INDEX

New Jersey Supreme Court

Bergen County

Notice of Appeal

(Filed, November 11, 1930)

MESEROLE SECURITIES CO., INC., a corporation, *Plaintiff,* vs. MARK M. DINTENFASS, *Defendant.*	Action at Law Notice of Appeal.

TO McCARTER & ENGLISH, Attorneys of Plaintiff, or to Whom It May Concern:

PLEASE TAKE NOTICE that the defendant in the above entitled cause appeals to the Court of Errors and Appeals in the Last Resort In All Causes in New Jersey, from the whole of a judgment entered in this cause and from the order made herein on the 23rd day of September, 1930, striking out the Answer of the defendant.

Dated: November 5, 1930.

PLATOFF, SAPERSTEIN & PLATOFF,
Attorneys of Defendant.

Grounds of Appeal

(Filed, November 29, 1930)

NEW JERSEY COURT OF ERRORS AND APPEALS

MESEROLE SECURITIES CO., INC., a corporation, *Plaintiff-Respondent,* vs. MARK M. DINTENFASS, *Defendant-Appellant.*	Action at Law On Appeal From Supreme Court.

The appellant states the following grounds of Appeal:

1. The Court Below erroneously struck out the Answer filed by the defendant after defendant had proven facts sufficient to entitle him to defend.

2. The Court Below erroneously ordered judgment upon the order striking out the Answer after defendant had proven such facts as entitled him to defend.

3. The affidavits filed by the plaintiff were not sufficient to entitle said plaintiff to an order striking out the Answer of defendant, and to summary judgment.

4. The affidavits filed by plaintiff contained facts sufficient to entitle defendant to defend.

5. The order made herein on the 23rd day of September, 1930, was erroneous in that the answer filed by the defendant was neither sham nor frivolous in whole or in part.

Grounds of Appeal

6. The judgment entered against the defendant was erroneous for the reason that the Answer filed by the defendant was neither sham nor frivolous in whole or in part.

7. The judgment entered in the Court Below was erroneous for the reason that the same was based upon the order striking out the Answer, dated September 23, 1930, which order was improvidently made and entered.

8. The notice of motion to strike out the defendant's Answer was defective in that the same fails to contain a specification of the particular cause or causes of objection to the Answer.

9. The order striking out the Answer was erroneous for the reason that the same was made by a Supreme Court Commissioner occupying the position of Circuit Court Judge in the County of Essex and the said Supreme Court Commissioner had no jurisdiction to make an order in this action where the venue is laid in the County of Bergen.

PLATOFF, SAPERSTEIN & PLATOFF,
Attorneys for Defendant-Appellant.

Summons

(Issued, July 11, 1930)

THE STATE OF NEW JERSEY—TO:

MARK M. DINTENFASS. You are hereby summoned to answer the (L.S.) annexed complaint of MESEROLE SECURITIES CO., INC., a corporation, in an action at law in the New Jersey Supreme Court, Bergen County, New Jersey, and TAKE NOTICE that unless you file your answer with the Clerk of the New Jersey Supreme Court at Trenton, New Jersey, within twenty days after service of this writ and the annexed complaint upon you, the plaintiff may proceed in this suit and judgment may be entered against you.

WITNESS, HONORABLE WILLIAM S. GUMMERE, Chief Justice of our said Supreme Court, at Trenton, New Jersey, this 11th day of July, 1930.

FRED L. BLOODGOOD,
Clerk.

McCARTER & ENGLISH,
Attorneys.

Complaint

(Filed July 17, 1930)

Plaintiff says that:

1. It is and at all times mentioned herein, was a corporation organized and existing under the laws of the State of New York, with its principal office in the City, County and State of New York.

2. Defendant is and at all times mentioned herein, was a resident of Englewood, County of Bergen and State of New Jersey.

3. Plaintiff sues for the amount due on a judgment recovered by it against the defendant, Mark M. Dintenfass, in the Supreme Court of the State of New York, a court of record and general jurisdiction of that state, on February 25, 1930, in the sum of Five thousand two hundred and thirty-six dollars and forty-eight ($5,236.48) Cents, copy of the exemplification of which transcript of judgment is hereto annexed and made a part hereof, as Schedule "A."

4. The amount due on said judgment is the sum of Five thousand two hundred thirty-six dollars and forty-eight ($5,236.48) Cents, with interest thereon from February 25, 1930.

5. Plaintiff is still the owner and holder of said judgment and the judgment still remains in full force and effect, not in any way reversed, annulled or in anywise vacated but still remains due and unpaid in the sum of Five thousand two hundred thirty-six dollars and forty-eight ($5,236.48) Cents, with interest as aforesaid.

Plaintiff demands of the defendant the sum of Five thousand two hundred thirty-six dollars and forty-eight ($5,236.48) Cents with interest from February 25, 1930 and costs of suit.

McCARTER & ENGLISH,
Attorneys for Plaintiff.

Exhibit "A" Annexed to Complaint

THE PEOPLE OF THE STATE OF NEW YORK:

By the Grace of God Free and Independent. To all to whom these presents shall come or may concern, GREETING:

KNOW YE, That we having examined the records and files in the office of the Clerk of the County of New York and Clerk of the Supreme Court of said State for said County, do find a certain Transcript Judgment there remaining, in the words and figures following, to wit:

No. 2152 00495

Names of Parties against whom Judgments have been obtained.	Names of Parties in whose favor Judgments have been obtained.
National Evans Motion Picture Film Laboratories Inc. Evans, Tom and Dintenfass, Mark M.	Meserole Securities Co. Inc.

Damages and Costs	Time of Filing	Attorneys' Names	When Satisfied
$5236.48	Feb. 25, 1930 at o'clock and min 1 25 P. M. 13812/27	Louis Rosenberg	— — —

(Seal)

I, DANIEL E. FINN, Clerk of the County of New York, certify that I have compared the foregoing with the original entries in the above entitled action, on the Docket of Judgments kept in this office, and that it is a correct transcript therefrom and of the whole thereof of a judgment

rendered in the Supreme Court of New York for said County.

IN TESTIMONY WHEREOF, I have hereunto set *any* name and affixed my official seal, this 3rd day of June, 1930.

(Signed) DANIEL E. FINN, *Clerk.*

All which we have caused by these presents to be exemplified, and the Seal of our said Supreme Court to be hereunto affixed.

Witness, Hon. Louis A. Valente, a Justice of the Supreme Court for the County of New York, the 4th day of June, in the year of our Lord one thousand nine hundred and 30, of our independence the one hundred and fifty-four.

(Seal) (Signed) DANIEL E. FINN, *Clerk.*

I, Louis A. Valente, a Presiding Justice at a Special Term of the Supreme Court of the State of New York, for the County of New York, do hereby certify that Daniel E. Finn, whose name is subscribed to the preceding exemplification, is the Clerk of the said County of New York, and Clerk of said Supreme Court for said County duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the exemplification is the seal of our said Supreme Court, and that the attestation thereof is in due form.

Dated, New York, June 4, 1930.

(Signed) LOUIS A. VALENTE,
Justice of the Supreme Court
of the State of New York.

Exhibit "A" Annexed to Complaint

STATE OF NEW YORK,
COUNTY OF NEW YORK, } SS.

I, Daniel E. Finn, Clerk of the Supreme Court of said State in and for the County of New York, do hereby certify that Hon. Louis A. Valente whose name is subscribed to the preceding certificate, is Presiding Justice at a Special Term of the Supreme Court of said State in and for the County of New York, duly elected and sworn, and that the signature of said Justice to said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 4th day of June, 1930.

(Signed) DANIEL E. FINN, *Clerk.*

Answer

(Filed August 12, 1930)

Defendant, residing in the City of Englewood, County of Bergen and State of New Jersey, answering the complaint filed herein, says that:

1. Defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1.

2. Paragraph 2 is admitted.

3. Defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph 3, except that he admits that a judgment was recovered by Meserole Securities Co., Inc., against defendant in the Supreme Court of the State of New York, on February 25th, 1930.

4. Paragraph 4 is denied.

5. Paragraph 5 is denied.

First Separate Defense

Defendant alleges that the plaintiff herein has received full payment and satisfaction of any and all sums by said judgment decreed to be owing from defendant to plaintiff and that defendant's liability under said judgment has been discharged by virtue of said payment and satisfaction.

Second Separate Defense

1. The judgment upon which the complaint in this suit is based was recovered by plaintiff in the Supreme Court of the State of New York, in a suit wherein one JACK T. COSMAN, NATIONAL EVANS MOTION PICTURE FILM LABORATORIES, INC., TOM EVANS and this defendant were parties defendant.

2. The said action was instituted to recove the balance owing on two (2) promissory notes each in the sum of Forty-four Hundred ($4400) Dollars, made by Bischoff, Inc., payable to th order of said Jack T. Cosman with interest at the rate of six per cent. per annum until paid.

3. Each of said promissory notes was endorsed by said Jack T. Cosman, said National Evans Motion Picture Film Laboratories, Inc., said Tom Evans and this defendant in the order named, and the liability of this defendant upon his said endorsement was subsequent and secondary in law and in fact to the liability of said Jack T. Cosman.

4. Subsequent to the entry of said judgment in favor of plaintiff against this defendant in said Supreme Court of New York, the same was paid and satisfied by said Jack T. Cosman to the plaintiff herein and upon the payment and satisfaction thereof defendant is credibly informed and believes said plaintiff assigned all its rights, title and interest of, in and to said judgment to said Jack T. Cosman, or his nominee.

5. Defendant alleges that the plaintiff herein is not the owner and holder of said judgment but that on information and belief the same is owned and held by said Jack T. Cosman, or his nominee.

6. Defendant further shows that on the 17th day of February, 1909, the Legislature of the State of New York adopted an act known as NEGOTIABLE INSTRUMENTS LAW, which act was adopted by the Laws of 1909, Chapter 43, of the State of New York, and was incorporated in Chapter 38 of the Consolidated Laws. Section

201 of said New York Negotiable Instruments Law provides, among other things, as follows:

> "201 When persons secondarily liable on, discharged. A person secondarily liable on the instrument is discharged:
>
> (1) By any act which discharges the instrument;
>
> (3) By the discharge of a prior party."

7. Defendant alleges that his liability under said promissory notes was governed by the Laws of the State of New York and that by virtue of the statute hereinabove set forth, the payment of said judgment by said Jack T. Cosman to plaintiff operated to discharge the said Jack T. Cosman from further liability on said promissory notes upon which said judgment was founded and that defendant whose liability was subsequent and secondary to that of said Jack T. Cosman was also discharged thereby.

PLATOFF, SAPERSTEIN & PLATOFF,
Attorneys for Defendant.

Notice of Motion

(Served August 20, 1930)

SIRS:

TAKE NOTICE that on Monday, August 25th, 1930, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall apply to the Honorable William A. Smith, Circuit Court Judge and Supreme Court Commissioner, sitting for the Honorable Edwin C. Caffrey, at the Essex County Hall of Records, Newark, New Jersey, to have the Answer filed herein by the defendant, Mark M. Dintenfass, struck out upon the ground that said Answer is sham in part and frivolous in part; and

TAKE FURTHER NOTICE that at the said time and place we shall present to the Court the affidavit, of which a true copy is hereto attached.

Dated: August 20, 1930.

