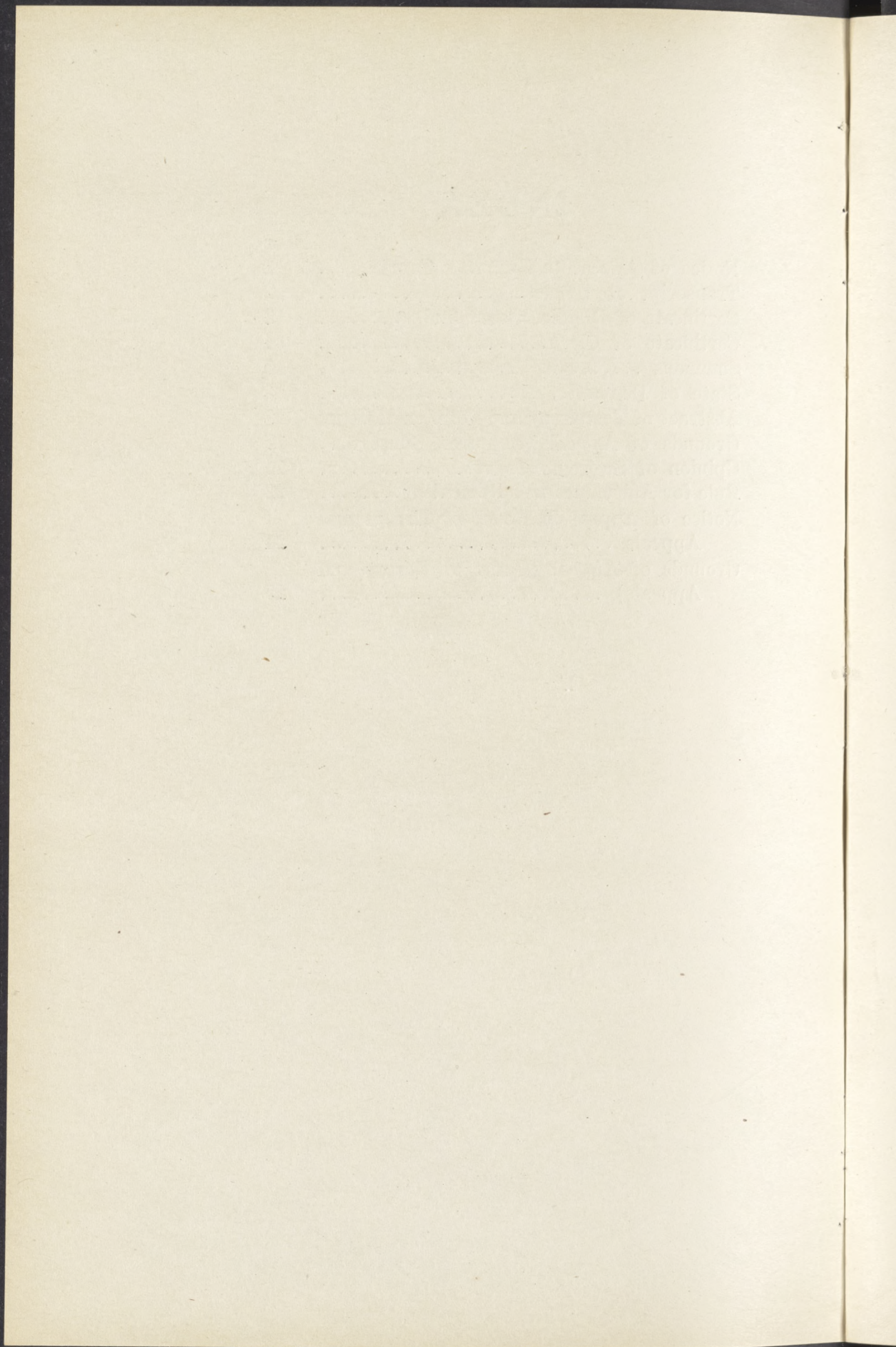


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NOTICE OF APPEAL.

Filed October 11, 1929.

**SECOND DISTRICT COURT OF THE
CITY OF NEWARK.**

<p>GOLDSMITH, MYER & LOBDELL, INC., a corporation, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>PHILLIP GLADSTONE, <i>Defendant.</i></p>	}	<p>10</p> <p><i>On Contract.</i></p>
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To Samuel H. Nelson, Esquire, attorney for defendant. 20

SIR:

Take notice that the plaintiff appeals to the New Jersey Supreme Court from the determination of the Second District Court of the City of Newark in the above entitled cause which resulted in a judgment in favor of the defendant and against the plaintiff.

Yours truly,

PITNEY, HARDIN & SKINNER, 30
Attorneys for Plaintiff.

Service of copy of notice of appeal acknowledged by attorney for defendant on October 10, 1929.

TRANSCRIPT OF DOCKET.

10	GOLDSMITH, MYER & LOBDELL, INC., a corporation, <div style="text-align: right;"><i>Plaintiff,</i></div>
	<i>vs.</i>
	PHILLIP GLADSTONE, <div style="text-align: right;"><i>Defendant.</i></div>

Pitney, Hardin & Skinner, plaintiff's attorney.
 Samuel Nelson, defendant's attorney.

PLAINTIFF'S COSTS.

20	Summons	\$2.10
	Mileage48
	Listing Fee	1.50
	Appeal Bd.	1.00

On contract demand \$500.00
 17 Orange Heights avenue, West Orange.
 Summons issued August 26, 1929.
 Returnable September 9, 1929.
 Demand filed.

Summons returned as follows:

30 The said defendant not being found, I served the within summons August 29, 1929, by leaving a copy thereof at his residence with a member of his family, above the age of fourteen years, who was informed of its contents.

DANIEL MIELE,
 Sergeant-at-Arms, Constable.

Transcript of Docket.

1929

- Sept. 9. This cause was adjourned until September 16th.
- “ 16. This cause was adjourned until September 23rd.
- “ 23. The plaintiff and defendant appeared and the cause was tried and determined at this time. 10
 Richard L. Cohen and Walter Otto Donath were sworn in behalf of the plaintiff.
 The defendant was sworn in his own behalf.
 James S. Hare was sworn in rebuttal. The evidence being closed, the Court rendered judgment in favor of the defendant; whereupon judgment is entered in favor of the defendant and against the plaintiff with costs. 20
- Oct. 11. Notice of appeal and appeal bond filed.

