker

Although the instrument was drawn to the order of the makers it was not endorsed by the B-W Holding Co., Inc., M. Weinstein, president.

Although appellant appears to rely upon the Negotiable Instruments Act, those provisions which he relies upon are not specified nor are the presumptions and inferences to which he lays claim cited. The controlling provision of the Act to which all other provisions are subordinate appears to be Section 184.

Uniform Negotiable Instruments Law, 3 C. S. 1910, p. 3755, Sec. 184:

“A negotiable promissory note, within the meaning of this act, is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to order or bearer; where a note is drawn to the maker's own order, it is not complete until endorsed by him.”

Apparently the appellant is relying upon Section 51 of the Act without regard to the antecedent effect of the preceding section. 3 C. S. 1910 p. 3740, Section 51:

“The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.”

8 C. J. p. 176, par. 301, cited in part, by the appellant would appear to be dispositive of the question. The language quoted by the appellant is incomplete and the text of that authority continues as follows:

“And the negotiable instrument law expressly provides that where a note is drawn to the maker's own order, it is not complete until endorsed by him.”

3 R. C. L. p. 965, sec. 173, in speaking of negotiation, says:

“Where a note is payable to two it must be endorsed by both in order to transfer the entire interest in it to the endorsee and an endorsement by one joint promisee of a negotiable instrument for himself and his co-promisee, without special authority, transfers no title to the note.”

In *Peoples State Bank v. Snyder*, 50 N. D. 234, 195 N. W. 436, a note the order of “ourselves” was held to be incomplete until endorsed by the maker.

In *Market etc. Bank v. Ettinson*, 172 Mo. App. 404, 158 S. W. 448, a note drawn to the order of “ourselves” having several makers who did not appear to have been partners, was required to have been endorsed by all.

In *St. Martinsville Bank v. Duchamp*, 6 La. App. 562, it was held that the note, having two makers, and drawn to the order of “myself”, must have been endorsed by both before liability could arise thereunder.

Market etc. Bank v. Ettinson, supra, is of distinct interest inasmuch as it was identical with the instant case, and it was held that mere delivery for value of a promissory note drawn to the maker’s own order imports no vital force to the instrument but leaves it a nullity in the hands of the holder.

In *Simon v. Mintz*, 51 Misc. 670, 101 N. Y. S. 86, and *Edelman v. Rams*, 58 Misc. 561, 109 N. Y. S. 816, it was held that a complaint in an action on a note drawn to the maker’s own order should allege his endorsement of it.

It is respectfully submitted, therefore, that the

instrument in question is not a negotiable instrument, either by the plain reading of the statute or the complete authority cited by the appellant and that there was no evidence before the lower court either by presumption or otherwise from which the respondent's liability could have been inferred.

POINT II.

There was no proof of assignment to the appellant.

It is conceded that an assignment of a promissory note may be effected by means other than that of endorsement, and although the authorities cited by the appellant are employed in a very general fashion it would seem that the true test of assignment is based not upon delivery but rather upon "those words or acts which fairly indicate the intention to make the assignee the owner" (appellant's brief, p. 14). It would seem that proper reasoning would require an intent, not only on the part of the assignee, but on the part of the assignor, as well, or perhaps in other words a mutuality of intent. The authorities cited by appellant do not indicate the contrary and without exception refer to cases of bearer instruments, which are not controlled by Section 184 of the Negotiable Instruments Law quoted in the preceding point.

Reference to all of the proof adduced by the appellant, without regard to its relevancy, indicates an intent to accept by assignment and the significance and necessity of proof and intent to assign becomes evident by reference to the Negotiable Instruments Act from which it appears (3 C. S. 1910, p. 3743, Sec. 65):

“Every person negotiating an instrument by delivery or by a qualified endorsement, warrants (1) that the instrument is genuine and in all respects what it purports to be; (2) That he has a good title to it; (3) That all prior parties had capacity to contract; (4) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no person other than the immediate transferee.”

