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**Notice of Appeal to the Court of Errors  
and Appeals.**

(Filed May 24, 1930)

**New Jersey Supreme Court** 10

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WILLIAM B. STEIN and SAUL F.  
ELLEND, partners trading under  
the firm name and style of  
W.M. B. STEIN & Co.,  
Plaintiffs-Appellees,  
*vs.*

ABRAHAM V. BRODER,  
Defendant-Appellant.

Action at Law.  
Notice of Appeal  
to the Court of  
Errors and  
Appeals.

20

TO FAST & FAST,  
24 Commerce St.,  
Newark, N. J.  
Attorneys for Plaintiffs:

PLEASE TAKE NOTICE that the defendant in the  
above entitled cause appeals to the Court of  
Errors and Appeals in the last resort in all causes 30  
in the State of New Jersey from the whole of the  
judgment entered in this cause.

Respectfully yours,

CHARLES HANDLER,  
Attorney for Defendant.

40

**Grounds for Appeal.**

(Filed June 12, 1930)

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

10

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WILLIAM B. STEIN and SAUL F.  
ELLEND, partners trading under  
the firm name and style of  
WM. B. STEIN & Co.,  
Plaintiffs-Appellees,

*vs.*

ABRAHAM V. BRODER,  
Defendant-Appellant.

---

Action at Law.

Grounds for  
Appeal.

20

To FAST & FAST,  
24 Commerce St.,  
Newark, N. J.  
Attorneys for Plaintiffs:

The defendant-appellant assigns the following grounds of appeal from the judgment entered in this cause:

30

1. Because the Supreme Court erred in giving judgment to the plaintiff instead of the defendant, in that:

(a) The defendant appeals from the ruling of the Trial Court excluding the following question asked by the counsel for the defendant of the witness, William B. Stein, on cross-examination:

Q. Have you a record among the books here of any other sales of Firemen's Insurance Company stock made by you?

40

*Grounds for Appeal.*

(b) The defendant appeals from the ruling of the Trial Court excluding the following question asked by the counsel for the defendant of the witness, William B. Stein, on cross-examination:

Q. Suppose I wanted to check thru your books, how would I do it with your system of bookkeeping? 10

(c) The defendant appeals from the ruling of the Trial Court excluding the following question asked by the counsel for the defendant of the witness, William B. Stein, on cross-examination:

Q. Do you sell stock on your own account?

(d) The defendant appeals from the ruling of the Trial Court excluding the following question asked by the counsel for the defendant of the witness, Saul F. Ellend, on cross-examination: 20

Q. In your business, did your firm buy stock on its own account to be re-sold on its own account?

(e) The Trial Court erred in refusing to grant defendant's counsel's motion for direction of verdict in favor of the defendant on the ground that the complaint on the face of it shows that the suit is brought on the basis of a sale, and consequently, the plaintiff's testimony should prove a sale under the provisions of the sales act, and should prove an order in writing. 30

(f) The Trial Court erred in refusing to grant defendant's counsel's motion for direction of verdict in favor of the defendant on the ground that the evidence taken in conjunction with the complaint made out a sale, and consequently, the plaintiff's case should be dismissed because it failed to prove a compliance with the conditions of the sales act.

(g) The Trial Court erred in refusing to grant defendant's counsel's motion for direction of ver- 40

*Grounds for Appeal.*

dict in favor of the defendant on the ground that the plaintiffs hypothecated the stock as their own and they had treated it as their own, and consequently were not ready at the time of trial to tender delivery.

- 10 (h) The Trial Court erred in charging the jury that the suit was brought for "the recovery of the purchase price and commission".

CHARLES HANDLER,  
Attorney for and of counsel with  
Defendant-Appellant.

20

**Opinion Per Curiam.**

(Filed May 6, 1930.)

NEW JERSEY SUPREME COURT,

No. 54, OCTOBER TERM, 1929.

30

WILLIAM B. STEIN, *et als.*, as  
WM. B. STEIN & COMPANY,  
Plaintiffs-Appellees,

*vs.*

ABRAHAM V. BRODER,  
Defendant-Appellant.

Argued October 11, 1929; decided May 6, 1930.

Appeal from Essex County Circuit Court.

Before Chief Justice GUMMERE, and Justices  
KALISCH and CAMPBELL.

40

For appellant, CHARLES HANDLER.

For appellees, FAST AND FAST.

*Opinion Per Curiam.**Per Curiam:*

The action was to recover the purchase price and commissions for the purchase of 100 shares of stock of the Firemen's Insurance Company. The plaintiffs-appellees have a judgment therefor.

This the appellant, defendant below, seeks to have reversed upon several grounds: 10

1. Because the Trial Court erred in excluding answers to certain questions addressed to the plaintiff Stein.

We think the rulings were proper as the questions were not pertinent to the issues involved in the cause then being tried.

2. Because the plaintiff having hypothecated the stock in question for a bank loan such transaction amounted to a conversion by it and it was error for the Trial Court to refuse to direct a verdict in favor of the defendant-appellant. 20

This was not error. The proofs were that the stock in question would be released as collateral security to the loan in question upon payment to the bank of the purchase price of such stock. This under the law and custom of brokers does not make for a conversion. Moreover, this question was submitted to the jury and they found against the defendant. This submission probably placed the defendant in a more favorable position than he was entitled to. 30

3. Because the Court erred in refusing to direct a verdict in that there was a variance between the proofs and the allegations of the complaint.

It is insisted that the complaint set up an absolute sale as between the plaintiffs and the defendant while the proofs tended to show an executed brokerage agreement to purchase for the account of the defendant. 40

*Opinion Per Curiam.*

While the complaint may be said to be inartistically drawn, nevertheless, it fairly sets up a brokerage agreement upon the part of the plaintiff to purchase for the account of the defendant the stock in question.

10       4. Error in the charge of the Court as follows:  
 “This action as you have heard is brought by a brokerage firm to recover the purchase price and commission on 100 shares of Firemen’s Insurance Company stock”.

20       This is the merest sort of an extract from the charge. A reading of the entire charge shows that the Court explicitly and carefully submitted to the jury the contention of both parties; that of the plaintiffs that the transaction was that of brokerage to purchase the stock for the account of the defendant and that of the defendant that it was a direct and absolute sale of the stock by plaintiffs as the owners thereof to the defendant.

30       It is also urged that this case is controlled by the finding of Part 3 of this Court in case 409 of the October 1929 Term of this Court, in the matter of Pascal *vs.* Hess. We are inclined to think this would be so if in the present case a verdict had been directed in favor of the plaintiff instead of submitting to the jury for determination the character of the contract. We think that here, as there, a jury question, upon that point, was presented. In the case referred to the Trial Court took the question away from the jury. Here the question was submitted to the jury and it found for the plaintiff-appellee.

Finding no error in any of the grounds urged we conclude that the judgment below should be affirmed, with costs.

**Rule for Judgment.**

(Filed May 13, 1930.)

NEW JERSEY SUPREME COURT,

No. 54, OCTOBER TERM, 1929.

WILLIAM B. STEIN, <i>et als.</i> , as WM. B. STEIN & COMPANY, Plaintiffs-Appellees,  <i>vs.</i>  ABRAHAM V. BRODER, Defendant-Appellant.	}	On Appeal.  Rule for Judgment.
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This matter being brought to the attention of  
 the Court by Fast & Fast, attorneys for appellees,  
 Louis A. Fast, of counsel, and it appearing that  
 no error was found in the decision of the judg-  
 ment rendered in the Essex County Circuit Court,  
 from which decision the appeal hereunder was  
 made, it is hereby on this 13th day of May, 1930,

20

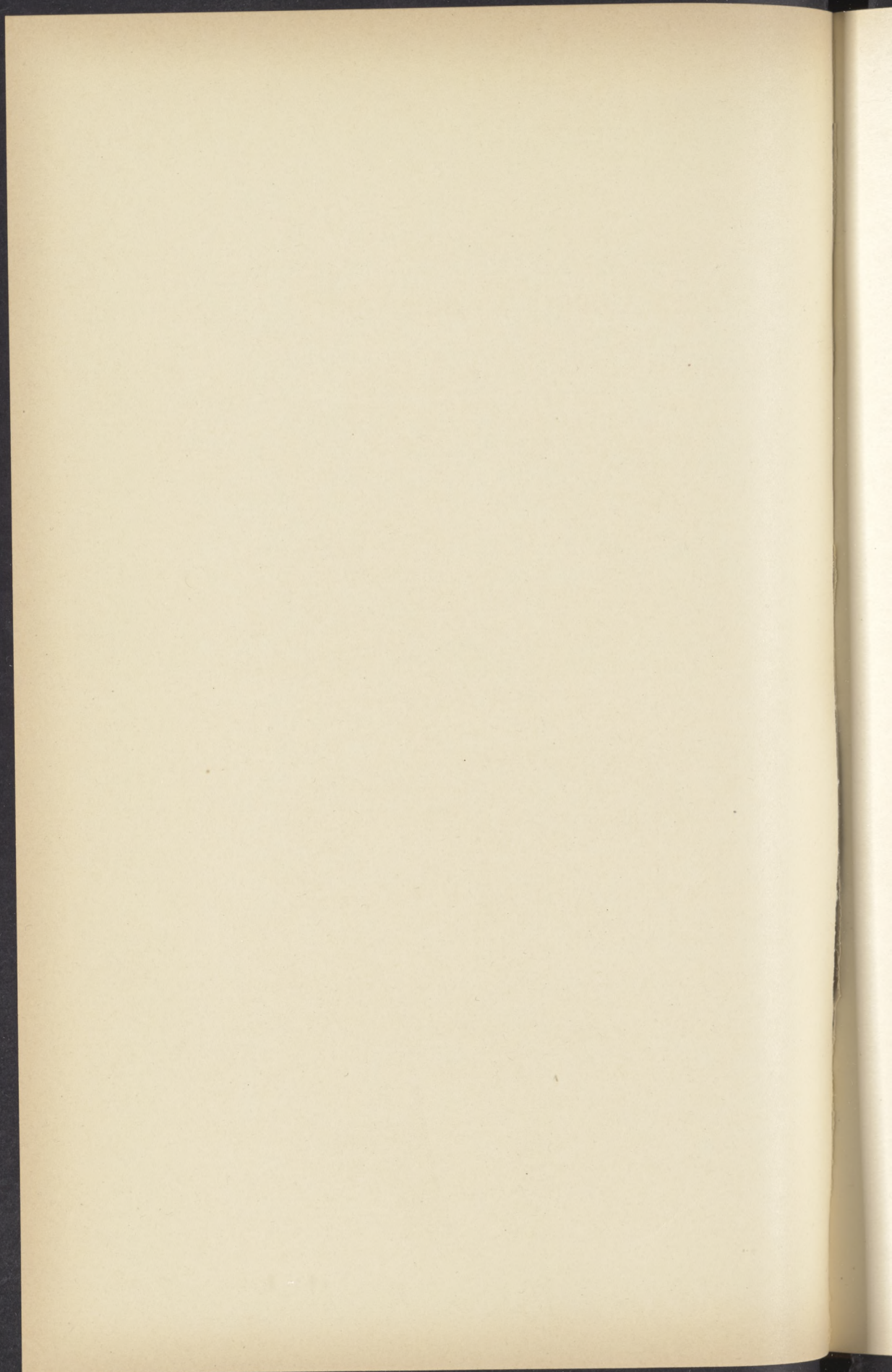
ORDERED that the said judgment rendered in the  
 said Essex County Circuit Court, be and the same  
 is hereby affirmed and that the record be remitted  
 to the Court below to be proceeded with in accord-  
 ance with this judgment and the practice of the  
 said Court.

30

Entered, May 13th, 1930.