SECOND DISTRICT COURT OF THE
 CITY OF NEWARK.

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I, LOUIS R. FREUND, Judge of the Second District Court of the City of Newark, County of Essex and State of New Jersey, do hereby certify that the aforesaid Court is a Court of Record, that James E. Garrigan, whose name is subscribed to the preceding transcript, is the Clerk of the Second District Court of the City of Newark, County of Essex and State of New Jersey, and that full faith and credit are due to his official acts. 40

Certificate of Clerk.

Witness my hand at Newark, N. J., this sixteenth day of October, A. D. 1929.

LOUIS R. FREUND,
Judge.

10

SECOND DISTRICT COURT OF THE
CITY OF NEWARK.

I, JAMES E. GARRIGAN, Clerk of the Second District Court of the City of Newark, County of Essex and State of New Jersey, do hereby certify that the aforesaid Court is a Court of Record, that Honorable Louis R. Freund, whose name is subscribed to the preceding certificate is Judge of the Second District Court of the City of Newark, County of Essex and State of New Jersey, and that the signature of said Judge is genuine.

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IN TESTIMONY WHEREOF I have set my hand and affixed the seal of said Court this sixteenth day of October, A. D. 1929.

JAMES E. GARRIGAN,
Clerk.

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State of Demand.

SUMMONS.

The defendant was duly summoned.

STATE OF DEMAND.

SECOND DISTRICT COURT OF THE
CITY OF NEWARK.

10

GOLDSMITH, MYER & LOBDELL,
INC., a corporation,
Plaintiff,

vs.

PHILLIP GLADSTONE,
Defendant.

On Contract.

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The plaintiff demands of the defendant the sum of five hundred dollars (\$500.00) upon the following demand:

1. Plaintiff is a corporation organized and existing under the laws of the State of New Jersey and having its principal office and place of business at 1060 Broad street in the City of Newark, State of New Jersey.

30

2. Plaintiff is, and at the times herein referred to was, engaged in a general brokerage business and particularly in buying and selling stock on the order and for the account of its customers and as their agents.

3. On July 12, 1929, defendant was, or represented to plaintiff that he was, the holder and owner of 100 shares of the common stock of American Insurance Company and 72 shares of

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State of Demand.

the common stock of Firemen's Insurance Company.

4. On said date, defendant ordered plaintiff to find a purchaser for and to consummate a sale of said 100 shares of stock of American Insurance Company and said 72 shares of stock of
 10 Firemen's Insurance Company, "at the market," and to buy for defendant 25 shares of the common stock of Chase National Bank, "at the market."

5. Thereupon, at defendant's instance and request as aforesaid, and as his broker and agent, plaintiff placed an order for the sale of and sold 100 shares of American Insurance Company stock at the best price then obtainable for the same, to-wit at $25\frac{3}{8}$ for each share; and further
 20 placed an order for the sale of and sold 72 shares of Firemen's Insurance Company stock for the best price then obtainable for the same, to-wit at $40\frac{1}{4}$ for each share; and further purchased for defendant, at the lowest price at which it was then obtainable, to-wit at 209, 25 shares of Chase National Bank.

6. Plaintiff thereupon confirmed to defendant said transactions of sale and said transaction of purchase so made upon the order of and for the
 30 account of defendant, confirming said sale of 100 shares of American Insurance Company stock aforesaid at $25\frac{1}{2}$ instead of at $25\frac{3}{8}$, by reason of the fact that plaintiff had quoted said stock to defendant, prior to his ordering sale thereof, as having a then current market price of " $25\frac{1}{2}$ bid and 26 asked." Plaintiff further confirmed to defendant said sale of 72 shares of Firemen's Insurance Company stock at $39\frac{3}{4}$, thereby charging defendant with one-half of a point (50c) on
 40 each such share as and for plaintiff's reasonable

State of Demand.

commission on the sale of said 72 shares of Firemen's Insurance Company stock and also said 100 shares of stock of American Insurance Company, making a net charge for said commissions of \$23.50. Plaintiff further confirmed to defendant the purchase of said 25 shares of Chase National Bank, at 210, thereby charging defendant the reasonable commission of one dollar upon each of said shares so purchased, or a commission of \$25 upon said transaction of purchase. 10

7. Thereupon and on July 13, 1929, defendant unlawfully repudiated said transactions of sale and said transaction of purchase and unlawfully refused to deliver to plaintiff a certificate or certificates representing 100 shares of the common stock of American Insurance Company or a certificate or certificates representing 72 shares of common stock of Firemen's Insurance Company, or any part thereof, and further unlawfully refused to pay to plaintiff the cost to it of said 25 shares of common stock of Chase National Bank or any part of said cost. 20

8. Thereupon plaintiff was required and compelled, in order to fulfill and perform said transactions of sale so carried out by it at the instance and request of defendant, to purchase 100 shares of common stock of American Insurance Company, at a cost of $25\frac{3}{4}$ for each share and 72 shares of the common stock of Firemen's Insurance Company, at a cost of $41\frac{1}{4}$ for each share, to the damage of plaintiff in the sum of \$109.50. Plaintiff suffered no damage upon the resale of said 25 shares of Chase National Bank stock which defendant refused to take delivery of or pay for, as aforesaid. 30

PITNEY, HARDIN & SKINNER,
Plaintiff's Attorney. 40

**ABSTRACT OF TESTIMONY AND OPINION
OF COURT.**

SECOND DISTRICT COURT OF THE
CITY OF NEWARK.

10	GOLDSMITH, MYER & LOBDELL, INC., a corporation, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>On Contract.</i>
	<i>vs.</i>		
	PHILLIP GLADSTONE, <div style="text-align: right;"><i>Defendant.</i></div>		

20 Pitney, Hardin & Skinner (William H. Osborne, Jr.), attorneys for plaintiff.

Samuel H. Nelson, attorney for defendant.

The action was for the recovery of damages arising out of the alleged repudiation of orders for the purchase and sale of stock claimed by plaintiff, stock-brokers, to have been placed by defendant with plaintiff. The case was tried before the Honorable Louis R. Freund without a jury.

