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Notice of Appeal.

NOTICE OF APPEAL.

Filed June 5, 1924.

New Jersey Supreme Court

UNION COUNTY.

10

NATHAN S. VOGEL,

Plaintiff,

vs.

ATLANTIC TAR & CHEMICAL
WORKS, Ltd., a corporation,
or in the alternative, DAVID
WEINER,

Defendants.

*Notice of
Appeal.*

20

To Leo S. Lowenkopf, attorney of plaintiff:

TAKE NOTICE, that the defendant, Atlantic Tar & Chemical Works, Ltd., a corporation, appeals to the Court of Errors and Appeals of the State of New Jersey, from that part of the judgment in the Amended Postea filed in this cause which recites:

“The jury rendered a general verdict against the defendant, Atlantic Tar & Chemical Works, Ltd., and in favor of the plaintiff, for five thousand one hundred sixty-seven and ninety-three cents (\$5,167.93) upon the first count of complaint.”

30

FEIT & FEIT,
Attorneys of Defendant,
Atlantic Tar & Chemical
Works, Ltd., a Corpora-
tion.

40

Notice of Appeal.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Service of a true copy of the within notice is
hereby acknowledged this 2nd day of June, 1924.

10

L. S. LOWENKOPF,
Attorney for Plaintiff.

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30

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Grounds of Appeal.

GROUND OF APPEAL.

Filed July 3, 1924.

New Jersey Court of Errors and Appeals

NATHAN S. VOGEL, <i>Plaintiff-Respondent,</i> <i>vs.</i> ATLANTIC TAR & CHEMICAL WORKS, Ltd., a corporation, <i>Defendant-Appellant.</i>	<i>Action at</i> 10 <i>Law.</i> <i>On Appeal</i> <i>from New</i> <i>Jersey</i> <i>Supreme</i> <i>Court, Union</i> <i>County</i> <i>Circuit.</i> <i>Grounds</i> 20 <i>of Appeal.</i>
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The following are the grounds of appeal of the defendant-appellant in the above-entitled cause:

The Court permitted the following questions to be answered over the objection of the appellant.

1. To the witness Nathan S. Vogel: 30

Q When did you make your first sale of either stocks or bonds of the defendant company, to Mr. Hetzell, after signing that memorandum, or after receiving that agreement?

Q How many shares did you sell him on August 17th?

Q Were you paid a commission?

Q By whom?

Q By whose check?

40

Grounds of Appeal.

Q Subsequent to that time did you make any other sale to Mr. Hetzell?

Q When?

Q Were there any other agents, to your knowledge, employed during the period that you were employed to sell these stocks?

10 Q Did Mr. Wiener ever advise you that there were any other agents working?

Q How long were you engaged as a salesman selling securities?

2. To the witness, John J. Donovan:

Q Will you please tell me whether or not, on August 17, 1922, there was transferred to Mr. Hetzell, 1,750 shares of the stock of the Atlantic Tar & Chemical Works, Ltd.?

20 Q On the 23rd day of September I ask you whether or not there was 1,000 shares transferred to Mr. Hetzell?

3. To the witness, David Wiener:

Q Will you kindly produce the books of the company and turn to the stock issues and tell me whether or not there was stock issued to Mr. Hetzell on or about July 17, 1922?

30 Q Will you tell me whether or not on July 31st there was not another sale made to Mr. Hetzell?

4. The Trial Court erred in refusing to direct a non-suit against the plaintiff-respondent and in favor of the defendant-appellant on the first count of the complaint when thereunto moved by counsel for the defendant-appellant.

5. The Trial Court erred in refusing to direct a verdict against the plaintiff-respondent and in
40 favor of the defendant-appellant on the first

Grounds of Appeal.

count of the complaint when thereunto moved by counsel for the defendant-appellant.

6. The Trial Court erred in charging the jury:

a. Was it that Vogel, until he was actually stopped by Wiener, or someone else representing the company, have the right to sell this stock at the price of \$10 a share or more if he could get it, to anyone to whom he could sell it? Or was it that every sale he made had to be confirmed by Wiener or the company as to the amount that was to be paid, and as to the personality of the purchaser?

10

b. It is admitted, as I understand it, that so far as this stock is concerned that it was the company's stock, the 2,972 shares.

20

c. There is a memorandum, gentlemen, which provides that in case of a sale of this stock by Vogel, Vogel is entitled to fifty per cent. of the amount secured for the stock; that is a memorandum that concerns itself alone with the compensation that is to be paid to Vogel for a sale effected according to whatever you find was the agreement between Wiener, or the company, and Vogel.

30

d. If you find, from a preponderance of evidence in this case, that the agreement was that Vogel had the right to sell this stock under authority given to him by the company, or Wiener, representing the company, at ten dollars a share, to whomever he could sell it, then if he effected this sale, which is undisputed, that he effected the sale, he was entitled to fifty per cent. of \$29,720.

40

Grounds of Appeal.

10 e. If Vogel had the right, under the power given him by this company, through Wiener, or the company, to sell this stock at ten dollars a share to whomever he saw fit, and he effected this sale to Mr. Hetzell, and there was nothing in their agreement whereby the company, or Mr. Wiener, could veto that, under the terms of the agreement, then because he was the effective cause of such a sale, under such an agreement, if such an agreement existed, he was entitled to fifty per cent.

FEIT & FEIT,
Counsel for Defendant-Appellant.

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30

40

Complaint.

JUDGMENT RECORD.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

NATHAN S. VOGEL,	} <i>Plaintiff,</i>	<i>Action at Law.</i>	10
<i>vs.</i>			
ATLANTIC TAR & CHEMICAL WORKS, Ltd., a corporation, Impld., &c.,	} <i>Defendant.</i>	<i>On Postea.</i>	
		LEO S. LOWENKOPF, Attorney.	

Atlantic Tar & Chemical Works, Ltd., a corporation, Impld. &c., the defendant in this cause was summoned to answer unto Nathan S. Vogel the plaintiff therein, in an action at law upon the following complaint: 20

(Summons issued October 11, 1923.)

Plaintiff, residing at 2323 North Park avenue in the City of Philadelphia, and State of Pennsylvania, says that:

FIRST COUNT.

(1) On August 16, 1922, the defendant corporation duly authorized this plaintiff by a written agreement, a copy of which is hereto annexed, to sell bonds and shares of common stock of the defendant corporation. 30

(2) From the proceeds of said sales, defendant corporation agreed to pay unto the plaintiff, twenty (20%) per cent. from the moneys received by it, for the sales of said bonds, and 40

Complaint.

fifty (50%) per cent. from the moneys received by it, for the sales of said common stock.

10 (3) Relying upon said contract, as aforesaid, plaintiff interested one Isaac D. Hetzell of Philadelphia, Pennsylvania, and sold him certain certificates of common stock, and bonds in the defendant corporation, and received his commission upon said sales in accordance with the terms set forth in said agreement.

20 (4) During the month of November, 1922, by virtue of said agreement, plaintiff sold to said Isaac D. Hetzell, an additional block of common stock, consisting of 2,970 shares of common stock of said defendant corporation, which said 2,970 shares of common stock were issued to the said Isaac D. Hetzell by the said defendant corporation, and for which the said defendant corporation received the sum of \$29,720 from the said Isaac D. Hetzell.

30 (5) By reason of said sale, there became due and owing to the plaintiff, from the defendant corporation, the sum of \$14,860, which the defendant corporation, according to the terms of the agreement with the plaintiff agreed to pay unto this plaintiff.

(6) Defendant corporation paid on account of said sum of \$14,861 the sum of \$10,104.80, leaving a balance due to the plaintiff from defendant corporation, of \$4,755.20.

(7) Plaintiff has demanded payment of said sum of \$4,755.20, but defendant corporation has refused and still refuses to pay same.

40 Plaintiff demands from the defendant corporation, damages in the sum of \$4,755.20, besides interest from November 9, 1922.

Complaint.

SECOND COUNT.

(1) Plaintiff repeats paragraphs, one, two, three and four of the first count.

(2) Plaintiff further alleges and says that in the month of January, 1923, defendant, David Wiener, was the vice-president and general manager of the Atlantic Tar & Chemical Works, Ltd., a corporation of the State of New Jersey, one of the defendants herein. 10

(3) The defendant, David Weiner, the vice-president and general manager of the said Atlantic Tar & Chemical Works, Ltd., made and executed said written agreement as vice-president of the Atlantic Tar and Chemical Works, Ltd., and had full knowledge of the existence of said contract between this plaintiff and the said Atlantic Tar & Chemical Works, Ltd. 20

(4) Plaintiff informed said defendant, David Wiener that the aforesaid Isaac D. Hetzell, as a result of the efforts on the part of the plaintiff, who was endeavoring to sell to said Isaac D. Hetzell additional stock of the Atlantic Tar & Chemical Works, Ltd., one of the defendants herein, intended to purchase additional stock of the defendant corporation, at some early future date. 30

(5) Isaac D. Hetzell, while this plaintiff was still an agent of defendant corporation by virtue of said written agreement, purchased a block of common stock of the defendant corporation, consisting of twenty-five hundred shares, at the rate of \$10 per share amounting to \$25,000.

(6) Defendant, David Wiener, had knowledge of the fact that the plaintiff had procured the said Isaac D. Hetzell as such purchaser, and 40

Complaint.

was selling said Isaac D. Hetzell additional stock of the defendant corporation.

10 (7) David Wiener received from said Atlantic Tar & Chemical Works, Ltd., as commission for said sale, the sum of \$12,500, being, in fact, moneys belonging to the plaintiff, and fraudu-
lently, and intending to deprive this plaintiff of the commissions due him in accordance with the terms of the agreement hereto annexed, refused to account to this plaintiff for the commissions justly due plaintiff, but has unjustly and fraudulently, and with intention to deprive the plaintiff of the money due him, converted said commissions, amounting to \$12,500 to his own use.

20 (8) Plaintiff demanded from defendant, David Wiener, and defendant corporation, his commissions, in accordance with the terms of the agreement aforesaid, amounting to \$12,500, but defendant corporation and defendant, David Wiener, refused and still refuse to pay same.

30 Plaintiff demands from the defendant corporation, Atlantic Tar & Chemical Works, Ltd., or in the alternative from the defendant, David Wiener, the sum of \$12,500 besides interest from January 29, 1923.

LEO S. LOWENKOPF,
Plaintiff's Attorney.

Answer.

(Copy of Agreement.)

Bayway, Elizabeth, New Jersey
8/16/22

Dear Mr. Vogel:

This is the memorandum for your understanding that you are to receive (20% twenty) of sales of bonds and (50% fifty) from common stock whatever price is realized for same. 10

Atlantic Tar & Chemical Works, Ltd.,

(Signed) D. WIENER,
Vice-President.

Filed Oct. 24, 1923.

The defendants, Atlantic Tar & Chemical Works, Ltd., a New Jersey corporation located in the City of Elizabeth, Union County, New Jersey, and the defendant, David Wiener, residing at the same place answering the plaintiff's complaint: 20

TO THE FIRST COUNT.

1. Severally deny each and every allegation contained in paragraphs 1, 2, 3, 4, 5, 6 and 7, of the plaintiff's complaint excepting that defendant company signed agreement attached to complaint and that during the month of November, 1922, one Isaac D. Hetzel purchased common stock of the defendant company for which he paid, and also that the plaintiff received from the defendant company the sum of ten thousand and one hundred four dollars and eighty (\$10,104.80) cents. 30

Answer.

By way of further separate and distinct defense to the first count, defendants severally say:

2. On the 9th day of November, 1922, there was an account had and stated between the plaintiff and the defendant company wherein and whereby there was found to be due to the plaintiff the sum of ten thousand one hundred four dollars and eighty (\$10,104.80) cents, which sum the plaintiff promised and agreed to accept in full payment of the matters and things set forth in the first count of the plaintiff's complaint and any and all other matters of transactions had between the defendant company, and plaintiff and for any and all monies which were due or might become due from the defendant company to the plaintiff.

3. Defendant company paid to the plaintiff said sum in full payment of the matters and things set forth in the first count of plaintiff's complaint and in satisfaction of any and all other debts which the plaintiff might have had against the defendant company.

TO THE SECOND COUNT.

4. Severally deny allegations 1, 2, 3 and 4, of the first count as repeated in the second count, excepting as the same are admitted in paragraph one (1) of this answer.

5. Severally deny each and every allegation contained in paragraphs 4, 5, 6, 7 and 8, of the second count.

Wherefor defendants demand judgment dismissing the plaintiff's complaint besides costs of each defendant.

FEIT & FEIT,

Attorneys for Defendants.

Filed Dec. 22, 1923.

Judgment.

Plaintiff denies each and every allegation set forth in the answer of the defendants, by way of separate and distinct defenses to the first count of plaintiff's complaint.

LEO S. LOWENKOPF,
Plaintiff's Attorney.

Filed Dec. 27, 1923.

10

This action was tried before Hon. Peter F. Daly, Circuit Court Judge, with a jury, at the Union Circuit, on May 15, 1924.

The jury rendered a general verdict against the defendant, Atlantic Tar & Chemical Works, Ltd., and in favor of the plaintiff, for five thousand and one hundred sixty-seven dollars, and ninety-three cents (\$5,167.93), upon the first count of complaint.

20

	Whereupon it is adjudged that the plaintiff, Nathan S. Vogel do recover of the said defendant, Atlantic Tar & Chemical Works, Ltd., a corporation, Impld. &c., on the first count of the complaint, the sum of five thousand	
\$5,167.93	one hundred sixty-seven dollars, and	
53.54	ninety-three cents damages, together	
—	with his costs which have been taxed	
\$5,221.47	at the sum of fifty-three dollars and	30
	fifty-four cents, making in the whole	
	the sum of five thousand, two hundred	
	twenty-one dollars and forty-seven	
	cents.	

Judgment entered May 24, 1924.

WM. S. GUMMERE,
C. J.

A true copy.

EDWARD J. KELLEHER,
Clerk.

40

Opening.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

May Term, 1924.

10	NATHAN S. VOGEL,	}
	<i>vs.</i>	
	ATLANTIC TAR & CHEMICAL WORKS, Ltd., and in the alter- native, DAVID WEINER.	

20 Transcript of stenographer's notes of evidence in the above-entitled cause, taken before Hon. Peter F. Daly, Circuit Court Judge, and a jury, at the Union County Court House in the City of Elizabeth, New Jersey, on the fourteenth day of May, A. D. 1924, at 11.50 A. M.

Appearances:

John E. Toolan, Esq., Leo S. Lowenkopf, Esq.,
counsel for the plaintiff.

Louis J. Feit, Esq., counsel for the defendants.

A jury being empanelled and found satisfactory, they were sworn.

30 Mr. Toolan opens the case for the plaintiff.

Mr. Feit: At this time I am not quite clear, from Mr. Toolan's opening, and the allegations in the pleading, as to just what the nature of Mr. Toolan's claim is. In the pleadings, the way I read them, it sets forth a conversion, a count in conversion against Mr. Weiner, and brings an action in the alternative against Mr. Weiner and the Atlantic Tar & Chemical Works Company. Now, I would like to be clear on just

40

Nathan S. Vogel, direct.

what his claim in this case is on the second count.

Mr. Toolan: The allegations are general allegations, charging that they fraudulently entered into an arrangement to purchase this stock directly from Hetzel, and it charges in the alternative that either that money went to Weiner, or to the corporation, and while the word is used here converted, that is only one word in the second count in the complaint. There are the general allegations that conform to my opening. I believe the pleadings support the opening. 10

Mr. Feit: I still do not know—

The Court: I do not care whether you do or not, you follow the pleadings, and that is what you are limited by.

Mr. Feit opens the case for the defendants. 20

NATHAN S. VOGEL, the plaintiff, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Toolan.

Q Mr. Vogel, where do you reside? A 2323 N. Park avenue, Philadelphia.

Q Where were you employed prior to the month of August, 1922? A Huntley, Gordon & Company, Inc., New York City. 30

Q What is their business? A Selling securities.

Q While you were in the employ of the Huntley, Gordon Company did you receive any communication from the defendant company, the Atlantic Tar & Chemical Company? A Yes, sir. 40

Nathan S. Vogel, direct.

Q Have you that letter there? A It is amongst those papers there, Mr. Toolan. July 31st, is the date, I believe.

Q I show you this letter and ask you whether or not that is the letter to which you refer? A Yes, sir.

10

Mr. Toolan: I offer that letter.

Mr. Feit: All right.

(Letter dated July 31, 1922, entered in evidence and marked Exhibit P. 1.)

Adjourned until 1.30 P. M.

AFTERNOON SESSION, 1.30 P. M.

20

Q Mr. Vogel, as a result of the letter introduced in evidence and marked Exhibit P. 1, dated July 31, 1922, from the defendant corporation, did you call at the office or plant of the defendant company? A Yes, sir.

Q Where? A In Bayway, a mile from Elizabeth.

Q Whom did you meet there? A Mr. Weiner.

30

Q And as a result of the conversation with Mr. Weiner did you reach any arrangement? A Yes, sir.

Q That was reduced to writing? A Yes, sir. Of which you have a copy.

Q And is this the memorandum of that agreement? A Yes, sir. That is in Mr. Weiner's handwriting.

40

Mr. Toolan: I want to offer that.

(Memorandum entered in evidence and marked Exhibit P. 2.)

Nathan S. Vogel, direct.

Q Mr. Vogel, had you, prior to entering into this arrangement with the Atlantic Tar & Chemical Company, sold any of the stocks or bonds of that company for any other concern? A Yes, sir.

Q For whom? A For Huntley, Gordon Company, Inc.

Q They were the people with whom you were employed? A Yes, sir. 10

Q How many sales had you made prior to that?

Mr. Feit. I object to the question as being immaterial and irrelevant to this issue.

The Court: It shows the relationship.

A Altogether, Mr. Toolan, approximately seven sales, two of whom were made to the man in this particular case. 20

Q Mr. Hetzel? A Yes, sir.

Q Subsequent to the signing of that memorandum or agreement? A Yes, sir.

Q Did you make any further sales to Mr. Hetzel? A Yes, sir. Two further sales subsequent to signing this. I believe it is two, to be correct.

Mr. Feit: I object on the same ground, as it is immaterial to this issue, this being a claim for commission based on a particular sale, and any other sales are irrelevant and immaterial. 30

Mr. Toolan: In the light of counsel's opening I propose to object to it at the proper time, but this is evidential for this reason: We want to show that other sales were made, and that on those other sales a commission of fifty per cent. on the total amount of the sale was paid to this plaintiff. 40

Nathan S. Vogel, direct.

The Court: It is admitted on the sole ground of showing the relationship between the parties.

Mr. Feit: I ask for an exception.

The Court: Yes. You may have it.

10 Q What is the date of that memorandum?

A August 16, 1922.

Q When did you make your first sale of either stocks or bonds of the defendant company to Mr. Hetzel, after signing that memorandum, or after receiving that agreement?

Mr. Feit: I urge the same objection to any of this testimony with reference to any other sales than the one claimed in count one of the complaint.

20

The Court: You have your exception.

A August 17th, and another one November 9th.

Q How many shares did you sell him on August 17th? A August 17th, ten thousand dollars' worth of bonds, and seventeen hundred and fifty shares of common stock, or seventeen thousand five hundred dollars.

Q Were you paid a commission on that sale?

30 A Yes, sir.

Q By whom? A By Mr. Weiner.

Q By whose check? A Atlantic Tar & Chemical's check, with Mr. Weiner's signature, two thousand on the bonds and \$8,750 on the common stock.

Q Subsequent to that time did you make any other sale to Mr. Hetzel? A Yes, sir.

Q When? A On August 23rd I sold Mr. Hetzel bonds of the said company to the rate of \$2,500, on which I received a commission of

40

Nathan S. Vogel, direct.

\$500, and one thousand shares of the common stock, for \$10,000, on which I received a commission of \$5,000. But, Mr. Toolan, there is another \$150 in that sale, I don't recall what that extra \$150 was for.

Q Subsequent to that time did you make any other sales? A Yes, sir.

Q When? A On November 9th and 10th. 10

Q That is the sale involved in this suit? A Yes, sir. Two thousand nine hundred seventy-two shares.

Q Of what? A Of common stock only, upon the request of Mr. Weiner, you have a letter to that effect, asking me to do that special favor for him.

Q Is this the letter to which you refer? A Yes, sir. 20

Mr. Toolan: I want to offer that letter.

Q Where did you make this sale to Mr. Hetzel? A In Philadelphia, at the same place I made all prior sales.

Q To whom was the check delivered? A To Mr. Weiner in person, the same as all other checks.

Q I mean of Mr. Hetzel? A Beg pardon?

Q To whom did Mr. Hetzel deliver the check? A To myself. 30

Q What did you do with the check then? A I immediately took it by train to Mr. Weiner, came right over on the following train; wired him to the effect that I had received the check, and that I would call on him as soon as I got in Elizabeth and give him the check.

Q Did you do that? A Yes, sir.

Q Where did you meet him? A I believe it was at his home, Mr. Toolan. I called the 40

Nathan S. Vogel, direct.

plant, and I was advised that he left the plant and was at his home.

Q Where did you turn over this check and actually do business with him? A At Mr. Weiner's home I gave him the check.

10 Q Were you paid your commission on that sale? A On this last sale, no, sir.

Q Were you paid any of your commissions? A Yes, sir.

Q How much? A Ten thousand one hundred four dollars and twenty cents, if I remember correctly.

20 Q Was this agreement between the Atlantic Tar & Chemical Company and you, marked Exhibit P. 2, still in existence on that date? A Yes, sir; there was never any termination to this contract.

Q Had it ever been revoked? A No, sir.

Q Is it revoked today? A No, sir.

Q What commission was due you under that agreement? A Well, the same as I had been receiving on all my prior sales. I don't know the exact figures, but it was half of 2,972.

30 Q What if anything was said between you and Mr. Weiner there when this check of \$10,104.80 was delivered to you? A I brought the check to Mr. Weiner's home.

Q Which check are you referring to now?

A I am referring to the last check.

40 Q The twenty-nine thousand-dollar check of Mr. Hetzel? A Yes, sir. And he invited me to have lunch with him, which I did; at his home. There wasn't anything mentioned, and I said, Mr. Weiner, I would appreciate you giving me my check, I will not deposit it until this check clears, like we have done in all prior cases, and I am very anxious to get home, I have some busi-

Nathan S. Vogel, direct.

ness to attend to. He said, very well, we will go right down to the plant. As we left the home he said, Mr. Vogel, I think the company is paying you too much money, and I won't agree to continue paying you the same commission as I have been doing heretofore. Well, I said, Mr. Weiner, that is not the understanding. I had made prior sales upon which you have given me this money, and you are a man of your word, at least, you told me you were, and I am entitled to the same proportion as I have received in all cases made before. He said, well, if it is not satisfactory, you can take the check back to Mr. Hetzel. Well, I gave the thing a few minutes' thought, and I had an idea what it was possible for Mr. Weiner to do if I didn't take what was offered to me, which I did. And, Mr. Toolan, I want to bring up a question here, never before was I asked to sign a receipt for any commission checks. 10 20

Q Just a minute. Did you sign a receipt?

