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NOTICE OF APPEAL

New Jersey Court of Errors and Appeals

FENNING, DORNBUSCH & CO.,
a corporation,

Plaintiff,

vs.

MORRIS H. GREENFIELD

Defendant.

10

Action at Law.

*Notice of
Appeal.*

To Bilder & Bilder, Esqs., Attorneys of Plaintiff.

20

Sirs:

PLEASE TAKE NOTICE, That the defendant, Morris H. Greenfield, in the above-entitled cause, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause against him, and from each and every part thereof.

Dated: March 31, 1930.

30

PHILIP J. SCHOTLAND,
Attorney for Defendant-Appellant,
Morris H. Greenfield.

Service of a true copy of the within Notice is hereby acknowledged, this 1st day of April, 1930.

BILDER & BILDER,
Attorneys for Plaintiff.

40

GROUNDS OF APPEAL

NEW JERSEY COURT OF ERRORS AND
APPEALS

10	<div style="display: flex; justify-content: space-between;"> <div style="width: 60%;"> <p>FENNING, DORNBUSCH & CO., <i>Plaintiff,</i> a corporation, <i>vs.</i> MORRIS H. GREENFIELD <i>Defendant.</i></p> </div> <div style="width: 5%; text-align: center;">}</div> <div style="width: 35%; vertical-align: middle;"> <p><i>Action at Law.</i></p> <p><i>Grounds of Appeal.</i></p> </div> </div>
20	

Appellant specifies the following grounds why the judgment in the above-entitled cause should be reversed:

- 30

 1. The learned trial judge erred in admitting in evidence, over the objection of the defendant, copies of so-called confirmations, prepared by the plaintiff and alleged to have been mailed to the defendant, which papers were marked in evidence as "Exhibit P-4."
2. Because the Court erred in denying the motion of the appellant for a non-suit.
3. Because the Court erred in denying the motion of the appellant for a direction of a verdict in favor of the defendant-appellant.
- 40
 4. Because the Court erred in charging the jury:

Grounds of Appeal.

“Where there is an offer of delivery, or where an offer of delivery is refused, and the person being charged with the delivery of the stock is told to retain that stock for the order of the person to whom it is sold there has then become a constructive delivery of that stock, and the person who is ordered to hold it becomes the bailee or agent of the purchaser of the stock. That is exactly what the plaintiff claims there was in this case; while there was not an actual delivery of the stock, it is claimed that the stock was at all times in shape for delivery; that at the time the stock was sold to the defendant, the defendant directed the plaintiff to hold the stock, and thereafter the plaintiff did continue to hold the stock, subject to the defendant’s order, until it was actually sold.”

Now, if you believe, from the evidence in this case,—that is, the greater weight of the evidence in this case, because the burden of proof is upon the plaintiff to show by the greater weight of the evidence—that there was a constructive delivery by the plaintiff to the defendant of stock, and that the defendant by what he said at that time constituted the plaintiff his bailee, his agent, for the purpose of holding that stock subject to his order—if you believe that that is shown by the greater weight of the evidence in this case, then this case is taken out of the Statute of Frauds, and the mere fact that there was no order in writing for this stock does not prevent the plaintiff in this case from recovering the value of that stock, or the difference between the charge of the stock to the defendant and what the plaintiff realized upon it, if it was an order to sell.”

Grounds of Appeal.

5. Because the verdict of the jury is not supported by the evidence and is contrary to the charge of the Court.

Dated: April 10, 1930.

10

PHILIP J. SCHOTLAND,
Attorney for and of counsel with
Defendant-Appellant.

Service of a true copy of the within Grounds of Appeal is hereby acknowledged, this 10th day of April, 1930.

20

BILDER & BILDER,
Attorney for and of counsel
with Plaintiff-Appellee.

30

40

THE STATE OF NEW JERSEY

10

TO

MORRIS H. GREENFIELD

YOU ARE SUMMONED to answer
the annexed complaint of
FENNING, DORNBUSCH & CO.,
a corporation,

in an Action at Law in the Essex
County Circuit Court. AND TAKE NOTICE, that
unless you file your answer to the said complaint
with the Clerk of the Essex County Circuit Court,
at Newark, New Jersey, within twenty days after
service upon you of this writ and the annexed com-
plaint, the plaintiff may proceed in the suit and
judgment may be entered against you (and see no-
tice endorsed thereon).

20

WITNESS, WORRALL F. MOUNTAIN, Judge of
the Essex County Circuit Court, at Newark, New
Jersey, this 28th day of December, A. D. 1928.

BILDER & BILDER
Attorneys.

JOHN H. SCOTT
Clerk.

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COMPLAINT

ESSEX COUNTY CIRCUIT COURT.

10

FENNING, DORNBUSCH & CO.,
a corporation,

*Plaintiff,**vs.*

MORRIS H. GREENFIELD

*Defendant.**Action at Law**Complaint.*

20

Plaintiff, a corporation of the State of New Jersey, having its principal place of business in the City of Newark and State of New Jersey, says:

FIRST COUNT.

1. On or about April 12, 1928, plaintiff sold to the defendant one hundred ten (110) shares of Public Fire Company stock amounting to \$3,712.50.
2. On or about May 29th, 1928, defendant did make a part payment on account of the said purchase, in the sum of \$2,249.92.
3. On or about October 17th, 1928, plaintiff was further reimbursed by the defendant upon the said purchase of said stock in the sum of \$892.50.
4. There remains due and owing to the plaintiff from the defendant, the sum of \$570.08, no part thereof having been paid.

40

Complaint

WHEREFORE, plaintiff demands of the defendant on the First Count the sum of \$570.08 with interest thereon from October 17th, 1928.

Judgment will be claimed by the plaintiff against the defendant on the First Count in the sum of \$570.08 with interest thereon from October 17th, 1928. 10

SECOND COUNT

1. Plaintiff repeats all of the allegations of the First Count.

2. On or about April 12th, 1928, plaintiff did at the defendant's request, advance for the defendant the sum of \$3,712.50 for the purchase of one hundred ten (110) shares of Public Fire Company stock amounting to the said sum of \$3,712.50. 20

3. On or about May 29, 1928, plaintiff was reimbursed by the defendant in the sum of \$2,249.92.

4. On or about October 17th, 1928, the plaintiff was further reimbursed by the defendant in the sum of \$892.50.

5. There remains due and owing to the plaintiff from the defendant, the sum of \$570.08, no part thereof having been paid. 30

WHEREFORE, plaintiff demands of the defendant on the Second Count the sum of of \$570.08 with interest thereon from October 17th, 1928.

Judgment will be claimed by the plaintiff against the defendant on the Second Count in the sum of \$570.08 with interest thereon from October 17th, 1928. 40

*Complaint***THIRD COUNT.**

1. Plaintiff repeats all of the allegations of the First and Second Counts.

10 2. On or about June 7th, 1928, plaintiff sold to the defendant three hundred twenty (320) shares of Essex Fidelity & Plate Glass stock amounting to \$3,920.00.

3. On or about June 15th, 1928, defendant did make a part payment on account of the said purchase, in the sum of \$618.75.

20 4. On or about October 17th, 1928, plaintiff was further reimbursed by the defendant upon the said purchase of said stock in the sum of \$2,362.50.

5. There remains due and owing to the plaintiff from the defendant, the sum of \$938.75, no part thereof having been paid.

WHEREFORE, plaintiff demands of the defendant on the Third Count the sum of \$938.75, with interest thereon from October 17th, 1928.

30 Judgment will be claimed by the plaintiff against the defendant on the Third Count in the sum of \$938.75 with interest thereon from October 17th, 1928.

FOURTH COUNT.

1. Plaintiff repeats all of the allegations of the First, Second, and Third Counts.

40 2. On or about June 7th, 1928, plaintiff did at the defendant's request, advance for the defendant the sum of \$3,920.00, for the purchase of three hun-

Complaint

dred twenty (320) shares of Essex Fidelity & Plate Glass stock amounting to the said sum of \$3,920.00.

3. On or about June 15th, 1928, plaintiff was reimbursed by the defendant in the sum of \$618.75.

4. On or about October 17th, 1928, the plaintiff was further reimbursed by the defendant in the sum of \$2,362.50. 10

5. There remains due and owing to the plaintiff from the defendant, the sum of \$938.75, no part thereof having been paid.

WHEREFORE, plaintiff demands of the defendant on the Fourth Count the sum of \$938.75 with interest thereon from October 17th, 1928. 20

Judgment will be claimed for the plaintiff against the defendant on the fourth count in the sum of \$938.75, with interest thereon from October 17th, 1928.

FIFTH COUNT.

1. Plaintiff repeats all of the allegations of the First, Second, Third and Fourth Counts.

2. That on or about June 7th, 1928, defendant did agree to purchase from plaintiff three hundred twenty (320) shares of Essex Fidelity & Plate Glass stock for the sum of \$3,920.00. 30

3. That the defendant did agree to pay for said stock immediately and to accept delivery thereof.

4. That the defendant has paid on account of the purchase of said stock the sum of \$2,981.25, and has accepted delivery of fifty (50) shares thereof. 40

Complaint

5. That the defendant has refused to accept delivery and pay for the balance of two hundred seventy (270) shares of the said Essex Fidelity & Plate Glass stock.

10 6. That because of the refusal of the said stock, plaintiff has sustained damages in the sum of \$938.75.

WHEREFORE, plaintiff demands of the defendant on the Fifth Count, the sum of \$938.75 with interest thereon from October 17th, 1928.

Judgment will be claimed by the plaintiff against the defendant on the Fifth Count in the sum of \$938.75, with interest thereon from October 17th,
20 1928.

SIXTH COUNT.

1. Plaintiff repeats all of the allegations of the First, Second, Third, Fourth and Fifth Counts.

2. On or about June 12th, 1928, plaintiff sold to the defendant one hundred (100) shares of U. S. Securities stock amounting to \$1,200.00.

30 3. On or about September 12th, 1928, plaintiff did make a part payment on account of the said purchase, in the sum of \$924.90.

4. There remains due and owing to the plaintiff from the defendant, the sum of \$275.10, no part thereof having been paid.

WHEREFORE, plaintiff demands of the defendant on the Sixth Count the sum of \$275.10, with interest thereon from September 12th, 1928.
40

Complaint

Judgment will be claimed by the plaintiff against the defendant on the Sixth Count in the sum of \$275.10 with interest thereon from September 12th, 1928.

SEVENTH COUNT.

10

1. Plaintiff repeats all of the allegations of the First, Second, Third, Fourth, Fifth and Sixth Counts.

2. On or about June 12th, 1928, plaintiff did, at the defendant's request, advance for the defendant the sum of \$1,200.00 for the purchase of one hundred (100) shares of U. S. Securities stock, amounting to the said sum of \$1,200.00.

3. On or about September 12th, 1928, plaintiff was reimbursed by the defendant in the sum of \$924.90. 20

4. There remains due and owing to the plaintiff from the defendant, the sum of \$275.10, no part thereof having been paid.

WHEREFORE, plaintiff demands of the defendant on the Seventh Count the sum of \$275.10, with interest thereon from September 12th, 1928. 30

Judgment will be claimed by the plaintiff against the defendant on the Seventh Count in the sum of \$275.10, with interest thereon from September 12th, 1928.

EIGHTH COUNT.

1. Plaintiff repeats all of the allegations of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Counts. 40

Complaint

2. That between December 1st, 1926 and October 17th, 1928, plaintiff did, at the defendant's request and for the defendant's benefit, advance certain moneys in the defendant's behalf, and interest has accrued on the said sums so advanced as afore-
10 said for the defendant's benefit in the sum of \$146.94.

3. There is due and owing from the defendant to the plaintiff the sum of \$146.94, no part thereof having been paid.

WHEREFORE, plaintiff demands of the defendant on the Eighth Count the sum of \$146.94 with interest thereon from October 17th, 1928.

20 Judgment will be claimed by the plaintiff against the defendant on the Eighth Count in the sum of \$146.94 with interest thereon from October 17th, 1928.

Judgment will be claimed by the plaintiff against the defendant on the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Counts in the sum of \$1.930.87 with interest thereon.

30 BILDER & BILDER,
Attorneys of Plaintiff.

ANSWER.

ESSEX COUNTY CIRCUIT COURT

FENNING, DORNBUSCH & CO.,
a corporation,

Plaintiff,

vs.

MORRIS H. GREENFIELD

Defendant.

10

Action at Law.

Answer.

Defendant Morris H. Greenfield, residing in the City of Newark, County of Essex and State of New Jersey, answering the complaint of Fenning Dornbusch & Co., a corporation says:

20

ANSWER TO FIRST COUNT

He denies each and every allegation of the first count.

ANSWER TO SECOND COUNT.

He denies each and every allegation of the second count.

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ANSWER TO THIRD COUNT.

He denies each and every allegation of the third count.

ANSWER TO FOURTH COUNT.

He denies each and every allegation of the fourth count.

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Answer

ANSWER TO FIFTH COUNT.

He denies each and every allegation of the fifth count.

ANSWER TO SIXTH COUNT.

10 He denies each and every allegation of the sixth count.

ANSWER TO SEVENTH COUNT.

He denies each and every allegation of the seventh count.

ANSWER TO EIGHTH COUNT.

20 He denies each and every allegation of the eighth count.

FIRST SEPARATE DEFENSE.

The agreements alleged in all of the counts of said complaint were not in writing, nor was any part of the purchase price of the said stock paid on account of the same by this defendant or any one in his behalf, nor was any part of the subject matter mentioned in any of the counts of the complaint delivered to the defendant, as required by the statute in such case made and provided.

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PHILIP J. SCHOTLAND,
Attorney for Defendant.

AFFIDAVIT.

ESSEX COUNTY CIRCUIT COURT.

FENNING, DORNBUSCH & CO., a corporation, <i>Plaintiff,</i> <i>vs.</i> MORRIS H. GREENFIELD <i>Defendant.</i>	}	10 <i>Action at Law.</i> <i>Affidavit.</i>
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STATE OF NEW JERSEY, } COUNTY OF ESSEX, } ss.	20
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MORRIS H. GREENFIELD, of full age, being duly sworn according to law on his oath deposes and says:

That he is the defendant in the above entitled cause; that the above answer is not filed for the purpose of delay, but in truth and in good faith and that he believes that he has a just and legal defense on the merits of the case. 30

Sworn and subscribed to before
me this 16th day of January, 1929.

MORRIS H. GREENFIELD.

HELEN JEDELL,
Notary Public of New Jersey.

REPLY.

ESSEX COUNTY CIRCUIT COURT

10	FENNING, DORNBUSCH & CO., a corporation, <i>Plaintiff,</i> <i>vs.</i> MORRIS H. GREENFIELD <i>Defendant.</i>	}	<i>Action at Law.</i> <i>Reply.</i>
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20 Plaintiff denies the allegations set forth in the First Separate Defense in the answer of the defendant.

BILDER & BILDER,
 Attorneys of Plaintiff.

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AMENDED COMPLAINT

ESSEX COUNTY CIRCUIT COURT

FENNING, DORNBUSCH & CO., a corporation, <i>Plaintiff,</i> <i>vs.</i> MORRIS H. GREENFIELD <i>Defendant.</i>	}	10 <i>Action at Law.</i> <i>Amended Complaint</i>
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Plaintiff, a corporation of the State of New Jersey, having its principal place of business in the City of Newark and State of New Jersey, says by way of amended complaint:

FIRST COUNT.

1. On or about April 12, 1928, plaintiff sold to the defendant one hundred ten (110) shares of Public Fire Company Stock amounting to \$3,712.50.

2. On or about May 29, 1928, pursuant to the instructions of defendant, plaintiff sold for the account of defendant seventy-five (75) shares of the said Public Fire Company stock and credited to the defendant's account the proceeds thereof in the sum of \$2,249.92.

3. On or about October 17, 1928, pursuant to the defendant's instructions, plaintiff sold for the account of the defendant thirty-five (35) shares of the said Public Fire Company stock and credited the de-

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Amended Complaint

defendant's account with the proceeds thereof in the sum of \$892.50.

4. There remains due and owing to the plaintiff from the defendant, the sum of \$570.08, no part thereof having been paid.

10

WHEREFORE, plaintiff demands of the defendant on the First Count the sum of \$570.08 with interest thereon from October 17th, 1928.

Judgment will be claimed by the plaintiff against the defendant on the First Count in the sum of \$570.08 with interest thereon from October 17th, 1928.

SECOND COUNT.

20

1. Plaintiff repeats all of the allegations of the First Count.

2. On or about April 12th, 1928, plaintiff did, at the defendant's request, advance for the defendant the sum of \$3,712.50 for the purchase of one hundred ten (110) shares of Public Fire Company stock amounting to the said sum of \$3,712.50.

30 3. On or about May 29, 1928, pursuant to the instructions of defendant, plaintiff sold for the account of defendant seventy-five (75) shares of the said Public Fire Company stock and credited to the defendant's account the proceeds thereof in the sum of \$2,249.92.

40 4. On or about October 17, 1928, pursuant to the defendant's instructions, plaintiff sold for the account of the defendant thirty-five (35) shares of the said Public Fire Company stock and credited the defendant's account with the proceeds thereof in the sum of \$892.50.

Amended Complaint

5. There remains due and owing to the plaintiff from the defendant, the sum of \$570.08, no part thereof having been paid.

WHEREFORE, plaintiff demands of the defendant on the Second Count the sum of \$570.08, with interest thereon from October 17th, 1928. 10

Judgment will be claimed by the plaintiff against the defendant on the Second Count in the sum of \$570.08 with interest thereon from October 17th, 1928.

THIRD COUNT.

1. Plaintiff repeats all of the allegations of the First and Second Counts.

2. On or about June 7th, 1928, plaintiff sold to the defendant three hundred twenty (320) shares of Essex Fidelity & Plate Glass stock amounting to \$3,920.00. 20

3. On or about June 15, 1928, pursuant to the defendant's instructions, plaintiff delivered fifty (50) shares of the said Essex Fidelity & Plate Glass stock, for the defendant, to one David Knowler, for which plaintiff received the sum of \$618.75, which sum was credited to the defendant's account. 30

4. On or about October 17, 1928, pursuant to the defendant's instructions, plaintiff sold for the account of defendant two hundred seventy (270) shares of the said Essex Fidelity & Plate Glass stock and credited the defendant's account with the proceeds thereof in the sum of \$2,362.50.

5. There remains due and owing to the plaintiff from the defendant, the sum of \$938.75, no part thereof having been paid. 40

Amended Complaint

WHEREFORE, plaintiff demands of the defendant on the Third Count the sum of \$938.75, with interest thereon from October 17th, 1928.

10 Judgment will be claimed by the plaintiff against the defendant on the Third Count in the sum of \$938.75, with interest thereon from October 17th, 1928.

FOURTH COUNT.

1. Plaintiff repeats all of the allegations of the First, Second and Third Counts.

20 2. On or about June 7th, 1928, plaintiff did, at the defendant's request, advance for the defendant the sum of \$3,920.00, for the purchase of three hundred twenty (320) shares of Essex Fidelity & Plate Glass stock amounting to the said sum of \$3,920.00.

30 3. On or about June 15, 1928, pursuant to the defendant's instructions, plaintiff delivered fifty (50) shares of the said Essex Fidelity & Plate Glass stock, for the defendant, to one David Knowler, for which plaintiff received the sum of \$618.75, which sum was credited to the defendant's account.

4. On or about October 17, 1928, pursuant to the defendant's instructions, plaintiff sold for the account of defendant two hundred seventy (270) shares of the said Essex Fidelity & Plate Glass stock and credited the defendant's account with the proceeds thereof in the sum of \$2,362.50.

40 5. There remains due and owing to the plaintiff from the defendant the sum of \$938.75, no part thereof having been paid.

Amended Complaint

WHEREFORE, plaintiff demands of the defendant on the Fourth Count the sum of \$938.75, with interest thereon from October 17th, 1928.

Judgment will be claimed by the plaintiff against the defendant on the Fourth Count in the sum of \$938.75 with interest thereon from October 17th, 1928. 10

FIFTH COUNT.

1. Plaintiff repeats all of the allegations of the First, Second, Third and Fourth Counts.

2. That on or about June 7th, 1928, defendant did agree to purchase from plaintiff three hundred twenty (320) shares of Essex Fidelity & Plate Glass stock for the sum of \$3,920.00. 20

3. That the defendant did agree to pay for said stock immediately and to accept delivery thereof.

4. On or about June 15, 1928, pursuant to the defendant's instructions, plaintiff delivered fifty (50) shares of the said Essex Fidelity & Plate Glass stock, for the defendant, to one David Knowler, for which plaintiff received the sum of \$618.75, which sum was credited to the defendant's account. 30

5. On or about October 17, 1928, pursuant to the defendant's instructions, plaintiff sold for the account of defendant, two hundred seventy (270) shares of the said Essex Fidelity & Plate Glass stock and credited to the defendant's account the proceeds thereof in the sum of \$2,362.50.

6. That there remains due and owing to the plaintiff from defendant the sum of \$938.75, no part thereof having been paid. 40

Amended Complaint

WHEREFORE, plaintiff demands of the defendant on the Fifth Count the sum of \$938.75, with interest thereon from October 17th, 1928.

10 Judgment will be claimed by the plaintiff against the defendant on the Fifth Count in the sum of \$938.75 with interest thereon from October 17, 1928.

SIXTH COUNT.

1. Plaintiff repeats all of the allegations of the First, Second, Third, Fourth and Fifth Counts.

20 2. On or about June 12th, 1928, plaintiff sold to the defendant one hundred (100) shares of U. S. Securities stock amounting to \$1,200.00.

3. On or about September 12, 1928, pursuant to the defendant's instructions, plaintiff sold for the account of defendant one hundred (100) shares of U. S. Securities stock and credited the defendant's account with the proceeds thereof in the sum of \$924.90.

30 4. There remains due and owing to the plaintiff from the defendant the sum of \$275.10, with interest thereon from September 12th, 1928.

WHEREFORE, plaintiff demands of the defendant on the Sixth Count the sum of \$275.10, with interest thereon from September 12th, 1928.

40 Judgment will be claimed by the plaintiff against the defendant on the Sixth Count in the sum of \$275.10 with interest thereon from September 12th, 1928.

*Amended Complaint***SEVENTH COUNT.**

1. Plaintiff repeats all of the allegations of the First, Second, Third Fourth, Fifth and Sixth Counts.

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2. On or about June 12th, 1928, plaintiff did, at the defendant's request, advance for the defendant the sum of \$1,200.00 for the purchase of one hundred (100) shares of U. S. Securities stock, amounting to the said sum of \$1,200.00.

3. On or about September 12, 1928, pursuant to the defendant's instructions plaintiff sold for the account of defendant, one hundred (100) shares of U. S. Securities stock and credited the defendant's account with the proceeds thereof in the sum of \$924.90.

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4. There remains due and owing to the plaintiff from the defendant, the sum of \$275.10, no part thereof having been paid.

WHEREFORE, plaintiff demands of the defendant on the Seventh Count the sum of \$275.10, with interest thereon from September 12th, 1928.

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Judgment will be claimed by the plaintiff against the defendant on the Seventh Count in the sum of \$275.10, with interest thereon from September 12th, 1928.

EIGHTH COUNT.

1. Plaintiff repeats all of the allegations of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Counts.

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Amended Complaint

10 2. That between December 1st, 1926 and October 17th, 1928, plaintiff did, at the defendant's request and for the defendant's benefit, advance certain moneys in the defendant's behalf, and interest has accrued on the said sums so advanced as aforesaid for the defendant's benefit in the sum of \$146.94.

 3. There is due and owing from the defendant to the plaintiff the sum of \$146.94, no part thereof having been paid.

 WHEREFORE, plaintiff demands of the defendant on the Eighth Count the sum of \$146.94, with interest thereon from October 17th, 1928.

20 Judgment will be claimed by the plaintiff against the defendant on the Eighth Count in the sum of \$146.94, with interest thereon from October 17th, 1928.

 Judgment will be claimed by the plaintiff against the defendant on the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Counts in the sum of \$1,930.87, with interest thereon.

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BILDER & BILDER,
Attorneys of Plaintiff.

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ESSEX COUNTY CIRCUIT COURT

<p>FENNING, DORNBUSCH & CO., a corporation, Plaintiff, vs. MORRIS H. GREENFIELD Defendant.</p>	}	<p><i>Action at Law.</i> <i>On Verdict</i> <i>by a Jury.</i> <i>Judgment</i> <i>Entered</i> <i>March 25, 1930</i></p>	<p>10</p>
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BILDER & BILDER,
Attorneys of Plaintiff.

This action was tried before Judge Nelson Y. Dungan with a jury at the Essex Circuit Court on March 25, 1930. 20

The cause having been heard and submitted to the jury they return their verdict as follows:

They find in favor of the plaintiff Fenning, Dornbusch & Company and against the defendant Morris H. Greenfield for the sum of One Thousand Nine Hundred Forty-two Dollars and Eighty Cents (\$1,942.80) damage.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of One Thousand Nine Hundred Forty-two dollars and eighty cents (\$1,942.80) damage and Nintey-four dollars and forty-seven cents costs making in the whole the sum of Two Thousand Thirty-seven dollars and Twenty-seven Cents. 30

Judgment entered and signed March 25, 1930.

WILLIAM S. GUMMERE,
C. J.

Book 110 Page 138 C C Judgments. 40

ESSEX COUNTY CIRCUIT COURT.

Tuesday, March 25, 1930.

10	FENNING, DORNBUSCH & CO., a corporation, <i>Plaintiff,</i> <i>vs.</i> MORRIS H. GREENFIELD <i>Defendant.</i>	}	Action at Law.
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Before Hon. Nelson Y. Dungan, J., and a jury.
 For plaintiff appear Bilder & Bilder (By Walter J. Bilder.)

20 For defendant appears Philip J. Schotland.
 (A jury is called and sworn.)
 Mr. Bilder opens for plaintiff.
 Mr. Schotland opens for defendant.

SIGMUND DORNBUSCH sworn in behalf of plaintiff.

DIRECT EXAMINATION by Mr. Bilder.

Q. Mr. Dornbusch, you are an officer of the plaintiff corporation, Fenning, Dornbusch & Company? A. Yes, sir.

30 Q. That corporation has its place of business where? A. In Newark and New York.

Q. Where do you reside. A. In Newark.

Q. How long have you lived here; A. Thirty-three years.

By the Court:

Q. Is that your age? A. Yes.

Q. You were born here, were you? A. Yes.

By Mr. Bilder:

40 Q. How long has Fenning, Dornbusch & Com-

Sigmund Dornbusch, direct.

pany been in business in Newark? A. Pretty near four years.

Q. Mr. Dornbusch, do you know Mr. Greenfield?
A. Yes, sir.

Q. How long have you known him? A. Oh, about fourteen or fifteen years.

10

Q. Have you been on friendly relations with him during a long period of time? A. Yes, sir.

Q. When did Mr. Greenfield first start to deal with Fenning, Dornbusch & Company? A. I believe it was in 1926.

Q. And to your own knowledge, were his dealings numerous? A. Yes.

Q. During the period from 1926 down to about what date? A. Up until the time that he instructed us to sell his stock; I don't remember the exact date.

20

Q. In the latter part of 1928? A. Yes.

Q. And what did you personally do with Mr. Greenfield's various transactions over that period of time with the plaintiff, Fenning, Dornbusch & Company? A. Personally, I handled practically all of the transactions.

Q. Do you recall any transaction which you personally had on behalf of Fenning, Dornbusch & Company with this defendant on April 12, 1928, or would you be able to recall that? Is there any existing memorandum made by you which would record that transaction? A. Yes. Each sale or purchase, a memorandum was made of it at the time of the sale or purchase.

30

Q. Whose handwriting is on this paper which I show you (handing witness document)? A. That is my signature.

Q. Will this paper enable you to state what transaction, if any, took place on April 12, 1928, between plaintiff and defendant?

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Sigmund Dornbusch, direct.

10 Mr. Schotland. I object, and I object to the use of the paper. The transaction referred to, alleged in the complaint, is a transaction involving an alleged sale of stock amounting to \$3,712.50. The only memorandum that can be used and the only proof that can be given of the transaction under the law is a memorandum in writing, signed by the party to be charged. The statute is especially pleaded.

20 Mr. Bilder. If your Honor please, we rely upon the rule to the effect that, although a contract of sale is within the Statute of Frauds and there is no signed memorandum, there can be a delivery to satisfy the requirements of the statute where the merchandise remains in the hands of the seller as the bailee of the buyer and the buyer thereafter exercises dominion or control over the merchandise, and I have authority to that effect, and we propose to show that situation.

The Court. I will be glad to have the authority.

30 Mr. Schotland. I think the Supreme Court decision, rendered in January of this year, holds the other way.

Mr. Bilder. I do not think that there is anything in that decision which mentions the rule that I have in mind.

The Court. I will hear your authority.

40 Mr. Bilder. Williston on Sales, Section 91, page 100. I find no New Jersey case directly in point on this rule. In other words, if the seller holds the stock as bailee, there need not be any physical turning over of the stock

Sigmund Dornbusch, direct.

by the seller to the buyer if the stock remains in the seller's hands subject to the buyer's order and control; and we intend to show by his testimony that there was that state of facts in this case.

Brown on Statutes of Fraud, Section 318B; and Elliott, page 111. 10

Mr. Schotland. Section 4 of the Sales Act covers this. It replaces the Statute of Frauds on this, the uniform act the same as in New York, and it is the New York construction that is being followed here. It is referred to in that decision I handed your Honor, page 1.

Mr. Bilder. Of course, if it appear in this case that we held on to this stock as security for the purchase price, we would not come within the rule. We contend that we held onto the stock merely as bailee and for accommodation, that we did this for a period of years as a matter of the course of dealing. 20

The case of *Berman vs. Baas*, a Massachusetts case, cited in 27 *Corpus Juris*, 253—this is not very clear to me. I have other cases here, but I would respectfully submit that the citation of authority that I have submitted to your Honor makes it clear that there is this rule well established and unquestioned, that where the goods are left with the seller as bailee of the buyer the statute is satisfied that there is a constructive delivery. 30

The Court. Do you desire to answer that at all, Mr. Schotland?

Mr. Schotland. If your Honor please, the rule contended for by Mr. Bilder is not an exception to the Statute of Frauds at all. It is 40

Sigmund Dornbusch, direct.

10 not an exception to the rule that I am contend-
ing for, because there is simply the difference—
an entirely different situation—a delivery and
acceptance of the thing purchased, and control
exercised over that. Your Honor will notice
that Mr. Bilder has not cited a single case deal-
ing with negotiable instruments like stocks
where the amount involved is within the Stat-
ute of Frauds, and where the broker retaining
possssion on a claim that the buyer who had
paid nothing told him to hold them for him has
recovered, and that the Court held that that
is an exception; and there is no such case hold-
ing that; and it is very evident, because, if we
would imagine a situation of that kind, then
the entire purpose of the Statute is absolutely
20 defeated, because, where the purpose of the
Statute is to prevent charging somebody with
a purchase that they did not make, that is the
mischief that the Statute is enacted to prevent.

Now, if the courts should hold that where
the man is charging someone else with some-
thing which, under the provisions of the Stat-
ute, he cannot charge him with unless he has
got a memorandum in writing from the party
that he is seeking to charge, if all he has got to
do is say, "I have not any memorandum in writ-
ing, but, in addition to the verbal order he gave
30 me a verbal order to sell some of that stock"—
if all a broker would have to do is simply say
that, and that takes it out of the Statute, then
the whole purpose of the Statute is absolutely
defeated and the Statute is of no effect.

There is not any attempt to show here a
written order, "Sell some of that stock," which
would be evidence of exercise of ownership of
it.

40 The Court. You see, we have not gotten that

Sigmund Dornbusch, direct.

far yet. We have only gotten so far as the purchase is concerned a sale to the defendant and a purchase by him. You can see further in the case than I can, because I do not know anything about it. The only question I am now considering is whether or not there is to be shown in this case, in connection with this sale, a distinct situation where bailment on the part of plaintiff is shown. 10

Mr. Schotland. If Mr. Bilder will assure your Honor that he will show a written order upon the plaintiff by the defendant to sell any of this stock that is being sued for, I will withdraw my objection and admit that that changes the situation. 20

The Court. I am just wondering if he would be obliged to do that if he can show a distinct affirmative order of bailment.