McCARTER & ENGLISH,
Attorneys for Plaintiff.

To: Messrs. Platoff, Saperstein & Platoff,
400 38th Street,
Union City, N. J.
Attys. for Defendant.

Affidavit Annexed to Notice of Motion

(Served August 20, 1930)

STATE OF NEW YORK
COUNTY OF NEW YORK

HARRY SCHIFFMAN, being duly sworn, according to law, upon his oath, deposes and says that:

1. He is secretary of Meserole Securities Co., Inc., the plaintiff in the above entitled cause, and is authorized to make this Affidavit in its behalf.

2. On February 25th, 1930, a judgment was entered in the Supreme Court of the State of New York in favor of the above named plaintiff and against the above named defendant, National Evans Motion Picture Film Laboratories, Inc., and Tom Evans, in the sum of Fifty-two Hundred Thirty-six Dollars and Forty-eight Cents ($5,236.48) as damages and costs.

3. Deponent has read the answer filed herein by Mark M. Dintenfass which alleges that the said judgment has been paid. The said judgment has not been paid in whole or in part, and the full amount thereof, viz: Fifty-two Hundred Thirty-six Dollars and Forty-eight Cents ($5,236.48), with interest thereon, from February 25th, 1930, is due to the plaintiff from the defendant. It is not true that the plaintiff has received full payment and satisfaction of any and/or all sums by said judgment decreed to be owing from defendant to plaintiff, as is alleged in said Answer. It is further untrue that the amount of the said judgment has been paid and satisfied to the plaintiff by Jack T. Cosman.

4. The said judgment has not been assigned to Jack T. Cosman or any person whatsoever and

said judgment is still owned and held by the plaintiff, and still remains in full force and effect, not having been reversed, annulled or vacated in any way, and deponent believes that the defendant, Mark M. Dintenfass, has no defense to this action.

HARRY SHIFFMAN.

Sworn to and subscribed
before me this 18th day
of August, A. D. 1930.

JOSEPH FELDMAN—Commissioner of Deeds
N. Y. Co. Clks. No. 47, Reg. No. 17F1
Bronx Co. Clks. No. 6, Reg. No. 31005
Kings Co. Clks. No. 15, Reg. No. 1012
Commission Expires March 1, 1931

County Clerk's Certificate attached to original.

Affidavit of Defendant

(Filed, August 25, 1930)

NEW JERSEY SUPREME COURT
BERGEN COUNTY

MESEROLE SECURITIES CO., INC., a corporation, *Plaintiff,* vs. MARK M. DINTENFASS, *Defendant.*	Action at Law Affidavits In Opposition to Motion to Strike Out Answer.

STATE OF NEW JERSEY }
COUNTY OF HUDSON } SS.

MARK M. DINTENFASS of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am the defendant in the above entitled action and I am the person against whom a judgment was entered in the Supreme Court of the State of New York in favor of the above named plaintiff on February 25, 1930.

2. The judgment upon which the complaint in this suit is based was recovered by Meserole Securities Co., Inc., in the Supreme Court of the State of New York in a suit wherein one Jack T. Cosman, National Evans Motion Picture Film Laboratory, Inc., Tom Evans and myself were parties defendant. The said action was instituted to recover the balance owing on two promissory notes each in the sum of Forty-four hundred ($4400) Dollars made by Bischoff, Inc., payable

to the order of said Jack T. Cosman, with interest at the rate of six per cent per annum, until paid.

3. Each of said promissory notes was endorsed by Jack T. Cosman, said National Evans Motion Picture Film Laboratory, Inc., said Tom Evans and myself in the order named and my liability upon my said endorsement was subsequent and secondary in law and in fact to the liability of said Jack T. Cosman. In my answer filed herein I have stated that subsequent to the entry of said judgment in favor of the plaintiff in the Supreme Court of New York the said judgment was paid and satisfied by said Jack T. Cosman to the plaintiff and that I am credibly informed and believe that Jack T. Cosman, or his nominee, is now the owner of said judgment. I also stated that by virtue of the negotiable instruments law in effect in New York, where the said promissory notes were endorsed, the payment of said judgment by said Jack T. Cosman to plaintiff operated to discharge Jack T. Cosman from further liability on the promissory notes upon which the judgment was founded and that my liability being subsequent and secondary to that of said Jack T. Cosman, was also discharged thereby.

4. I believe that all the facts contained in my said answer are true. The circumstances upon which the allegation that the said judgment has been paid is based are as follows:

Some time in the month of May, 1930, after the conclusion of the litigation in New York, I went with Mr. Tom Evans, against whom the judgment had also been entered, to the office of the plaintiff corporation. The chief executive officer of the

plaintiff corporation is Solomon Brill, the president, who is in charge of the office and of the business of the corporation. The secretary, Harry Shiffman, is merely an employee of the plaintiff company and is subject to the direction and control of the said Solomon Brill.

Our purpose in going to see Mr. Brill was to arrange for some sort of settlement of the judgment.

Mr. Brill at that time stated that he did not want us to pay the judgment because he felt that Mr. Cosman was the person who owed the money and he stated that he was going to press Cosman for payment.

About a month later, Mr. Evans and I again went to see Mr. Brill and at that time he said that the judgment had been paid by Jack Cosman and that so far as we were concerned we had no further obligation to his company.

In the original suit against us in New York, the trial court rendered a judgment in favor of all the defendants. An appeal was taken by the plaintiff to the Appellate Division of the Supreme Court, First Department and the said Appellate Division reversed the judgment. At that time, in accordance with the New York practice the defendants were put to an election either to take a further appeal to the Court of Appeals or to take a new trial. The defendants, National Evans Motion Pictures Film Laboratories, Inc., Tom Evans and myself elected to appeal to the Court of Appeals. The defendant, Jack T. Cosman, elected to take a new trial. Pending the determination of our appeal, the suit against Jack T. Cosman remained undisposed of. After the affirmance

by the Court of Appeals and the entry of judgment against us, the suit against Jack T. Cosman was still pending.

During the course of the conversation with Mr. Brill, when he stated that the judgment had been satisfied by Cosman, he also told us that the suit against Cosman, which had theretofore been pending, was settled and had been or was about to be discontinued.

During the course of our said conversation with Mr. Brill, I asked him whether he would state to my attorney, Mr. Louis J. Rosett, what he had told us and he said that he would. Thereupon, in Mr. Brill's presence I called Mr. Rosett on the telephone and I told him what Mr. Brill had said; then I put Mr. Brill on the phone and in the presence of myself and Mr. Evans, Mr. Brill repeated that the judgment had been paid and satisfied by Cosman and that he had no claim against Evans or myself and that we were discharged of all liability.

After the notice of motion was served on my attorneys in this action, Mr. Evans and I endeavored to see Mr. Brill all day Thursday, August 21, 1930, but we were informed that he was out of town and would not return until August 25, 1930. However, he returned to his office on Friday, August 22, 1930, and I spoke with him there. I asked him whether he would give me an affidavit or other writing to corroborate what he had told Mr. Evans and myself about the judgment having been paid. He stated positively that the judgment had been paid and satisfied but that he was unwilling to give me any writing to that effect. He said as nearly as I can remember "I will not give

you an affidavit now but if I am subpoenaed, I will testify that the judgment was paid by Jack Cosman." He also said that he had been away when Harry Shiffman had signed the affidavit in support of the motion and that he was sorry the affidavit had been made.

He also said that some arrangement had been made by his counsel in New York with the attorneys for Cosman that the affidavit should be given by Shiffman.

The said Solomon Brill is a resident of New York and in order for me to get his testimony it will be necessary for me to take his depositions in New York.

5. I verily believe that I have a good and bona fide defense to this action; and that if given opportunity to take the necessary depositions in New York I will be able to establish the facts above stated; and that the application to strike out my answer should be denied.

MARK M. DINTENFASS.

Sworn and subscribed to before
me this 22nd day of August, 1930.

DAVID SAPERSTEIN,
Master in Chancery of New Jersey.

Affidavit of Tom Evans

(Filed August 25, 1930)

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS:
CITY OF NEW YORK }

TOM EVANS, being duly sworn, according to law, upon his oath, deposes and says:

I am one of the defendants against whom the judgment in the instant action in favor of the Meserole Securities Co., Inc., was rendered, and I am the party referred to in paragraph numbered "2." of the affidavit of Harry Shiffman, attached to plaintiff's notice of motion, dated August 20th, 1930. I have read the said affidavit of Harry Shiffman, and am amazed at its contents, and have no hesitancy in declaring it to be unqualifiedly false, as to the question of the non-payment of this judgment.

The truth of the matter is, that this judgment has been paid by Jack T. Cosman, a co-defendant in the original action which was carried on through all the Courts of the State of New York. The said Jack T. Cosman, being a prior endorser on the negotiable instruments upon which the suit was based.

During the middle of the month of May of the current year, together with Mr. Mark M. Dintenfass, the defendant herein, I called upon the plaintiff corporation, at its office, No. 1560 Broadway, Borough of Manhattan, City and State of New York, which was a period of about two months after the rendition of the final determination of the Court of Appeals of the State of New York for the purpose of arranging for a settlement of the judgment. The said Mark M. Dintenfass and myself then spoke to Mr. Solomon Brill, the Presi-

dent of the plaintiff corporation. At that time the said Solomon Brill said to us: "I have had this judgment since the 25th day of February, 1930, and I have not bothered you boys. I feel that the money is owed by Cosman, and I am not going to bother you. I am going to make him pay it, so you have nothing to worry about." The said Mark M. Dintenfass and myself again visited the office of Meserole Securities Co., Inc., and again spoke to the said Solomon Brill on some day during the middle of June of the current year. At that time, the said Solomon Brill stated most positively: "Boys, it is just as I told you. Cosman has paid the amount due. It is all straightened out as far as I am concerned. I have gotten my money."

Subsequent to that time, it came to my attention that the prosecution of the action against the said Jack T. Cosman which was prior to that time pending on the calendar for trial in the Supreme Court of the State of New York, New York County, had been discontinued.

Today I was informed of the instant motion for summary judgment, by Mark M. Dintenfass, the defendant. Together with the said Mark M. Dintenfass, I called at the office of the plaintiff corporation to see the said Solomon Brill, and was informed that the said Brill is now out of town on some trip or other, that he cannot be reached and will return on Monday, August 25th, 1930, the date of the hearing of this motion.

I am absolutely positive that the said Solomon Brill has information which will absolutely contradict and categorically deny the assertion in Harry Shiffman's affidavit that this judgment has not been paid. I feel certain that if the books of

the plaintiff could be subpoenaed and testimony taken with respect to the transactions of this corporation, that it would be conclusively proven that this judgment has been paid by Jack T. Cosman.

I am absolutely certain that the affidavit of Harry Shiffman herein was made purely and solely for the purpose of assisting Jack T. Cosman in collecting the judgment.

Incidentally, at the time of the visit in June, 1930, at the office of the plaintiff corporation, hereinbefore referred to the said Solomon Brill, the President of the plaintiff corporation in my presence, and in the presence of the defendant, Mark M. Dintenfass, telephoned to our attorney, in that action, Louis J. Rosett, of No. 130 West 42d Street, Borough of Manhattan, City of New York, and stated to the said Louis J. Rosett that the judgment in that action had been paid by Jack T. Cosman, and that there was no need for either the said Dintenfass or myself to worry in connection therewith. The said Louis J. Rosett is now away in Hallowell, Maine, on a vacation, and likewise will not return to this City until Monday, August 25th. If Mr. Rosett were here, he could, and undoubtedly he would, make an affidavit confirming that conversation with the said Solomon Brill.