On Motion of Fast & Fast, Louis A. Fast, of  
Counsel, attorneys for appellees.

40



NOTICE OF APPEAL.

**Essex County Circuit Court**

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WILLIAM B. STEIN and SAUL F. ELLEND, partners trading under the firm name and style of WM. B. STEIN & Co., <i>Plaintiffs,</i>	}	<i>Action at Law.</i>	10
<i>vs.</i>			
ABRAHAM V. BRODER, <i>Defendant.</i>	}	<i>Notice of Appeal to the Supreme Court of the State of New Jersey.</i>	

---

TAKE NOTICE that the defendant, Abraham V. Broder appeals from the whole of the judgment entered in this cause to the Supreme Court of the State of New Jersey. 20

CHARLES HANDLER,  
Attorney of Appellant.

To Fast & Fast, 24 Commerce street, Newark, N. J., attorneys for plaintiffs.

Service of the within notice of appeal acknowledged this 6th day of June, 1929. 30

FAST & FAST,  
Attorneys for Plaintiffs-Appellees.

GROUNDS OF APPEAL.

**New Jersey Supreme Court**

10	WILLIAM B. STEIN and SAUL F. ELLEND, partners trading under the firm name and style of W.M. B. STEIN & Co., <i>Plaintiffs-Appellees,</i>  <i>vs.</i>  ABRAHAM V. BRODER, <i>Defendant-Appellant.</i>	} <i>Action</i> <i>at Law.</i>  <i>Grounds</i> <i>for Appeal.</i>
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20 The defendant-appellant assigns the following grounds of appeal from the judgment entered in this cause:

(1) The defendant appeals from the ruling of the trial court excluding the following question asked by the counsel for the defendant of the witness, William B. Stein, on cross examination:

30 Q Have you a record among the books here of any other sales of Firemen's Insurance Company stock made by you?

(2) The defendant appeals from the ruling of the trial court excluding the following question asked by the counsel for the defendant of the witness, William B. Stein, on cross examination:

Q Suppose I wanted to check through your books, how would I do it with your system of bookkeeping?

40 (3) The defendant appeals from the ruling of the trial court excluding the following question

*Grounds of Appeal.*

asked by the counsel for the defendant of the witness, William B. Stein, on cross examination:

Q Do you sell stock on your own account?

(4) The defendant appeals from the ruling of the trial court excluding the following question asked by the counsel for the defendant of the witness, Saul F. Ellend, on cross examination: 10

Q In your business, did your firm buy stock on its own account to be re-sold on its own account?

(5) The trial court erred in refusing to grant defendant's counsel's motion for direction of verdict in favor of the defendant on the ground that the complaint on the face of it shows that the suit is brought on the basis of a sale, and consequently, the plaintiff's testimony should prove a sale under the provisions of the sales act, and should prove an order in writing. 20

(6) The trial court erred in refusing to grant defendant's counsel's motion for direction of verdict in favor of the defendant on the ground that the evidence taken in conjunction with the complaint made out a sale, and consequently, the plaintiff's case should be dismissed because it failed to prove a compliance with the conditions of the sales act. 30

(7) The trial court erred in refusing to grant defendant's counsel's motion for direction of verdict in favor of the defendant on the ground that the plaintiffs hypothecated the stock as their own and they had treated it as their own, and consequently were not ready at the time of trial to tender delivery.

*Grounds of Appeal.*

(8) The trial court erred in charging the jury that the suit was brought for "the recovery of the purchase price and commission."

CHARLES HANDLER,  
Attorney for the Defendant-Appellant.

10 Service of a copy hereof acknowledged this 8th  
day of July, 1929.

FAST & FAST,  
Attorneys of Plaintiffs-Appellees.

20

30

40

## COMPLAINT.

## ESSEX COUNTY CIRCUIT COURT.

WILLIAM B. STEIN and SAUL F. ELLEND, partners trading under the firm name and style of W. M. B. STEIN & Co., <i>Plaintiffs,</i>  <i>vs.</i> ABRAHAM V. BRODER, <i>Defendant.</i>	}	10          <i>Action          at Law.          Complaint.</i>
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The plaintiffs, of the City of Newark, County  
of Essex and State of New Jersey, say: 20

(1) That on the 4th day of September, 1928,  
the defendant requested the plaintiff to buy for  
him one hundred shares of stock in the Fire-  
men's Insurance Company, a New Jersey cor-  
poration, at \$49 3/8 a share.

(2) That in accordance with said order, the  
plaintiffs purchased the aforementioned one hun-  
dred shares of stock and sold them to the de-  
fendant at the agreed price, to wit, the sum of 30  
\$49 3/8 per share.

(3) On the 5th of September, 1928, the plain-  
tiff offered the one hundred shares of stock in  
the Firemen's Insurance Company, so purchased  
for the defendant, to him, but the defendant re-  
fused to accept same.

(4) Plaintiff has at various times tendered  
the one hundred shares of Firemen's Insurance  
Company stock to the defendant, but the defend- 40

*Complaint.*

ant has refused and still does refuse to accept the same.

10 WHEREFORE plaintiffs demand as damages the sum of four thousand nine hundred thirty-seven dollars and fifty cents (\$4,937.50), together with interest from September 4, 1928, and costs of suit to be taxed.

FAST & FAST,  
Attorneys of Plaintiffs.

## Notice to the Within Named Defendant:

20 In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of such service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of this notice.

FAST & FAST.

30

40

**ANSWER.****ESSEX COUNTY CIRCUIT COURT.**

WILLIAM B. STEIN and SAUL F. ELLEND, partners trading under the firm name and style of WM. B. STEIN & Co., <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Action</i>	10
<i>vs.</i>		<i>at Law.</i>	
ABRAHAM V. BRODER, <div style="text-align: right;"><i>Defendant.</i></div>		<i>Answer.</i>	

The defendant, residing in the City of Newark, County of Essex and State of New Jersey, answering the complaint of the complainants herein, say: 20

He denies the allegations of paragraphs one, two, three and four of the complaint.

**FIRST SEPARATE DEFENSE.**

The defendant hereby reserved the right to move to strike out the complaint of the plaintiffs filed herein.

30

CHARLES HANDLER,  
Attorney for Defendant.

**REPLY.****ESSEX COUNTY CIRCUIT COURT.**

10	WILLIAM B. STEIN and SAUL F. ELLEND, partners trading under the firm name and style of WM. B. STEIN & Co., <i>Plaintiffs,</i>	}	<i>Action  at Law.</i>
	<i>vs.</i>		<i>Reply.</i>
	ABRAHAM V. BRODER, <i>Defendant.</i>	}	

20      The plaintiffs deny each and every allegation  
contained in the answer filed by the defendant  
herein.

FAST & FAST,  
Attorneys of Plaintiffs.

30

40

### JUDGMENT FOR PLAINTIFF.

This action was tried before Judge William A. Smith with a jury at the Essex County Circuit Court on June 3, 1929.

The cause having been heard and submitted to the jury they returned their verdict as follows: 10  
 A general verdict for the plaintiff in the amount of five thousand one hundred and fifty-nine dollars and sixty-eight cents (\$5,159.68).

Whereupon it is adjudged that the plaintiff recover from the defendant the sum of five thousand one hundred and fifty-nine dollars and sixty-eight cents (\$5,159.68) and his costs, which are taxed at the sum of eighty-eight dollars and ninety-two cents (\$88.92) making in the whole the sum of five thousand two hundred and forty-eight dollars and sixty cents (\$5,248.60). 20

Judgment entered June 3, 1929.

30

40

*William B. Stein, direct.*

**TESTIMONY.**

ESSEX CIRCUIT COURT.

Monday, June 3, 1929.

10

WILLIAM B. STEIN, *et al.*,

*vs.*

ABRAHAM V. BRODER.

*Action  
at Law.*

Before Hon. William A. Smith, *J.* and a jury.

For plaintiffs appear Fast & Fast (by Louis A. Fast).

20

For defendant appears Charles Handler.

(A jury is called and sworn.)

Mr. Fast opens for plaintiffs.

Mr. Handler opens for defendant.

WILLIAM B. STEIN, one of the plaintiffs,  
sworn in behalf of plaintiffs.

*Direct examination* by Mr. Fast.

30

Q Mr. Stein, what is your business? A Broker.

Q With whom are you associated? A With Saul Ellend.

Q What is your firm name? A William B. Stein & Co.

Q On September 4, 1928, did you have any business dealings with Abraham V. Broder, the defendant in this case? A Yes, sir.

Q Tell us what it was. A About 11 A. M.  
40 I received a call. A gentleman on the other side

*William B. Stein, direct.*

introduced himself as Abe Broder of 972 Broad street and asked me if I had any Firemen's Insurance Company's stock for sale. I said, "No, sir." He asked me the range for the Firemen's Insurance Company's stock that morning and I told him it was  $49\frac{1}{2}$  bid and  $49\frac{3}{4}$  asked. Mr. Broder asked me if I could pick up 100 shares at  $49\frac{1}{4}$  and I said I would try and if I could I would charge  $\frac{1}{8}$  point as brokerage. He asked me to see what I could do, and if I could to call him back and confirm the order. I called up various brokers in this city and succeeded in buying 100 shares—that is, placing a temporary order for 100 shares with Julius Rippel, a brokerage house, subject to the confirmation I was to receive from Mr. Broder at my next telephone call which would enable me to buy it. I called him up and said, "I can get you 100 shares at  $49\frac{1}{4}$  plus  $\frac{1}{8}$  point which will make the stock  $\$49.37\frac{1}{2}$  a share." He said "Go ahead and buy it." I called up Mr. Rippel and bought it.

Q How did you pay for this stock?

Objected to.

Objection overruled.

A I paid the next day with our funds.

Q Have you the check with you? A Yes, sir.

Q I show you a piece of paper and ask you what this paper is? A This is a check given September 5th by William B. Stein & Co., to Julius Rippel in payment of 100 shares of Firemen's Insurance Company stock at  $49\frac{1}{4}$ , \$4,925.

Mr. Fast: I offer it in evidence.

(Same is received in evidence and marked Exhibit P. 1.)

*William B. Stein, cross.*

Q You used the word "range" in your testimony. What does that mean? A It means the difference between the bid price and the asked price on a certain stock.

10 Q When you gave Mr. Rippel or his firm that check, what did you get in return? A I received 100 shares of Firemen's Insurance Company stock.

Q For whom did you buy that stock? A For Mr. Broder.

Q What did you do with the stock? A I proceeded to make delivery to Mr. Broder through Mr. Ellend.

Q Did you make a confirmation to Mr. Broder? A I certainly did.

20 Q When? A The moment we completed the transaction over the telephone.

Q After sending out that confirmation did Mr. Broder get in touch with you? A He did not.

Q Did he ever say that he never ordered these shares of stock? A Never; nothing of the kind, sir.

Q Is 1/8 of a dollar per share a reasonable brokerage commission? A This is the least that any one can charge.

30 *Cross examination by Mr. Handler.*

Q Where is that stock now? A It's at the New Jersey National Bank & Trust Company as collateral.

Q As collateral for what? A For a loan.

Q In whose name? A In the name of William B. Stein & Co.

40 Q You want us to understand that that is Mr. Broder's stock and you sue him for the purchase price and you pledged it for your own

*William B. Stein, cross.*

loan? A I purchased it for him and held it in our safe until February, 1929, and we were short of funds; this is the custom of the brokerage houses. I then got the loan on it.

Q So now you have hypothecated that for your own loan? A That's right.

Q And that was done when? A February, 1929, when the necessity arose for our loaning money on stock.

Q You received a subpoena from my office, did you not? A I did.

Q Did you bring your company's books with you in response to that subpoena? A I did.

Q Which of these books would carry a record of the purchase of the stock from Rippel for which the check in evidence was given? A This one right here (indicating).