A Yes, sir; but I made him cross out certain things in there, which are crossed out on the duplicate as well.

Q Is this the receipt which you signed? A Yes, sir. Never before was I even asked to sign a receipt of that kind. 30

Mr. Toolan: I want to offer that receipt. I understand counsel has no objection to the admission of this last letter?

Mr. Feit: No.

(Letter dated October 30, 1922, entered in evidence and marked Exhibit P.3.)

(Receipt dated November 9, 1922, entered in evidence and marked Exhibit P.4.) 40

Nathan S. Vogel, direct.

Q Mr. Vogel, this letter recites 29,724 shares of stock. Did you ever speak to Mr. Weiner as to whether or not that was the number of shares that he had in mind? A That was exactly it. It wasn't twenty-nine thousand.

10 Q How many? A Two thousand nine hundred seventy-two.

Q They were the number of shares you sold to Mr. Hetzel? A Yes, sir.

Q And as the result of this letter, you saw Mr. Hetzel? A Yes, sir. Mr. Carlisle represented in there this Huntley Gordon, Inc. That is who Mr. Carlisle is.

20 Q You say when that ten thousand-dollar check was given to you on this sale to Mr. Hetzel in November, you signed this receipt? A Yes, sir. The first one I was ever asked to sign, compelled to sign.

Q Was that letter sent through the mails? A No, sir.

Q Delivered to you personally? A When I brought the check there, Mr. Toolan.

Q At the plant? A Yes, sir. The first time I have ever signed anything like that.

30 Q Did you, subsequent to the date that that money was paid over, ever demand of Mr. Weiner the balance which you claimed to be due? A Yes, sir.

Q Was it paid? A No, sir.

Q Was your agency with this corporation ever terminated? A No, sir; not to the present day.

Q Were there any other agents, to your knowledge, employed during the period that you were employed to sell these stocks?

Nathan S. Vogel, direct.

A Not to my knowledge.

Mr. Feit: As being immaterial and irrelevant.

The Court: Objection overruled.

Mr. Feit: Prays exception.

Q Did Mr. Weiner ever advise you that there were any other agents working?

10

Mr. Feit: I object to the question on the same ground.

A No, sir; he did not.

Mr. Feit: Prays exception.

Q Subsequent to this November transaction were there any other sales made to Mr. Hetzel? A Yes.

20

Q What was the nature of the sale, how many shares of stock? A Twenty-five shares.

Q When was that sold? A In January of 1923.

Q Did you at that time have any knowledge of the sale? A I had it when I called on Mr. Hetzel and he showed me the agreement that he entered into with Mr. Weiner.

30

Q Did you ever introduce Mr. Hetzel and Mr. Weiner? A Why, certainly.

Q Had they met prior to the time that you introduced them? A No, sir.

Q Did you ever make any demand for commissions on this latter sale? A When I called to get my commissions, yes, together, I did; I asked for the \$4,755.20, as well as the commission on the twenty-five thousand-dollar sale.

40

Nathan S. Vogel, direct.

Q Was it paid to you? A No, sir.

Q Who negotiated that sale? A I believe it was done direct, Mr. Weiner and Mr. Hetzel direct.

Q Where did you introduce Mr. Hetzel and Mr. Weiner? A At the Bayway plant.

10 Q How did you get down to the Bayway plant? A I brought them over in my car.

Q From Philadelphia? A Yes, sir. Mr. Hetzel and I made many trips, in fact, before I sold him the first time, when I was with Huntley Gordon, I made many calls and had many people come over to see the plant, and Mr. Hetzel was one of those people, and after he had seen it, and had been impressed with the plant, I made a call on Mr. Hetzel and got the first
20 check for Huntley Gordon Company to the amount of \$18,450 I believe was the exact amount. Then I made another sale with him for Huntley Gordon. Of course, when I came over— We would take trips over there about twice a month, or once every three weeks, and every time Mr. Weiner was there and showed us around the plant, what improvements he was making there. In fact, the first visit, Mr. Toolan, Mr. Hetzel never met Mr. Weiner prior to making the first
30 sale with him. He met one of the employees of the plant, who showed him through.

Q Do you know what the total authorized capital stock of this corporation was? A Yes, sir; at that time I can answer it. Half a million dollars' worth of bonds, eight per cent. bonds.

Mr. Feit: I object to that question, before he goes any further, on the ground it is immaterial to this issue.

40 The Court: Is that your objection?

Nathan S. Vogel, cross.

Mr. Feit: That is my objection. And the next objection is that the best evidence of that is the books of the company.

The Court: Your last objection is well founded. The first amounts to nothing.

Mr. Toolan: I call upon the defendants to produce the certificate of incorporation. 10

Mr. Feit: We haven't got the certificate of incorporation here.

Mr. Toolan: I will prove it in some other way.

Mr. Toolan: May we have on the record at this time, before I turn this witness over for cross examination, that it is admitted on the record that David Weiner, who signed the memorandum marked in evidence Exhibit P. 2, was authorized by the corporation to sign that instrument, to bind the corporation. 20

Mr. Feit: You may.

Mr. Toolan: You may cross examine.

Cross examination by Mr. Feit.

Q Mr. Vogel, at the time that you were authorized to make sales of these bonds and stocks, pursuant to the memorandum P. 2, was that your sole occupation? A At that particular time? 30

Q Yes. A I was devoting all my time, yes, sir, at that particular time.

Q For how long did you devote your entire time? A For how long?

Q Yes. Subsequent to that time? A Well, as much time as I really had to give it, which was all my time at that time. 40

Nathan S. Vogel, cross.

Q Well, for how long further after that did you have to give all your time? A Do you want the weeks, days or months?

Q Well, any information you have? A Why, I devoted as much time as I could see where I would get results from my efforts.

10 Q And the rest of the time what did you do? A Well, I slept and ate. I didn't promiscuously canvass from door to door. I would get prospects and call on them when those prospects could be seen.

Q Were you engaged in other employment for yourself? A Real estate business; yes, sir.

Q You were engaged in the real estate business at that time? A No, not at that time.

20 Q How soon after? A Well, if you call by investing my money in real estate, if you call that real estate business, there are other men following various occupations that are not in the real estate business, but I invested in property. If you call that real estate business, why, then you are right.

Q You actually engaged in the real estate business, didn't you? A No, I didn't actually engage in it at that time.

30 Q When did you? A Only in April of 1923 I actually—I mean—yes, April, 1923, that is correct.

Q In the intervening time were you exclusively engaged— A Yes, sir. Prior to April, 1923?

Q Yes. A Yes, sir.

Q Were you in Florida between the time that you signed this agreement and April, 1923? A Yes.

40 Q During the interim, between the time that you signed this memorandum agreement marked P. 2, and April, 1923? A Yes, I was in Florida.

Nathan S. Vogel, cross.

Q What were you doing there? A I had a rash on my hands. I was told to go there by my physician, for the sulphur water there, and in turn I received a letter, which I can produce if you wish it, from Mr. Hetzel, asking me to visit him at Fort Lucy.

Q Don't tell me what Mr. Hetzel wrote you. I am not interested in that. A Yes. 10

Q How long had you been down in Florida between the time you signed this agreement and April, 1923? A Why, I was down there four months.

Q Four months? A Yes, sir. While I was also engaged in soliciting business for the Atlantic Tar, which I can verify by wire. In answer to my inquiry whether I could still offer them more stock, and what was the price, I received a wire in return from Mr. Weiner saying, yes, you can, such and such is the price. That was in February of 1923, sir. 20

Q Or course, you did not consider yourself obliged to spend your time exclusively on behalf of the corporation? A Simply because, Mr. Feit, I did not receive any compensation only when I—

Q Made the sale? A Exactly, sir. 30

Q So you were free to do with your time as you chose? A But I devoted most of it as I say.

Q I say you were free, however, to do with your time as you chose? A Certainly, I was an American. This is a free country. I can do with my time as I wish.

Q You say while you were in Florida you wired Mr. Weiner as to what price you were at liberty to sell bonds and stocks? A Yes, sir. 40

Nathan S. Vogel, cross.

Q Then you considered it necessary, when you entered into any transaction for the sale of stocks and bonds, to first get the approval of Mr. Weiner? A No, sir.

Q In the transaction? A I beg pardon, Mr. Feit.

10 Q Why did you wire him in that particular transaction? A I will answer that question.

Q All right. A The common stock was destined to earn such big profits, and was to enhance in value in such short time, that I was not going to commit myself and take an order at ten dollars, if it was worth twenty or thirty, sir.

Q In other words, there was no definite price set for which you were to sell that stock, was there? A When?

20 Q Or bonds? At any time? A Oh, yes, there was a definite price. The minimum was to have been ten, upon which I was entitled to receive such commission.

Q That is not part of your memorandum? A Well, this is a verbal understanding between Mr. Weiner and myself, Mr. Feit.

Q When was that understanding entered into? A That was the understanding even prior to this little memorandum being drawn up.

30 Q Then why did you consider it necessary to have the memorandum drawn? A I wanted to play safe, Mr. Feit.

Q Then you wanted to have it corroborated what your actual bargain was in that memorandum, didn't you? A It was understood—it was told to me by Mr. Weiner that I was to receive twenty per cent. from the sale of bonds, and fifty per cent. from the sale of stock, whatever price is realized. Ten dollars was

40 the minimum, and no maximum.

Nathan S. Vogel, cross.

Q When did he tell you that about the ten dollars minimum? A That has been our understanding from the very inception of our relationship in this particular business.

Q When did he tell you that, I repeat? A Do you want the exact date on it, Mr. Feit?

Q As near as you can tell it? A Well, I would say in July some time, the latter end, possibly. 10

Q July of when? A Of 1922.

Q Now, when you sold any stocks or bonds of the company, you, as a matter of fact, always communicated first with Mr. Weiner as to the quantum and as to the price, did you not? A No, sir.

Q Was there any limit set as to the amount of stock that you were to sell? A No, sir; there was never any limit set as to the amount of stock I was to sell. Never. 20

Q There was no limit set? A Never any limit.

Q You are positive about that? A Absolutely positive.

By the Court.

Q Any limit as to bonds? A No, sir. They had a half a million dollars' worth— 30

Q No. A No, sir; no limit.

By Mr. Feit.

Q No limit as to the bonds? A No, sir.

Q When you received that order for 2,972 shares of stock from Mr. Hetzel, when did you notify Mr. Weiner of that? A Of that sale?

Q Yes. A Five minutes after the sale was consummated, which means the completed sale, 40

Nathan S. Vogel, cross.

means that a check attached five minutes later, I went to the Western Union office and wired or telephoned. Now, I am not absolutely positive which of those two it was, but one or the other, that the sale was consummated and I am leaving on the next train with the check. I don't recall whether I left on the train, or drove up.

10 Q As soon as you sent that word you left Philadelphia? A To tell him I was coming, to have my check ready.

Q Exactly. A Yes, sir.

Q That was before you had received any response in reply, of course, to your inquiry? A Yes. I am saying, I don't recall whether it was a telephone or telegraph message. I believe I drove, if I remember correctly.

20 Q You believe you did what? A I believe I drove over, instead of coming over by train.

Q But you don't know whether you telegraphed or telephoned? A That I am not positive of; no, sir; but I believe I drove over.

Q And then you say that you drove to Mr. Weiner's home? A Yes. No, I came to Elizabeth. My custom was to call up the plant first, if he was not at the plant, they would tell me where he was, so they informed me he was at his home.

30 Q What time did you arrive at his home? A At Mr. Weiner's home? It was around one o'clock, or something like that. It was in the middle of the day. The sale was consummated possibly ten o'clock, and I didn't respect the speed limits, and I drove over in possibly three hours.

Q It was around one o'clock, you say? A Yes, sir.

40

Nathan S. Vogel, cross.

Q And then you sat down to have your lunch?

A I gave him the check, and Mr. Weiner asked me to have lunch with him, which I did.

Q Did you give the check to Mr. Weiner at that time? A No, I didn't give it to him right away.

Q It was at the plant? A No, he didn't ask me for any check. He invited me to have lunch. 10

Q Then you went down, on your way over to the plant, and then you began talking about this transaction on your way to the plant? A Yes.

Q And then he took up with you the fact that you say that he was unwilling to pay you the full commission? A The full commission; yes, sir.

Q That he would not accept a sale unless you— A Would accept a lesser amount. 20

Q He would not take the check from Hetzel? A From me.

Q That was Hetzel's check? A Yes, sir.

Q Unless you cut your commission? A Yes, sir.

Q That you are sure about? A I was forced to take a cut—

Q Wait a minute. You are sure about that? A Why certainly I am sure about that. 30

Q You reached the plant? A Yes, sir.

Q Still undecided? A No. I beg your pardon. No, sir. That thing didn't take three minutes. When he told me he would not give it to me, I said, you are not a man of your word. I looked ahead, and I saw what Mr. Weiner could do to me, and I did take the \$10,104.80, and then try and get the balance.

Q You said you told Mr. Weiner that he was not a man of his word? A Exactly. 40

Nathan S. Vogel, cross.

Q On your direct examination I understood you to say that you told Mr. Weiner, you have always been a man of your word, and then continued on after that? A I said, Mr. Weiner, you are not a man of your word.

Q You didn't say that on direct examination.

10 A I didn't.

Q No. A Did I say, you always were a man of your word?

Q Yes. A Well, I had reason to say that, because he always paid me what the agreement was.

Q He always did? A Yes, sir; up until this sale.

Q Did you read this memorandum agreement?

A This which?

20 Q This memorandum agreement, the letter which you signed accepting this \$10,104.80? A Did I read the agreement?

Q Yes, when you signed it did you read it? A Sure, I was compelled to, or I couldn't get my check. I figured \$10,104.80 was better than to have him go direct.

Q You thought that was better? A I mean, it would be better, and then fight for the balance. I would at least have that much.

30 Q That is what you had in your mind when you took that? A In other words, I had in my mind that nothing could stop Mr. Weiner from going to Mr. Hetzel and say, Mr. Hetzel, Vogel wants a big commission, we will do business direct; what answer could I give Mr. Hetzel if I brought him back his twenty-nine thousand-dollar check?

Q Then why did you bring this suit on the \$2,500, when there was a dealing direct, as you say?
40

Nathan S. Vogel, cross.

Mr. Toolan: I object. It is argumentative.

The Court: He is under cross examination.

Q If you thought by your not accepting this check you would have no recourse against Weiner if he dealt directly with Hetzel on the sale of this stock, and that was your impelling reason for signing this paper, why did you bring this action on the second count in this case? A Mr. Feit, I have never been in court in my life, except as a defendant in an automobile accident, and I never want to have any litigation, and that is why I took that at that particular time. 10

Q So you change your story? A I didn't change my story. I knew I would have to fight to collect it. 20

Q And that is what you had in your mind? A What did I have in my mind?

Q What you just said? A What did I just say?

Q About accepting this paper? A Of course, I would have to sue for the whole business then, would I not, Mr. Feit?

Q Come to my office, Mr. Vogel, and pay me a fee, and I will give you an answer. 30

Mr. Toolan: I move that be stricken from the record.

Q That is your signature on there? A Yes, sir. Let me see if it is identically the same as mine. Yes. "I hope everything will be agreeable to both of us."

Mr. Feit: I ask that be marked for identification. 40

Nathan S. Vogel, cross.

(Letter dated November 9, 1922, marked D.1 for identification.)

Q And this is the check that you received?

A It looks like it.

Q Is it? A It is my signature on the back.

10

Mr. Feit: I ask that be marked for identification.

(Check number 3886, dated November 9, 1922, for \$10,104.80, marked D.2 for identification.)

Q On your direct examination I understood you to say that you knew that twenty-five hundred shares of stock were sold to Hetzel because you first saw an agreement in Mr. Hetzel's hands, showing that he had purchased this stock? A No; first he told me that, Mr. Feit, and then he showed me the agreement.

20

Q That was simultaneously? A No.

Q When was that? A After he told me about it.

Q Well, how long after he told you about it?

A About fifteen or twenty minutes afterward.

Q Well, it was all during the same course of the conversation? A Yes.

30

Q And that is the only inkling that you had of this twenty-five hundred shares being sold?

A What Mr. Hetzel told me.

Q And when you saw this agreement in Mr. Hetzel's hand? A On my return from Florida I called on Mr. Hetzel, and I called on him since.

Q Mr. Hetzel had been a frequent visitor prior to that time at Mr. Weiner's plant, had he not? A Always in my company, Mr. Feit.

Q But he had been a frequent visitor there before? A Yes, with me, yes.

40

Nathan S. Vogel, cross.

Q And he took a great interest in the plant, didn't he? A He had enough money in there to take an interest in it, Mr. Feit.

Q And he and Mr. Weiner were pretty good friends? A Became very intimate.

Q They became after you introduced them? A Naturally.

10

Q You brought him there originally? A After Mr. Weiner had jurisdiction over that man's money.

Q When did you first bring Mr. Hetzel to the plant? A When I first brought him there, do you mean the first visit he made there, or when he first accompanied me there? Which?

Q The first visit he made to the plant, when was that? A Well, the first visit he made to the plant I would say was maybe the 16th of July, 1922, fell on Monday, if I remember correctly, and that made it possibly the 14th—let us see, the 13th day of July, I believe, fell on Friday. Either the 13th or the 14th. And then I called on him on the 17th, when the sale was consummated for \$18,450.

20

Q Then he made considerable investments in that plant since the time of his first visit to the time of this twenty-five hundred sale of the stock? A Yes, sold him five consecutive times.

30

Q You sold him yourself five consecutive times? A Yes, sir.

Q And he had been at the plant? A Each time with me.

Q And how many times was that? A Well, I would say possibly five times preceding each sale.

Q And he made visits there privately, too, didn't he? A If he made any privately, possibly while I was away, not while I was still here,

40

Nathan S. Vogel, cross.

because invariably I would see the man possibly twice a week, or every week.

Q And as far as you know he took considerable interest in it? A Naturally. I would, too, if I had that much money in it, Mr. Feit.

10 Q Is this a copy of what you read when you were at Mr. Hetzel's? A I wouldn't be sure about that. I haven't even read this, but I will read it.

Q Well, read it and see. A May I have my counsel consent on this, your Honor?

(Question repeated by stenographer.)

A I wouldn't say, sir. It has been from 1923, over a year ago when I saw it. I have read it. I couldn't remember whether it was or not.

20 Q You wouldn't want to say whether it was or was not? A I wouldn't say either way; no, sir.

Q Then you don't know exactly what that agreement contained, do you? A Pardon me, may my attorney see that letter, please?

Q I asked you a question; will you kindly answer it?

30 (Question repeated by stenographer.)

A No, I can't say, only that it had in it twenty-five hundred shares, for which he was to receive so much interest on all of the money invested with the company on the common stock, even though it was bringing no dividends, he was to receive a certain amount of interest by taking this block.

40 Q He was to receive a certain amount of interest? A Yes, by taking this block of stock.

Nathan S. Vogel, cross.

Q That you do recall? A Yes, but whether that and this are the same I don't remember exactly.

Q Have you sold any stocks or bonds for the company since November 9, 1922, the 2,972 transaction? A No.

Q Not a single share, or not a single bond? 10
A No, sir; to my knowledge, no.

Q Have you attempted to sell any? A I did in February, in Florida I spoke to a man who became very much interested in it, and I told you before, that I wired to Mr. Weiner to get the price at that time, assuming that it had advanced in price.

Q Assuming that he had advanced it in price? A No. Assuming that the stock had advanced in price on account of the earnings back of it. 20
I received a wire to go ahead and sell at the same price.

Q Have you got that wire with you? A No. I told you I haven't got it with me.

Mr. Feit: Then I ask that the witness' reference to what the wire contained be stricken out.

A I can get the wire. 30

The Court: It is stricken out.

Q As a matter of fact, you haven't sold a single bond, or a single share of stock of the company since November, 1922? A No, sir.

Mr. Feit: That is all.

Nathan S. Vogel, re-direct.

Re-direct examination by Mr. Toolan.

Q How long were you engaged as a salesman selling securities?

10 Mr. Feit: I object to the question as being immaterial and irrelevant to this issue.

A Very short time.

The Court: Objection overruled.

Mr. Feit: Prays exception.

A I had about seventeen months' experience, from May, 1920, until December, 1921. I was in business, and the bank where I deposited my money failed.

20 Q That is all I want. Did you make any efforts to sell Mr. Hetzel, subsequent to that November sale? A Subsequent to that November sale? I called on him twice; I don't recall whether there was anything said about any further sales at that time, because I was leaving on account of my hand. I had to go and use sulphur water for my hands.

30 Q Did you approach him about buying any further stock in the Atlantic Tar & Chemical Company? A I mentioned it to him, and he told me what he had in it, and told me he was contemplating taking—

Mr. Feit: I object to what Hetzel told him as being entirely heresay. I ask it be stricken out.

The Court: Yes. Let it be stricken out.

Q Did you see him in Florida? A No, sir;
40 I couldn't get over where he was, on account

John J. Donovan, direct.

of the roads. I was on the West coast and he was on the East coast.

Mr. Toolan: That is all I have.

JOHN J. DONOVAN, a witness produced on 10
behalf of the plaintiff, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Toolan.

Q Mr. Donovan, are you an officer of the Atlantic Tar & Chemical Company? A Not now.

Q Were you? A I was.

Q For how long a period? A From March, 1922, until November, 1923. 20

Q What office did you hold? A Secretary and treasurer.

Q Were the books of the company kept in your possession during that period? A They were.

Q The stock book? A Yes.

Mr. Toolan: I call for the stock book.

Mr. Feit: This man has not the right to look through the entire stock book of this company. If he wants any particular matter or transaction, we will gladly refer him to it. 30

The Court: I will rule on objections when they are properly put. I do not know what question you are objecting to.

Q Do you, Mr. Donovan, know what the total authorized capital stock of this corporation was?

A Yes. 40

John J. Donovan, direct.

Q What was it? A Three thousand shares of preferred stock of the par value of one hundred dollars each, and sixty thousand shares of common of no par value.

Q Do you know how many shares of stock of the no par common were held by Mr. Weiner?

10

Mr. Feit: I object to the question as being entirely irrelevant and immaterial to this issue.

The Court: Objection overruled.

Mr. Feit: Prays exception.

The Court: As far as the ground of that objection is concerned, but I think the record is the best evidence, Mr. Toolan. That may necessitate looking all through that book, which they want to avoid.

20

A If you will tell me when, and what period of time, I could better answer you.

Mr. Toolan: I will withdraw that question and put it this way:

Q Did you become secretary of this company upon the organization of the company? A Yes.

30

Q How many shares of stock at that time, no par common, were issued to Mr. Weiner? A None.

Q How many to Mr. Lewis? A None.

Q Was the corporation organized through the medium of dummies?

Mr. Feit: I object to that question as being entirely irrelevant and immaterial.