For these reasons, I respectfully join in the prayer of Mark M. Dintenfass that this motion be denied.

TOM EVANS.

Subscribed and sworn to before
me this 21st day of August, 1930.

MURRY ALDRIDGE,

Commissioner of Deeds, City of New York.

Certificate of the County Clerk of New York was attached to the original.

Replying Affidavit of Plaintiff

(Filed August 30, 1930)

NEW JERSEY SUPREME COURT
BERGEN COUNTY

MESEROLE SECURITIES CO., INC., a corporation, *Plaintiff*, vs. MARK M. DINTENFASS, *Defenda*	Action at Law Affidavit in Support of Motion to Strike Out Answer.

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS:

SOLOMON BRILL, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I am now and for several years past have been the president of plaintiff corporation. I have read the affidavitts submitted in opposition by Mark M. Dintenfass, the defendant, and Tom Evans who was his co-defendant in the action brought in the Supreme Court of the State of New York.

2. Before I turn specifically to the statements that the defendant and Mr. Evans set out concerning conversations had with me, I want to place before the Court the entire situation. In July, 1925, Mr. Cosman had entered into a contract with Bischoff, Incorporated, to discount thirty notes for them, running over a period of time. In December, 1925, shortly before Mr. Cosman left for Europe, the defendant, Dintenfass,

and Tom Evans, through the corporation that they operated, National Evans Motion Picture Film Laboratory, Inc., entered into an agreement with Mr. Cosman to discount certain of these notes of Bischoff, Incorporated. These facts were all brought out in the action in the Supreme Court of New York County. After the contract was made between Cosman and Dintenfass and Evans, and while Cosman was in Europe, the notes continued to come, payable to Mr. Cosman. Dintenfass and Evans delivered two of these notes to Meserole Securities Co., Inc., which discounted them after being endorsed by Dintenfass and Evans and National Evans Motion Picture Film Laboratory, Inc. As Mr. Cosman was named as the payee, the notes had to be endorsed in his name and were endorsed in his absence by his bookkeeper. These are the two notes that were involved in the suit brought by Meserole Securities Co., Inc., against Dintenfass, Evans and Cosman. Dintenfass and Cosman had no defense on the merits of the suit. They relied wholly on a point of law that Meserole Securities Co., Inc., had no authority to discount notes and that its act in so doing was *ultra vires*. The lower court did not go into the question of fact raised by Mr. Cosman as to his liability, and dismissed the complaint as to all the defendants on the point of law. The judgment was reversed by the Appellate Division and ordered a new trial. Dintenfass and Evans gave the stipulation required under the New York practice as condition to a further appeal to the Court of Appeals, stipulating that if the Court of Appeals affirmed the judgments of the Appellate Division, judgment absolute should be entered against them. Cosman having interposed a defense on the merits, did not give such a stipulation. The Court of Appeals

affirmed (253 N. Y., 130), and judgment absolute was entered against Dintenfass and Evans on February 26, 1930. There remained undisposed of the action against Cosman.

3. Cosman then agreed with Meserole Securities Co., Inc., that if the judgment obtained by Meserole Securities Co., Inc., was not paid by Dintenfass and Evans in the interim, he would pay the judgment and the judgment should then be assigned to him on March 30, 1931. The agreement between Meserole Securities Co., Inc., and Cosman was reduced to writing. I attach a true photostatic copy of that agreement. It is the only agreement between Cosman and Meserole Securities Co., Inc. As the Court will see, Cosman agreed to buy the judgment (unless previously collected) and it was to be assigned to him upon payment. Cosman has not paid a penny upon the contract, upon the notes or upon the judgment, or otherwise, to Meserole Securities Co., Inc. The judgment has not been satisfied in whole or in part, has not been discharged of record or otherwise and the suit against Cosman has not been discontinued.

4. I had conversations with the defendant, Dintenfass, and Evans, and told them the arrangements that I had made with Cosman. It was, of course, to the advantage of the defendant, Dintenfass, and Evans to understand that the judgment had been paid. I never said that. The fact is that the judgment has not been paid. I never told Mr. Dintenfass, either in words or in substance, that "I will not give you an affidavit now but if I am subpoenaed I will testify that the judgment was paid by Jack Cosman."

5. It is respectfully submitted that there is no issue of fact involved, neither the judgment

nor the notes have been paid. Mr. Evans in his affidavit refers to the desirability of examining the books of the plaintiff corporation to see if they do not show the amount paid; I desire to state in response that there are no entries in any of my books relating to the transaction; the original ledger sheet of the account in question was prior to the trial of the action of Meserole Securities Co., Inc., vs. Cosman above referred to turned over unto Louis Rosenberg, my attorney in that action, and has never been returned by him; I am informed by my said attorney that the sheet in question has been misplaced in his office and that notwithstanding diligent search, he has not been able to find it. Your deponent desires to state, however, positively that the sheet in question has been out of his office and out of his possession for almost two years, and that no entries have been made thereon since the date that it was turned over to his said attorney; there is accordingly nothing whatsoever in the books or records of your deponent or of Meserole Securities Co., Inc., which could substantiate the claim or contention of Dintenfass that the judgment above referred to has to date been paid.

SOL BRILL.

Sworn to before me this
28th day of August, 1930.

JACOB LIEBERMAN,
New York Co. Clk No. 455, Reg.
No. 11611.
Kings Co. Clk. No. 88, Reg. No. 1380.
Certificate filed in Richmond Co.
Bronx Co. Clk. No. 75, Reg. No. 3109B.
Commission expires March 30, 1931.

(Seal)

Exhibit Annexed to Replying Affidavit of Plaintiff

LR:AG
SUPREME COURT : NEW YORK COUNTY
- - - - - - - - - - - - - - - - - -x
MESEROLE SECURITIES CO. INC.
Plaintiff,
-against-
JACK T. COSMAN, et al.
Defendants.
- - - - - - - - - - - - - - - - - -x

IT IS HEREBY STIPULATED BY AND BETWEEN the plaintiff, the attorney for the plaintiff, the defendant Jack T. Cosman and the attorney for the defendant, Jack T. Cosman, as follows:

1. The plaintiff does herewith agree to sell and the defendant, Jack T. Cosman, does herewith agree to buy the judgment heretofore recovered by the plaintiff as against the other defendants amounting to Five Thousand Two Hundred Thirty-six and 48/100 ($5,236.48) Dollars, with interest from the 26th day of February, 1930, with the defendant, Jack T. Cosman, promising and agreeing to pay therefor and the plaintiff agreeing and promising to accept therefor the said sum of Five thousand Two hundred Thirty-six and 48/100 ($5,236.48) Dollars, with interest from the 26th day of February, 1930, payable in manner and form following, to wit:

a. Two thousand six hundred eighteen and 24/100 ($2,618.24) dollars, with interest from the 26th day of February, 1930, on or before the 10th day of September, 1930, and

Exhibit Annexed to Replying Affi...
of Plaintiff

b. Two thousand six hundred eighteen and 24/100 ($2,618.24) dollars, with interest from the 26th day of February, 1930, on or before the 10th day of March, 1931.

2. Upon the full payment of Five thousand Two hundred Thirty-six and 48/100 ($5,236.48) Dollars being made as hereinbefore in paragraph "1" set forth, with all payments to be made at the office of Louis Rosenberg, 1440 Broadway, New York City, an assignment of the judgment in due and proper form for filing is to be executed by the plaintiff without warranty by or recourse as against it in any event, with the assignment in question then to be delivered to the defendant, Jack T. Cosman, or his nominee. Upon default in the making of either payment, the entire indebtedness shall be deemed due and payable, the answer of the defendant herein interposed shall then by virtue of the provisions hereof be deemed to be and hereby is withdrawn, with the defendant, Jack T. Cosman, in that event confessing and consenting to the entry of judgment in this action as against him and in favor of the plaintiff for the sum of Five thousand Two hundred Thirty-six and 48/100 ($5.236.48) Dollars, with interest from the 26th day of February, 1930, less the payments theretofore made, with said judgment to be entered at the option of the plaintiff ex party and without notice and upon its affidavit.

3. The plaintiff is herewith authorized and empowered by the defendant, Jack T. Cosman, to at its choice and discretion, collect or endeavor to collect as against the other defendants upon the judgment heretofore entered in this action as

against them, with all sums so collected less the reasonable fees and disbursements of counsel on and after the date hereof incident to the collection or attempted collection thereof, to be credited on account of the last payments herewith agreed to be made by the defendant, Jack T. Cosman, with the assignment of judgment in that event to take into consideration and give credit for the moneys so collected upon the judgment as against the other defendants.

4. Any collection made by or in behalf of the plaintiff upon the judgment entered as against the other defendants is herewith conceded to be a gratuitous act on his part and as a matter of favor unto the defendant, Jack T. Cosman, with the reasonable costs and disbursements incurred on and after the date hereof in connection with such collection or attempted collection to be charged against the defendant, Jack T. Cosman. Dated, New York, March 14th, 1930.

LOUIS ROSENBERG,
Attorney for Plaintiff.

STRASBOURGER & SCHALLEK,
Attorney for Defendant, Jack T. Cosman.

MESEROLE SECURITIES CO., INC.,
By SOL BRILL, Pres.

J. T. COSMAN.

STATE, CITY AND COUNTY OF NEW YORK: SS:

On this 14th day of March, 1930, before me came SOL BRILL to me known, who, being by me duly

sworn, did depose and says; that he resides in the Borough of Manhattan; that he is the President of MESEROLE SECURITIES CO. INC., the corporation described in, and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order.

JACOB LIEBERMAN.

New York Co. Clk. No. 455, Reg. No. 1L611
Kings Co. Clk. No. 88, Reg. No. 1380.
Certificate filed in Richmond Co.
Bronx Co. Clk. No. 75, Reg. No. 3109B.
Commission expires March 30, 1931

STATE, CITY AND COUNTY OF NEW YORK: SS:

On this 14th day of March, 1930, before me came JACK T. COSMAN, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he duly executed the same.

D. F. DALY,

Notary Public, Kings Co. No. 402, Reg. No. 1157
Cert. filed in N. Y. Co. No. 423, Reg. No. 1D346
Commission expires March 30, 1931.

Order Striking Out Answer

(Filed September 24, 1930)

NEW JERSEY SUPREME COURT
BERGEN COUNTY

MESEROLE SECURITIES CO., INC., a corporation, *Plaintiff,* vs. MARK M. DINTENFASS, *Defendant.*	Action at Law. Order.

This matter having been presented to the Court by Messrs. McCarter & English, attorneys for the plaintiff, in the presence of Messrs. Platoff, Saperstein & Platoff, attorneys for the defendant, and it appearing by affidavit that the Answer filed herein by the defendant is sham in part and is frivolous as to the balance thereof, and that the defendant after due notice, has failed to show such facts as entitle him to defend,

It is on this 23rd day of September, Nineteen Hundred and Thirty, ORDERED, that the whole of the Answer of the defendant filed herein be struck out.

Let this Rule be entered on the Minutes.