As a necessary condition to assignment, it would seem, therefore, it should affirmatively appear that the assignor, by his conduct, intended to become bound to the extent of the liabilities imposed upon him by virtue of this section of the act.

The affidavits of Henry Sommerrock, Jr., the individual who effected the physical delivery of the instrument to the appellant indicated:

“On or about April 30, 1930, Mr. Samuel Weinstein called at the Franklin Washington Trust Company, Weequahic Branch, Newark, New Jersey, and informed me that he had purchased and paid for the note marked Schedule “A”. He asked me to deliver the said note to him. I advised him that he would have to wait until I checked our records in this matter. According to our records the said note was paid as follows: During the month of February, 1930, by check the sum of \$350. During the month of April, 1930, by check the sum of \$350. During the month of April, 1930, by check the sum of \$246.38. All of the above checks were received from the office of Milton M. Unger, attorney, who represented the bank in this matter.” (St. of Case, p. 32).

“The manner in which the payments were received by the Franklin Washington Trust Company is particularly set forth in the affidavit signed by me on the plaintiff’s behalf, and on the date of the last payment the obligation evidenced by the said promissory note was completely paid and discharged.

On the date that Samuel Weinstein called at the bank and informed me that he had purchased the said promissory note he did not inform me how, when or from whom he had purchased the same and I did not inquire inasmuch as neither I nor the bank were interested since the obligation evidenced by the same and arising therefrom had been fully paid and when, upon reference to the bank’s records, I satisfied myself that the entire amount had been fully paid, I delivered the note to the said Samuel Weinstein without any comment whatever.

I at no time discussed the sale, transfer or assignment of the said note with the said Samuel Weinstein, and on the occasion of the delivery of the same to the plaintiff nothing was due thereon to the Franklin Washington Trust Company from either David Bobker, the defendant herein, the maker, or the endorser.” (St. of Case, p. 23).

Acceptance of the appellant’s reasoning would require a judicial determination of the relationship between the assignor and the appellant in which the assignor has no voice, and inferentially not only subjects the assignor to the obligations of Section 65 of the Negotiable Instruments Law, but the respondent to the possibility of claim by the bank, a situation which called for considerable comment by this Court in *Robertson v. Bur-*

stein, 105 N. J. L. 375, where in treating with the effect of an assignment, this Court said:

“If they were not authentic, the two companies, and not he, were the parties entitled to any recovery and if under such circumstances he were permitted to rest his case on them without proper proof that they were genuine, the defendant might well be faced with the same claims again on the part of the companies themselves.”

With this situation, of which this Court is so mindful, it would seem that the absence of proof, through either Milton M. Unger or Henry Sommerrock, Jr., the persons referred to by the appellant, and his failure to account for the absence of proof through them, would give rise to an inference that the same would not support the theory that delivery was made by the assignor with the intention of making the assignee the owner. The appellant appears to have been an uncertain assignee, of whom it is said, 2 A. & E. Enc. of Law, 1012,

“An assignment will not be enforced in favor of an uncertain assignee.”

It would seem therefore, that at most the appellant has acquired a mere chose in action and that no inference of liability is to be drawn therefrom.

Moreover the mechanism of assignment presented to the trial court was limited by the appellant in his supplemental bill of particulars from which it appeared that it had been effected solely by physical delivery, from which, it is respectfully submitted, no inference of intention may be drawn.

POINT III.

There was no evidence of an assignment at law.

Respondent, of necessity, will confine his discussion to the effect of the assignment in law as opposed to the suggestion of equitable assignment suggested by appellant.

The proofs submitted by the appellant, in their greatest measure, established that an "arrangement" was made with Milton M. Unger, the attorney employed by the corporate assignor, and Henry Sommerrock, Jr., its assistant secretary and assistant treasurer. Reference is again made to the assignment of the judgment referred to by the appellant, a judgment entered on a note against B-W Holding Co., Inc. and Morris Weinstein, and its assignment, neither of which were in evidence before the trial court, and are not in evidence on this appeal (State of Case, p. 25 & 29). It is noteworthy, however, that no judgment had been recovered against the respondent.