30 For the plaintiff, Richard S. Cohen testified that he was a salesman employed by the plaintiff; that on Friday, July 12, 1929, he had a conversation with the defendant at the Newark office of Hirsch, Lilienthal & Co., at about three P. M., during which he suggested to the defendant that the defendant might profit by selling his stock in the American Insurance Company and in the Firemen's Insurance Company and purchasing Chase National Bank stock in its place. At the defendant's request, Mr. Cohen 'phoned to plaintiff's office and obtained the bid and asked quota-

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Abstract of Testimony.

tions on said stocks as follows: American Insurance Company, 25½ bid, 26 asked; Firemen's Insurance Company, 39¾ bid, 40¼ asked; Chase National Bank, 208 bid, 210 asked. He repeated these quotations to defendant and was instructed by the defendant to sell defendant's 72 shares of Firemen's stock and 100 shares of American stock "at the market" and to purchase 25 shares of Chase National Bank stock "at the market." Cohen immediately instructed plaintiff's trader to execute these orders. 10

Objection was made to the testimony of Cohen as to the prices at which the respective stocks were sold and bought by the trader, on the ground that such testimony was hearsay. The objection was sustained.

Cohen testified that plaintiff buys and sells stock for its customers through its trader by telephone and that a reasonable charge for services is made by plaintiff by deducting such charge in the confirmation forwarded to the customer. 20

Cohen further stated that later in the afternoon of the 12th, at about four o'clock, defendant 'phoned to him at plaintiff's office and said that he had been thinking over the matter and believed that he would suffer too great a loss in the transaction. Cohen told him that the sales and purchase had already been made, that the American Insurance Company stock had been sold for the defendant at 25½, the Firemen's Insurance Company stock at 39¾ and the Chase National Bank stock had been purchased at 210; whereupon the defendant seemed satisfied and made no objection to the prices; that a Mr. Eyre, another employee of plaintiff, was within hearing at Cohen's end of the telephone and overheard Cohen's part of the conversation with the defendant. The 30 40

Abstract of Testimony.

next morning, Cohen stated, the defendant called him on the 'phone at plaintiff's office and said that he had compared the prices obtained with the newspaper quotations and thought that he was getting very poor prices; that he could have done better elsewhere. Cohen went to see the defendant at Hirsch, Lilienthal & Co.'s office that morning and told him that the prices obtained were fair prices; that the plaintiff merely deducted a reasonable charge for its services and did not indulge in shading the price to the customer's disadvantage. The defendant said that he would not deliver his American and Firemen's stock for transfer to the purchaser and that he would deny that he had given any orders of sale or purchase to Cohen. Cohen told him that plaintiff would place the matter in the hands of its attorneys if the American and Firemen's stock was not delivered by the defendant to plaintiff.

Walter Otto Donath, for plaintiff, testified that he was employed in the cashier's department of plaintiff; that plaintiff kept regular books of account showing the transactions made for customers and that the witness had supervision over these accounts. He quoted from the defendant's account on plaintiff's books, which he produced, the prices at which the American Insurance Company and Firemen's Insurance Company stock had been sold for the defendant, the price at which the Chase National Bank stock had been purchased and the prices of stock bought by plaintiff to cover the sale transactions on defendant's refusal to deliver the stock, as follows:

July 12, 1929—72 Firemen's at $40\frac{1}{4}$ sold; 100 American at $25\frac{3}{8}$ sold; 25 Chase at 210 bought.

July 13—100 American at $25\frac{3}{4}$ bought.

Abstract of Testimony.

July 22—72 Firemen's at 41¼ bought.

He testified that a calculation of the losses suffered by plaintiff in covering the repudiated transactions, based on said figures, was the sum of \$109.50.

Plaintiff rested.

The defendant testified that he had a conversation with the witness Cohen on Friday, July 12, wherein Cohen urged him to sell his stock in the American Insurance Company and Firemen's Insurance Company and to purchase stock of the Chase National Bank, saying that the defendant would recoup the losses suffered by him on the sale of said stocks through the the rapid rise of Chase stock; that Gladstone requested that Cohen obtain further quotations and communicate with him before he would give Cohen a definite answer; that on going to his home the defendant looked up his records showing the purchase price of the American and Firemen's stock held by him and calculated that he would suffer a loss of \$1,250 if he sold this stock at that time. He thereupon, on that afternoon, called up Cohen at the plaintiff's office and told Cohen not to bother to get further quotations; but that on the following morning he received from the plaintiff in the mails confirmations of the sale of his stock and the purchase of Chase National Bank stock for his account. The defendant immediately called Cohen and stated that he had given no orders to Cohen. Cohen thereupon met him at Hirsch, Lilienthal & Co. and tried to induce the defendant to agree to the transactions which had taken place. Cohen was very excited and said that if he did not deliver the stock the plaintiff would place the matter in the hands of its attorneys.

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Abstract of Testimony.

On cross examination, the defendant said that he had bought and sold stocks for some time, but that he had had no dealings in bank stocks with the exception of the purchase of the American and Firemen's stock. He did not know how brokers dealing in bank stocks received compensation for their services. He stated that Cohen had called up plaintiff's office from Hirsch, Lilienthal & Co. on July 12th and had obtained the bid and asked prices, which he reported to the defendant. Defendant told Cohen to work on the proposition further and to give him a report on the following morning. The defendant then went home and looked up his records, found on comparison with the newspaper prices of stocks bid and asked that he would lose \$1,250 if he sold said stocks at that time.

Q If Cohen had already obtained quotations for you what more could he do before the next day in working the proposition up? A The bid and asked prices don't mean a thing necessarily. You can often get better prices than those quoted. The bid price often varies ten points from the asked price.

Q How much did the bid and asked prices given you by Cohen vary? A About a point or two.

Q Then what better quotations could Cohen obtain for you than those he had already quoted? A I told him to work on it and see if he could not get better quotations.

Gladstone said that when he called Cohen on Friday afternoon, Cohen did not say that he had sold any of the stock, but gave a quotation for Firemen's stock. He gave no other quotations.

Gladstone testified that he never buys or sells without getting a special quotation, whether it

Abstract of Testimony.

be bank stocks or stocks on the stock exchange. He does not rely on the tape.

Q Then why did you put in an order with plaintiff before this time to sell American and Firemen's at a price much higher than was being offered? A That was a future order.