The Court: Objection sustained.

40

John J. Donovan, direct.

Q Subsequent to the organization, how many shares of stock came into the possession of Mr. Weiner?

Mr. Feit: I object to that question.

The Court: All right. Then go all through the book, Mr. Toolan. You have a right to go through the book to find out. 10

Mr. Feit: I take an exception.

The Court: Exception to what?

Mr. Feit: I say my ground of the objection is that how many shares of stock Mr. Weiner held is entirely irrelevant and immaterial to this issue. This issue is a question involving as to how much money is due and owing to this plaintiff on commission for stock which was actually sold. What Mr. Weiner's holdings are in this company is absolutely immaterial and irrelevant to that. It has no bearing whatsoever on the case. 20

Mr. Toolan: It is relevant to this extent: The defense is, as I gained it from counsel's opening, that Mr. Vogel was engaged to sell only the bonds of the company.

Mr. Feit: Oh, no, I didn't state that. The memorandum agreement says bonds and stocks. 30

Mr. Toolan: As I understand the opening, they desire to sell the bonds, but not the stock. I want to show, through this medium, that the stock that was actually sold, as a matter of fact, was the personal stock of Mr. Weiner and Mr. Lewis, the president, and not the treasury stock of the corporation, and that although the money 40

John J. Donovan, direct.

did go into the treasury of the corporation, and that on this twenty-five hundred stock transaction, the twenty-five hundred shares in January of 1923, was in fact Mr. Weiner's personal stock, and that the money went into the corporation.

10 The Court: What have you to say to that?

Mr. Feit: Counsel asks how many shares of stock Mr. Weiner held in the corporation, and does not mention any specific time; he asks a general question of how many shares of stock Mr. Weiner held in the corporation immediately after its organization. He can examine this witness as to the twenty-five hundred shares of stock, or he can ask the question directly if twenty-five hundred
20 shares of stock were transferred directly to Hetzel, but not to go around about in that way to ascertain how many shares of stock Mr. Weimer had in the corporation right after its organization.

Mr. Toolan: I will follow the latter suggestion, if counsel wishes me to.

Q Will you please tell me whether or not,
30 on August 17, 1922, there was transferred to Mr. Hetzel 1,750 shares of the stock of the Atlantic Tar & Chemical Works?

Mr. Feit: I object to that question because the complaint does not set forth--- may I ask the question, is this pertaining to the 2,500 shares?

Mr. Toolan: No.

Mr. Feit: We will admit there was 2,972
40 shares of stock sold to Hetzel. We admit

John J. Donovan, direct.

that. There is no use going into the books for that. And we say we have paid him for it. We have paid him his entire commission. That is not an issue as to this—

(Question repeated by stenographer.)

The Court: I will allow it.

Mr. Feit: Prays exception.

10

A Yes.

Q From whose stock was that transferred? Was it treasury stock, or not? A It was not treasury stock. One-half was charged against David Weiner and one-half against George C. Lewis.

Q Who was George C. Lewis? A The then president of the company.

Q On the 23rd day of September I ask you whether or not there was one thousand shares transferred to Mr. Hetzel? 20

Mr. Feit: Objection on the same ground, it is immaterial and irrelevant.

The Court: Objection overruled.

Mr. Feit: Prays exception.

A Yes.

Q Whose stock was that? Was it treasury stock, or the stock of private individuals? A That was not treasury stock. It was charged against the account of David Weiner. 30

Q On November 9, 1922, was there 2,972 shares of stock transferred? A November 9, 1922, yes.

Q Was that treasury stock? A No, that was charged against the account of David Weiner. 40

John J. Donovan, cross.

Q On January 29, 1923, were there twenty-five hundred shares of stock transferred? A Certificate was issued to Isaac D. Hetzel for twenty-five hundred shares on January 29, 1923.

Q Was that treasury stock, or not? A It was not. It was charged against the account of David Weiner.

10 Q Do you know whether or not the money that was paid for these various stock transactions went into the treasury of the corporation? A It did.

Cross examination by Mr. Feit.

Q With reference to the last item, Mr. Donovan, what was the nature of that transaction, if you know, the twenty-five hundred shares of
20 stock?

Mr. Toolan: I object, unless this man knows of his personal knowledge.

The Court: Of course. It is assumed he will not answer unless he knows of his own personal knowledge.

A I never met Mr. Hetzel at that time, I didn't have any conversation with him.

30 Q Did you receive any instructions from Mr. Weiner as to the transfer of that stock?

Mr. Toolan: I object.

A I did.

Mr. Toolan: I object.

Q You are a member of the bar of the State
40 of New York, Mr Donovan? A I am.

John J. Donovan, cross.

Q How long have you been such member of the bar? A Twenty-four years.

Q In active practice? A Yes.

Q What were the instructions that you received from Mr. Weiner with reference to the transfer of that stock?

Mr. Toolan: I object to the instruction. 10

The Court: How is that competent?

Mr. Feit: He is an officer of the company, and he is secretary, and Mr. Weiner was the president and general manager, and it would be incumbent upon him to instruct the secretary as to the nature of the transaction, and how the entry was to be made up, in due course of business.

Mr. Toolan: I think that the books of the corporation might be competent to show the nature of the transaction, but I don't believe we are bound by the instructions that the president of the corporation gave to the secretary of the corporation, that might be his interpretation, or certain conclusions or inferences that he drew from the transaction. We couldn't be bound by that. That is the point of my objection. 20

The Court: I will allow the question. You may take an exception. 30

A I was instructed by Mr. Weiner to draw the certificate of stock registered in the name of Isaac D. Hetzel, for twenty-five hundred shares, and charge that to the account of David Weiner as collateral security for a loan of twenty-five thousand dollars that Hetzel had made to the company, or to Weiner. I don't know what that was. 40

John J. Donovan, re-direct.

Q As collateral security for a loan from Hetzel—

The Court: That is what he said.

Mr. Feit: Very well, sir. That is all.

10 *Re-direct examination* by Mr. Toolan.

Q Were you advised by Mr. Weiner of the terms of the loan? A No, sir.

Q The loan, as I understand it, was a personal loan from Mr. Hetzel to Mr. Weiner, is that correct? A No. The check was made to the order of the company.

Q That is, the check of Mr. Hetzel for that twenty-five hundred shares was payable to the
20 order of the company? A Correct.

Q The twenty-five hundred shares of stock, do they appear in the books of the company as an absolute transfer? A It is just charged against D. W., is all I have got. These, by the way, Mr. Toolan, are temporary certificates, this book you now have.

Q Mr. Weiner's original certificate was not endorsed in blank, and then delivered to Mr.
30 Hetzel, was it? A No.

Q A certificate for twenty-five hundred shares was issued, in the usual course, from the book of certificates of the company, is that correct? A That is correct.

Q Was there any memorandum or agreement in writing, or any endorsement on the certificate to indicate that it was delivered as collateral security? A Not by me.

Q Well, you have the certificate there, have
40 you? A I have the return certificate.

John J. Donovan, re-direct.

Q Will you please tell me whether or not that was a loan from Hetzel to Weiner, according to Mr. Weiner's instructions, or was it a loan from Hetzel to the corporation? A Well, it was a loan, as I understood the transaction, Mr. Toolan, it was a loan from Hetzel—

Q Not as you understood it. According to your instructions. A No. You asked me did you understand so and so. I am trying to say my understanding. 10

Q I will withdraw that question and put it this way: Did Mr. Weiner tell you that that was a loan from Hetzel to him, or a loan from Hetzel to the corporation? A Oh, I don't think that detail was gone into, Mr. Toolan. I didn't have charge of the finances of the company.

By the Court. 20

Q What did he tell you, Mr. Donovan? A Why, he told me that he was getting twenty-five thousand dollars from Mr. Hetzel as a loan, and for me to issue a certificate to Hetzel for twenty-five hundred shares, which he was to give Hetzel as collateral security for the loan.

Mr. Toolan: Do you object to it?

Mr. Feit: I object. 30

Mr. Toolan: All right, sir. We will not offer it.

The plaintiff rests.

Motion for a Non-suit.

MOTION FOR NON-SUIT.

10 Mr. Feit: At this time I desire to move
for a non-suit on the second count of the
complaint. My interpretation of the second
count is that it simply charges a conversion,
or embezzlement of certain funds, by Mr.
Weiner. The plaintiff in his opening, how-
ever, it seemed to me, as much as I could
gather from his opening, and the line of
his testimony, is that he simply charges that
the plaintiff was authorized to make the
sale of twenty-five hundred shares of stock
to Hetzel, that he made the sale, and that
he is entitled to commission for that sale,
although that in effect, in my estimation,
20 varies materially from the charges set forth
in the second count of the complaint. If his
charge is embezzlement, of course, it has not
been sustained. There is no evidence what-
soever in this case to show that any con-
version, or any embezzlement of the plain-
tiff's money, either by the company, or the
defendant, Weiner, had taken place. If the
basis of his complaint is a sale to Hetzel,
and that he effected that sale, there is ab-
30 solutely no evidence in this case showing that
the plaintiff was the efficient or procuring
cause of that sale of twenty-five hundred
shares of stock to Hetzel. He says that
when he came to Hetzel the first thing that
he saw was an agreement, although he can
give us practically no details of that agree-
ment, wherein Hetzel informed him that an
actual sale had taken place. This man had
no exclusive agency. He is relying on that
40 memorandum agreement. The memorandum

Motion for a Non-suit.

agreement was an offer, and as he said he
 understood it that he was not obligated to
 devote his time to it, that if he made a sale,
 he was entitled to commission. And on the
 strength of his own testimony, he says, I
 did not make a sale, because when I came
 to Hetzel I saw this agreement, and Hetzel
 told me that there had been a sale, so he
 said. Of course, that part was stricken out,
 with reference to what Hetzel said. But he
 said he saw an agreement, although he is
 unable to tell us what the agreement was.
 So, therefore, all we have is Mr. Donovan's
 testimony that twenty-five hundred shares of
 stock was transferred to Hetzel in January,
 1923, and that is all there is to it. He says
 he received instructions that it was given
 as collateral security. Before an agent can
 recover, he must show authority; conse-
 quently, in order to recover in this case, he
 would have to show not only that he had an
 exclusive agency, or that he had an exclu-
 sive right, as the courts have distinguished
 between exclusive agency and exclusive right,
 to sell the stock of this company, and no one
 else had the right; just because this com-
 pany gives him a memorandum agreement
 and says, I will give you so much for the
 sale of stocks and bonds, without mentioning
 the amount, without mentioning the price,
 and then anybody, whether it is Weiner,
 Jones, or Smith, or Henry, or whoever it may
 be, sells Hetzel, even though this man had
 introduced, seven months ago, Hetzel to the
 corporation, if they sell him subsequently,
 without his intervening, without his efforts,
 shares of stock, certainly he cannot recover;

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Motion for a Non-suit.

10 just because I give an agent authority to
sell bonds and stock, and he introduces a
purchaser to me, and he sells to that pur-
chaser bonds and stocks, over a period of time,
and then seven or eight months later sells this
purchaser some stock, without the interven-
tion of the agent, without his efforts, the
agent certainly is not entitled to commis-
sions. If that were the case, if this company
should sell Hetzel, or Hetzel should come
over and say, I want twenty-five hundred
shares of stock from this company, and
then if they would sell him, it would mean
they would have to go and give fifty per
cent. of that to this plaintiff. That is
ridiculous, under this memorandum agree-
ment, and that is all he has. He has not
20 testified that he had any exclusive agency.
He has not testified that he had any ex-
clusive right to sell. There is nothing in
this case whatsoever that gives him that
right. And not only have the cases gone
that far, but there has been a recent case
in this State which went so far, on the ques-
tion of damages, where a man had the ex-
clusive agency, and the owner sold the man,
30 and this man sued for commission, the Court
said no, you are merely limited to your loss,
you didn't come around and show that you
had another purchaser that was ready, able
and willing to buy that property, you spent
some time in advertising and some other
little matters, we will allow you for that,
but that does not even appear in this case.

40 Now, with reference to count one, I move
for a non-suit on count one, because this
memorandum agreement, which this witness

Motion for a Non-suit.

states was the agreement that contained their terms, that he didn't want to trust anybody, and he wanted it put down in that paper, this agreement says, "This is the memorandum for your understanding, that you are to receive twenty per cent. of sales on bonds, fifty per cent. of common stock, whatever price is realized for the same." How many shares, or bonds, was he authorized to sell? How many shares of stock was he authorized to sell? Naturally, every time this man got a sale, or had a customer, he had to, by virtue and performance of this agreement, come to the company and say, gentlemen, I have such and such a purchaser at such and such a price, will you accept? Suppose he sold ten million shares—let us expand it and contract it, to get at it—or suppose he sold one share; suppose he sold ten million shares for ten cents, naturally each transaction was an individual transaction. What does he say about that? He said he made the sale; he didn't notify these people before; he was in Philadelphia and saw Mr. Hetzel and the sale was made; I even wired the company, or 'phoned, I don't know which. No testimony that Weiner, or anyone for the company, accepted this offer. Then I immediately took an automobile to Mr. Weiner's house, I reached there, we didn't discuss anything, we went and had lunch, we had our lunch, and when we went over Mr. Weiner said, Vogel, you are getting too much commission, you will have to cut this commission, or else I will not accept the sale, which he had the perfect right to do, under this memorandum agreement, because

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Motion for a Non-suit.

this man had to come to him and tell him how many shares he sold, what he sold, and what price he sold, before it was incumbent upon him to accept, and consequently he could terminate that offer right then and there, which he did, and do as he choose about it.

10

The Court: Where do you get it that he was compelled to have the sale approved?

Mr. Feit: From the very terms of this memorandum. There is no limitation of how many shares he has got to sell. It says here "this is the memorandum for your understanding, that you are to receive twenty per cent. of sales of bonds, and fifty per cent. from common stock, whatever price is realized for same." Suppose this man came with an offer of ten million shares of stock, or ten million bonds.

20

The Court: Suggest some illustration that is sensible. The corporation was only authorized to issue so many shares of preferred stock and so many of common. Give us a practical illustration.

Mr. Feit: This plaintiff did not go into that, as to how many shares this company had. I asked him particularly—

30

The Court: He could not sell any more than the company had.

Mr. Feit: Exactly, but he didn't know at the time, and it was left open, and I asked him particularly, were you told how many shares of stock and how many bonds you could sell. He said, no, nothing whatsoever. That is what he said on cross examination. Therefore I assume—

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Motion for a Non-suit.

The Court: But you would not let him testify as to his knowledge as to the number of shares; you objected, saying that the books were the best evidence, the certificate was the best evidence.

Mr. Feit: It is not a question, even if he had that knowledge. He said there was absolutely no agreement as to how many he could sell. 10

The Court: He could not sell any more than the company had a right to deliver, could he?

Mr. Feit: There is no question about that.

The Court: I am going to hold, as a matter of law, that any sales that he effected, that he was the effective cause in consummating, bringing a willing purchaser, able to purchase, able to pay, that he was entitled to his commission, until that was revoked. 20

Mr. Feit: Well, I say to your Honor that it was revoked, before he came to Weiner and told him that he had this sale.

The Court: When was it revoked?

Mr. Feit: It was revoked on the way over to the plant. 30

The Court: Who revoked it?

Mr. Feit: Mr. Weiner.

The Court: After the sale was made? After he had a purchaser to purchase so many shares at so much money?

Mr. Feit: My point is not that he had no authority to make this sale, on count one. On count two that would be material. 40

Motion for a Non-suit.

The Court: I thought you were arguing on count one.

Mr. Feit: No. But on count one the material point is that they went there, and he told him that, and then he accepted the check for ten thousand dollars.

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The Court: He said he accepted it in a qualified way, that he did not accept it in full. I am going to hold, and it is my duty to interpret that agreement, they authorized this man, as their agent, to sell their stock and their bonds at whatever price he could obtain. That is a rather indefinite proposition as to price, but anything that was within reason was within the price, that was the meeting of their minds, that was the price to be obtained, and that he was to get twenty per cent. on whatever price he obtained on the sale of stock, and fifty per cent. upon whatever price he obtained for the sale of the bonds, and until they revoked that, any able and willing buyer that he obtained, as to their stock, within the limit of the amount of stock he sold, provided it was within the limit of the amount they were legally authorized in their certificate to issue, or under the law to issue, he was entitled to the commissions that were fixed by this written memorandum. That is the effect legally of this memorandum, as I, the Court, give it. Of course, you may disagree with it, and you can take your exception, but that is the way the jury is going to be charged. I do not say anything at all about the facts in this case.

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Now, as to the other proposition under count two, what does that count charge?

Motion for a Non-suit.

That count, as I read it, charges that this plaintiff, under this agreement that has been referred to, had the authority to make these sales, and that there was one sale in which Weiner himself was a participant, so far as the corporation was concerned, and the purchaser, Hetzel, but that, as a matter of fact, the real seller, the man who was the effective cause of that particular sale of the corporation stock to Hetzel, was the plaintiff, and not Weiner, and yet the corporation paid Weiner the commission, and Weiner took those commissions to himself, instead of turning them over to the man who was the effective cause of the sale, the plaintiff; therefore, he demands from Weiner this twenty-five thousand dollars, because there was a sale made of the stock of this company, from the company, to Hetzel, to the extent of twenty-five thousand dollars, that he effected, and not Weiner, and that the company actually paid Weiner. Where is there evidence to prove that?

Mr. Toolan: There is not any evidence that he paid Weiner, but that count is in the alternative and says that either Weiner or the company.

The Court: It is in the alternative so far as your caption is concerned, but is it in the alternative when you come to make your positive charge, which is, after all, the body of the complaint, and that alone is what counts?

Mr. Toolan: It says, paragraph eight (Reading).

The Court: Your contention there is that although you do charge Weiner with hav-

David Weiner, direct.

ing received twelve thousand five hundred dollars as commissions from the corporation, that even if he did, that since the commissions were actually and legally due to the plaintiff, the corporation has to pay the plaintiff, even though they paid Weiner?

10 Mr. Toolan: Payment to Weiner would not absolve their obligation to this plaintiff.

The Court: The motions of non-suit are denied.

Mr. Feit: I ask for an exception.

DEFENDANTS' CASE.

20 DAVID WEINER, one of the defendants, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Feit.

Q Mr. Weiner, what office do you hold in the Atlantic Tar & Chemical Company? A At present time president and general manager.

Q What office did you hold in the month of August, 1922, and particularly August 16, 1922?

30 A Vice-president and general manager

Q You signed that memorandum referred to as Exhibit P. 2? A I did.

Q Did you at that time, when that memorandum was signed, or at any time previous or subsequent thereto, fix any price or limit as to the stocks or bonds that were to be sold by Mr Vogel? A I did not.

Q How did you and he fix the amount and the price? A He brought Mr. Hetzel out,
40 when Huntley, Gordon & Company—

David Weiner, direct.

Q I am not referring to any particular transaction. But any transaction wherein he was the agent, what was the customary— A Well, the way he got that memorandum, when he brought Mr. Hetzel over on behalf of Huntley, Gordon & Company, he told me that he is receiving ten per cent. commission from the bonds, and fifteen per cent. from the stock, and that he has very good prospects of selling. We were in course of construction. 10

Q You are taking up the time with irrelevant matter. My question is directed to how did you and Mr. Vogel arrive at the price and the limit as far as number of the various transactions? A Well, he had to submit to me everything that he was supposed to sell.

The Court: Strike it out, what he had to do. You can tell us what your agreement was. 20

A That was the understanding, that he bring me the price and bring me the purchaser, before a sale could be made, for my approval.

The Court: Strike that out also, what the understanding was. 30

Q What was actually said? A That is what was said, that when he is going to sell any stock, if it is twenty dollars a share, he is going to tell me so. If it is fifteen dollars a share, he is going to tell me. And the same thing with bonds.

Q Was that with reference to each particular transaction? A Yes, sir; and it was each and every transaction, that it had to be approved by me before consummated a sale. In fact, this 40

David Weiner, direct.

10 memorandum, he said, now, for guidance, an accident may happen to you something, and in the meantime I will make a sale, give me that memorandum. And I sit down, he dictated himself, and I have written it in my own notes. Otherwise, I could have directed the stenographer to draw up a regular agreement, just to satisfy him. There wasn't any specific time, or any specific understanding that for any limit of time. Each and every sale was agreed upon between Mr. Vogel and myself, is to be made separately.

20 Mr. Toolan: I think the witness ought to be instructed not to be testifying about conclusions. He continually refers to understandings, and so forth. I think he ought to be restricted to the actual conversation between the parties.

The Court: I have already directed that.

Q Mr. Vogel has testified to three or four sales that had taken place prior to this November sale. A Wasn't three. It was only two on behalf of myself and the company, and there was some previous sales that he has made for the Huntley Gordon Company.

30 Q Each one of those transactions, or before their consummation, did he get in touch with you to get your approval of the same? A He certainly did. He brought Mr. Hetzel over, and then he came along himself to approve the sale, if I accept. And then I approved it, he went to Philadelphia and closed the deal and brought me the money. And Mr. Vogel knowed that the company did not have any stock for sale, that the stock, common stock that was sold, he knowed that it was my personal stock, and in
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David Weiner, direct.

turn I loaned the money to the company, which the books will show, and the bookkeeper is right here, how the entry was made.

Q In reference to this 2,972 shares that was made in the month of November, November 9, 1922, did you have any conversation immediately prior to that time, with Mr. Vogel, with reference to the sale of stocks? A Mr. Vogel, after making that sale, where the check will show \$10,750 on some bonds and stock, I told Mr. Vogel expressly that I hadn't any more stock for sale, because if I should sell any more stock, I am going to lose control of it and, therefore, not to consummate any sales whatever, unless there is some stock that was held out by Huntley, Gordon & Company, which I have written them a letter, that was introduced by him, on these 29,724, that it was to be round up on the outside. Otherwise, I said, Mr. Vogel, you can sell bonds, but no stock, because this is the limit. And furthermore, Mr. Lewis cannot lose any of his holdings either.

Q Who was Mr. Lewis? A The president at that time from the company. He worked on a re-sale of these 2,970 some odd shares, which I was supposed to round up and pick up from Huntley, Gordon & Company, and there was no price agreed on it, no sale consummated, but Mr. Vogel came along ready with a check in his pocket, and I didn't know that he had his check in his pocket. He came along to my house and had lunch with me, and then we came along to the plant, and in presence of the bookkeeper, he started to tackle me on the transaction of making the sale of twenty-nine hundred and some odd shares, which he said Mr. Hetzel would like to buy, to make up a certain amount of shares, that

David Weiner, direct.

10 he should be a part holder, and make it worth while. I told him that there isn't any stock for sale, with the exception those shares that I contemplated to pick up from the Huntley, Gordon, which I have written him the letter. And then furthermore I said, Vogel, I don't think that I would part with one share of stock, unless
you are committed, and if you are committed, and you will charge a smaller commission; I will take a chance to assign my personal stock, on the contemplation of reimbursing myself by the stock which I am going to pick up from Huntley, Gordon & Company, pursuant to the letter which I have written him.