Q Will you turn to the transaction, please? A Yes, sir, here it is (indicating).

Q What time of the day did you purchase this from Rippel? A I should say five minutes after Mr. Broder called me up.

Q What time of the day would you say it was? A About 11 o'clock in the morning.

Q You didn't purchase this stock before you ever talked to Broder, did you? A Of course not.

Q What time do you say it was? A Eleven o'clock in the morning.

Q That is when you bought it from Rippel? A I wouldn't say exactly eleven; it might have been ten thirty or ten fifteen or eleven thirty.

Q Have you a record among the books here of any other sales of Firemen's Insurance Company stock made by you?

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30

40

*William B. Stein, cross.*

Objected to on the ground that it is not proper cross examination and as being a matter of defense.

10 The Court: I will sustain the objection. You have produced these books and you are making him your witness. It is not cross examination.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Did you have any other sales of Firemen's Insurance Company stock that day?

Objected to.

20 Objection overruled.

Q In your system of bookkeeping do you keep any separate system of books for records of Firemen's Insurance Company stock particularly? A Not particularly, no.

Q Suppose I wanted to check through your books, how would I do it with your system of bookkeeping?

Objected to.

30 Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40 Q What book is this, Mr. Stein? A This is our collateral book showing when we put the Firemen's Insurance Company stock into the bank for collateral. We also have our sales book here that we produced in answer to your subpoena.

*William B. Stein, cross.*

Q How long have you been in the brokerage business? A Since April, 1928.

Q Since April 19, 1928? A No, since April 1, 1928.

Q You had been in business about six months by the time this transaction came about, hadn't you? A That's apparent. 10

Q When you buy stock for a man as an agent what sort of a confirmation do you send him? A We send him a confirmation which is the usual confirmation sent out by the brokers by mail.

Q What would be on the face of that confirmation? A Here is the confirmation that we sent—here is a copy of the confirmation we sent Mr. Broder. 20

Q This confirmation says merely "We confirm sale to you of the following." And then it lists the stock, is that right? A That's right.

Q Isn't it a fact that when a jobber makes an outright sale of stock he sends this kind of a confirmation (indicating)? A I wouldn't agree with you, sir.

Q When you make an outright sale to a customer, what kind of confirmation do you send? A What do you mean? 30

Q When you make a confirmation of stock that you own— A (Interrupting.) I didn't own that stock.

Q I didn't ask you that. I am asking you what kind of a confirmation you send for stock which you own at the time of the transaction. Suppose you own 100 shares of XY stock, or anything, or Firemen's Insurance Company stock, what kind of confirmation do you send? A We send no other kind of confirmation out of the office than this. 40

*William B. Stein, cross.*

Q Isn't it also a fact that brokers selling as agents send a confirmation and on the confirmation show the purchase from whom and the purchase for whom? A No, sir.

Q You never saw a confirmation like that, did you? A I did not.

10 Q Are these the only confirmations you ever saw? A I saw other confirmations, but I never saw the one where you say you buy from one and sell to the other. As a matter of fact, we have the evidence where we bought it from Mr. Rippel for 49 $\frac{1}{4}$  and we paid for that.

Q Have you ever bought stock from a broker that is listed on the Exchange? A Yes, sir.

Q What sort of confirmations do you get from these people? A Various kinds.

20 Q Do you also get this kind of a confirmation: "We confirm purchase for you, for so many stocks purchased for you"?

The Court: What difference does it make? In some other case he might get a different confirmation. I don't think it makes any difference here. He has to stand or fall on this transaction.

30 Mr. Handler: But the man testifies that this is an agency sale and he executes the confirmation which he claims is an agency confirmation. To impeach his credibility I want to show that from his experience he must know that there is an agency confirmation and a sale confirmation and he must know that this is a sale confirmation and not an agency confirmation.

40 The Court: He said that he had not seen the type of confirmation you are asking him about.

*William B. Stein, cross.*

Q Is this the record that you have of pledging the collateral with the New Jersey bank? A Yes, sir.

Q What does the record show in regard to pledging the Firemen's stock? A It shows that we pledged 100 shares of Firemen's Insurance Company stock. 10

*By the Court.*

Q When and for what? A I don't know exactly the date; I will have to consult my partner.

Q For what amount was it? A There was a substitution of this insurance stock for another which we have taken out. We had Bankers' Indemnity in the bank and substituted the Firemen's Insurance Company stock. 20

Q For what loan was it put up as collateral? A There was a series of loans.

Q What loan was this for? A We had a certain amount at this time.

Q I know your loans may change, but at the time it was put up what was the loan? A This wasn't a specific loan.

Q What was the collateral for? A The entire amount which this was a part of was around \$30,000. 30

*By Mr. Handler.*

Q You say that you had replaced some Bankers' Indemnity for 100 shares of Firemen's Insurance Company? A Yes, sir.

Q You were the sole owners of that Bankers' Indemnity stock, weren't you? A Yes, sir.

Q And you replaced it with some stock that you were also the owners of, didn't you? A No, sir, that was Mr. Broder's stock. 40

*William B. Stein, cross.*

Q Did Mr. Broder ever have any transactions with your concern before this one? A No, sir.

Q He never did? A No, sir.

Q Were you the first member of your firm to talk to Mr. Broder? A I was.

10 Q And as a matter of fact, didn't you call him up? A What do you mean by my him calling up?

*By the Court.*

Q Originally when you got in touch with him? A Absolutely not, I never heard of Mr. Broder until he called me up that morning.

*By Mr. Handler.*

20 Q On September 4th did you have any dealings with Julius Rippel? A I don't remember.

Q Would your books show it? A I believe they would.

Q Will you look that up, please?

The Court: Are you going to put the bookkeeper on, Mr. Fast?

30 Mr. Fast: I am going to have these marked in evidence as soon as the testimony is over.

A No, sir, no other dealings with Mr. Rippel.

Q You say you sent the confirmation? A Yes, sir.

Q Did you get a reply to that? A My reply was over the phone prior to sending the confirmation that I should go ahead and buy the stock.

40 Q Did you get a reply to the confirmation? A No.

*William B. Stein, cross.*

Q When was the first time you learned that Mr. Broder did not consider that he had made a purchase of stock from you? A Repeat that question, please.

Q When did you first discover that Mr. Broder said he did not make a purchase of stock from you? A I never heard anything of the kind. Mr. Broder never said anything to that effect. 10

Q Who in your firm had this suit instituted?

Objected to.

Objection sustained.

Q When did you first find out that Mr. Broder did not want to take the stock? A Do you want me to tell it to you in my own way? 20

Q Yes. A We received a call from Mr. Rippel and paid for it—

Q I am not asking you that.

Objected to.

The Court: You may withdraw your question if you wish. You asked him to tell it in his own way and that is what he is doing.

Q When did you first learn that Mr. Broder would not take the stock? A About three weeks after this transaction took place. 30

Q How many men are employed in your concern? A I employ myself, my partner employs himself, and we have one young lady as secretary.

Q Have you an office boy? A No, my junior partner generally makes deliveries.

Q That was your entire staff? You had no delivery boys and yet you say you were engaged 40

*William B. Stein, cross.*

in the stock brokerage business and not the stock jobbing business?

Objected to.

Objection sustained.

10 Q Your partner delivered the stock, didn't he? A Yes, sir.

Q As a matter of fact, didn't you merely sell Mr. Broder stock that you had? A Absolutely not.

Q You say that when the price was arrived at between you and Mr. Broder it was agreed upon at 49 3/8? A No, sir, 49 1/4 plus 1/8 point commission.

20 Q You are sure you mentioned the fact that it was commission? A Absolutely.

Q In having your attorney start suit you didn't mention that the price of the stock is 49 1/4 and that the extra 1/8 of a point was for commission?

Objected to.

The Court: The record speaks for itself.

30 Q You didn't ask your attorney to split up your claim into commission and into the purchase price of the stock, did you?

Objected to.

Objection sustained.

Mr. Fast: I offer in evidence this confirmation book page 1131.

(The same is received in evidence and marked Exhibit P. 2.)

40 Mr. Fast: I offer in evidence page 131 of the purchase book showing purchase from

*William B. Stein, cross.*

J. S. Rippel & Co. on September 4, 1928, of 100 shares of Firemen's Insurance Company stock at 49¼.

(The same is received in evidence and marked Exhibit P. 3.)

Mr. Fast: I also offer in evidence confirmation from J. S. Rippel to William B. Stein & Co. of 100 shares of Firemen's Insurance Company stock at 49¼. 10

(The same is received in evidence and marked Exhibit P. 3.)

Mr. Fast: I also offer in evidence confirmation from J. S. Rippel to William B. Stein & Co. of 100 shares of Firemen's Insurance Company stock at 49¼.

(The same is received in evidence and marked Exhibit P. 4.) 20

Mr. Fast: I also offer in evidence receipt from J. S. Rippel & Co.

(Same is received in evidence and marked Exhibit P. 5.)

*By Mr. Handler.*

Q Do you usually buy stock on your own account? 30

Objected to.

Objection sustained.

Q Do you sell stock on your own account?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 40

*William B. Stein, re-direct—re-cross.*

*Re-direct examination by Mr. Fast.*

Q You have just testified that this stock is now in the hands of the New Jersey National Bank & Trust Company. Have you and additional stock there as collateral for the loans you have testified to? A Yes, various stocks.

10 Q What is the value of that stock? A Approximately \$40,000.

Q Are you in a position to obtain this stock by the payment of the \$4,900 to the bank? A At a moment's notice.

Q What is the custom in your business in regard to stock in so far as offering it as collateral is concerned?

Objected to.

20

Objection sustained.

Q Is there a custom in your trade that when you send out a confirmation that you are to receive a reply to it? A No, sir.

*Re-cross examination by Mr. Handler.*

Q Where you haven't a previous account with a customer would you purchase stock from him without having anything on deposit?

30

Objected to.

The Court: That is not re-cross examination. I will sustain the objection.

*Saul F. Ellend, direct.*

SAUL F. ELLEND, one of the plaintiffs, sworn in behalf of plaintiffs.

*Direct examination by Mr. Fast.*

Q Mr. Ellend, are you a member of the plaintiff firm? A Yes, sir. 10

Q Do you know Mr. Abraham V. Broder? A Yes, sir.

Q Do you see him in court? A Yes, sir.

Q Did you see him sometime in September, 1928? A Yes, sir.

Q Under what circumstances? A I delivered 100 shares of Firemen's Insurance Company stock to him to receive payment for it.

Q Is that the hundred shares that you got from J. S. Rippel? A Yes, sir. 20

Q What conversation did you have with him? A I delivered it to Mr. Broder and asked him for a check and Mr. Broder told me that he was tied up at the present time; that is, he had no available funds, but he intended to sell some securities that afternoon and to bring the stock back the following day and he would have the cash.

Q Did you go back? A Yes, sir.

Q What did he say? A The same story and to bring it back the following day and he would positively have the money. 30

Q Did you tell him under what circumstances you got the stock? A Yes, sir.

Q What did you tell him? A I told him, "You know, Mr. Broder, we bought that stock for you as you told us to and we are only charging you a commission and we want you to take the stock."

Q What did he say? A He said he knew it, but he was tied up at the time. 40

*Saul F. Ellend, cross.*

Q How many times did you go to see him?

A Three or four times.

Q At no time did he offer payment? A No, sir.

*Cross examination by Mr. Handler.*

10

Q When you went to see Mr. Broder the first time to deliver the stock didn't he tell you out and out at that time that he had never ordered the stock from your firm? A No, sir.

Q He did not? A No, sir.

Q And didn't you suggest to him, "Well, we will give it to you a few points cheaper"? A No, sir.