WM. A. SMITH,
Supreme Court Commissioner of N. J.

Rule for Judgment

(Entered September 25, 1930)

The answer of the defendant in the above entitled cause having been struck out by an order of this Court, dated September 23, 1930, which order is filed herein, it is hereby ORDERED, that judgment interlocutory be entered against the defendant and in favor of the plaintiff, and the damages of the plaintiff having been assessed by the Clerk of the Court in the sum of $5,419.75,

IT IS ORDERED, that judgment final be entered against the defendant and in favor of the plaintiff in the sum of $5,419.75, with costs to be taxed.

On motion of McCarter & English, attorneys for plaintiff.

Rule actually entered this 25th day of September, 1930.

Judgment Final by Default

(Entered September 25, 1930)

Judgment entered this 25th day of September, A. D. 1930, in favor of plaintiff and against the defendant, for the sum of Five thousand Four hundred and nineteen Dollars and seventy-five cents, damages, and Sixty-four Dollars and Six cents, costs.

WM. S. GUMMERE, *C. J.*

McCARTER & ENGLISH, *Attorneys.*

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

New Jersey Court of Errors and Appeals

MESEROLE SECURITIES CO., INC., a corporation, *Plaintiff-Respondent,* *vs.* MARK M. DINTENFASS, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF FOR PLAINTIFF-RESPONDENT.

Statement of Facts.

This is an appeal from an order of Circuit Court Judge William A. Smith, sitting as Supreme Court Commissioner, striking out the answer of the defendant. Suit was brought on a New York judgment which had been obtained by the plaintiff against the present defendant and others. An answer was filed setting up the following defenses: a denial that $5,236.48 is due on the New York judgment (R., 9, line 20); a denial that the plaintiff is the owner of the judgment and that the judgment is in force and unpaid (R., 9, line 21); a first separate defense alleging payment (R., 9, lines 22-30); and a second separate defense alleging in some detail that the New York judgment was obtained on certain notes endorsed by the defendant and that the judgment has been paid by one Jack T. Cosman who was the first endorser on the notes although not a party to the judgment. The second separate defense further alleges that the judgment has been assigned to Cosman and that under Section 201 of the Negotiable Instruments Law of New York, which is pleaded, payment of the judgment by Cosman, a prior endorser on the

notes, discharged the defendant from liability (R., 9, line 30, to 11, line 30).

A motion was made by the plaintiff to strike out the answer, and after considering the two affidavits filed for the plaintiff and the two affidavits filed for the defendant, Judge Smith signed an order (R., 31) striking out the answer. Thereafter, judgment for $5,419.75 and $64.06 costs was entered (R., 32).

The defendant attacks the judgment upon 4 principal grounds: (a) that the defendant had shown sufficient facts to entitle him to defend, (b) the affidavits filed by the plaintiff state facts giving the defendant a defense, (c) the plaintiff's notice of motion did not sufficiently specify the grounds of objection to the answer, and (d) Judge Smith had no jurisdiction to strike out an answer filed in an action in which the venue was laid in Bergen County.

Insofar as necessary, the facts stated in the affidavits presented to Judge Smith will be referred to under the appropriate points of the argument.

POINT I.

The defendant has not shown facts sufficient to entitle him to defend.

Two affidavits were filed by the plaintiff. At the time the motion was argued orally, the plaintiff presented the affidavit of Harry Schiffman (R., 13 and 14), its secretary. This affidavit verifies generally the cause of action and denies that the judgment sued upon has been paid by Jack T. Cosman or assigned to him. Later, pursuant to leave granted by the Court, the plaintiff filed the affidavit of Solomon Brill (R., 23 to 30), its

president, by way of reply to the affidavits of Tom Evans (R., 20 to 22) and of the defendant (R., 15 to 19) which had been filed by the defendant. In only one way does the affidavit of the defendant cast any doubts upon the essential elements of the plaintiff's case: it states that the defendant and Tom Evans were told by Solomon Brill, president of the plaintiff, that the New York judgment had been paid by Jack Cosman (R., 17, line 20, and R., 18, line 37). There is a further statement that Brill also told the defendant's New York attorney the same thing by telephone (R., 18, lines 15-25). The affidavit of Tom Evans filed by the defendant simply repeats the statements of the defendant that the defendant and Evans were told by Brill that the judgment had been paid by Cosman (R., 21, lines 18-20) and that Brill, in the presence of the defendant and Evans, telephoned to their New York attorney and stated that Cosman had paid (R., 22, lines 13 to 25). To contradict these admissions which Brill is claimed to have made, the plaintiff produced the affidavit of Brill himself (R., 23, *et seq.*). He tells in detail just what the arrangements between the plaintiff and Cosman are. He places before the Court, by his affidavit, the whole agreement between the plaintiff and Cosman. On the present question of fact it is immaterial what the arrangements were; they will be taken up in detail in Point II. The important thing is that Cosman had not paid the plaintiff for anything. Brill swears (R., 25, line 22) "Cosman has not paid a penny upon the contract, upon the notes or upon the judgment, or otherwise, to Meserole Securities Co., Inc." Brill's affidavit also shows (R., 25, line 12) that the judgment was not assigned to Cosman as claimed by the defendant. It is argued

for appellant that Brill does not deny unequivocally that he told the defendant and Evans that Cosman had paid (Brief, p. 6). It is only necessary to refer to paragraph 4 of Brill's affidavit (R., 25, lines 29 to 40) to show that this argument is entirely unfounded.

It is not contended that admissions of Brill would not be admissible as evidence against the plaintiff. That is not the question. The question is, did Judge Smith err in striking out the answer of a defendant who had shown facts sufficient to entitle him to defend? He had before him the detailed affidavit of Brill, the plaintiff's president, explaining fully the relations between the plaintiff and Cosman. Opposed to this he had nothing to consider except the admissions concerning payment which it is claimed Brill made. Brill denies that he ever made them, but if he had done so it seems that they should be outweighed by the clear and detailed explanation contained in his affidavit.

The present case is not entirely within the Summary Judgment section of the Rules of the Supreme Court (Rules 80-84), because the answer was struck out by a Supreme Court Commissioner and not by one of the Justices. Except for the actual entry of judgment, however, the two methods of procedure are similar, *National Surety Company* v. *Mulligan,* 105 N. J. L. 336, and the language of Rule 80 is applicable to the present case. It provides that in certain cases an answer

> "* * * may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts *as may be deemed, by the judge hearing the motion,* sufficient to entitle him to defend."

Judge Smith had all of the affidavits before him yet struck out the answer. As Justice Bergen stated for this Court in the leading case of *Eisele & King* v. *Raphael,* 90 N. J. L. 219 at 221:

> "Reading the rules, to which the statute is subject, and the statute together, a plaintiff will be entitled to a summary judgment upon presenting an affidavit complying with rule 81, which should set out fully the facts upon which the cause of action is based, unless the defendant by affidavit or other proof shall show facts deemed by the judge hearing the motion sufficient to entitle him to defend. This confers upon the judge the power to determine the sufficiency of the facts sets up by the defendant, and *his conclusion that they are not sufficient should not be set aside unless the sufficiency clearly appears.*"

This shows that the Judge hearing the motion is to be given discretion as to whether sufficient facts have been shown. It is argued for appellant in Points I and III of his brief (Brief, p. 5, and Brief, p. 15) that a question of fact for a jury was raised. The argument made does not concede any discretion to the Judge hearing the motion. In view of his order, it is to be assumed that Judge Smith regarded the real facts to be those stated in the affidavit of Solomon Brill. He did not abuse the discretion given to him in taking that view. And on the affidavit of Brill, it is submitted that there is no question of fact raised for a jury.

POINT II.

The affidavits filed by the plaintiff do not show facts entitling the defendant to defend.

(a) The agreement between the plaintiff and Cosman does not amount to payment of the New York judgment.

The agreement speaks for itself in this respect. It is in writing and is before the Court in its entirety (R., 27 to 30). What the parties may think of its effect is unimportant. It is for this Court to construe it after considering all of its provisions.

By entering into the agreement, Cosman merely promised to pay the sum of $5,236.48 in the future for the New York judgment (R., 27, line 30, to R., 28, line 10). The giving of a promise to pay does not amount to payment either under the law of this State or the law of New York. *Fry* v. *Patterson,* 49 N. J. L. 612; *Jagger Iron Co.* v. *Walker,* 76 N. Y. 521. The first paragraph of the headnote of the New York case is as follows:

> "The taking, by a creditor, of the debtor's note for an existing indebtedness does not merge or extinguish the indebtedness; the note is simply evidence of the debt, and its operation is only to extend the time of payment."

It also seems significant upon the question of payment that the agreement provides for penalties in case of Cosman's failure to pay (R., 28, lines 20-35). This clearly indicates that the obligation to pay was a future obligation and that the status of the parties was to remain unchanged until the obligation was met.

(b) The agreement between the plaintiff and Cosman is not an assignment of the New York judgment to Cosman.

Again the agreement speaks for itself. It provides that the present plaintiff "does hereby *agree to sell* and * * * Cosman does herewith *agree to buy*" the judgment (R., 27, lines 22-24). It further provides that upon full payment "an assignment of the judgment in due and proper form for filing is to be executed by the plaintiff without warranty by or recourse as against it in any event, with the assignment in question then to be delivered to * * * Jack T. Cosman, or his nominee" (R., 28, lines 10-20). in *Sullivan* v. *Visconti,* 68 N. J. L. 543 (Sup. Ct.), Justice Pitney, at p. 551, gives the following definition of a valid written assignment:

> "Given a chose in action, legal in its nature and coming within the purview of the act, and an instrument in writing which sufficiently describes that chose in action and authoritatively makes known to all persons concerned that the subject-matter *has been or is thereby transferred* and made over by the owner to a designated assignee, accompanied by delivery of that instrument to the assignee and notice to the debtor, the assignment is as complete at law as in equity."

The agreement between the plaintiff and Cosman does not make "known to all persons concerned that the subject matter has been or is thereby transferred." To the contrary, it shows that the transfer is to take place in the future. The mere fact that the plaintiff has agreed to assign to Cosman does not give Cosman the right to sue on the judgment. *Arents* v. *Long Island R. Co.,* 55 N. Y. S. 401, affd. 64 N. E. 1118 (memo). The plaintiff has no guarantee that Cosman will pay. If he fails to perform his

part of the agreement, the New York judgment will never be assigned to him. Or, what is more important, if the judgment is collected before Cosman pays, no assignment will ever be made. The defendant goes far in asking this Court to deny the plaintiff the right to sue on the New York judgment because an agreement exists which may never be performed, especially since the agreement itself expressly shows that it was contemplated that the plaintiff should have the right to collect from the defendant (R., 28, line 35, to R., 29, line 15) before the time came for Cosman to pay.

(c) The Courts of this State are not concerned with equities which may exist between the defendant and Jack T. Cosman.