It would seem to be fundamental that agency will neither be presumed nor inferred and must be established affirmatively, with the burden of proof upon the appellant. It would seem to be equally obvious that persons dealing with officers of a corporation are charged with notice of their authority and defined and limited by the Charter of its By-Laws.

The appellant concedes that Mr. Unger was an attorney representing the bank and Mr. Sommerrock its assistant secretary and treasurer, and it can be said, therefore, that he is charged with notice of their authority. Nowhere was there a

scintilla of evidence of their authority or of acts from which such authority might be inferred.

In *Dennis Metal Mfg. Co. v. Fidelity Union Trust Co.*, 99 N. J. L. 365, in a suit involving a negotiable check endorsed by the president of a corporation, the Supreme Court, in opinion by Justice KATZENBACH, declined to infer from the mere fact of endorsement the authority of one who appeared to have endorsed the check on behalf of the payee corporation, holding that there was no evidence of express authority to so endorse the check and that there were no acts from which such authority could have been inferred.

In *Aerial League of America v. Aircraft Fireproofing Corp.*, 97 N. J. L. 530, this Court, in an opinion by Justice KATZENBACH said:

“A corporation is bound by the act of an officer or agent only to the extent that the power to do the act has been conferred upon such officer or agent expressly by the charter, by-laws or corporate action of its stockholders or board of directors, or can be implied from the powers expressly conferred or which are incidental thereto, or where the act is within the apparent powers which the corporation has caused those with whom its officers or agents have dealt to believe it has conferred upon them.”

In *Economy Auto Supply Co. v. Fidelity Union Trust Co.*, 105 N. J. L. 206, this Court reviewed the powers of officers of corporations and said:

“The treasurer by his title is indicated by the statute as the fiscal officer of the corporation and has control of its finances, subject to the higher power of the directors as emphasized by the requirement that he alone of the officers must give security for the faithful performance of his duties.”

Under the General Corporation Act, (Revision of 1896) the duties of corporate officers are defined, in Section 13, which provides:

“Every corporation organized under this act shall have a president, secretary and treasurer, who shall be chosen either by the directors or stockholders, as the by-laws may direct, and shall hold their offices until others are chosen and qualified in their stead; the president shall be chosen from among the directors; the secretary shall be sworn to the faithful discharge of his duty, and shall record all the votes of the corporation and directors in a book to be kept for that purpose, and perform such other duties as shall be assigned to him; the treasurer shall give bond in such sum, and with such surety or sureties, as shall be required by the by-laws for the faithful discharge of his duty. (L. 1896, Ch. 185, p. 281, Sec. 13, C. S. p. 1607, Sec. 13)”

It is the universal rule, both in law and in equity, that an attorney is a special agent and persons treating with him are charged with notice of his limited authority. *Strauss v. Rabe*, 97 N. J. E. 208; *Purine v. Cooley*, 42 N. J. L. 623, aff. 41 N. J. L. 322, 21 R. C. L. 988.

In *Dowden v. Cryder*, 55 N. J. L. p. 329, suit had been brought upon a negotiable instrument in which the agency of the assignor was an issue. In the course of the opinion, the court said:

“The plaintiff dealt with him as such agent and was therefore bound to ascertain the extent of his power.”

Speaking of the measure of proof, the same court said:

“The declarations of an agent, although accompanying his acts, constitute no evi-

dence of the extent of his authority (Citing Story Ag. Sec. 136)''

In 2 *A. & E. Enc. of L.*, p. 1012, it is said:

“An assignment may be by an agent but an unauthorized assignment by an agent is void.

An attorney at law to prosecute a suit cannot assign a judgment recovered without express authority from his client.”

It is respectfully submitted, therefore, that the appellant was dealing with a special agent on the one hand and a corporate officer on the other and there was no evidence before the lower court, from which it was possible to infer authority to effect the assignment as alleged.