Mr. Schotland. I do not think Mr. Bilder can find, your Honor—I know I have not been able to find any case where stock is involved where the Court has held an allegation of bailment, with absolutely no payment on account to take it out of the statute has been sufficient to take it out of the statute. 30

The Court. Since it is admitted that the stock comes under the Sales Act, would there be any difference between stock and other chattels which is sold?

Mr. Schotland: Would there be any difference—insofar as statute applying—certainly not.

The Court. I noticed awhile ago you mentioned stock as a negotiable instrument. I 40

Sigmund Dornbusch, direct.

have never understood that stock came under our Negotiable Instruments Act.

10 Mr. Schotland: I meant to say stock and negotiable instruments, Stock, of course, has to be—

The Court. Controlled by the Sales Act.

Mr. Schotland. Exactly.

The Court. I think I will hear this testimony for the present, subject to your objection, and perhaps make some ruling on it later. Read the question.

20 Q. (Read as follows): "Will this paper enable you to state what transaction, if any, took place on April 12, 1928, between plaintiff and defendant?"

A. What is that?

Q. Will that paper enable you to state what transaction took place? A. Yes.

Q. Will you state what transaction took place?
A. Mr. Greenfield purchased and our firm—me, as agent or salesman, sold to him 110 shares of Public Fire Insurance Company at $33\frac{3}{4}$, \$33.75 a share.

30 Mr. Schotland: May I object to the witness just reading off a memorandum made by him?

The Court. I do not know that he is reading the memorandum. I understood that the memorandum which was made by him at the time was shown him for the purpose of refreshing his recollection. Now, I do not know that he is reading it. Even though he were reading, if that be the fact, would it be objectionable, if that is the way his recollection is refreshed?

40 Mr. Schotland. Well, it would be turning

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around the use that the law allows a man to make of a memorandum made at the time or near the time of a transaction, from simply looking at it to refresh his recollection and then testifying from his memory. It would be turning that rule around and then making the memorandum his evidence.

10

The Court. I will say to Mr. Dornbusch that (addressing the witness) if you are reading from the memorandum, that is improper to do. You are handed the memorandum for the purpose of refreshing your recollection; then, having your recollection refreshed by the memorandum, you should testify from your refreshed recollection. Do you get the point of that?

The Witness. I do, yes, your Honor.

20

The Court. Now, then, suppose we strike that out and you begin over again. What occurred on April 12, 1928?

By Mr. Bilder:

Q. Mr. Dornbusch, will that memorandum refresh in your mind a recollection, or bring to your mind a recollection of any transaction which occurred between the plaintiff and defendant on April 12, 1928, so that hereafter you may, independently of the memorandum, testify from your refreshed recollection? A. Yes.

30

Q. Now can you testify from such a refreshed recollection? A. Yes.

Q. What transaction took place? A. On that date—

The Court. What is the date?

The Witness. April. There is one thing I want to bring out. I believe that the sales

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were made and entered in our books on the next day, because the confirmations are not handed in until the evening to the bookkeeper, or the confirmation clerk, until the evening of the transaction—I believe that is so—and confirmations are sent out the next day.

10

Q. Well, Mr. Dornbusch, if you cannot remember every detail as to day and month when you are testifying from a refreshed recollection, I am going to ask you to say so, because then I have got to take another tack. A. We sold to Mr. Greenfield—he purchased—

20

Mr. Schotland. The real distinction that I want to point out to your Honor between the ability to exercise the right of the bailee in a stock sale is the physical distinction of the stock situation itself. There cannot be a delivery of the stock to the buyer unless the stock is transferred to his name. There cannot be a selling for him unless he then assigns it. That is the distinction between stock and merchandise—a physical distinction which makes it impossible to take it out of the statute by alleging a verbal arrangement.

30

The Court. Certificates of stock are held for a long time before they are ever transferred in the name of the assignee.

40

Mr. Schotland. Yes, if your Honor please. Suppose I should buy stock from Mr. Dornbusch. In order to have that stock delivered to me it would have to be at least endorsed by the person in whose name it stands at present. Under my instructions he can have it endorsed in blank, of course.

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The Court. Or by a separate instrument. It can be assigned by a separate instrument; it does not have to be endorsed on the back of the certificate.

Mr. Schotland: Well, then, your Honor thinks you can get around it by a separate instrument, and then that separate instrument simply destroyed? 10

The Court. It may be assigned by a separate instrument, but whether that instrument may be destroyed or not I am not holding. I suppose that the endorsement or assignment of a certificate of stock is simply for the purpose of convenience. I do not think it has ever been questioned that securities might be assigned by a separate instrument and not by an endorsement on the back of the certificate. 20

Mr. Schotland. I do not question that. I have done it that way on behalf of clients, as well as had it done. But it cannot be retransferred without the party signing an assignment, either in a separate instrument or—

The Court. You may be right about that. I think you are arguing ahead of me in this case. You know so much more about it than I. 30

Mr. Schotland. I will wait.

By Mr. Bilder:

Q. You were beginning to state the transaction which you say occurred on April 12, 1928. A. Yes. We sold to Mr. Morris Greenfield 110 shares of Public Fire Insurance Company stock at \$33.75 per share. 40

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Q. Who made that sale? A. I made the sale.

Q. Where? A. At my office.

Q. The office of the plaintiff. A. Yes, at the office of Fenning, Dornbusch & Company.

10 The Court. By "we" do you mean Fenning, Dornbusch & Company?

The Witness. Yes.

Q. Where was the defendant at the time of this transaction? Where was he present, to your knowledge? A. In my room.

Q. What instruction, if any, did he give you at the time of the making of that purchase with reference to the stock? A. Why, he was buying the stock—

20 The Court. No, what instructions did he give you?

The Witness. Instructions as to the delivery or—

Q. Yes. A. We had no delivery instructions, except that he asked us to keep the stock for him.

Q. What next happened, to your knowledge, in connection with that purchase of stock by him? A. I believe there were other purchases made.

30 Q. No, with reference to that particular stock. Is there any memorandum made by you personally which will enable you to tell what, if anything, next happened in connection with that purchase of stock? A. Yes.

Q. Is this paper in your handwriting (handing document)? A. Yes.

Q. When was the writing put upon that paper which I have handed you, Mr. Dornbusch? A. Which one?

Q. The last paper which I have handed you, the blue sheet. A. On May 29, 1928, I believe.

40 Q. And can you, by reading what is on that pa-

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per written thereon by you, refresh your recollection so that you may then lay the paper aside and testify from a refreshed recollection as to what happened on that day in connection with this stock, if anything; A. Yes.

Q. Will you read the paper and then lay it aside?

A. I do not have to read it.

Q. What happened, and on what date? A. On May 29th—

Q. Of what year? A. 1928, I called Mr. Greenfield and told him that one of my salesmen had a purchaser for 75 shares of his Public Fire Insurance Company stock which we could get 30½ a share for, \$30.50. I told him on account of there being a salesman involved that I would pay him \$30 a share for the stock, which he said was satisfactory. Therefore, we made the purchase from him at \$30 a share, 75 shares of stock.

Mr. Schotland. If your Honor please, I do not know whether the previous reservation and objection cover this part of the testimony. If they do, I do not want to take up any time arguing it now.

All we have here is an oral order, an oral telling him to keep the stock, an oral consent to a sale which was done by this witness himself. Now, my objection is on the ground that the transaction comes within the statute and cannot be proven orally until the argument before is held in abeyance temporarily and your Honor hears the testimony with regard to the sale, regarding the holding.

The Court. Do I understand there is an objection to this testimony?

Mr. Schotland. Yes, your Honor.

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The Court. I have heard no objection to the question. I suppose what you are saying now must be in the way of a motion to strike out?

10

Mr. Schotland. Well, it would have to be, except for the fact that I thought that I had indicated my objection to this line of testimony and we were waiting to go a little further in the case.

The Court. I rather think you did, and I do not want to be technical about what I say.

20

Mr. Schotland. Well, I would rather be treated as having reserved the right to object, that is, as objecting to the testimony now regarding the character of the way the stock was disposed of.

The Court. I am afraid I do not quite understand you, Mr. Schotland.

30

Mr. Schotland. Well, even if your Honor would hold that the stock comes within the rule that Mr. Bilder contended for, that where a buyer exercises dominion over the thing bought and constitutes the seller the bailee, there would have to be far greater support to make the oral testimony competent to take this charge on this stock out of the Statute of Frauds, than the simple oral testimony that the defendant bought, no instructions ever delivered, "told me to hold it for him. I told him I could sell it"—and, of course, the testimony shows a loss—"and he said 'All right' and I sold it." There would have to be proof to show an assignment in some legal form of the stock he claims to have sold to the defendant. That is lacking to support this oral testimony, I sub-

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mit, even if this were not to come within the exception.

The Court. I do not quite understand what your motion is, Mr. Schotland. Is this an objection to the question or a motion to strike out? 10

Mr. Schotland. A motion to strike out this testimony on the ground that it is incompetent and violates the Statute of Frauds.

The Court. The motion will be denied, and an exception to that ruling may be noted.

Mr. Bilder. What is the question?

Q. (Question read.) What happened and on what date? A. I don't quite recall which—I don't remember whether or not Mr. Greenfield was in the office at the time or I called him on the telephone. I don't know which it was. 20

Q. But you spoke to him one way or the other; A. I spoke to him one way or the other, and recognized his voice if it was on the telephone or he was in the office.

Q. And when was this memorandum that you have referred to made with reference to that transaction? A. When was it made? 30

Q. The memorandum which you made in your handwriting. A. On May 29th.

Q. Will this paper that I show you refresh your recollection with reference to anything further which happened, if anything did happen, in connection with that stock (handing witness document)? A. Yes.

Q. And in whose handwriting is that paper? A. In my handwriting.

Q. And when was the handwriting put on that paper? A. On October 17th. 40

Sigmund Dornbusch, direct.

Q. Of what year? A. 1928.

Q. Now, will you look at that and then lay it aside and testify as to what, if anything, happened further in connection with that stock? A. On October 17th a conversation took place with Mr. Greenfield—

10 Q. And whom? A. And myself, in which I told him, I told him that I could dispose of 35 shares of his Public Fire Insurance Company stock at 25, the price which we paid him for the stock.

Q. And what did he say? A. He told me to sell it for him.

Q. And did you follow his instructions. A. I did.

Q. What amount was realized? A. I don't remember the amount that was realized.

20 Q. Will that memorandum refresh your recollection as to what was realized (handing witness document)? A. Well, \$25.50 a share is the amount that we paid Mr. Greenfield.

Q. That is, for 35 shares, \$25.50 for each of the 35 shares? A. That is right.

Q. That disposed did it not, of the entire lot of shares, the 75 and 35, making up the 110? A. Right.

30 Q. Will this paper refresh your recollection as to any transaction which the plaintiff may have had with the defendant or did have with the defendant (handing witness document)? A. Yes.

Q. In whose handwriting is that paper? A. In my handwriting.

Q. When was it made? A. On June 7, 1928.

Q. What transaction occurred, if any, between plaintiff and defendant on that date? A. Mr. Greenfield was in my office and purchased from me on that day—

40 Mr. Schotland. May I enter an objection and have my objection noted?

Sigmund Dornbusch, direct.

The Court. It will be noted.

Mr. Schotland. This is evidently attempting, by parole proof, to prove another transaction.

The Court. The same objection and same ruling as went to the other. 10

The Witness: By "me" I mean the firm.

Q. You mean the plaintiff company, do you not?
A. Yes, sir.

By the Court.

Q. Purchased from your firm? A. Right; I was the salesman in the transaction.

Q. Your corporation? A. Yes.

By Mr. Bilder.

Q. When you use the word "firm" do you mean the corporation, Fenning, Dornbusch & Company, the plaintiff? A. Yes, 320 shares of Essex Plate Glass at \$12.25 a share, which he asked me to hold for him. 20

Q. Now, can you recall anything which subsequently occurred between plaintiff and defendant with reference to that Essex Plate Glass stock? A. I do remember that Mr. Greenfield came in shortly after, and spoke to me about making a part delivery of the stock for him, to another broker. 30

Q. What can you recall in that connection? A. And I told him to give the instructions to the bookkeeper. He did tell me that he had sold some of the stock to another broker by the name of David Knoller, and he asked me if I would not deliver the stock to the other broker, a part delivery, I think of 50 shares and collect the amount that he had sold it for and credit the proceeds to his account.

Q. And who was the bookkeeper to whom you directed the defendant at that time? A. Mr. Collocia. 40

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Q. Is he in the court room? A. He is.

Q. Do you recall, or is there any memorandum made by you which would enable you to recall anything which subsequently happened in connection with the balance of that stock? A. Yes.

10 Q. Will this paper refresh your recollection (handling witness document)? A. Yes.

Q. In whose handwriting is that? A. My handwriting.

Q. Made when? A. October 17, 1928.

Q. Now, will you read that and then, if you can, testify by laying it aside, as to what happened? A. On October 17, 1928, we purchased—in a conversation with Mr. Greenfield and myself—

20 Q. You better tell me just how it happened—with whom you spoke. A. I spoke to Mr. Greenfield and I told him that I could dispose of the balance of his Essex Plate Glass stock at $\$8\frac{3}{4}$, \$8.75 per share, and he instructed me to sell it for him and credit the proceeds to his account.

Q. And did you? A. 270 shares were sold, we purchased from his, at \$8.75 per share.

Q. Was there a part delivery made pursuant to the defendant's instructions as you have referred to? A. There was.

30 Q. And how much? A. We delivered 50 shares of the stock of the Essex Fidelity Plate Glass stock, to David Knoller & Company, another broker, I believe at one-eighth of a point higher than the price that Mr. Greenfield had paid us for the stock.

Q. Will your records show the precise amount received? A. Yes.

By the Court.

40 Q. Is that 50 in addition to what you delivered to Coloccia? A. No—Coloccia is our bookkeeper. I told Mr. Greenfield the instructions that he had given me to give to the bookkeeper, because I am in a different department.

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Q. I thought you gave us the name of the other broker. A. The other broker is David Knoller. Mr. Greenfield gave me the instructions and I told him to repeat the instructions to the bookkeeper.

By Mr. Bilder.

Q. Was the bookkeeper then and there present in your office? A. Yes—that is— 10

Q. I mean on the premises. A. Yes, on the premises. We delivered the stock to David Knoller & Company at one-eighth of a point higher than the purchase price that Mr. Greenfield paid us for the stock, 50 shares.

Q. And was that amount credited to the defendant? A. It was.

The Court. You mean that \$12.37½?

The Witness. That is right, \$12 and three-eighths. 20

Q. Will this paper refresh your recollection as to any other transaction had by the plaintiff with the defendant (handing witness document)? A. Yes.

Q. Whose handwriting is that paper in? A. That is my handwriting.

Q. All of it? A. Yes.

Q. And on what date was it made? A. On June 11th.

Q. Of what year? A. 1928. 30

Q. And what transaction occurred on that date? A. We sold and Mr. Greenfield purchased 100 shares of United States Securities Company stock at \$12 per share.

Q. What instructions, if any, were given to you by the defendant with reference to the delivery of that stock? A. Mr. Greenfield asked us to hold the stock for him.

Q. Did you subsequently have any conversation with Mr. Greenfield on that subject in connection with that stock, or will this paper refresh your re- 40

Sigmund Dornbusch, direct.

collection in that connection (handling witness document)? A. Yes.

Q. In whose handwriting is that paper? A. My handwriting.

10 Q. And on what date was it made? A. On September 12, 1928.

Q. What took place on that date? A. I had a conversation with Mr. Greenfield and told him that we could sell his 100 shares of United States Securities Company stock at \$9.25 a share. He instructed me to sell it and credit the proceeds to his account.

Q. Did you follow his instructions? A. I did.

20 Q. Did you personally ever demand from the defendant payment of the balance or the loss sustained on this stock? A. Yes.

Q. And what did he say? A. He told me that "You cannot take blood out of a stone," and he did not have the money at that time, but if I waited awhile he would pay.

Q. Do you know what business Mr. Greenfield is in? A. Yes.

Q. What business? A. He is in the chemical line; I think he has a wholesale drug line.

30 Q. Has he a place of business, a store? A. He has.

Q. Is he now in business? A. He is—the last I heard he was.

40 Q. Have you any idea, independently of records, as to the volume of transactions that you had with Mr. Greenfield over the period of years between 1926 and 1928. A. The volume of business I don't know. I believe it was quite an amount, though, because Mr. Greenfield did quite a bit of trading during the bull period. When stocks were rising Mr. Greenfield purchased quite a bit of stock.

Sigmund Dornbusch, cross.

CROSS EXAMINED by Mr. Schotland.

Q. Mr. Dornbusch, in your dealings with Mr. Greenfield wasn't it your practice, when Mr. Greenfield purchased stock, for you to deliver it to his bank and be paid for it? A. No.

Q. It was not? You say that when he purchased this stock— A. That is, it was not the general practice. 10

Q. You say when you purchased this stock, that is, when you sold this stock to Mr. Greenfield, he told you to hold it? A. That is right.

Q. How long? A. Well, his reason—

Q. Answer my question. A. How long?

Q. Yes. A. For an indefinite period.

Q. Indefinite? A. It generally was about ten days.

Q. Just answer my question and stop, please. When you say you sold him that stock, outside of making a memorandum for your books in your own handwriting, what did you do with the stock? A. We kept the stock in our safe deposit box. 20

Q. What stock? A. The stock that we had sold to Mr. Greenfield.

Q. Well, now, did you have a certificate for 110 shares made out? A. No, we had—

Q. No, just answer my question. A. Did we have one made out?

Q. Yes. A. Not necessarily. 30

Q. Well, did you, as a matter of fact, did you get a certificate of stock for 110 shares made out to the order of Mr. Greenfield as stockholder? A. First of all, it was not necessarily one certificate for 110 shares.

Q. Well, or any number of certificates aggregating 110 shares—did you do that? A. We did not transfer any stock to Mr. Greenfield's name.

Q. Did you assign any shares of stock that your firm or your corporation owned, on the back of certificates amounting to 110 shares, to Mr. Green- 40

Sigmund Dornbusch, cross.

field? A. No. We always keep them in "street" names.

Q. Did you draw up any separate assignment to Mr. Greenfield of 110 shares owned by your corporation and have such an assignment executed by your officers? A. No.

10 Q. Then all you did, so far as this supposed sale of the 110 shares of stock is concerned, is this: Your corporation owned and controlled more than 110 shares of stock of the Public Fire, didn't you? A. Not necessarily.

Q. Well, did you? A. I don't believe so.

The Court. 110 or more?

The Witness: 110 or more.

20 Q. You did have 110 or more? A. Right.

Q. You did nothing to that stock? A. No.

Q. You left it in the same condition and position and place where it was? A. No, we did not.

The Court. Let me ask you this: Was that stock, at the time of the sale to Mr. Greenfield, actually owned and in the name of your corporation?

30 The Witness: No. It was in a "street" form, if you understand what "street" form is. It may have been in your name—stock properly endorsed and good for delivery as many times as you want to make of the stock.

Q. So all you did to the stock or, so far as this sale was concerned was that you put through your books a charge against Morris H. Greenfield for 110 shares of Public Fire Stock at \$33 a share? A. That is right—\$33 and whatever the amount was.

Q. The price you charged him? A. Right.

40 Q. That is all you did, and you say that you sold him that stock on behalf of your company, to hold indefinitely, that is right? A. Not for an indefin-

Sigmund Dornbusch, cross.

ite period. Of course, we could not hold it for an indefinite period or forever.

Q. But you did not make it any time, you say?

A. What I mean is that Mr. Greenfield would say, "I want you to hold the stock for three days or five days or ten days."

Q. I am not asking you that. A. (Continuing.) 10
No specified time was given.

Q. All I want is not what he would ordinarily say or what he did say in other transactions. I want what he actually said and what you actually said on this particular transaction. Now, what was said as to how long you were to hold this Public Fire stock? A. Mr. Greenfield told me to hold the stock for him for a few days.

Q. For a few days. A. A few days is an indefinite period, as far as I understand it. 20

Q. I see. And you remember that you said before you were to hold it indefinitely, to which you now add your explanation that a few days is an indefinite period? A. Well, a few days may mean three, and it may mean five and it may mean ten.

Q. That is why you say it is an indefinite period? Now, how many days did it mean to you when he said "a few days" at that time?

Objected to. 30

Objection sustained.

Mr. Schotland. I think the question is competent for the purpose of showing that if it meant as he defines it, why did he wait from April 12th to May 29th for any active sale in connection with that stock? This is cross examination.

The Court. An exception may be noted. 40

Sigmund Dornbusch, cross.

Mr. Schotland. All right, Note my exception.

Q. Well, Mr. Dornbusch, if Mr. Greenfield told you to hold the stock for a few days, and you have given us your definition that that means up to ten days— A. I did not say that it means up to ten days.

10 Q. No.? What do you say? A. If you will let me go on, I may have said 100 days. I don't know how many days.

Q. Well, what do you say? A. Each time that Mr. Greenfield spoke to me he said—

Q. No, no; this particular transaction. A. A few days.

Q. He said "a few days"? A. A few days.

20 Q. Then why did you wait until May 29th, which is more than a month and a half, before you did anything on this stock? A. Because when I spoke to Mr. Greenfield again, or whenever he came into the office, he always asked me to hold it another few days.

Q. I see. Now, how many times did he ask you to hold that stock? A. I don't recollect.

Q. Do you recollect at about the time that you claim he bought this stock he was in your office with a Mr. Joffe? A. He was in my office that day with Mr.— I don't remember the name.

30 Q. And do you recollect he told you that he was introducing Mr. Joffe as a future customer to you? A. No, I don't remember that.

Q. And didn't he tell you Mr. Joffe may be interested in buying some Public Fire stock, and what is the price? A. I don't remember.

Q. And didn't you quote a price for Public Fire stock? A. I may have. I quote prices all day long.

40 Q. And didn't Mr. Greenfield and Mr. Joffe tell you Mr. Joffe was going to inquire from another

Sigmund Dornbusch, cross.

broker if he could get it for less, and he would let you know the next morning if he wanted to buy the stock or not? A. I recollect some conversation of that kind.

Q. Yes. And didn't he let you know the next morning that he bought the stock for a lesser price from another broker? A. No. 10

Q. And didn't you just put the charge through just the same? A. No.

Q. And charge it to Greenfield? A. No.

Q. As if he had purchased? A. No, sir.

Q. Now, what is the next stock which you claim to have sold to Mr. Greenfield? A. Which was the first one—Public Fire?

Q. Yes. A. I believe, I don't recollect exactly, it may be the Essex Plate Glass.

Q. And how did you come to sell him Essex Plate Glass? A. Mr. Greenfield wanted to buy it. I rung him up and told him I thought it was a good stock. 20

Q. Didn't Mr. Greenfield tell you that he had loads of it and that he was selling it? A. Yes, I do remember something of that sort.

Q. And didn't he tell you, "Oh, by the way, have you got any fifty-share certificate?" when you talked to him about it? A. No. Mr. Greenfield told me that he was selling some stock and he wanted to fill his order by buying it from me at a lower price. 30

Q. Didn't he tell you that the stock he had was in 100-share certificates, and that he did not want to lose the sale, wanted to make an immediate delivery, and asked you if you had a fifty-share certificate? A. We would have been glad to exchange certificates for him, as many as he wanted.

Q. Didn't he ask you that? A. No, sir.

Q. And didn't he tell you to deliver fifty shares to a certain broker and get your money for them?

A. We did deliver fifty shares to them. 40

Sigmund Dornbusch, cross.

Q. And got paid for them? A. We did get paid for them.

Q. And isn't that all Mr. Greenfield said about buying or selling any Essex Plate Glass? A. No, sir.

10 Q. Now, what other stock do you say that he bought from you? A. He bought a number of stocks. I would have to be refreshed on that—U. S. Security, United States Securities Company stock.

Q. And when do you say he bought that from you? A. On June 11th.

Q. Now, let us see the status of affairs: In April he bought this Public Fire, didn't he? A. If you don't mind me looking at these (indicating documents)?

Q. No. A. Yes, that is right.

20 Q. And he did not pay for it? A. No, sir.
The Court. He did not pay anything?

The Witness. No he did not pay anything.

Q. He never paid a cent? A. No; Mr. Greenfield's credit was good.

Q. He did not pay a cent on that stock? Now, when did he buy the next stock? A. June 7th.

Q. At that time you had already sold 75 shares of the Public Fire stock at a loss, hadn't you? A. That is right.

30 Q. And Mr. Greenfield had not made good the difference on the Public Fire? A. That is right.

Q. So what do you say you sold him on June 7th? A. 320 shares of Essex Plate Glass.

Q. For how much money? A. For—I believe it is figured out correctly here (indicating document)—\$3,290.

Q. He had not made good the deficiency on the Public Fire? A. A very small loss.

40 Q. He had not paid a cent and you gave him credit again by selling him this stock, you say, and he did not put up a cent? A. No.

Sigmund Dornbusch, cross.

Q. Not a thing? Now, when you sold him this stock did you have any certificate or certificates of stock for these 320 shares assigned to Mr. Greenfield? A. No.

Q. In any form? A. No. I don't quite understand that last question. What do you mean by "any form"? 10

Q. I mean either by delivering the certificates to him, endorsed in blank, or endorsed to his name, or by delivering the certificates, or having them issued to him, together with a properly executed, separate assignment of those shares? A. The assignment was not necessary.

Q. You had no assignment? A. No.

Q. I am going to have the Court rule whether the assignment is necessary or not, and not you. A. Well, I meant as far as we were concerned. 20

Q. You did nothing at all as far as the shares were concerned? A. That is right.

Q. But you simply charged him on the books? A. That is right.

Q. Now, when was it that you sold him the next stock, you say? A. On June 11th.

Q. Four days later? A. Yes.

Q. And at that time how much stock did you sell him? A. \$1,200. worth.

Q. \$1,200. worth? A. Right.

Q. Now, he had not paid the balance on the Public Fire and he had not paid a cent on this \$3,900. of Essex Plate Glass? A. No, sir. 30

Q. And he did not pay a cent for this other stock? A. No, sir.

Q. And you sold it to him? A. Right.

Q. And you say you resold this stock gradually at lower prices as the result of a conversation with Mr. Greenfield in each instance? A. That is right, except in one case where he asked me to make a part delivery of the 320 shares of Essex Fidelity 40

Sigmund Dornbusch, cross.

Plate Glass which he sold at a higher price.

Q. He told you to deliver fifty shares and collect for them from the broker? A. That is right.

Q. And that is what you did? A. Yes.

10 The Court. That is the Knoller transaction?

The Witness. That is right.

Q. That is the only instance, isn't it, of those you are suing for? A. Where actual—

Q. Yes, where any money was paid. A. Where any money was paid, that is right.

Q. And at that time he told you that he had Essex Plate stock and was selling it, didn't he? A. No, he did not tell me that he was selling his own stock. He told me that he was buying some stock
20 because he had an order to sell 250 shares to another broker.

Q. You are sure of that? A. I remember he told me that he was selling this stock at a higher price than he was paying for it.

Q. You remember that positively? A. Yes.

By the Court.

Q. Do we understand or is it a fact that all of these authorized sales of stock by Mr. Greenfield, with the exception of those fifty shares transferred
30 to Mr. Knoller, were to your corporation, these sales were to your corporation? A. Yes.

Q. It was not a sale in the market? A. No. We are not commission brokers; we are dealers. We charge no commission. A sale is made to us. If there is a profit on it we charge the profit to the purchaser.

Q. In other words, these sales came from your corporation and the sales back were to your corporation? A. Exactly.

40 Q. With the exception of those fifty shares? A.

Sigmund Dornbusch, cross.

That was also the same thing—with the exception of the fifty shares, that is right; we bought back 270 shares, fifty shares of which Mr. Greenfield asked us to deliver to Knoller for him.

Q. Now, isn't it a fact that in all other instances, outside of these three transactions, when Mr. Greenfield bought any kind of stock from your firm, that he had delivery made to his bank and the stock paid for by his bank upon delivery? A. No, sir. 10

Q. Do you know of any other instance where that was not done? A. Yes.

Q. What? A. I remember in some instances where Mr. Greenfield asked to take the stock from the office without payment, and he said that he would bring a check in either the same day or the next day, and that privilege was given to him.

Q. But he always paid for all stock he ordered within a day or two from the date that he agreed to buy it, didn't he? A. No, sir. 20

Q. Do you remember any instance when he did not? A. Many instances.

Q. Is that so? A. Yes.

Q. Can you point out one? A. I can.

Q. What is it? A. If the books are handed me I can refresh my memory from the books.

Q. Oh, you mean what the books will show? A. Yes, what actually—when he actually took the securities— 30

Q. Never mind that. Do you remember? A. I cannot remember the dates so well; that is three or four years ago.

RE-DIRECT EXAMINATION by Mr. Bilder.

Q. Mr. Dornbusch, in what form was this stock that you speak of as having been sold by the plaintiff to defendant? In what form, with reference to its transferability? A. What we call a "street" form.

Q. What was done by you with stock that you 40

Sigmund Dornbusch, re-direct.

sold in this way to Mr. Greenfield when you delivered it to him in order to render it transferable?

A. I don't get your question.

10 Q. What had to be done to the stock that you sold to Mr. Greenfield and which you say you held for him, in order to render it transferable? A. Nothing at all.

Q. Well, in what form was it? A. The stock was in what we call a "street" form; the stock is in some nominee's name, it may be John Jones; John Jones endorses the certificate in blank, not assigned to anyone; that stock then can be sold or resold a hundred times before it is transferred.

Q. And all of this stock bore the endorsement in blank of the person in whom it stood? A. That is right.

20 By the Court.

Q. And then, so far as any handling of the securities was concerned, as I understand you, this was a mere bookkeeping transaction; that is, the stock was in your safe deposit box? A. That is right.

Q. It was in "street" form as you said? A. Yes.

Q. Properly endorsed for transfer? A. Yes.

30 Q. And that the stock continued to remain there, was not taken out, but that the transaction with Mr. Greenfield was, with that exception, a bookkeeping transaction, is that correct? A. That is right, an account that we had.

Q. An accounting transaction? A. That is right.

Q. Nothing at all was done with the stock itself? A. No.

40 Q. It was in the form in which it remained? A. Except possibly when the delivery of fifty shares was made, if we did not have a fifty-share certificate we transferred it.

Sigmund Dornbusch, re-direct.

Q. We are not talking about fifty shares, no question about that, because you admit having received more for that than the price paid; but with all this other stock, the stock remained, at the time you repurchased it, in your safe deposit box in precisely the same condition it was in when you had sold it to Mr. Greenfield? A. Right. 10

Q. Is that right? A. That is right.

By Mr. Bilder.

Q. Now, Mr. Dornbusch, with reference to that Public Fire, have you with you the record of the repurchase, as you call it, made in your handwriting? A. Yes.

Q. And there are two records there, are there, for seventy-five and thirty-five, respectively? A. That is right. 20

Q. Did you buy that for a resale on that date? A. On May 29th?

Q. Yes. A. Yes, I did.

Q. The thirty-five and the seventy-five, respectively? A. The seventy-five I bought for a resale.

Q. And have you any record in your own handwriting of a resale? A. I believe I have. If you have those memorandum slips there—

Q. Is this record in your handwriting (handing witness document)? A. It is.

Q. And does that enable you to testify with reference to these particular shares of stock? A. Yes. (Examining document.) Thirty-five shares. 30

Q. On what date? A. On October 17th, the same date that we purchased them from Mr. Greenfield.

Q. At what price? A. At the same price I paid Mr. Greenfield. We made no profit; sold the thirty-five shares at \$25.50 a share.

Q. The price at which you bought them from Mr. Greenfield? The price that I had paid Mr. 40

Sigmund Dornbusch, re-direct.