20 Q You didn't offer to knock off a few points if he would take it? A No, sir.

Q Shortly thereafter your firm was in need of a loan, wasn't it? A No, sir.

Q At that time you had loans outstanding in the Broad & Market National Bank? A Yes, sir.

Q Which subsequently became the New Jersey National Bank & Trust Company? A Yes, sir.

30 Q And you had to put up more collateral or replace some collateral, didn't you? A We had to replace some collateral.

Q Why didn't you sell that Firemen's Insurance Company stock as soon as the difference between the purchase price and the market price changed instead of holding it all that while and bringing suit for the purchase price?

Objected to.

40

Objection sustained.

*Saul F. Ellend, cross.*

Q As a matter of fact, didn't you bring this form of action in order to gamble on the market?

Objected to.

Objection sustained.

Q How long have you been in the stock business? A Mr. Stein and I started at the same time. 10

Q In your business did your firm buy stock on its own account to be resold on its own account?

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 20

Q What was the nature of your firm's business?

Objected to.

Objection sustained.

Q When was the last time you saw Mr. Broder? A Sometime in September.

Q Did you tell him at that time that if he did not pay you would have him sued? A No, sir. 30

Q Did you or your firm ever inform him of that?

Objected to.

Objection sustained.

Q Did you ever send him a letter that he would be sued if he did not pay? 40

*Abraham V. Broder, direct.*

Objected to.

The Court: He said he never did.

Q As far as you know, then, without any notice whatsoever, your negotiations with Mr. Broder stopped and suit was instituted, is that right? A Yes.

Q And that what you say was the transaction between you and Mr. Broder: several conversations and then a stop without talk of any kind and then suit was instituted? A As far as I know, yes.

Q Did you take this matter up with your attorney at the time suit was instituted? A Mr. Stein took care of that.

20

PLAINTIFFS REST.

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ABRAHAM V. BRODER, the defendant, sworn in his own behalf.

*Direct examination* by Mr. Handler.

Q Mr. Broder, you are the defendant in this suit, are you not? A Yes, sir.

30 Q Did you before September 4, 1928, know the firm of William B. Stein and Saul F. Ellend trading under the name of William B. Stein & Co.? A I heard of them

Q Did you ever have any business dealings with them? A Except for their phone calls.

Q Phone calls on what occasions?

Objected to unless he can show that they were calls that came from the plaintiffs.

40

Objection sustained.

*Abraham V. Broder, direct.*

Q You say William B. Stein & Co. called you up before this date?

Objected to.

The Court: Are you going to follow it up and prove that it was William B. Stein & Co.? 10

Mr. Handler: I will ask him who it was.

The Court: Just because somebody told him it was William B Stein & Co. does not prove it.

(Question withdrawn.)

Q On September 4, 1928, did you call up William B. Stein & Co. or did they call you up?

Objected to. 20

Objection overruled.

Plaintiffs' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A They called me up.

Q Had you before that date ever called them up? A I did not.

Q On that date did they talk to you about Firemen's Insurance Company stock? A They tried to sell me the Firemen's Insurance Company stock. 30

Q They talked to you on that date? A Yes, sir

Q Who was the person talking to you on the other end of the wire? What name did he give?

Objected to unless there can be a connection shown.

*Abraham V. Broder, direct.*

Q Do you know who it was that called you?

Objected to.

*By the Court.*

10 Q Did you know, not by the statements that he made, but did you know who he was? A I did not.

*By Mr. Handler.*

Q Did you ever have a conversation with Mr. William Stein over the wire?

Objected to unless he can identify the voice of Mr. Stein.

20 The Court: I will sustain the objection. You have to prove that he identified the man that he talked to.

Q Could you identify Mr Stein's voice if you heard it? A I can't now.

Q You say that you had a conversation on September 4th over the telephone with William Stein & Co. about the Firemen's stock?

Objected to.

30 Objection sustained.

Q Did you receive any written paper from William B. Stein & Co.? A I did.

Q When you got that paper what did you do? A I immediately called them up.

Q Is this the paper which you got from them (handing paper to witness)? A Yes, sir.

Mr. Handler: I offer it in evidence.

40 Mr Fast: No objection.

*Abraham V. Broder, direct.*

(Same is received in evidence and marked Exhibit D. 1.)

Q Whom did you speak to when you called them up? A I asked for Mr. William Stein.

Q Why did you ask for Mr. William Stein? A I surmised that he was the head of the firm. 10

Q What reply did you get? A He would look it up and inform me.

Q He would look up what? A He would look up the records to ascertain whether I had actually ordered the stock.

Q When you first called him up what did you tell him? A I asked him why the confirmation came to me when I never ordered the stock.

Q Then he said he would look up the records and let you know? A Yes, sir. 20

Q Then what did he do, if anything? A I didn't hear from him until Mr. Ellend came in to see me

Q In other words, the reply to your statement that he would look it up was that he would let you know, and instead of letting you know by wire he sent Mr. Ellend around with the stock? A Yes, sir.

Q When was that? A Around two or three weeks later. 30

Q He came around two or three weeks later with the stock? A Yes, sir.

Q What did he try to do with the stock? A He asked me, "Why not have it adjusted in a friendly way?" I said, "Why should I have it adjusted when I never ordered the stock?" He said, "I will let you have it for two points less than what you ordered it for." I said, "I never ordered it." Then he went away and I haven't seen him since that time. 40

*Abraham V. Broder, direct.*

Q Did you ever say to him that you knew you had ordered the stock but the reason you weren't taking it was because you were short of funds? A No, sir.

Q You say that you told him that you never ordered it and would not take it even on an adjustment? A Yes, sir.

Q And that was two or three weeks after September 4th? A Yes, sir.

Q Was that the only time that Ellend came to see you? A That's the only time he came to see me.

Q When did you next hear from William B Stein & Co.? A The next thing was that I got a summons.

Q That's the next thing that you got? A Yes, sir.

Q Did they ever send you a letter that they were going to sue you? A No, sir.

Q As a matter of fact, on September 4, 1928, did you have enough money to pay for the stock if you had ordered it? A I certainly did.

Q On that day did you sell \$5,000 worth of stock to another man?

Objected to as self-serving.

30 Objection sustained.

Q When you spoke to Mr. Stein when you called up to tell him that you had not ordered the stock after you got the confirmation, was that the same person you had spoken to the day previously? A I think it was.

Q And that was Mr. William B. Stein? A Yes, sir

Q When he spoke to you the day previously what did he say to you about selling you the  
40 Firemen's Insurance Company stock?

*Abraham V. Broder, direct.*

Objected to on the ground that it has not yet been shown that it was the voice of William B. Stein.

The Court: He said he called up their firm and asked for Mr. Stein and he got this man. If he got that man and identified the voice as being the same he can testify to it. 10

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

*By the Court.*

Q Was it the same voice? A Yes, sir.

*By Mr. Handler.*

Q What did he say? A He said he had one hundred shares of cheap Firemen's Insurance Company stock for sale. In fact, he said that before and he called me back a number of times before September 4th. 20

Q He said that he had it for sale? A Yes, sir.

Q Did he give you a figure on it? A He said he can let me have it for 49 3/8.

Q What did you say to him? A I told him I am not interested, but if I will be interested I will let him know. 30

Q Did you ever let him know? A I did not.

Q And the figure he gave you was 49 3/8? A Yes, sir.

Q You are positive of that? A Absolutely positive.

Q Did he tell you he can buy it for 49 1/4 and he would take 1/8 point commission? A No, sir.

Q He told you he would let you have it for 49 3/8? A Yes, sir. 40

*Abraham V. Broder, cross.*

*Cross examination by Mr. Fast.*

Q Was there a call on that same day from Stein to you or from you to Stein? A On what date?

Q On the date he told you he had the stock?

10 A He called me up several times before that.

Q Was there a quotation of 49 3/8? A There was not.

Q You say that he called you up several times before that day? A Yes, sir.

Q How long before? A For a few days previously trying to sell me different kinds of stock.

Q And you had never had any dealings with him before? A No, sir.

Q Did you ever get the letters from the office of Fast & Fast, lawyers, before suit was started?

20 A I don't recall.

Q Did you ever speak to me before suit was started? A Yes, sir.

Q What was that conversation with me? A You suggested that I try to have it adjusted and if possible you would finance it for me.

Q That I would finance it for you? A Yes, that you would finance it through one of your banks.

30 Q What else did you say? A I said I didn't order the stock and would not take it.

Q Didn't you offer to pay \$500 a week for three weeks and pay the balance the fourth week? A I did not.

Q How many times was Mr. Ellend in your office? A One time

Q He never was there afterward? A No, sir.

40 Q When I promised to finance this thing for you was I to get any interest? A I don't know what your attitude was.

*George A. Ziegler, direct.*

Q I am asking you for the conversation. A You asked me to have it adjusted in a nice way and I told you, "Why should I have it adjusted if I never ordered the stock?"

Q Where was it you told me that? A In a telephone conversation.

10

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GEORGE A. ZIEGLER, sworn in behalf of defendant.

*Direct examination by Mr. Handler.*

Q Are you employed by the New Jersey Bank & Trust Company? A Yes, sir.

Q And that is a merger of the Broad & Market National Bank? A Yes, sir, with the Guardian Trust Company.

20

Q Did William B. Stein & Company carry an account in the Broad & Market National Bank? A Yes, sir.

Q Was that account taken over by the new bank? A Yes, sir.

Q Did William B. Stein & Co. loan money from the Broad & Market?

30

The Court: Borrow money, you mean?

Q Borrow money? A Yes, sir.

Q Did they pledge collateral for that money? A Yes, sir.

Q Were those loans taken over and the collateral taken over by the new bank? A Yes, sir.

Q Have you a record of the loans and collateral of William B. Stein & Co. with your bank?

A Yes, sir.

40

*George A. Ziegler, direct.*

Q Will you please turn to that record and tell us what the amount of the loans is? A Yes.

Q What is the amount of the loans? A \$35,500 at the present time.

10 Q Among their collateral pledged to secure that loan is one hundred shares of Firemen's Insurance? A Right now there is

Q Is there any more than one hundred shares of Firemen's Insurance? A Not according to this record.

*By the Court.*

Q But there is other stock? A Yes, sir.

*By Mr. Handler.*

20 Q And that loan is solely to William B. Stein & Co., is that right? A Yes, sir.

Q And when they pledged their collateral on that loan, do you know whether they represented themselves to be the owners of that collateral? A It might be in street names, but it is properly endorsed. It may not all be under one name, but it is properly guaranteed by them.

Q Guaranteed as to the ownership of the stock? A That's right.

30 Q As to ownership in whom?

Objected to

The Court: This is your witness and you are asking him to testify to the particulars of a certain stock. The stock is the best evidence. I don't know what the endorsement on back is, but the stock itself is the best evidence.

40 Mr. Handler: I didn't know that was important at all.

*George A. Ziegler, re-cross—re-direct.*

The Court: I think it is very important.

Mr. Handler: I can't get the stock here now.

Q You say that the money was loaned to William B. Stein & Co.? A Yes, sir.

Q And they pledged this stock as their stock to secure this loan? A Yes, sir 10

*Cross examination by Mr Fast.*

Q If Mr. Stein paid your bank \$4,925, would your bank release that stock? A Yes, they would.

Q They would release it if they got less than \$4,900, wouldn't they? A It all depends upon what they loaned on that particular stock. 20

*Re-direct examination by Mr. Handler.*

Q How do you know that the bank would release it? A It's their regular business.

Q How do you know that the bank would not want the whole loan paid at once? A The whole \$35,500?

Q Yes. How do you know that for sure? A I don't know for sure. 30

*By the Court.*

Q Is this a running account? A A clearance account.

Q If they said they wanted it to deliver, you would deliver it to them? A We would deliver it to the consignee.