In rebuttal, plaintiff called James S. Eyre, who testified that he was employed by the plaintiff; that on the afternoon of July 12th he was sitting at his desk adjacent to Cohen's desk and heard the telephone girl call, "Mr. Cohen, Mr. Gladstone is on the wire." Cohen then took up the phone, addressed Mr. Gladstone by name and told him that he had sold Gladstone's American and Firemen's stock at certain prices and purchased Chase stock for the defendant at a certain price. Eyre remembered and gave the exact prices mentioned by Cohen as follows: American Insurance Company at 25½; Firemen's Insurance Company at 39¾; Chase National Bank at 210. 10 20

On cross examination Eyre said that he did not of his own knowledge know that Gladstone was speaking at the other end of the wire; that he did not hear Gladstone's voice; that he concluded that Gladstone was at the other end of the wire because he heard the telephone girl call, "Mr. Cohen, Mr. Gladstone is on the wire," and heard Cohen address a Mr. Gladstone in speaking over the telephone. 30

In rebuttal by the defendant, Gladstone denied that he had heard Cohen make any of the statements over the phone to him on the afternoon of July 12th that Eyre had testified had been made by Cohen.

Judge Freund, in rendering judgment, gave reasons for his decision, which were substantially as follows: 40

Opinion of Court.

This is a case involving a dispute as to the existence of an oral order by a customer to a broker for the sale of stock. I notice a number of cases on the lists of causes wherein brokers are plaintiffs. I have read the handwriting on the wall and am taking this opportunity of setting forth at length the grounds upon which I am deciding this action.

Mr. Cohen, the plaintiff's witness, tells a straightforward story. I have no reason to doubt any part of his story. At the same time, the defendant tells a story which has not been impeached. The law places upon the plaintiff the burden of proving a contract. Where the evidence to show the existence of the contract is counterbalanced by evidence of equal worth disputing the existence of the contract, the plaintiff has failed to sustain the burden of proof. For all that I have before me, there may have been an honest misunderstanding on each side as to the intention of the other.

I am fully aware that the method claimed to have been followed by the broker in this case is the usual practice, that is, the acceptance of orders from customers over the telephone or by word of mouth without written memorandum or other corroborative proof. Such transactions do not form exceptions to the rule requiring the plaintiff to assume the burden of proving a contract. If the broker deals in this fashion he must assume the risk of a dispute of the kind found in the instant case. You may say that there might be more reason for a falsifying by a customer than by a broker due to the fact that it is to the broker's interest to carry out a customer's orders faithfully while it may be to the customer's interest to deny an order which has

Opinion of Court.

been unwisely given. But I cannot give such a theory weight in determining whether the burden of proof has been sustained, and in consideration of that question the knowledge of this common practice stands mute.

Mr. Osborne—We submit that the burden of proof has been sustained for this reason: That outside of any inconsistencies which may have appeared in the defendant's testimony on cross examination, we have corroboration of the testimony of the plaintiff's witness, Mr. Cohen. Mr. Cohen testified that he held a telephone conversation with Mr. Gladstone wherein he advised the defendant as to the sale and purchase of the stock and the prices which were obtained, on Friday, the 12th; that Mr. Eyre overheard the conversation in the plaintiff's office. The defendant admits that he had a telephone conversation with Mr. Cohen on that afternoon. Mr. Eyre was then put on the stand and testified that he heard Mr. Cohen speak to a man whom he addressed as Mr. Gladstone over the telephone on that afternoon and that he quoted certain prices as the sale and purchase prices of certain stocks. This testimony not only corroborates the testimony of Mr. Cohen but serves to shake the testimony given by Mr. Gladstone.

The Court—I cannot give such corroboration any weight in arriving at my decision. Mr. Eyre said that the telephone girl called to Mr. Cohen, "Mr. Cohen, Mr. Gladstone is on the wire"; that Mr. Cohen picked up the receiver and talked over the telephone, addressing a Mr. Gladstone. If Mr. Eyre had testified that he heard Mr. Cohen direct a certain number to be called and then addressed the party answering as Mr. Gladstone, and if proof were offered to the effect that such number was Mr. Gladstone's—then I might be

Opinion of Court.

able to give such corroboration some weight, but I cannot give a self-serving declaration such as the repetition by Mr. Eyre of Mr. Cohen's words over the 'phone any weight in considering the question of preponderance of evidence. There are certain instances where such a conversation might
10 be admissible under circumstances tending to identify the speaker at the other end of the wire, but this is not one of those cases.

I had before me some time ago a suit for broker's commissions which I decided in favor of the broker, where the controversy confined itself to the question as to whether an oral direction to purchase, given by a customer, came within the Statute of Frauds. I decided that such a transaction did not come within the Statute. But
20 in that case the defendant did not deny that he had given the order. If I should decide for the plaintiff in this case upon its uncorroborated statement and in the face of defendant's denial, I would set a precedent which would open the door to unscrupulous brokers to buy and sell without actual orders. Until a higher court finds to the contrary, my ruling in this case will be followed in similar cases in this court.

There will be judgment for the defendant.

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PITNEY, HARDIN & SKINNER,
Attorneys for Plaintiff-Appellant.

SAMUEL H. NELSON,
Attorney for Defendant-Appellee.

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GROUNDS OF APPEAL.

Filed November 12, 1929.

NEW JERSEY SUPREME COURT.

<p style="margin: 0;">GOLDSMITH, MYER & LOBDELL, INC., <i>Plaintiff-Appellant,</i> <i>vs.</i> PHILLIP GLADSTONE, <i>Defendant-Appellee.</i></p>	}	10	<i>On Appeal.</i>
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To Samuel H. Nelson, attorney of defendant.

SIR:

The following is a specification of the determinations of the Second District Court of the City of Newark in the above-entitled cause with respect to which the plaintiff-appellant is dissatisfied in point of law:

1. The learned trial judge erred in determining that the plaintiff had not sustained the burden of proof.

2. The learned trial judge erred in refusing, over the plaintiff's protest, to consider as legal evidence the corroborative testimony of the plaintiff's witness, Eyre, who testified on rebuttal confirming the testimony of the plaintiff's witness, Cohen, and refuting the testimony of the defendant, Gladstone, regarding what was said by the witness, Cohen, to the defendant, Gladstone, during a telephone conversation between them on July 12, 1929, in that such refusal overlooked the fact that both the defendant and said Cohen had previously testified that there had

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Grounds of Appeal.

been a telephone conversation, and only one telephone conversation, between them, on the day and at the time mentioned.