Greenfield for them.

10 Q. I show you a paper and ask you whether this paper will refresh your recollection as to anything you did with the remaining number of shares of the Public Fire. You have accounted for thirty-five. With reference to the other seventy-five, will this paper refresh your recollection as to what, if anything, you did with the other seventy-five, will this paper refresh your recollection as to what, if anything, you did with the other seventy-five (handing witness document)? A. Yes.

Q. At the time you bought, at no other time, but on the date when you purchased, as you say, from Mr. Greenfield those seventy-five—yes or no.

20 Mr. Schotland. I object to that being shown to the witness.

The Court. Perhaps his recollection needs no refreshing.

The Witness. I do not need that (indicating document).

30 Q. Can you recall what was done with the seventy-five? A. I do remember that we could not purchase the stock from Mr. Greenfield. The reason why we purchased the stock on that date is because one of our salesmen—

40 Q. If you did not tell it to Mr. Greenfield you cannot say it. A. It did tell it to Mr. Greenfield—that one of our salesmen had an order for seventy-five shares of Public Fire Insurance stock, and I asked him if he would like to dispose of seventy-five shares of the stock that we were holding for him. I told him the salesman could get \$30.50 for it and told him that all we could pay him was \$30, because the salesman's commission must be paid out of the sale of the stock.

Sigmund Dornbusch, re-direct.

Q. Did you dispose of the stock on that date in accordance with your conversation with him? A. We did.

Q. To whom was the seventy-five delivered? A. A man in Passaic, I believe, if my memory serves me right; I think his name was Schwartz.

Q. And do you recall at what price? A. It was a customer from Passaic, and I don't remember his name. 10

Q. Do you recall at what price? A. At \$30.50 per share.

Q. Now, do you recall what you did with the 270 shares of Essex Plate Glass, that being what remained after the delivery of fifty shares you have testified to? A. Yes.

Q. Will this memorandum refresh your recollection (handing witness document)? A. Yes. 20

Q. Is it in your handwriting? A. Yes, it is; sold on October 17th, which I believe is the same date that we bought it from Mr. Greenfield, at the same price that I paid Mr. Greenfield for the stock, \$8.75 a share. A sale was made by me to the customer, on which we charged no profit; in other words, Mr. Greenfield got the same amount that I sold it for.

Q. Can you recall what was done with the 100 shares of U. S. Security, if anything was done with it, on the date that you purchased it from the defendant, the U. S. Security? A. Well, it was sold, I believe, to another broker at the bid price of the day or the time that I spoke to him about it. 30

Q. Would your books show? A. Yes, the books will show it.

SAMUEL SIEGELMAN sworn in behalf of plaintiff.

DIRECT EXAMINATION by Mr. Bilder.

Q. You are connected with the plaintiff, are you? A. Yes, sir. 40

Samuel Siegelman, direct.

Q. And for how long have you been connected with the plaintiff? A. Since March 1, 1928.

Q. What is your present position with the plaintiff? A. Resident manager.

10 Q. And what was your position with the plaintiff during April, May, June and including October, 1928? A. Trader.

Q. Where were you located during that period? A. 31 Clinton Street.

Q. In the office of the plaintiff? A. In the office of the plaintiff.

Q. Did you ever see the defendant in plaintiff's place of business during that period of time? A. Quite often.

20 Q. About how often, would you say? A. Oh, a couple of times a week.

Q. Are you acquainted with the course of business of the plaintiff in connection with the making of records of sales and purchases? A. Yes, sir.

Q. Will you describe that course of business?

Objected to.

Objection sustained.

Mr. Bilder. All right. I will withdraw the witness.

30 (Defendant's counsel produces and hands to the plaintiff's counsel several documents called for in notice to produce, served on defendant by plaintiff, as follows: Confirmation of purchase, dated October 17, 1928, for seventy shares of Essex Plate Glass stock; confirmation of purchase, dated October 17, 1928, for thirty-five shares of Public Fire Insurance stock, and confirmation of purchase, dated May 29 1928, for seventy-five shares of Public Fire
40 Insurance stock.)

Isadore J. Coloccia, direct.

ISADORE J. COLOCCIA sworn in behalf of plaintiff.

DIRECT EXAMINATION by Mr. Bilder.

Q. Are you connected with the plaintiff, Fenning, Dornbusch & Company? A. That is right.

Q. What is your position? A. Bookkeeper.

Q. And how long have you been with the company? A. Since August 4, 1927.

Q. August, 1927? A. Yes.

Q. What are your duties? A. Well, to take the trade slips, as they are made; make a record of them on the P. & S. blotter, and to take in whatever stock is coming in the next day and deliver stocks going out.

Q. What records, if any, have you of any entries in your own handwriting? A. Well, from the purchase and sales book in which the customers are there.

Q. When you speak of "trade slips", is there any document here that you can point to as being a trade slip? A. The pink and blue slips (indicating).

Q. Those pink and blue slips are trade slips? A. Sales and purchases.

Q. What is done with these pink and blue slips after they are copied in the office? A. Well, they are given over to a stenographer and she types comparisons on them.

Q. Then what is done? A. Then rechecked by me, seeing that they are typed correctly.

Q. Checked against what? A. That there slip against the comparison which has been typed.

Q. That is, you check the comparison slip with this so-called trade slip, the pink and blue slips? A. That is right.

Q. And then what is done? A. Well, then I see that they are typed correctly, and they are immediately mailed to the customer.

Iscodore J. Coloccia, direct.

Q. What do you see that is mailed to the customer? A. The comparison.

Q. You mean what we have been calling a confirmation? A. That is right.

Q. And who is that mails out confirmations in accordance with these sales slips? A. Well, I do.

10 Mr. Bilder. I desire to offer in evidence three documents which have been produced out of the defendant's possession.

The Court. Perhaps you had better offer each separately so that there will be a record of them.

20 Mr. Bilder. I am offering in evidence document purporting to be confirmation of purchase, bearing date May 29, 1928, and bearing a reference to seventy-five shares of Public Fire.

(The same is received in evidence and marked

Exhibit P-1.)

Mr. Bilder. Document purporting to be confirmation of purchase, dated October 17, 1928 referring to thirty-five shares of Public Fire.

(The same is received in evidence and marked

30 Exhibit P-2.)

Mr. Bilder. A document purporting to be a confirmation of purchase, dated October 17, 1928, referring to 270 shares of Essex Plate Glass.

(The same is received in evidence and marked

Exhibit P-3.)

40 Q. I hand you nine slips which you have designated as trade slips, and ask you whether upon inspection you can say whether or not they passed through your hands in your capacity as bookkeeper

Isidore J. Coloccia, direct.

of the plaintiff company? A. They all have my initials on them.

The Court. You have not quite answered the question.

The Witness. Well, they passed.

Q. Did they pass through your hands in the course of your work as bookkeeper? A. That is right. 10

Q. And do they bear any markings made by you in connection with your work? A. My red C.

Q. And what do you do in the course of your work in connection with these slips? A. Immediately after I was done with them?

Q. No, what do you do with these slips? What do you do, if anything, in the course of your work when those first come into your possession? A. What did I do with them? 20

Q. Yes, what did you do? A. Well, I extended them.

Q. What do you mean by "extended them"? A. These shares plus the amount of each—I extended the total sum.

Q. In other words, you calculated the total at the number of shares per price, at so much? A. Per share, that is right.

Q. What else do you do in the course of your work? A. Immediately made a record in the purchase and sales book. 30

Q. What else? A. Well after the girl had been done typing the comparisons they were mailed to the customer, I was given those slips with the comparisons, and I rechecked those confirmations that went out.

Q. And the confirmations that went out, what did you have to do with their accuracy? A. I had to initial them and check them.

Q. What did you have to do with their being 40

Isadore J. Coloccia, direct.

sent out? Who sent them out, sent out these forms? A. I did.

Q. And can you say whether or not a confirmation was sent out by you in connection with each one of these slips, by looking at the slips? A. We have the duplicates in our files.

10 Q. You have duplicate confirmations? The confirmations are made up in duplicate. A. Original and duplicate. The original is mailed to the customer; the duplicate is retained for files.

Q. I show you these papers and ask you whether they have any connection with these trade slips that you have been examining (handing witness document). A. I notice that each one of these here blue and red slips have a duplicate comparison which must have been mailed to the customer.

20 Q. Well, can you, by looking at the slips, say whether or not there is any connection between those trade slips, purchase and sales tickets, and these papers which I am now presenting to you (handing witness documents)? A. Well, these are our memorandum. Immediately after these are written up—

Q. "These" indicating the pink and blue slips? A. Blue and pink—a comparison is typed, checked by me and mailed to the customer, notifying him as to the sale or purchase of the stock.

30 Q. Well, what reference to the paper which is mailed to the customer do these sheets bear that I have shown you, the white sheets? Have these white sheets any connection, to your knowledge, with the papers which you say you mailed to the customer in connection with the blue and pink sheets? A. Well, they are—

Q. What connection, if any? Do you know what I mean by "what connection"? A. I do not.

Q. I mean in the course of your work.

40 Mr. Schotland. Ask him if they are carbon copies. I won't object.

Isadore J. Coloccia, direct.

The Witness. I already stated they were duplicates of originals.

Q. What happened to the originals? A. They were mailed to Mr. Greenfield.

Q. By whom? A. By me.

Mr. Bilder. I desire to offer these documents in evidence as follows: 10

Mr. Schotland. I object to them as incompetent. They are none of them signed by Mr. Greenfield at all. They are just self-serving declarations.

The Court. Well, I suppose if you had produced the originals they would have been admissible in evidence, and now he says he mailed originals, of which these are duplicates, to Mr. Greenfield. I understand that demand was made upon you for the production of the originals and you say that you haven't them. 20

Mr. Schotland. No, I produced what I had. The fact that a notice to produce certain documents is served does not make those documents competent evidence for the side that serves the notice, unless they are otherwise competent. My objection is— 30

The Court. The originals would not be competent?

Mr. Schotland. No. They are just as self-serving declarations. They are in no way connected as the defendant having done anything to them.

The Court. Well, I think they would be relevant if produced by you, because, if I under- 40

Isadore J. Coloccia, direct.

stand the defense to be that you never had these transactions at all, and if Mr. Greenfield received these advises and said nothing, it might be some evidence of the fact that he had made these purchases and sales. I will admit them. An exception to that ruling may be noted.

Mr. Schotland. Exception.

Mr. Bilder. I assume they will have to be separately marked.

The Court. I do not know that they will—just as you think about it.

Mr. Bilder. Well, since they all relate to the transactions involved in the suit, consisting of memorandums of purchases, sales and confirmations, I think that they may be properly offered as one exhibit.

(Eighteen documents referred to are received in evidence and marked Exhibit P-4.)

By the Court.

Q. What do you call them? A. Comparisons.

Q. Comparisons with what? What do you compare them with? A. Among brokers they are called comparisons, but with individuals I would call them confirmations.

Q. Well, you have been calling them comparisons. That is what you call them in the office? A. Yes, sir.

Q. And what are they comparisons with? A. Well, that is with brokers; that would not apply to an individual, though.

By Mr. Bilder.

Q. Is the word "comparison" a trade name, too?

A. It is among brokers.

Q. Among brokers? A. Yes.

Isadore J. Coloccia, direct.

Q. The word "comparison" is commonly used among brokers to designate these sheets which upon their face bear the word "confirmation"? A. Yes, sir.

Q. Do you recall independently of any records, any occurrence relating to a delivery of any stock by you—by "you" I mean the plaintiff—for Mr. Greenfield, during 1928, a delivery to some third person? A. I do. 10

Q. What do you recall? By the way, is there any memorandum which you made in that connection? A. Yes.

Q. What memorandum is that? A. On June 15th, a delivery of fifty shares of Essex Plate Glass, delivered to D. A. Knoller, in the amount of \$1,618.75, and the amount was deposited—

Q. What memorandum, if any, did you make? Did you make any memorandum of that? A. An entry in the ledger. 20

Q. In your own handwriting? A. That is right.

Q. When was that made? A. June 15th.

Q. That is, it was made on the date of the occurrence itself? A. The delivery.

The Court. Did you deliver that personally?

The Witness. No, the stock runner did. (After examining book). Right here) indicating). 30

Q. You find an entry there in your own handwriting? A. Fifty Essex Plate Glass, delivered on June 15th, for \$618.75.

The Court. At what rate is that?

The Witness: That is twelve and three-eighths.

Q. Now, do you recall anything in connection with that particular item? A. Well, I immediately 40

Isadore J. Coloccia, direct.

deposited the check.

10 Q. No. What do you recall? Give me your entire recollection with reference to that particular item, from the beginning. A. I think it was—I cannot recall the date—Mr. Greenfield did come into the office, and after leaving Mr. Dornbusch's room he had come to the bookkeeping cage, and he had instructed me to deliver fifty shares of Essex Plate Glass out of his account to D. A. Knoller, at twelve and three-eighths, and to credit his account with the check I received from Knoller.

Q. What did you do after that? A. After that I had asked him about taking up the balance of the account.

Q. Never mind that. What did you do about these particular shares, if you did it? A. I did.

20 Q. What did you do? A. I immediately took fifty shares of stock from the box, gave it to the stock runner and he made delivery to Knoller.

Q. You gave it to the stock runner with what instructions? A. To receive a check.

Q. Did you direct the stock runner where to go? A. To D. A. Knoller & Company.

Q. And did you deliver the stock to the stock runner? A. I did.

30 Q. And what happened after that? A. The runner made delivery and received the check.

Q. The next thing you know is what? Not what the runner did, but what is the next thing you know? A. Having received the check.

Q. From whom? A. From the runner.

Q. Whose check? A. Of D. A. Knoller.

Q. For how much? A. \$618.75.

Q. Does this deposit slip have any reference to that check [handing witness document]? A. June 15th—

Q. Does it or does it not? A. It does.

40 Q. In whose handwriting is this check? A. The

Isadore J. Coloccia, direct.

stock runner, checked by me.

Q. Did it pass through your hands? A. Yes.

Q. Is your mark on there? A. Yes, it is.

Q. What date? A. June 15th.

Q. Of what year? A. 1928.

Q. Recording what? A. That this check, although it had been credited to Mr. Greenfield's account, had been drawn by Mr. Knoller. 10

Q. Well, was there a check for the amount deposited with reference to Mr. Greenfield's account?

A. There was.

The Court: Do you remember to whose order that check was?

The Witness: I don't recall that. Most likely it would be in Fenning, Dornbusch's name.

Q. By whom was the check deposited? A. After having it checked by me— 20

Q. By whom was the check deposited? A. By the stock runner.

Q. In whose account? A. Fenning, Dornbusch & Company.

Q. Now, does that book purport to contain a record of the transactions between the plaintiff and the defendant? A. That is right; it does.

Q. You have turned to a page designated "M. H. Greenfield." In whose handwriting are the entries on that page? A. They are all mine, with the exception of one page. 30

Q. And which is the day that you say is not yours? A. Dated 1928.

Q. And where do the entries in your handwriting begin, with what date? A. August 17, 1927.

Q. How were those entries made, upon what basis, by you? A. Well, they were either made from the purchase and sales transactions or delivery and receipt of stock.

Q. Now, does this record contain any reference 40

Isadore J. Coloccia, direct.

to a transaction on April 2th, 1928, between plaintiff and defendant? A. It does.

Q. What transaction?

10 Mr. Schotland: I do not see the necessity, from my standpoint, of the books as far as the account is concerned. We have no means of knowing whether the prices at which they are crediting the sales, and the prices at which they are charging the purchases are the correct prices or not. I am perfectly willing that if it should turn out that the plaintiff is entitled to a verdict, that the balance that the books show would have to be the amount. I have no means of controverting those items. I did not check up what the prices or quotations were.

20

The Court: I suppose what you mean to say is that you are perfectly willing to admit the computation in the complaint as correct?

30

Mr. Schotland: I am perfectly willing to admit that the computation that they made—I do not know whether they made it correctly in the complaint or not—the bookkeeper can give what the computation is, just the last line from the books.

The Court: Maybe that is what Mr. Bilder is doing.

40

Mr. Schotland: Well, I mean he can tell us what the total amount is, because I have no means of questioning the items that go to make it up, and therefore I do not want to take up the time of the Court in insisting on technical proof of those prices and all that.

Isadore J. Coloccia, direct.

The Court: Is that the purpose of this testimony, to give the amounts involved?

Mr. Bilder: Yes, your Honor; I desire to offer the account in evidence as an account, as a book account.

10

The Court: Well, this suit not being upon an account, I expect that would not be evidential, would it? All the books may be used for is memorandum when the suit is not upon a book account, isn't that so? If your suit is upon a book account then you may offer your books, but if it is not upon the books of account, that is, upon the individual transactions, then your books are not evidential, but may be used simply as memorandum to refresh the recollection of witnesses. Is not that the rule?

20

Mr. Bilder: Well, I confess that I did not so understand it. I am not prepared to argue against your Honor's view, which is undoubtedly correct. My notion was that the books of account of original entry are always admissible in suits involving sales.

The Court: I always understood that that was an exception of the rule of evidence in the case of book accounts. You make them up yourself, you see.

30

Mr. Bilder: Yes.

The Court: And they are within your control, and self-serving as far as that is concerned, but there is an exception to that rule where your suit is actually based upon books of account.

40

Isadore J. Coloccia, direct.

10 Mr. Bilder: My notion was that the competency of the books as evidence did not depend upon the nature of the course of action but rather upon the fact that they were exceptions to the hearsay rule, that they were evidence wherever relevant, and that they were competent wherever relevant.

The Court: I suppose that at least this witness, who made those entries in the books, may use these books to refresh his recollection.

Mr. Bilder: Well, I do not need it for anything further than that.

20 *By Mr. Bilder:*

Q. Will you examine the entries made by you and ascertain if you made any entries of transactions, or a transaction, on April 12, 1928, and, if so, tell us what it is? A. On April 12th, Fenning, Dornbusch & Company had sold to Morris Greenfield 110 shares of Public Fire at $33\frac{3}{4}$, \$3,712.50; and 100 shares of Federal Trust at 158, \$15,800.

Q. Now, with reference to the Public Fire stock, do you have any entry on May 29th with reference to that stock? A. I have.

30 Q. What is it? A. On May 29th, Fenning, Dornbusch & Company had purchased of Morris H. Greenfield 75 shares of Public Fire at 30, \$2,249.92.

Q. Any further entry with reference to that stock on October 17, 1928? A. On October 17th we had purchased of Morris H. Greenfield—

40 Mr. Schotland: I object to this form of the evidence, making a record here from a witness who is a mere bookkeeper, who copies from a trader's slip.

Isadore J. Coloccia, direct.

The Court: Yes, it does not seem to me that his evidence that "we have sold" or "purchased" is competent, unless he has knowledge of the transactions. He may use the books to refresh his recollection on any transaction of which he has knowledge, but Mr. Dornbusch has testified positively to that—it was he who made the purchases and sales—so that the mere fact that these slips went through the books means nothing in this case. 10

Mr. Bilder: No, I do not offer this for the purpose of adding to what Mr. Dornbusch said, or offer the evidence of the transaction, but I want to arrive at the net result of the thing.

The Court: Yes. 20

Mr. Schotland: I have no objection to him stating what it is—

The Court: Suppose he gives us the net results of the purchases of 110 shares of this stock at $33\frac{3}{4}$ —that is \$3,712.50; 75 shares at 30 is \$2,249.92; and 35 shares at $25\frac{3}{4}$ is \$892.50.

Q. Have you calculated the difference between the price of the original sale by plaintiff to defendant, and the repurchase by plaintiff from defendant of that 110 shares of Public Fire? A. On the Public Fire, \$570.08. 30

Q. As of what date is that difference calculated?

A. Calculated on October 17th.

Q. 1928? A. That is right.

Q. Have you calculated interest on that sum from October 17, 1928, down to date? A. I have.

Q. What is the amount? A. To date?

Q. Yes. A. No, I have since—to October 17th?

Q. Have you calculated it from October 17th 40

Isadore J. Coloccia, cross.

down to date? A. No, but I can on the total indebtedness of the account.

Q. All right. You have not done that. Can you give us the net result of the difference between the selling price and the repurchase price on the Essex Plate Glass stock? A. \$938.75.

10 Q. And have you calculated the difference between the selling price from plaintiff to defendant of th 100 shares of U. S. Securities and the repurchase price? A. \$275.10.

Q. Has any part of those sums been paid by the defendant to plaintiff? A. Not as yet.

Q. The entire amount is owing? A. That is right.
Mr. Bilder: I just want to have permission to have the witness calculate, off the stand, the interest on those three items, and offer it.

20

CROSS EXAMINATION by Mr. Schotland.

Q. Who is known by the name of "Nick" at Fenning, Dornbusch & Company's office? A. He is the cashier.

Q. Did you personally ever talk to Mr. Greenfield? A. I did.

Q. When? A. At the time that he had instructed me to deliver fifty shares of Essex Plate to Knoller.

Q. Did he talk to you or did he talk to "Nick"?
30 A. He talked to me, because I took the stock out of the box immediately and delivered it.

Q. You remember that distinctly? A. I do.

Q. You are sure you did not get the order from Nick? A. No.

Q. Well, what exactly did he say to you? A. He had instructed me to deliver fifty shares—

Q. What did he say to you? A. "Deliver fifty shares of Essex Plate Glass out of my account to Knoller & Company and receive a check for \$618.75."

Q. Did he say "out of my account" or "on my
40 account"? A. What was that?

Isadore J. Coloccia, cross.

Q. Did he say "out of my account" or "on my account"? Can't you answer? A. I cannot.

Mr. Bilder: That, but for the calculation of the interest, is the plaintiff's case, your Honor.

Mr. Schotland: I move for a non-suit on the ground that this comes within the Statute of Frauds, and no evidence to bring it within any exception in this case. In addition to what I have already given your Honor, I might call your Honor's attention to the fact that under the Stock Transfer Act Uniform Stock Transfer Act, which this State has adopted, as well as most other states also, the statute provides that title to a certificate and to the shares represented thereby can be transferred in only one of two ways: By delivery of the certificate endorsed either in blank or to a specified person, by the person appearing by the certificate to be the owner of the shares represented thereby, or by delivery of the certificate and a separate document containing a written assignment of the certificate, or a power of attorney to sell assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power may be either in blank or to a specified person.

Then there is one other way and that is the delivery of a certificate by the person appearing by the certificate to be the owner thereof, without the endorsement requisite for the transfer of the certificate and the shares represented thereby, but with intent to transfer such certificate or shares shall impose an obligation, in the absence of an agreement to the contrary,

Isadore J. Coloccia, cross.

upon the person so delivering, to complete the transfer by making the necessary endorsement. The transfer shall take effect as of the time when the endorsement is actually made. This obligation may be specifically enforced.

10 Those are the only three ways possible to transfer a stock certificate legally under the statute.

Now, the facts are clear, if your Honor please. In addition to what I have brought out on cross examination, following the methods prescribed by the statute, your Honor brought out even more clearly in your own examination of Mr. Dornbusch this fact—the verbal sale, alleged verbal sale—for this motion we will assume 20 there was a verbal sale—nothing whatsoever done except bookkeeping; no change of position or condition of any stock—all of it within the statute. I do not see that there is anything left upon which to even hang an argument that there is anything in these transactions to take it out of the statute, and I therefore respectfully submit that there should be a nonsuit.

Mr. Bilder: I am not, offhand, familiar with the provisions of the Stock Transfer Act, but as I follow it Mr. Schotland's statement— 30

The Court: Where are they found?

Mr. Schotland: This is in the 1916 Laws of this State, I think Section 1. I read first the Uniform Transfer Act, and Section 9 was the third way that I read.

Mr. Bilder: It seems to me, clearly, the provisions of that statute either do not apply or 40 are fully satisfied where, as in this case, the

Morris H. Greenfield, direct.

stock is in such a condition as that it will pass by delivery. The testimony was that this stock was in possession of the plaintiff and was endorsed by the person in whose name it stood, endorsed in blank, so that a mere physical turning over or transfer of the stock, delivered by one to another, would transfer title. Now, if that be so, then the legal situation arises, as I contend, that where the seller is told by the buyer to hold this stock, title to which admittedly under the Stock Transfer Act would pass if seller handed the stock to buyer, because it is in that condition, being endorsed in blank, that when in that situation the buyer says to the seller "Keep this for me," and therefore follows it up by exercising dominion by directing the seller to sell, pursuant to his instructions, that therefore the Stock Transfer Act either does not apply or is fully satisfied. The stock is in such condition as that it will pass by whatever physical handing over—

The Court: The motion for a nonsuit will be denied, and an exception to the ruling may be noted.

MORRIS H. GREENFIELD, defendant, sworn in his own behalf.

DIRECT EXAMINATION by Mr. Schotland.

Q. Mr. Greenfield, you are the defendant in this case? A. Yes, sir.

Q. And you know Mr. Dornbusch, of Fenning, Dornbusch & Company. A. I do.

Q. You had some stock transactions with them? A. I did.

Q. It is alleged here that you bought, on May 12, 1928, 110 shares of Public Fire stock for \$3,712.50. Did you make such a purchase? A. I did not.

Morris H. Greenfield, direct.

Q. Did you pay anything on account of any such stock? A. I did not.

Q. It is alleged here that on or about May 29, 1928, you sold 75 of the 110 shares of Public Fire to Fenning Dornbusch & Company. Did you make any such sale? A. I did not.

10 Q. Did you talk to Mr. Dornbusch and tell him to sell 75 shares of any Public Fire stock that you owned? A. Never did.

Q. It is claimed that on October 17, 1928, you also gave an order to Mr. Dornbusch to sell 35 shares of Public Fire stock. Did you ever give such an order? A. Never gave such order.

Q. Have you ever purchased any stock from Fenning, Dornbusch & Company that you did not pay for. A. Never did. I always paid for my stock,
20 whatever I bought.

Q. What was the way in which you bought your stock from them? What was your method of payment? A. When they bought any stock I would always instruct the concern to deliver to my bank, whichever bank it was, because I had more than one bank, and the stock would be delivered and paid for by the bank.

Q. Did you ever buy stock from Fenning, Dornbusch & Company without paying anything, and tell Mr. Dornbusch to hold that stock for you? A. Never did.
30

Q. And you say you never bought this Public Fire stock? A. Never.

Q. Did you ever have any conversation with Mr. Dornbusch about Public Fire stock? A. I did.

Q. Was it about the time that he claims you bought these 110 shares? A. Yes, sir.

Q. What was the conversation? A. The conversation was this: I came in with a friend of mine, that was in April—I don't exactly remember
40 the date, whether it was the 7th or 8th—with a

Morris H. Greenfield, direct.

friend of mine there and introduced him to Mr. Dornbusch, which was a sort of a private room that he was trading in, and told him that this friend of mine was interested in Public Fire if he could get it at the right price, and Mr. Dornbusch told him that he had 110 shares of Public Fire, and he asked him if I recall it correctly, it was $33\frac{3}{4}$ a share. This friend of mine didn't know much about Public Fire, and told him so; he did not know whether the price was right or much about the company, and he told Mr. Dornbusch that he would find out about the stock and would let him know the next morning. That was the conversation that I was present at that day.

10

Q. Did you order any of that stock bought? A. No, sir.

Q. Did you receive any confirmation that you bought these shares? A. I did.

20

Q. What did you do with it? A. I went down immediately. Upon receiving this confirmation I went down and saw Mr. Dornbusch and told him, "Why the confirmation?" He says, "I thought your friend wanted the stock." We called him up the next day, we did call up Mr. Dornbusch and told him that my friend did not want this stock, that his price was higher than somebody's else's called up about that stock the next morning, and that same afternoon my friend called up some other broker.

30

Q. Never mind that, but you can repeat what you told Mr. Dornbusch. A. I told Mr. Dornbusch the next morning that he did not want that stock, that my friend got it for less money than what he quoted him, and therefore he did not want that stock.

Q. Now, it is claimed that on or about June 7th you bought 320 shares of Essex Fidelity & Plate Glass stock for \$3,920 from Fenning, Dornbusch & Company. Did you buy any such stock? A. I did not.

40

Morris H. Greenfield, direct.

Q. Did you have any transaction with them in such stock about that time? A. About that time, only as far as fifty shares are concerned.

10 Q. Well, what was that transaction? A. That transaction was this: Prior to—about that same month I had sold to Knoller & Company 250 shares of Plate Glass, of which I had 500. I was anxious to sell the 500, and Mr. Dornbusch knows about it, too because I had complained to Mr. Dornbusch about that stock, because he sold me the stock that I did not want, and that day I sold to Knoller & Company 250 shares.

20 Mr. Bilder. I object to the witness' transactions with other persons being testified to when not in the presence of the plaintiff or its officers and not connected with them in their business.

Mr. Schotland. He is testifying to what he told Mr. Dornbusch.

The Court. It may remain.

30 The Witness. I had it in the Lincoln National Bank in 100-share certificates. When I sold 250 I was able to deliver 200 shares, and 50 shares I was supposed to deliver within the next couple of days. I know a stock transfer would take—

Q. Only tell us what you told Mr. Dornbusch about 50 shares.

Mr. Bilder. I do not understand that the witness told any of this to Mr. Dornbusch.

40 The Court. He is telling us that he had 500 shares of that stock in 100-share certificates, 250 of which he had sold to Mr. Knoller. (Ad-

Morris H. Greenfield, direct.

dressing witness) Now is this what you told Mr. Dornbusch?

The Witness. That is correct. I told Mr. Dornbusch that I had delivered 200 to Knoller & Company, 50 shares I still owed him. If he was anxious to sell the Public Fire and that he had mentioned to me that day that he had 320, he could deliver 50 shares for me to Knoller & Company and receive the money.

Q. Are you talking about Public Fire or Essex Plate Glass? A. No, I am talking about the Plate Glass.

The Court. You said "Public Fire."

The Witness. No—Essex Plate Glass.

Q. You mean the Essex Plate Glass? A. Yes, I mean the Essex Plate Glass.

Q. All right, go ahead. A. The bookkeeper, the name I only know was Nick, that is what they used to call him—I walked up to him and told him that he should deliver to Knoller & Company 50 shares of stock, and I also told him the price of it. The difference was about \$12.50. I told him to mail me a check for that difference.

Q. Did he ever mail you the check for that difference? A. Never did.

Q. And did you still have at that time on hand 300 shares of that stock? A. I still had 300 shares left.

At one o'clock p. m. the court takes a recess
until two o'clock p. m.

AFTER RECESS

MORRIS H. GREENFIELD, defendant, resumes the stand.

Direct Examination (continued) by Mr. Schotland.

Morris H. Greenfield, direct.

Q. Mr. Greenfield, on June 12, 1928, it is alleged that you purchased 100 shares of U. S. Security stock for \$1,200. Did you make any such purchase?

A. No, sir.

10 Q. It is alleged that on September 12th you directed Fenning, Dornbusch & Company to sell that 100 shares for \$924.90. Did you direct them to sell any of that stock? A. Never did, and never had any conversation in reference to that.

Q. Mr. Dornbusch has testified that on October 17th, 1928, you gave him instructions to sell the 35 shares of Public Fire stock and the 220 shares of Essex Plate Glass. Did you give him any such instructions? A. Never did.

Q. Did you have any such stock with him? A. Not to my knowledge.

20 Q. What do you mean, not to your knowledge?
A. What I mean is I never had any such stock and never had to give him any such instructions for it.

Q. Did you receive this letter from Fenning, Dornbusch & Company (handing witness document)? A. I did.

Mr. Schotland. I offer it in evidence. (The letter referred to is received in evidence and marked Exhibit D-1.)

30 Mr. Schotland. This letter is dated October 17, 1928, addressed to Mr. Greenfield and says (reading Exhibit D-1): "In accordance with your instructions we have finally completed sale of the balance of the stock we have been carrying for your account. The defficit is \$1,783.93, and we must insist upon a check from you by return mail for this amount. You surely can find no unreasonableness in our insisting upon this check immediately, as we feel that we have been more than fair in continuing to carry your account in compliance with your many requests to hold off so as to give you an opportunity to settle. Now that we have sold it we trust that

40

Morris H. Greenfield, direct.

you will not hold us up for this money. Very truly yours, Fenning Dornbusch & Company." I do not know which one of the firm signed it, but it is signed.