*George A. Ziegler, re-cross—re-direct.*

*Re-cross examination by Mr. Fast.*

Q A clearance account is an account that the bank maintains for a broker? A Yes.

Q It is customary, isn't it, that the stock certificates are picked up by your bank when the  
10 bank advances the money? A Yes.

Q And when the broker is ready to sell the stock or wants to get money on it, it delivers it to the person it was sold to and gets the money?  
A Yes.

*Re-direct examination by Mr. Handler.*

Q After they sell and you deliver for them you get the money from the consignee and you take that money and credit it to the owners' account, is that right? A No, sir, we reduce the  
20 amount of the loan.

Q From your records, how far back was that the type of business that Stein carried on with your bank? A The record here shows—

*By the Court.*

Q How far back does that clearance account go? A April 30, 1928, is when it was opened.

30 Q Is the collateral at the market price more than the loan? A If the collateral falls off—that is, the market price—the broker is asked to increase his collateral.

*By Mr. Fast.*

Q These clearance accounts are usual with brokers, aren't they? A Yes, sir.

40 Defendant's counsel moves for a direction of a verdict in favor of the defendant on the

*George A. Ziegler, cross—re-direct.*

ground that the complaint alleges an agency and the suit is on the basis of a sale and consequently on the face of the complaint they fall under the Sales Act and the order should be in writing.

The Court: It is not pleaded. The complaint alleges that they were requested by the defendant to buy the stock for him and they bought it and that is what they claim their proof is. The damage clause can be omitted as far as the complaint is concerned. All that you need to do is to say that the plaintiff demands damages. The proof the plaintiffs put in was that that was the understanding. I do not think there is any variance there. I think it is immaterial. They simply say he was to pay 49 3/8. Now the agent amplified it and said 49 1/4 was the price of the stock and 1/8 was the commission. I will deny the motion on that ground.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal

Defendant's counsel moves for a direction of a verdict on the ground that the evidence taken in conjunction with the complaint makes out a sale; on the further ground that the plaintiffs hypothecated the stock as their own and they have treated it as their own and they are suing for the purchase price of that stock, which would establish a sale.

The Court: They have a loan on the stock for the price of it as agents for the defendant. They have put in testimony that it is ready for delivery at any time upon the payment of the purchase price. I think they

*Charge of Court.*

10 have a right to use it as long as they keep it liquidated and they can liquidate it at any time. The bank deals with it; it isn't like going in and taking a time loan; it is what the bank calls a clearance account. That can be taken out at any time. I will deny your motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Mr. Handler sums up in behalf of defendant.)

(Mr. Fast sums up in behalf of plaintiff.)

20

**CHARGE OF COURT.**

The Court charges the jury as follows:

SMITH, J.

Members of the Jury:

30 This action, as you have heard, is brought by a brokerage firm to recover the purchase price and commission on one hundred shares of Firemen's Insurance Company stock. The plaintiffs allege that they were given an order as broker or agent for the defendant, to buy from somebody else; that they executed that order by purchasing the stock from Julius Rippel; that when they got the offer from Rippel to sell at that price they submitted it to the defendant and the defendant said he would take the stock; that they then carried out the commission which the defendant gave them, and purchased the stock and took delivery  
40 and then tendered it to the defendant and asked

*Charge of Court.*

for the money and that at that time they were met with what amounted to a refusal on the defendant's part; that is, he postponed payment and said he would pay later; that it was tendered again later and he would not pay, and they are suing to recover the purchase price of this stock and their commission. 10

It is claimed that the order was executed at  $49\frac{1}{4}$ . The evidence of the transaction is submitted here and there is evidence as to the  $\frac{1}{8}$  commission which they claim he agreed to, making  $49\frac{3}{8}$  as the price. They say that while it is held by the bank as collateral it is in the clearance account, and it was said that this stock is susceptible of delivery upon the payment of the purchase price; that the bank will deliver it upon the plaintiff's direction upon receiving the purchase price. 20

It is the duty of the plaintiff in this kind of action to be ready to carry out his offer of delivery. He has to remain able to deliver the stock and that is necessary to be proved on his case. In other words, the plaintiffs, in order to recover, must prove the case that they complain of. They cannot recover in this action for an original sale by them of their own stock to the defendant. They must recover upon the case made. 30

These facts are disputed. The defense is that no order was placed; that is, that the plaintiffs wanted to sell some stock to the defendant and he refused to buy it, and that is an issue of fact.

The facts are for you to decide. You are the judges of the facts and in deciding the facts you will rely upon the testimony you have heard here. My duty is to charge you the law which should govern you in your determination. 40

*Charge of Court.*

The burden of proof is upon the plaintiffs. They must establish their case by a fair preponderance of the evidence; that is, the evidence must weigh in their favor. If they fail in this they are not entitled to your verdict.

10 If the plaintiffs are entitled to your verdict they are entitled to the full amount of the purchase price of this stock together with the one-eighth commission, and that amounts to \$4,937.50. They would be entitled to interest to date, amounting to \$222.18, making a total of \$5,159.68.

20 If the plaintiffs recover a judgment at your hands for this amount, then the defendant would be entitled to delivery or recovery from the plaintiffs of this stock or its value. You must not get the idea that the plaintiffs keep the stock and get the money in addition. The defendant will then have a right to get from the plaintiffs this stock or its equivalent. The stock amounts to \$4,937.50 and the interest is \$222.18, making a total of \$5,159.68. In other words, your verdict, if for the plaintiffs, will be for the \$5,159.68, or it will be for the defendant.

(The jury retires.)

30 Defendant's counsel prays an exception to that portion of the Court's charge wherein the Court stated that the suit was for recovery of the purchase price and commission.

Exception noted as ground of appeal.

**EXHIBIT P. 1.**

WILLIAM B. STEIN & CO. No. 705  
Investment Securities

Newark, N. J. Sept. 5, 1928

Pay to the order of J. S. Rippel & Co. 10  
\$4925.00/100  
Forty Nine Hundred & Twenty Five 00/100  
Dollars to BROAD & MARKET NATIONAL  
BANK AND TRUST COMPANY.  
NEWARK, N. J.

WILLIAM B. STEIN & CO.  
SAUL ELLEND (Signed)

Certified—Sept. 5, 1928,—BROAD & MARKET  
NAT'L BANK & TRUST CO.

Endorsement—Pay to the order of FIDELITY 20  
UNION TRUST CO.,  
Newark, N. J. J. S. RIPPEL & CO.

**EXHIBIT P. 2.**

Wm. B. Stein 1131  
Saul F. Ellend  
WM. B. STEIN & CO.  
Bank, Insurance and Title Company Stocks  
Military Park Building, Newark, N. J. 30  
Mitchell 9536-7

September 4th, 1928.  
Mr. A. V. Broder, Certificate No...Delivered..  
972 Broad Street,  
Newark, N. J.

To.....  
We confirm Sale to you of the following:  
Quantity Description Price Amount  
100 shares "Firemen's Insurance Co." @ 49 3/8 ..\$4937.50

Thanking you for this business, we are,  
Very truly yours,  
WM. B. STEIN & CO.  
BY.....

**EXHIBIT P. 3.****SALES**

1928  
 Date—Sept. 4. Customer, A. V. Broder;  
 Stock. Firemen's Ins.; No. of Sale, 1131;  
 10 Cert. No. , No. of Shs, 100;  
 Price, 49 3/8; Amt. 4937.50; Accts Rec. 4937.50;  
 Accts. Pay.

**EXHIBIT P. 4.**

J. S. RIPPEL & CO. 18 Clinton Street  
 Investment Securities Newark, N. J.  
 Telephone 3250 Mulberry  
 20 Messrs. Wm. B. Stein & Co. Sept. 4, 1928  
 We confirm SALE to you this day of  
 100 shares Firemen's Insurance Co. stock.  
 @ 49 1/4  
 Yours truly,  
 J. S. RIPPEL & CO.  
 by J. A. RIPPEL (Signed)

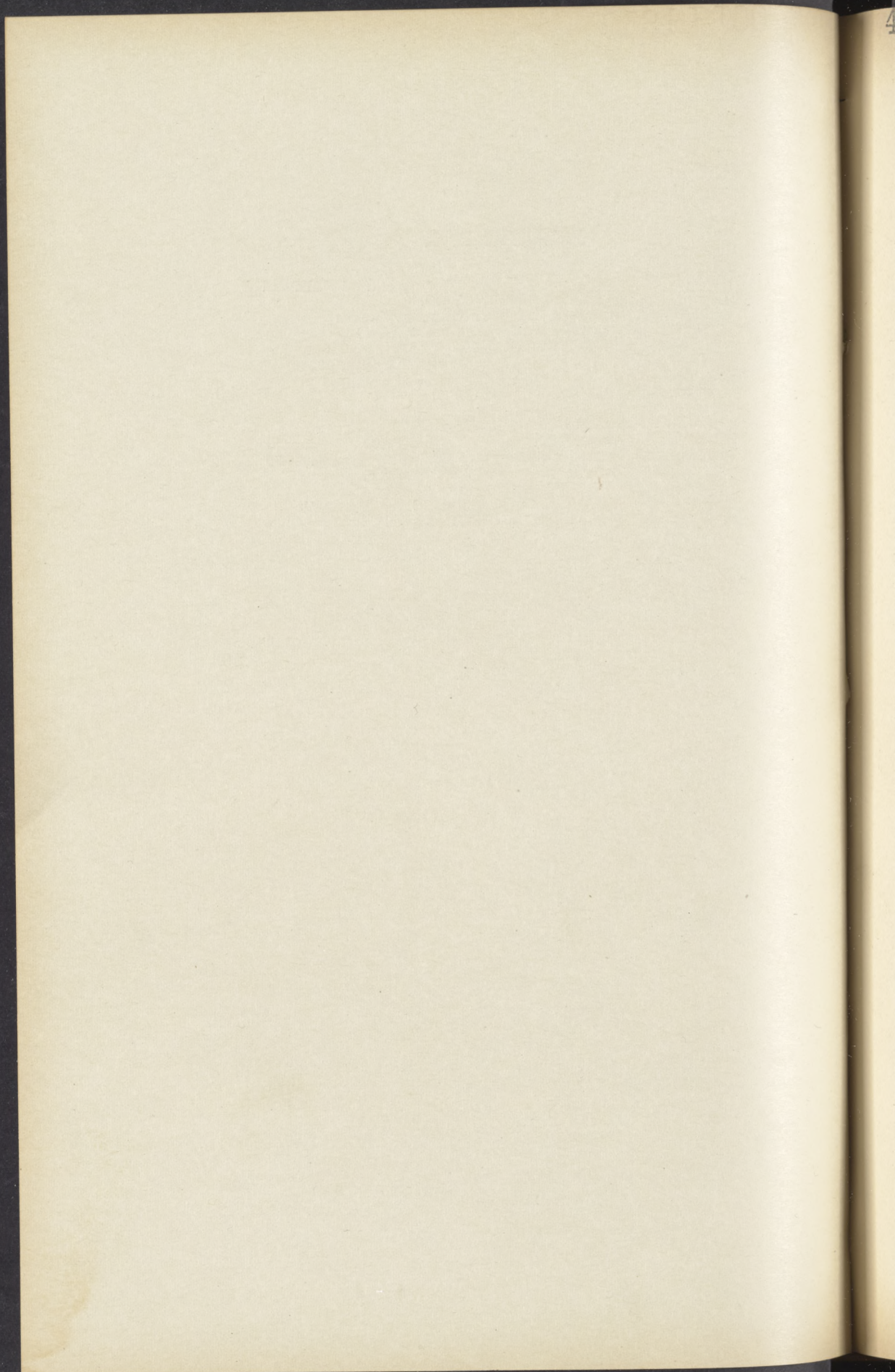
30

**EXHIBIT P. 5.**

J. S. RIPPEL & CO. DEALERS  
 18 Clinton Street 3250  
 Telephones 3251 Mulberry  
 3252  
 INVESTMENT SECURITIES  
 Newark, N. J. Sept. 4, 1928  
 Sold to Messrs. Wm. B. Stein & Co.  
 100 shares Firemen's Insurance Co. stock @ 49 1/4 . . \$4925.00  
 J. S. RIPPEL & CO.  
 SEPT. 5, 1928

40





## New Jersey Court of Errors and Appeals

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WILLIAM B. STEIN and SAUL F.  
ELLEND, partners trading un-  
der the firm name and style of  
WM. B. STEIN & Co.,  
Plaintiffs-Appellees,

Action at Law.  
On Appeal.