10 3. The learned trial judge failed in the performance of his duty to weigh and compare the credibility of the testimony of the witnesses called on behalf of the plaintiff with the credibility of the testimony of the defendant, who was the only witness on behalf of the defense, and failed to take into consideration the self-interest of the defendant in denying the existence of an unprofitable contract and failed to compare the defendant's self-interest with the absence of any like pecuniary interest on the part of the witnesses called in the plaintiff's behalf.

20 4. The learned trial judge erred in rendering judgment for the defendant upon the ground that a judgment for the plaintiff would set a precedent which would open the door in future cases to fraud upon the part of brokers, thus overlooking the greater possibility that the judgment entered will open the door to fraud upon the part of unscrupulous customers whose trading orders have proved unprofitable.

30 5. The learned trial judge erred in determining that brokers who accept oral orders from customers, "without written memorandum or other corroborative proof," must assume the risk of a dispute of the kind raised in the case at bar.

PITNEY, HARDIN & SKINNER,
Attorneys for Plaintiff-Appellant.

Dated November 9, 1929.

40 Service of grounds of appeal acknowledged by attorney for defendant-appellee November 9, 1929 and consent given to filing as within time.

OPINION OF SUPREME COURT.

Filed January 29, 1930.

NEW JERSEY SUPREME COURT.

No. 407, January Term, 1930.

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<p>GOLDSMITH, MYER & LOBDELL, INC., <i>Plaintiff-Appellant,</i> <i>vs.</i> PHILLIP GLADSTONE, <i>Defendant-Respondent.</i></p>	}	<i>On Appeal.</i>
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Argued January 21, 1930; decided January 28, 1930. 20

Before Justices Parker, Black and Bodine.

For the appellant, Messrs. Pitney, Hardin & Skinner and Messrs. Shelton Pitney and William H. Osborne, Jr.

For the defendant, Mr. Samuel H. Nelson.

PER CURIAM.

This suit was brought in the Second District Court of Newark to recover \$109.50 damages by a broker growing out of an alleged oral contract made over the telephone. The state of demand alleges, that on July 12, 1929, the defendant requested the plaintiff to find a purchaser and sell for him 100 shares of stock of the American Insurance Company and 72 shares of the stock of the Fireman's Insurance Company "at the market," and to buy 25 shares of the common stock of the Chase National Bank "at the market." 30

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Opinion of Supreme Court.

The case was tried by the judge without a jury resulting in a judgment for the defendant. The plaintiff appeals and files five specification of determinations, with respect to which the plaintiff is dissatisfied in point of law. They are all included in and may be considered under the first one, viz: the trial judge erred in determining that the plaintiff had not sustained the burden of proof. With the conclusion of the trial judge we concur, because the crux of the case involves simply a question of fact. There was evidence before the Court on which the judgment rests. It may not be amiss, however, to point out that in the state of the case sent up with the appeal in the printed book Richard S. Cohen, a salesman for the plaintiff, was called and testified to the alleged transaction and Walter Otto Donath, employed in the cashier's department of the plaintiff, the latter's testimony however, is simply as to the quotations of the stock, which is not in controversy. The plaintiff then rested. The defendant, Phillip Gladstone, testified on his own behalf, flatly contradicting the testimony given by the plaintiff's witness Richard S. Cohen, as to the alleged contract. Then the plaintiff in rebuttal called as a witness James S. Eyre, who said he was in the room when the telephone girl called "Mr. Cohen, Mr. Gladstone is on the wire." He also testified that he did not know that Mr. Gladstone was speaking at the other end of the wire, that he did not hear Gladstone's voice. He concluded that it was Mr. Gladstone on the wire simply because the telephone girl called "Mr. Cohen, Mr. Gladstone is on the wire." This testimony was pure hearsay. The trial judge believed the testimony of the defendant and gave

Opinion of Supreme Court.

judgment accordingly. The judgment of the Second District Court of Newark is, therefore, affirmed with costs.

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**RULE FOR AFFIRMANCE AND
REMITTITUR.**

NEW JERSEY SUPREME COURT.

10	<p style="text-align: center;">GOLDSMITH, MYER & LOBDELL, INC., a corporation, <i>Plaintiff-Appellant,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">PHILLIP GLADSTONE, <i>Defendant-Appellee.</i></p>	<p><i>On Contract.</i></p> <p><i>On Appeal from the Second District Court of the City of Newark.</i></p> <p><i>Rule for Affirmance of Judgment and Remit- titur.</i></p>
20		

The appeal taken in this cause from the judgment entered in the Second District Court of Newark, New Jersey, having been brought on for hearing and the Court having considered the issues raised and having determined that the judgment below should be affirmed, it is on this 8th day of February, 1930,

30 ORDERED that the judgment of the Second District Court of Newark, New Jersey, from which this appeal was taken, be and the same is hereby affirmed with costs of this appeal to be paid by the plaintiff-appellant.

And it is FURTHER ORDERED that the record in this cause be remitted to the Second District Court of Newark, New Jersey, for further pro-

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NOTICE OF APPEAL.

Filed March 7, 1930.

NEW JERSEY SUPREME COURT.

10	GOLDSMITH, MYER & LOBDELL, INC., a corporation, <i>Plaintiff-Appellant,</i> <i>vs.</i> PHILLIP GLADSTONE, <i>Defendant-Appellee.</i>	}	<i>On Appeal.</i> <i>Notice of</i> <i>Appeal.</i>
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To Samuel H. Nelson, Esquire,
 Attorney for Defendant-Appellee.

20 SIR:

Take notice that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the determination of the New Jersey Supreme Court in the above entitled cause which resulted in the affirmance of judgment in favor of the defendant and against the plaintiff.

Yours truly,

30 PITNEY, HARDIN & SKINNER,
 Attorneys for Plaintiff-Appellant.

Service of the within Notice of Appeal is hereby acknowledged this 20th day of February, 1930.

SAMUEL H. NELSON,
 Attorney for Defendant-Appellee.

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GROUNDS OF APPEAL.