Q. Did you have any conversation with Mr. Dornbusch, the very day that this letter is written, telling him to sell any stock for you? A. I did not.

10

Q. Did you receive a letter a few days later from the attorneys of Fenning, Dornbusch & Company? A. I did.

Q. Is this the letter (handing witness document)? A. That is right.

Mr. Schotland: I offer this in evidence.

[Letter referred to is received in evidence and marked Exhibit D-2.]

20

Mr. Schotland: This is written by Bilder & Bilder, dated October 25, 1928, addressed to Mr. Greenfield [reading Exhibit D-2]: "Dear Sir: Fenning, Dornbusch & Co. of this city have consulted us with reference to a claim which they make against you in the sum of \$1,930.87. We are instructed to institute suit against you unless settlement of said amount is promptly made with us. Very truly yours, Bilder & Bilder."

30

Have you got my reply to that letter?

[Plaintiff's counsel produces document.]

Mr. Schotland: I offer the reply I wrote to that letter in evidence.

[Letter referred to is received in evidence and marked Exhibit D-3.]

Mr. Schotland: This is a letter written by me in reply, following the receipt of the letter from Bilder & Bilder. Their letter is dated

40

Morris H. Greenfield, direct.

10 October 25th and my reply is dated October 31st [reading Exhibit D-3]: "Gentlemen, in reply to yours of the 25th instant, addressed to Morris H. Greenfield, regarding a claim of Fenning, Dornbusch & Company, I beg to advise that Mr. Greenfield claims that he did not purchase from your clients the stock he is being charged with and that he did not direct the sale of the same stocks to be made by your clients for his account. If you have any records or orders or memorandums signed by him and will make an appointment to have me either come to your office and go over them, or show them to me at my office, I will be very glad to talk about some adjustment. On the other hand, if Mr. Greenfield is correct in his claim 20 made to me, why, then, of course, I will have to advise him that he owes nothing and, if your clients desire to recover, they would have to bring suit. I am writing this tone of letter because I know both Mr. Greenfield and your clients very well personally, and if there is something in the claim, notwithstanding what Mr. Greenfield says, I would be anxious to use my influence to bring about a settlement rather than to allow litigation. Very truly yours."

30 Q. What is your business, Mr. Greenfield? A. Wholesale druggist.

Q. How long have you been in that business? A. Close to thirty years.

Q. Where? A. At present?

Q. What city? A. Newark city, all my years.

Q. Right here in this city? A. Yes, sir.

Q. How long have you known Mr. Dornbusch? A. Well, about four years.

Q. Did you know him before he was in this stock business? A. Never did.

40 Q. Is that where you first got acquainted with

Morris H. Greenfield, direct.

him? A. That is correct.

Q. Did you buy any stocks from him or his firm on credit at any time? A. As I recall, once I did.

Q. Under what circumstances? A. I bought 100 shares of a stock that I cannot recall the name, but I have it recorded in my book. The book is right here.

10

(Mr. Schotland hands book to witness.)

The Witness. (Examining.) General Bond.

Q. How did you buy it? A. Amcunting to \$1,900, and I asked Mr. Dornbusch to hold it for about ten days that I would make arrangements with the bank to take care of it, and I gave him a thousand dollars; that is, he asked me for some money and I gave him \$1,000.

Q. Then you asked him to hold it for the balance of the \$900? A. That is it.

20

Q. Well, did you buy any stock without paying anything to them? A. No, I did not. What I mean, "I did not," is this—when I bought a stock I would always leave instructions where to deliver, to what bank, whenever they were ready with the stock to deliver it, and deliver it to my bank.

Q. I mean did you buy any stock without giving them instructions to deliver it and be paid upon delivery, except this bond? A. That is the only occasion.

Q. And on that occasion you paid a thousand dollars down? A. That is correct.

30

Q. You saw the bookkeeper on the witness stand. Did you ever talk to him about these transactions? A. Never did in my life.

Q. Who was it that you talked to about selling the 50 shares of Essex Plate Glass stock? A. I only knew him by his first name, they used to call him Nick. I knew that he was cashier and bookkeeper in their concern.

Q. Now, what actual instructions did you give about the 50 shares of Essex Plate Glass? A.

40

Morris H. Greenfield, direct.

When Bramhall, that is Knoller & Company, wanted me to deliver the balance that I had sold them—and I sold them 250 shares—I delivered to them from my bank 200 shares, and 50 shares I owed them. Now, before I could get the stock certificate transferred into two 50 shares from the bank,
 10 he wanted the stock because he had sold to somebody that wanted it quick. I then walked in to Dornbusch and told him to deliver to Bramhall—that is, Knoller & Company—the 50 shares of Essex Plate Glass, and I also told him the price that I had sold it to Knoller. The difference was from the price that he mentioned to me the stock was at the time, was about \$12.50, so I told him to deliver that stock to Knoller and send me a check for that little difference.

20 Q. You said something this morning about having purchased the Essex Plate Glass stock that you had on hand originally from Fenning Dornbusch & Company? A. That is correct.

Q. How many shares had you purchased? A. I purchased 200, but by some error on their part I was stuck with 500.

Q. So you had 500? A. That is correct.

Q. At what price? A. At 13, $13\frac{1}{4}$ or $13\frac{1}{2}$; my record will show exactly what it is.

30 Q. Well, look at your record to refresh your recollection. A. (Examining book) $13\frac{1}{2}$.

Q. $13\frac{1}{2}$? A. $13\frac{1}{2}$.

The Court. That was which?

The Witness: Essex Plate Glass.

Q. When was it that you had purchased it? A. (Examining book.) In May; the 25th of May, 1928.

Q. Now, in June, when Mr. Dornbusch claims that you bought 270 more shares, what was the price of it? A. I don't recall. It was less than
 40 12, I know that, or somewhere around there.

Morris H. Greenfield, cross.

Q. Well, it had gone lower than the price you paid? A. Oh, yes.

Q. And you still had 300 shares on hand? A. That is I had 500 shares at the time when I put in an order with Knoller & Company to sell my 500 shares, and they were only able to sell 250, of which 200 shares I delivered for my stock. 10

Q. Now, did you give anyone else any orders to try to get rid of that Essex Plate Glass stock? A. No, I did not.

Q. Did you talk to Mr. Dornbusch about it? A. I did talk to Mr. Dornbusch to try and get rid of my stock.

Q. What did he say? A. Well, he is going to try, but never did.

Q. That is at the very same time that he claims you bought 270 shares. A. Well, not 270 but 320. 20

Q. 320? A. Yes, he claims 320. That was the day when he mentioned to me the 320 shares, when I asked him to sell my balance of the Plate Glass that I held, that Knoller could not sell.

Q. Did you ever tell the bookkeeper that was on the stand, Mr. Coloccia, that he should deliver 50 shares to Knoller out of your account? A. I never spoke to that boy in my life.

CROSS EXAMINATION by Mr. Bilder.

Q. Mr. Greenfield, do you recall when you started to deal with Fenning, Dornbusch & Company? 30

A. As I recall, about the early part of 1927.

Q. And your dealings were quite frequent? A. Yes, sir.

Q. And continued through 1927, down to about the month of October, 1928? A. Not October, 1928; no, sir.

Q. Well, into 1928? A. Into the early part of 1928.

Q. Have you any idea of the extent of your deal- 40

Morris H. Greenfield, cross.

ings with the plaintiff? A. I haven't got any idea, but my records will show.

10 Q. What was the extent of your dealings, as your records show, with the plaintiff? A. The fact is the records will not show the exact amounts, because we have them separated. I bought from other brokers, too, stocks occasionally, so I could not exactly tell you the amounts. However, if you mention the amounts I can tell you whether it was so or not.

Q. Would you say your purchases from Fenning, Dornbusch & Company amounted to upwards of \$180,000? A. I would not say that because I haven't got any figures.

Q. Would you say how near that, in your best recollection, the dealings came to? Well, I could not give you any amounts.

20 Q. Would you say they were over \$100,000? A. Possibly.

Q. And you did sell to Fenning, Dornbusch, too, did you not? A. Yes, sir.

Q. Your dealings partook both of the nature of purchases and sales, is that correct? A. That is right.

30 Q. And can you say whether or not your sales to the plaintiff during the period of your dealings amounted to as much as \$185,000? A. I could not say that.

Q. Would you say how near that amount you could be sure of? A. I could not.

40 Q. Are your records complete there—the book that you have in front of you—as to your dealings that you had with the plaintiff? A. Well, the records are complete. If you mention any stock, we have it here, but since we never had any stock at the brokers only by order—when I bought something I always had them transfer to the bank, and when we had completed a transaction we simply had it marked what bank the stock is held, and no names

Morris H. Greenfield, cross.

of any broker appearing here (indicating).

Q. Can you recall or do you have a record there of a purchase in August 1927, of 100 shares of Industrial Finance, August 17, 1927, for \$4,375? A. Yes.

Q. And the 26th, \$1,900? A. That is right.

Q. And the 31st, \$4,700? A. The 31st? 10

Q. Yes. Lincoln Mortgage & Title, 100 shares, \$4,700? A. 1927?

Q. Yes. A. Lincoln Mortgage?

Q. And Title, \$4,700? A. Yes.

Q. And on September 21st, 100 shares of Metropolitan Casualty, \$8,700? A. That is right, that is correct.

Q. \$8,700? A. That is correct.

Q. Then do you find, skipping a number of items, do you find a twelve-thousand dollar purchase, in March, 1928, of Lincoln Interstate, \$12,300? A. What date was that? 20

Q. March 21, 1928, \$12,300. A. Yes.

Q. And then do you have a record there of paying \$17,249 to the plaintiff on April 2, 1928? A. Paying how much?

Q. \$17,249—no, of making a sale on April 2nd, of receiving from the plaintiff, check for \$17,249? A. I do not, sir.

Q. For— A. What is that stock?

Q. 50 Central Mercantile. A. I can explain this— 30

Q. No. Have you a record of a transaction in 50 shares of Central Mercantile as of March 30th? A. I haven't got it in the record, and I can explain why it is not in the record.

Q. I am not asking you for that. A. All right, sir.

Q. Going to April 14, 1928, did you not purchase 100 Steneck Trust at \$13,300 of the plaintiff? A. I know I did, without referring to the record. I cannot find it just this minute. 40

Morris H. Greenfield, cross.

Q. That was April 14, 1928? A. Yes, but I don't know exactly the date.

Q. April 27, 1928, did you not purchase 400 shares of Sussex Fire for \$6,500 from the plaintiff? A. I did.

10 Q. Did you not, on April 27th, sell to the plaintiff 200 shares of Lincoln Interstate for \$2,549.80? A. What date?

Q. April 27, 1928. A. I possibly did.

Q. No, no. Check it off, please—April 27, 1928, a sale by you to plaintiff of 200 shares of Lincoln Interstate. A. What price was that?

Q. \$2,549.80—12¾. A. I cannot find such a sale.

Q. You are not prepared to deny that it took place? A. I will not deny; no, sir.

20 Q. Now, on May 10th, have you a record there of purchasing 200 shares of International Germanic, Ltd., for \$13,200? A. I have.

Q. On May 10th, 1928? A. That is correct.

Q. And on May 22, 1928, 100 Independence Indemnity for \$3,750, bought by you from plaintiff? A. Yes.

Q. Now, these stocks that are involved in this suit; Public Fire, Essex Plate Glass, United States Securities, they are all regarded as high-class stocks, are they not? A. Not to my knowledge.

30 Q. You thought they were high-class when you bought them?

Mr. Schotland. I object to the question. The witness has never said he bought them.

Mr. Bilder. I withdraw that.

Q. Do you know whether or not in the market they were considered high-class stocks at the time you bought them? A. To my knowledge they were not.

40 Q. Were you able to borrow money at the banks

Morris H. Greenfield, cross.

on Public Fire, Essex Plate Glass and United States Securities?

Mr. Schotland. I object to that as not proper cross examination and immaterial.

The Court. I sustain the objection. 10

Q. When did you buy the 500 shares of Essex Plate Glass? A. I mentioned that to you a little while ago. I think it was (examining book) it was in May, the 25th of May, 1928.

Q. What date was it? A. I haven't got this date here so clear, but it was in May, 1928.

Q. What price? A. The price of what?

Q. The price you paid. A. I paid \$13.50.

Q. 13½? A. Yes.

Q. You are sure of that? A. Yes; that shows up in my records. 20

Q. And when did you take delivery of that stock?

A. It was delivered to the Lincoln National Bank.

Q. When did you take delivery of that stock?

The Court. Have you the date?

The Witness. I haven't got the date, your Honor. This is my bookkeeper's writing, according to my instructions, the purchase day anyd stock; then when the bank took that stock over I don't know what date, because often the broker—that is, Dornbusch—would hold the stock for three or four days before they were able to deliver. Now, when the bank would notify me— 30

Mr. Bilder. I object to that explanation.

Q. Isn't it a fact that you bought that 500 shares on March 29th at 13? A. At what?

Q. 13? A. Not to my knowledge. It possibly 40

Morris H. Greenfield, cross.

is an error.

Q. And that you actually got it on March 30th?

A. Not according to my records.

Q. Of course you do not know that your records are correct, do you? A. There is a number here that is not clear, and I do not know whether it is
10 March or April; it only gives the number of the month and it is not clear in the book.

Mr. Bilder. I object to the witness volunteering.

Q. Now what happened to the other confirmations that you got, other than the three that you have produced here? What happened to all of the other confirmations that you got from the plaintiff?

A. Which have you got in mind?

Q. Any of them. A. As long as we had them
20 recorded in the book we didn't save the confirmations. As long as our bank took care of the stock we did not bother about—

Mr. Bilder. I object.

The Court. The answer may remain. I think that is an answer to that question.

Q. You say that you bought General Bond stock
30 and paid \$1,000 on account, is that correct? A. That was about the first transaction.

Q. Is that correct? A. Yes. I think I gave more than that.

Q. Now, when did you say you bought the General Bond stock?

The Court. He did not say, but I suppose you mean to ask now when it was?

40 Mr. Bilder. I think he did say.

Morris H. Greenfield, cross.

The Court. I think not. He said "Once I bought stock on credit and that was 100 shares of General Bond."

Q. You say you paid something on account of it at the time that you made the purchase?

The Court. \$1,000 he said. 10

Q. When do you say you paid that \$1,000? A. That was in 1927, the early part of 1927—or the latter part of 1926.

Q. Do you know the date? A. I haven't got the date here.

Q. And you say that a thousand dollars was paid on account of the General Bond stock? A. That is correct.

Q. Are you sure of that? A. I know I paid \$1,000 on account of the stock that he held for me. 20

Q. Are you sure it was the General Bond stock? A. Well that is my belief.

Q. Upon what do you base that belief? A. After all, it is 1927—

Q. You testified— A. I testified that is my belief, that it was on account of the General Bond stock.

Q. Now, upon what do you base that belief? A. Because I do not recall having any other stock at the time. That was my first purchase.

Q. Oh, you say General Bond stock was the first purchase you made, is that what you say? A. As far as having a broker hold the stock. In 1926 I possibly— 30

Q. Wait, please. A. Yes, sir.

Q. You say that the General Bond stock is the first purchase or the first transaction you had with the plaintiff—yes or no? A. No.

Q. Why do you say it was the General Bond stock that you said you paid \$1,000 on? A. Because my impression was that that is the only stock 40

Morris H. Greenfield, cross.

that I had asked the broker to hold for me for a couple of days.

Q. Why do you say that it was the General Bond and not any other stock? A. Because I don't know of any other stock.

10 Q. Have you any recollection as to when you purchased the General Bond stock? A. My recollection is in 1927.

The Court. He said the early part of 1927.

Q. The early part of 1927, is that correct? A. Yes.

Q. Do your records indicate that? A. My records indicate 1927.

20 Q. Isn't it a fact that you bought that on August 26th of 1927, and that you did not pay anything on account but that you paid for the stock in its entirety? A. No, sir.

Q. Is that not a fact? A. No, sir.

Q. It is not a fact? A. No, sir.

Q. You deny that you bought, on August 26th, 1927, 100 shares of General Bond at 19 for the sum of \$1,900? A. That is correct.

Q. You deny that? A. No, I do not deny. I remember the amount that I paid for the stock.

30 Q. Do you deny the date? A. The date I don't remember.

Q. Do you now still say—— A. Because my record is 1927. I cannot remember, I will not swear whether it was 1926 or 1927.

Q. Do you now still insist that you paid \$1,000 on account of the General Bond stock? A. I do insist that I paid a thousand dollars; yes, sir.

Q. On account of this General Bond stock? A. On account of that stock, yes, to my best knowledge.

40 Q. Is all of your testimony also to the best of your knowledge? A. Yes, sir.

Morris H. Greenfield, cross.

Q. In the same way. Now, you say you bought 200 shares of Essex Plate Glass from the plaintiff, and then, in your language, you got stuck with 500?

A. That is correct.

Q. Just what do you mean by that? A. I can explain that. Mr. Dornbusch himself sold me 200 shares of Plate Glass; that is, they tried to sell me 500 that his partner Fenning—

Q. You mean they tried to persuade you? A. That is it trying to tell me that his partner's brother was a director in the Plate Glass company, and they knew that the stock is going to be very good.

Q. But what I am getting at is this: You say you bought 200 but you got stuck with 500.

Mr. Schotlland. I object. He was asked the question to explain, and he should not be interrupted; he should be permitted to finish his answer.

The Court. I think your question was to explain, and that opened rather a very wide field.

Mr. Bilder. Well, then, may I withdraw my question?

The Court. Yes, you can do that and have it all stricken out.

Mr. Bilder. I ask that I be permitted to withdraw the question and have the answer stricken out.

Mr. Schotland. I object to that, if your Honor please. Of course, it is purely discretionary with the Court, but I object to counsel speculating on the question, not liking the an-

Morris H. Greenfield, cross.

swer and then withdrawing the question and the answer.

The Court. That will be done; the answer will be stricken out.

10 Q. When you stated that you bought 200 but you got stuck with 500, did you mean that you only entered into a contract for 200 but that you were in some way cheated by having 500 forced upon you after you had contracted for 200? A. That is correct.

Mr. Schotland. I object to the form of the question.

20 The Court. The answer may remain.

Q. Did you make a contract for 500? A. I did not. I asked him to give me 200 shares; that is all I wanted of that stock.

Q. You only made a contract for 200? A. That is right.

Q. Did you pay for 500? I did; that is, my bank paid it—by mistake.

30 Q. Did you hold your bank liable for the mistake? A. I did not, sir, because it was partly the bank's mistake that this was put over on them, and I would not hold the bank responsible for any mistake of that kind. And if you want me to tell you further, I can explain to you how the bank made the mistake.

Q. Did you deal with the plaintiff after they cheated you into buying 500 shares—yes or no? A. Well—

Q. Yes or no, please? A. I did.

40 Q. And that so-called trickery occurred when, with reference to these 500 shares? A. That was in 1928.

Morris H. Greenfield, re-direct.

Q. That purchase was of March 29th of 1928?

A. About that time; yes, sir.

Q. And after that you purchased from them, did you not, as follows—just check up these items, if you please: March 31st, two days later, 200 shares of American Insurance for \$6,850—correct? A. That is right.

10

Q. And two days thereafter, on April 2nd, you sold them 200 shares of Guaranty Company for \$2,599? A. That is right.

Q. And on the same day you sold them, did you not, 50 shares of Central Mercantile for \$17,249? A. That is right.

Q. And on the very next day you sold them 270 shares of National Commercial for \$9,955? A. What date was that?

Q. The 3rd of April, 1928, 270 shares National Commercial, sold by you to them for \$9,955. That is right.

20

Q. And on the very next day you bought 10 shares of Reliance Casualty for \$1,920? A. That is right.

Q. And on the very same day you sold them 70 shares of National Commercial for \$2,581? A. That is right.

Q. And on April 12th you bought from them 100 Federal Trust for \$15,800? A. That is right.

Q. And then two days later you bought from them 100 Steneck Trust for \$13,300? A. That is right.

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Mr. Bilder. And so on. That is all.

RE-DIRECT EXAMINATION by Mr. Schotland.

Q. All of these stocks that you have been questioned about as having bought from Fenning, Dornbusch & Company, or any of the stocks that you sold to them: Were any of those on credit without deliveries? A. No, sir.

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Morris H. Greenfield, re-direct.

Q. Did you take delivery of all stock you purchased from them? A. That is correct.

Q. And did you deliver to them all stock that you sold them? A. My bank delivered to them.

10 Mr. Bilder. I think this is improper rebuttal, and I do not think it is anything that was covered by my cross.

The Court. The answer may remain.

Q. Now, this 500 shares instead of 200, of Essex Plate Glass—will you explain how that came about?

20 A. I will. Mr. Dornbusch and Mr. Fenning, both of them, tried to persuade me to buy 500 shares, telling me that Mr. Fenning, one of the partners, his brother was a director in the Essex Plate Glass Company, and they know and got good information that that stock is very good. I did not have faith in that stock because before the stock was issued—

30 Q. Did you tell them that? A. That is the story I gave them. I told Mr. Dornbusch that I did not think that that stock was worth anywhere near the price, because the stock was not issued yet. It was a new company and it was already more than twice the par value. Mr. Dornbusch and Mr. Fenning tried to tell me that that stock is going to be double the price within the next couple of months, so I told them "If you insist upon taking that stock I will take 200 shares," because it was a sort of favor to them. They had to distribute that stock for that company.

The Court. You are digressing here.

40 The Witness. That is the way it was put to me, your Honor.

Morris H. Greenfield, re-direct.

The Court. But you are telling us what you had in your mind.

The Witness. I told them to send 200 shares to the Lincoln National Bank. They sent over 500 shares to the Lincoln National Bank. The Lincoln National Bank called me up in the morning, asking me whether they should accept—

10

Mr. Bilder. I object to what they said.

The Court. I sustain the objection.

Q. You got a call from the Lincoln National Bank—do not tell us what it was. You say you got a call from the Lincoln National Bank? A. Yes, sir.

20

Q. Regarding Fenning, Dornbusch & Company delivering stock? A. Yes, sir.

Objected to,

Objection sustained.

Q. As a result of that call—

Mr. Schotland. If your Honor means to rule that out, I would like an exception.

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The Court. That may be noted.

Q. As a result of that call were the 500 shares which were tendered to the Lincoln National Bank for your account, by Fenning, Dornbusch & Company accepted there and paid for?

Mr. Bilder. I object. There is no evidence that this stock was tendered to the bank, and there is no witness here who can speak of his personal knowledge to that effect.

40

Harry Joffe, direct.

The Court. I sustain the objection.

Q. Well, did you find yourself charged with those 500 shares in your bank? A. That is correct.

Q. And did you find the 500 shares there? A. I did.

RE-CROSS EXAMINATION by Mr. Bilder.

Q. You do not of your personal knowledge know where those 500 shares came from? A. Personally, no; only the bank called my attention—

Mr. Bilder. I ask that the last part of the answer be stricken out.

The Court. It will be stricken out.

Mr. Schotland. I ask for an exception to striking that out.

The Court. An exception will be noted.

HARRY JOFFE, sworn in behalf of defendant.
DIRECT EXAMINATION by Mr. Schotland.

Q. Mr. Joffe, do you know Mr. Greenfield? A. Yes, sir.

Q. Were you ever with Mr. Greenfield at the office of Fenning, Dornbusch & Company? A. Yes, sir.

Q. Did you talk to Mr. Dornbusch? A. Yes, sir.

Q. Do you recall when that was? A. Some time in the early part of May; I can recall that as right.

Q. Of what year? A. 1928.

Q. What did you talk about? A. Oh, I just come in with Mr. Greenfield, and Mr. Greenfield introduced me to Mr. Dornbusch, and Mr. Dornbusch had a proposition for me to make some money. He said, "I got 110 shares of Public Fire at 33¾." I didn't

Harry Joffe, direct.

know much about the stock. I asked Mr. Greenfield what he thought of it and he said, "Well——

Mr. Bilder. I object to conversations of the witness with Greenfield.

The Court. I understood it was a conversation with Mr. Dornbusch. 10

The Witness. Well, Mr. Greenfield was with me at the time.

The Court. Was this in the presence of Mr. Dornbusch?

The Witness. Yes, sir.

The Court. All right. 20

The Witness. I told Mr. Greenfield I didn't know much about stocks. I would like to make some easy money the way Mr. Dornbusch told me about it, and Mr. Greenfield says, "I will tell you what we do, Joffe——

The Court. Was that right there?

The Witness. Yes. (Continuing): "Well, tell Mr. Dornbusch we will let Mr. Dornbusch know tomorrow night or tomorrow morning," and Mr. Greenfield and I left. We had lunch together and Mr. Greenfield says—— 30

Mr. Bilder. I object.

Q. Never mind. Did you then talk again to Mr. Dornbusch after that? A. After I left?

Q. Yes. A. Yes, sir.

Q. How? A. The next morning we called him up. 40

Harry Joffe, cross.

Q. What did you tell him?

The Court. Who is "we"?

10 The Witness. Mr. Greenfield and myself. I told him I was not interested in the stock at that price.

CROSS EXAMINATION by Mr. Bilder.

Q. Mr. Joffe, when was this? A. Sometimes the latter part of April or the early part of May, 1928.

Q. How do you remember the date? A. I cannot recall the date.

20 Q. How do you remember the month and the year? A. I will tell you why. I know that much, what month it was in, or what year it was in, because I bought some stock of Mr. Greenfield later on, the same day.

Q. Is that the only stock you ever bought? A. Yes, sir.

Q. You haven't bought any stock since April, 1928? A. No, sir.

Q. And you never bought any stock before? A. No, sir, I wish I had never bought any at any time.

Q. Are you related to Mr. Greenfield. A. No, sir.

30 Q. How long do you know him? A. For about seven years.

Q. What is your business? A. Salesman.

Q. For whom? A. For J. Kramer & Company, New York City.

Q. How did you come to know Mr. Greenfield? A. Well, he was introduced to me by a nephew of mine.

Q. When? A. Oh, about eight, seven or eight years ago.

Q. And you became intimate with him thereafter? A. Friendly.

40 Q. Visit him? A. Sometimes.

Harry Joffe, cross.

Q. How did you happen to be with him on that day that you testified to having been at Dornbusch's office? A. I called on him to do some business with him, to sell him some merchandise.

Q. You had been selling him some merchandise? A. At that time, yes.

Q. Was he a good customer of yours? A. Not a very good one; no, sir. 10

Q. Well, you do not mean to say he did not pay his bills? A. That has nothing to do with this question, sir.

Mr. Schotland. You can tell him whether he paid his bills or not.

Mr. Bilder. He has answered the question.

Q. Are you still selling him goods? A. No, sir, not lately. 20

Q. When did he quit buying from you? A. Oh, about a year ago.

Q. Have you tried to get him to buy since? A. No, sir.

Q. Are you selling a line of goods in which he is now engaged? A. Yes, in the drug line.

Q. That is your business? A. Yes, sir.

Q. When did you first see him about this case. A. Oh, about five weeks later Mr. Greenfield called me up. 30

Q. When did you first see him about this case? A. This case?

Q. Yes. A. Oh, I don't recall what date, really.

Q. You talked the case over with him? A. No, sir.

Q. Never talked to him about it? A. He never asked me anything.

Q. He did not know what you were going to say when you got on the stand here, did he? A. I don't think he did.

Mr. Schotland. That is all. That is our case. 40

Sigmund Dornbusch, rebuttal.

SIGMUND DORNBUSCH sworn in behalf of plaintiff in rebuttal.

Direct Examination by Mr. Bilder.

10 Q. Mr. Dornbusch with reference to the Essex, Plate Glass stock on June 15, 1928, where could a one-half hundred-share certificate of Essex Plate Glass be divided up so that a fifty-share certificate could be obtained?

Mr. Schotland. I object. No foundation laid for that.

20 The Court. I understood that the reason that the defendant went to the plaintiff's office to get this was on account of the difficulty in having his Plate Glass stock, which was in one-hundred-share units, divided up into fifty-share units.

Mr. Schotland. It being pledged with the bank. His stock was pledged with his bank, he said.

The Court. I will overrule the objection. The question may be answered.

A. At the transfer office—

30 Mr. Schotland. I ask that my exception be noted.

The Witness. (Continuing) Which is located in the City of Newark, and an exchange or split-up of the stock, as we call it, could be done while you waited, or in about ten minutes' time. It is a general practice with us, if we have stocks hypothecated at our banks, to have the bank have the stock split for us, which they do on the same day that we order it done.

40 Q. Is it true that Mr. Greenfield came to your

Sigmund Dornbusch, rebuttal.

office with Mr. Joffe and had a conversation with you, in which a proposal to have Mr. Joffe buy 110 shares of Public Fire was made, and that was talked over in your presence by Joffe and the defendant, and then they went away with the statement to you that they would let you know by telephone—did such a conversation take place? 10

The Court. I wonder how that is rebuttal. That was all brought out on Mr. Schotland's cross examination in the main case, wasn't it? I thought that was denied.

Mr. Bilder. Yes, he anticipated his defense by asking Mr. Dornbusch this.

Mr. Schotland. No, it was not. It was cross examination on his claim that he sold the stock to Greenfield. 20

The Court. It was on cross examination. This gains no weight by being rebutted.

Mr. Bilder. I simply did not want to leave an affirmative statement by the defendant unanswered.

The Court. There appears to be no objection to it. The question may be answered yes or no, whether that was what happened. 30

A. No.

Q. Did you receive a telephone call the following day from Mr. Joffe or Mr. Greenfield, in which they said they decided not to take that 110 shares of stock, that Joffe had not decided to take it? A. No, sir.

Q. Is it true that the defendant purchased or agreed to purchase from the plaintiff 200 shares of Essex Plate Glass in March, 1928, and that 500 40

Isadore J. Coloccia, rebuttal.

shares were sent by the plaintiff to the defendant instead of 200 of it, to his bank? A. No, sir. He ordered 500 and that is what he got.

Cross Examination by Mr. Schotland.

10 Q. Mr. Dornbusch, did Mr. Greenfield come to you when he found you had delivered 500 shares of Essex Plate Glass to his bank, and complain that he had only bought 200? A. No, sir.

Q. And didn't you agree to allow him \$75 for each extra hundred—\$225? A. No, sir.

Q. You did not? A. No.

ISADORE J. COLOCCIA sworn in behalf of plaintiff in rebuttal.

20 *Direct Examination by Mr. Bilder.*

Q. Can you refer to the record of Mr. Greenfield's account with the plaintiff and tell when the sale of the 500 shares of Essex Plate Glass, which occurred in 1928, was made, and when the delivery of that stock was made? A. (Examining document.) Mr. Greenfield purchased the stock on March 29th.

Q. And delivery was made when? A. On April 5, 1928.

30 Q. Now, do you know when the confirmation of sale went out on the March 29th sale? A. The same date as the purchase date.

Q. Now, can you account for the difference between the demand for \$1,700 and some-odd dollars made by plaintiff in its letter of October 17th, offered in evidence, and the subsequent demand for something over \$1,900 made by plaintiff through its attorneys? A. Well, the additional charge would be the interest charge up until October 17th.

40 Q. Have you calculated the interest up to date on the three items? A. I have.

Isadore J. Coloccia, rebuttal.

Q. What does the interest amount to? Can you give it on the three items separately? A. No.

Q. You cannot? A. Well, that is up until—

Q. No, no; from the— A. Wait a minute—up until October 17th I have them individually but from October 17th there is one lump sum.

Q. Well, give me the lump sum from October 17th. 10

Mr. Schotland. That would be an improper figure, because he is compounding.

Q. I will ask you to calculate that. A. Individually?

Q. No.

Mr. Bilder. Can we have that calculated later? There are three separate accounts and the interest must be computed separately. 20

The Court. I will tell you what you may arrange to do. On whatever sum the jury shall find due to the plaintiff, if anything, Mr. Schotland and you can agree to the calculation, and the amount may be added to the jury's verdict.