Within the scope of the appellant's bill of particulars, however, the only evidence relevant before the lower court was limited by his supplemental bill of particulars stating that the assignment was effected through Henry Sommerrock, Jr., and that the lower court properly excluded from its consideration so much of the evidence as related to transactions with the special agent.

Moreover it will be observed that Henry Sommerrock's authority was that of assistant to the secretary and to the treasurer with duties not defined by statute and conceivably limited to aiding its officers in the discharge of their duties.

It is respectfully submitted, therefore, that the conclusion of the trial court should be sustained upon any one of the following conclusions:

1. That the instrument sued upon was not a negotiable instrument within the meaning of the Negotiable Instruments Act and that the appellant was not thereby entitled to the inferences and presumptions to be drawn therefrom.

2. That there was no evidence of an assignment to the appellant.

3. That there was no evidence that the assignment alleged by the appellant was effected through the medium of agents of the assignor so authorized to do.

POINT IV.

The provisions of Section 15 of the Practice Act of 1912 are not mandatory.

Associate Justice BENJAMIN N. CARDOZO, of the U. S. Supreme Court, in his "The Paradoxes of Legal Science", Columbia University Press, 1928, in speaking of statutory constructions said:

"Statutes derogating from the common law are to be strictly construed, a maxim which recalls what has been said by Sir Frederick Pollack of rules of statutory construction generally: they cannot well be accounted for except on the theory that the legislature generally changes the law for the worse and that the business of judges is to keep the mischief of its interference within the narrowest possible bounds."

Justice CARDOZO joined with the later thinkers who softened the apparently hard outer lines of this criticism by suggesting

"where doubt enters in, there enters the judicial function."

Such a measure of doubt immediately presents itself in determining the effect of the latter portion of this section which provides:

"Whether the striking out of any such

complaint or counterclaim, or any part or count thereof, shall be with or without prejudice to the institution of another proceeding at law, based on the same cause or causes of action as were set forth in such complaint or counterclaim, or in the portion or count thereof so stricken out, shall be in the discretion of the court. Such discretion shall be exercised by the court and indicated in the order striking out such complaint or counterclaim or portion or count thereof."

Either it is directory, or perhaps more properly, permissive on the one hand or mandatory on the other. In substance it is simply the legislative statement of fact (*Jaeger v. Naef*, 112 N. J. L. 417) with the addition of some new matter. From time immemorial, superior courts have been possessed of inherent power to control litigation pleading the rule being based upon the soundest policy, namely to discourage unfounded and vexatious litigation.

That the Courts might suppress but not otherwise control the bases of litigation, *i. e.* the pleadings, would imply that the Courts might not exercise a lesser degree of the same function, namely to regulate, a conclusion which does not address itself either to logic or reason.

If it is to be said that the declaration of the legislature is mandatory, then it must follow that compliance comprehends a restraint upon the freedom of judicial utterance, a clear invasion of judicial prerogative enjoyed by constitutional sanction.

The "mischief" likewise becomes apparent since solemn judicial consideration and expression would become inert and impotent unless vitalized by the Legislative abracadabra suggested by the appellant's reasoning.

If the constitutional aspect of the question is to be avoided, then it must follow that this section of the act should be defined as declaratory and directory only.

It is respectfully submitted that the judgment of the court below should be affirmed, with costs, to the respondent on this appeal.

Respectfully submitted,

JACOB LIPMAN,
Attorney of Defendant-Respondent.

MILTON J. FINKELSTEIN,
Of Counsel.

78 FEB. 1. 1935

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

SAMUEL WEINSTEIN, Assignee of
Franklin Washington Trust
Company, a corporation of
New Jersey,

Plaintiff-Appellant,

vs.

DAVID BOBKER,

Defendant-Respondent.

*Action
at Law.*

*On Appeal
from Essex
County
Circuit
Court.*

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT.

POINT I.

The subject matter of the suit is subject to the
Negotiable Instruments Act. C. S. 1910, page
3732.