*vs.*

ABRAHAM V. BRODER,  
Defendant-Appellant.

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### BRIEF OF PLAINTIFFS-APPELLEES.

#### Facts.

On September 4th, 1928, the defendant called the plaintiffs on the phone and requested them to buy for him 100 shares of Firemen's Insurance Company stock at 49 $\frac{1}{4}$ , plus the customary  $\frac{1}{8}$  commission.

In accordance with said order, plaintiffs purchased the stock and tendered it to the defendant, whereupon it was refused. The plaintiffs hypothecated the stock with the N. J. Bank & Trust Co., among other stocks, in its clearance account. However, plaintiffs always had the means of delivering said stock to defendant upon his tender of the price. There was a verdict and judgment rendered by a jury in favor of plaintiffs.

The judgment was affirmed by the Supreme Court on appeal. *Stein v. Broder*, 8 N. J. Misc. Rep. 357.

## The Law.

### Answer to Point One.

The complaint, read in its entirety, sets up an agency transaction, and not a sale.

Paragraph one of the complaint (S. C., p. 5) clearly states that "defendant requested the plaintiff to buy for him 100 shares, etc." Paragraph two, though loosely constructed, sets out that the agreed price was \$49 $\frac{3}{8}$  per share, referring to paragraph one. Paragraph three states that plaintiffs offered said stock "so purchased for the defendant, to him". Taken together, plaintiffs contend that the complaint does not allege a sale, but an agency transaction.

Where one as agent buys goods for a principal, an agreement between them is not within the Statute of Frauds.

27 C. J. 236, citing cases.

The complaint having been framed upon the theory of agency, and not within the Statute of Frauds, the questions offered on cross-examination by defendant were irrelevant and properly excluded.

Questions not directly relevant to the issue, on cross-examination, are within the discretion of the judge, to prevent an undue expansion of the case by collateral facts (*Jones v. Mechanic's Fire Ins. Co.*, 36 N. J. L. 29).

Even though the questions propounded by counsel for defendant had brought the sought for answer "yes", it would have availed him nothing. *There is no legal reason why plaintiffs could not in other transactions engage in the business of buying and selling stock.* As the Trial Court so aptly put it:

“He must stand or fall on *this transaction*”  
(S. C., p. 16).

And so in *Carter v. Allenhurst*, 100 N. J. L. 138, plaintiff had left jewelry with defendant for safekeeping while she went swimming in defendant's pool. Upon asking for the jewelry it was not delivered. To show ordinary care, defendant introduced evidence to show that for four years there had been no loss. The Court said:

“The fact that others, for a period of four years had had the property entrusted by them to the defendant returned, constitutes no defense in an action by one whose property has not been returned after delivery for safekeeping. Each case of this character must rest upon the special circumstances surrounding it.”

Plaintiff testified that the only kind of confirmation he ever sent in any sort of transaction was the form sent to defendant (S. C., p. 16). It might not be amiss to note that the order (S. C., p. 11, l. 21), the confirmation from J. S. Rippel to plaintiffs (Exhibit P-4, p. 42), and the confirmation from plaintiffs to defendant (Exhibit P-2, p. 41) are all dated September 4, which clearly shows that plaintiffs purchased the stock at the request of and for defendant.

#### **Answer to Point Two.**

Defendant is slightly in error as to the facts upon which he bases his second point. There is no testimony to show plaintiff hypothecated the stock to secure a personal loan of a larger amount than was due plaintiffs. Plaintiff testified that this stock was merely a part of a large amount of stock pledged to secure the clearance account in question (S. C., p. 17). To the same effect testi-

fied George A. Ziegler, witness for the defendant (S. C., p. 34). It was placed in an account usually held by brokers, over which the brokers had the control to withdraw any stock on payment of the price of that stock (S. C., p. 35, l. 15).

A broker who has bought stock for another with money advanced by himself, and holds it in his own name, may, so long as he has not been paid or tendered the amount of his advances, pledge it as security for his own debt to a third person without making himself liable to an action by his employer. *Wood v. Hayes, et al.*, 81 Mass. 375.

Jones on Pledges (2nd ed.), says:

“The broker acts in a three-fold capacity: First, in purchasing the stock he is an agent; then in advancing money for the purchase he is a creditor; and finally in holding the stock to secure the advances made, he becomes a pledgee of it.”

The principle governing rehypothecation is correctly stated by counsel for defendant in his brief, page 9:

“A broker who has bought stock for another with money advanced by himself and who holds it in his own name may, so long as he has not been paid or tendered the amount of his advances, pledge it to the extent of his lien thereon as security for his own debt to a third person without being guilty of conversion or breach of contract, provided the broker has the stock under his control, and can resume possession by paying the amount borrowed thereon. He may even sell the stock, provided he keeps on hand sufficient similar stock to make a delivery to his client. But he is guilty of conversion if he pledges the stock purchased for an amount greater than the amount of his lien thereon, or if he resells or otherwise uses the stock in a manner inconsistent with the customer's ownership,

without retaining control of sufficient similar stock, so that he is unable to make delivery on demand and a tender of his balance of the price. Such conversion precludes the stock-broker from recovering a balance due him on the stock purchased, and the customer may at once rescind and recover the deposit and need not accept the tender of stock thereafter purchased or acquired." (Citing cases.)

Plaintiff testified that he was in position at a moment's notice to obtain the stock in question (S. C., p. 22, l. 13).

Defendant's witness George A. Ziegler testified that upon the payment of \$4,925 his bank would release the stock (S. C., p. 35, l. 15):

"Q. If Mr. Stein paid your bank \$4,925, would your bank release that stock? A. Yes, they would."

There was testimony that the custom of brokers, in such cases, was to pledge the stock in a clearance account (S. C., p. 13, l. 3).

17 C. J., page 486:

"It is well settled that a mercantile agency may be executed in accordance with the valid usages of the particular trade or market to which it relates; and the authority of the agent is regulated and controlled by such usages of the particular business." Citing *Elliott v. Bodine*, 59 N. J. L. 567.

Defendant introduced no evidence to show that plaintiff was not in a position to pay off the entire loan of \$40,000, if the bank refused to release the stock for a lesser payment. The burden of proving this defense rested on him.

Inasmuch as plaintiff was always ready to deliver the stock, the hypothecation did not amount to a conversion.

*Packard v. Denver Sav. Bank*, 45 Pac.  
511.

The case of *In re Sterling's Estate*, cited by defendant, is contrary to the weight of authority inasmuch as it holds that any rehypothecation for a greater amount is a conversion even though the pledgee has similar bonds on hand ready for delivery. (Cases cited herein and by defendant in his brief, *supra*.)

#### **Answer to Point Three.**

The Trial Court found that the complaint set forth an agency and not a sale (S. C., p. 37). Therefore, in proving an agency, there could be no variance. The case proceeded on and was tried on the agency theory. Conceding (only for the argument) that no agency was set forth, the complaint may be amended in this Court to conform with the theory the case proceeded on.

*Bonewski v. Polish Home of Lodi*, 103  
N. J. L. 323.

#### **Answer to Point Four.**

The only evidence appearing in this case concerns an agency transaction. There is absolutely no testimony regarding a sale. Defendant did not try to prove a sale, but merely denied knowledge of the entire transaction. Therefore, the only proper question to be submitted to the jury was whether or not there had been the alleged transaction.

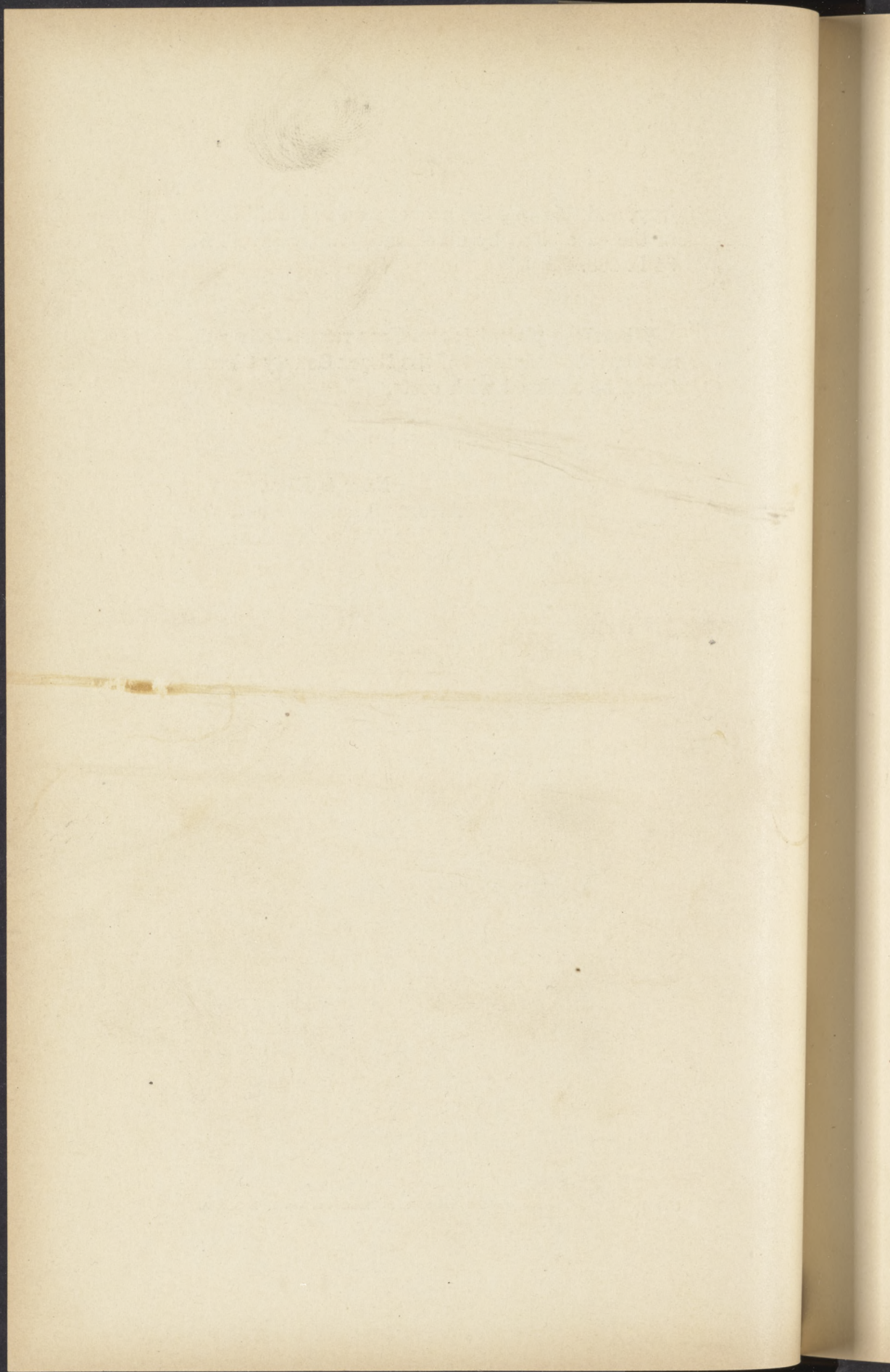
Those questions which were within the issue raised by the pleadings were submitted to the

jury, and this was the proper rule as is laid down in the case cited by defendant, *Gilliard v. P. S.*, 94 L. 288.