Mr. Bilder. Yes.

Mr. Schotland. Yes.

The Court. You see, by adding the interest up to October 17th, Mr. Coloccia, and then calculating the interest on the total sum after that, you are adding interest to the interest. 30

The Witness. I see.

The Court. And that is quite improper.

Mr. Bilder. The plaintiff rests.

Mr. Schotland. Just one question of Mr. Greenfield. 40

Charge to Jury.

MORRIS H. GREENFIELD, defendant, sworn in his own behalf in surrebuttal.

By Mr. Schotland.

Q. Did Mr. Dornbusch promise you an allowance of \$225 on those extra 300 shares of Plate Glass?

A. That is correct, sir.

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The Court. Is the case closed?

Mr. Schotland. The case is closed as far as the evidence is concerned.

I want to make a motion for a direction of a verdict on the same ground as the motion for a nonsuit: On the ground that the transactions involved are within the Statute of Frauds, no memorandum in writing proven and there is nothing proven to take them out of the statute.

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The Court. The motion will be denied and an exception to that ruling as grounds of appeal may be noted.

Mr. Schotland sums up in behalf of defendant.

Mr. Bilder sums up in behalf of plaintiff.

The Court charges the jury as follows:

DUNGAN, Y.

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Gentlemen, according to the testimony of Mr. Dornbusch, who is a member of the plaintiff corporation of Fenning, Dornbusch & Company, dealers in stocks and securities, he says that Mr. Greenfield, the defendant in this case, who for several months had been dealing in stocks with his corporation, purchased on the 12th day of April, 1928, 110 shares of Public Fire Insurance Company stock at $33\frac{3}{4}$, which amounted to \$3,712.50 at that price; that on the 29th day of May, 1928, the defendant, Mr. Greenfield, instructed him to sell 75 of those shares

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of stock, or rather, he says that by reason of a con-

Charge to Jury.

versation between them, in which Mr. Greenfield agreed to sell, that his corporation purchased from Mr. Greenfield 75 of those shares of stock at a price of \$2 249.92; and that on the 17th day of October, 1928, pursuant to the defendant's instructions, the plaintiff purchased from the defendant the remaining 35 shares for \$892.50.

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Mr. Dornbusch also says that the defendant had paid nothing for the stock which the plaintiff had sold to him, that that was a transaction showing upon the books and that the amount for which the stock was repurchased by his company was credited against the amount for which his company had sold it to the plaintiff, leaving a balance due from the defendant to the plaintiff of \$570.08.

Mr. Dornbusch says there was a similar transaction with reference to 320 shares of the stock of the Essex Plate Glass Company. This transaction commenced on the 7th day of June, 1928. He says that the defendant purchased from his company that amount of stock at a price which came to \$3,920; that on June 15, 1928, pursuant to the defendant's instructions and upon his order, 50 of those shares of stock were transferred to one David Knoller at a price of \$618.75, and the proceeds of the sale of that stock credited against the purchase price of the 320 shares, and that on October 17, 1928, pursuant to instructions of the defendant, the remaining 270 shares were sold by defendant to the plaintiff for a price which netted \$2,362.50, and this was credited to the defendant's account; and these two transactions, deducted from the purchase price of the 320 shares of stock, left a difference of \$938.75.

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He also testifies that on June 11, 1928, the plaintiff sold to the defendant 100 shares of United States Securities stock at 12, amounting to \$1,200, and

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Charge to Jury.

10 that on September 12 1928, the defendant resold to the plaintiff those 100 shares at a price which netted \$924.20. Deducting the resale price from the purchase price left a difference of \$275.10, due from the defendant to the plaintiff—making altogether, according to the plaintiff's claim, \$1,783.93, with interest which it is admitted need not enter into your consideration of this case, but which, if your verdict should be in favor of the plaintiff, will be agreed upon as to the amount between the attorneys, and added by the Court to the amount of the verdict which you shall render in favor of the plaintiff and against the defendant. if you do render a verdict in favor of the plaintiff and against the defendant.

20 The defenses introduced in this case are, first, what is usually called the Statute of Frauds. We have in this State what is known as a Sales Act, Uniform Sales Act, which is in force in most of the States, certainly of the East, and I think in most parts of the United States, the fourth section of which provides: "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards"—and all of these transactions involve more than five hundred dollars—"shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." Admittedly there was nothing signed by this defendant charging him with any obligation under this sale; so the question upon the Statute of Frauds which you are to consider and decide is whether or not the defendant accepted part
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40 of the stock which was sold to him, or all of it; whe-

Charge to Jury.

ther he actually received the same or gave something in earnest to bind the contract.

Now, manifestly he gave nothing, because the evidence on the part of the plaintiff is that he did not pay for this stock or any part of it nor anything on account of the stock. So there is just one question there; that is, unless the sale of 50 shares to Knoller be on account of it—that is a matter which you may take into consideration, of course—but even that the defendant denies was any part of this transaction to which Mr. Dornbusch testifies—therefore the question is whether or not there was delivered to the defendant, and received by him, this stock or any part of it. 10

The undisputed proof is that this stock which the plaintiff claims was sold to the defendant was in a safe deposit box, presumably in the bank; that it was endorsed for delivery, that is to use the term Mr. Dornbusch uses, that it was in "street form," which means that the person to whom the certificate of stock was made out had endorsed it in blank, so that it might be delivered in that form to any purchaser. It had not actually been transferred even to the plaintiff corporation, Fenning, Dornbusch & Company, but was in such shape, Mr. Dornbusch says, that it could have been actually transferred upon the books of the company at any time; and that stock continued to remain in the safe deposit vault of the plaintiff company, never was changed in any form until after it was sold, and when it was sold it was then turned out to the new transferee. In other words, it was never in the name, distinctly in the name, of the defendant in this case but was always in shape, according to Mr. Dornbusch, and not denied by the defendant, that it might have been delivered to him and the transfer made upon the books of the companies which the stock represented. 20 30 40

Charge to Jury.

10 Notwithstanding the fact that there was no actual manual delivery of this stock to the defendant, it is insisted that there was a constructive delivery to him of the stock, and that is permissible. Where there is an offer of delivery, or where an offer of delivery is refused, and the person being charged with the delivery of the stock is told to retain that stock for the order of the person to whom it is sold there has then become a constructive delivery of that stock, and the person who is ordered to hold it becomes the bailee or agent of the purchaser of the stock. That is exactly what the plaintiff claims there was in this case: while there was not an actual delivery of the stock, it is claimed that the stock was at all times in shape for delivery; that at the time the stock was sold to the defendant, the defendant directed the plaintiff to hold the stock, and thereafter the plaintiff did continue to hold the stock, subject to the defendant's order, until it was actually sold.

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30 Now, if you believe, from the evidence in this case,—that is, the greater weight of the evidence in this case, because the burden of proof is upon the plaintiff to show by the greater weight of the evidence—that there was a constructive delivery by the plaintiff to the defendant of this stock, and that the defendant by what he said at that time constituted the plaintiff his bailee, his agent, for the purpose of holding that stock subject to his order—if you believe that that is shown by the greater weight of the evidence in this case, then this case is taken out of the Statute of Frauds, and the mere fact that there was no order in writing for this stock does not prevent the plaintiff in this case from recovering the value of that stock, or the difference between the charge of the stock to the defendant and what the plaintiff realized upon it, if it was an order to sell.

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Charge to Jury.

However, the defendant goes much farther than that. The defendant says there never was an order to buy that stock, that he never gave an order to buy that stock, and if he never did then these confirmations that were sent to him amount to nothing. Of course, you may consider these confirmations, which, if he received and made no protest, said nothing may bear upon Mr. Dornbusch's testimony that there was an order and the defendant's denial that there ever was an order; but the defendant says, as to at least one of these confirmations, that immediately upon receiving this confirmation he went to Mr. Dornbusch and protested against it. Of course, if he did, that is a matter for you to take into consideration in determining whether or not he gave such an order.

The burden of proving that there was a sale is upon the plaintiff. That must appear by the greater weight of the evidence before the defendant can be charged with this stock. The defendant admits, as I say, having received this one confirmation, at least—whether others or not you will have in mind when you go to the jury room—and his explanation is that he protested against it.

Now, there is another transaction between them, and that transaction was with reference to the Public Fire Insurance stock.

As to the next transaction, 320 shares of Essex Plate Glass stock, which Mr. Dornbusch says was sold to the plaintiff on June 7th, the defendant says that in May he had purchased 200 shares of that stock from the plaintiff, and that instead of sending to him the 200 shares the plaintiff had sent to him 500 shares, which, through some kind of a mistake in the bank, he had received; and it appears beyond question that 50 shares of that kind of stock, Essex

Charge to Jury.

10 Plate Glass stock, was delivered to a broker named Knoller subsequent to that time, and Mr. Dornbusch says that that was upon the order of the defendant, to sell from that 320 shares this 50 shares of stock. If it was, that may be strong corroboration of the purchase by the defendant of that 320 shares; but the defendant says that this is not the way that it occurred at all. He says that out of this 500 shares which he already had, he had sold 250 shares, all of his certificates were in 100-share lots, and that he had delivered 200 shares to the purchaser, and rather than break up the 100-share lots, or for his convenience, he went to the plaintiff and purchased a 50-share lot for delivery, and that the arrangement between them was that if stock was purchased for less than he had sold it to his customer for, if the plaintiff had received the proceeds for the sale of the 50 shares, the proceeds, so far as the amount of his purchase price of the plaintiff, should be credited to his account and that account extinguished, and the \$12.50 difference should be paid to him. That is his explanation of that.

As to the last transaction, the 100 shares of United States Securities Company, the defendant says that there never was any such transaction.

30 Now, gentlemen, as I say, the burden of proving that these transactions were had between the plaintiff and the defendant is upon the plaintiff, and even though you find that the Statute of Frauds would not apply to this situation, yet unless the greater weight of the evidence shows that there were these purchases by the defendant and these sales by him to the plaintiff, the plaintiff is not entitled to your verdict. If it does show, that these sales were made by the plaintiff to the defendant and the repurchases of them by the plaintiff were made from the defendant, then, to the extent that you decide that

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Charge to Jury.

these transactions were had between these parties, the plaintiff is entitled to your verdict.

As I say, you need not consider the subject of interest at all. That will be taken care of by the attorneys.

I guess that covers the situation.

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Mr. Schotland. Yes, sir.

(The jury retires.)

Mr. Schotland. I desire to note an exception to that portion of your Honor's charge dealing with what you said about "constructive delivery."

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Exhibits

Exhibit P-3

CONFIRMATION OF PURCHASE

FENNING, DORNBUSCH & CO.

Investment Securities

31 Clinton Street

Essex Building, Newark, N. J.

Mitchell 4500

10

October 17, 1928.

To

We have bought from Mr. M. Greenfield

42 Badger Avenue,

City

270 shs. Essex Plate Glass @ $8\frac{3}{4}$ \$2,362.50

D|FA

Fenning, Dornbusch & Co.

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Exhibit P-4

CONFIRMATION OF SALE

FENNING, DORNBUSCH & CO.

Investment Securities

31 Clinton Street

Essex Building, Newark, N. J.

Mitchell 4500

30

April 12, 1928.

To

We have sold to Mr. M. Greenfield

42 Badger Avenue,

City

For delivery at Del. Tuesday

100 shs. Federal Trust @ 158 \$15,800.00

CW

Fleming, Dornbusch & Co.

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Exhibits

Exhibit P-5

CONFIRMATION OF SALE

FENNING, DORNBUSCH & CO.

Investment Securities

31 Clinton Street

10

Essex Building, Newark, N. J.

Mitchell 4500

June 7, 1928.

To

We have sold to Mr. M. Greenfield

42 Badger Avenue,

City

For delivery at Lincoln National Bank

50 shs. Franklin Capital @ 19¼ \$962.50

Dorn|CW

20

Fenning, Dornbusch & Co.

Exhibit P-6

CONFIRMATION OF PURCHASE

FENNING, DORNBUSCH & CO.

Investment Securities

31 Clinton Street

Essex Building, Newark, N. J.

30

Mitchell 4500

May 29, 1928.

To

We have bought from Mr. M. Greenfield

42 Badger Avenue,

City

75 shs. Public Fire @ 30 \$2,250.

tax08

\$2,249.92

Dorn|CW

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Fenning, Dornbusch & Co.

Exhibits

Exhibit P-7

CONFIRMATION OF SALE

FENNING, DORNBUSCH & CO.

Investment Securities

31 Clinton Street

Essex Building, Newark, N. J.

Mitchell 4500

10

June 7, 1928

To

We have sold to Mr. M. Greenfield

42 Badger Avenue,

City

320 shs. Essex Plate Glass @ $12\frac{1}{4}$ \$3,920.

Dorn|CW

Fenning, Dornbusch & Co.

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Exhibit P-8

CONFIRMATION OF PURCHASE

FENNING, DORNBUSCH & CO.

Investment Securities

31 Clinton Street

Essex Building, Newark, N. J.

Mitchell 4500

30

October 17, 1928

To

We have bought from Mr. M. Greenfield

42 Badger Avenue,

City

270 shs. Essex Plate Glass & $8\frac{3}{4}$ \$2,362.50

D|FA

Fenning, Dornbusch & Co.

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Exhibits

Exhibit 9

CONFIRMATION OF PURCHASE

FENNING, DORNBUSCH & CO.

Investment Securities

31 Clinton Street

Essex Building, Newark, N. J.

Mitchell 4500

September 12, 1928.

10

To

We have bought from Mr. M. Greenfield

42 Badger Avenue,

City

100 shs. U. S. Securities @ $9\frac{1}{4}$ \$925.

Les Tax..... .10

20

\$924.90

Dorn|CW

Fenning, Dornbusch & Co.

Exhibit 10

CONFIRMATION OF SALE

FENNING, DORNBUSCH & CO.

Investment Securities

31 Clinton Street

Essex Building, Newark, N. J.

Mitchell 4500

April 12, 1928.

30

To

We have sold to Mr. M. Greenfield

42 Badger Avenue,

City

110 shs. Public Fire @ $33\frac{3}{4}$ \$3,712.50

FA

40

Fenning, Dornbusch & Co.

Exhibits

Exhibit 11

CONFIRMATION OF SALE
FENNING, DORNBUSCH & CO.

Investment Securities

31 Clinton Street

Essex Building, Newark, N. J.

Mitchell 4500

10

June 12, 1928.

To

We have sold to Mr. M. Greenfield

42 Badger Avenue,

City

100 shs. U. S. Securities $\frac{1}{2}$ 12 \$1,200.

Dorn|CW

Fenning, Dornbusch & Co.

Exhibit 12

20

CONFIRMATION OF PURCHASE

FENNING, DORNBUSCH & CO.

Investment Securities

31 Clinton Street

Essex Building, Newark, N. J.

Mitchell 4500

Oct. 17, 1928.

To

We have bought from Mr. M. Greenfield

42 Badger Avenue,

City

35 shs. Public Fire @ $25\frac{1}{2}$ \$892.50

30

D|FA

Fenning, Dornbusch & Co.

Exhibit 13

SOLD TO

M. Greenfield

Waverly 4001

320 shs. Essex Plate Glass @ $12\frac{1}{4}$ \$3,920.

6|7

SalesmanD..... 40

Exhibits

Exhibit 14
BOUGHT FROM M. Greenfield
Waverly 4001
75 shs. Public Fire @ 30 \$2,250.
tax..... .08

10 \$2,249.92
SalesmanD.....

Exhibit 15
BOUGHT FROM M. Greenfield
Waverly 4001
35 shs. Public Fire @ 25½ \$892.50
SalesmanD.....

Exhibit 16
20 SOLD TO M. NEWMAN
35 shs. Public Fire @ 25½ \$892.50
Oct. 17

SalesmanD.....

Exhibit 17
SOLD TO M. NEWMAN
270 shs. Essex Plate Glass ½ 8¾ 2,160.
202.50

30 Oct. 17 \$2,362.50
SalesmanD.....

Exhibit 18
BOUGHT FROM M. Greenfield
Waverly 4001
270 shs. Essex Plate Glass @ 8¾ \$2,160.
202.50

40 \$2,362.50
SalesmanD.....

Exhibits

- Exhibit 19
BOUGHT FROM M. Greenfield
Waverly 4001
100 shs. U. S. Securities @ $9\frac{1}{4}$ \$925.
tax..... .10
\$924.90 10
Salesman D.....
September 12
-
- Exhibit 20
SOLD TO M. Greenfield
Waverly 4001
110 shs. Public Fire @ $33\frac{3}{4}$ \$3,712.50
April 12,
Salesman D..... 20
-
- Exhibit 21
SOLD TO M. GREENFIELD
42 Badger Avenue
100 shs. U. S. Securities @ 12 \$1,200.
June 12
Salesman D.....
-
- Exhibit D-1
FENNING, DORNBUSCH & CO. 30
Stocks of Financial Institutions
31 Clinton Street, Newark, N. J.
Telephones Mitchell 4000, 4501, 45
Cable Address "Fenndorn"
October 17, 1928
Mr. Morris Greenfield,
42 Badger Avenue,
Dear Mr. Greenfield:
In accordance with your instructions we have
finally completed the sale of the balance of the stock
we have been carrying for your account. 40

Exhibits

The deficit is \$1,783.93 and we must insist upon a check from you by return mail for this account. You surely can find no unreasonableness in our insisting upon this check immediately as we feel that we have been more than fair in continuing to carry your account in compliance with your many requests
 10 to hold off so as to give you an opportunity to settle.

Now that we have sold it we trust that you will not hold us up for this money.

Very truly yours,
 FENNING, DORNBUSCH & CO.
 A. H. Fenning,
 Vice President.

AHF/FA

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Exhibit D-2

BILDER & BILDER
 Counsellors-at-Law
 Offices

60 Park Place, Newark, N. J.

Mr. Morris H. Greenfield,
 42 Badger Avenue,
 Newark, N. J.

30 Dear Sir:

Fenning, Dornbusch & Co. of this city have consulted us with reference to a claim which they have against you in the sum of \$1,930.87.

We are instructed to institute suit against you unless settlement of said amount is promptly made with us.

Very truly yours,
 BILDER & BILDER.

WJB:ES

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Exhibits

Exhibit D-3

PHILIP J. SCHOTLAND
 Counsellor at Law
 9 Clinton Street., Newark, N. J.

October 3, 1929.

Bilder & Bilder, Esqs.,
 60 Park Place,
 Newark, N. J.

10

Gentlemen:—

In reply to yours of the 25th instant addressed to Morri sH. Greenfield regarding a claim of Fenning, Dornbusch & Co., I beg to advise that Mr. Greenfield claims that he did not purchase from your clients the stocks he is being charged with, and that he did not direct the sale of the same stocks to be made by your clients for his account.

If you have any records or orders or memorandums signed by him and will make an appointment to have me either come to your office and go over them ,or show them to me at my office, I will be very glad to talk about some adjustment; on the other hand, if Mr. Greenfield is correct in his claim made to me, why then, of course, I will have to advise him that he owes nothing and if your clients desire to recover, they would have to bring suit.

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I am writing this tone of letter because I know both Mr. Greenfield and your clients very well personally and if there is something in the claim notwithstanding what Mr. Greenfield says, I would be anxious to use my influence to bring about a settlement rather than to allow litigation.

30

Very truly yours,

S:P

PHILIP J. SCHOTLAND

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New Jersey Court of Errors and Appeals

Between

FENNING, DORNBUSCH & Co., a
corporation,

Plaintiff-Respondent,

vs.

MORRIS H. GREENFIELD,

Defendant-Appellant.

*Action
at Law.*

*On Appeal
from Essex
County
Circuit Court.*

BRIEF OF DEFENDANT-APPELLANT.

Facts.

This is an appeal by the defendant, Morris H. Greenfield, from a judgment in favor of the plaintiff, Fenning, Dornbusch & Co., rendered on a jury's verdict in the Essex County Circuit Court. The complaint and amended complaint filed by the plaintiff were framed in eight counts, but dealt with three transactions from which plaintiff's alleged claims arose. The first transaction was an alleged sale by plaintiff to defendant of 110 shares of Public Fire Insurance Company stock for \$3,712.50 on April 12, 1928. Certain things about this alleged sale are not in dispute: that no written memorandum of this sale was ever executed; that the defendant, Greenfield, never paid one cent for this stock, and that he never actually received into his possession a single share of this stock. Sigmund Dornbusch, an officer of the plaintiff corporation, and the person actually in charge of all the transactions involved in this suit, testified as to this alleged sale:

“By Mr. Bilder.

Q You were beginning to state the transaction which you say occurred on April 12, 1928? A Yes. We sold to Mr. Morris Greenfield 110 shares of Public Fire Insurance Company stock at \$33.75 per share.

Q Who made that sale? A I made the sale.

Q Where? A At my office.

Q The office of the plaintiff? A Yes, at the office of Fenning, Dornbusch & Company.

The Court: By ‘we’ do you mean Fenning, Dornbusch & Company?

The Witness: Yes.

Q Where was the defendant at the time of this transaction? Where was he present, to your knowledge? A In my room.

Q What instruction, if any, did he give you at the time of the making of that purchase with reference to the stock? A Why, he was buying the stock—

The Court: No, what instructions did he give you?

The Witness: Instructions as to the delivery or—

Q Yes. A We had no delivery instructions, except that he asked us to keep the stock for him” (State of the Case, p. 35, ll. 35 to 40, and p. 36, ll. 1 to 26).

He further testified as to what his firm did in keeping the stock for Greenfield:

“A We did not transfer any stock to Mr. Greenfield’s name.

Q Did you assign any shares of stock that your firm or your corporation owned, on the back of certificates amounting to 110 shares, to Mr. Greenfield? A No, we always keep them in ‘street’ names.

Q Did you draw up any separate assignment to Mr. Greenfield of 110 shares owned by your corporation and have such an assignment executed by your officers? A No.

Q Then all you did, so far as this supposed sale of the 110 shares of stock is concerned, is this: Your corporation owned and controlled more than 110 shares of stock of the Public Fire, didn't you? A Not necessarily.

Q Well, did you? A I don't believe so.

The Court: 110 or more?

The Witness: 110 or more.

Q You did have 110 or more? A Right.

Q You did nothing to that stock? A No.

Q You left it in the same condition and position and place where it was? A No, we did not.

The Court: Let me ask you this: Was that stock, at the time of the sale to Mr. Greenfield, actually owned and in the name of your corporation?

The Witness: No, it was in a 'street' form, if you understand what 'street' form is. It may have been in your name—stock properly endorsed and good for delivery as many times as you want to make of the stock.

Q So all you did to the stock or, so far as this sale was concerned, was that you put through your books a charge against Morris H. Greenfield for 110 shares of Public Fire stock at \$33 a share? A That is right—\$33 and whatever the amount was.

Q The price you charged him? A Right."

(See State of the Case, p. 45, ll. 36 to 40, and p. 46, ll. 1 to 37.)

"By the Court.

Q And then, so far as any handling of the securities was concerned, as I understand you, this was a mere bookkeeping transaction; that is, the stock was in your safe deposit box? A That is right.

Q It was in 'street' form as you said? A Yes.

Q Properly endorsed for transfer? A Yes.

Q And that the stock continued to remain there, was not taken out, but that the transaction with Mr. Greenfield was, with that exception, a bookkeeping transaction, is that correct? A That is right, an account that we had.

Q An accounting transaction? A That is right.

Q Nothing at all was done with the stock itself? A No.

Q It was in the form in which it remained? A Except possibly when the delivery of fifty shares was made, if we did not have a fifty-share certificate we transferred it.

Q We are not talking about fifty shares, no question about that, because you admit having received more for that than the price paid; but with all this other stock, the stock remained, at the time you repurchased it, in your safe deposit box in precisely the same condition it was in when you had sold it to Mr. Greenfield? A Right.

Q Is that right? A That is right."

(See State of the Case, p. 54, ll. 20 to 40, and p. 55, ll. 1 to 11.)

To complete this transaction, Mr. Dornbusch testified that on May 29, 1928, his firm, the plaintiff herein, repurchased 75 shares of the stock and credited Mr. Greenfield with \$2,249.92 on his account (State of Case, p. 37, ll. 13 to 20), and that on October 17, 1928, his firm repurchased the remaining 35 shares for \$892.50, also credited on Greenfield's account (State of Case, p. 40, ll. 10 to 27), leaving a balance due of \$570.08, which plaintiff claimed from defendant on this alleged transaction. Plaintiff put in evidence as one of the eighteen documents in Exhibit P. 4 (State of Case, pp. 115-121, at p. 118, l. 28), the confirmation which it claimed to have sent Mr. Greenfield of his purchase from them on April 12, 1928; and also put in evidence as Exhibits P. 1 and

P. 2 (State of Case, p. 114), the confirmation of their purchases from him, dated May 29, 1928, and October 17, 1928. Exhibits P. 1 and P. 2 were the originals produced from the custody of the defendant at the trial, they having been demanded previously. Exhibit P. 4 was a collection of carbon copies of confirmations of sale and purchase, the originals of which plaintiff claimed to have sent to the defendant, all of which defendant denied receiving, except that one of April 12, 1928, for 110 shares of Public Fire Insurance Company. As to that confirmation, he testified that he immediately went down, on receiving it, and told Mr. Dornbusch that he knew he had made no sale, and that he should have sent no confirmation.

The answer of the defendant to this claim was a denial of any such purchase of stock and of any such resales of it; that such transactions never took place. As a separate defense reliance was put upon the Statute of Frauds.

The second transaction alleged by plaintiff was a sale of 320 shares of Essex Fidelity and Plate Glass stock, on June 7, 1928, at \$12.25 per share, amounting to \$3,920.00. On page 117 of the State of Case is found a copy of the confirmation of this sale, alleged to have been sent to the defendant. This transaction was described very much like that of April 12, 1928, by Mr. Dornbusch:

"A Yes, 320 shares of Essex Plate Glass at \$12.25 a share, which he asked me to hold for him" (State of Case, p. 41, ll. 22-24).

Plaintiff accounts for the disposal of these 320 shares as follows: 50 shares delivered to Knoller & Company, at defendant's order, on June 15, 1928, received from Knoller & Company \$618.75; 270 shares repurchased by plaintiff on

October 17, 1928, for \$2,362.50, both of which sums were credited on the alleged indebtedness, leaving a balance claimed by plaintiff of \$938.75 (State of Case, p. 42, ll. 18-35). There was no memorandum of this transaction signed by defendant, no payment by him on this account, and no actual receipt by him of any of the stock. There was alleged to be the same "keep it for me" arrangement, the same mere book entry of sale and repurchase as in the alleged dealings in the Public Fire Insurance Company stock, except as to the 50 shares delivered to Knoller & Company.

The defendant pleaded the Statute of Frauds to this claim and denied that the whole transaction ever took place, except that he admitted that 50 shares of Essex Fidelity & Plate Glass stock were delivered by the plaintiff to Knoller & Company. This, he explained, arose out of a sale of 250 shares of this stock he had made to Knoller & Company out of 500 shares which he owned in 100-share certificates; that he had delivered 200 shares and was requested to deliver the other 50, and rather than take his 100-share certificate from his bank and have it split up at the transfer office, and knowing that the plaintiff had this stock which it was anxious to dispose of, he asked plaintiff to deliver 50 shares of their holdings to Knoller & Company, to take the check as payment, and turn over to him the small profit to be made on the transaction. This he claimed was the only dealing he had with plaintiff with reference to these shares. The 500 shares were previously purchased by him from the plaintiff, delivered and paid for at the rate of \$13.50 a share, and not involved in this suit.

The third transaction alleged by plaintiff was a purchase by the defendant of 110 shares of United States Securities Company stock on June 12, 1928, for \$1,200.00, and a repurchase from the defendant on September 12, 1928, of the same shares for \$924.90, leaving a deficit of \$275.10. Mr. Dornbusch claimed that he was requested to hold this stock also for the defendant:

“Q And what transaction occurred on that date? A We sold and Mr. Greenfield purchased 100 shares of United States Securities Company stock at \$12 per share.

Q What instructions, if any, were given to you by the defendant with reference to the delivery of that stock? A Mr. Greenfield asked us to hold the stock for him”
(State of Case, p. 43, ll. 30-37).

This claim is the same as the one first related concerning the Public Fire Insurance Company stock. The defenses interposed were the same.

It is to be noted that plaintiff does not claim to have acted as a broker in these transactions. Mr. Dornbusch made it clear that it bought and sold only on its own account, and that the transactions were not advances by a broker, and then selling out the account, but actual sales to defendant by plaintiff and repurchases from defendant by plaintiff, if they occurred at all.

“*By the Court.*

Q Do we understand or is it a fact that all of these authorized sales of stock by Mr. Greenfield, with the exception of those fifty shares transferred to Mr. Knoller were to your corporation, these sales were to your corporation? A Yes.

Q It was not a sale in the market? A No. We are not commission brokers; we are dealers. We charge no commission. A sale is made to us. If there is a profit on it we charge the profit to the purchaser.

Q In other words, these sales came from your corporation and the sales back were to your corporation? A Exactly" (See State of Case, p. 52, ll. 26 to 39).

These three alleged deficits constitute plaintiff's claim, totalling \$1,783.93, which, with interest from October 17, 1928, the date of the demand for this amount, totalled \$1,942.80, for which sum, with costs, the judgment appealed from was entered.

ARGUMENT.

I.

The first ground of appeal to be argued by defendant-appellant, is:

Because the Court erred in charging the jury:

"Where there is an offer of delivery, or where an offer of delivery is refused, and the person being charged with the delivery of the stock is told to retain that stock for the order of the person to whom it is sold there has then become a constructive delivery of that stock, and the person who is ordered to hold it becomes the bailee or agent of the purchaser of the stock. That is exactly what the plaintiff claims there was in this case; while there was not an actual delivery of the stock, it is claimed that the stock was at all times in shape for delivery; that at the time the stock was sold to the defendant, the defendant directed the plaintiff to hold the stock, and thereafter the plaintiff did continue to hold the stock, subject to the defendant's order, until it was actually sold.

Now, if you believe, from the evidence in this case—that is, the greater weight of the evidence in this case, because the burden of proof is upon the plaintiff to show by the greater weight of the evidence—that there was a constructive delivery by the plaintiff to the defendant of stock, and that the de-

defendant by what he said at that time constituted the plaintiff his bailee, his agent, for the purpose of holding that stock subject to his order—if you believe that that is shown by the greater weight of the evidence in this case, then this case is taken out of the Statute of Frauds, and the mere fact that there was no order in writing for this stock does not prevent the plaintiff in this case from recovering the value of that stock, or the difference between the charge of the stock to the defendant and what the plaintiff realized upon it, if it was an order to sell” (State of Case, p. 2, l. 40, and p. 3, ll. 1 to 40).

Exception was duly taken to this charge, and noted on the record (State of Case, p. 113, ll. 15-17).

That charge admirably states the theory upon which this suit was started and tried by plaintiff, and considered by the learned trial judge. The question fundamentally at issue here is answered by the approval or disapproval of that charge.

It was not denied at the trial of this action that a contract for the sale of stock of the value of \$500.00 or over is within the Statute of Frauds, as enacted in the Uniform Sales Act (Compiled Statutes, 1910 Ed., Vol. 4, p. 4648, Section 4).

“Sec. 4. STATUTE OF FRAUDS—(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.”

This has been the interpretation put upon the Act in other states.

DeNunzio v. DeNunzio, 90 Conn. 342; 97 Atl. 325;

Fair Association v. Phillips, 328 Ill. 368; 159 N. E. 815;

Davis v. Arnold, 165 N. E. (Mass.) 885.

Our courts had generally indicated that would be the decision when the question arose here, *French v. Schoonmaker*, 69 N. J. L. 6; 54 Atl. 225, and it has been so decided lately by the Supreme Court.

Allen Schiffman & Co. v. Burnson, 8 Misc. Rep. 1; 148 Atl. 153.