Several ingenious arguments are made for the defendant that there are equities between the defendant and Cosman which are sufficient to raise a defense against the plaintiff. It is first argued that the usual equities based on the Negotiable Instruments Law are present here; that Cosman as first endorser on the notes involved in the New York suit is liable thereon before the defendant, a later endorser, and discharged the defendant by his agreement with the plaintiff (Brief, pp. 8 and 9). This argument is based upon the unsound assumption that Cosman paid the judgment. He did not do so. And furthermore, appellant ignores the fact that this is a suit in New Jersey upon a New York judgment. The Courts of this State do not go behind judgments of other States to examine into equities which may have existed in the original transaction. Two cases are cited for the defendant as supporting the claim that equities between parties to a negotiable instrument may

be considered even after judgment. The New York case of *Kelly* v. *O'Brien,* 196 N. Y. S. 705 (cited, Brief, p. 8), involved a situation where a supposed holder in due course of a note obtained a judgment against the maker and payee-endorser. The judgment was then assigned to the payee-endorser and when he proceeded upon it against the maker an answer was filed setting up, among other things, that the original judgment was the result of a fraudulent scheme to make it appear that the judgment plaintiff was a holder in due course and thus defeat equities existing in favor of the maker and against the payee. This answer was held good but it is submitted that the result is merely a manifestation of the well-known rule that judgments will not stand against fraud. It is said in 2 Pomeroy's Equity Jurisprudence, 4th ed., p. 1921:

> "When a judgment or decree of any court, whether inferior or superior, has been obtained by fraud, the fraud is regarded as perpetrated upon the court as well as upon the injured party. The judgment is a mere nullity, and it may be attacked and defeated on account of the fraud, in any collateral proceeding brought upon it or to enforce it, at least in the same court in which it was rendered. When a judgment fraudulently recovered in one court is sued upon in another court, whether the fraud can *there* be set up to defeat its enforcement has been questioned."

There is no claim of fraud in the present case and the above-stated rule has no application here.

The New Jersey case of *First National Bank* v. *Hoffman,* 68 N. J. L. 245, is the other case cited for the proposition that our Courts can go behind the New York judgment to apply the ordinary Negotiable Instruments law. There application was made, by the last endorser of a note

on which judgment had been obtained, to have the judgment cancelled after it had been paid by a prior endorser who was also a party defendant to the judgment. The application was granted. It is conceded that this was properly done for the case is an example of the settled rule that courts of law retain equitable control over *their own* judgments. That rule is stated by Justice Magie in *Brown* v. *Dunn,* 50 N. J. L. 111, 114, as follows:

> "Courts of law, by virtue of their control over their own proceedings, judgments and process, determine all conflicting claims to the management of suits, the control of judgments, and the disposition of proceeds raised thereunder. In making such determinations, it is well settled that they administer equity and deal with such contests on equitable principles. Equitable assignments are, therefore, properly recognized and protected as a court of equity would do."

As indicated in the above quotation Justice Magie was deciding that an equitable assignment of a judgment at law would be recognized by the law court granting the judgment.

Since the present case does not involve fraud and is not within the rule that a law court may look at the equities behind *its own* judgments, it is submitted that the defendant is a principal obligor on the New York judgment and, under any circumstances, cannot claim that the obligation of Cosman is prior to his own. The true rule is stated by Chancellor Kent in *Bay* v. *Tallmadge,* 5 Johns. Ch. 305, at 315. He said:

> "I am not aware of any case that has ever imposed upon the creditor the necessity of peculiar diligence against the principal, on the ground of the still subsisting relation of principal and surety, *after judgment and execution* against the bail or the surety. It becomes, then too late to inquire into the antecedent relations between the parties.

> Those relations became merged in the judgment. This was expressly declared to be the case as between the holder and maker, and endorser of a promissory note, by the Supreme Court of the *United States,* in Lenox *v.* Prout (3 Wheat. 520)."

Other cases laying down the same rule are *King* v. *Thompson,* 3 Cranch C. C. 146; *Pole* v. *Ford,* 2 Chitty 125, 18 E. C. L. 545; *Bray* v. *Manson,* 8 M. & W. 668; *Lenox* v. *Prout,* 3 Wheat 520. These cases also dispose of the argument (Brief, pp. 13, 14 and 15) that time was extended to Cosman, a prior endorser, thus discharging the defendant. After judgment against an endorser, he is not discharged by an extension of time to a prior party. *King* v. *Thompson, supra.*

It is also argued that the agreement to assign to Cosman amounted to an equitable assignment and, by its terms, constituted him the beneficial owner of the judgment (Brief, 11, 12 and 13). This argument also asks our law courts to take cognizance of equities. It is shown above that they have no such jurisdiction except over *their own* judgments. The cases of *Sullivan* v. *Visconti,* 68 N. J. L. 543, and *Brown* v. *Dunn,* 50 N. J. L. 111, cited by appellant (Brief, p. 13) do not show that such jurisdiction exists. In fact, they show the contrary. It also seems unsound to say that an agreement to assign in the future constitutes an equitable assignment. The appellant cites cases (Brief, p. 13) which seem to involve present assignments of property rights which are to come into existence in the future. The rule goes that far but does not go farther. Concerning a situation somewhat similar to the one with which we are dealing, 3 Pomeroy's Equity Jurisprudence, 4th ed., p. 3087, note, says:

> "The order on a future fund which thus operates as an equitable assignment should

> be carefully distinguished from a *mere promise* to appropriate an existing or future fund in discharge of an obligation or a mere promise to give an order on a fund, and the like. * * * They (the American Courts) require a *present appropriation* by order or otherwise, of a fund, whether existing or future, a mere promise or executory agreement to apply or to appropriate a fund does not, according to the American rule, amount to an equitable assignment."

Jack T. Cosman is not the real party in interest in this case as is argued for the defendant (Brief, p. 12). His agreement with the plaintiff shows that the New York judgment was not assigned to him. If the plaintiff collects on the obligation of the defendant, Cosman will not receive the money; he will simply be discharged from an entirely separate and distinct obligation. He is interested in this suit only to that extent. Tom Evans is also interested in this suit. He is a party defendant to the New York judgment and liable on it. It might be argued just as plausibly that he is the real party in interest in the present suit. The various arguments for the defendant considered under this point seem to amount, when finally analyzed, to attempts by the defendant to evade his liability on the ground that the plaintiff has and has had remedies against others. Appellant states that the case of *Bank of America* v. *Wilson,* 71 N. E. 312 (Mass.), is distinguishable (Brief, pp. 12 and 13). In reality that case governs the present situation. In its opinion the Court said:

> "This is an action by the holder of two negotiable promissory notes against the second of two indorsers on it. The defendant admitted his liability unless the facts stated in his offer of proof constituted a defense. The defendant offered to prove that this action was brought against the second indorser

alone, at the request of the first indorser, one Grosvenor by name, under an agreement between Grosvenor and the plaintiff to guaranty to the plaintiff the payment of its expenses of this action, not to take advantage of any defense which might arise by reason of this action having been brought by it, and admitting his liability on the notes; that both indorsers are solvent, and are inhabitants of the state of New York as is the plaintiff; and that no effort has been made to collect the notes of Grosvenor, as the first indorser. * * * The case before us is therefore the ordinary case of two indorsers of a negotiable promissory note, each of whom is directly liable to the holder if the holder elects to demand payment from him, and where, if the holder elect to demand payment first of the last indorser, it becomes his duty to meet his obligation, and his right, on doing so, to look to the prior indorser for repayment of the amount due on the note. As between a first and second indorser, the first indorser is ultimately liable for payment of the note, but he is not primarily liable for it as between himself and subsequent indorsers, in the sense that, as between a principal and surety, the principal is primarily liable. It is not the duty of the first indorser, as between himself and a subsequent indorser, to pay in the first instance. A prior indorser is entitled to the delay consequent on demand for payment being made in the first instance on a subsequent indorser. And he is at liberty to arrange with the holder to secure such delay by procuring such a demand. It is plain that such a delay was Grosvenor's sole object in the agreement he made with the plaintiff."

(d) The law of Sales has no bearing upon the present case.

It is argued for the defendant that the plaintiff's agreement with Cosman may be regarded as a present sale of the judgment (Brief, pp. 10 and

11). This argument is unsound in fact and on the law. It has already been pointed out that the express terms of the agreement negative the idea of present transfer. To show that the law of sales is applicable to the present case, the defendant's brief (p. 10) quotes from the New York Sales law. It also cites *Currie* v. *White,* 45 N. Y. 822, a case involving shares of stock and *Erdriech* v. *Zimmerman,* 179 N. Y. S. 829, a case involving bonds. Aside from any rule of sales law that may apply to stock and bonds, it is submitted that the transfer of a judgment is not governed by the New York version of the Uniform Sales Act. The Statute of Frauds section of the New York sales act, New York Personal Property Law, Chapt. 42, sec. 85, Cahill's Consolidated Laws of N. Y. (1930) p. 1743, applies to "a contract to sell or a sale of any goods or choses in action of the value of $50 or upwards." Even before the adoption of the Uniform Sales Act, New York had such a provision in its laws for many years. For example, the Revised Statutes of New York, Vol. III, 6th ed., 1875, page 142, require a memorandum in writing of "every contract for the sale of any goods, chattels, or things in action, for the price of $50 or more." Yet New York has consistently held that ordinary choses may be assigned by parol irrespective of their price. The following cases illustrate this point: *Barnett* v. *Prudential,* 86 N. Y. S. 842 (insurance policy); *Liberty Wall Paper Co.* v. *Stoner, etc., Co.,* 69 N. Y. S. 355, affd. 63 N. E. 1119, on opinion (parol assignment of executory contract to buy $25,000 worth of wallpaper); *Bernstein* v. *Horth,* 85 N. Y. S. 263 (parol assignment of right of action to recover wager). In *Selleck* v. *Manhattan Fire Alarm Co.,* 117 N. Y. S. 964 (1909), the Court was dealing

with a parol assignment of a claim for work and material and said,

> "An assignment of claims, even over $50, can commonly be made by parol."

In *Baumert* v. *Daeschler,* 120 N. Y. S. 956 (1910), there was a question of whether a judgment had been assigned by a general transfer of a partner's interest in a partnership. It was held that the judgment had been assigned, the Court saying at page 958:

> "The statute here also expressly authorizes the assignment of a judgment, but prescribes no formality as essential to the validity of the assignment."

It seems clear that the New York Sales Act, which the defendant cites and relies upon, does not apply to assignments of choses in action such as judgments. Thus, even if there were a sound basis of fact this Court would not be bound to apply the usual sales rules concerning the transfer of legal title to chattels.

By way of summary on Point II, we may urge that this plaintiff is not concerned with equities which do or do not exist between the defendant and Cosman. The plaintiff holds an unpaid judgment against the defendant. If it is entitled to satisfaction from others in addition to satisfaction from the defendant, that is unimportant for the purposes of this case. That the defendant may have remedies against Cosman or others after paying the judgment is also unimportant in this case.

POINT III.

The defendant should not succeed in his objection to the plaintiff's notice of motion.