20 Q Then this paragraph which says, "I am very anxious to get hold of these 29,724 shares of common stock that he pledged to those people."

A Yes, sir.

Q To what people does that refer to? A Huntley, Gordon & Company had pledged with Clark, Waters, Levinson & Company, and several other people, and I found they have pledged some of the common stock which they didn't have clear title to.

30 Q "At the rate of ten dollars per share, and as a matter of fact, I am much disturbed about leaving the common stock out in sources where I will not be able to get hold of them and redeem them within a reasonable time and for a reasonable term." A Correct.

Q Is that the time that you informed him about he was not to sell any further common stock? A Yes, sir. That is the letter that I have given him the information that the only stock that could be picked up is over there. But
40 as far as my personal stock is concerned, Mr.

David Weiner, direct.

Lewis neither, or the company's stock, nothing for sale whatever. Even at fifty dollars a share.

Q When he came to you on November 9, 1922, did he inform you that he had made a sale?

A No, he did not. He tried to fish, he walked around with me around the plant for three-quarters of an hour, while I was walk, and was trying to induce me to accept the sale for twenty-nine hundred shares, three thousand shares, at the same basis as before. I said no, nothing doing.

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Q Did he at that time tell you that he had actually effected a sale? A No, he did not.

Q Now, then, will you please give us the conversation that took place at that time between you and Mr. Vogel, that led up to your giving this check of \$10,104.80? A After he tackled me for an hour or an hour and a quarter in the plant, we had lunch—

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Mr. Toolan: I object, if they are going to attempt to set up that that agency evidenced in that Exhibit P. 2 was revoked.

A Absolutely, at each and every sale.

Mr. Toolan: For the reason that this defense is not set up in the answer. The answer is a general denial to the allegations in the complaint, and then sets up the specific defense of accord and satisfaction. There is no separate defense that this sale, this latter sale, was consummated under any different agreement to pay a different commission, and I submit that that defense cannot be interposed under the defense of a general denial, and certainly it is not accord and satisfaction.

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David Weiner, direct.

The Court: No, but they do deny, don't they, Mr. Toolan, under the answer, that there was any sale?

10 Mr. Toolan: Yes, they deny generally our complaint, but they do not set up specifically the defense that there was a different contract between the parties at the time that sale was consummated.

The Court: Talking about the second count?

Mr. Toolan: Yes. No, that is the first count. The only defense is in accord and satisfaction. The rest is general denial. I think this is matter they would have to plead specially.

20 The Court: Why do they have to plead it specially?

Mr. Toolan: Because I don't believe they can introduce proof of this under the general denial. It is matter we could not reasonably anticipate under their general denial. I think they can deny the existence of this specific contract, but when they come in and interpose another contract, I think that is a matter of which we ought to be advised in their pleadings.

30 The Court: Objection overruled. You may proceed.

Q (Question and answer repeated by stenographer.) A We finally came in in the office and he said, won't you give me forty per cent. on this sale. I said, no. We was in my office, where the bookkeeper sits right at the next desk. Well, I said, I will tell you, Vogel, you are impressing on me that you are committed for this here

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David Weiner, direct.

amount of shares, I am going to take a chance and I will give you one-third of the whole commission, that means thirty-three and one-third. He said, make it thirty-four per cent. I said to Mr. Gunter, at the next desk, figure out what thirty-four per cent. makes. Mr. Gunter took a pencil and a rough piece of paper and he said, \$10,104.80. I said to Mr. Vogel, are you satisfied with this amount? I said, I am going to call Donovan, the secretary, and tell him exactly what to do. He said, perfectly all right. Now, I said, look here, it looked to me that you been working an hour and a half, I am not quite satisfied the way you tackled me, I had better draw a memorandum to make sure that there is no come back on it, and I called Betty Macken in, the stenographer, I said, Betty, take down something. All right. Enclosed please find check for \$10,104.80, in payment of difference on the Hetzel transaction to the extent of 2,972 shares of common stock; I hope everything will be agreeable to both of us. Kindly acknowledge by signing copy of this letter. I said, Vogel, before Gunter makes out the check, I want you to sign this. Well, he took it and thought a minute and then he went with a pencil and scratched out the two words "of difference." He said, we have no differences, why do you have to put that in? And he signed it and accepted the check. I said, Vogel, from today on we haven't any further business, you haven't treated us right. Now, if you have anything to do, I said, act fair and square, tell me before you make a sale what you contemplate doing, and have my consent. He said, all right. Now, he said, you know, Weiner, I am going to leave for Florida, I am kind of ashamed about

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David Weiner, direct.

that proposition, Hetzel is a public man, and a big man in Philadelphia, I think I loaded him up with enough stuff, now I am going to Florida; and he went to Florida and stayed there for four months. When he came back from Florida, seeing the plant going up, everything materialized, he came along to me, how are you, Mr. Weiner, the same as he done yesterday at the lunch table, very glad to see you. All right. Now, he said, Weiner, I am back from Florida, I feel that you owe me some money; I said, we owe you some money; he said, yes, I talked it over in Florida with my lawyer and he thinks I have a good case, you compelled me to take that amount of money. Well, I said, if that is the case, Hetzel loaned me twenty-five thousand dollars. You may ask some commission, and then go on, have half of the plant. Well, he said, I want a little money, if you can, get me some money to straighten it out. That passed away two or three weeks, I finally got a lawyer letter from Philadelphia stating a balance on this here transaction and \$12,500. Well, I don't have to tell you, Mr. Feit, that you yourself seen that they were trying a fishing expedition.

30 Mr. Toolan: I move that be stricken out.

Q Is this the memorandum? A Yes, sir; that is the memorandum.

Q That was signed at that time? A By Vogel, yes. I told Mr. Gunter not to give him the check until he signs that memorandum, and I walked out in the plant.

The Court: Is that in evidence?

David Weiner, direct.

Mr. Feit: The original, without Vogel's signature, is in evidence. But not this particular one.

Q Is this the check that was given to him at that time? A Yes, sir; that is the check for \$10,104.80, and then he took a pencil and figured that out of \$29,720, at the agreed price, and brought him thirty-three and one-quarter per cent., and he said, well, make it thirty-four; and I told to Mr. Gunter to figure it out and he figured it out, it is just the amount? Why, should a check be made out \$10,104.80 on account? That is a silly idea, stating there that he got that on account; just that eighty cents which was made out.

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Q Now, Mr. Weiner, do you know of your own knowledge whether Mr. Vogel went to Florida? A I did, because I had some correspondence. He was trying—

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Q Mr. Weiner, just answer the questions that I ask you. A Yes, sir.

Q How long did he stay there, do you know? A About four months.

Q Did he get back prior to the transfer of the twenty-five hundred shares to Hetzel? A Oh, no, a good deal later, because he had enough of Florida, couldn't make out as well as Philadelphia. There was no Hetzels there.

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Q This twenty-five hundred stock transfer to Mr. Hetzel, what was the nature of that, and how did it come about? A I called Mr. Hetzel up in January and I told him the company is short of some funds for completion on the re-erection that we are doing there. Well, he said, how much do you need. Oh, I said, twenty-five thousand dollars will do for a little while. He

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David Weiner, direct.

said, for how long a time. I said, six months. Well, he said, what interest will you pay.

Mr. Toolan: I object to all this conversation between he and Hetzel. He can testify as to what was done.

10 The Court: He can testify to the fact. He cannot testify to the conversation.

Q Under what terms was the twenty-five hundred shares of stock transferred to Hetzel?

A Under a personal loan to David Weiner, and David Weiner in turn loaned it to the Atlantic Tar & Chemical Works for a consideration of ten per cent. per annum, per month, with collateral of twenty-five hundred shares, and which you will find original letters, an original transaction right here, from Mr. Hetzel to the company, and personally myself.

Q Were those twenty-five hundred shares of stock sold to Mr. Hetzel in January, 1923? A It was not, and it is not sold to-day yet.

Q Were they placed as collateral? A They were.

Q And with the money that you received from Hetzel, where did that go? A To the Atlantic Tar & Chemical Works, from my personal account, which the ledger will show the same date that I have received the money the bookkeeper deposited the Hetzel check to the account of the Atlantic Tar & Chemical Works, and made an entry in the book that this money belonged to David Weiner, and David Weiner in turn loaned the Atlantic Tar & Chemical Works, and that is the way the loan is carried on today yet.

Q Were there any commissions paid to you as the result of this twenty-five hundred shares

David Weiner, direct.

of stock transferred to Hetzel? A Not one cent.

Q Was there any commission paid to anybody by the company? A No, sir.

Q Were there any commissions paid at all as the result of this transfer? A Nothing whatever.

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Q Did you have communications with Mr. Hetzel with reference to this matter? A I did.

Q Mr. Hetzel had loaned the company previously some sums of money? A No. Later than that. That was the first loan he made. He loaned additional seventy-five thousand dollars, besides this twenty-five thousand dollars.

Mr. Toolan: I object.

The Court: Yes.

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Q Mr. Hetzel took a great deal of interest in the plant, did he not? A Yes, sir. He is vice-president now.

Q Where is Mr. Hetzel now, do you know? A In Philadelphia.

Q Have you made attempts to get him here? A I spoke to Mr. Hetzel last night and he told me it will be impossible for him to be today here, because he had some very important public duties to attend to today in Philadelphia. If we could adjourn the trial until Friday he will gladly come down and explain the twenty-five thousand-dollar transaction.

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Q What office does Mr. Hetzel hold? A He is city council man for the last twenty-one years, of the City of Philadelphia, one of the oldest and most reputable men, and a contractor besides. Not as counsel expressed himself, a politician, opening up to the jury.

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David Weiner, direct.

Q Now, I show you—for how long a term was this loan? A Six months.

Q And was there any understanding after that six months with reference to this loan? A Yes, sir.

10 Q I show you letters from you to Mr. Hetzel, and from Mr. Hetzel to you, and ask you to look at them. A January 24th—

Mr. Toolan: I object to the production of anything but original documents.

Q Was this letter received by you in due course of business? A Yes, sir.

Q Is that signed by Mr. Hetzel? A Yes, sir.

Q Do you know his signature? A Yes, sir.

20 Q Did that refer to this 2,500 shares of stock? A Yes, sir; that was an extension, June 23, 1923.

Mr. Toolan: I object to the witness testifying about what is in the letter, until it is in evidence.

Mr. Feit: I will show you the letter.

30 Mr. Toolan: I object to the admission of that instrument. I will state my reason: It refers to an agreement. I think if they want to introduce this paper, referring to another agreement, they first ought to introduce the other agreement, so we can see what that is. I am anxious to know what it is myself.

Q Do you know to what agreement that refers, Mr. Weiner? A Yes, sir.

Q Do you know what the agreement was?

40 A There is a copy of the agreement right here,

David Weiner, direct.

January 24, 1923, at the time of the sale of this here—at the time of the loan of the twenty-five thousand dollars on twenty-five hundred shares.

Mr. Toolan: I object to all this testimony, unless we have the original documents. I do not want to be bound by his interpretation of those documents. 10

Mr. Feit: We have explained our inability to produce the original documents and, therefore, we are entitled to introduce the next best evidence, a copy.

The Court: What is your explanation as to your inability to produce the original?

Mr. Feit: The witness who possesses them is out of the State.

The Court: You have not shown any effort to get it. You have not shown that the witness who is out of the State has it. 20

Q Did you send a copy of that letter, or the original of that letter to Mr. Hetzel? A Yes, sir; Mr. Hetzel has it in his possession, and if the case was on yesterday, Mr. Hetzel would be here in person.

The Court: Do not volunteer those explanations, and do not argue. Let your counsel do that. 30

Q Did you receive assurance from Mr. Hetzel that he would be here? A Yes, sir.

Q Did you call him on the 'phone last night? A Yes, sir.

Q What you have testified to is what he told you of that conversation? A Yes, sir. 40

David Weiner, direct.

Mr. Feit: I believe we have made a bona-fide attempt.

The Court: I think so.

10 Mr. Toolan: I want to press my objection for the reason that if they wanted to protect themselves, with a foreign witness, in the first place, they could take his depositions, out of the State, and we could have been noticed, and we would have had an opportunity to cross examine that witness and determine just exactly what his testimony was; this man is a friendly witness; they could have had all the original documents from that man during the months that this case has been pending. There has been no effort either to give his testimony personally, or to get possession of the original documents. Now, they come into court here at the last moment and offer what purport to be office copies of papers which this man alleges were sent. Now, I do not believe they have proven that they have in any wise exhausted the remedy, or opportunity the law gives them, to produce the best evidence. They have not shown that they endeavored to have depositions taken out of the State, or that they ever endeavored to get these papers. They say the only thing they did was notify this man to be here today. Now, that surely is not sufficient to bind us by this man's interpretation of that contract.

20

30

The Court: Objection sustained. You may take an exception.

Mr. Feit: I will ask an exception.

The Court: You will have between now and to-morrow morning to get it. He is the vice-president of your company, according

40

David Weiner, direct.

to his testimony, and presumably a friendly witness.

Mr. Feit: The difficulty with that is—

The Court: I do not care what the difficulty is. I am telling you now openly, as a matter of record, this case will not finish this afternoon, that you will have your opportunity to get the original. You have your opportunity of getting Hetzel here, if you need him as a witness. 10

Q I show you this letter from Mr. Hetzel and ask you if that is the original, sent by him to you, in the course of business? A Yes, it is.

Q Does that refer to this 2,500 shares of stock? A Yes, sir.

Mr. Toolan: No objection to that. 20

Mr. Feit: I offer this in evidence.

The Court: There being no objection, it is admitted.

(Memorandum dated January 29, 1924, entered in evidence and marked Exhibit D. 3.)

Mr. Feit: (Reading): Exhibit D. 3, there is on here: "Six months interest on \$25,000, or 2,500 shares, at 10% per annum." And there is \$1,250— 30

Mr. Toolan: I think counsel ought to read the whole instrument.

Mr. Feit: All right. I will not read the top part, it has no bearing on this.

Q What is that word, do you know, Mr. Weiner? A Well, it means the \$25,000 to be redeemed in six months, and extension for six months later. 40

David Weiner, direct.

Mr. Feit: There is one word here you will have to make out yourself:

“Belonging to Mr. Lewis and yourself, and held by me as collateral for loan of \$25,000, to be redeemed by you in six months, and subject to future agreement. Yours truly.”

10

Q Now, the top part relates to the interest on 6,977 shares, for six months, including February 21st, 1922, \$2,093.10. The latter portion, does that have reference to the twenty-five thousand shares of stock? A Yes, sir.

Q Had you been continuing to pay him the interest every six months? A Yes, sir.

Q And that top clause, was that an additional loan? A No. That is on the entire holdings of 6,972 shares that it was sold to him by Mr. Vogel; he is getting 6% interest on account of the reconstruction proposition.

20

Q Did Mr. Vogel ever communicate with you, prior to the time that he told you, when he came back from Florida, about demanding this sum of money, that he had at any time taken up with Mr. Hetzel the sale of 2,500 shares of stock, between November and February?

30

Mr. Toolan: I object.

Q November, 1922 and February, 1923?

Mr. Toolan: I object. This is a conversation between he and Hetzel, not binding on this plaintiff. Mr. Hetzel could come here and testify himself.

Mr. Feit: The question is, did Mr. Vogel tell you.

The Court: Yes.

40

David Weiner, direct.

Mr. Toolan: Oh, I have no objection.

The Court: Answer that yes or no.

A No.

Q Did Mr. Vogel sell any stock or bonds on behalf of your company, or on behalf of yourself, or anyone else, stocks, or bonds belonging to the company, since November 9, 1922? A No. 10

Mr. Feit: That is all.

Adjourned until tomorrow, Thursday, May 15, 1924, at 9:30 A. M.

20

30

40

David Weiner, cross.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

May Term 1924.

10 NATHAN S. VOGEL,
 vs.
 ATLANTIC TAR & CHEMICAL
 WORKS, LTD., and in the Alter-
 native, DAVID WEINER.

20 Transcript of stenographer's notes of evidence
 in the above entitled cause, taken before HON.
 PETER F. DALY, Circuit Court Judge, and a jury,
 at the Union County Court House in the City
 of Elizabeth, New Jersey, on the fifteenth day
 of May, A. D. 1924, at 9:30 A. M.

Appearances: John E. Toolan, Esq., Leo S.
 Lowenkopf, Esq., counsel for the plaintiff.
 Louis J. Feit, Esq., counsel for the defendants.

30 Mr. Feit: May I withdraw Mr. Weiner
 and put Mr. Hetzel on the stand? Mr.
 Hetzel must make the 10:20 train for Phila-
 delphia, and I do not think it would in any
 way jeopardize the plaintiff's case.

Mr. Toolan: I would like to finish with
 Mr. Weiner before Mr. Hetzel goes on the
 stand.

Mr. Feit: The plaintiff has not started
 cross examination at all yet. It is not
 interrupting.

40 The Court: I cannot control it. If Mr.
 Toolan does not agree to it, you must go on
 in the regular way.

David Weiner, cross.

Mr. Weiner: I went over to Mr. Hetzel's house and brought Mr. Hetzel over, with the understanding that he be back at council's office at twelve o'clock. Now, Mr. Hetzel insisted upon me that he can't go, and I was out the whole night to bring Mr. Hetzel here.

10

DAVID WEINER, resumed.

Cross examination by Mr. Toolan.

Q Mr. Hetzel is now an officer of the Atlantic Tar & Chemical Company, is he not? A Yes, sir.

Q What office does he hold? A Vice-president.

Q When was he elected vice-president? 20

Mr. Feit: I object to the question as being irrelevant and immaterial.

The Court: Objection overruled.

Mr. Feit: Prays exception.

A About six weeks ago, if I recollect right.

Q The paper that you offered in evidence yesterday, marked Exhibit D.3, is an acknowledgment by Mr. Hetzel of the receipt of interest on the amount of money he has invested in the defendant company? A As far as common stock is concerning, on a certain appraisal of \$69,770, and also the loan of \$25,000, which induced Mr. Hetzel to make us the loan, was ten per cent. per annum interest. 30

Q In other words, you paid Mr. Hetzel interest at 6% on the 6,977 shares that he held in that company, capitalized at ten dollars a share, 40

David Weiner, cross.

is that correct? A It is not capitalized. That was sold to Mr. Hetzel at ten dollars a share.

Q Was that a dividend? A No. That was the understanding at the time with Mr. Hetzel, that when we sell him he should have a loan of 6% interest until the dividends is declared.

10 Q In other words, you are paying to Mr. Hetzel, who is a stockholder, 6% on all the stock which he owns, at the rate of \$10 per share, and you are not paying any dividends to any other stockholders, is that true? A We are paying to some of the stockholders to which we have made that arrangements, for the purpose of getting the money.

Q Was there ever a dividend declared by this corporation? A There was not.

20 Q Under what authority do you pay one stockholder interest on an investment, and not pay to other stockholders? A Because that was the arrangement at the time we have made the concession with Mr. Hetzel.

Q In other words, you make a deal to pay one man a certain percentage, and another man nothing, is that it? A Well, that was the understanding at the time when we have obtained the money from Mr. Hetzel.

30 Q Don't you know, as a matter of law, that you have to pay all stockholders the same money? A No, I do not.

Q This 6,977 shares held by Mr. Hetzel, were all sold to him at \$10 per share, that is correct? A Yes, sir.

Q And that stock was sold to him in five different installments, isn't that so? A I don't exactly recollect if it was five. I know from three that I have made the deals.

40

David Weiner, cross.

Q Wasn't the first sale to Mr. Hetzel made on July 17, 1922? Didn't Mr. Hetzel buy some stock in July of 1922? A If I have the folder there I will refresh my memory. There is two folders there, Mr. Gunter. The smaller one. The first instruction we had to Mr. Vogel from Mr. Hetzel was on August 16, 1922.

10

Q Well, referring back to the Huntley, Gordon Company, didn't they sell Mr. Hetzel some stock, through Mr. Vogel, as their representative, in July, 1922? A That was an account with Huntley Gordon & Company, which I cannot tell you. I can only tell you the transactions which we have done with Mr. Hetzel, through Mr. Vogel.

Q Will you please produce the books of the company and turn to the stock issues and tell me whether or not there was stock issued to Mr. Hetzel on or about July 17, 1922?

20

Mr. Feit: I object to the question; it is immaterial to this issue what was sold to Mr. Hetzel July 17, 1922. The basis of this complaint is commission for a sale that took place in November, 1922, and in January, 1923. What transactions took place in July is entirely immaterial and irrelevant to this issue.

30

The Court: That may prove so, but it is proper cross examination.

Mr. Feit: Prays exception.

Q Will you please turn to the stock book and tell me whether or not there wasn't stock issued to Mr. Hetzel in July, 1922? May I have it? A I wouldn't be able, Mr. Toolan, to tell you anyway from that stock book, because when

40

David Weiner, cross.

the deal was made with the Atlas Security Company there was certain stock given to them in that deal, and this stock was held by the Atlas Security Company, and it may be, by the instructions of the Huntley Gordon, who was a subsidiary from the Atlas Security Company, issued some stock to Hetzel.

10 Q Will you turn to that book, in the month of July, 1922, and tell me whether or not there was any stock issued to Hetzel? A I wouldn't be able to tell you anything from this book.

Mr. Feit: I object to having the plaintiff and counsel going through our books indiscriminately. It is not very fair.

20 The Court: Well, he says there is nothing in those books. He is under cross examination. If they do not believe that, then they have a right to see whether or not there is anything in the books.

Mr. Feit: I take an exception to the Court's ruling.

Q I ask you to look at this stock certificate number 55, and tell me to whom that certificate is made out? A Isaac D. Hetzel.

30 Q For how many shares? A One hundred shares.

By the Court.

Q What date is that? A July 17, 1922.

By Mr. Toolan.

Q And the next certificate, number 56? A Same thing, one hundred shares.

Q Same date? A Yes, sir.

David Weiner, cross.

Q And the next certificate? A One hundred shares, same date.

Q The next certificate? A One hundred shares, same date.

Q Next? A Same date, one hundred shares.

Q And the next? A Same date, one hundred shares. That is all. 10

Q Will you tell me whether or not on July 31st there was not another sale made to Mr. Hetzel?

Mr. Feit: I object to that question.

Q Of some shares of stock of the defendant company, at ten dollars per share?

Mr. Feit: I object to that question as being irrelevant and immaterial, to this transaction. 20

The Court: Objection overruled.

A It was not. July 31st was not made by the company. It was sold by the Huntley Gordon Company, which the company did not receive one dollar for this stock.

Q That is not my question. I want to know if more stock was sold to Mr. Hetzel on July 31st? A I didn't sell him. 30

Q Did any agent that you authorized sell him stock? A Well, if the book will show that Huntley Gordon has sold them through Mr. Vogel, it will be a fact.

Q Well, will you turn to the book here and tell me what stock certificate number 65 shows? A It shows to Isaac D. Hetzel, on July 31st, 850 shares. 40

David Weiner, cross.