In that case the payment of interest on the indebtedness was not considered sufficient to take the contract out of the Statute because it was not a payment of earnest, not being a payment of the purchase price. The Court said:

“* * * There was no written contract of sale, and, hence, under section 4 of the Sales act (Comp. Stat., p. 4648), as the price of the stock sold was in excess of \$500 the contract was not enforceable by action unless the goods or part thereof had been delivered and accepted, which was not the fact, or unless the buyer had given something in earnest to bind the bargain or in part payment. In this aspect it was admitted that after some time the buyer had paid plaintiffs \$18.65 for interest on the balance carried on their books. In our judgment, that payment does not take the case out of the statute. The check for interest was neither earnest nor part payment, nor did it on any other ground take the case out of the statute.”

It is submitted that this decision is a correct exposition of the law, that shares of stock as well as any other chattel are within the Statute.

As stated before, this case was tried, recognizing the full authority of the above decision of the Supreme Court as binding on the Circuit Court. It is admitted that there was no written memorandum signed by the defendant; also that nothing was given in earnest to bind the contract, or in part payment. The plaintiff, however, claimed that the buyer, the defendant herein, "accepted and actually received" the stock alleged to have been sold, by asking the plaintiff to hold it for him. As it was put by the learned trial judge:

"Where there is an offer of delivery, or where an offer of delivery is refused, and the person being charged with the delivery of the stock is told to retain that stock for the order of the person to whom it is sold, there has been a constructive delivery of that stock, and the person who is ordered to hold it becomes the bailee or agent of the purchaser of the stock."

with the result stated further on—

"* * * then this case is taken out of the Statute of Frauds" (State of Case, p. 110, ll. 8-16, and ll. 34-35).

This doctrine of constructive delivery is maintained by Mr. Elliott in his book on New Jersey Law of Sales, page 111—

"Notwithstanding the presumptions to the contrary, there may be a delivery and receipt of goods sufficient to comply with the provisions of the Statute, although the goods are left in the seller's possession if it clearly appears that all the terms of the contract have been agreed upon and that the buyer has placed the goods in the seller's possession as his bailee or agent."

but he cites no New Jersey cases in support. It is also stated in 27 Corpus Juris, at page 247, Section 280—

“Although the goods remain in the possession of the seller, yet there may be a receipt by the buyer if the seller ceases to hold as owner and agrees to hold as the bailee of the buyer with his consent; *but to constitute a receipt in such a case the seller must have lost his lien for the price.*”

and cases from other states are there cited to support the statement, some of which are discussed below.

The contention of defendant-appellant is that such a doctrine is not the law of New Jersey. The Statute of Frauds was meant to prevent cases just such as this one, where large claims are made against a party, based wholly on **words**, *no writing, no act of payment, no act of acceptance and receipt*, nothing but the word of the plaintiff and his witnesses, denied by the defendant. The Statute is sometimes used as a technical defense to escape a moral obligation; but be that as it may, it stands on the books and its very title directs it against parties plaintiff. Over one hundred years ago an effort was made to judicially repeal the Statute by deciding that the seller could testify that the buyer asked him to sign the buyer's name for him as his agent. This attempt to throw everything back into parol was summarily dealt with in one short sentence by Lord Ellenborough in the case of *Wright v. Dannah*, 2 Campb., 203.

“Lord Ellenborough said the agent must be some third person, and could not be the other contracting party.”

This decision was followed by our Supreme Court in an opinion by Mr. Justice Depue, in *Johnson & Miller v. Buck*, 35 N. J. L. 338. It

is submitted that the same attempt is being made again in the instant case. To adopt the doctrine that the plaintiff must testify not merely that "he bought it from me" but "that he bought it from me and asked me to keep it for him" is, it is submitted, to repeal the Statute of Frauds. This State has not adopted any such doctrine.

In the case of *Bauer v. Victory Catering Co.*, 101 N. J. L. 364, 128 Atl. 262, the facts were as follows: the defendant orally ordered \$8,000 worth of table silverware to be initialled with the defendant's initial, delivery in three shipments. The first shipment was not delivered on time, and defendant wrote that since it was not yet delivered it should be held for further instructions. Instructions were never given, and the goods had to be resold by plaintiff on the open market at a loss, for which suit was brought. This court reversed a judgment for the plaintiff, entered in the Supreme Court, stating, that the sale was within the Statute of Frauds, that the letter written by defendant requesting that the goods be held, not containing the full terms of the contract, was not a sufficient memorandum to satisfy the Statute, and that a verdict should have been directed for the defendants.

It is submitted, that that case, where not only was it clear that the defendant had ordered the goods, but that he had requested that they be held for him, was a very strong case for applying the doctrine of "constructive delivery." The failure to apply it led to a reversal, whereas a judgment will always be affirmed even if the reasoning used below be erroneous. The doctrine was not even mentioned by the learned justice who delivered the opinion for this Court, Mr. Justice Katzenbach, and this very silence in a case where morally there can be no doubt that

the defendant had given the order, and where *the request to hold the goods was in writing*, can only be attributed to the fact that this Court refused to subscribe to the doctrine of "constructive delivery." Our Supreme Court, in the case above cited, of *Allen Schiffman & Co. v. Burnson*, 8 Misc., 1, 148 Atl. 153, where the *conduct* of the defendant not only proved the purchase and the request to hold, but the payment of interest proved defendant paid for having the request to hold granted, held:

"The check for interest was neither earnest nor part payment, *nor did it on any other ground* take the case out of the Statute."

thus positively repudiating the theory adopted by the learned trial judge in the instant case.

Even if there were such a doctrine that the seller may be told to hold the goods as the bailee of the buyer, and if he does so, the case is taken out of the Statute, there are certain limitations put upon it by the courts that adopt it. In *Shindler v. Houston*, 1 N. Y. 261, the Court of Appeals of New York, in a leading case on the question, limited it to cases of acts, not mere words.

Bronson, *J.*—"Mere words of contract unaccompanied by any act, cannot amount to a delivery. To hold otherwise would be repealing the statute."

Wright, *J.*—"So far as I have been able to look into the numerous cases that have arisen under the statute, the controlling principle to be deduced from them is, that when the memorandum is dispensed with, the statute is not satisfied with anything but the unequivocal acts of the parties; not mere words that are liable to be misunderstood and misconstrued, and dwell only in the imperfect memory of witnesses."

In *Castle v. Swift & Co.*, 104 Atl. (Md.) 187, the Court of Appeals of Maryland held:

“It was not only necessary to find that the eggs were placed in the cooler, but it was also to be found that by so doing the unrestricted control of the eggs passed to the buyer, and that such was the intention of the parties.”

Examining the testimony in this case, it is apparent that the whole transaction was at best *mere words*, that the plaintiff itself never acted except to make bookkeeping charges against the defendant, that the unrestricted control of the stock was clearly not put into the defendant:

“The Court: Let me ask you this: Was that stock, at the time of the sale to Mr. Greenfield, actually owned and in the name of your corporation?”

The Witness: No, it was in a ‘street’ form, if you understand what ‘street’ form is. It may have been in your name—stock properly endorsed and good for delivery as many times as you want to make of the stock.

“Q So all you did to the stock or, so far as this sale was concerned was that you put through your books a charge against Morris H. Greenfield for 110 shares of Public Fire Stock at \$33 a share? A That is right—\$33 and whatever the amount was.

Q The price you charged him? A Right” (State of Case, p. 46, ll. 23 to 37).

“Q It was in the form in which it remained? A Except possibly when the delivery of fifty shares was made, if we did not have a fifty-share certificate we transferred it.

Q We are not talking about fifty shares, no question about that, because you admit having received more for that than the price paid; but with all this other stock, the stock remained, at the time you repurchased it, in your safe deposit box in precisely the same

condition it was in when you had sold it to Mr. Greenfield? A Right.

Q Is that right? A That is right” (State of Case, p. 54, ll. 37 to 40, and p. 55, ll. 1 to 11.)

It is submitted that it was error therefore for the learned trial judge to charge—

“Now, if you believe from the evidence in this case, * * * that there was a constructive delivery by the plaintiff to the defendant of this stock, and that the defendant *by what he said at that time* constituted the plaintiff his bailee, his agent, for the purpose of holding that stock subject to his order— if you believe that that is shown by the greater weight of the evidence in this case, then this case is taken out of the Statute of Frauds * * *” (State of Case, p. 110, ll. 24 to 34).

It is respectfully submitted that the doctrine of “constructive delivery” is not law in New Jersey, at all, and that even if this Court should recognize it as restrictedly adopted in some other jurisdictions, that this charge went to the length of making mere words, without any contemporaneous acts, without any change in the control of the chattel, a sufficient delivery, and that this was error and would be held to be error even in the states subscribing to the doctrine of “constructive delivery.”

II.

The second and third grounds of appeal will be argued together.

2. Because the Court erred in denying the motion of the appellant for a non-suit.

3. Because the Court erred in denying the motion of the appellant for a direction of a verdict in favor of the defendant-appellant (State of Case, p. 2).

Exceptions were duly taken to both these denials and noted on the record (State of Case, p. 75, ll. 24 to 27; p. 106, ll. 21 to 23).

In the discussion of the first point, the doctrine of "constructive delivery" was set forth and it was on this theory that this case was allowed to go to the jury. Defendant-appellant's motions for non-suit and a direction were both denied. It must be admitted that if the doctrine is not law in this state, if the case cannot be taken out of the Statute of Frauds by the seller being told to hold the stock for the buyer, then clearly both these motions should have been granted. And defendant-appellant maintains even if it is the law that the Statute is satisfied if the seller holds the goods for the buyer as bailee, the plaintiff did not prove any such case. It is to be remembered that in this case we are not dealing with ordinary chattels but with shares of stock. Assuming there is no distinction, did the plaintiff hold these shares as bailee for the buyer? From the testimony that has been quoted above, (State of Case, p. 45, ll. 36 to 40; and p. 46, ll. 1 to 37; and p. 54, ll. 20 to 40; and p. 55, ll. 1 to 11), it is clear all the shares in question were indorsed in "street form"; that is, really in blank and possession would constitute title. They lay with many other shares of stock of the same and different companies in the plaintiff's safe deposit box. They were untouched when allegedly sold to defendant and untouched when alleged to have been repurchased. Never separated, never specified and never ascertained, title could not pass to the buyer.

"Where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained" (Compiled Statutes, 1910 Ed., Vol. 4, p. 465, Sec. 17).

This was clearly not a sale of an undivided share of the goods. It was a certain number of shares of stock. To constitute a bailment there can be no question that the bailor must have a property right to certain specified goods. The cases which clearly point this out arise where delivery of grain and the like is made to warehouses and the question of sale or bailment is in dispute. The rule as laid down by the courts in such cases is:

“Thus, where logs are delivered to be sawed into boards or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title of the thing delivered vests in the manufacturer. We understand this to be a correct exposition of the law” (*Powder v. Burkhardt*, 97 U. S. 110).

In other words, there is no bailment unless the bailee must hold certain specified goods. In the instant case it is submitted the shares never were specified, to which fact the plaintiff's own witness testified.

Furthermore, the goods in question in this case were not ordinary chattels, but shares of stock. For the plaintiff to hold as a mere bailee, it is clear the defendant must have title. The question is, therefore, did he ever get title? The Uniform Stock Transfer Act (Compiled Statutes, 1911 Ed., Vol. 1, p. 690, Sec. 1) provides:

“Title to a certificate and to the shares represented thereby can be transferred only,
(a) By delivery of the certificate in-

dorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent."

The plaintiff owned the certificates because they had been delivered to it indorsed in blank. It neither delivered them to the defendant, nor indorsed them to him, nor executed a separate writing assigning them to him, nor even separated them from its own shares. The difficulty of transferring title arising under the Sales Act, because of failure to specify the shares, is many times increased by the Stock Transfer Act. That Statute provides the only methods to transfer shares of stock in New Jersey, and the plaintiff failed to comply with it. It is submitted that title never passed, that the plaintiff always held the shares as owner and never as bailee, and that it did not bring itself within the broadest application of the doctrine of "constructive delivery."

The Supreme Court of Errors, of Connecticut, in the case of *DeNunzio v. DeNunzio*, 90 Conn., 342, 97 Atl. 323, decided that even the transfer of the entire control and management of the corporation was not a "constructive delivery" sufficient to satisfy the statute.

"We recognize also that there may be a constructive delivery and acceptance, unaccompanied by a manual delivery or actual change of custody, resulting from acts and conduct from dealing with goods when there has been a change in the relation of the parties to the goods. *Devine v. Warner*, 75 Conn. 380, 53 Atl. 782, 96 Am. St. Rep. 211; *Garfield v. Paris*, 96 U. S. 557, 24 L. Ed. 821; note, 49 Am. Dec. 329, 334. The same principle applies to the transfer of a chose in action * * * and we have held that mere words will not constitute an acceptance and receipt sufficient to satisfy the statute of fraud. We find one instance where the reasoning of the trial court has been adopted by a court of last resort, *Ford v. Howgate*, 106 Me. 522, 76 Atl. 939, 29 L. R. A. (N. S.) 734. The case is distinguishable from this in that no certificate of stock had ever been issued. Aside from that, we cannot concur with the Maine Court that the transferee could have done nothing more significant to show his ownership of the stock interest than to enter into the management of the corporation as an owner. Suppose thereafter the transferer had assigned his stock to a purchaser in good faith, and he had presented his certificate to the corporation for transfer. What was there about the fact of the management of the corporation by the first purchaser which would have charged the last purchaser with notice of it, or of the first purchaser's existence? It is important to corporate management that transfers of stock be made in an orderly manner. An observance of the requirements of the statute of frauds as interpreted by our court will accomplish this desirable end.

It is as essential that a transfer of stock should be supported by written evidence as a transfer of goods. Williston on Sales, Sec. 67."

Applying the reasoning of that decision to the instant case, we find: (a) the attempt to evade the statute in that case, was by oral testimony, which the court called "mere words," the same as here, except that that case was stronger for the plaintiff because the defendant assumed active management of the corporation as owner of the stock, while in the instant case there is no overt act and no conduct to help out the "mere words"; (b) the plaintiff was in a position at any time to sell and deliver the stock it claimed to have sold to the defendant, and the new buyer would get a good title without the defendant being required to do anything and without even knowing about the transaction.

The reasoning of the learned Connecticut Court very clearly and very strongly points out how the attempted evasion of the statute by "mere words" opens the door to opportunities as well as possibilities of perpetrating a fraud.

As to the 110 shares of Public Fire Insurance Company stock and the 100 shares of United States Securities stock, there was never anything which satisfied the Statute of Frauds. As to these two claims plaintiff made out no case of sale to the defendant of any stock, and no case of purchase from him; for he never retransferred the stock because it had never been transferred to him. It was never put into his control from which he had to return it. As to the claim arising from the alleged sale of 320 shares of Essex Fidelity and Plate Glass stock, there was no such sale proven by plaintiff. It never proved that it transferred such stock to

the defendant in any way, shape or form. The most it proved was that on June 15, 1928, it delivered to Knoller & Company 50 shares of Essex Fidelity and Plate Glass stock and was paid for them. This transaction stood alone, for not having proven any shares were sold to defendant and held for him, it was impossible to prove that the fifty shares delivered were defendant's fifty. He had no fifty.

The entire case illustrates the danger not only of the doctrine of "constructive delivery" but of the absolute disregard of all limitations on that doctrine. An entirely separate transaction, having no connection with anything else, can be moulded into a recognition of purchases and sales involving large amounts of money, resting solely in parol proof, and absolutely not disprovable by anything more than a vehement denial, which may be presented to the jury as a welching on a losing transaction.

There is here no dispute as to the facts of the alleged sale. There is no written memorandum, no payment of earnest, and no part of the goods have been accepted and delivered, and the alleged seller has not even held anything as bailee for the buyer, all of which facts are clearly proven on plaintiff's own case; there is therefore no question for the jury and the trial court should have directed a verdict for the defendant.

Bauer v. Victory Catering Co., 101 N. J. L. 364, 128 Atl. 262.

It is respectfully submitted that the motion for non-suit should have been granted, and that nothing appearing in the defendant's case to support the plaintiff's claim, the motion for a direction in favor of the defendant should have been granted.

III.

The last ground of appeal to be argued by defendant-appellant is:

“The learned trial judge erred in admitting in evidence, over the objection of the defendant, copies of so-called confirmations, prepared by the plaintiff and alleged to have been mailed to the defendant, which papers were marked in evidence as ‘Exhibit P. 4’” (State of Case, p. 2).

Exception was duly taken to this ruling and noted on the record (State of Case, p. 64, ll. 9-11).

This exception deals with the admission into evidence of two sorts of documents. Office slips of transactions supposed to have taken place between plaintiff and defendant, and carbon copies of confirmations made up on the basis of these slips and supposed to have been sent to defendant. Defendant's objection to these was not that they were copies and that the originals alone could be used (State of Case, p. 63, ll. 12-38). His objection was to the use of even the originals had they been offered, on the ground that they were self-serving declarations purely and simply. The plaintiff attempted to put its books of account in evidence. These were excluded (State of Case, p. 69). But he was allowed to put these slips from which the books were made up into evidence. These are papers made up by plaintiff's officers and employees, out of the presence of the defendant. There is absolutely nothing to prevent the creation of hundreds of these records. The defendant has no power to prevent this, nor to prevent plaintiff from mailing (if it did, as claimed) the originals of these confirmations to him. The one defendant admitted receiving, was followed

by his immediate protest. Even if he received the rest, could the plaintiff, at its whim, broadcast such confirmations and make it the duty of every receiver to send them a registered letter disclaiming liability on pain of being a party to a transaction which always ended up in plaintiff's favor? These slips, whether sent or not, were merely self-serving declarations by plaintiff, tending to build up its claim.

That self-serving declarations, as such, are inadmissible, is clear; that these are nothing more and equally inadmissible, is appellant's claim. The case of *Duysters v. Crawford*, 69 N. J. L. 614, 55 Atl. 823, is practically decisive of this question. In that case an attorney sued on an account stated for legal fees. He offered in evidence a letter he had written to the defendant's attorney four days after the purported agreement, setting forth the terms of the agreement. This letter was admitted over objection. The defendant's attorney answered this letter, disclaiming any knowledge of such a claim, and this letter was also put in evidence. The Supreme Court reversed a judgment for the plaintiff, saying:

"That such a self-serving declaration is inadmissible as evidence unless it constitutes a part of *res gestae*, or is made in the presence of the opposite party and is acquiesced in by him, is a principle so elementary as not to require any citation of authority in its support.

The defendant-in-error has not cited any authority in support of the admission of this evidence. The only semblance of justification is that the answer to the letter was put in with the letter itself. But the answer, as before stated, was offered by the plaintiff also, and therefore could not possibly have the effect suggested by the plaintiff. We think the admission of the letter was injuri-

ous error, and, since the result must be a reversal of the judgment, the other assignments of error need not be considered."

The parallel between that case and the instant case is apparent; in both most of the evidence was parol, in both the one document was plaintiff's creation and was a statement to the effect that "you owe me money," in both the effect of the one and only bit of documentary evidence was probably highly prejudicial, in the cited case the error was considered sufficiently harmful to cause a reversal, and it is submitted in the instant case the same result should follow. The effect of these confirmations on the jury can hardly be calculated. The Court charged:

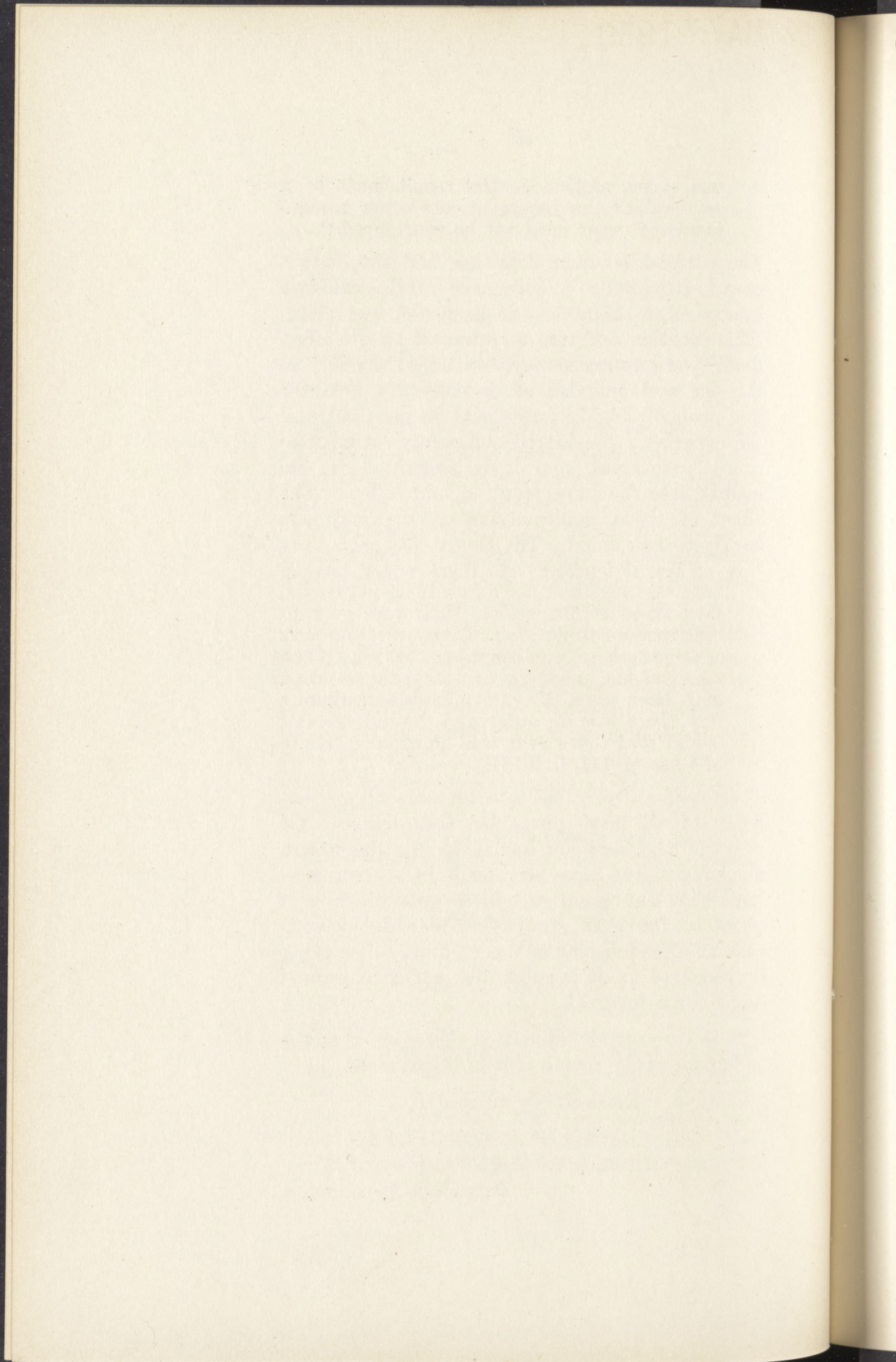
"The defendant says there never was an order to buy that stock, and if he never did, then these confirmations, that were sent to him, amount to nothing. Of course, you may consider these confirmations, which, if he received and made no protest, said nothing, may bear upon Mr. Dornbusch's testimony that there was an order and the defendant's denial that there ever was an order" (State of Case, p. 111, ll. 2-13).

These papers were the one tangible bit of evidence of all these purported transactions. Of course, they were not signed by the defendant, nor supposed to have been made in his presence, but they lent great weight to plaintiff's oral proofs. The great prejudice done defendant's case by the admission of these purely self-serving declarations, is, it is submitted, sufficient ground alone for a reversal.

It is respectfully submitted therefore, that the judgment under review should be reversed.

Respectfully submitted,

PHILIP J. SCHOTLAND,
Attorney for and of Counsel with
Defendant-Appellant.



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New Jersey Court of Errors and Appeals

FENNING, DORNBUSCH & Co., a corporation, <i>Plaintiff-Respondent,</i> vs. MORRIS H. GREENFIELD, <i>Defendant-Appellant.</i>	}	<i>Action at Law. On Appeal from the Essex County Cir- cuit Court.</i>
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REPLY BRIEF OF DEFENDANT-APPELLANT.

I.

Respondent in its brief has contended that the exception taken by appellant to the charge of the learned trial judge is legally insufficient and not available on this appeal. (Brief of plaintiff-respondent, pp. 5-8.) The argument made is that the exception to the charge did not clearly indicate to the learned trial judge the erroneous proposition to which it was addressed. The exception is

“I desire to note an exception to that portion of your Honor’s charge dealing with what you said about ‘constructive delivery’ ”
(State of Case, p. 113, ll. 15-17).

That portion of the charge is to be found on page 110 of the State of Case. It was set out as appellant’s fourth ground of appeal (State of Case, p. 2, l. 40, p. 3, l. 40). The very phrase “constructive delivery” is used therein three times (p. 110, l. 3, l. 13, l. 28) and at no other place in the charge. No other legal proposition, and no other thoughts are to be found in these excerpts. There can be no contention therefore that the trial court was misled by the exception

being to a portion of the charge containing several propositions, some of which were admittedly correct. The portion of the charge to which exception was taken laid down the doctrine of "constructive delivery" only. The whole case had been fought out over this question. On the argument on the very first objection (State of Case, p. 28) counsel for plaintiff-respondent put his whole case squarely on this rule.

"there can be a delivery to satisfy the requirements of the statute where the merchandise remains in the hands of the seller as the bailee of the buyer * * * that where the goods are left with the seller as bailee of the buyer the statute is satisfied that there is a constructive delivery" (State of Case, p. 28, ll. 15-20, and p. 29, ll. 30-33).

The motions for non-suit and direction of a verdict were argued on this proposition. Obviously, the rule cited by respondent from the case of *Mittlesdorfer v. West Jersey etc. Railroad Co.*, 77 N. J. Law 702 at 703

"The rule is that a general exception to a charge or a part of a charge containing several distinct and separate legal propositions will not be available. *Oliver v. Phelps*, 1 Zab. 597; *Potts v. Clarke*, Spenc. 536; *Associates, &c., v. Davison*, 5 Dutcher 415.

The doctrine is founded upon the inflexible rule that the party who objects in the course of a trial must bring his objection to the mind of the trial judge, so that the judge may correct erroneous expressions or explain what would otherwise mislead. Obviously, any such exception, while logically asserting the error of each of the propositions involved, is considered unavailable, because the objection has not been leveled at a specific and distinct error and the attention of the judge has not been called to the precise point of the objection. *Packard v. Bergen Neck Railway Co.*, 25 Vroom 553."

has no application in the instant case; for the reason for the rule (which is the portion omitted by plaintiff-respondent as indicated by the asterisks) is

“The rule is mainly established for the protection of the prevailing party. No party ought to be allowed to surprise or mislead his adversary, nor raise *here for the first time* a point which might have been obviated had it been made in the court below.”

The learned trial judge and respondent's counsel clearly understood wherein appellant considered the charge erroneous, and therefore it is submitted this ground of appeal is available to defendant-appellant.

Plaintiff-respondent also objects to the defendant-appellant arguing on this appeal the propriety of the rulings by the learned trial court on the motions for non-suit and direction of a verdict for defendant. In addition to again citing the case of *Mittelsdorfer v. West Jersey Railroad Co.*, 77 N. J. Law 702 to the same effect as above, he cites *Bingham, Jr. v. Schindel*, 72 N. J. Law 502 to the effect that a general motion to non-suit on several counts, one of which is good, is properly denied, and that on appeal the fact that some of the counts are insufficient cannot be raised.

In the instant case the trial was not conducted on the theory that one of the counts is differentiated from the others and that as to that count, the case is taken out of the Statute of Frauds by partial delivery and partial payment. No such point was made at the trial and the whole case was tried on the theory that if there was constructive delivery it takes the case out of the Statute of Frauds. This is clearly demonstrated by the Court's charge in reference

to that count appearing on page 111, line 32 to line 10, on page 112, of the State of the Case as follows:

“As to the next transaction, 320 shares of Essex Plate Glass stock, which Mr. Dornbusch says was sold to the plaintiff on June 7th, the defendant says that in May he had purchased 200 shares of that stock from the plaintiff, and that instead of sending to him the 200 shares the plaintiff had sent to him 500 shares which through some kind of a mistake in the bank, he had received; and it appears beyond question that 50 shares of that kind of stock, Essex Plate Glass stock, was delivered to a broker named Knoller subsequent to that time, and Mr. Dornbusch says that that was upon the order of the defendant, to sell from that 320 shares this 50 shares of stock. *If it was, that may be strong corroboration of the purchase by the defendant of that 320 shares.*”

And further respondent's counsel at the trial and upon argument as to the law involved in this case on page 28, lines 13 to 22, ^(State of Case) argued as follows:

“Mr. Bilder: If your Honor please, we rely upon the rule to the effect that, although a contract of sale is within the Statute of Frauds and there is no signed memorandum, there can be a delivery to satisfy the requirements of the statute where the merchandise remains in the hands of the seller as the bailee of the buyer and the buyer thereafter exercises dominion or control over the merchandise, and I have authority to that effect, and we propose to show that situation.”

thus indicating that his whole case stands or falls on that theory.

And in his reply to the motion for non-suit appearing at the bottom of page 74 and half of page 75 of the State of the Case also argued the constructive delivery theory and did not mention

or contend that any different situation existed as to one count.

It is therefore clear that the question of part delivery or part payment was not raised in the case and the motions for non-suit and direction of a verdict being addressed to the law of the case as presented at the trial are available on appeal.

II.

Plaintiff-respondent has cited many authorities to show that the doctrine of "constructive delivery" is recognized in other jurisdictions. Defendant-appellant did not deny this; but contended it is not law in this state at all, and cited *Bauer v. Victory Catering Co.*, 101 N. J. Law 364, a decision by this Court, as controlling. Respondent attempts to distinguish that case by stating that

"The sale was *not made on credit*. There was no receipt and retention by the buyer from the seller of a written confirmation of sale. There was no exercise of ownership by the buyer by directing the seller to hold the goods for him * * *." (Brief of Respondent, p. 18, H. 11-16.)

These distinguishing features do not exist. Nowhere in the opinion in that case is it stated that a cash transaction was contemplated. But on page 370 near the bottom of the page Mr. Justice Katzenbach, in pointing out why the letters written by the defendant were not a sufficient memorandum to take the case out of the Statute of Frauds, states that the letters did not mention

"the price and terms of credit."

Furthermore it is distinctly stated in the opinion at page 366,

“Three copies of the order were made. The original was given to Mr. Wyler.” (Mr. Wyler was president of the defendant corporation.) “The two copies were left in the order book.”

and further down on that page

“On that day it wrote a letter to the Gotham Company (plaintiff’s assignor) stating that part of the order given Mr. Wolferman, was to have been delivered between June 15th and July 1st and as the silverware had not arrived they had been obliged to make other arrangements, *and to please hold the order until notified to ship the same.* On July 15th, 1921, the Victory Company again wrote to the Gotham Company that they did not wish anything shipped to them until the Gotham Company received instructions.”

It is apparent therefore that in that case there was a receipt and retention of a confirmation of sale—not received through the mail as in the instant case—but received personally by defendant’s president; and also an exercise of ownership by requesting that the goods be held for defendant—not merely testified to by plaintiff as in the instant case—but in the defendant’s own letters. The only distinction between that case and the instant case is in the fact that that was a much clearer one for the application of the doctrine of “constructive delivery” and this Court did not apply it; whereas the Circuit Court did apply it to the instant case.

Plaintiff-respondent has objected to the argument that the goods must be specified. This same argument was made in the court below, though naturally in different language, in the arguments presented by counsel as to the effect

of the Uniform Stock Transfer Act (Compiled Statutes, 1911 Ed., Vol. 1, page 690, Sec. 1) on this case. It was then pointed out that certain stock must have been legally transferred to defendant to make possible any application of the doctrine of "constructive delivery." Moreover the necessity of having specified goods of which the seller may become bailee, in order to have the foundation for the doctrine of "constructive delivery" is made apparent by the very language in the cases cited by plaintiff-respondent in its brief.