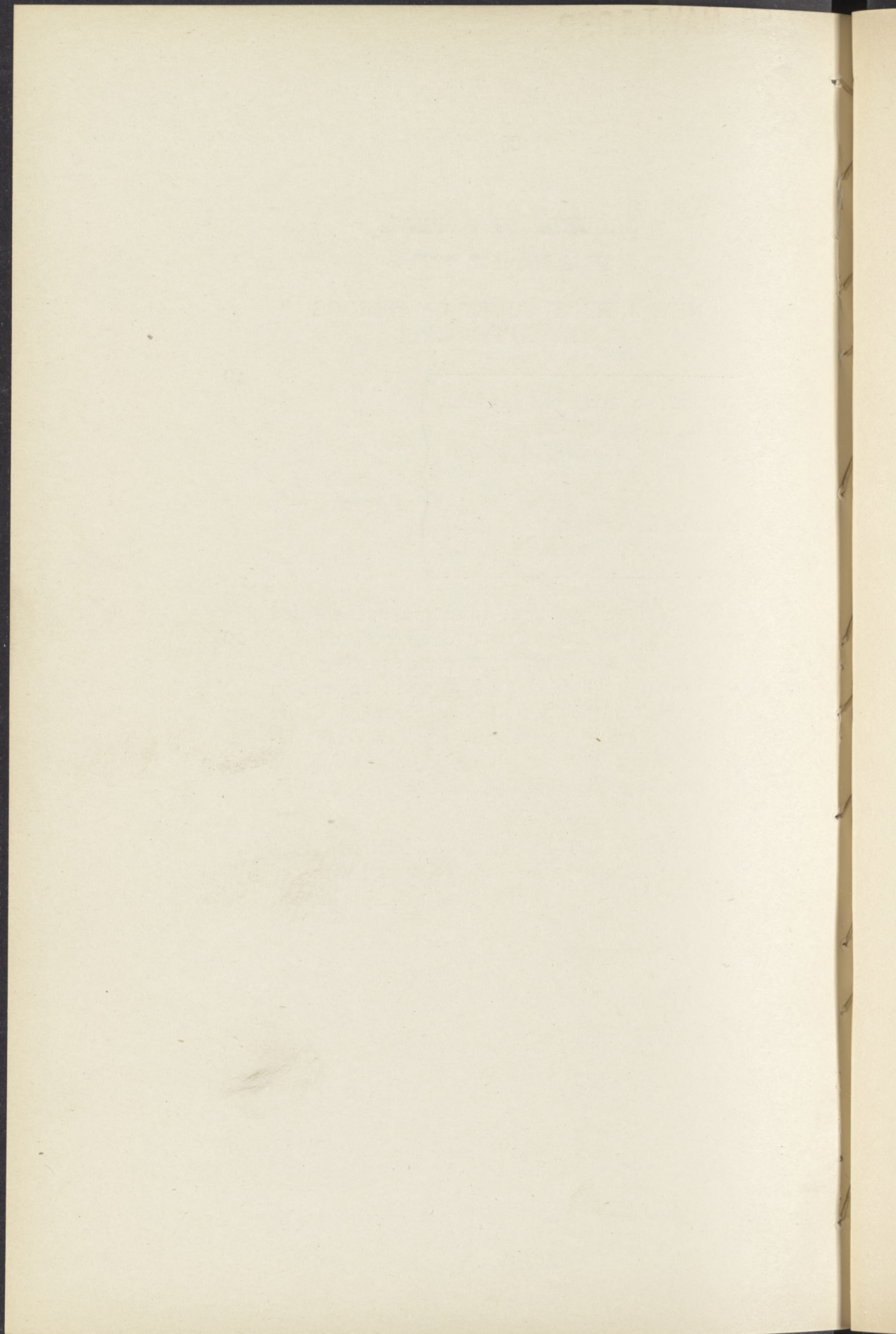
Filed March 7, 1930.

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

<p>GOLDSMITH, MYER & LOBDELL, Inc., a corporation, <i>Plaintiff-Appellant,</i> <i>vs.</i> PHILLIP GLADSTONE, <i>Defendant-Appellee.</i></p>	}	<p><i>On Appeal.</i> <i>Grounds of Appeal.</i></p>	<p>10</p>
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The plaintiff-appellant in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause in the New Jersey Supreme Court on the following ground, to wit: that the Supreme Court erred in giving judgment for the defendant-appellee, instead of for the plaintiff-appellant. 20

PITNEY, HARDIN & SKINNER,
Attorneys for and of Counsel with
Plaintiff-Appellant. 30



New Jersey Court of Errors and Appeals

GOLDSMITH, MYER & LOBDELL, INC.,
a corporation,
Plaintiff-Appellant,

against

PHILLIP GLADSTONE,
Defendant-Appellee.

On Contract

On Appeal from
the Supreme Court

BRIEF FOR PLAINTIFF- APPELLANT.

This case was tried before District Court Judge Louis R. Freund, without a jury. It resulted in a judgment for the defendant which was affirmed by the Supreme Court. The *per curiam* opinion of the Supreme Court* is reported in VIII Misc. 91, and will also be found at page 19 of the record. Plaintiff appeals from the judgment of affirmance.

The Question of Law Presented.

A single question of law is presented and is urged as reason for reversal. It is that the testimony of the plaintiff's witness, James S. Eyre (hereinafter set forth), was competent, relevant and material evidence and should not have been thrown into the discard by the trial judge, upon his own motion, following its admission without objection on the defendant's part.**

*Justices Parker, Black and Bodine.

**Raised by second ground of appeal.

The facts will be stated with sufficient fullness to demonstrate how the legal question arose and that its disposition by the learned trial judge was prejudicial error.

The Supreme Court dismissed the point briefly by saying that Eyre's "testimony was pure hearsay." At the outset, we would respectfully point out that we have been able to find no authority to sustain the view expressed by the Supreme Court, and that our adversary has at no time attempted to support that view by any citation whatever. While the legal point appears not to have been before presented for consideration in a court of this state, the decisions in other states are unanimously opposed to the ruling of the Supreme Court, which cited no authority in support thereof and ignored the cases upon which we now rely and cited on our brief below.

Statement.

The case made by plaintiff's state of demand (R. pp. 5-7) is this:

Plaintiff was and is engaged in transacting a general brokerage business in Newark.* On July 12, 1929 the defendant ordered plaintiff to sell 100 shares of American Insurance Company common stock and 72 shares of Firemen's Insurance Company common stock, belonging to the former, "at the market," and to buy from the proceeds 25 shares of Chase National Bank common stock, "at the market." Trusting the defendant to deliver his certificates for the insurance stocks, plaintiff carried out the defendant's orders on the same day.

*Except that it does not accept "margin accounts."