Q The sale on July 17, 1922, of 600 shares, was at ten dollars per share, is that right? A I don't know what it was he paid for it.

Q And the sale on July 31, 1922, was at ten dollars per share, wasn't it? A I don't know what price he paid for this sale.

10 Q Mr. Vogel did make a sale, did he not, on August 17, 1922, of 1,750 shares to Mr. Hetzel, did he not? A August 16th.

Q How many shares?

20 Mr. Feit: We admit, Mr. Toolan, that all these shares were sold by Mr. Vogel. There is no dispute in this case, your Honor, that these various sales of stock were all made by Mr. Vogel. They were made, and he received his money for them.

Mr. Toolan: If you will admit this, that everyone of these shares of stock that are held by Mr. Hetzel, were sold to him at these different dates at ten dollars per share, it will eliminate the necessity for further cross examination.

30 A Well, there is \$69,770 will show that it means ten dollars a share. I am taking Mr. Hetzel's word that he paid ten dollars a share.

Mr. Feit: Mr. Toolan, we will admit that, of course, without admitting anything on the twenty-five hundred dollar transaction. Of course, we admit it, and we always did admit that.

40 Q So that Mr. Vogel sold stock of the defendant company from July 17, 1922, up through November 9th of 1922, and every share of stock

David Weiner, cross.

sold was sold at ten dollars per share, that is right, isn't it? A That is correct, as Mr. Hetzel told me, and Mr. Vogel told me.

Q As I understand your interpretation of that contract, Mr. Vogel had to get authority from you before any sale could be consummated, is that right? A Yes, sir.

Q Was a price fixed at which this stock could be sold by Mr. Vogel? A It was not, because Mr. Vogel told me that he sold some shares in Pennsylvania at \$22.50.

Q Well, was a minimum of ten dollars fixed? A It was not.

Q In other words, you sent a salesman out on the road to sell stock? A Salesman?

Q Yes. A Pardon me. Repeat the question.

Q I say, you sent a salesman out on the road to sell stock? A We did not.

Q Well, you gave a man authority to sell your stock? A We did not, with the exception of Mr. Vogel, on account of the first sales that he made to Mr. Hetzel.

Q Well, did you give Mr. Vogel authority to sell your stock? A To Mr. Hetzel.

Q To anyone else? A No.

Q Why didn't you put that in your little agreement? A That isn't an agreement. This is simply for accomodation of Mr. Vogel, that he trust me, in case something happens to me. Do you mean to say intelligently that this would be an agreement drawn up?

Mr. Toolan: I move this be stricken out. I am not looking for an argument. I want the questions answered.

The Court: Do you have to make that train, Mr. Hetzel?

Isaac D. Hetzel, direct.

Mr. Hetzel: Yes, sir.

Mr. Toolan: Then I will consent to it.

(Witness withdrawn from stand.)

10 ISAAC D. HETZEL, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Feit.

Q Mr. Hetzel, where do you reside? A In Philadelphia.

Q What is your business? A General contractor.

20 Q You are holding an office in the Atlantic Tar & Chemical Works at the present day? A Yes, sir.

Q What is that office? A Vice-president.

Q Did you, in the month of January, 1923, hold any office in that company? A What say?

Q Did you, in the month of January, 1923, hold any office in that company? A That I can't tell, about the exact date. It was about that time that I was notified I was elected vice-president.

30 Q You have made considerable investments in that company, have you not? A I have.

By the Court.

Q Was it this year, or last year, that you were made vice-president? A This year, 1924.

By Mr. Feit.

40 Q You have made considerable investments in that company, have you not? A Yes, sir.

Isaac D. Hetzel, direct.

Q And some of those investments have been made through Mr. Vogel? A My original investment was made through Mr. Vogel.

Q And your subsequent investments, did Mr. Vogel have anything to do with them? A My large investments were made entirely independent of anyone, except what I thought was my own judgment. 10

Q Now, turning to the month of January, 1923, did you loan the company any money in that month and year? A About that time. I can't tell the exact date, or the exact month.

Q What was the amount of your loan? A Twenty-five thousand dollars.

Q And what was the nature of the transaction, or, that is, will you please describe the transaction whereby you loaned the company twenty-five thousand dollars? A Well, I invested my money from time to time, I became very much interested in the Atlantic Tar & Chemical Works, and every opportunity I had to visit the works I went there; I saw the improvements were being made; Mr. Weiner, who was the general manager of the concern, thought that if they could get more money that their improvements would proceed much more rapidly than they would otherwise, if they had to drag along and depend on the sale of some remaining bonds they had, and one thing or other, and wanted to know if I would advance them any money. I said, yes, with proper collateral. He said, well, would I accept more shares of the common stock of the company. I said, yes, I will. But, I said, what terms am I going to get for this money, if I advance it. He said, I will give you ten per cent. I said, when will you re-pay that. He said, I will give you ample notice. I said, so that I have notice 20 30 40

Isaac D. Hetzel, direct.

from the time you pay your one six months interest to the other, is sufficient. That condition has been going on, for those twenty-five thousand dollars; I have the twenty-five hundred shares of stock, made out in my name, which the first of February I receive my ten per cent., or
 10 twelve hundred and fifty dollars, and I expect to receive it again on the first of August. I had considerable money invested in this concern, and I talked the matter over with Mr. Weiner, that I wanted something definitely done in this matter, and I had too much at stake, and I thought I ought to have the same return for the money that I had invested, which, with my stock accumulations, amounted to \$69,777. He had an interview with the president of the company,
 20 Mr. Lewis, and arranged to meet. We met the next week, they agreed to allow me six per cent. on the money that I had put in, for the stock that I had purchased at ten dollars a share from Mr. Vogel. Mr. Vogel thought at that time, as I did, that it was a very good proposition, and the common stock would be a great producer of revenue in the future.

By the Court.

30

Q Did that six per cent. comprehend that twenty-five thousand dollars loan that you speak of? A No. That twenty-five thousand dollar loan was ten per cent., I think. But the money that I had bought the stock through Mr. Vogel was 6,977 shares originally. He came to me one time and says, I can make a sale of bonds if I can get twenty shares of your stock, which I will pay twenty dollars a share for; otherwise
 40 I can't sell these bonds. I said, Vogel, if that will

Isaac D. Hetzel, direct.

be any accomodation, you can have the twenty shares of my stock at twenty dollars a share. That transaction took place and made my balance 6,977 shares, for which I paid \$69,770.

By Mr. Feit.

Q I show you a statement and ask you whether you wrote that to Mr. Weiner? A That is my handwriting.

10

Q You refer there, I notice, to the 6,977 shares at 6%, and then you also refer to the twenty-five thousand dollar loan as collateral. A That is my writing; yes, sir.

Q Then the 2,500 shares that were given to you by Mr. Weiner, was that as collateral for this twenty-five thousand dollar loan? A Certainly. I insisted on having something as collateral, and he wanted to know if I would accept stock of the company. I said yes. And he gave me 2,500 shares of the stock, which I now hold as collateral for that loan, which will be returned when I get my \$25,000 back. Otherwise I will hold those 2,500 shares.

20

Q Of course, those 2,500 shares are no part of the 6,977? A Absolutely not. That letter of mine I think covers that. I think you could submit that to the jury.

30

Q Yes, it has been submitted to the jury; it is in evidence. A That is my handwriting.

Q Mr. Vogel has testified that he came to your residence in Philadelphia and that you informed him orally that you had bought 2,500 shares of stock from the company. Is that a fact? A When was this?

Q In January or February of 1923, so he testified. A February, 1923?

40

Isaac D. Hetzel, direct.

Mr. Toolan: I think the testimony was that he was in Florida at that time. It was in April of 1923.

Q Or in April of 1923? A That may be.

10 Q Did you tell him that you had purchased 2,500 shares of stock from the company? A Why, how could I tell him such a thing, when I hadn't purchased it?

Q Did you tell him that? A Absolutely not.

Q Mr. Vogel also testified that you showed him an agreement that purported to state in effect that you had purchased this 2,500 shares of stock from the Atlantic Tar & Chemical Company. A When was this?

20 Q At some time twenty minutes later? A That I had showed you any agreement of anything of that nature?

Q Yes. That was Mr. Vogel's testimony. Is that a fact? A I am asking Vogel when that took place, or if I ever made such a statement?

30 Q You can't do that. Will you please answer the question yes or no? A No, absolutely no. If it is any benefit, I will state Mr. Vogel came to see me at that time, or about that time, on another proposition that he was very much interested in, and wanted me to take part in. I told him very distinctly I didn't approve of the proposition and would have nothing to do with it. But, as for telling Mr. Vogel that I had purchased this stock, it is furthest from my thought, for I never contemplated purchasing.

40 Q I show you that letter and ask you whether you have written that letter to Mr. Weiner, and what it refers to? A You can compare that with the other writing and you will see it is my handwriting.

Isaac D. Hetzel, cross.

Q Is that referring to the same transaction?

A Absolutely to the same transaction.

Mr Feit: I want to offer that in evidence.

Mr. Toolan: No objection

(Letter dated June 23, 1923, entered in evidence and marked Exhibit D.4.)

10

Q What agreement did you refer to in that letter, Mr. Hetzel? A I can't recall.

Q Well, will you just read the letter, if you please, and refresh your recollection? A To extend the agreement?

Q Yes. A Why, I think I stated—

Q Was that the agreement you had stated before to the company that it was for collateral security? A Why, of course. So that I had notice, when the one payment became due, that I would extend until such time as they wanted it.

20

Cross examination by Mr. Toolan.

Q You did have an agreement, did you not, with the Atlantic Tar & Chemical Company, respecting that 2,500 share and \$25,000 loan proposition? A Yes.

Q Did you show that to Mr. Vogel in April when he was there? A A written agreement with them? There is the only agreement, was the transactions I made. No, I didn't show Mr. Vogel anything.

80

Q Didn't you have an agreement in letter form, or in some form, stating that proposition? A No. The agreement was made—

Q Didn't you show that to Mr. Vogel when he came into your office in April, 1923? A The agreement was made with Mr. Lewis, Mr. Weiner and myself, a verbal agreement. That was all.

40

Isaac D. Hetzel, cross.

Q Wasn't that verbal agreement confirmed in letter form, a typewritten letter, which you showed to Mr. Vogel in the month of April? A I couldn't show it to him, because I never saw it myself.

10 Mr. Toolan: May I call for the defendant to produce a typewritten letter. They offered one here yesterday.

Mr. Feit: We didn't offer it. We couldn't produce it, Mr. Toolan.

Mr. Toolan: I am asking for the typewritten letter you offered yesterday.

Mr. Feit: Which one are you referring to? There are about a dozen that have been offered.

20 Q To whom did you make this loan, to Mr. Weiner, or to the Atlantic Tar & Chemical Company? A The Atlantic Tar & Chemical Company.

Q It was not made to Mr. Weiner personally? A Only as the general manager of the company. He was the representative, and I consulted with Mr. Lewis, who sanctioned that agreement that Mr. Weiner and I had discussed.

30 Q Then it was not a personal loan to Weiner, but a loan direct to the corporation? A A loan to the Atlantic Tar & Chemical Company.

Q And you received this stock as collateral? A As collateral.

Q Was there any endorsement on the stock to that effect? A No.

Q This money you loaned for a period of six months, is that right? A Yes.

40 Q And under the terms of your understanding, if the loan was not repaid in that time they

Isaac D. Hetzel, cross.

were to forfeit that stock, is that correct? A No. I gave them the privilege of extending that, which they have always availed themselves of, and have paid the interest every time it became due.

Q But under the terms of your original agreement, was that stock to be forfeited to you in the event the loan was not repaid? A In case I wanted to take it, but I didn't want to take it, as long as I was getting ten per cent 10

Q And then it was extended? A Of course.

Q This agreement to get 6% of the total amount of money you had invested in the corporation was by virtue of an arrangement made between you and Mr. Weiner and Mr. Lewis, the president of the company? A Yes, sir.

Q Subsequent to the time that you had invested all this money, is that right, that is, after this money was put in? A About that time, certainly, after I had invested. 20

Q And after you had waited a while for dividends, is that correct? A Yes.

Q And didn't get any? A Didn't get any, and I had as much money invested there as anybody else, and I thought I ought to get some return for it.

Q Do you know whether any dividends were paid to the other stockholders in this corporation? A I don't think they ever were. There was never any declared to me. 30

Q There was never any at any meeting of the board of directors that you attended? A No.

Q Did you receive a letter, the original of a letter dated January 24, 1923, of which I show you a copy? A Yes, I guess I saw that letter, the original of it. 40

Isaac D. Hetzel, cross.

Q The original of that letter was sent to you?

A I imagine it was.

Q And that states the terms of your arrangement, does it? A Yes.

Mr. Toolan: I will offer that letter.

10

Mr. Feit: I will consent to its being offered.

The Court: You consent to its admission?

Mr. Feit: Yes, sir.

The Court: All right, it may be done, under agreement.

(Letter entered in evidence and marked Exhibit P. 5.)

By the Court.

20

Q Am I correct, Mr. Hetzel, in my understanding that as a condition of the loan of twenty-five thousand dollars, as you allege, you insisted that they should pay you not only 10% on that \$25,000, but 6% upon the money that you had already invested, as an investor in the stocks, was that done at the same time? A No, sir; I don't think so.

30 Q Well, when was the 6% arrangement effected? A Well, I can't tell exactly, without referring to the time I got my checks.

Q Was that afterwards, after the loan of \$25,000? A No. I think that was before the loan of \$25,000 was made, or practically about the one time.

Mr. Toolan: I think this letter will help clear up the situation. May I read it? Letter dated January 24, 1923.

40

(Letter read to the jury by Mr. Toolan.)

Isaac D. Hetzel, cross.

By Mr. Toolan.

Q By whom was that letter signed? A Why, it was signed by Mr. Weiner, I imagine.

Q So that you did discuss, at the same time that loan was spoken of, the proposition of paying you 6% on the balance of your investment, is that not so? A Well, I say about the one time. I can't carry the dates with me. 10

Q That is what is referred to in this letter, is it not? A I think so.

Q So that was a personal loan to Mr. Weiner, rather than to a corporation? A What does the latter end of the letter say about taking it up with Mr. Lewis? My understanding was it was a joint affair between Mr. Lewis and Mr. Weiner. I got the twenty-five hundred shares of stock, that is all I was interested in. 20

Q What I mean is, your letter recites it was to be a personal loan to Mr. Weiner. A As the manager. It was a personal loan, to be used for the benefit of improving that property that I was vitally interested in.

Q Did you subsequently loan the corporation another seventy-five thousand dollars? A I have; yes, sir.

Q What collateral did you get for that? A 30 No. I loaned that, in addition to that fifty thousand dollars. I think the 24th of March.

Q Of this year? A Of this year, twenty-five thousand, and I took their notes, and their bonds, that they still have on sale, as collateral for that. On the 24th of April I loaned them twenty-five thousand additional money, and have their bonds as collateral for that, with their notes.

Mr. Toolan: That is all.

Isaac D. Hetzel, re-direct—re-cross.

Re-direct examination by Mr. Feit.

10 Q Did Mr. Vogel ever talk to you in any shape, manner, or form with reference to the twenty-five hundred shares of stock that you got from the Atlantic Tar & Chemical Works? A Not that I have any recollection of. Because at that—

Q Did he induce you to advance that money, under those conditions?

Mr. Toolan: I object. That is a conclusion. He can tell us what was done, but not give us his conclusion.

20 Q Did he by any word, act, or deed, ask you to advance that money? A Never had any conversation in reference to that money at all.

Q With Mr. Vogel? A With Mr. Vogel.

Mr. Feit: That is all,

Re-cross examination by Mr. Toolan.

30 Q Mr. Vogel, however, was the man who introduced you to Mr. Weiner and the Atlantic Tar & Chemical Works? A Originally, yes. It was through Mr. Vogel's interest that I became such an extensive stockholder, I don't know whether I am happy or sorry to say.

By Mr. Feit.

40 Q You had, after his introduction, visited the plant and taken a personal interest in the plant? A I go there as often as possible. I try to make a visit once a week.

Isaac D. Hetzel, re-direct—re-cross.

Q Were you accompanied always by Mr. Vogel when you went there? A On various occasions, originally, as long as Mr. Vogel was connected with the sale of the securities, why, every time I went to the plant Mr. Vogel accompanied me, and we had some very pleasant times going and coming.

10

Q Did you visit the plant while he was away in Florida? A Oh, yes.

Q On numerous occasions? A I visited the plant while he was in Florida, before I went to Florida, and after I came home.

By Mr. Toolan.

Q All these sales were made to you at ten dollars a share, of common stock, is that correct? A Yes. That was the value—the original transaction was made, for every one thousand-dollar bond that was taken the person that took the bond was entitled to subscribe for ten shares of common stock, for which they paid one hundred dollars additional, or ten dollars a share.

20

Q But ten dollars a share was always the price, is that correct? A That was the price I always paid.

Q Did Mr. Vogel, in your presence, ever call up the home office at Elizabeth to ascertain whether or not ten dollars was all right as a price for the stock? A Not to my knowledge. I don't recall why it was necessary for him to have any conversation of that kind.

30

Mr. Toolan: That is all I have.

Mr. Feit: That is all.

40

David Weiner, cross.

By the Court.

Q Why do you say you don't think it was necessary for him to have any conversation of that kind? A Why do I say I don't think it was necessary for me to have any conversation with him?

10 Q For him to have any conversation of that kind? A With me at that time?

Q Yes. A I was satisfied, when I made the investment, that that was the proper amount to pay for it. I had paid that for every investment I made. I bought bonds at different periods.

Q Had you been told by anyone else connected with the company that that was the fixed price?

A No, sir.

20

DAVID WEINER, resumed.

Cross examination by Mr. Toolan (Continued).

Q Mr. Weiner, did you send Mr. Vogel, or give him an authority to sell your stock, and not make known to him the price at which he was to sell it? A He was to consult me, oh every—

30 Q Answer that yes or no. A Repeat it please.

Q Did you authorize Mr. Vogel to sell your stock, without making known to him the price at which he was to sell it? A I don't quite understand how to answer that, because that was no such understanding.

Q Well, what was the understanding about the sale, about the price? A That he is to submit to me every individual sale, customer, price, amount,
40 every detail, before it is approved.

David Weiner, cross.

Q Well, what was the price, that is what I want to know? A He said he could sell some of the stock maybe for twelve dollars, maybe for fifteen dollars. He showed me the instance that he sold twenty shares for Hetzel for twenty dollars.

Q Did he have authority to sell the stock at ten? A When I consented to it. 10

Q And you had consented to these other numerous sales to Mr. Hetzel at ten, didn't you? A When he consulted me before making the sale.

Q And you wrote to Mr. Vogel this letter of October 30th, referring to the 29,724 shares of stock, did you not? A That was on stock that was held as collateral by Clark Waters, and some other concerns, that Huntley Gordon didn't have proper title to it, and I wanted to buy this stock up. 20

Q Do you mean twenty-nine thousand shares, or twenty-nine hundred and seventy shares? A Twenty-nine hundred and seventy shares.

Q And that is the exact number of shares that Mr. Vogel sold to Mr. Hetzel nine days later, isn't that so? A I believe it is.

Q And didn't you say in this letter, I am very anxious to get hold of those 2,972 shares of common stock that he pledged with those people at ten dollars a share? A That is right. 30

Q Did you tell Mr. Vogel at what price he was to sell these shares of stock? A He said he would probably sell them for 15, 18 or 20. In all events ten dollars.

Q You knew, and you asked him in this letter to try to sell those shares of stock to Mr. Hetzel, isn't that so? A Yes. 40

David Weiner, cross.

Q And you knew that Mr. Hetzel had bought thousands of shares of stock of this company at ten, isn't that so? A No, no, I did not, because Mr Vogel never saying the truth between Mr. Hetzel and me.

10 Q Didn't you know, at the time you wrote this letter, that Mr. Vogel had sold thousands of shares of the stock of this company to Mr. Hetzel? A Thousands and thousands of shares?

The Court: He said just thousands.

A Yes.

Q Didn't you know that? A He sold some shares.

20 Q They went into the thousands, too, didn't they, the numbers that he had sold? A Well, whatever the amount is. You have got the schedule there.

Q And you suggested to him that he go to Mr. Hetzel and sell these shares too, didn't you, in this letter? A I did not suggest to him. Mr. Vogel came over and suggested to me.

Q Did you not suggest that in this letter? A Yes, to pick up the shares from the outside. That was Mr. Vogel's construction of the letter, if you want to know, he has to—

30 Q Just a minte. In other words, you had some shares outstanding? A Yes.

Q In the hands of some people in New York, that you wanted to get control of, is that correct? A Correct.

Q So that you wrote a letter to Mr. Vogel? A Yes.

Q And told him to sell 2,972 shares more to Mr. Hetzel, is that right? A No, I didn't tell him exactly to sell it to Mr. Hetzel. I told him
40 to sell it.

David Weiner, cross.

Q Told him to sell it? A Yes, if he can, to help me out.

Q You testified yesterday that you didn't want Mr. Vogel to sell any of the common stock of this company, is that right? A Yes. Not mine.

Q I am asking you whether or not you told Mr. Hetzel that you did not want him to sell the common stock of this company? A I didn't speak to Mr. Hetzel. I talked to Mr. Vogel. 10

Q Mr. Vogel, did you tell him that? A I told Mr. Vogel—

Q Did you tell him that? A Please, Mr. Toolan, don't try to mix me up.

Q I want you to answer yes or no. Did you tell him that? A You ain't going to make me to testify the way you want.

Q I submit I am entitled to an answer yes or no on that question. A Well, just ask the question plain and simple. 20

Q Did you tell Mr. Vogel that you did not want him to sell the stock of this company, that is, the common stock? A The company did not have any stock for sale. That was my personal stock. All the stock which was outstanding from the Huntley Gordon Company, that I was trying to get away from Huntley Gordon & Company. 30

Q How many shares of stock did you have on August 16, 1922, when you signed this memorandum? A I guess I and Mr. Lewis have had in full about forty thousand shares.

Q And the total authorized number of common shares that the company could issue was sixty thousand, isn't that true? A Yes, sir.

Q Where are the other twenty thousand? A Ten thousand was in the treasury, ten thousand was given away for promotion. 40

David Weiner, cross.

Q To Huntley Gordon? A Yes.

Q And there was ten thousand shares of treasury stock then at the time that you signed this memorandum, that is true? A Not for sale, if you want to look at the by-laws and the minutes, stating there not for sale.

10 Q Will you please answer the question? I say, there was ten thousand shares of treasury stock at the time you signed this memorandum, that is correct? A Yes.

Q And did you tell Mr. Vogel not to sell the stock of the company, the common stock? A I did.

Q Whose stock did you authorize him to sell? A Mine.

20 Q Were you anxious to get rid of it? A I did not. I wanted to help the company, that is all. Only sell a certain amount. Not to lose the control.