Ex Parte Safford, 21 Fed. Cases 142, Case No. 12,212.

"if *specific goods* are fully agreed on and bought."

Castle v. Swarder, 158 English Reprints 341, 6 Hurlstone and Norman's Reports 828 at 834.

"The plaintiff appropriated *particular goods* to the defendant and sent him an invoice *specifying the goods so appropriated.*
* * * The goods were sold on credit, and it is incontestable that during six months *the buyer might have claimed these specific goods* * * * *for as soon as the goods had been specifically appropriated*"

and by the fact that every case cited in respondent's brief deals with specified goods.

Ex Parte Safford, 21 Fed. Cas. 142 certain lots of leather;

Swafford v. Pratt, 67 S. W. (Mo.) 701, an entire crop;

Janvrin v. Maxwell, 23 Wis. 51, 6 barrels of beef set apart from all others;

Marvin v. Wallis, 119 English Reprints 1035, one horse;

Bicknell v. Owyhee Sheep and Land Co., 176 Pac. (Idaho) 782, a shipment of sheep;

Beaumont v. Brengeri, 136 English Reprints 893, one carriage;

Bissell v. Balcom, 39 N. Y. 275, 15 head of cattle which were all that plaintiff owned; and in this case there were 2 part payments made after the contract was entered into;

Norwegian Plow Co. v. Hanthorn, 37 N. W. (Wisc.) 825, all the goods plaintiff had previously sold defendant and was now repurchasing.

It is submitted that these authorities establish conclusively, that plaintiff-respondent failed to maintain its case when its president admitted that all the shares of stock were in the plaintiff's safe deposit box in "street form," with many other shares, before the alleged sale to defendant-appellant and remained there untouched after the alleged sale.

III.

Plaintiff-respondent argues that the admission into evidence of "Exhibit P. 4" (State of Case, p. 64, ll. 24-25) was not reversible error; first, because, if error, it was not prejudicial, and secondly, because it was not error at all, they being part of the *res gestae*. The cases cited to prove this second reason disprove it.

Hunter v. State, 40 N. J. L. 495 at 539. Chief Justice Beasley quoting Mr. Wharton. "Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary, in this sense, that they are a part of the immediate preparations, for, or emanations of such act, and are not produced by the calculated policy of the actors."

Kupfersmith v. Law, etc. Insurance Co., 80 N. J. Law 432 at 435, Voorhees, J.

“Such declarations must be spontaneous, impulsive, and have been made during or shortly after the time of the occurrence which has inspired them, *so as to preclude the idea of deliberate design.*”

Defendant-appellant maintains that these confirmations were not spontaneous incidents of any act, they were “produced by the calculated policy of the actors” with “deliberate design.”

It was error to admit them and the very ground of admission stated by the learned trial judge in his ruling on them, shows that the purpose for which they were admitted; namely, to prove these purchases and sales by the receipt of these confirmations without complaint, was the very purpose for which they were inadmissible.

The case of *State v. MacForland*, 83 N. J. Law 474 cited by respondent is an authority establishing that it was error.

“Letters addressed to an individual and received by him are not to have the same effect as verbal communications. Silence in the latter case may authorize the inference of an assent to the statement made but not equally so in the case of a letter received but never answered or acted upon.”

and the case of *Hand v. Howell*, 61 N. J. L. 142 (cited therein) is to the same effect.

“Oral declarations made to one sought to be charged thereby may in some cases be considered as admitted by silence, *but the rule is otherwise as to letters. The recipient is not called on to reply or be considered as admitting what is written.*”

It was not only error, but it was highly prejudicial error, and not cured by that excerpt from the charge quoted on page 36 of respondent-

ent's brief, because the learned trial judge continued to say:

"Of course, you may consider these confirmations, which if he *received and made no protest, said nothing may bear on Mr. Dornbusch's testimony that there was an order and the defendant's denial that there ever was an order* (State of Case, p. 111, ll. 9-13).

which is precisely the effect the cited cases prohibit.

At the bottom of page 39 of respondent's brief the argument is made that:

"Testimony that defendant-appellant continued to buy stock from plaintiff-respondent after the date when he received said confirmations, is to be found in the State of Case, pages 65 to 67 and on pages 77, 78, 83, 84, 87, 88 and 89.

Where a party repeatedly receives confirmations of alleged sales of stock to him from a dealer in stocks which, as he later claims, were wholly fictitious and he continues to buy stock from such a dealer, that is certainly some evidence of an acquiescence by him in the truth of the statements contained in said documents within the above quoted rule."

The only evidence of these continued purchases from the dealer was that of the dealer himself. It is submitted that respondent argues in a circle when he supports the admission of these confirmations as merely cumulative to the oral testimony and therefore admissible, and then states that the confirmations support the oral testimony and nail the defendant down to the truth of the matters set forth in these confirmations. This argument demonstrates what happened to the defense once these exhibits were allowed into evidence.

It is respectfully submitted therefore, that the judgment under review should be reversed for the reasons stated in the original brief of defendant-appellant.

Respectfully submitted,

PHILIP J. SCHOTLAND,
Attorney and of Counsel
with Defendant-Appellant.

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NEW JERSEY COURT OF ERRORS
AND APPEALS

Between)	
)	
FENNING, DORNBUSCH & CO.,)	
a corporation,)	
)	
Plaintiff,)	
)	ON APPEAL
vs.)	
)	STIPULATION
MORRIS H. GREENFIELD,)	
Defendant.)	

It is hereby stipulated and agreed by and between the parties hereto that the amount of the verdict actually rendered by the jury in this case in the Essex County Circuit Court was for the sum of \$1,783.93, being the total amount of the damages claimed by plaintiff on the trial of this cause, without inclusion of interest, the jury being instructed by the Court that they should exclude interest in arriving at the amount of any verdict which they should find for plaintiff and being advised by the Court that the matter of interest "would be taken care of by the attorneys".

It is stipulated and agreed that thereafter the parties hereto, by their respective counsel, calculated the amount of the interest to be added to said verdict and agreed that the amount of such interest to be added should be the sum of \$158.87, and that the Clerk of the Court was advised to add such sum to the verdict so that same could be included in the postea.

BILDER & BILDER,
Attorneys of Plaintiff

PHILIP J. SCHOTLAND,
Attorney of Defendant.

82 MAY.T.1930

Between
MERRILL B. GUNDELWILL,
as
Plaintiff,
and
MERRILL B. GUNDELWILL & CO.,
a corporation,
Defendant.

NEW JERSEY COURT OF CHANCERY
AND APPEALS

ORAL DEPOSITION
OF MERRILL B. GUNDELWILL

[Faint, mostly illegible text, likely a deposition transcript or legal proceedings.]

MERRILL B. GUNDELWILL
MERRILL B. GUNDELWILL & CO.,
a corporation

New Jersey Court of Errors and Appeals.

Between

FENNING, DORNBUSCH & Co.,
a corporation,
Plaintiff-Respondent,

vs.

MORRIS H. GREENFIELD,
Defendant-Appellant.

ON APPEAL
BRIEF OF
PLAINTIFF-
RESPONDENT.

Statement of Facts.

Plaintiff-respondent brought this suit against defendant-appellant upon three separate and distinct transactions which are variously set forth in seven separate counts in plaintiff's amended complaint. Each of the three transactions consisted of sales of stock made by plaintiff-respondent to defendant-appellant on three separate dates, the sale being made in each case orally at plaintiff-respondent's place of business in Newark, New Jersey. There was no written memorandum of sale signed by the defendant-appellant in connection with any one of the sales, but in connection with one of the sales there was an actual delivery of part of the stock made by plaintiff-respondent to a third person, pursuant to the request and instructions of the defendant-appellant. This was in connection with the sale of 320 shares of Essex

Fidelity Plate Glass stock which were sold by plaintiff-respondent to defendant-appellant on June 7, 1928, and 50 shares of which were delivered by plaintiff-respondent eight days later, viz., June 15, 1928 to one, David Knoller pursuant to the request and direction of defendant-appellant. On the occasion of each of the three sales, defendant-appellant requested plaintiff-respondent to retain possession of the stock for him and upon subsequent occasions gave instructions to the plaintiff-respondent as to the resale of said stock with which instructions plaintiff-respondent complied. Plaintiff-respondent's testimony showed that the stock was sold by plaintiff-respondent to defendant-appellant *on credit*; that the stock was subject to defendant-appellant's order and control, and that the stock, standing in "street name" and being endorsed in blank (by such "street name") was in a condition to be dealt in and transferred by mere delivery. Plaintiff-respondent's testimony further showed that this stock was actually in plaintiff-respondent's possession at the time of the respective sales; that the stock sold in each case to defendant-appellant was actually in plaintiff-respondent's possession at the time of such sale and continued in plaintiff-respondent's possession during all times thereafter until the stock was subsequently disposed of pursuant to specific instructions from defendant-appellant to plaintiff-respondent in that regard.

At the trial of the case plaintiff-respondent proceeded as to each of the three transactions on the theory of a sale made by plaintiff-respondent to defendant-appellant in each case, thereby inferentially abandoning all of the other causes of action set forth in plaintiff-respondent's amended complaint. Thus, the causes of action upon which proof was actually made were the following con-

tained in plaintiff-respondent's amended complaint:

First Count (See State of Case pages 17
and 18)

Third Count (See State of Case pages 19
and 20)

Sixth Count (See State of Case page 22)

The amount of damages claimed by plaintiff-respondent in each of said counts respectively is as follows:

First Count—\$570.08

Third Count— 938.75

Sixth Count— 275.10

Plaintiff-respondent alleged and proved that all of the stock purchased by defendant-appellant as aforesaid was resold or disposed of by plaintiff-respondent for defendant-appellant and on defendant-appellant's order for a sum less than the agreed purchase price. The loss sustained in each case was as follows: \$570.08, \$938.75 and \$275.10, making the total loss on all three transactions or counts in the sum of \$1,783.93. The jury rendered a verdict in favor of plaintiff-respondent for said sum omitting any addition of interest in accordance with the court's instructions in that regard. (See State of Case, page 113, lines 6 to 8.) The following stipulation was entered into by the parties hereto after the State of the Case was printed:

“It is hereby stipulated and agreed by and between the parties hereto that the amount of the verdict actually rendered by the jury in this cause in the Essex County Circuit Court was for the sum of \$1,783.93, being the total amount of the damages claimed by plaintiff on the trial of this cause, without inclusion of interest, the jury being instructed by the Court that they should exclude interest in arriving at the amount of any verdict which

they should find for plaintiff and being advised by the Court that the matter of interest 'would be taken care of by the attorneys'.

It is stipulated and agreed that thereafter the parties hereto, by their respective counsel, calculated the amount of the interest to be added to said verdict and agreed that the amount of such interest to be added should be the sum of \$158.87, and that the Clerk of the Court was advised to add such sum to the verdict so that same could be included in the *postea*."

Said stipulation was filed with the Clerk of the Court of Errors and Appeals.

ARGUMENT.

In this argument the grounds of appeal will be taken up in the order in which they have been dealt with by counsel for defendant-appellant. The first ground of appeal discussed in his brief is ground numbered "4" in the "Grounds of Appeal". This ground of appeal deals with the exception taken by defendant-appellant to the trial court's charge to the jury. At the trial, counsel for defendant-appellant stated his exception as follows:

"I desire to note an exception to that portion of your Honor's charge dealing with what you said about 'constructive delivery'."

(See State of Case, p. 113, lines 16 to 18.)

It is our contention that such exception is legally insufficient or formally defective, and legally unfounded.

POINT I.

Defendant's said exception to the Court's charge is legally insufficient or formally defective.

The general and indefinite character of the defendant-appellant's exception to the court's charge is apparent. In the case of *Noyes v. State*, 41 N. J. Law 418, at page 429 the Court said:

“This is my understanding of these sentences, reading them in connection with those parts of the charge immediately sequent. The counsel puts a different sense upon them; and does not such disagreement present, in a shape very distinct, the illegality of an exception of this general character? No rule regulating the trial of causes is more valuable or more settled than the requirement that an exception to the judicial charge, to be legal, must be explicit. If the exception embraces several legal propositions, and any one of them be unexceptionable, the objection fails. Counsel must put his finger on the erroneous proposition, and thus point the mind of the judge to it; if he challenges any part of the charge in bulk, assigning no reason for such challenge, and a bill is allowed on the point, the risk of any legal ingredient being found in such bulk, is that of the party so excepting. The cases, including several of the decisions of our own courts, are conclusive with respect to this doctrine; and it therefore needs no discussion or further explanation. In its application to the present exception, it is entirely decisive, for, at the least, most of the propositions contained in that portion of the charge which was objected to, are indisputably correct. If, therefore any single instruction in this mass should appear to be erroneous, which I have said I do not think is the case, it could not have the effect of avoiding these proceedings. In neither aspect is this assignment of errors well laid.”

In the case at bar defendant-appellant's counsel obviously did not put his finger on any erroneous proposition in the court's charge which he intended to challenge, and hence his exception should not avail him on this appeal.

In the case of *Gannon v. Brady Brass Company*, (Court of Errors and Appeals), 82 N. J. Law 411, at page 415, the Court said:

“Moreover, counsel did not direct the attention of the trial court to the verbal criticism that he now advances. His exception was ‘to what your Honor said with regard to the right of the jury to find an implied contract from the language used by Mr. Brady to Mr. Onslow.’ This was in effect an exception to the whole charge, all of which was concerned in one way or another with the contract so described, but the point now made, viz., that the word ‘implied’ was improperly employed was in no way brought to the judge’s notice.”

In the case at bar defendant-appellant's counsel by his language similarly in effect took exception to the whole charge and did not specifically point out the particular language or statement in the court's charge to which he desired to take exception.

In the case of *Mittelsdorfer v. West Jersey, &c. R.R. Co.* (Court of Errors and Appeals) 77 N. J. Law 702, at page 703 the Court said:

“The rule is that a general exception to a charge or a part of a charge containing several distinct and separate legal propositions will not be available. *Oliver v. Phelps*, 1 Zab. 597; *Potts v. Clarke, Spenc.* 536; *Associates, &c., v. Davison*, 5 Dutcher 415.

The doctrine is founded upon the inflexible rule that the party who objects in the course of a trial must bring his objection to the mind of the trial judge, so that the judge may correct erroneous expressions or explain what

would otherwise mislead. Obviously, any such exception, while logically asserting the error of each of the propositions involved, is considered unavailable, because the objection has not been leveled at a specific and distinct error and the attention of the judge has not been called to the precise point of the objection. *Packard v. Bergen Neck Railway Co.*, 25 Vroom 553.”

* * * *

“An exception to a part of a charge containing various legal propositions must, therefore, single out and specify, one by one, the propositions objected to, and this may be done, as was said in *Potts v. Clark*, supra, ‘either by saying in the bill that the party excepts to so much of the charge as instructs the jury that the law is so and so, or by stating, by way of recital, the part of the charge excepted to, or by calling on the court to charge in a certain way, and if the court refuse to so charge, then by excepting to such refusal.’”

Defendant-appellant’s said exception is also defective in that it fails to state the ground or grounds of defendant-appellant’s exception. In the case of *Wood v. Public Service Corporation*, 74 N. J. Law 51, the Court said at pages 52 and 53:

“It might be well to call attention to another fact. No reasons were given for the motion for the direction of a verdict. There was simply a motion that a verdict be directed for the defendant. That is not good, and the refusal of the trial judge to grant it should not be reversed on error. A trial judge will not be reversed on writ of error except for refusal to act on specific grounds stated.”

In the case of *Garretson v. Appleton* (Court of Errors and Appeals) 58 N. J. Law 386, at page 391 the Court said:

“It is a fundamental rule in the administration of justice in courts of law, that the

point must be clearly stated in which the judge is supposed to err. 3 Bl. Com. *372. There can be no error alleged, unless either in the objection or the exception the point of law be stated, and certainly without this the exception cannot be allowed or disallowed, because there can be no matter to the exception."

At page 393:

"Every objection to be entertained in this court must have been taken, considered and decided by the court below. *Associates of the Jersey Company v. Daveson*, 5 Dutcher 415; *Hoey v. Lewis*, 10 Vroom 501, 507. The exception must be precise. *Conover v. Middleton*, 13 Id. 382, 383. The point must be embraced in the exception taken below. *Pennsylvania Railroad Co. v. Page*, 12 Id. 183. For further illustrations of the principles applicable, see *Engle v. State*, 21 Id. 272; *Ell. App. Pro.*, Sec. 325, 326, 327."

The exception is therefore defective in that it makes no distinction as to any of the three separate transactions and counts involved in this suit. It is arguable that a court's charge might be erroneous insofar as it affected certain counts in plaintiff-respondent's case, but not erroneous insofar as other counts which were not affected thereby.

**The Portion of the Court's Charge Set Forth in
the Fourth Ground of Appeal, when Con-
sidered in its Entirety, Contains a
Correct Statement of Law.**

The rule of law to which the Court referred is well recognized.

"Notwithstanding the presumptions to the contrary, there may be a delivery and receipt of goods sufficient to comply with the provi-

sions of the statute, although the goods are left in the seller's possession if it clearly appears that all the terms of the contract have been agreed upon and that the buyer has placed the goods in the seller's possession as his bailee or agent." (Elliott on Sales, page 111.)

"Although the goods remain in the possession of the seller, yet there may be a receipt by the buyer if the seller ceases to hold as owner and agrees to hold as the bailee of the buyer with his consent." (27 Corpus Juris, page 247.)

In the case of *Ex parte Safford*, 21 Fed. Cas. No. 12, 212 (Mass.), where goods were sold and credit extended for the purchase price, the Court said:

"I take it to be clear that by the laws of this state, and of the United States generally, as well as of England, if specific goods are fully agreed on and bought, and afterwards are sent to a warehouseman or carrier designated by the vendee, the statute is satisfied. *Ullman v. Barnard*, 7 Gray 554; *Cross v. O'Donnell*, 44 N. Y. 661; *Howes v. Ball*, 7 Barn. & C. 481; *Dodsley v. Varley*, 12 Adol. & E. 632.

There is no doubt that the vendor himself may be the warehouseman or bailee. This was decided in the leading case of *Elmore v. Stone*, 1 Taunt. 458. * * * The cases are many where a sale, or a mere offer to sell, or a request by the vendee to the vendor to sell on his account, and various other acts of ownership, have been held sufficient for that purpose, though the goods remained in the actual possession of the vendor, or a middleman. *Chaplin v. Rogers*, 1 East. 192; *Blenkinsop v. Clayton*, 7 Taunt. 597; *Marvin v. Wallis*, 6 El. & Bl. 726; *Castle v. Sworder*, 6 Hurl. & N. 828."

In the case of *Swafford v. Pratt* (Mo.) 67 S. W. 701, at page 702 the Court said:

“To constitute the receipt required by the statute, there must be shown a transfer of the possession of the goods by and from the seller to the buyer, either actually by manual delivery, symbolically by some substituted delivery, or constructively by a change in the nature of the seller’s subsequent holding. A constructive delivery is when, without actual transfer of the goods or their symbol, the conduct of the parties is such as to be inconsistent with any supposition than that there has been a change in the nature of the holding; and whether such a change has taken place is a question for the jury. Browne, Statute of Frauds, Sec. 318a, 319. And the question of whether or not there has been an acceptance is likewise a question for the determination of the jury, and circumstances of the slightest probative force may be submitted to it for that purpose. Browne, Statute of Frauds, Sec. 318a 319, 321.”

The case of *Janvrin v. Maxwell*, 23 Wis. 51, was a case in all respects similar to the case at bar. That case is as follows:

Defendant orally purchased goods from plaintiff and requested plaintiff to store goods for defendant. Later at the request of defendant, plaintiff sold some of the goods and credited the proceeds to defendant. The court said:

“In the following English cases the precise point under consideration has been thoroughly discussed; and they fully sustain the conclusion that there is nothing in the statute that prevents the vendor from becoming the bailee of the purchaser if the parties so agree. And this being so, it becomes then merely a question upon the evidence whether there was a delivery, an acceptance and a bailment. *Beaumont v. Brengeri*, 57 E. C. L. 301; Mar-

vin *v. Wallis*, 88 Id. 727; *Castle v. Sworder*, 6 Hurl. & Nor. 828 * * * The purchaser, therefore, gave directions for a specific disposal of the property, thus assuming control; and their directions were followed by the plaintiff."

The court held in favor of plaintiff.

The same principle is relied on by the Court in the case of *De Nunzio v. De Nunzio* (Supreme Court of Errors, Conn.) 97 At. 323, in the following language:

"We recognize also that there may be a constructive delivery and acceptance, unaccompanied by a manual delivery or actual change of custody, resulting from acts and conduct from dealing with goods when there has been a change in the relation of the parties to the goods. *Devine v. Warner*, 75 Conn. 380, 53 Atl. 782, 96 Am. St. Rep. 211; *Garfield v. Paris*, 96 U. S. 557, 24 L. Ed. 821; note 49 Am. Dec. 329, 334. The same principle applies to the transfer of a chose in action."

In the case at bar the defendant-appellant, after the oral purchase of the stock, received and presumably retained written confirmations of the purchase on the same day or the day following the purchase, subsequently gave instructions to the plaintiff-respondent to resell the said stock for defendant-appellant's account, and thereafter received and accepted from plaintiff-respondent written confirmations of such resale of said stock. These written confirmations of resale were produced by the defendant-appellant on the trial and were put in evidence without objection from defendant-appellant, being marked Exhibits P-1, P-2 and P-3. (See State of Case page 60, lines 18 to 36).

This certainly brings this case within the principle recognized in the foregoing case.

English

In the case of *Marvin v. Wallis*, 119 Reprints 1035, the facts were that plaintiff sold a horse to defendant. This was a bargain for immediate delivery. Plaintiff requested temporary loan of the horse. Defendant assented. Later defendant refused to take the horse. The Statute of Frauds was set up as a defense. In that connection, the Court said:

“Coleridge, J. P. 1038. The case of *Elmore v. Stone* (1 Taunt. 458) furnishes an answer to that question for there there was a removal of a horse from one stable of the vendor to another stable of the vendor; in the first of these the vendor kept his own horses, in the other the horses belonging to other people; so that the horse still continued in his apparent possession, but the character of the possession was altered. So here there is the apparent possession throughout, but the evidence shows that its character was changed. Much has been said as to whether the lien here was retained or not; but it seems to me that this is not material to the argument, and that the legal result arises only from the preceding part of the transaction. Had the plaintiff retained the horse in the character of an unpaid vendor, there would not have been a delivery.”

The court held for plaintiff. In the case at bar the sales were made by plaintiff-respondent to defendant-appellant on credit.

In the case of *Bicknell v. Owyhee Sheep & Land Co.*, (Supreme Court, Idaho), 176 Pac. 782, the Court said:

“The prevailing modern rule, and the one applicable to the facts before us, seems to be that: ‘Although the goods remain in the possession of the seller, yet there may be a receipt by the buyer if the seller ceases to hold as owner and agrees to hold as the bailee of

the buyer with his consent.' 20 Cyc. 250; Devine v. Warner, 75 Conn. 375, 53 Atl. 782, 96 Am. State Rep. 211, and extended note thereto; Rappleye v. Adey, 65 Bart (N. Y.) 589; Green v. Merriam, 28 Vt. 801; Janvrin v. Maxwell, 23 Wis. 51; Ex Parte Safford, 21 Fed. Cas. 142."

At page 784:

"While it is true that no act of a seller of personal property alone can constitute a delivery, taking the contract out of the Statute of Frauds, without a receipt and acceptance by the buyer, the act of the buyer of goods under a contract within the Statute of Frauds in offering to sell the goods which he has contracted to purchase, is such an act as constitutes an acceptance of the goods so as to take the contract out of the operation of the statute. Beedy v. Brayman Wooden Ware Co., 108 Me. 200, 79 Atl. 721, 36 L. R. A. (N. S.) 76; Ann. Cas. 1913 B. 273."

In the case at bar plaintiff-respondent's testimony showed that defendant-appellant had sometime after the sales to him instructed plaintiff-respondent to resell said stock and that thereafter received from plaintiff-respondent written confirmations of such resale made by plaintiff-respondent for defendant-appellant, and defendant-appellant actually produced these confirmations at the trial. They were marked in evidence, without objection from defendant-appellant, as Exhibits P-1, P-2 and P-3.

The case of *Castle v. Sworder*, 158 ^{English} Reprints, 341, was as follows: Plaintiffs kept a bonded warehouse and were rum merchants. Defendant agreed to buy from plaintiffs two puncheons of rum to remain on bond until wanted. Plaintiffs sent defendant invoices for the puncheons and entered on their warehouse-books the transfer. The

goods remained there two years during which time defendant asked plaintiffs to take back the goods or buy them. The court said:

“The plaintiffs appropriated particular goods to the defendant and set him an invoice specifying the goods so appropriated. Sometime after this, the defendant finding that it did not suit his convenience to keep the goods, proposed to plaintiffs’ traveller to take them back and wrote plaintiffs suggesting that they should do so. The question is, whether these facts amount to evidence of a constructive acceptance of the goods by the defendant. The important particular which has existed in several of the cases, viz. a lien on the part of the seller, which imports a right of possession incompatible with the possession of the purchaser, did not exist here. The goods were sold on credit, and it is incontestable that during six months the buyer might have claimed these specific goods. The first point then is, whether, upon these facts, the possession which the sellers retained was a possession by virtue of their original property, or as bailees of the buyer. I think there was evidence that the possession of the plaintiffs, which had originally been as owners and sellers had been converted into a possession by them as bailees for the buyer; for as soon as the goods had been specifically appropriated, the defendant, by virtue of his right as purchaser, evidenced by the terms of the invoice, availed himself of his right by having the goods warehoused in the general warehouse of the sellers, and by requesting the sellers to take back the goods and failing that to resell them for him. Under the contract he was entitled to have the goods warehoused for a certain period free of charge, and after that at a rent and he dealt with the goods as if they had been warehoused for him. This was a constructive possession in the buyer, and a constructive acceptance by him.”

In the case of *Beaumont v. Brengeri*, 136 ^{English} Reprints, 893, the Court said:

“If a man bargains for the purchase of goods, and desires the vendor to keep them in his possession for an especial purpose for the vendee, and the vendor accepts the order, this is a sufficient delivery of the goods within the Statute of Frauds.”

In the case of *Bissell v. Balcom*, 39 N. Y. 275, plaintiff agreed to sell 15 head of cattle then on his premises to defendant. Plaintiff promised to keep them on his land and pasture them as defendant directed. Defendant was to call for them as he pleased. Plaintiff obeyed defendant's instructions and maintained the cattle as directed. The defense of the Statute of Frauds was set up by defendant. The court said:

“The argument is by no means trivial, that the acts of the plaintiff, in removing the cattle to the place designated by the defendant, and the defendant's assumption of dominion over them, by directing their removal, submitted to by the plaintiff, warranted the jury in finding delivery and acceptance; that, although the cattle remained upon the premises of the vendor in his charge and keeping, yet, he no longer held them as owner, and had no control over them, except as bailee of the purchaser; that the character in which he held possession was changed, and therefore, as in *Martin v. Wallace* (37 Eng. L. & Eq. 6), the jury were justified in finding delivery and acceptance.” The Court also cited *Elmore v. Stone*, 1 Taunt. 458.

The Court found in favor of the seller.

The foregoing case is in all important respects precisely like the case at bar.

In the case of *Norwegian Plow Co. v. Hanthorn*, (Wis.) 37 N. W. 825, there was an oral sale of

goods. The merchandise was left in possession of the seller who gave therefore his written receipt, acknowledging that he held it subject to the buyer's order. In that immediate connection, the Court said:

“It would seem that the giving of a written receipt for the goods by Lints, acknowledging that he held the goods subject to the order of the Co., and the acceptance of such receipt by the company was a sufficient delivery, and acceptance of them by the company, to take the case out of the statute. *Benj. Sales Sec. 182* and cases cited in the notes to said section; *Janvrin v. Maxwell*, 23 Wis. 51; *Smith v. Bouck*, 33 Wis. 33; *Marvin v. Walles*, 37 Eng. Law & Eq., 6.”

In the case at bar the same legal effect should be given to the undenied receipt and presumable retention by defendant-appellant of written confirmations of sale made to him by plaintiff-respondent.

The defendant-appellant cites and relies upon the case of *French, Executrix v. Schoonmaker*, 69 N. J. Law, 6, (New Jersey Supreme Court). The court merely held that:

“A parol contract, whereby the defendant bargained for and agreed to purchase from plaintiffs' testator a claim against a third party on the consideration that said testator would put the claim in judgment and make an assignment of the judgment to the defendant, is invalid, under the sixth section of the statute of frauds (Gen. Stat. p. 1603), which declares that a contract for the sale of goods, wares and merchandise for the price of \$30 and upwards shall be void unless in writing.”

Defendant-appellant also cites and relies upon the case of *Allen Schiffman & Co. v. Burnson* (New Jersey Supreme Court) 148 Atl. 153. In

that case there was no evidence whatsoever of any constructive delivery and that point was not even mentioned. The case obviously is not in point.

The defendant-appellant relies upon the case of *Johnson & Miller v. Buck*, 35 N. J. Law 338. That case is wholly inapplicable. In that case the Court held that:

“A signature by the vendor or purchaser, of the name of the other, is not a sufficient signing.” (See page 342.)

The defendant-appellant cites and relies upon the case of *Bauer v. Victory Catering Co.*, 101 N. J. Law 364. In that case in order to satisfy the Statute of Frauds, the seller relied upon two letters written *by the buyer* to the seller, which the seller contended *constituted a sufficient memorandum* of sale to satisfy the Statute. The Court said at pages 370 and 371:

“The trial judge left to the jury the question as to the sufficiency of the letters to take the case out of the statute and the further question as to whether the writers of the letters had authority to bind the Victory Company. To take the case out of the statute the letters, or, at least, one of them, had, of course, to be written by one having authority to bind the sender, and also had to be a memorandum sufficient to satisfy the statute. If either of these elements were lacking then the case was within the statute. There was no dispute as to what the contents of the letters were. To satisfy the statute, however, the memorandum must contain the full terms of the contract. That is, the names of the buyer and seller, the subject of the sale, the price and terms of credit, and the conditions of sale, if any there be. *Johnson & Miller v. Buck*, 35 N. J. L. 338. A perusal of the letters written by the Victory Company to the Gotham Company show that they do not comply with these

requirements. Since the letters fall short of the requirements necessary in a memorandum in writing signed by the party to be charged, it was unnecessary to determine whether the writers thereof had authority from the Victory Company to write and sign them."

No contention was made as to there having been a constructive delivery of the goods to satisfy the Statute. Hence the case is inapplicable. On the facts, however, that case is readily distinguishable from the case at bar. The sale was *not* made *on credit*. There was no receipt and retention by the buyer from the seller of a written confirmation of sale. There was no exercise of ownership by the buyer by directing the seller to hold the goods for him and by subsequently directing the seller to resell or dispose of the goods for him. Indeed in the cited case, a change of ownership was negated by the very fact that subsequent to the date of sale and *without the buyer's direction or request*, the seller prepared the silverware for sale to others and actually resold same. This fact either negated a transfer of title or constituted an assertion by the seller of a right to a lien on the goods for the purchase price. In the case at bar plaintiff-respondent's testimony establishes that the goods were sold *on credit* and that plaintiff-respondent never performed any act or made any claim indicating the existence of an unpaid seller's lien on said goods.

Defendant-appellant cites and relies upon the case of *Shindler v. Houston*, 1 N. Y. 261, in arguing that mere words unaccompanied by any act cannot amount to a delivery. The facts in this case were as follows:

"The plaintiff was the owner of about 2070 feet of curled maple plank and scantling, which he had brought to Troy in a boat, and

which, after being inspected and measured, was piled on the dock apart from any other lumber. Soon after this, the plaintiff and defendant met at the place where the lumber lay. The plaintiff said to the defendant, 'what will you give for the plank?' The defendant said he would give three cents a foot. The plaintiff then asked, 'what will you give for the scantling?' The defendant replied, one and a half cents a foot. The plaintiff then said, 'the lumber is yours.' The defendant then told the plaintiff to get the Inspector's bill of it, and carry it to Mr. House, who would pay it. The next day the plaintiff, having procured the Inspector's bill, presented it to House, who refused to pay it, on the ground that the instructions he had received from the defendant did not correspond with the plaintiff's statement of the contract. There was no note or memorandum of the contract in writing, nor was there any evidence of a delivery or acceptance of the lumber, except as above stated." (Pages 261, 262.)