Wherefore plaintiffs-appellees respectfully submit that the judgment of the **Essex County Circuit Court** be affirmed with costs.

Respectfully submitted,

FAST & FAST,  
Attorneys and Counsel for  
Plaintiffs-Appellees.



## New Jersey Court of Errors and Appeals

WILLIAM B. STEIN and SAUL F.  
ELLEND, partners trading under  
the firm name and style of  
W. M. B. STEIN & Co.,

Plaintiffs-Appellees,

*vs.*

ABRAHAM V. BRODER,  
Defendant-Appellant.

On Appeal from  
New Jersey  
Supreme Court.

### BRIEF OF DEFENDANT-APPELLANT.

#### Preliminary Statement.

This case presents an appeal from the judgment of the New Jersey Supreme Court affirming a judgment entered in the Essex County Circuit Court in favor of plaintiffs, after a trial before Judge William A. Smith and a jury. The verdict was for \$5,159.68, representing the price (with interest) of 100 shares of stock of the Firemen's Insurance Company, which plaintiffs claimed to have sold to defendant pursuant to an oral telephone order from defendant and which defendant refused to accept when tendered.

Since this appeal among other points involves a question of variance and also the necessity of specifically pleading the Statute of Frauds (Section 4 of the Uniform Sales Act, 4 C. S., p. 4648), a reference to the pleadings will be helpful. The complaint (S. C., p. 5) alleges in paragraph 1 that on September 4, 1928, defendant requested plain-

tiffs to buy for him one hundred shares of Firemen's stock at  $\$49\frac{3}{8}$  a share; in paragraph 2 that accordingly plaintiffs purchased 100 shares of this stock *and sold them to defendant at the agreed price*; in paragraphs 3 and 4 that plaintiffs tendered the stock and defendant refused to accept it. The complaint having been framed on the theory of a contract between the parties for the sale of choses in action of a value in excess of \$500, defendant filed a general denial, which made it incumbent on plaintiffs to prove an enforceable legal contract in writing, or at least a memorandum signed by defendant or one of the other elements prescribed by Section 4 of the Uniform Sales Act to take the case out of its operation.

At the trial, plaintiffs changed the theory of the case as set forth in the complaint. The purport of their testimony was that they acted as brokers for defendant, and that after receiving a telephone order from defendant they purchased from J. S. Rippel & Co. for defendant 100 shares of Firemen's Insurance Company stock. Although the complaint alleged in paragraph 2 (S. C., p. 5) that plaintiffs sold these shares to defendant at the agreed price of  $49\frac{3}{8}$  per share, they testified at the trial that the understanding was that they would purchase the stock at  $49\frac{1}{4}$  and would charge  $\frac{1}{8}$  point as their brokerage fee (S. C., p. 11, ll. 4-25).

Despite these efforts to alter the character of the transaction from a sale by plaintiffs to defendant to a mere brokerage transaction, plaintiffs introduced documentary evidence which at least raised a jury question as to whether they purchased the stock and as traders resold it to defendant or were merely acting for defendant as brokers. Ex. P-4 (S. C., p. 42) is the confirmation from J. S. Rippel & Co. to plaintiffs of a sale of

100 shares of Firemen's stock, the language of the confirmation being, "We confirm SALE to you this day of 100 shares Firemen's Insurance Company stock at  $49\frac{1}{4}$ ." Exhibit P-2 (S. C., p. 41) is the confirmation from plaintiffs to defendant, and it is significant that it is a sale confirmation of the same character as the one which plaintiffs received from J. S. Rippel & Co., the language being, "We confirm Sale to you of the following: 100 shares 'Firemen's Insurance Co.' at  $49\frac{3}{8}$ .....\$4,937.50". This confirmation does not indicate a purchase for defendant by plaintiffs, nor does it follow the usual form in brokerage transactions of indicating the price at which the stock was purchased for the customer and the brokerage commission charged thereon. The confirmation in question gives a flat price of  $49\frac{3}{8}$  per share and a total amount of \$4,937.50 as the sales price to defendant.

These facts raise questions involved in this appeal as to the propriety of the trial court's exclusion of evidence calculated to prove that the transaction was a sale which fell within the provisions of Section 4 of the Sales Act, of the refusal of the trial court to direct a verdict in favor of defendant on the ground of material variance between the pleadings and proofs, and of the propriety of the trial court's characterization of the action in its charge to the jury as involving a brokerage transaction between plaintiffs and defendant.

Although this action was brought by plaintiffs to recover the full purchase price of the stock which defendant had refused to accept, their own testimony disclosed that in February, 1929, plaintiffs hypothecated the stock in question with the New Jersey National Bank and Trust Company, together with other collateral, to secure a loan to plaintiffs of \$35,500 (S. C., p. 12, l. 30; p. 13, l. 12; p. 34, ll. 7-13). This Firemen's stock was sub-

stituted as collateral in place of stock of the Bankers Indemnity Company owned by plaintiffs and previously pledged with the bank as collateral (S. C., p. 17, ll. 15-20).

Plaintiff William B. Stein testified that the Firemen's stock was substituted as collateral to secure a series of loans aggregating approximately \$30,000 and was not security for any specific loan (S. C., p. 17, ll. 20-30).

The trial court was requested to direct a verdict in favor of defendant on the principle that where brokers are pledgees of stock to secure the payment to them by the customer of the whole or any part of the purchase price, an hypothecation by the brokers of such stock to secure a personal loan of a larger amount is unauthorized and unlawful and relieves the customer of all liability. This motion was denied and is one of the grounds of this appeal.

## ARGUMENT.

### POINT I.

**The Trial Court erred in excluding questions addressed to plaintiffs on cross-examination relating to the issue of whether the alleged transaction between plaintiffs and defendant was a sale by plaintiffs to defendant or a brokerage transaction.**

Counsel for defendant on cross-examination of plaintiff William B. Stein asked the witness the following question: "Do you sell stock on your own account?" This question was objected to and the court sustained the objection, and exception was duly taken and noted (S. C., p. 21, ll. 34-40).

The same witness was also asked the following question on cross-examination: "Have you a rec-

ord among the books here of any other sales of Firemen's Insurance Company stock made by you?" This question was overruled, and exception taken (S. C., p. 13, l. 37; p. 14, l. 12).

On cross-examination of Saul F. Ellend, the other plaintiff, defendant's counsel asked the following question: "In your business did your firm buy stock on its own account to be resold on its own account?" This question was likewise overruled, and an exception taken (S. C., p. 25, ll. 10-20).

It is respectfully urged that the exclusion of these questions constituted prejudicial error because defendant was thereby prevented by the Trial Court from establishing that plaintiffs in the regular course of their business sold stock on their own account. The complaint in this cause is framed on the theory of a sale by plaintiffs to defendant, and if the transaction did constitute a sale it fell within the provisions of Section 4 of the Uniform Sales Act which provides as follows:—

"A contract to sell or a sale of any goods or choses in action of the value of \$500. 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 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 of sale be signed by the party to be charged or his agent in that behalf" (4 C. S., pp. 46-48).

It has been uniformly held that this section applies to transactions involving the purchase and sale of corporate stock.

*DeNunzio v. DeNunzio*, 90 Conn. 342, 97 Atl. 323 (1916); *Davis Laundry Co. v. Whitmore*, 92 Ohio State 44; 110 N. E. 518; *Woolley v. Loose*

(Utah), 194 Pac. 908, 14 A. L. R. 373; *Mahoney v. Kennedy* (Wisc.), 179 N. W. 754 (1920).

It is clear under the decisions of the Court of Errors and Appeals and of the Supreme Court that defendant's general denial of the contract alleged in the complaint imposed upon plaintiffs the obligation of proving an enforceable legal contract, and that it was not necessary for defendant specifically to plead the statute of frauds provision of the Sales Act.

In *Owen v. Riddle*, 81 N. J. L. 546, the Court of Errors and Appeals stated the governing principle as follows (p. 547):—

“It is said that this contention is not supported by any plea which interposes the statute as a bar to the action. Such plea was not necessary. The Statute of Frauds is a rule of substantive law, not of pleading; hence when the plea of *non assumpsit* requires the plaintiff to prove his contract enforceable at law, the defendant has the benefit of the statute without having specially pleaded it. A collection of authorities illustrative of the application of this doctrine are: *Walker v. Hill's Executors*, 6 C. E. Gr. 191; *S. C.* affirmed in 7 Id. 513; *Wakeman v. Dodd*, 12 Id. 564.”

To the same effect are *Ziegner and Lane v. Daeche*, 91 N. J. L. 634 (E. & A.) and *Naagget v. Brawer Silk Co.*, 95 N. J. L. 72 (Supreme Court).

When the applicability of the Statute of Frauds was directed to the attention of the Trial Court on one of the motions made by defendant, the Court replied “It is not pleaded” (*S. C.*, p. 37, l. 9).

If plaintiff William B. Stein had given an affirmative answer to the question, “Do you sell stock on your own account?”, it would have laid a basis of fact from which the jury could have inferred, considering the language of the confirmations (Ex-

hibits P-2, p. 41, and Exhibit P-4, p. 42), that this particular transaction involved a contract of sale. This would have been equally true if an affirmative answer had been given by plaintiff Saul F. Ellend to the question, "In your business, did your firm buy stock on its own account to be resold on its own account?"

As will be contended under Point III, plaintiffs' proofs that this was a brokerage transaction in which they were acting as agents for defendant constituted a material variance from the gravamen of the complaint. But even if under the complaint it was proper for plaintiffs to establish that they were acting as brokers for defendant in the purchase of the stock, it was nevertheless competent for defendant to challenge this new theory upon which plaintiffs' proofs were predicated, and to prove that in fact the transaction involved a sale of stock to him by plaintiffs on their own account. In other words, defendant had a right to introduce evidence from which the jury might have found, under proper instructions from the Court, that the parties made an oral contract for the sale of the stock which was not enforceable by plaintiffs against defendant. The action of the Trial Court in excluding the questions bearing on this issue deprived defendant of material testimony on an issue of fact which, if the jury had determined it in favor of defendant, would have entitled the latter to the verdict.

It is respectfully submitted, therefore, that the Trial Court committed prejudicial error in excluding the aforementioned questions addressed to the plaintiffs.

## POINT II.

**Plaintiffs having hypothecated the stock in question to secure a personal loan of a larger amount than was due plaintiffs on said stock were not entitled to recover the purchase price from defendant, and the Trial Court erred in denying the defendant's motion for a directed verdict on this ground.**

Plaintiffs contended that they purchased the stock in question from J. S. Rippel & Co. on September 4, 1928 (Exhibit P-4, p. 42), that they sold it to defendant the same day, tendered the stock to defendant on September 5, 1928, and on several other occasions thereafter, and that defendant refused to accept the stock. There is no dispute on the fact that plaintiffs hypothecated this stock in February, 1929, with the Broad and Market National Bank, which subsequently merged into the New Jersey National Bank and Trust Company (S. C., p. 13, ll. 4-5; p. 33, l. 18 to p. 34, l. 15). This stock was substituted for stock of the Bankers Indemnity Company, owned by plaintiff, and theretofore deposited with the bank as collateral, and plaintiff Stein, when questioned by the Court, stated that there was no specific loan on the Firemen's stock, but that it was deposited together with other collateral to secure a loan of approximately \$30,000 (S. C., p. 17, ll. 13-40).