Q How many shares did you tell him he could sell? A Every sale had to be approved, if it is five shares, and when I would feel that there is nothing to sell, I would notify him.

Q Will you answer the question, how many shares did you tell him he could sell? A I didn't tell him any amount at all.

30 Q You were not anxious to sell the common stock of the company? A I was not.

Q And yet you signed this memorandum to pay a commission of fifty per cent. of the amount of all such sales? A Because Mr. Vogel told me that he can obtain twenty dollars a share.

40 Q Did you think that paying him fifty per cent. on all sales would discourage him in his efforts to sell common stock? A He only had one customer, and he became a broker on account of that customer, which he called himself.

David Weiner, cross.

Q You became one, too, as soon as he quit, didn't you? A Oh, yes, sure.

Q With that same customer? A Yes, sir; the same as he told me the beginning of the suit, when he came back from Florida, he said, I have nothing to lose, the lawyers will take it on a contingency basis anyway, you will have to bother in court, you had better give me a few dollars. 10

Mr. Toolan: I would like to have the Court tell the witness to answer questions. He seems to be wound up and talks endlessly, and I can't stop him.

A I am certainly wound up, after a man takes away twenty-eight thousand dollars in commission, and doesn't invest nothing, and doesn't do nothing, and deceives either side, he deceived Mr. Hetzel, too. 20

Mr. Toolan: I submit none of this is relevant.

The Court: I will let him go just so far, and then he will hear something. Strike out that last.

Q Now, Mr. Weiner, at the time you wrote this letter to Mr. Vogel, you were very anxious to get more money into the treasury, were you not? A I was anxious to get this stock away. 30

Q You were anxious to get more money into the treasury, were you not? A I was anxious to get money in in the treasury all the time, because I had a construction program to go through.

Q You were so anxious to get money into the treasury that when Mr. Vogel made a sale 40

David Weiner, cross.

you delivered to Mr. Hetzel your personal stock, and put the money into the treasury of the company, did you not? A Yes, sir.

10 Q And, as a matter of fact, wasn't this letter written for the purpose of Mr. Vogel using it to show to Mr. Hetzel, to convince him that it was very hard to buy the common stock of this company? A It is not.

Q Wasn't this, as a matter of fact, what is known as a come-on letter? A Mr. Vogel is a very slick article.

Q Is that not so? A It is not. Absolutely not. It is an outrage, cases of this kind.

Q When Mr. Vogel came to you with that check for \$29,720, he had consummated that sale as a result of this letter of yours, hadn't he?

20 A I don't know as the result of this letter.

Q You wrote him this letter and asked him to try and put that sale over, didn't you? A Let me read that letter and I will tell you. Yes, October 30th, I asked him to try and sell to Mr. Hetzel this here stock which was to be picked up, that was outstanding from the Huntley Gordon Company.

30 Q You asked him to sell 2,972 shares of stock, that is right? A Yes, sir.

Q Within nine days after that he came to you with this check for \$29,720, isn't that right? A Well, he probably was several times there before he came with that check.

Q So that he talked to you about this sale before he came with the check, did he? A He did not.

40 Q You say he was over to your place several times after you wrote this letter? A Several times since October 30, 1922, until he brought

David Weiner, cross.

the check for twenty-nine thousand and some odd dollars.

Q And during that time did he tell you that he was working on Mr. Hetzel, in conformity with your letter? A He told me that he was working on other parties; some was in Spring Lake, right out here, he had to go out and see some people there. 10

Q Did he tell you that he was working on Mr. Hetzel? A He did.

Q You knew it? A What do you mean, I know it? I didn't go travel with Mr. Vogel.

Q Did you say anything to him about the price, when he told you that he was talking to Mr. Hetzel? A Well, before he would do any business with Mr. Hetzel he would have to consult me. 20

Q Did you say anything to him about the price at which he was talking to Mr. Hetzel? A I did not.

Q You knew that he had sold other stock to Mr. Hetzel at ten, didn't you? A I did not. I didn't take that in consideration at all, and I did not. Mr. Vogel thoroughly understood at that time, when I have given him the memorandum, that each and every individual sale has to be approved by me, price, quantity and everything. 30

Q There wasn't any dispute about the quantity, because you told him the quantity, isn't that so? A Yes.

Q So that was out of the way? A Yes.

Q You knew that repeated sales had been made to Mr. Hetzel at ten, didn't you? A Repeated sales?

Q Yes. A No, I did not. 40

David Weiner, cross.

Q Well, you knew that he bought other stock, didn't you? A Yes.

Q And didn't you think that Mr. Vogel might be working on him at that same price to sell these 2,970 shares? A That isn't exactly so, because since Mr. Vogel has left for Florida, Mr. Hetzel bought 125—

10

The Court: You are not answering the question.

A Well, he is trying to have me to answer the question that it was an established price of ten dollars.

20

The Court: Well, the trouble with you is that you want to comment, and you want to characterize, and you want to argue, whereas your sole duty is to answer questions. Now, you understand that. Repeat that question.

(Question repeated by stenographer.)

The Court: You can answer that yes or no.

A No.

Q That never occurred to you? A No.

Q This paper writing of August 16th was still in existence at that time, isn't that so? A Yes.

Q And you knew that any sale that Mr. Vogel consummated in compliance with the authority that he had, that he would be entitled to a commission of fifty per cent. on it, didn't you? A No, I did not. Each and every individual sale had to be approved and understood between us.

40

David Weiner, cross.

Q Was this ever revoked prior to November 9th? A Yes, sir; after each and every individual sale. I simply give him that memorandum to cover himself, as he asked me, in case anything happens to me while he consummates a sale.

Q Will you listen to this question, Mr. Weiner, and answer it yes or no. Was this memorandum of August 16, 1922, ever revoked? 10

A Yes, sir.

Q When? A After the first sale.

Q How? A Orally.

Q Notwithstanding the fact he had that very valuable little piece of paper, you never thought it necessary to sit down and write him a letter telling him the authority was revoked, is that right? A Because it was optional with me to make the sales, or not. 20

Q Did you ever revoke that in writing? A I did not.

Q The only time you ever got a receipt from Mr. Vogel for commissions was at this transaction on the 9th of November, isn't that so? A Yes, when I handed him a check for \$10,104.80.

Q And on every other transaction that Mr. Vogel put through he got a commission of fifty per cent. on sales of stocks, did he not? A I believe he did. There was only two sales. Not on every sale. Only two sales previous. 30

Q The other sales to Mr. Hetzel are the ones I am talking about. A Only two sales.

Q That is all the money he made you are talking about? A Yes, he made over thirty thousand dollars.

Q Now, Mr. Weiner, this loan from Mr. Hetzel, you testified it was a personal loan to you, did you not? A Yes, sir. 40

David Weiner, cross.

Q And you in turn loaned that to the corporation? A Correct. That was the understanding between me and Mr. Lewis and Mr. Hetzel.

10 Q Now, as I understand it, subsequently you absolved the company from their indebtedness to you for that twenty-five thousand dollars, did you not? A I did not.

Q Don't the books of the company show that? A Absolved?

Q Yes. Wipe out that debt of \$25,000? A No, I did not.

Q Didn't you know it was a fraud on your other stockholders, and contrary to the corporation act to pay interest or dividends to one stockholder, and not pay them to the other stockholders in the corporation?

20

Mr. Feit: I object to the question. It has been gone over before.

The Court: He did not admit it was dividends.

Mr. Toolan: He is paying interest.

The Court: Well, that is different.

30 Q Well, pay interest to one stockholder on his investment, and not pay it to the other stockholders? A Well, you may take the other stockholders and bring an action against the company, if you think that isn't within the law.

Q Will you answer the question, Mr. Weiner?

A I am paying interest, plainly, on that collateral right there, that I am paying interest on this common stock.

Q I am asking you whether or not you didn't know that was contrary to law? A I did not.

40

David Weiner, re-direct.

Q Will you produce the books of the company and show me how this twenty-five thousand-dollar affair is carried on your books?

Mr. Feit: We will have the bookkeeper on the stand, Mr. Toolan.

Mr. Toolan: All right. That is all.

10

Re-direct examination by Mr. Feit.

Q Mr. Weiner, at the time that you wrote this letter, or subsequent thereto, did you at any time authorize Mr. Vogel to sell to Hetzel, or anyone else, any of your personal stock?

A I did not.

Q I understand that the shares of stock that are referred to in this letter were shares of stock that were held by another company in New York? A Correct. They didn't have no title to it, and they pledged it, pledged it with some other bank for some money, and I was anxious to get the stock away.

20

Q Was that what prompted you to give this letter to Vogel? A Correct; yes, sir.

Q And did Vogel at that time take away any of that stock from the company and sell it to Hetzel? A He did not.

30

Q How many sales altogether did Vogel make, subsequent to the time that he received that memorandum from you? A Three sales.

Q All of those were made to whom? A To Isaac D. Hetzel.

Q He made absolutely no other sales? A No other sales.

The Court: That has all been covered.

Mr. Feit: That is all.

Mr. Toolan: That is all.

40

Edward J. Gunter, direct.

By the Foreman.

Q In regards to that \$25,000, at 10%, was that a bonus, or interest? A Ten per cent. per annum interest, paying him every six months, which we pay him every six months for that loan.

10 Q Ten per cent? A Yes, sir; 10% per annum interest.

EDWARD J. GUNTER, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Feit.

20 Q You are the bookkeeper of the Atlantic Tar & Chemical Works? A I am.

Q Were you the bookkeeper on August 16, 1922, and for some time prior thereto? A I was.

Q Were you the bookkeeper a year prior to that time, that would bring you into November, 1921? A No.

30 Q Well, when did you first commence your duties with the company? A June, 1922.

Q Will you, as bookkeeper, inform us whether your books disclose payment of commission by the company to Mr. Weiner, or to anyone else, on an alleged sale of 2,500 shares of stock to Isaac D. Hetzel in January, 1923? A No commission paid on that.

Q You know that as an absolute fact? A Yes, sir.

40 Q Will you please tell us how the 2,500 shares of stock, which Isaac D. Hetzel holds now, and

Edward J. Gunter, direct.

which were given to him in his possession in the month of January, 1923, appear on the books of your company? A Well, it appears as a liability to the company, with the company owing Mr. Weiner that \$25,000.

Q That is, do I understand that Mr. Weiner loaned this money to the company? A He 10
turned it over to the company.

The Court: It does not make any difference what you understand. You are asking him what his books show, and that is all he can testify to.

Q Is there any further entry in the books with reference to that transaction? A No.

Q Were you in the office of the company at the time that Mr. Vogel came to the plant on November 9, 1922? A Yes, I was. 20

Q Were you in the office of the company when this check was passed over from Mr. Weiner to Mr. Vogel? A Yes.

Q Were you in the office of the company when this copy, referring to a copy dated November 9, 1922, signed by N. S. Vogel, and marked D.1 for identification, were you there when that was signed? A Yes. 30

Q And the check referred to in the previous question is a check for \$10,104.80, dated November 9, 1922? A Yes.

Q Under what circumstances was that check given, and that letter signed? A Well, there had been some discussion about the commission to be paid, and when they finally settled on the amount of the commission, Mr. Weiner told me that his commission would be 34%. 40

Edward J. Gunter, direct.

Q Was that in Mr. Vogel's presence? A Oh, yes. So I figured out the amount of the commission at 34%, and had the stenographer make up a check for it; at the same time he made up that letter and Mr. Vogel signed it.

Q Did Mr. Vogel read it? A He read it.

10 Q And then signed it? A Signed it.

Q Then you know that there had been a dispute between them over the commission? A Oh, yes, yes.

Q What language was this dispute carried on in? A Well, most of it in English, and some of it in Jewish.

Q What was the nature of the dispute?

20 Mr. Toolan: He cannot give us his conclusion as to the nature of it. Let him tell us what was said.

Q What was the conversation, if you know? A Well; it was mostly on commission, trying to arrive at some definite figure.

30 Q Can you give us any of the language? A Well, Mr Weiner mentioned that he didn't want to sell too much of his own personal stock, but due to the fact Mr. Vogel had made a commitment, why, if he could come down in commission a little bit, he would willingly do it; so talking back and forth there for a while, and finally mentioned 34% as the commission.

Q Did you hand the check and the letter over to Mr. Vogel personally for him to sign? A Well, I don't remember that.

Q It was signed in your presence, though? A Oh, yes, I was there.

40 Q Do you know anything of this twenty-five hundred shares of stock transaction with Hetzel, that took place in January of 1923? A Well,

Edward J. Gunter, cross.

at that time Mr. Weiner had gotten in touch with Mr. Hetzel and told him he could use—

Mr. Toolan: Unless the witness is testifying of his own knowledge, I object. If he is testifying from information he received subsequently, I object.

10

A I know this to be a fact.

By Mr. Toolan.

Q Were you present? A I was present.

By Mr. Feit.

Q Tell us? A Mr. Weiner got in touch with Mr. Hetzel over the 'phone and told him he could use some additional cash, and if he would loan him \$25,000 he could give him collateral of 2,500 shares of common stock. That was to cover a certain period of time. At that time it would either be renewed or paid.

20

Q Is that all the conversation that took place in reference to that transaction, in your presence? A Yes.

Mr. Feit: Take the witness.

30

Cross examination by Mr. Toolan.

Q The chief subject of discussion when you heard Mr. Vogel and Mr. Weiner talking about this transaction on the 9th of November, 1922, was the amount of the commission, isn't that true? A Well, the amount of the commission, and then Mr. Weiner dwelt on the point he didn't want to dispose of all his common stock.

40

Edward J. Gunter, cross.

Q Well, did you see that letter of Mr. Weiner's of October 31st? A No, I don't think I did.

Q Did you know that he had written Mr. Vogel asking him to sell this stock? A No, I didn't know that.

10 Q There were two things talked about, one was that he didn't want to sell all his common stock, is that right? A That is right.

Q And the other was the amount of the commission? A Yes.

Q That is what happened, do you remember it? A Yes.

Q Your recollection is true on that? A Yes.

Q Those two things were the subject of that conversation? A Yes.

20 Q The argument was about a fifty per cent. commission, isn't that true? A Well, yes.

Q And it was a question of beating down to a lower commission, that is correct, isn't it? A That is all it was, coming down on the commission.

Q Let me see the entry in your book there? A (Witness indicates.)

Q You credit David Weiner with twenty-five thousand dollars, is that right? A That is right.

30 Q Is there any entry in the book here that indicates that Mr. Weiner absolved the company from that indebtedness? A No, there isn't.

Q Well, now, as a matter of fact, wasn't that indebtedness split by Mr. Weiner and Mr. Lewis, the president of the company, and the company released from obligation to them for that twenty-five thousand dollars? A Not of my knowledge.

Q Did Mr. Weiner ever receive any interest from the company on that loan? A No.

40

Edward J. Gunter, cross.

Q Any interest ever charged to the company on that loan? A No.

Q The company did, however, pay direct to Mr. Hetzel interest, did it not? A Yes, but it was charged against Mr. Weiner's account.

Q It was charged against Mr. Weiner's account how? A Well, it was his common stock that he sold, and he paid the interest personally. It wasn't up to the company to pay the interest. 10

Q Well, that is what I want to know, whether or not the interest was paid by a company check, or by Mr. Weiner's check? A It was paid by a company check, but it was charged up against his account.

Q It was charged up against his account? A Yes.

Q Because he had loaned the company twenty-five thousand dollars, they were charging him with the interest on the loan, is that right? A That isn't the interest on the \$25,000. 20

Q What is it on? A It is on the interest on the other stock that he held.

Q Interest on what other stock? A That 6,900 shares which we were talking about beforehand.

Q How is that charged against Mr. Weiner? A It was his common stock that was sold, therefore, it was up to him to pay the interest, and not the company. 30

Q Have you got any entries that show that? A Sure.

Q Where? A (Witness indicates.)

Q Interest to Hetzel. So because Weiner sold his personal stock to Hetzel, and put the money that he got from it into the corporation, therefore the corporation makes Weiner pay Hetzel 6% on that money, is that right? A Yes. 40

David Weiner, direct.

Mr. Toolan: I would like to have that page marked in evidence.

The Court: Any objection?

Mr. Feit: No, no objection.

The Court: By agreement it is admitted in evidence.

10 (Page from book entered in evidence and marked Exhibit P.6.)

Q What does that number 86 refer to under Weiner? A Salary account. This is his special account.

Q When was this writing made up? A At the time it happened.

Q When was that? A What is the date there?

20 Q Were all those entries made at the same time, or at the various dates shown on there? A The various dates shown.

Q How is it there is no index in the front of the book showing that account? A It is not fully indexed, the book isn't.

Q This particular account was not indexed in the book? A No. You will find other accounts in there that are not indexed.

30 Mr. Toolan: That is all.

Mr. Feit: That is all.

DAVID WEINER, recalled.

Direct examination by Mr. Feit.

Q Mr. Weiner, why did you charge yourself with interest on the 6,977 shares of stock, that
40 was paid to Hetzel on the shares held by him?

David Weiner, cross.

A Because I felt, and Mr. Lewis felt with me, that we ought to support the company as much as we can, on account of our heavy interest having in it.

Q And therefore you paid to Hetzel the 6 per cent. personally, and Mr. Lewis? A Yes, sir.

10

Mr. Feit: That is all.

Cross examination by Mr. Toolan.

Q Didn't you tell me a few moments ago that the company paid that? A Oh, yes, but it is charged to my account. Sure, it was always paid by the company's check.

Q Why didn't you pay it by your check? A Because I don't have that much fund in my account. 20

Q So that in other words, the company is loaning you the money to pay your debts, is that right? A No, it did not. There was moneys coming to me right along on salary, and when the company—I thought that the funds would help the company, I didn't draw any.

Mr. Toolan: That is all.

Mr. Feit: That is all. 30

That is the defendant's case.

Nathan S. Vogel, direct—cross.

PLAINTIFF'S REBUTTAL TESTIMONY.

NATHAN S. VOGEL, recalled.

Direct examination by Mr. Toolan.

10 Q Mr. Vogel, did your agreement with Mr. Weiner require you to submit every sale, the price, and the number of shares, to Mr. Weiner, before the sale could be consummated? A No, sir, Mr. Toolan.

Mr. Toolan: That is all.

Cross examination by Mr. Feit.

20 Q You said, however, Mr. Vogel, that there was an additional understanding besides that memorandum between you and Mr. Weiner with reference to the sale of stock, was there not? A There was first a memorandum, first a verbal agreement to that effect, and then, as Mr. Weiner has explained, that should anything happen to him, I wanted to be safe; something could happen while I brought the check over.

30 Q You say that there was an additional understanding between you and Mr. Weiner? A Yes.

Q To the effect that you were to sell this stock for no less than ten dollars a share? A Ten was the minimum, and no maximum.

Q That wasn't, of course, incorporated in the agreement, in the memorandum? A No.

40 Q So that there was—so that that memorandum did not contain the entire agreement between you, did it? A Didn't contain the minimum or maximum; no, sir.

Motion for Direction of a Verdict.

Re-direct examination by Mr. Toolan.

Q Was that memorandum ever revoked? A
Never in writing, or orally.

Mr. Toolan: That is all. We rest.

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MOTION FOR DIRECTION OF A VERDICT.

Mr. Feit: Your Honor, at this time, with reference to count two, I desire to make a motion for a direction of a verdict on the ground that there is no evidence in this case that a sale had taken place of twenty-five hundred shares of stock to Hetzel at the time alleged.

20

Second: That there is no evidence in the case that such alleged sale, if there was a sale, was procured through the efforts of Vogel.

The Court: Mr. Toolan, I will hear you as to the second count.

Mr. Toolan: There is this situation: This is a motion, as I understand it, to direct a verdict as to the second count: Under the well established law if there is any evidence that might support a finding on that second count, a verdict cannot be directed. The testimony is that there was a sale, that was Mr. Vogel's testimony. That may or may not be weak. He says Mr. Hetzel told him he bought it. Mr. Hetzel denies it. There is, of course, considerable evidence that it was a loan, but in light of the fact that you have got this situation, you have got that transaction first negotiated in a

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Motion for Direction of a Verdict.

10 situation where it is used as a lever, or a medium, to have Mr. Hetzel paid usurious interest, that is, ten per cent. on that \$25,000 proposition, according to his story, and six per cent. on all the rest of the money that he had invested in that corporation. You have got that stock not issued to him, not endorsed in blank, mind you, as stock normally is; that is turned over as collateral security for a loan, but he appeared upon the books of the company as the absolute owner of that stock, and there is not a single entry in the stock book, or anywhere else, indicating that stock is held as collateral security. You have got the situation where they provide for the payment of that interest, first, Mr. Hetzel says—or he testified that it was

20 a loan direct to the corporation; the testimony later develops that it was a loan from Mr. Hetzel to Mr. Weiner, and from Mr. Weiner to the corporation. The books, or what they now produce as the book, and the entries show that that \$25,000 is credited to Mr. Weiner, and I presume the company is charged with it. Mr. Weiner, according to his testimony now, is paying to Mr. Hetzel the interest on that money, and the company is charging Mr. Weiner with interest on that money, notwithstanding the fact that Mr. Weier loaned the money to the corporation. And Mr. Weiner now takes the stand and says that he is paying Mr. Hetzel personally interest on all these stock holdings of his, and that the company is not being charged with it. I think in that situation it is so ridiculous and preposterous from their own point of view, that it ought to be left to the

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Motion for Direction of a Verdict.

jury, as a question of fact, to say whether or not it actually is a sale, and whether or not it wasn't used merely as a subterfuge to defeat this man from his right to commissions. Because their story is certainly subject to attack.

The Court: Assuming, for the sake of argument, that there was an absolute sale of this stock to Hetzel, twenty-five thousand dollars' worth of stock, as of the date of January, 1923, where is there any evidence to justify the jury in finding that Vogel was the effective cause of such a sale, if such a sale actually took place? 10

Mr. Toolan: There is this situation: 'This is a stock transaction, where they are selling stock; the only feature in this case is that the only custom that this company had, the only custom they have ever had, the only man who has financed the company, apparently, is this one individual. The difficult proposition of stock transactions is the man who goes out and solicits, discovers and finds the man with the money, and through his efforts convinces that man that the proposition is a good proposition, and mellows and brings him to the point where he feels safe and secure in investing in that corporation; all that preliminary work, every bit of the work on this particular customer was accomplished by Mr. Vogel, and they have never had another customer. That is his customer, it is his work, and until his agency was revoked—they had the right to revoke that agency at any time—they permitted that authority to stand; and they went, without first revoking the agency, 20 30 40

Motion for Direction of a Verdict.

direct to his customer, and sell that customer direct, without the knowledge or consent of Mr. Vogel, and without the agency first being revoked.

(Further argument by counsel.)