On page six of respondent's brief, under
Point I, he contends that this instrument had
more than one maker. He further contends that
the instrument was not endorsed by the makers.
At first examination this note would appear to
have two makers, but this is not the fact. It is a
note made by a corporation alone and not by a
corporation and an individual. It is to be noted
that there is a duplication of the endorsement of
M. Weinstein and D. Bobker. Why? Because in
fact the first of these endorsements is the cor-
porate endorsement of B. W. Holding Co. Inc.
notwithstanding the fact that the name of B. W.
Holding Co. Inc. does not appear above the
signatures. A careful reading of the affidavit of
Henry Sommerrock, Jr. (page 30, State of Case)
clearly shows that there is but one maker on this

note and that maker endorsed the note and discounted the note with the Bank. (As to evidence of a note being discounted and proceeds placed to the credit of the payee, see *Manufacturer's Trust Company of N. Y. v. Wechsler*, 7 N. J. Miscellaneous 886.) Appellant is entitled to introduce oral testimony to prove his contention that this note is in fact a negotiable instrument by showing that this instrument has but one maker and that the maker has in fact endorsed the instrument. The cases which are in accord with this contention are *Reeve v. First National Bank of Glassboro*, 54 N. J. L. 208; *Phelps v. Weber*, 84 N. J. L. 630, and *Austin Nichols & Co. Inc. v. Gross*, Supreme Court of Errors, Connecticut, 120 Atlantic Reporter 596.

POINT II.

There was proof of assignment to the appellant.

On page 9 of respondent's brief, under Point II he contends that proper reasoning would *require* an intent upon the part of the assignor to assign this note. Appellant respectfully submits that respondent is mistaken in that contention. A careful reading of the authorities cited by the appellant in his brief, pages 11 to 16 inclusive, clearly negative respondent's contention. See *Dobbs v. Coleman Lumber Co. Inc.*, 102 N. J. L. 560, and *Peoples State Bank v. Dryden*, 91 Kansas 216, 137 Pacific 928.

Respondent contends that the assignor did not intend to be bound by Section 65 of the Negotiable Instruments Act. The question of intention of the assignor is not the controlling point. If a person negotiates an instrument by delivery he automatically makes those warranties whether he intends to or not.

On page 12 of respondent's brief he contends that appellant was limited to the supplemental bill of particulars with reference to showing how appellant acquired this note. This is not so. The affidavits submitted by the appellant were before the Court and were considered by the Court. *A Bill of Particulars is not part of the record for purpose of motion to strike a complaint.*

State v. Lehigh Valley R. R. Co., 94 N. J. L. 171 and *Cassatt v. First National Bank of West New York, N. J.*, 9 N. J. Miscellaneous 848.

POINT III.

There was evidence of an assignment at law.

On page 13 of respondent's brief reference is made to the assignment of judgment made by the Bank to the appellant. Respondent is mistaken in his contention that this assignment of judgment was not before the lower court. (See affidavit of Samuel Weinstein, page 27 State of Case, paragraph 8). Respondent argues that no judgment was recovered against him on this note. *No judgment was recovered against him because the Bank did not sue him.*

Respondent is laboring under a delusion that the lower court had power to conduct a trial of all the issues of fact involved in this case. He raises the question of authority of the Bank's attorney and the Bank's officer. In this case the authority of the Bank's agents is a question of fact and must be decided by a jury. Appellant has clearly shown that Milton M. Unger, Esq., and Henry Sommerrock, Jr. were the Bank's agents. This is admitted by the respondent. (*Weinberg Clinic v. Weinberg*, 105 N. J. Equity 690, and *Elfenbein v. Luckenbach Terminals Inc.*, 111 N. J. L. 67.)

Appellant contends that the respondent has no right to question the authority of the agents of the Bank. This is not a suit against the Bank. There is no privity of contract between the Bank and the respondent. We refer to the contract of assignment by the Bank to the appellant.

It is respectfully submitted that the judgment of the Court below should be set aside and for nothing holden, with costs to the appellant on this appeal.

DAVID COOPERMAN,
Attorney of Plaintiff-Appellant.

SAMUEL GEORGE COHEN,
Of Counsel.

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DAVID C. CORMAN
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