Next morning the defendant repudiated his orders and refused to deliver his insurance stocks to plaintiff or to take delivery of, or pay for, the bank stock. As a necessary result, plaintiff found itself "short of the market" to the extent of 100 shares of American Insurance and 72 shares of Firemen's Insurance* and obligated to take delivery of and pay for 25 shares of Chase stock from its own funds. Plaintiff managed to resell the Chase stock without loss, but in "covering" its unintended "short sales" (viz., in buying in the insurance stocks in order to deliver certificates therefor to the purchaser of July 12) suffered an actual loss of \$109.50, exclusive of the commissions which it would have made if the defendant had not repudiated his contract.

Plaintiff sued to recover its actual out-of-pocket loss sustained in so "covering," disregarding its commissions.**

The Testimony.

It was and is undisputed that plaintiff actually sold the insurance stocks and purchased the Chase stock "at the market"; and for the defendant's account, as it supposed (R. p. 10, l. 24 *et seq.*). It is also undisputed that the actual loss suffered by plaintiff in "covering" was \$109.50 (R. p. 11, l. 5). The defendant received the usual confirmation slips in his mail on the following morning (R. p. 11, l. 28).

*Viz., obligated to purchase a like number of shares of each of said stocks in the open market, in order to deliver certificates therefor to the purchaser of said shares of the day before,—a broker not being excused from making a delivery upon the ground that his customer has "welched".

**The headnote, VIII Misc. 91, is in error in referring to "suit for broker's commissions." The suit in no way involves commissions but only the excess cost to plaintiff of the insurance stocks over the price for which plaintiff had agreed to deliver them to the purchaser of the defendant's said stocks.

Plaintiff's witness Cohen testified that on July 12, 1929, he quoted to the defendant the then prevailing market prices of the three stocks and that the defendant then ordered him to sell the insurance stocks and buy the Chase Bank stock (R. p. 8, l. 29 to p. 9, l. 14). These orders were orally given, but not by telephone, as mistakenly stated in the opinion of the Supreme Court. Cohen immediately caused the orders to be executed (R. p. 9, l. 13) and they were in fact executed within an hour. Cohen also testified that at about 4 P. M. on the same day, after the execution of the orders, the defendant telephoned him at plaintiff's office and said that he, the defendant, had been thinking the matter over and believed that he would suffer too great a loss in the transaction. Cohen replied that the orders had already been executed, and gave him the execution price as to each. The defendant made no objection to the prices and seemed satisfied (R. p. 9, ll. 26-37).

The defendant testified (inferentially) that he had not given definite orders to Cohen, but had only requested that Cohen obtain "further quotations." The defendant's version of the later telephone conversation between Cohen and himself (referred to above), differed widely from Cohen's version. The defendant testified that he told Cohen "not to bother to get further quotations" (R. p. 11, l. 26). *He denied that Cohen told him that the insurance stocks had been sold and the bank stock purchased and said that Cohen gave him a quotation for the Firemen's stock alone and no other* (R. p. 12, l. 35).

Thus, there was a sharp issue as to what Cohen actually said to the defendant on the telephone during the course of the conversation in question.

The credibility of the two witnesses turned upon which had correctly recalled and related Cohen's words to Gladstone. Admittedly plaintiff had already executed all three orders when the defendant telephoned and the defendant's testimony was that Cohen did not tell him of the execution at that time.

That sharp issue of fact as to what Cohen did say to the defendant during the course of the above mentioned telephone conversation having been presented, plaintiff called James S. Eyre, in rebuttal, who testified (R. p. 13, l. 12) that on the afternoon of July 12 he was sitting at his desk in plaintiff's office adjacent to Cohen's desk and heard the telephone girl call, "Mr. Cohen, Mr. Gladstone is on the wire"; that Cohen then took up the 'phone, addressed the defendant Gladstone by name, and thereupon told the latter that he had sold the latter's insurance stocks and had purchased the Chase Bank stock for him, and that Cohen repeated each of the three execution prices to the defendant.

Eyre's testimony was given without any objection on the part of the defendant, and the trial judge gave no intimation that, at the conclusion of the case, he would refuse to consider Eyre's testimony in any way. When the testimony had been closed and it was too late for plaintiff to present other evidence to corroborate Cohen and impeach the defendant's testimony, the trial judge announced his decision for the defendant (R. p. 15, l. 30 *et seq.*), saying:

"I cannot give such corroboration (Eyre's testimony) any weight in arriving at my decision. * * * I cannot give a self-serving declaration such as the repetition by Mr. Eyre of Mr. Cohen's words over the 'phone any weight in considering the question of preponderance

of evidence. There are certain instances where such a conversation might be admissible *under circumstances tending to identify the speaker at the other end of the wire, but this is not one of those cases. * * **"

It is for the above error on the part of the trial judge that we ask a reversal.

ARGUMENT.

POINT I.

Eyre's testimony was competent, relevant and material evidence and the trial judge erred in throwing it into the discard, upon his own motion, following its admission without objection.

First: There was no doubt or dispute as to the identity of the defendant at the other end of the wire.

Cohen had testified that Eyre was in the room and within earshot at the time that he, Cohen, was talking to the defendant over the 'phone (R. p. 9, l. 37). The defendant had testified that he himself had put in the telephone call for Mr. Cohen and had spoken to Mr. Cohen on the particular occasion and concerning the subject in hand. Eyre had then testified that he heard Mr. Cohen called to the 'phone to speak to Mr. Gladstone, that Cohen addressed Mr. Gladstone by name and related to the latter the sale of his insurance stocks and the purchase of the Chase stock, for the prices and in the exact number of shares that the orders had just been executed in Gladstone's behalf. *Thus, Gladstone's identity at the other end of the telephone*

wire was not in dispute. All witnesses agreed that the telephone conversation, and only one telephone conversation, took place on the occasion in question, and the subject matter of that single telephone conversation was also conceded.

We have been able to find no authority for treating Eyre's testimony as to what Cohen said, which was in dispute, as inadmissible or incompetent, either as "self-serving" (Judge Freund) or as "hearsay" (Supreme Court). The reported decisions have gone farther than is necessary to support the competency and admissibility of Eyre's testimony as to what Cohen did say.