10 The Court: As I look at this paper, it seems to me that there is one question of fact alone to be passed upon by the jury: The paper itself is a mere memorandum that puts in writing the compensation that Vogel would be entitled to in case he was the effective cause of the sale of stock. The written paper does not go beyond the mere fixing of compensation and, therefore, it is a question of fact for the jury to determine as to what were the terms of the arrangement between
20 Vogel and Weiner representing this defendant company. And from the testimony that question of fact is limited in its scope to this: Did Vogel have the right to go out and sell this stock at such price as he could get for it, or was he required, before there was an effective sale, to submit the terms of such sale, the personality of the purchaser, and the price to be paid, to Weiner. Vogel
30 claims that there was a minimum price of ten dollars a share fixed for this stock, and that he had the right to go on and sell to anyone as many shares as he could sell, provided he got at least a minimum of ten dollar a share. If he could get more, all the better, but that he did not have to wait for a confirmation of any sales that he effected until Weiner approved the sale, as to the personality of the purchaser, and the price that the purchaser was to pay. Weiner
40 claims that this memorandum was simply to

Motion for Direction of a Verdict.

satisfy Vogel, so that in case anything happened to any of them before Vogel's commissions were paid, and subsequent to a sale made by Vogel, that was satisfactory to the company, or to Weiner, that it would be known in writing what the amount of Vogel's compensation was for the sale. Now, if the jury believes Vogel's story that he had the right to sell at ten dollars a share, without submitting the terms to Weiner, then it seems to me now that the jury will be constrained in finding that Vogel is entitled to the difference between fifty per cent. of the twenty-nine-odd hundred dollars, and the thirty-four per cent. which he actually received. If the jury believes Weiner's story, that the sales were subject to his confirmation as to price and personality of purchaser, then it is for them to determine whether or not, at the time he gave this check for \$10,104.80, there was not an accord and satisfaction, a consummated agreement between them, which concluded any further claims, so far as that sale was concerned, in reference to Vogel.

But it seems to me on the second count that the preponderance of evidence is such as to make it practically conclusive that even though there was a sale between the company, or Weiner, and Hetzel, that since this was not an exclusive agency, and was simply a power that lasted when it was exerted to the agreement of both parties, that there is no justification in the jury finding that Vogel was the effective cause of the sale of the twenty-five hundred shares as of January, 1923. Further, so far as the sale is

Motion for Direction of a Verdict.

concerned, the burden of proof is upon Vogel to show that there was a sale, and what happened. We have nothing excepting Vogel's uncorroborated statement that he met Mr. Hetzel in Philadelphia, and that Mr. Hetzel said that he had bought twenty-five hundred shares. And there is nothing in that conversation to show that Vogel was the effective cause of that sale, if there was a sale. But we have Mr. Hetzel's testimony, uncontradicted, we have Weiner's testimony, and we have the books, and the proof is almost conclusive, and it is certainly uncontradicted by any affirmative proof, that this twenty-five thousand dollars which Mr. Hetzel paid out in January, 1923, was a loan. He says it was a loan to the company. The books show it was a loan to Weiner, at least, that is the bookkeeping end of it; but there is no question, whether it was a loan to the company or a loan to Weiner, it was loaned on the distinct understanding of going to the company, a company in which Mr. Hetzel was already heavily interested from the financial standpoint; and that he was, because of this loan, to get ten per cent. interest for the risk he was taking in making that loan, as well as for the use of the money, and in addition to that, the company was to give him six per cent. interest on the money that he had already invested, as an actual stockholder. There is no contradiction of Mr. Hetzel, and there is no contradiction of Mr. Weiner, and so far as corroboration is concerned, the company's books, made up at the time of the transaction, do corroborate them. Therefore I do not see that, so far as

Motion for Direction of a Verdict.

the second count in the complaint is concerned, that the jury would be justified, from any evidence in this case, to find for the plaintiff. So in your argument to the jury you can limit yourself to your first count. You may take an exception, Mr. Toolan.

Mr. Toolan: I do not care for any exception. 10

Mr. Feit: For the purpose of the record, I want to address myself to the first count, on the motion for a direction of a verdict.

The Court: You have argued that before. Are they the same reasons?

Mr. Feit: On the ground that—

The Court: I deny your motion, no matter what grounds you may make, and I will assume you may make anything it is possible to make. 20

Mr. Feit: All right, sir.

Mr. Feit sums up the case for the defendant.

Mr. Toolan sums up the case for the plaintiff.

Charge to Jury.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

May Term, 1924.

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NATHAN S. VOGEL,

vs.

ATLANTIC TAR & CHEMICAL
WORKS, Ltd., and in the alter-
native, DAVID WEINER.

CHARGE.

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Charge to the jury, by HON. PETER F. DALY,
Circuit Court Judge, as follows:

Gentlemen of the Jury:

30

Although we have been a comparatively long
time in the trial of this case, and it seems to me
necessarily so, it at its end resolves itself into
a very narrow question of fact that is entirely
up to you to determine, and that is, what was
the agreement between these two men, Vogel
and Weiner, as to the sale of this stock. Was
it that Vogel, until he was actually stopped by
Weiner, or someone else representing the com-
pany, had the right to sell this stock at the
price of ten dollars a share, or more if he could
get it, to anyone to whom he could sell it? Or
was it that every sale he made had to be con-
firmed by Weiner, or the company, as to the
amount that was to be paid, and as to the
personality of the purchaser? We find evidence
in this case that several sales had been made by
Vogel at ten dollars a share, and we find further
40 that the particular sale which is involved in

Charge to Jury.

this suit, the sale of November 9, 1922, of 2,972 shares, was effected by Vogel. There is no dispute upon the part of the defendant that Vogel was the effective cause of the sale of these 2,972 shares, at ten dollars a share, to Mr. Hetzel; but Mr. Weiner claims that when this sale was reported to him, or this proposed sale was reported to him, that he told Vogel that he would not agree to this sale unless there was a satisfactory adjustment, a settlement as to how much Vogel would get out of that sale as a matter of commissions. That is not exactly the language, but it is substantially the contention that Mr. Weiner makes; and he says he made it because in all his talks with Vogel he distinctly asserted that every sale that Vogel made was subject to the approval of himself or his company, as to the terms, and as to the purchaser. So you can readily see that it is for you to say who is telling the truth. If you are in doubt about it, then you must remember that before you can find for the plaintiff there must be a preponderance of evidence to justify you in the conclusion that it is the plaintiff's story that is the true story in this respect, and not that of Weiner, one of the defendants. It is admitted, as I understand it, that so far as this stock is concerned, that it was the company's stock, the 2,972 shares.

Mr. Feit: No, it was not.

The Court: Who are you looking for judgment against?

Mr. Toolan: Looking for judgment against the corporation, because it is with them we have the agreement.

The Court: On what basis?

Mr. Toolan: He had the agreement to sell this stock. Mr. Vogel, the plaintiff, did not know

Charge to Jury.

whose stock he was selling. He thought it was treasury stock he was selling, but the other stock was delivered.

The Court: There is a memorandum, gentlemen, which provides that in case of a sale of this stock by Vogel, Vogel is entitled to fifty per cent. of the amount secured for the stock; that is a memorandum that concerns itself alone with the compensation that is to be paid to Vogel for a sale effected according to whatever you find was the agreement between Weiner, or the company, and Vogel. If you find, from a preponderance of evidence in this case, that the agreement was that Vogel had the right to sell this stock under authority given to him by the company, or Weiner, representing the company, at ten dollars a share to whomever he could sell it, then if he effected the sale, which is undisputed, that he effected the sale, he was entitled to fifty per cent. of \$29,720. If he was entitled to one-half of \$29,720, that there was an agreement whereby he was entitled to ten per cent. upon any sales that he could make at ten dollars a share, to anyone to whom he sold, regardless of any approval upon the part of the company, or Weiner, then the fact that he accepted a check for a lesser sum does not extinguish the amount that was actually due him under that agreement. If, for example, you have an agreement whereby you are definitely and positively entitled to a certain compensation for doing a certain thing, there is no question as to the amount, according to the terms of your agreement, and you have done that thing and earned that money, and that amount the other party is indebted to you for, and when you come looking for your money they say, well, I will not pay you that amount, here is a check

Charge to Jury.

for a lesser amount, and you take it, that does not extinguish the full amount that is due you under your contract. But in this case you are to consider the fact that Vogel did accept this check, remembering his explanation of it, in determining, of course, the probability or improbability of the respective stories told by the parties, as to just what the terms of the contract were. Now, if what Weiner says is a true story, that these sales were subject to his approval, as to the terms of the sale, and as to the personality of the purchaser, and they came to an agreement as to the compensation that was to be paid, upon the condition that otherwise he would not approve the sale, why then, of course, if Vogel accepted that check, there was an accord and satisfaction that made it all conclusive, and he would not be entitled to another cent.

So it all resolves itself again, gentlemen, into determining what that agreement was. If Vogel had the right, under the power given him by this company, through Weiner, or the company, to sell this stock at ten dollars a share to whomever he saw fit, and he effected this sale to Mr. Hetzel, and there was nothing in their agreement whereby the company, or Mr. Weiner, could veto that, under the terms of the agreement, then because he was the effective cause of such a sale, under such an agreement, if such an agreement existed, he was entitled to fifty per cent. of \$29,720, and not having received that, he is now entitled from you to a judgment for the difference between fifty per cent. of \$29,720, and the amount that he received, which amount was \$10,104.80, making a difference of \$4,755.20, besides interest from the time that was due,

Exceptions to Charge.

if it was due at all, November 9, 1922, to date, one year, and six months and six days. If you find he is entitled to that judgment, then it is up to you to compute what that interest is on that amount, and add it to the amount, in the rendering of your verdict.

10 If you find that the agreement was as Weiner testifies, then this plaintiff is not entitled to recover any amount.

Mr. Feit: I desire to take exception to the Court's charge, wherein the Court charges the jury to the effect that it was for the jury to determine the question of fact as to whether the agreement was as to the amount of the contract, and as to the personality, without including as well the amount of the shares of stock to be sold, because that was the testimony of Weiner.

20 The Court: My attention is called that Weiner also claimed that not only as to the price that was to be paid, and as to the personality of the purchaser, but he also had the veto or the approval power as to the number of shares that this man Vogel could sell.

Mr. Feit: I take an exception to the Court's charge to the jury to the effect that the agree-
 30 ment, that it was only for the jury to determine as to the construction of the agreement, without submitting to the jury the fact that this was David Weiner's personal stock, and inasmuch as it was his personal stock, he was at liberty to arrange for the payment of such commission as he deemed it best with Vogel, and that arrangement would be effective to all intents and purposes, it being no part of the stock of the company that was sold, and consequently did not
 40 come within the purview of the original memo-

Exceptions to Charge.

random, or the original contract, as testified to by the parties.

The Court: That is what you call a trick, isn't it?

Mr. Feit: Your Honor did not permit me to move for a direction of a verdict on the first count, and I intended to include that in it, and that is why it wasn't included in the motion for a direction of a verdict on the first count, because your honor would not permit me to do it. 10

The Court: All right, if that is the way you want to practice law.

Mr. Feit: I also say it should go before the jury the fact Mr. Weiner claimed to have revoked the original memorandum before Mr. Vogel informed him that he had made a sale to— 20

The Court: I do not care anything more about that exception.

Mr. Feit: (Continuing)—Mr. Hetzel, in that Mr. Weiner testified that he told him, before he informed him of the actual consummation of the sale of the 2,972 shares of stock to Hetzel, that the company had no more stock for sale.

Mr. Toolan: It might be well to submit that, as to whether or not the agreement was in existence. 30

The Court: If you find, gentlemen, that there was an agreement, as Vogel claimed, that did originally exist, or existed at any time before the sale to Hetzel, but was revoked, that agreement was revoked by Weiner, or the company, before the sale of November 9, 1922, to Hetzel of course, that would end that agreement, then the settlement made by the check given would be in full settlement, and the plaintiff would not be entitled to recover. 40

Exhibits.

Mr. Feit: I also would ask the Court to charge the jury to the effect that this memorandum was merely an offer, and was revocable at the will of Weiner.

10 The Court: I have already told the jury that if it was revoked, of course, it was revocable, it was a mere power that was revocable at any time by the party who gave it originally.

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EXHIBIT D. 1—Identification. ..

Nov. 9, 1922.

Pd
20 Mr. N. S. Vogel,
2323 N. Park Ave.,
Philadelphia, Pa.

Dear Sir:

Enclosed please find check for \$10,104.80 in payment on the Hetzel Transaction, to the extent of 2,972 shares of Common Stock.

I hope everything will be agreeable to both of us.

30 Kindly acknowledge by signing copy of this letter.

Very truly yours,

ATLANTIC TAR & CHEMICAL WORKS LTD.

Vice Pres. & Gen. Mgr.

DW:P

By N. S. VOGEL

*Exhibits.***B****EXHIBIT D. 1—Identification.**

ATLANTIC TAR & CHEMICAL WORKS, LTD.
BAYWAY, ELIZABETH
NEW JERSEY

Check No. 3886

10

To N. S. Vogel,
Address Philadelphia.

Description	Inv. No.	Inv. Date	Deduc- tions	Net Amount
Stock transaction				10,104.80
TOTAL				10,104.80

Audited
No. 3886

Approved for Payment
November 9th, 1922.

PAY TO THE ORDER OF N S Vogel \$10,104.80 ***Ten
thousand one hundred four and 80/100 DOLLARS

PLANT ACCOUNT

ATLANTIC TAR & CHEMICAL WORKS, LTD. 20

By D. Wiener
General Manager

To

NATIONAL STATE BANK
OF ELIZABETH
NEW JERSEY

NO RECEIPT REQUIRED—IF INCORRECT, RETURN
VOUCHER IMMEDIATELY

PAID.

Indorsed by N. S. Vogel
N. Stanley Vogel.

30

*Exhibits.***C****EXHIBIT D. 1—Identification.**

Voucher No. 3654
 Check No. 3886 Charge to
 10 11/10/22 D. Wiener Spec. a/c 10104.80
 Date Paid 11/9/22
 In Favor of N. S. Vogel.
 Address

Payment by D. W.
 from Spec. a/c 10104.80
 Personal transaction between D. W. &
 N. S. V. per phone conversation with
 NRC 12/5/22
 20 See Cash entry CK folio 65 for
 29720 recd.

Less
 Cash Discount 34%

AMOUNT OF CHECK 10104.80

Approved for Payment E. J. G.

30

Exhibits.

EXHIBIT D. 3.

KEYSTONE PAVING AND CONSTRUCTION Co.
No. 320 RICHMOND STREET.

I. D. HETZELL, President.

PHILADELPHIA, January 29th 1924

10

Mr. D. Wiener.

My dear Mr. Wiener

The interest on 6977 shares @ 10 for 6
months inc. February 1st 1924 69.770 @ 6 % per
annum

3

2,093.10

6 months interest on \$25,000. or 2500 shares @
10 per cent

5

20

\$125,000.

belonging to Mr. Lewis &
yourself & held by me as
collateral for loan of \$25,-
000 & to be redeemed by
you in 6 months & subject
to future agreement.

2,093.10

1,250.

\$3,343.10

Yours Truly,
ISAAC D. HETZELL.

30

Exhibits.

EXHIBIT D. 6.

KEYSTONE PAVING AND CONSTRUCTION Co.
No. 320 RICHMOND STREET.

I. D. HETZELL, President.

PHILADELPHIA, June 23 1923.

10

Mr. D. Wiener

My dear Mr. Wiener

In reply to yours of a couple of days ago, in reference to 2500 shares of stock of Atlantic Tar & Chemical Works held by me. I am willing to extend the agreement from August 1st 1923 to February 1st, 1924 under the same terms 10% per annum interest, will be over to see you week after 4th when we can discuss this & other

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matters.

Yours,
ISAAC D. HETZELL.

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Exhibits.

EXHIBIT P. 5.

January 24, 1923.

Mr. Isaac D. Hetzel,
320 Richmond St.,
Philadelphia, Penn.

My Dear Mr. Hetzel:

10

This is to confirm our conversation that we had in New York yesterday and our understanding is as follows:

I will deliver 2500 shares of Common Stock made to your order from my personal stock and you will advance me \$25,000 on this 2500 shares for six months from the date of closing of this deal.

It is further understood that the dividends which will be declared on this stock within the next six months should belong to you, and that I have an option after six months to redeem this 2500 shares of Common Stock by paying you back the \$25,000. In the event I do not redeem this 2500 shares of stock, same is to remain your property without any claim to whatever rights I have on same.

20

I further agree to use this \$25,000 for the purpose of the company's interest.

If this is in accordance with the terms that you and I understand between us, under which this transaction is to be carried out, will you please be kind enough to sign the copy of the letter which is enclosed for the purpose of Mr. Lewis' consent to this transaction.

30

Very truly yours,

DW:P

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*Exhibits.***EXHIBIT P. 6.**

Sheet No.		Account No. 104	
RATING	CREDIT LIMIT	NAME D. Wiener Special a/c	
BUSINESS		ADDRESS	
DATE	ITEMS	FOLIO	✓ DEBITS
1922			
Sept. 22	To Vogel	214	✓ 5650 —
Nov. 10	" "	3654	✓ 10104.80
Dec. 29	Cash on a/c	3948	226.20
1923			
Jan. 15	" " "	4033	500.00
30	" " "	4104	2500.00
31	Trsfr. J. Mitzmer (all)	J131	4750.00
31	" Leg.	"	2170.51
31	" Exchg.	"	1418.78
31	" Plant	"	1455.26
31	" D. W. Sal.	"	2116.68
31	Interest to Hetzell	J135	2043.00
DATE	ITEMS	FOLIO	✓ CREDITS
1922			
Sept. 22	Sale of Pres. Stock	662	10761.00
30	" " " " G. C. L.	J112	3000.00
Nov. 10	" " " " Hetzell	C 65	29720.00
1923			
Jan. 29	" " " " " "	C 70	25000.00

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Exhibits P. 2—P. 3.

EXHIBIT P. 2.

Bayway, Elizabeth, N. J.

8/16/22

Dear Mr. Vogel

This is the Memorandum for your understanding that you are to receive (20% Twenty) of Sales of Bonds and (50% Fifty) from Common Stock whatever price is realized for same. 10

Atlantic Tar & Ch.

D. WIENER

Vice Pres.

EXHIBIT P. 3.

October 30, 1922.

20

Mr. N. S. Vogel,
2323 N. Park Ave.,
Philadelphia, Pa.

My dear Mr. Vogel:

Since you left the plant on Saturday, I communicated with some of my friends who know the inside affairs of the Madison Avenue brokers.

I have started a thorough investigation into what those people have done with the common stock that they possessed. After a day's hard work, they located the securities which were put up as collateral on notes which matured during the early part of October. 30

I am told that Mr. Carlisle is trying to make arrangements to re-pledge these securities with other persons.

I am very anxious to get hold of these 29,724 shares of common stock that he pledged with 40

Exhibit P. 3.

those people at the rate of \$10.00 (ten) per share, and, as a matter of fact, I am much disturbed about leaving the common stock out in sources where I will not be able to get hold of them and redeem them within a reasonable time and for a reasonable return.

10 I would suggest that you take this matter up with Mr. Hetzel, and if possible to try and buy in the common stock above mentioned. I have full faith that through you and your friend I am going to get a square deal as soon as I find it necessary to call in these securities.

From the information given to me today, if I bring the money over to the concerns where Carlisle has the securities pledged, I can redeem them for \$10.00 (ten) per share and I feel that this is the opportune moment for me to
20 wiggle out partly from their hands, so, if you can assist me in doing same I will appreciate it greatly.

I want to state to you that a representative of the Equitable Trust Company of New York was over to see me. They have asked me to go to see one of the Vice-presidents and talk matters over in reference to making a one million issue on this plant. My answer to them was that
30 I am not interested at present, and that I may be within six months or a year, and that the issue would be much larger than one million dollars. In other words, I told them practically that I was not interested. I do not want to go into any such deals again as I have had very hard experience in same and all financing propositions do not attract me. I am heeding to one issue and that is the completion of the plant. When that is accomplished, we will be able to "play
40 ball."

Exhibit P. 3.

If you will try to give me immediate action, I will appreciate it very much as I fear that if I lose any time I may slip up on redeeming these securities, as Mr. Carlisle will probably succeed in re-pledging them in a very few days.

Hoping to hear from you by return mail, I am

Very truly yours,

10

ATLANTIC TAR & CHEMICAL
WORKS, LTD.

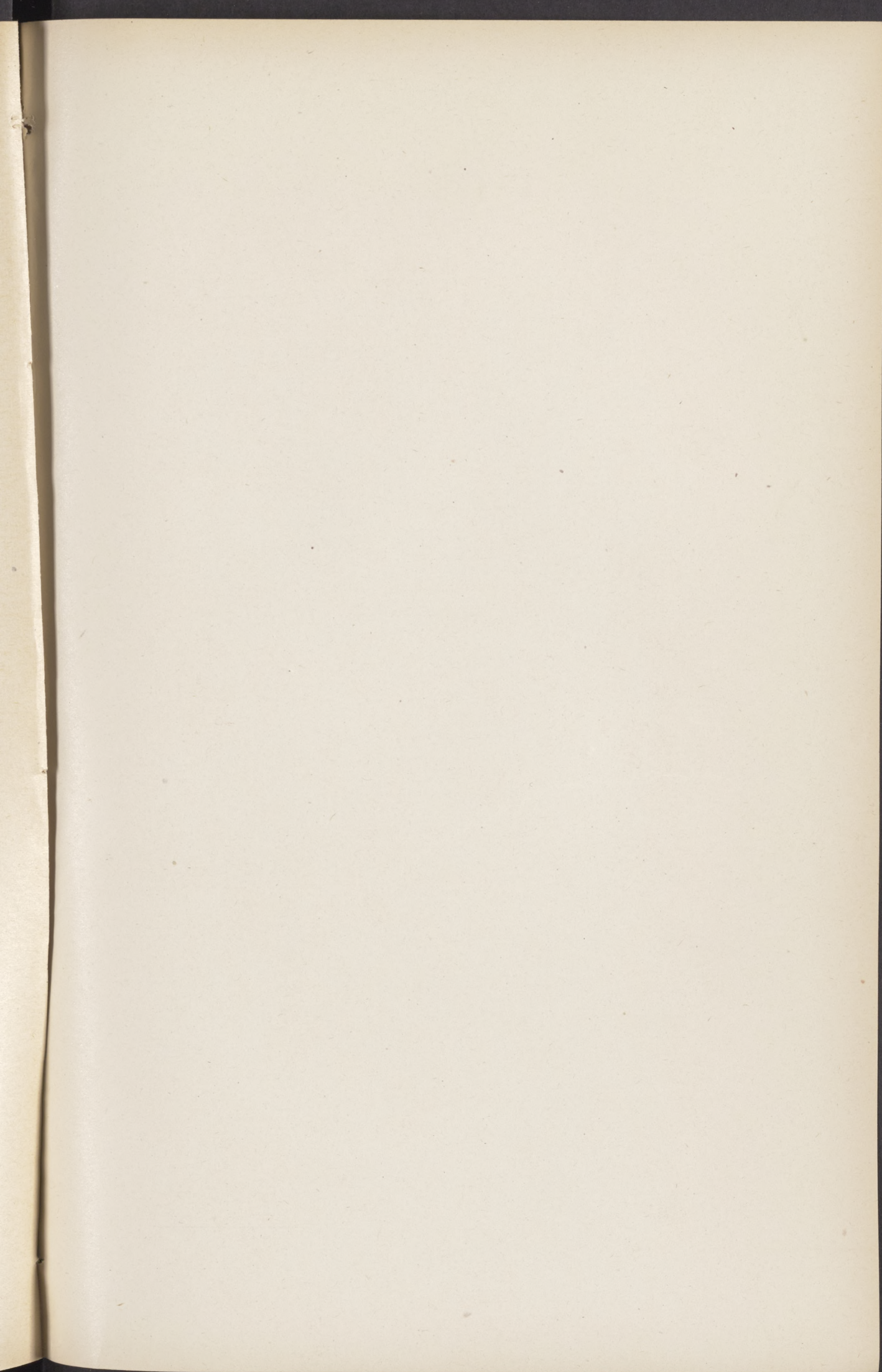
By DAVID WIENER
Vice-president & Gen'l. Mgr.