George A. Ziegler, an employee of the bank, testified that the total amount of the loan that was secured by the Firemen's stock in question and by other collateral was \$35,500 (S. C., p. 34, ll. 4-18). Counsel for plaintiffs attempted to prove by this witness that the bank would have released the 100 shares of Firemen's stock if it received \$4,925, representing the price paid by plaintiff

to J. S. Rippel & Co. for the stock. Although this witness gave a hasty affirmative answer, he subsequently indicated that "it all depends upon what they loaned on that particular stock" (S. C., p. 35, ll. 9-20). On this point we have the testimony of plaintiff Stein that here was no specific loan on the Firemen's stock and that it was part of the collateral security for plaintiffs' loan of \$35,500. Mr. Ziegler also testified that he could not say that the bank would not want the entire \$35,500 paid at once in the event that it was asked to release the 100 shares of Firemen's stock (S. C., p. 35, ll. 24-30).

At the conclusion of the trial, defendant's counsel moved for a direction of a verdict on the ground that the plaintiffs hypothecated the stock as their own and treated it as their own and were nevertheless suing for the purchase price of said stock (S. C., p. 37, ll. 30-34). The Trial Court denied the motion and exception was duly noted as a ground for appeal (S. C., p. 38, ll. 9-13).

The principle governing re-hypothecation by brokers is well settled by the authorities. In 9 Corpus Juris, 544, it is stated as follows:

"A broker who has bought stock for another with money advanced by himself and who holds it in his own name may, so long as he has not been paid or tendered the amount of his advances, pledge it to the extent of his lien thereon as security for his own debt to a third person without being guilty of conversion or breach of contract, provided the broker has the stock under his control, and can resume possession by paying the amount borrowed thereon. He may even sell the stock, provided he keeps on hand sufficient similar stock to make a delivery to his client. But he is guilty of conversion if he pledges the stock purchased for an amount greater than the amount of his lien thereon, or if he resells or otherwise uses the stock in a manner

inconsistent with the customer's ownership, without retaining control of sufficient similar stock, so that he is unable to make delivery on demand and a tender of his balance of the price. Such conversion precludes the stockbroker from recovering a balance due him on the stock purchased, and the customer may at once rescind and recover the deposit and need not accept the tender of stock thereafter purchased or acquired." (citing cases.)

In 4 Ruling Case Law, p. 268, it is said:

"There is one important limitation to a broker's right to repledge, and that is, that he can do so only to the extent of the indebtedness that is due him from his client. The purpose of this is to protect the customer so that if necessary he could go to the pledgee of the broker and obtain his securities by payment of the amount of his indebtedness due to his broker. Of course, in so far as the rights of a *bona fide* pledgee are concerned, a broker has the actual power to repledge for a greater amount, where he has been clothed with the indicia of title; but this necessarily involves a breach of his duty to his client."

In *Turner v. Schwarz & Sons* (1922), 117 Atl. 904, the Court of Appeals of Maryland after reviewing the authorities concluded in a similar case as follows:

"The obligation resting upon the appellees was that they should so use and rehypothecate the securities pledged with them as to be able to comply with the condition to return to the appellants, upon the payment or tender of payment of the indebtedness owed by them, stock of said bank equal in amount to the stock pledged, though not required to return the specific shares of stock pledged, the ownership of which was evidenced by the certificate or certificates thereof. This they failed to do when they placed the pledged

stock beyond their control by the rehypothecation of it, with others, to secure a personal loan to them greatly in excess of the indebtedness for which it was placed with them, without having at such time in their possession and under their control stock of said bank of the amount of that pledged with which to comply with the condition imposed upon them, and because of such failure on their part, the hypothecation of said stock amounted to an unlawful conversion of it by the appellees."

The Maryland Court referred to *Sproul v. Sloan*, 241 Pa. 284, 88 Atl. 501, in which the Court said:

"One to whom stock has been pledged for a loan has full power to hypothecate it so long as the original pledgor may obtain possession of it upon payment of his debt; but if it has been mingled with the other securities of the pledgee, or has been rehypothecated by him to secure a different or larger debt than that for which it was pledged to him, or if the collaterals have been transferred, but the obligation they were given to secure retained, or if it has been in any way placed beyond the control of the pledgee, this is a conversion." *Strickland v. Magoun*, 119 App. Div. 113, 104 N. Y. Supp. 425; *Id.*, 190 N. Y. 545, 83 N. E. 1132.

In a later Pennsylvania case, *in re Sterling Estate*, 98 Atl. 771, the Supreme Court of Pennsylvania held that where brokers on selling bonds to a customer retained them as security for the price, no deposit or other security having been required, and afterwards mingled the bonds with other security and pledged them as collateral for their own indebtedness without the customer's knowledge or consent, they unlawfully converted the bonds to their own use releasing the liability of the customer although they at all times had

similar bonds which they were ready to deliver on demand in payment of the price.

Applying these authorities to the facts of this case, it is clear that it was improper for plaintiffs without defendant's consent to repledge the Firemen's stock in question to secure a personal loan greatly in excess of the amount due them on this stock. It is hardly necessary to cite authorities to show that the New Jersey National Bank and Trust Company had a lien on all of the collateral and that there was no legal obligation on the part of the bank to surrender the Firemen's stock on the payment of any sum less than the entire loan. The only manner in which plaintiffs could compel a release of the Firemen's stock from the banks' lien was by paying the full amount of the loan of \$35,500. What the bank might as a practical matter have done is immaterial. We are concerned with the legal situation created by the hypothecation of the stock. Suppose for example that the Firemen's stock had appreciated in value and the other stock deposited by plaintiffs had depreciated. There certainly would have been no obligation on the part of the bank to release the Firemen's stock on the tender of \$5,000 or any other sum less than the amount of the loan by plaintiffs. The important fact, as admitted by plaintiff Stein, is that the Firemen's stock was not deposited to secure any specific loan equal to or less than the amount due from defendant, but was given to the bank with other securities to secure a loan of \$35,500.

It is respectfully submitted that under the authorities referred to, the hypothecation of the stock in question by plaintiffs to secure a personal loan greatly in excess of the amount due from defendant relieved defendant of all liability and precluded plaintiffs from recovering the purchase

price of said stock. Accordingly, the Trial Court erred in refusing to direct a verdict in favor of defendant.

### POINT III.

**The Trial Court erred in denying defendant's motion for a directed verdict on the ground that there was a variance between the complaint and the proofs in that the complaint alleged a sale and plaintiffs' proofs purported to establish a brokerage transaction.**

The essential allegations of the complaint on this point are contained in paragraph 2, which reads as follows: "That in accordance with said order the plaintiff purchased the aforementioned 100 shares of stock and sold them to defendant at the agreed price, to wit,  $\$49\frac{3}{8}$  per share" (S. C., p. 5, ll. 25-30).

As has already been stated, the plaintiffs at the trial introduced evidence that they were acting merely as brokers for defendant, and that the price to defendant was not  $49\frac{3}{8}$  per share as alleged in the complaint but  $49\frac{1}{4}$  plus  $\frac{1}{8}$  point as commission.

At the conclusion of the trial, a motion for a directed verdict in favor of defendant was made on the ground that there was a variance between the complaint and the proofs and on the ground that the suit was based on the theory of a sale and that on the face of the complaint it fell within the provisions of the Sales Act requiring a writing (S. C., p. 36, l. 39 to p. 37, l. 8). The Court denied this motion because, among other reasons, the Statute of Frauds was not specifically pleaded, and an exception was allowed (S. C., p. 37, ll. 9 to 27).

In *Jordan v. Reed*, 77 N. J. L. 584, the Court of Errors and Appeals considered the subject of variance under the present day practice and set aside a judgment because it was supported, in part at least, by evidence which varied materially from the case as made out by the pleadings. The Court said at pages 590-591:

“Variance, or discrepancy, between a material averment in pleading and the evidence adduced in support of it was, in early times, of vital importance. 1 Chit. Pl. (3d Lond. ed.) secs. 303, 308; *Bristow v. Wright*, 2 Doug. Secs. 665, 667a; *Mulford v. Bowen*, 4 Halst. secs. 315, 318. Since the enactment of the provisions now embodied in the Practice act (Pamph. L. 1903, p. 571, sec. 125), variance has with us been of less consequence. Nevertheless, today, it is sound law and sound reason that there must be no variance to the prejudice of the adverse party between the case declared upon and the case proven, and that a recovery must be *secundum allegata et probata*. *Hallock v. Commercial Insurance Co.*, 2 Dutcher 268, 274; *Bristow v. Wright*, *supra*; *Martinez v. Runkle*, 28 Vroom 111, 117, 122.”

An allegation of a sale is certainly not supportable by proof of a purchase by an agent for a principal. To circumvent the statute of frauds provision of the sales act plaintiffs deviated from the material allegation of the complaint as set forth in paragraph 2 and relied upon a fiduciary relationship between themselves and defendant rather than upon a direct sale by the persons meeting at arms' length.

The Court of Errors in the case of *Jordan v. Reed*, *supra*, indicated at page 592 that it is proper to raise a question of variance on a motion for a directed verdict, as was done in this case, and it is respectfully submitted that the Court erred in denying defendant's motion.

## POINT IV.

The Court erred in charging the jury that "this action, as you have heard, is brought by a brokerage firm to recover the purchase price and commission on 100 shares of Firemen's Insurance Company stock" since this language characterized the suit as one based on a brokerage transaction rather than a sale, as alleged in the complaint.

The portion of the charge complained of appears at the very beginning of the Court's charge to the jury (S. C., p. 38, ll. 26-30).

We have already argued that the Court improperly excluded questions addressed to plaintiffs tending to establish that they were not merely brokers but also dealers in stock on their own account and that the transaction in question was a sale. But even with this testimony excluded there was sufficient evidence of a sale to require the submission to the jury of the question of whether this transaction involved a sale or a mere brokerage relation. Exhibit P-2 (S. C., p. 41) confirmed *a sale* to defendant of the stock in question for a specified amount without indicating any brokerage charge. This confirmation was, as has already been shown, in the same form as the confirmation received by plaintiffs from J. S. Rippel & Co. in what amounted to a sale and purchase as distinguished from a brokerage transaction. Accordingly, the Trial Court should not have characterized the transaction as one by a "brokerage firm to recover the purchase price and commission on 100 shares of Firemen's Insurance Company stock". This language and the remainder of the charge limited the question so far as the jury was concerned, to whether plain-

tiffs as brokers received an order from defendant and executed it.

The question of whether an oral contract for the sale of the stock by plaintiffs to defendant existed rather than a mere brokerage relationship, and the applicability of the Statute of Frauds to such a contract, were eliminated from the case by the language complained of, and this was prejudicial to defendant's case.

Moreover, it has been held by the Supreme Court that only those questions which are within the issue raised by the pleadings should be submitted to the jury, and a failure to observe this rule is a legal error.

*Gilliard v. Public Service Railway Co.*,  
94 N. J. L. 288.

As we have already argued, the complaint was based on the theory of a sale, and it was, therefore, improper to submit to the jury the question of whether a brokerage contract existed between the parties. Furthermore, on the analogy of the reasoning of the Court in the *Gilliard* case against the submission to the jury of questions not raised by the pleadings, the Trial Court, if it felt that the issue of whether there was a brokerage contract between the parties, did come within the scope of the pleadings should not have adopted the theory of plaintiffs' proofs, but should have submitted for the determination of the jury whether the contract was one of brokerage or one of sale.

It is respectfully submitted that the error of the Trial Court's charge is prejudicial to defendant and requires a reversal of the judgment.

**POINT V.**

**Conclusion.**

For the several reasons urged under the foregoing points, the judgment in favor of plaintiffs should be reversed with costs to the defendant.

Respectfully submitted,

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Defendant-Appellant.