The notice of motion is set out in full in the record at page 12. The defendant argues (Brief, p. 16) that it is defective in stating no other grounds for the motion except that the answer is sham in part and frivolous in part. It seems a sufficient answer to this argument to refer to the opinion which Chancellor Walker delivered for this Court in *National Surety Co.* v. *Mulligan,* 105 N. J. L. 336. In that case the plaintiff moved to strike out the answer as "false, sham and frivolous," and the order striking it out recited that it was "sham *and* frivolous." At page 338 Chancellor Walker said:

> "The order striking out the answer recited that 'the defendant's (Agnes K. Mulligan's) answer is sham and frivolous and interposed solely for the purpose of delay and fails to show such facts as entitle her to defend.' Now, in Fidelity, &c. Co. *v.* Wilkes-Barre, &c., Co., 98 N. J. L. 507 (at p. 510), it was held that a plea might be condemned as either false (sham) or frivolous, and could be struck out upon either ground, but was never summarily dealt with upon both grounds. However, the Supreme Court commissioner's order recites that the answer fails to show such facts as entitle Agnes K. Mulligan to defend, and this is so; and therefore the order will be treated as striking out the answer as frivolous (Wittemann *v.* Giele, 99 *Id.* 478), especially as no ground of appeal challenges it for the reason that the answer was struck out as both, when it should have been on one or the other head. *Besides, no judgment shall be reversed or new trial granted for error of procedure, unless after examination of the whole case it shall appear that the error injuriously af-*

fected the substantial rights of a party. The Practice Act (1912), Pamph. L., p. 377, Sec. 27. *The essential thing was striking out the answer, not that it was so done for such and such a reason.''*

The present case was fully presented to Judge Smith irrespective of what was or was not specified in the notice of motion. The record fails to show that any objection was made to the notice at the time of the argument. This indicates that the defendant felt that he had been brought before the Court properly, and proceeded with the merits of the case accordingly. It is difficult to see how he has been injured.

Furthermore, it is submitted that the notice of motion was not defective. Our Courts have often said that pleading cannot be both sham and frivolous. Parts of a pleading can be sham, however, and other parts frivolous. *Yale Electric Corp.* v. *Morrissey,* 8 A. R. 128, 148 A. 721, 723. We have argued in Point I of this brief that the defendant's answer was sham in alleging payment and in making certain other allegations. In Point II, however, we have argued that the arrangements between the plaintiff and Cosman, which were brought into the case under the rather detailed allegations of the defendant's second separate defense, do not free the defendant from liability. This is a question of law and it seems that it was proper, to this extent, to object to the answer as frivolous. The same questions involved in Points I and II of this brief were argued before Judge Smith. We submit that it would have been proper to argue them under the notice of motion even though the defendant had raised an objection instead of proceeding on the merits. It seems clear, on the reported decisions in this State, that a notice of motion to strike out an answer as frivolous would be suf-

ficient. The same may be said of a notice of motion to strike out an answer as sham. *Fidelity Mutual Life Ins. Co.* v. *Wilkes-Barre, etc., R. R. Co.,* 98 N. J. L. 507 at 510. The notice need not specify in what respects the answer is sham; or in what respects it is frivolous. The notice served in the present case gives as much information as a notice objecting to an answer as sham. It does not state inconsistent objections to the answer as would a notice objecting to a pleading as sham *and* frivolous. It is also to be remembered that a copy of an affidavit is ordinarily served with and as a part of a notice of motion to strike out an answer. That was done in this case, and gave the defendant the detailed information which he now complains he did not receive.

POINT IV.

Circuit Court Judge Smith, as Supreme Court Commissioner, had jurisdiction to strike out the defendant's answer.

This suit was started in the New Jersey Supreme Court and the venue laid in Bergen County. The appellant argues (Brief, p. 17) that Judge Smith, being a Circuit Court Judge assigned to Essex County, had no jurisdiction under the Supreme Court Rules to strike out the answer. For the information of the Court we may say that Judge Caffrey was in Europe at the time the answer was filed in this case. Before leaving, he had arranged with Judge Smith that the latter would hear any Bergen County matters which might come up for consideration and the Bergen County Clerk was notified of this arrangement.

We wish to point out that the notice of motion (R., 12) informed the defendant that application would be made "to the Honorable William A. Smith, Circuit Court Judge and Supreme Court Commissioner, sitting for the Honorable Edwin C. Caffrey." The record fails to show that any objection was made to a hearing of the motion by Judge Smith. But overlooking the failure to make an objection, the sound view of the situation seems to be that for the purposes of this case and other Bergen County matters coming up during the absence of Judge Caffrey, Judge Smith was judge of the Bergen County Circuit Court and, as such, was a Supreme Court Commissioner with power to deal with pleadings in Bergen County cases. He was simply acting as a substitute for Judge Caffrey and, as shown by the notice of motion, application was made to him in that capacity. Had Judge Smith gone to Bergen County and assisted temporarily with the regular work there, it would seem ridiculous to say that he was not acting as Judge of the Bergen County Circuit Court. It is well known that Circuit Judges often assist temporarily with work outside of the county or counties to which they are regularly assigned. Their power to do so goes unquestioned. Judge Smith was doing exactly that and nothing more in striking out the answer of the defendant. The argument under Point V of the appellant's brief (Brief, p. 17, *et seq.*) makes the serious error of ignoring that the Circuit Court Judges are empowered to act in the Circuit Court of any county of the State. The original act for the appointment of Circuit Judges, P. L. 1893, p. 158, provides:

> "* * * there shall be nominated by the governor and appointed by him, by and with the advice and consent of the senate, three judges, each of whom shall be empowered to

hold, in the absence of a justice of the supreme court, the respective circuit courts in *every* county of this state."

Later acts increasing the number of judges have modified this language slightly but the meaning clearly is the same. The most recent statute (P. L. 1927, p. 827) uses the wording of all of the supplements to the Act of 1893. It says:

"There shall be appointed by the Governor, by and with the advice and consent of the Senate, two judges, each of whom shall be empowered to hold, in the absence of a justice of the Supreme Court, the Circuit Courts in the respective counties."

It is true that the Supreme Court may assign Circuit Court Judges to certain circuit courts as may be considered expedient, 2 C. S. 1719, sec 61. But that provision is, by its terms, a matter of administration, and does not act as a condition upon the broad powers given the Circuit Court Judges.

For these reasons we contend that Judge Smith became, temporarily, the Judge of the Bergen County Circuit Court and that it was proper for him to do so. We believe that the well established practice by which one Circuit Court Judge temporarily assists outside of his own assignment supports our contention. It follows that as Judge of the Bergen County Circuit Court, Judge Smith was a Supreme Court Commissioner with power, even under the construction of Supreme Court Rule 93 for which appellant argues, to strike out the answer in the present case.

The statute making it possible for a Circuit Court Judge to control pleadings in no way limits jurisdiction to the particular county or

counties in which he happens to be sitting regularly. The statute (P. L. 1926, p. 103) provides:

> "The New Jersey Supreme Court shall have power, by appropriate rules, revocable or amendable at the pleasure of said court, to grant respectively to such Supreme Court Commissioners as shall respectively from time to time occupy the position of Circuit Court judge, full control over the pleadings in any matter then pending in said court, whether prior to or at the time of trial, and any motions addressed thereto, including motions to strike out, motions in lieu of pleas to the jurisdiction, or pleas in abatement, and also motions to dismiss or non-suit for failure to file notice of trial or for lack of prosecution, and if a decision be decisive of the whole case the commissioner may order judgment for the successful party or make such order as may be just; and the action of court upon such motions may be reviewed on appeal after final judgment."

Supreme Court Rule 93 provides:

> "The several Circuit Court Judges of this State heretofore or hereafter appointed Supreme Court Commissioners are hereby severally designated as commissioners for the several counties of this State, with authority to hear and determine all motions preliminary to trial as specified in rules 94 and 95 of this court, and in such other rules as may be hereafter promulgated in the premises. (June, 1926.)"

The appellant stresses the use of the words "several" and "severally" in Rule 93 (Brief, p. 19) and contends that "several" should be construed to mean "respective." "Several" very seldom has that meaning. For example, in *Outcault* v. *Outcault,* 42 N. J. E. 500, the word was held to mean "all." See 7 Words and Phrases, 1st series, p. 6454 *et seq.* for other cases in which a similar construction has been applied.

Bovier's Law Dictionary, 3rd Rev., Vol. 3, p. 3055, defines "several" as "separate; distinct * * *." It is believed that Rule 93 merely was so worded in order to treat the Circuit Court Judges and the counties individually and not as groups, and that it is meant to do nothing further. There is no general tendency to make Circuit Court Judges nothing more than County Judges. The policy of this State has always been in the opposite direction as is shown by the various statutes providing for the appointment of Circuit Court Judges. As Supreme Court Commissioners, the Circuit Court Judges are part of a state-wide court. It would be out of keeping with the nature of that Court to confine its officers to strict territorial limits in the exercise of their powers. To give Supreme Court Rule 93 the effect for which appellant argues would be to apply a strained construction to it, and it is submited that the Rule should not be so construed.

We respectfully submit that the judgment should be affirmed.

McCARTER & ENGLISH,
Attorneys for Plaintiff-Respondent.

WARD J. HERBERT,
ARTHUR F. EGNER,
Of Counsel.

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#143
Feb Term

New Jersey Court of Errors and Appeals

MESEROLE SECURITIES CO., INC., a corporation, *Plaintiff-Respondent,* vs. MARK M. DINTENFASS, *Defendant-Appellant.*	Action at Law. On Appeal from Supreme Court.

BRIEF FOR APPELLANT

Statement of the Case

Plaintiff sues to recover the amount of a judgment procured by it against the present defendant and others in the Supreme Court of New York. Defendant's answer traverses paragraphs 4 and 5 of the complaint, which allege that the amount due is $5,236.48; that plaintiff is still the owner and holder of the judgment; and that the same still remains in full force and effect, and entirely due and unpaid. The answer further states two separate defenses: First, that plaintiff has received full payment and satisfaction of all sums decreed to be owing from defendant to plaintiff by said judgment; Second, that the judgment was based on two promissory notes endorsed by this defendant and others including one Jack T. Cosman, that plaintiff has received payment and satisfaction of said judgment from said Cosman, whose liability on said notes was prior to that of defendant, that said Cosman has received

an assignment of plaintiff's interest in said judgment, and that by virtue of the Negotiable Instruments Law, effective in New York, defendant's liability is discharged. (State of Case, pp. 9-11.)

On August 20, 1930, defendant was served with notice of a motion to strike out the answer upon the ground that the same was sham in part and frivolous in part. (State of Case, p. 12.) The notice was accompanied by the affidavit of plaintiff's secretary, verifying the recovery of the judgment and denying the payment or satisfaction thereof. (State of Case, p. 13.)

On the return day of the notice, the matter was argued before Circuit Court Judge Smith, sitting as a Supreme Court Commissioner. Defendant filed two affidavits. His own affidavit establishes that the New York judgment was recovered in an action based on two promissory notes payable to Jack T. Cosman; that Cosman was the first endorser on said notes and that the present defendant's liability was subsequent in law and in fact to the liability of said Cosman; that after the entry of judgment, Solomon Brill, president of the plaintiff corporation, stated that the judgment had been paid and satisfied by said Cosman; that said Cosman was also a defendant in the New York suit but since he had not participated in the appellate litigation the action against him remained undisposed of; that said Brill also stated that the suit against Cosman was settled and had been or was about to be discontinued; that said Brill had refused to make an affidavit in connection with the motion but stated that if he were subpoenaed, he would testify that the judgment was paid by Cosman; and that said Brill being a resident of New York it would be necessary for

defendant to take his depositions in order to procure his testimony. (State of Case, pp. 15-19.)