The Court said at page 264:

"The case before us is destitute of all such collateral evidence. The acts of the party sought to be charged are proved. We are presented with a naked verbal agreement. The declarations relied upon as evidence, of a delivery and acceptance constitute a part of the contract, and of course are obnoxious to all the evils and every objection against which it was the policy of the law to provide.

The acts of part payment, of delivery and acceptance mentioned in the statute are something over and beyond the agreement of which they are a part performance, and which they assume as already existing. The entire absence of such evidence distinguishes the present case from all those that have been cited by the counsel for the plaintiff in support of this action."

The distinction between that case and the case at bar is obvious and fundamental. In the case at bar the sale was made on credit. In the cited case the sale was expressly one for *payment on delivery*. *In the case at bar, after the contract had been fully made, the defendant requested plaintiff to hold the stock for him.* Thereafter the defendant-appellant received and retained written confirmation of sale and subsequently directed plaintiff-respondent to resell the stock for him and received confirmation of such resale.

The case of *Castle v. Swift & Co.*, 104 Atl. Rep. 187, is cited and relied upon by the defendant-appellant. In that case the court said:

“It is said, however, upon good authority, that goods may be received by the buyer within the meaning of the statute, and yet allowed to remain in the hands of the vendor, if it be shown that the seller has ceased to hold in the character of unpaid vendor and holds wholly as bailee for the buyer. Williston on Sales, Sec. 91, and the numerous cases cited in note thereto.

In this case we think there is evidence of both acceptance and actual receipt of the goods, which should be submitted as a question of fact to the jury under proper instructions of the court; thus we find no error in the ruling of the court in its rejection of the defendant's first prayer, asking that the case be taken from the jury.” (See page 189.)

Thus the Court fully recognized the ruling which was applied by the trial court in the case at bar. In the cited case the Court goes on to say:

“But the court in our opinion erred in granting the plaintiff's prayer, in which it is said that, if it be disclosed by the evidence that the defendant purchased the eggs at the price named, and the same were to be placed

in the butter cooler to save him storage, and that upon the eggs being placed therein and an invoice sent to him he was to pay for the eggs, then the placing of the eggs in the butter cooler under such circumstances vested the title to said eggs in the defendant. This prayer fails to recognize, or at least within sufficient clearness, the essential requirements of the actual receipt of the goods by the buyer and the intention of the parties as to the same. It was not only necessary to find that the eggs were placed in the butter cooler, but it was also to be found that by so doing the unrestricted control of the eggs passed to the buyer, and that such was the intention of the parties." (See page 189.)

In this language the court on appeal merely points out that the trial court erred in *not* permitting the jury to determine also the *intention of the parties as to delivery*. The court makes this clear when it says:

"It was not only necessary *to find* that the eggs were placed in the butter cooler, but it was also *to be found* that by so doing the unrestricted control of the eggs passed to the buyer, and that such was the intention of the parties."

In the case at bar the trial court carefully avoided such error by using the following language:

"Admittedly there was nothing signed by this defendant charging him with any obligation under this sale; so the question upon the Statute of Frauds *which you are to consider and decide* is whether or not the defendant accepted part of the stock which was sold to him, or all of it; whether he actually received the same or gave something in earnest to bind the contract."

(See State of Case page 108, lines 36 to 40 and page 109, lines 4 and 5).

* * * * *

“The question is whether or not there was delivered to the defendant, and received by him, this stock or any part of it.”

(See State of Case page 109, lines 15 to 18 inclusive.)

* * * * *

“Notwithstanding the fact that there was no actual manual delivery of this stock to the defendant, it is insisted that there was a constructive delivery to him of the stock, and that is permissible.”

(State of Case, page 110, lines 4 to 7 inclusive.)

* * * * *

“That is exactly what the plaintiff claims there was in this case; while there was not an actual delivery of the stock, it is claimed that the stock was at all times in shape for delivery; that at the time the stock was sold to the defendant, the defendant directed the plaintiff to hold the stock, and thereafter the plaintiff did continue to hold the stock, subject to the defendant’s order, until it was actually sold.

“Now, *if you believe from the evidence in this case,—*that is, the greater weight of the evidence in this case, because the burden of proof is upon the plaintiff to show by the greater weight of the evidence, *that there was a constructive delivery* by the plaintiff to the defendant of this stock, and that the defendant by what he said at that time constituted the plaintiff his bailee, his agent, for the purpose of holding that stock subject to his order—*if you believe that that is shown by the greater weight of the evidence* in this case, then this case is taken out of the Statute of Frauds, and the mere fact that there was no order in writing for this stock does not prevent the plaintiff in this case from recovering the value of that stock, or the difference between the charge of the stock to the defend-

ant and what the plaintiff realized upon it, if it was an order to sell.”

(See State of Case page 110, lines 15 to 40 inclusive.)

The Second and Third Grounds of Appeal have been argued together in defendant-appellant's brief and will be herein dealt with in the same way. It is our contention that the trial court's denial of defendant-appellant's motion for a nonsuit and his motion for a direction of verdict was proper. The trial court's denial of the defendant-appellant's motions for nonsuit and for direction of a verdict was proper because (1) defendant-appellant's said motions were general and not directed to specific counts of plaintiff-respondent's amended complaint and the evidence relating to such counts separately, and (2) because the evidence both on plaintiff-respondent's case and on the whole case required a submission thereof to the jury.

At the trial the plaintiff-respondent offered evidence to establish three separate and distinct causes of action against the defendant-appellant, being the causes alleged in the First, Third and Sixth Counts of the amended complaint. Such evidence related to three separate sales of stock made by plaintiff-respondent to defendant-appellant, viz. 110 shares of Public Fire Company stock, 320 shares of Essex Fidelity & Plate Glass stock, and 100 shares of U. S. Securities stock. With reference to the sale of 320 shares of Essex Fidelity & Plate Glass stock made by plaintiff-respondent to defendant-appellant on or about June 7, 1928, plaintiff-respondent's testimony showed that 50 shares of said stock were actually delivered by plaintiff-respondent to a third person, viz. David Knoller, at the request of the de-

defendant-appellant and for defendant-appellant's account on or about June 15, 1928. Defendant-appellant's motion for a nonsuit, of course admitted the truth of such testimony for the purpose of the motion. Such a delivery of part of the goods sold satisfied the requirements of the Statute of Frauds with reference to said sale.

“Any part of the goods, however small, will satisfy the requirements of the statute.”

(Elliott on Sales, page 113.)

“By the terms of the statute acceptance and receipt of part of the goods suffice, and it is immaterial how small the part may be.”

(Williston on Sales, page 104.)

This rendered the question of whether or not there had been a constructive delivery of the entire 320 shares immaterial as to the third count. The motion for nonsuit was based wholly upon the Statute of Frauds. Reference which defendant-appellant's counsel made to the Uniform Stock Transfer Act was made in the same connection. Defendant-appellant argued that a constructive delivery of the stock could not have been made without a compliance with the requirements of the Uniform Stock Transfer Act. Obviously reference to the Uniform Stock Transfer Act had no application to the 50 shares of the Essex Fidelity & Plate Glass stock which were actually delivered by plaintiff-respondent to defendant-appellant by a delivery thereof made to Mr. David Knoller at the request of the defendant-appellant. Hence, defendant-appellant's motion for nonsuit, because it would involve this cause of action, could not have been properly granted.

In the same way and for the same reason the motion for direction of a verdict in favor of de-

defendant-appellant could not have been properly granted so far as same affected the above mentioned sale of 320 shares of Essex Fidelity & Plate Glass stock, of which 50 shares of stock were actually delivered by plaintiff-respondent. Moreover, defendant-appellant in his own testimony actually admitted that he had requested plaintiff-respondent to make a delivery of 50 shares of Essex Fidelity & Plate Glass stock to Mr. Knoller, defendant-appellant claiming, however, that such a request was in connection with a purchase of only such 50 shares from plaintiff-respondent, and not a delivery of 50 out of the 320 shares. This, however, was a matter for the jury.

By making his motions for nonsuit and for direction respectively, *general*, the defendant-appellant called upon the court to decide and determine all three of said causes of action in favor of the defendant-appellant as a matter of law, including the above mentioned third count. If the court had done so and granted the motions, the court would clearly have been in error. The rule which governs this situation has been stated by the Court of Errors and Appeals in the case of *Bingham, Jr. v. Schindel*, 92 N. J. Law, 502, at page 504 as follows:

“The second ground of appeal is based on the refusal of the court to grant a nonsuit at the close of the plaintiff’s case. It is obvious from the record that the motion was properly refused.

It appears that at the close of the plaintiff’s case counsel for defendant moved for a nonsuit on the ground that the plaintiff had failed to show any damages sustained.

In appellant’s brief it is argued that the defendant was entitled to a nonsuit as to the first count of the complaint. The motion for a nonsuit *was a general one* and was placed squarely on the ground that the plaintiff

failed to make out a case under the complaint; and even though it appeared that the first count was insufficient in law or not supported by the testimony, nevertheless, if *the second count* was good, and there was evidence to support it, the motion to nonsuit could not properly be entertained.”

An analogous principle is furnished by the case of *Gannon v. Brady Brass Company*, 82 N. J. Law 411, where the Court said at page 415:

“Moreover, counsel did not direct the attention of the trial court to the verbal criticism that he now advances. His exception was ‘to what your honor said with regard to the right of the jury to find an implied contract from the language used by Mr. Brady to Mr. Onslow.’ This was in effect an exception to the whole charge, all of which was concerned in one way or another with the contract so described, but the point now made, viz., that the word ‘implied’ was improperly employed was in no way brought to the judge’s notice.”

In the case of *Mittelsdorfer v. West Jersey, &c. R. R. Co.*, 77 N. J. Law 702, the court said at page 703:

“The rule is that a general exception to a charge or a part of a charge containing several distinct and separate legal propositions will not be available. *Oliver v. Phelps*, 1 Zab. 597; *Potts v. Clarke, Spenc.* 536; *Associates, &c. v. Davison*, 5 Dutcher 415.

“The doctrine is founded upon the inflexible rule that the party who objects in the course of a trial must bring his objection to the mind of the trial judge, so that the judge may correct erroneous expressions or explain what would otherwise mislead. Obviously, any such exception, while logically asserting the error of each of the propositions involved, is considered unavailable, because the objection has not been leveled at a specific and dis-

tinct error and the attention of the judge has not been called to the precise point of the objection. *Packard v. Bergen Neck Railway Co.*, 25 Vroom 553.”

* * * * *

“An exception to a part of a charge containing various legal propositions must, therefore, single out and specify, one by one, the propositions objected to, and this may be done, as was said in *Potts v. Clark*, supra, ‘either by saying in the bill that the party excepts to so much of the charge as instructs the jury that the law is so and so, or by stating, by way of recital, the part of the charge excepted to, or by calling on the court to charge in a certain way, and if the court refuse to so charge, then by excepting to such refusal.’”

POINT II.

The defendant-appellant’s motion for nonsuit and for direction of verdict respectively were properly denied on the merits.

The only ground on which defendant-appellant rests his motions for nonsuit and direction of a verdict respectively was that there was no evidence to show compliance with the requirements of the Statute of Frauds. As regards the third count, as hereinabove shown, a delivery of part of the shares of stock involved in said cause of action was proved, and hence the Statute was fully complied with with reference to said cause of action. With reference to the two other transactions embraced respectively in the first and sixth counts of the amended complaint, the evidence was sufficient to warrant the jury in finding a constructive delivery sufficient to comply with the requirements of the Statute of Frauds. This evidence and the

law applicable to the subject of constructive delivery is fully set forth and discussed hereinabove and ^{need} not be repeated at this point. It is settled that [^] the question of whether or not there was a constructive delivery is one which should be submitted to the jury with proper instructions from the court. In the case of *Castle v. Swift & Co.* (Court of Errors and Appeals of Maryland) 104 Atl. 187, the court said at page 189:

“It is said, however, upon good authority, that goods may be received by the buyer within the meaning of the statute, and yet allowed to remain in the hands of the vendor, if it be shown that the seller has ceased to hold in the character of unpaid vendor and holds wholly as bailee for the buyer. Williston on Sales, Sec. 91, and the numerous cases cited thereto.

In this case we think there is evidence of both acceptance and actual receipt of the goods, which should be submitted as a question of fact to the jury under proper instructions of the court; thus we find no error in the ruling of the court in its rejection of the defendant's first prayer, asking that the case be taken from the jury.”

In the case of *Bissell v. Balcom*, 39 N. Y. 275, the court said:

“The argument is by no means trivial, that the acts of the plaintiff, in removing the cattle to the place designated by the defendant, and the defendant's assumption of dominion over them, by directing their removal, submitted to by the plaintiff, warranted the jury in finding delivery and acceptance; that, although the cattle remained upon the premises of the vendor in his charge and keeping, yet, he no longer held them as owner, and had no control over them, except as bailee of the purchaser; that the character in which he held possession was changed, and, therefore, as in

Martin *v.* Wallace (37 Eng. L. & Eq. 6), the jury were justified in finding delivery and acceptance.”

In the case of *Swafford v. Pratt* (Mo.) 67 S. W. 701, the court said at page 702:

“To constitute the receipt required by the statute, there must be shown a transfer of the possession of the goods, by and from the seller to the buyer, either actually by manual delivery, symbolically by some substituted delivery, or constructively by a change in the nature of the seller’s subsequent holding. A constructive delivery is when, without actual transfer of the goods or their symbol, the conduct of the parties is such as to be inconsistent with any supposition than that there has been a change in the nature of the holding; and whether such a change has taken place is a question for the jury. Browne, Statute of Frauds, Secs. 318a, 319. And the question of whether or not there has been an acceptance is likewise a question for the determination of the jury, and circumstances of the slightest probative force may be submitted to it for that purpose. Browne, Statute of Frauds, Secs. 318a, 319, 321.”

It is stated in *Williston on Sales*, page 105, Section 96, that:

“It is for the jury to determine in a doubtful case whether there has been acceptance and receipt.”

Defendant-appellant’s counsel contends before this Court for the first time that there was no constructive delivery of any of the shares of stock involved in this suit by plaintiff-respondent to defendant-appellant because the shares of stock were not “ascertained”. Defendant-appellant’s counsel says on page 17 of his brief:

“Never separated, never specified and never ascertained, title could not pass to the buyer.

‘Where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.’ (Compiled Statutes, 1910 Ed., Vol. 4, p. 465, Sec. 17.)”

Hence, counsel for defendant-appellant argues, plaintiff-respondent could not have held the goods as bailee for defendant-appellant. (See page 18 of defendant-appellant’s brief.) It is a sufficient answer to this argument to say that it is not available to defendant-appellant in this court because it was not raised or mentioned at the trial in the court below. In the case of *Saffran v. Grillo*, 4 Misc. 618, the Supreme Court said at page 619:

“The defendant’s third point is error to grant a nonsuit on the ground of novation. The motion for the nonsuit at the trial was not made upon this ground, and cannot be urged here;”

In the case of *Potts v. Evans* (Court of Errors and Appeals) 58 N. J. Law 384, the Court said at pages 385 and 386:

“The plaintiff’s recovery of that portion of his salary which had not yet accrued and become due to him was clearly illegal, and the error would have at once been rectified by the trial judge had his attention been called to it by defendant’s counsel. Unfortunately for the defendant, however, this was not done, nor was the error made the basis of an exception, and this latter omission makes it impossible for us to direct a new trial *on this ground*. The consequence is that the judgment below must be affirmed.”

In the case of *Garretson v. Appleton* (Court of Errors and Appeals), 58 N. J. Law 386, the court said at pages 390 and 391:

“The case furnishes an apt subject for the application of the principle that exceptions will not be considered by this court unless they were alleged in the court below and entered upon the record. Parties cannot be allowed to so change the basis of action and defence, and after having tested the procedure and opinions of the trial court, in all other respects, take advantage of points not taken, noticed or decided by the trial court. That this is now the settled rule of law in this state cannot be disputed.”

Aside from being unavailable on this appeal, however, the point itself is without merit. *Elliott on Sales* at pages 284 to 287 says:

“Delivery is not necessary to pass title unless required by the statute of frauds. The fact that the goods are not in the possession of the vendor, but of his bailee or agent, will not prevent title passing. And so title may pass, although the vendor retains possession of the goods as the vendee’s bailee or agent.”

In the case of *Hurff v. Hires* (Court of Errors and Appeals) 40 N. J. Law 581, the court said:

“Where there is a sale of a specified quantity of grain, from a mass identical in kind, and uniform in value, a separation of the quantity sold is not necessary to pass the title, where the intention of the parties that the property should pass by the contract of sale, is clearly manifested; otherwise, where the articles composing the mass are of different qualities and values, making a selection, and not merely separation, necessary.”

In the case at bar the testimony showed that the plaintiff-respondent had in its actual possession the shares of stock sold by plaintiff-respondent to defendant-appellant and mentioned in the First, Third and Sixth Counts of the amended complaint, that these shares of stock stood in the "street name" and had been duly endorsed so as to be transferable by delivery, that the sale of the said stock by plaintiff-respondent to defendant-appellant was duly recorded in plaintiff-respondent's books and that written confirmations of such sale were in the regular routine mailed out by plaintiff-respondent to defendant-appellant on the same day, and that such shares of stock remained at all times in plaintiff-respondent's actual possession for defendant-appellant's account until defendant-appellant requested and directed plaintiff-respondent to resell same. Even if plaintiff-respondent had in its possession a larger number of shares of the particular stock which were sold to defendant-appellant as aforesaid, there would be no more need for an actual selection and setting apart of a specific number of said shares in the case of such stock than there would be in the case of a quantity of grain such as was dealt with in the above cited case. Obviously all shares of stock of a particular kind and character are "identical in kind and uniform in value".

The defendant-appellant further argues in the same connection (see defendant-appellant's brief, pages 18 and 19) that plaintiff-respondent could not hold the shares of stock as bailee for defendant-appellant since, as he claims, defendant-appellant did not have title because of the provisions of the Uniform Stock Transfer Act. That Act provides that title to a stock certificate and to the shares represented thereby can be transferred "by delivery of the certificate indorsed either in blank

or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby". (See defendant-appellant's brief on pages 18 and 19.) In the case at bar the proof shows that the certificates for shares of stock sold by plaintiff-respondent to defendant-appellant were in the "street name" and endorsed in blank (by the "street name") and hence they were in condition to pass "by delivery", under the Uniform Stock Transfer Act. The said Act does not define the word "delivery" and prescribe an actual physical delivery as being requisite to a transfer of title of shares of stock. In the absence of any narrower definition of the word "delivery" in the said Act, it is to be presumed that the legislature intended the word "delivery" to have that meaning which is accorded to the word by law and hence contemplated the kind of delivery which the law recognizes as such, including "constructive delivery".

Discussion of First Ground of Appeal.

The only other ground of appeal which is mentioned and argued by defendant-appellant in his brief is ground numbered "1" which is stated as follows:

"The learned trial judge erred in admitting in evidence, over the objection of the defendant copies of so-called confirmations, prepared by the plaintiff and alleged to have been mailed to the defendant, which papers were marked in evidence as 'Exhibit P-4'."

It is important to note that Exhibit P-4 mentioned in said ground consisted of 18 separate documents which were marked as one exhibit, viz., P-4. (See State of Case, page 64, lines 14 to 25.)

In setting forth the various exhibits in the printed state of the case, these 18 exhibits are erroneously designated as exhibits P-4 to 21 inclusive. Of these 18 documents only three purported to be confirmations of each of the three sales involved in this suit. These specific confirmations of sale are printed in the State of Case on page 119, lines 36 to 40 designated erroneously Exhibit 13; page 121, lines 14 to 20 designated erroneously Exhibit 20, and page 121, lines 21 to 27 designated erroneously as Exhibit 21. Of the other 15 documents comprised in Exhibit P-4, three were written memoranda of the said sales of stock by plaintiff-respondent to defendant-appellant which plaintiff-respondent's president, Mr. Dornbusch, testified that he personally made contemporaneously with the actual sales of said stock to the defendant-appellant and in defendant-appellant's presence, and Mr. Dornbusch made use of said written memoranda to refresh his memory in testifying. (See testimony of Mr. Dornbusch, State of Case, page 27, lines 34 to 40; page 32, lines 19 to 26; page 33, lines 25 to 34; page 40, lines 28 to 38; page 41, lines 16 to 25; page 43, lines 21 to 35.) As above stated, these contemporaneous memoranda were included in Exhibit P-4 and are printed in the State of the Case on page 119, lines 35 to 40 erroneously designated Exhibit 13; page 121, lines 14 to 20 erroneously designated Exhibit 20, and page 121, lines 21 to 26 erroneously designated as Exhibit 21. The confirmations of sale setting forth the three transactions involved in this suit were merely duplicates of the contemporaneous written memoranda which plaintiff-respondent's president testified he made at the time of the sale of the respective shares of stock in controversy to defendant-appellant in defendant-appellant's presence, and hence all of the context therein contained

was put in evidence in and by the testimony of plaintiff-respondent's president. Consequently, it is clear that the admission in evidence of the contemporaneous written memoranda on the basis of which the plaintiff-respondent's president testified was certainly not erroneous. Erroneous admission of evidence is not reversible error if the evidence which was erroneously admitted was merely cumulative, that is covering a point already or afterwards proved by other competent evidence. *Steelman v. Steelman*, 16 N. J. L. 66; *Meyers v. Weger*, 62 N. J. L. 432.

The admission in evidence of the written confirmations of sale which exactly reproduced what was set forth in the said contemporaneous written memoranda of sale could not have been injurious to defendant-appellant's cause because it added nothing substantial to plaintiff-respondent's evidence. The admission of irrelevant, immaterial, remote, or incompetent evidence is not error if in the whole case the substantial rights of the party complaining is not injuriously affected. See *West v. O'Leary*, 56 N. J. Law 699; *Fitzgerald v. Faunce*, 46 N. J. L. 599; *Lackenauer v. Lyon*, 67 N. J. Law 677; *Mulholland v. Jones*, 83 N. J. L. 605; *Am. Process, etc. v. Pensauken, etc.*, 78 N. J. L. 658; *Bradley v. Cleary Co.*, 86 N. J. L. 338; *Van Nest v. Hirsch*, 87 N. J. L. 336; *Gromer v. George*, 90 N. J. L. 644; *Meyers v. Weger*, 62 N. J. L. 432; and P. L. 1912, Sec. 27, p. 382. The rule is well settled that non-injurious error is no ground for reversal. In the case of *Freeman v. Bartlett* (N. J. Supreme Court) 47 N. J. Law 33, the court said at page 35:

“The rule is well settled that when the plaintiff in error has sustained no injury he cannot rely upon a technical mistake on the part of the court as a ground for reversing the

judgment, *Ayres v. Van Lieu*, 2 South, 765; *Smith v. Ruecastle*, 2 Halst. 357; *Rodenbough v. Rosebury*, 4 Zab. 491."

Furthermore, if the admission of such confirmations in evidence was erroneous, the error was cured by the court's charge to the jury in which the court said:

"The defendant says there never was an order to buy that stock, that he never gave an order to buy that stock, and if he never did *then these confirmations that were sent to him amount to nothing.*" (State of Case, p. 111, lines 5 to 8)

The erroneous admission of such evidence is not reversible if a proper instruction to the jury is given. See *Bernardsky v. Erie*, 76 N. J. L. 580; *Weldman v. Wills*, 86 At. 362; *Thompson v. R. R.*, 51 N. J. L. 42; *Dallas v. Koehler*, 86 N. J. L. 651.

In ruling upon the admission of these documents, the court admitted them expressly on the ground that the receipt of these confirmations by Mr. Greenfield coupled with his *conduct with reference thereto* "might be some evidence of the fact that he had made these purchases and sales". We contend that said ruling of the court was correct.

In the case of *State v. MacFarland* (Court of Errors and Appeals), 83 N. J. L. 474, the Court dealt with the general question of the admissibility of letters. In this connection the court said:

At page 481:

"The jury was therefore instructed that they could find *from the letters* themselves that the assertions contained in them were true. This was clearly erroneous unless letters written to a person are, by the mere fact of their possession, proof of the truth of their contents, which is not the law.

(State of Case
p. 63, lines 31
and 40, and
64, lines 1 to 15)

The fault of this instruction is twofold—first, that it did not leave to the jury the question of the defendant's *assent* to the truth of the statements made in the letters, and second, that it permitted the jury from the mere persual of the letters to determine whether or not their writer told the truth about the defendant.

The error is fundamental both in what the charge omitted and in what it permitted; for it omitted the defendant's *assent* to the truth of the contents of the letters, which was essential to their use as evidence against him; and it permitted the jury to find that the statements in the letters were true solely upon the internal evidence of the letters themselves, which was to convict the defendant by the acts and declarations of another person."

At pages 482 and 483:

"* * * notwithstanding the logically probative character of the letters written to the defendant and their peculiarly persuasive character, they are excluded from being legal proof of the facts stated in them by the rule of evidence that testimony to be legal must be given under oath and subject to cross-examination."

At page 484:

"* * * it is evident that, in the case of written communications, the evidential factor must be the act of the party who received the letters and not the declarations contained in the letters themselves. The question for the jury, therefore, is: Has the party by some act of his made the statements of another person evidence against him? This question was not submitted to the jury in the present case. This being so, it is immaterial whether there was testimony of such an act to go to the jury; if there was it was not submitted to them, and if there was not there was no way

in which the facts stated in the letters could be used against the defendant.”

At page 485:

“The rule, itself, which is in harmony with the great preponderance of decisions elsewhere, is thus stated in one of the most recent works on evidence: ‘Letters written to the party and received by him may under some circumstances be read against him, but before they can be received in evidence against him there must be some evidence besides mere possession showing acquiescence in their contents and proof of some act, or reply or statement.’ Jones Evid. 271.”

At pages 485, 486:

“The letters, however, if properly identified would not of themselves authorize any inference against the defendants; they were only the acts and declarations of others; and unless adopted and sanctioned by the defendants by some reply or statement or by some act done in pursuance of their suggestions they ought not to prejudice the defendants. Letters ~~addressed~~^{addressed} to an individual and received by him are not to have the same effect as verbal communications. Silence in the latter case may authorize the inference of an assent to the statement made but not equally so in the case of a letter received but never answered *or acted upon*. So far as these letters might have been shown by other proof to have been acted upon or sanctioned by the defendants so far *they* would have been competent evidence.’ This is the rule that is at once consonant with reason and with the fundamental rules of evidence as applied in English speaking courts; it accords with our own rule upon this topic and I can perceive no benefit in multiplying the citation of authorities.”

Upon the authority of the excerpts above quoted from the cited case, it appears that the documents here in controversy were properly admitted if there was evidence of their receipt by defendant and of acquiescence by him in the truth of the statements contained in said documents by his subsequent conduct. It was expressly upon that theory that the court in the case at bar admitted such documents. We contend that the testimony furnished ample evidence of such acquiescence in the truth of said documents by the defendant-appellant. The mailing of said documents by plaintiff-respondent to defendant-appellant was testified to by plaintiff-respondent's witness, Coloccia (See State of Case page 63, lines 3 to 8) and their receipt *was not denied* or disproved by defendant-appellant. Indeed defendant-appellant expressly testified to his receipt of one of the said confirmations without in any wise denying or negating his receipt of the others. See State of Case, page 77 lines 19 to 21.) After the receipt of such confirmations, defendant-appellant continued to deal with plaintiff-respondent, although he testifies that he protested against the sending of one of the confirmations of sale. (See State of Case page 77 lines 19 to 21.) He did not testify that he protested against the sending of the two other confirmations of sale. Testimony that defendant-appellant continued to buy stock from plaintiff-respondent after the date when he received said confirmations, is to be found in the State of Case pages 65 to 67 and on pages 77, 78, 83, 84, 87, 88 and 89.

Where a party repeatedly receives confirmations of alleged sales of stock to him from a dealer in stocks which, as he later claims, were wholly fictitious and he continues to buy stock from such a dealer, that is certainly some evi-

dence of an acquiescence by him in the truth of the statements contained in said documents within the above quoted rule. But plaintiff-respondent's testimony showed further that subsequent to the date upon which the said confirmations were mailed to defendant-appellant by plaintiff-respondent, the *defendant-appellant* actually recognized the transaction by reselling the shares of *stock mentioned in such confirmations* to plaintiff-respondent. Testimony to this effect was given by plaintiff-respondent's president. (See State of Case page 37, lines 12 to 21; page 39 lines 33 to 40; page 40, lines 1 to 18; page 40 lines 28 to 40; page 41 lines 15 to 38; page 42, lines 14 to 25; page 43 lines 30 to 40; and page 44 lines 1 to 16.) The testimony of plaintiff-respondent's president further shows that subsequent to the resale or repurchase of said stock from defendant-appellant at defendant-appellant's request, plaintiff-respondent's president demanded payment of the loss sustained on the foregoing transactions by plaintiff-respondent. Testimony in that regard is as follows:

“Q. Did you personally ever demand from the defendant payment of the balance or the loss sustained on this stock? A. Yes.

Q. And what did he say? A. He told me that ‘you cannot take blood out of a stone,’ and he did not have the money at that time, but if I waited awhile he would pay.”

See State of Case, page 44, lines 17 to 24.

In addition to all of the foregoing, the defendant-appellant actually preserved and produced in court the written *confirmations of resale* of the very stock here in controversy by him to plaintiff-respondent which plaintiff-respondent's president testified to. These documents were produced *by the defendant-appellant* upon demand of plain-

tiff-respondent and were marked in evidence *without defendant-appellant's objection* as Exhibits P-1, P-2, and P-3 respectively. (See State of Case page 60, lines 11 to 37 inclusive. Those exhibits are printed in State of Case on page 114 lines 1. to 40 inclusive and page 115 lines 1 to 20 inclusive.) This conduct alone on the part of defendant-appellant, viz. his receipt and retention of these written documents setting forth the resale *by him to plaintiff-respondent* of the very shares of stock which are mentioned and referred to in the confirmations of sale now objected to, without any evidence or testimony to explain or account for such conduct, is certainly evidence of acquiescence by him in the truth of the *confirmations of sale* within the above stated rule.

The case of *Duysters v. Crawford*, 69 N. J. Law 614, upon which defendant-appellant's counsel solely relies in this connection in his brief, is clearly distinguishable because the court in that case said:

“There is no question here of *assent to or acquiescence in the statement of the letter by the defendant*, for the plaintiff also offered in connection with the letter to the defendant's attorney the latter's reply, which was to the effect that he had no information from the defendant as to any agreement fixing the amount of the fees, and that the writer was in doubt whether the plaintiff's bill was against the company or against the plaintiff.” (See page 616.)

Furthermore, in that case, the letter in controversy was written by the plaintiff *to the defendant's attorney* and did *not* come into the *defendant's* possession.

The evidence objected to was admissible on the further ground that it was part of the *res gestae*

of the sales testified to by the plaintiff-respondent's witness. Res gestae includes those circumstances which are the undesigned incidents of a particular litigated act. *Murphy v. Brown & Co.*, 91 N. J. L. 412; *Hunter v. State*, 40 N. J. L. 1538; *Luse v. Jones*, 39 N. J. L. 707. Declarations which are part of the res gestae may be shown though such declarations are self-serving. *Kuppersmith v. Law*, etc., 80 N. J. L. 432; *State v. Kane*, 77 N. J. L. 244; *State v. Simon*, 70 N. J. L. 407; *Duysters v. Crawford*, 61 N. J. L. 614; *Luse v. Jones*, 39 N. J. L. 707.

We respectfully submit that the verdict in the court below should be affirmed.

Respectfully submitted,

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Of Counsel:

WALTER J. BILDER.