Hancock v. Hartford Insurance Company,
142 N. Y. Sup. 352;

Pieper v. Krutzfeldt (Iowa Sup.), 136
N. W. 904;

Merchants National Bank v. State Bank
(Minn. Sup.), 214 N. W. 750;

McCarthy v. Peach, 186 Mass. 67, 70 N. E.
1029;

Miles v. Andrews, 153 Ill. 262, 38 N. E.
644;

Kent v. Cobb (Colo. Sup.), 133 Pac. 424;

Snively v. Colburn, 78 Ill. App. 93.

In *Hancock v. Hartford Insurance Company*, *supra*, the issue was whether an employee of the defendant insurance company had told the plaintiff on the telephone that the defendant would pay an earlier claim only upon the surrender of the plaintiff's policy for cancellation. The plaintiff absolutely denied any conversation, by telephone or otherwise, regarding the cancellation of the policy. Defendant's employee testified to the telephone conversation which he said that he had had

with the plaintiff and the defendant then called a second employee, who had overheard the conversation, to bear out the testimony of the first employee. The trial court excluded the testimony of the second employee and the Appellate Term held that the exclusion was erroneous. Judge Lehman, speaking for himself, and Judges Bijur and Whitaker, said:

“To corroborate the defendant’s version of the telephone conversation, the defendant offered the testimony of a second employe, who claims to have overheard what the first employe spoke into the telephone at the time of the alleged conversation with the plaintiff. This testimony was excluded, apparently because the second employe could not state of his own knowledge who was at the other end of the telephone wire. It seems to me that the exclusion of this testimony is erroneous. Of course, ordinarily, no telephone conversation can be admitted unless the person, with whom the conversation is held is identified. A conversation with an unidentified person is obviously immaterial. The testimony, however, of the first employe as to the telephone conversation was admitted, and we must therefore assume that the trial justice has held that this employe sufficiently identified the plaintiff to make this conversation admissible. The testimony of an auditor who heard only the one side of the conversation could obviously not be considered corroboration upon the issue of whether the plaintiff took part in the conversation; but the important issue in this case was, not whether the parties did have some telephone conversation at that time, but as to whether at that conversation the defendant’s employe said anything about canceling the policy, and upon this issue the testimony as to what the second employe overheard would be entirely material, and I can see no logical

reason for its exclusion. See *McCarthy v. Peach*, 186 Mass. 67, 70 N. E. 1029, 1 Ann. Cas. 801, and *Miles v. Andrews*, 153 Ill. 262, 38 N. E. 644."

As in the above New York case, the important issue was not whether the parties did have some telephone conversation at the time, but as to what plaintiff's employee said to the defendant during the course of that conversation. Eyre's testimony not only supplied the very corroboration of plaintiff's case which the trial judge thought it lacked but also impeached the defendant's testimony and affected his credibility. We submit that the trial judge erred in treating Eyre's testimony as incompetent and that his refusal to take it into account, in determining what Cohen had said to the defendant and in resolving the question whether plaintiff had sustained its burden of proof, and ^{in weighing} ~~the question~~ of the credibility of the witnesses, was prejudicial error.

Second: Even if Eyre's testimony were "hearsay," as described by the Supreme Court, it was relevant and material in determining the disputed question as to what Cohen said to the defendant. Hearsay may be evidential. The testimony was admitted without objection and no motion was made to strike it out. The trial judge gave no intimation that he would treat it as incompetent and inadmissible until he pronounced his judgment at the close of the case. Having been admitted without objection, Eyre's testimony became evidence in the case to establish what Cohen said to the defendant. 10 R. C. L. 1008; 23 C. J. 39; *Poluski v. Glen Alden Coal Co.*, (Pa. Sup.) 133 Atl. 819. And in *Smith v. Delaware and Atlantic Telegraph and Telephone*

Company, 63 N. J. Eq. 93 (affirmed 64 N. J. Eq. 770), the court said with respect to proof of agency by the declaration of the agent that where "no objection is made, hearsay evidence, like any other evidence, is to be considered and given the importance it deserves." See also *Fath v. Thompson*, 58 N. J. L. 180, 187.

CONCLUSION.

For the foregoing reason in point of law we respectfully submit that the judgment below should be reversed, to the end that there may be a new trial. The fact is that the trial judge announced a general rule "to be followed in similar cases in this court" that brokers "must assume the risk" of repudiation of oral orders (R. p. 16, l. 28, and p. 14, l. 33). In so ruling he ignored not only the evidence in the case, but also present day business practice, convenience and experience. If the purchase and sale of bonds and stocks were restricted to written orders a vast majority of the brokerage business of the present day would necessarily be seriously handicapped, if not eliminated. The custom of recognizing and acting upon oral orders is more for the benefit of customers than of brokers. It is the customer who demands prompt execution of his orders. The court's ruling was not only prejudicial to the appellant but to the transaction of brokerage business generally. In effect, the learned District Judge extended the statute of frauds to a pure agency transaction. That was judicial legislation and, of course, unwarranted.

In conclusion, we respectfully point out that the Supreme Court's statement "that the trial judge believed the testimony of the defendant" wholly ig-

nored Judge Freund's observation (R. p. 14, l. 12) that plaintiff's witness, Cohen, told a straightforward story, no part of which he had any reason to doubt. Therefore, the trial judge's refusal to consider Eyre's corroborative testimony at all was manifestly prejudicial error. It was not that the trial judge disbelieved Eyre, which it would have been his privilege to do, but that he regarded the evidence as incompetent and inadmissible and excluded it from his mind in determining whether the plaintiff's burden of proof had been sustained and whether Cohen, for the plaintiff, or Gladstone, for himself, had told the truth.

SHELTON PITNEY,
WILLIAM H. OSBORNE, JR.,
Of Counsel with Plaintiff-Appellant.

(1) The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) under the conditions (2). It is shown that the existence of solutions is guaranteed if the matrix $A(t)$ is positive definite and the vector $b(t)$ is bounded. The second part of the paper is devoted to the study of the stability of the solutions of the system (1) with respect to the initial conditions. It is shown that the solutions are stable if the matrix $A(t)$ is positive definite and the vector $b(t)$ is bounded. The third part of the paper is devoted to the study of the stability of the solutions of the system (1) with respect to the parameters. It is shown that the solutions are stable if the matrix $A(t)$ is positive definite and the vector $b(t)$ is bounded.

REFERENCES

1. A. M. Ljapunov, *Problème de la stabilité du mouvement*, Ann. Chem. Phys. (5) 24 (1892).