The affidavit of Tom Evans corroborates in detail the defendant's statements and asserts that Brill's declarations were made in the presence of Evans as well as of defendant, and were also made to defendant's New York attorney, who was in Maine when the motion was made and argued, and hence could not furnish an affidavit. (State of Case, pp. 20-22.)

Decision was reserved by Judge Smith and plaintiff was granted leave to file a replying affidavit. The affidavit of Solomon Brill was filed on August 30, 1930. (State of Case, pp. 23-26). Said Brill denies that the judgment was paid, but sets forth an agreement for the sale thereof by plaintiff to said Jack T. Cosman. This agreement, which appears in the State of Case at pages 27 to 30, will be hereinafter adverted to and analyzed.

On September 23, 1930, an order was made striking out the answer on the ground that it is sham in part and frivolous as to the balance and that defendant after due notice has failed to show such facts as entitle him to defend (State of Case, p. 31.) On September 25, 1930, judgment final by default was entered against defendant in the sum of $5,419.75. (State of Case, p. 32.)

The action was instituted in the New Jersey Supreme Court, and the venue was laid in Bergen County. The motion to strike was made returnable before Hon. William A. Smith, Circuit Court Judge and Supreme Court Commissioner, "sitting for the Honorable Edwin C. Caffrey, at the Essex County Hall of Records, Newark, New Jersey." (State of Case, p. 12.) The order striking out the answer was made by Judge Smith, as a Supreme Court Commissioner of New Jersey. (State of Case, p. 31.)

This appeal is taken from the whole of the judgment and from the order striking out the answer. (State of Case, p. 1.)

Grounds of Appeal

1. The Court below erroneously struck out the Answer filed by the defendant after defendant had proven facts sufficient to entitle him to defend.

2. The Court below erroneously ordered judgment upon the order striking out the Answer after defendant had proven such facts as entitled him to defend.

3. The affidavits filed by the plaintiff were not sufficient to entitle said plaintiff to an order striking out the Answer of defendant, and to summary judgment.

4. The affidavits filed by plaintiff contained facts sufficient to entitled defendant to defend.

5. The order made herein on the 23rd day of September, 1930, was erroneous in that the answer filed by the defendant was neither sham nor frivolous in whole or in part.

6. The judgment entered against the defendant was erroneous for the reason that the Answer filed by the defendant was neither sham nor frivolous in whole or in part.

7. The judgment entered in the Court below was erroneous for the reason that the same was based upon the order striking out the Answer, dated September 23, 1930, which order was improvidently made and entered.

8. The notice of motion to strike out the defendant's Answer was defective in that the same fails to contain a specification of the particular cause or causes of objection to the Answer.

9. The order striking out the Answer was erroneous for the reason that the same was made by a Supreme Court Commissioner occupying the position of Circuit Court Judge in the County of Essex and the said Supreme Court Commissioner had no jurisdiction to make an order in this action where the venue is laid in the County of Bergen.

Point I.

The affidavits of defendant showed facts sufficient to entitle him to defend.

Supreme Court Rule 80 provides in substance that the answer may be struck out and judgment final entered unless the defendant by affidavit or other proofs shows such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend. P. L. 1912, p. 394, sec. 57; S. C. R. 80.

Under this rule, a plaintiff is entitled to a summary judgment upon presenting an affidavit complying with Rule 81, unless the defendant by affidavit or other proofs shows such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend; but if upon review of such a final judgment, as permitted by section 15 of the Practice Act of 1912 (P. L., p. 380), it be found by the appellate court that the facts set out in the defendant's affidavit presented in support of his answer fully and completely deny and controvert essential allegations of the plaintiff's complaint and affidavit upon which his cause of action depends, the judgment will be reversed. *Birkenfeld* vs. *Ginsburg*, 7 N. J. A. R., 745; 146 Atl. 176.

The affidavits filed by the present defendant in support of his answer fully and completely

controvert the essential allegations of plaintiff's complaint and affidavit that the amount due on the judgment is unpaid and that the plaintiff is the owner and holder of the judgment. Defendant's affidavits establish that the president and chief executive officer of the plaintiff corporation stated to at least three persons that Jack T. Cosman, whose liability on the promissory notes in question was anterior to that of defendant, had paid the whole amount thereof, and that defendant had no further obligation to plaintiff.

The affidavit of Brill does not eliminate this controverted issue. At most, it constitutes a denial of a previous contradictory statement. Material statements made out of court which are in conflict with the testimony of a party are substantive proof of the facts previously asserted. *McBlain* vs. *Edgar,* 65 N. J. L., 634; and the credibility of the testimony becomes a question for the jury. *State* vs. *Rosa,* 71 N. J. L., 316. Admissions of the creditor or his agents are sufficient to show payment, (48 C. J., 727.)

Moreover, it is significant that the affidavit of Brill does not unequivocally deny his previous assertions. In paragraph 4 of his affidavit, Brill admits that he had conversations with the defendant and with Evans and that he explained "the arrangements" he had made with Cosman. (State of Case, p. 25.) The paragraph then proceeds as follows:

> "It was of course to the advantage of the defendant, Dintenfass, and Evans, to understand that the judgment had been paid. I never said that."

The plain implication from this language is that Brill did say something from which the defendant was led to understand that the judgment had been paid. A mental reservation is indicated here on the part of Brill regarding which defendant ought to have opportunity for cross-examination.

It is admitted by plaintiff that there was an arrangement between plaintiff and said Cosman. The nature and the bona fides of said arrangement ought to be subjected to scrutiny and defendant afforded an opportunity for cross-examination with respect thereto.

What the defendant must show is that he has a bona fide defense, one which he may be able to establish a plausible ground of defense, something fairly arguable and of a substantial character. The question is on a motion for judgment over answer, whether the answer exhibits a possible and plausible defense. *Meyer* vs. *Nickelsburg Bros. Co.*, 37 N. J. L. J., 36.

Defendant has complied with the test laid down in the *Meyer* case. He has controverted essential allegations of the plaintiff's complaint and affidavits as required in *Birkenfeld* vs. *Ginsburg*, supra. Hence, the first two grounds of appeal should prevail.

Point II.

The affidavits filed by plaintiff were not sufficient to entitle it to an order striking out the answer and contained facts sufficient to entitle defendant to defend.

The affidavits filed by plaintiff in support of its motion to strike out the answer do not controvert, but rather establish that defendant has a

bona fide defense to the action. The exhibit annexed to the Replying Affidavit is an agreement between the present plaintiff and Jack T. Cosman, one of the defendants in the New York action (State of Case, pp. 27 to 30). By its terms the plaintiff agrees to sell and the said Cosman agrees to buy the judgment recovered by the plaintiff against the other defendants, for its face amount, payable in two equal installments, one on September 10, 1930, and one on March 10, 1931. Upon full payment being made, an assignment of the judgment in due and proper form for filing is to be executed by the plaintiff, which assignment is to be delivered to the defendant, Cosman, or his nominee. Upon default in the making of either payment, the entire indebtedness shall be deemed due and payable, and the said Cosman agrees to withdraw his answer and to confess judgment for the balance remaining unpaid.

Since the notes were endorsed in New York and the judgment procured in that State, the law of New York is applicable. Neither in New York nor in our own state, does the entry of a judgment in favor of the holder of a negotiable instrument against parties liable thereon disturb the equities as between such parties. In New York, it has been held, in an action on a judgment based on a note that an answer alleging that the judgment was recovered in an action instituted by plaintiff's assignor against defendant as maker and plaintiff as payee-endorser, and that equities existed between plaintiff and defendant before the judgment was procured, stated a valid defense and should not be stricken out. *Kelly* vs. *O'Brien,* 196 N. Y. S., 705. In New Jersey it has been held that an endorsee is entitled to have a judgment can-

celled as to him where his endorser has satisfied it and taken an assignment of the same. *First National Bank* vs. *Hoffman,* 68 N. J. L., 245.

Thus, the fact that the present suit is based upon a judgment rather than upon the original notes does not alter the equities between the parties. Sec. 201 of the New York Negotiable Instruments Law provides as follows:

> "WHEN PERSONS SECONDARILY LIABLE ON, DISCHARGED. A person secondarily liable on the instrument is discharged:
>
> "1. By any act which discharges the instrument;
>
> "2. By the intentional cancellation of his signature by the holder;
>
> "3. By the discharge of a prior party;
>
> "4. By a valid tender of payment made by a prior party;
>
> "5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
>
> "6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved."

Under this section, defendant's plea of payment by Cosman raises a valid and bona fide issue. But assuming that the agreement between plaintiff and Cosman establishes on the motion that the payment was to be made in futuro, it is submitted that defendant is nevertheless discharged from liability.

The agreement may be regarded:

(a). As accomplishing a present sale of the judgment to Cosman; or

(b). As presently vesting in Cosman the beneficial interest in the judgment.

From either viewpoint the present suit is brought for the benefit of Cosman and he is the real party plaintiff. Since his liability is paramount to that of defendant, the suit cannot be maintained.

(a). The agreement may be regarded as accomplishing a present sale of the judgment to Cosman.

The first rule for ascertaining the intention of the parties as to the time when the property in goods passes to the buyer appears in the Personal Property Law of New York (L. 1909, ch. 45, sec. 100), as follows:

> "Rule 1. Where there is an unconditional contract to sell specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery, or both, be postponed."

A contract for the sale of shares of stock at a specified price "payable and deliverable, seller's option, in this year, with interest at the rate of 6 per cent. per annum" effects a present sale of the stock, so that the seller becomes a quasi-trustee for the buyer. *Currie* vs. *White,* 45 N. Y., 822. See also *Erdreich* vs. *Zimmerman,* 190 A. D., 443, 179 N. Y. S., 829.

The section above quoted together with the New York cases cited, establish that title to a chose in action may pass forthwith despite post-

ponement of the time for payment or delivery. The assignment of a judgment need not be in any particular form. 34 C. J., 638. The mere fact that a formal assignment is to be executed when the full amount has been paid, does not prevent title to the judgment from passing to Cosman at once. The formal assignment is merely to enable Cosman to become the record owner of the judgment. The view that title has passed to Cosman is fortified by the fact that the parties deemed it necessary to include an authorization from Cosman to plaintiff to proceed with the collection of the judgment as against the other defendants; and by the further fact that all the expenses of such collections were to be defrayed by Cosman. (State of Case, pp. 28 and 29.)

In any event, the agreement raises a fair jury question as to whether title to the judgment has or has not passed to Cosman. *Boswell* vs. *Green*, 26 N. J. L., 390. *Hurff* vs. *Hires*, 45 N. J. L., 581, 595. *People* vs. *Canadian Fur Trappers Corp.*, 248 N. Y., 159.

(b). Cosman is the beneficial owner of the judgment and hence the real party in interest in the present suit.

Whether legal title to the judgment has passed to Cosman by virtue of the agreement or not, the beneficial interest was thereby vested in him. The plaintiff was authorized and empowered by Cosman to collect or endeavor to collect as against the other defendants. All sums so collected are to be credited on account of the payments agreed to be made by Cosman. All fees and disbursements of counsel, after the date of the agreement incident to the collection or attempted collection, are to be deducted from the amount of such credits

—in other words, are to be charged against Cosman. The assignment of judgment is to take into consideration and give credit for the moneys so collected from the other defendants. Any collection so made is conceded to be a matter of favor unto the defendant, Jack T. Cosman. In no clearer way could the intention of the parties be expressed that the real party in interest in any suit which might be brought by plaintiff on the judgment should be Cosman.

Thus it appears that the instant plaintiff instituted the action as the agent and for the benefit of the prior endorser who is to receive full credit, that is, the equivalent of payment, out of the proceeds collected. The moneys derived from this action against defendant will be devoted toward the reduction or satisfaction of the obligations incurred by Cosman under the agreement.

In an action to recover on a promissory note brought by one who, while holding the legal title, is merely the agent or trustee for the beneficial owner of the note, the defendant may interpose any defense which might be available against the beneficial owner just as though the action had been brought in the latter's name. *Schmidt* vs. *Turnbuckle Oil Co.,* (1923), 88 Okla., 223. Defenses against the beneficial owner may be shown against one who holds for the purpose of suit only. *McAlester* vs. *McAlester Bank,* (1923), 95 Okla., 193.

The holder of the legal title may sue although not the full owner if the maker is not thereby prejudiced in his defense, 8 C. J., 822. Any defense is admissible in such an action which would be available against the real owner. *Farwell* vs. *Tyler,* 5 Iowa, 535.

The case is, of course, distinguishable from such cases as *Bank of America* vs. *Wilson,* 71 N. E.

(Mass.), 312; *Lenox* vs. *Prout,* 3 Wheat (U. S.), 520, which are merely illustrations of the doctrine that the holder of a note has the right to look to any or all of the parties for payment. In the instant case the beneficial holder is a prior party who has no right to look to the defendant for payment despite the assignment of, or agreement to assign the judgment to him. *Kelly* vs. *O'Brien,* 196 N. Y. S., 705.

A valid contract to assign may take effect as an equitable assignment. 5 C. J., 840, 841. *Williams* vs. *Ingersoll,* 89 N. Y., 508; *Wemple* vs. *Hauenstein,* 46 N. Y. S., 288. To constitute an equitable assignment no particular form is necessary, it being sufficient that the assignee has such evidence of title as, although it does not pass a legal title to enforce the judgment in his own name, authorizes him to receive the proceeds thereof and protects the judgment debtor in making payment to him. Thus an equitable assignment of a judgment may be by parole. 34 C. J., 639.

It is well settled that such equitable ownership is recognized in our courts of law. *Sullivan* vs. *Viconti,* 68 N. J. L., 543; *Brown* vs. *Dunn,* 50 N. J. L., 111, 114.

The third and fourth grounds of appeal ought therefore to prevail.

The agreement further establishes that the time of Cosman to pay the obligation was extended to September 10, 1930, and thence to March 10, 1931. Such an agreement as against a non-assenting endorser operates to discharge such endorser. New York Personal Property Law, Sec. 201, sub-sec. 6.

An extension made after the maturity of a note discharges the endorser equally as well as one made before, *Greenberg* vs. *Ginsburg,* 143 N. Y. S., 1017. *Nightingale* vs. *McGinnis,* 34 N. J. L., 461;

and so with an extension made after judgment. *Westervelt* vs. *Frech,* 33 N. J. E., 451.

To prevent such a result the agreement must expressly reserve all the remedies of the creditor against the endorser or surety; in which case the latter will be in a position to pay immediately and then to proceed against the principal debtor. *National Park Bank* vs. *Koehler,* 204 N. Y., 174.

Such a reservation will not be implied. *Stein* vs. *Steindler,* 20 N. Y. S., 839; 8 C. J., 449:

> "Indeed, the term 'expressly reserved' is evidently employed in the statute in order to leave no room for doubt as to this very matter; to require an express as distinguished from an implied reservation of the holder's right of recourse against a party secondarily liable."
>
> *Phenix National Bank* vs. *Hanlon,* 183 Mo. Appellate, 243, 248.
>
> To the same effect, see *Westervelt* vs. *Frech,* supra, 456.

The agreement in the instant case contains every element requisite to the discharge of the defendant. It is an "agreement binding upon the holder"; it extends the time of payment; and it fails to expressly reserve "all the remedies of the creditor against the endorser" so that the latter is not in a position to pay immediately and then to proceed against the principal debtor.

It may be urged that this defense is not set up in the Answer. The reason is obvious. The agreement was within the exclusive knowledge of the plaintiff and Cosman. Defendant knew nothing of its contents until the Replying Affidavit was filed on August 30, 1930, after the motion to strike was argued. It appearing that the agreement fur-

nishes defendant with a bona fide defense under sub-section 6 above quoted, the ends of justice would appear to require that defendant be permitted to plead over.

Point III.

The answer is neither sham nor frivolous in whole or in part.

The defense of payment to an action on a foreign judgment is not frivolous. *Smith* vs. *Swart,* 103 N. J. L., 150, 152. Hence, the First Separate Defense should not have been stricken out.

The matters and things set forth in the Second Separate Defense are not frivolous. If plaintiff concedes their truth, as it is bound to do on this aspect of its motion, they make a case under *First National Bank* vs. *Hoffman,* supra, and under *Kelly* vs. *O'Brien,* supra.

Neither should the answer have been stricken out as sham. A motion to strike out pleadings as sham can prevail only when it is entirely clear that they are devoid of merit. *Taylor* vs. *Hutchinson,* 61 N. J. L., 440. To warrant the court in striking out a plea as false or sham 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. *Engler* vs. *Buesser,* 106 N. J. E., 173; *South Camden Trust Co.* vs. *Steifel,* 101 N. J. E., 42; *Muhlenbeck* vs. *West Hoboken,* 2 N. J. Misc., 7; *Fidelity Ins. Co.,* vs. *Wilkes Barre Railroad Company,* 98 N. J. L., 507.

In this State the procedure is regarded as merely an inquiry whether there is an issue of fact to be tried; a distinction being recognized between

the determination whether there is a real issue to be tried and the trial of an issue upon a motion; whether what in form is an issue is a real issue. *Engler* vs. *Buesser,* supra; *Coykendall* vs. *Robinson,* 39 N. J. L., 98. Where the affidavits filed raise questions of fact the matter should not be decided upon motion, but should be submitted to a jury. *Perloff* vs. *Island Development Company,* 4 N. J. Misc., 473.

As indicated under Point I, the affidavits filed by defendant were sufficient to raise a serious question of fact as to his liability; and as developed under Point II, the affidavits filed by plaintiff corroborated the fact that serious questions both of fact and of law are at issue in this suit. Hence, the 5th and 6th grounds of appeal are meritorious.

Point IV.

The notice of motion to strike out the answer was defective for failure to contain a specification of the particular cause or causes of objection to the answer.

The notice of motion contains no grounds for striking out the answer other than that the same is sham in part and frivolous in part. There is no specification as to the part which is sham and the part which is frivolous. This omission violates Supreme Court Rule 43.

A notice of motion to strike out shall contain a specification of the particular cause or causes of objection to a plea. *Dunn* vs. *Chernewski,* 101 N. J. L., 27.

Since the purpose of a notice of motion is to acquaint the party with the ground on which he is

to be proceeded against and give him an opportunity to answer, it is the general rule that unless the notice sets forth the grounds on which relief is sought, it is insufficient and will be denied. 42 C. J., 483.

The vice of a notice of motion such as the instant one is emphasized by the fact that even after the order striking out the answer has been entered it is impossible to determine definitely, no opinion having been filed, whether the answer was stricken out as sham or frivolous, or both.

Point V.

The Supreme Court Commissioner occupying the position of Circuit Court Judge in the County of Essex had no jurisdiction to make an order striking out the answer filed in an action where the venue was laid in the County of Bergen.

This court may take judicial notice of the fact that Hon. William A. Smith is a Supreme Court Commissioner and a Judge of the Circuit Court of Essex County, and that Hon. Edwin C. Caffrey is a Supreme Court Commissioner and a Judge of the Circuit Court of Bergen County. *Henry L. Lang Co.* vs. *McGarry,* 8 N. J. A. R., 346; 150 Atl. 689.

It is appellant's contention that Judge Smith, neither as a Supreme Court Commissioner, nor as a Circuit Court Judge had authority to strike out the answer in this action. Prior to 1912 a Circuit Court Judge had no control over Supreme Court pleadings even at the trial of the action. *Dayton* vs. *Boettner,* 82 N. J. L., 421; *Hubbard* vs. *Montross Shingle Co.,* 79 N. J. L., 208. With the

adoption of Rule 26 of the Practice Act of 1912, now Supreme Court Rule 40, the Circuit Court Judge was authorized to dispose of objections to pleadings at or after the trial. *Koppelon* vs. *W. M. Ritter Flooring Co.,* 97 N. J. L., 200 This rule, however, did not empower a Circuit Court Judge to strike out a pleading before the trial. *Koppelon* vs. *W. M. Ritter Flooring Co.,* supra; *Savage* vs. *Public Service Railway Co.,* 95 N. J. L., 432. This was the situation until 1926.

Prior to 1926, a Supreme Court Commissioner had no authority to strike out an answer. *Milberg* vs. *Kuethe,* 98 N. J. L., 779.

In 1926 the following statute was passed:

> "1. The New Jersey Supreme Court shall have power, by appropriate rules, revocable or amendable at the pleasure of said court to grant respectively to such Supreme Court Commissioners as shall respectively from time to time occupy the position of Circuit Court Judge, full control over the pleadings in any matter then pending in said court." (P. L. 1926, p. 103.)

Pursuant to the authority of this statute, Supreme Court Rule 93 was adopted, which provides as follows:

> "The several Circuit Court Judges of this State heretofore or hereafter appointed Supreme Court Commissioners are hereby severally designated as commissioners for the several counties of this State, with authority to hear and determine all motions preliminary to trial, as specified in rules 94 and 95 of this court, * * * "

Rule 94 was thereupon amended to include the power to hear objections to pleadings and to order the striking out thereof.

Since the power to strike out pleadings in advance of trial did not exist, except in Supreme Court Justices, prior to adoption of Rule 93 as authorized by P. L. 1926, p. 103, the newly-created power should be strictly limited to cases within the statute and the rule.

The word "several" as used in Rule 93 to modify "Circuit Court Judges" and the words "severally designated as Commissioners for the several counties of this State," indicate a clear intention that the authority of the Circuit Court Judge shall be limited to his own county. The word "several" means "respective, each particular, or a small number, singly taken." 35 Cyc. 1447. The definition in Cyc. follows that of Webster's Dictionary. The word "severally" is defined as meaning "respectively; distinctly separate or apart from others." 35 Cyc., 1447. Applying these definitions to Rule 93, it would appear that the Circuit Court Judges are respectively designated as Commissioners for their respective counties to hear motions with regard to pleadings.

This construction is fortified by the language of the statute above quoted, which authorizes the Supreme Court to grant the power "respectively" to such Supreme Court Commissioners as shall respectively from time to time occupy the position of Circuit Court Judge. In *Sandford* vs. *Stagg*, 106 N. J. E., 71, the word "respective" is defined as meaning "relating to particular persons or things, each to each; particular; several; as, their respective homes." If "respective" and "sev-

eral'' are synonymous, as decided in the Sandford case, then the word ''several'' in Rule 93 surely relates the particular judge to his particular county.

Under this construction, the motion to strike out defendant's answer could only be properly made before Judge Caffrey, and hence, the order striking out the answer and the judgment entered thereon are erroneous.

Respectfully submitted,

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