JW/DW

20

30

40



New Jersey Court of Errors and Appeals

NATHAN S. VOGEL,

Plaintiff-Respondent,

vs.

ATLANTIC TAR & CHEMICAL
WORKS, LTD., a corporation,
Defendant-Appellant.

Action at
Law.

On Appeal
from Supreme
Court, Union
County
Circuit.

BRIEF OF PLAINTIFF-RESPONDENT,

Statement of Fact.

This was an action on a contract. The complaint contained two counts. The court directed a verdict in favor of defendant, and against the plaintiff on the second count. The judgment rendered was on the first count. We will therefore confine ourselves entirely to the first count in the complaint.

This action was brought to recover commissions due the plaintiff for stock sold for the defendant company. In the month of August, 1922, the defendant company engaged the plaintiff to sell stock and bonds, and agreed to pay the plaintiff for his services, in accordance with the terms

of the memorandum, of which the following is a true copy.

Bayway, Elizabeth, New Jersey.

8/16/22

Dear Mr. Vogel:

10 This is the memorandum for your understanding that you are to receive (20 % twenty) of sales of bonds and (50 % fifty) from common stock, whatever price is realized for same.

ATLANTIC TAR & CHEMICAL
WORKS, LTD.,

(Signed) D. Weiner,
President.

(Page 11 State of Case)

20 Pursuant to the agreement entered into between plaintiff and defendant, and relying upon the memoranda above mentioned, as to the terms of compensation, the plaintiff consummated a number of sales of the stock of the defendant company, as follows:

August 17, 1922,	1750 Shares
August 23, 1922,	1000 Shares
November 9, 1922	2972 Shares

30 All the above shares of stock were sold by the plaintiff at Ten (\$10) dollars per share, and to the same customer, namely one Isaac D. Hetzell.

On the first two sales of stock, above mentioned, plaintiff was paid a commission of Fifty (50 %) percent, in accordance with the terms of the memoranda. With respect to the sale of twenty nine hundred and seventy-two (2972) shares of stock on November 9, 1922, plaintiff was entitled to a commission of Fourteen Thousand, Eight Hundred and Sixty (\$14860) Dollars. The defendant company gave plaintiff a check in the sum of Ten
40 Thousand, One Hundred and Four Dollars and Eighty Cents (\$10,104.80) in payment for serv-

ices rendered, in consummating this sale. Suit was brought on the first count of the complaint, to recover the sum of Four Thousand, Seven Hundred and Fifty Dollars and Twenty Cents (\$4755.20), the balance of the money due plaintiff as commission from the defendant corporation.

The defendants, in their answer (Page 11, state of the case) set up a general denial, and by way of affirmative defense, alleged an accord and satisfaction. At the trial, no attempt was made on the part of defendant, to prove an accord and satisfaction, but on the contrary, defendant attempted to prove, over the objection of attorney for plaintiff (Page 61, state of case) an entirely new agreement which they alleged was made between the plaintiff and one David Wiener, Vice President of the defendant corporation. 10

The jury returned a verdict in favor of the plaintiff and against the defendant, for the sum of Five Thousand, One Hundred Sixty Seven Dollars and Ninety Three Cents (\$5167.83) being the amount claimed by plaintiff, together with interest. 20

The plaintiff, in this brief, will meet and argue the respective points advanced by the defendant, in the order in which they are set forth in defendant's brief.

POINT ONE

There was no error by the trial court in admitting the questions and answers set forth under point one in defendant's brief. 30

The plaintiff was suing on a contract. The memorandum agreement for the payment of a commission of Fifty Percent (50%) on all sales of stock, was part of that contract. The defendant, while admitting that the memorandum agreement for the payment of the Fifty Percent (50%) commission "Exhibit P-2, page 135 of State of Case," was executed by the defendant company, denied, at the trial, that this memorandum agree- 40

ment was in effect at the time of the sale on November 9, 1922, of the shares of stock, the subject matter of this suit. The defendant contended (Page 59-1 10 State of Case) plaintiff's authority to sell stock on Fifty Percent (50 %) commission basis, had been revoked prior to this sale. The plaintiff, on the other hand, contended that this authority was not revoked at the time of the sale of November 9, 1922, and never had been revoked, even up to the time of trial, (Page 29, State of Case).

This situation naturally created a sharp issue of fact. The questions set forth under point one, were asked for the purpose of showing that the plaintiff had been paid a commission of Fifty Per Cent (50 %), on all stock sold by him for the defendant company, prior to the sale on November 9, 1922. This testimony was clearly evidential to refute the contention of defendant, that plaintiff's authority had been revoked. If plaintiff's authority had been revoked, it is singular that the defendant company gave plaintiff a commission of Fifty percent (50 %) on the sale of all stock prior to the stock transaction involved in this suit. Since plaintiff and defendant were not in accord on the terms of their contract, it was certainly competent to prove the contract, by the conduct of the parties, and it was for this purpose that the testimony set forth under point one was offered. The reason for offering this testimony is stated at the bottom of page 17 of the state of case, by trial counsel for the plaintiff, as follows:— "We want to show that other sales were made, and that on those other sales, a commission of fifty percent on the total amount of the sale, was paid to this plaintiff. Page 18, The Court: "It is admitted on the sole ground of showing the relationship between the parties."

POINTS TWO AND THREE

The trial court committed no error in permitting the question complained of, under points two and three in defendant's brief.

The only object or purpose of producing the testimony complained of under points two and three in defendant's brief, was to show sales made by the plaintiff of the stock of the defendant company, were actually consummated by the delivery of the certificates of stock for the number of shares sold by the plaintiff, and that the defendant company, by its conduct, ratified and confirmed its contract with the plaintiff. 10

In any event, it is hard to conceive how the question set forth under points two and three of defendant's brief, could have any harmful effect upon the defendant on the merits of the case. 20

POINT FOUR

The trial court committed no error in declining to direct a non-suit.

If we understand the defendant's argument under point four, the defendant contends that a non-suit should have been directed on two grounds; first that there had been a revocation of plaintiff's authority. Second, that the memorandum agreement "Exhibit P-2, Page 135," was indefinite. 30

With respect to the first argument, we submit as an elementary proposition of law that a trial court can not direct a non-suit, when there are disputed questions of fact involved; unless the testimony was in such shape, that the only inference that reasonable men might draw from the testimony, would be that the plaintiff's authority had been revoked, the trial court would not be justified in non-suiting the plaintiff. 40

The plaintiff, Nathan Vogel, on page 20, State of Case, testifies as follows:—

“Q. Were you paid your commission on that sale?

A. On this last sale, no sir. (Referring to sale of November 9, 1922, the subject matter of this suit).

10 Q. Were you paid any of your commission?
A. Yes sir.

Q. How much?

A. Ten Thousand One Hundred Four Dollars and Twenty Cents, if I remember correctly.

Q. Was this agreement between the Atlantic Tar & Chemical Company and you, marked Exhibit P-2, still in existence on that date?

A. Yes sir; there was never any termination to this contract.

Q. Had it ever been revoked?

A. No sir.

Q. Is it revoked today?

20 A. No sir.”

This is the testimony of the plaintiff himself. We are entitled, on a motion to non suit, to consider the testimony most favorable to the plaintiff. In light of this testimony, how could the trial court possibly direct a non-suit. Surely this testimony would support a finding by the Jury that plaintiff's authority had not been revoked. At the time of defendant's motion, there was a clear cut question of fact before the court, i. e., the plaintiff contended that his authority had not been re-
30 voked, and the defendant argued that it had. This was clearly a question of fact for the jury.

Defendant makes the second point, that the memorandum agreement was indefinite, in that it did not specify the number of shares of stock that plaintiff was authorized to sell, and therefore, that the plaintiff was required to submit to the defendant for confirmation, every sale made by the plaintiff.

40 This same argument involves nothing more than a disputed question of fact. The testimony given by the defendant himself, in his argument of this

point, clearly shows that the plaintiff denies that he was required to submit the name of his purchaser, and the amount of his sale to the defendant company for confirmation, before plaintiff could consummate the sale. The defendant, on the other hand, contended that this was part of his contract. This created nothing more than a disputed question of fact, which the court was obliged, as a matter of law, to submit to the jury. 10

POINT FIVE

The argument in defendant appellant's brief, under point five, is in substance and effect, a re-statement of his argument under point four, of his brief.

Under sub-divisions "a" and "b", point Five, defendant-appellant, argues that the plaintiff's authority to sell stock on a fifty percent commission basis, had been revoked, prior to the sale of November 9, 1922. David Wiener, the Vice-President of defendant company furnished testimony to support this argument. 20

The testimony of Wiener on this subject, however, is in direct conflict with the testimony of the plaintiff. (P 20 State of Case), in the testimony of Nathan S. Vogel, the plaintiff, set forth under point four above, the plaintiff Vogel, states that his authority was not revoked. Wiener, a witness for defendant company, testified that plaintiff's authority had been revoked. This testimony created a clear issue of fact which the court was obliged, as a matter of law, to submit to the jury. 30

Under subdivision "c", page 19 of defendant-appellant's brief, an argument is made to the effect that David Wiener, the Vice-President of the defendant company, transferred part of his personal stock to Mr. Hetzell, who purchased the twenty nine hundred and seventy two shares of stock, on November 9, 1922. It is admitted that treasury stock was not delivered to the purchaser. 40

Counsel for defendant now conceives the in-

genious argument that since Wiener delivered his personal stock for this particular sale, that therefore he, Wiener, could make any sort of a bargain he wished, with the plaintiff, for the payment of commission, and that Wiener did actually make a new contract with the plaintiff, and induced plaintiff to accept a commission of thirty four per cent, rather than fifty percent. The immediate answer to this argument, is that the plaintiff was employed not by David Wiener, but by the defendant company, to sell the stock of the defendant company, on a fifty percent commission basis. When plaintiff obtained a customer ready willing and able to buy, on the terms upon which plaintiff was authorized to sell, then, plaintiff's commission was earned. It made no difference to the plaintiff whether the purchaser was given treasury stock or whether one of the stockholders of the corporation, from his plentiful supply of questionable securities transferred part of his own enormous holdings, in order to consummate the sale.

The plaintiff testified that he was selling stock for the defendant company (Pages 16-20 State of Case). As a result of this authority, plaintiff (Page 19 State of Case) sold twenty nine hundred and seventy two shares of stock of the defendant company, at Ten Dollars per share, to one Isaac D. Hetzell. Immediately upon consummating the sale, plaintiff obtained a check from Mr. Hetzell, the purchaser, and brought same forthwith to Mr. Wiener, the Vice-President of defendant company, and turned same over (Page 19 State of case). Plaintiff was then entitled to his fifty percent commission. He had performed his part of the contract, and it was then too late for Wiener, the Vice-President of the defendant company, to strike any new bargains with reference to that particular sale.

POINT SIX

With respect to the matters set forth in paragraphs "a", "b", "c", "d", "e", under point six of defendant's brief it is respectfully submitted, that defendant did not take any exception to these portions of the court's charge, and is therefore not entitled to avail himself of any error, if any existed in these extracts from the court's charge.

10

Middlesex Water Co. v. Sawyer, 65 L. 374
Smith v. Atlantic City R. R. Co., 74 L. 452.
Naunczik vs. McAllister Lighterage Line,
111 Atl. 173.

We submit that the extracts mentioned in paragraphs "a", "b", "c", "d", and "e" of defendant's brief clearly state the law, as applied to the issues of this case, and that in charging these matters, the trial court committed no error.

Defendant argues further, under this, point that the court should have submitted to the jury, the question that since it was the stock of David Wiener that was delivered to Hetzell, that therefore Wiener was at liberty to make any sort of a bargain with respect to commission, as he. Wiener saw fit.

20

The court, in its final paragraph to the jury, in effect, charged as requested in the following language,

"If you find, gentlemen, that there was an agreement, as Vogel claimed, that did originally exist, or existed at any time before the sale to Hetzell, but was revoked, and that agreement was revoked by Wiener or the company, before the sale of November 9, to Hetzel, of course that would end the agreement, then the settlement made by check given, would be in full settlement, and the plaintiff would not be entitled to recover."

30

By this paragraph, the court in effect charged the jury that if they found that the authority to sell stock for the defendant company had been revoked prior to the sale of November 9, 1922, then Wiener or anyone else was at liberty to make

40

10 a new contract with Vogel, and that such new contract would be conclusive, and Vogel would not be entitled to recover in this action, but that the payment to him would be in full, of his claim. By this paragraph of the court's charge, as well as throughout the court's charge, the question of the revocation of plaintiff's authority was squarely up to the jury as a question of fact, for them to determine.

Since the court, in effect charged as defendant requested, defendant can not claim that the court committed error in not using the exact language suggested by the defendant.

20 Defendant, under the sixth point takes exception to the remarks of the court found on page 23 of defendant's brief, and complains that the court's ruling was made in the presence of the jury. The remark complained of, we submit, could not prejudice the defendant's cause to the jury, for the reason that this remark was made while counsel for the plaintiff and defendant were addressing the court at side-bar, and we do not think it was possible for the jury to have heard the remark.

Respectfully submitted,

LEO S. LOWENKOPF,
Attorney for Plaintiff-Respondent.

30 JOHN E. TOOLAN,
Of Counsel.

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Service of three copies of the within
Brief of Plaintiff-Respondent is hereby
acknowledged as within time.

Philip F. Lee
.....
Attys for Defendant-Appellant

New Jersey Court of Errors and Appeals

NATHAN S. VOGEL, <i>Plaintiff-Respondent,</i> <i>vs.</i> ATLANTIC TAR AND CHEMICAL WORKS, LTD., a corporation, <i>Defendant-Appellant.</i>	}	<i>Action at Law. On Appeal from the New Jersey Supreme Court, Union County Circuit.</i>
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BRIEF OF DEFENDANT-APPELLANT, Atlantic Tar & Chemical Works, Ltd., a Corporation.

Facts.

The plaintiff brought suit for commissions due him from the defendant on two alleged stock sales which were incorporated separately in his complaint (p. 17) in the form of two counts. On Count Two the Trial Court directed a verdict in favor of the defendant (bottom of p. 120, top of p. 121). The jury rendered a verdict on Count One in favor of the plaintiff in the sum of Five Thousand One Hundred Sixty Seven dollars and ninety-three cents (\$5,167.93) from which the defendant appeals (p. 13).

The basis for the claim of the plaintiff as set forth in Count One of the complaint is a sale of 2,970 (2,972) shares of common stock of the defendant corporation in the month of November, 1922 to one Isaac D. Hetzell for the sum of Twenty Nine Thousand Seven Hundred Twenty dollars (\$29,720) pursuant to an agreement between the plaintiff and defendant embodied in the following memorandum (top of p. 11):

“Bayway, Elizabeth, New Jersey
8/16/22

Dear Mr. Vogel:

This is the memorandum for your understanding that you are to receive (20% twenty) of sales of bonds and (50% fifty) from common stock whatever price is realized for same.

ATLANTIC TAR & CHEMICAL
WORKS, LTD.,

(Signed) D. Wiener,
Vice-President.”

The defendant's answer to Count One was a denial that the defendant was indebted to the plaintiff for any commission and by way of affirmative defense set up a plea of accord and satisfaction (pp. 11-12).

It appears uncontradicted from the testimony that the 2,972 shares of common stock sold to Hetzell were those owned by one David Wiener, then vice-president of the defendant company, hereinafter referred to as the company. That Vogel on the day of the sale was given a check for Ten Thousand One Hundred Four dollars and eighty cents (\$10,104.80) in payment of his commission, and signed a receipt in the form of a letter acknowledging said payment (Exhibit D. 1 (a) (b) (c) pp. 128-129-130).

Vogel claimed that there was coming to him an additional sum of Four Thousand Seven Hundred Fifty Five dollars and twenty cents (\$4,755.20) as a commission for this sale pursuant to the aforesaid memorandum (see complaint, Count 1, pp. 7-8).

The matters with which the company finds itself aggrieved are set forth in the grounds of appeal (pp. 3-6) and will be argued in their order.

POINT ONE.

It is respectfully urged that the learned Trial Court erred in admitting the following questions over the objection of counsel for the company, to wit:

To the witness Nathan S. Vogel:

Q When did you make your first sale of either stocks or bonds of the defendant company, to Mr. Hetzell, after signing that memorandum, or after receiving the agreement? (p. 18, l. 12).

The ground of the objection was that it was irrelevant and immaterial (see p. 17, l. 30) also (p. 18, l. 16).

A August 17th, and another on November 9th.

Then followed a series of questions in explanation of the August 17th transaction as follows:

Q How many shares did you sell him on August 17? (p. 18, l. 23).

A August 17th, ten thousand dollars worth of bonds, and seventeen hundred and fifty shares of common stock, or Seventeen Thousand Five Hundred dollars (\$17,500) (p. 18, l. 24).

Q Were you paid a commission on that sale?

A Yes, sir (p. 18, ll. 30-31).

Q By whom? (p. 18, l. 31).

A By Mr. Wiener (p. 18, l. 31).

Q By whose check? (p. 18, l. 32).

A Atlantic Tar & Chemical's check, with Mr. Wiener's signature, two thousand on the bonds, and eight thousand seven hundred fifty on the common stock (p. 18, l. 32).

Q Subsequent to that time did you make any other sale to Mr. Hetzell? (p. 18, l. 36).

A Yes, sir (p. 18, l. 36).

Q When? (p. 18, l. 37).

A On August 23rd I sold Mr. Hetzell bonds of the said company to the rate of two thousand five hundred (\$2,500), in which I received a commission of Five Hundred dollars (\$500), and one thousand shares of the common for Sixteen Thousand dollars (\$16,000) on which I received a commission of Five Thousand dollars (\$5,000), etc. (p. 18, l. 37).

Q Subsequent to that time did you make any other sales? (p. 19, l. 6).

A Yes (see p. 19, l. 10).

Q When? (p. 19, l. 11).

A On November 9th and 10th (p. 19, l. 11).

These questions were entirely irrelevant and immaterial to the issue presented either on the first or second counts of the complaint. The only transactions or sales involved in the suit was, one a sale of two thousand nine hundred seventy-two (2,972) shares of stock on November 9, 1922 (First Count) (pp. 7-8) and the other a sale of two thousand five hundred (2,500) shares in January, 1923 (Second Count) (pp. 9-10). Evidence, therefore, of any other transactions were extraneous of the issues presented by the pleading. The answers given evidence their harmful effect to the defendant since one of the issues presented was a payment of a less sum than that specified in the memorandum and evidence of prior payments which happen to be the same as the rate specified in the memorandum had its influence on the jury.

POINTS TWO AND THREE.

The learned Trial Court erred in admitting the following questions to the witness, John J. Donovan:

Q On the twenty-third day of September I ask you whether or not there was one thousand (1,000) shares transferred to Mr. Hetzell?

A Yes (p. 43, ll. 20-30).

To the witness David Wiener:

Q Will you please produce the books of the company and turn to the stock issues and tell me whether or not there was stock issued to Mr. Hetzell on or about July 17, 1922? (p. 77, l. 18).

Q Will you turn to that book in the month of July, 1922, and tell me whether or not there was any stock issued to Hetzell? (p. 78, l. 11).

Q Will you tell me whether or not on July 31st there was not another sale made to Mr. Hetzell? (p. 79, l. 11).

Q Of some shares of stock of the defendant company, at ten dollars per share? (p. 79, l. 17).

All these questions were irrelevant and immaterial to the issues presented in the pleadings and were harmful for the same reason as alleged under Point One.

POINT FOUR.

The Trial Court erred in refusing to direct a non-suit against the plaintiff-respondent and in favor of the defendant-appellant on the First Count of the complaint when thereunto moved by counsel for the defendant-appellant (bottom of p. 4).

There were two grounds urged in support of this motion by counsel for the defendant; one,

in effect was based on the contention by the defendant that it had revoked the offer contained in the memorandum agreement, Exhibit P. 2 (bottom of pp. 50-56) two, that the memorandum agreement was so indefinite in that it did not contain the amount of stocks or bonds that Vogel was permitted to sell or the price at which he was to sell them, that therefore because of such indefiniteness it was incumbent upon Vogel when he had an offer from a prospective customer to purchase any of the stocks, or bonds of the company, to inform it of such offer and get the acceptance of it before he could effect a sale of any stocks or bonds. Therefore, when Vogel informed the company of the Hetzell offer to purchase the 2,972 shares of stock, it was optional with the company to accept or reject the offer or accept it under such terms or conditions as it might impose, such as an acceptance on condition that Vogel accept thirty-four per cent. (34%) commission on the sale instead of fifty per cent. (50%) as embodied in the memorandum (pp. 48-56).

These two grounds will be argued herein under sub-divisions (a) and (b).

(a) The memorandum agreement, Exhibit P. 2, was merely an offer. It was not based on any consideration and was not coupled with an interest. It was therefore revocable at any time at the will and pleasure of the company. *Walker v. John Hancock Ins. Co.*, 80 N. J. L. 342, at bottom of p. 343.

The defendant, Vogel, on his direct examination testified as follows:

Q When you received that order for 2,972 shares of stock from Mr. Hetzell, when did you notify Mr. Wiener of that? A Of that sale?

Q Yes. A Five minutes after the sale was consummated, which means the completed sale, means that a check attached five minutes later, I went to the Western Union office and wired or telephoned. Now, I am not absolutely positive which of those two it was, but one or the other, that the sale was consummated and I am leaving on the next train with the check. I don't recall whether I left on the train, or drove up.

Q As soon as you sent that word you left Philadelphia? A To tell him I was coming, to have my check ready.

Q Exactly. A Yes, sir.

Q That was before you had received any response in reply, of course, to your inquiry? A Yes. I am saying, I don't recall whether it was a telephone or telegraph message. I believe I drove, if I remember correctly.

Q You believe you did what? A I believe I drove over, instead of coming over by train.

Q But you don't know whether you telegraphed or telephoned? A That I am not positive of; no, sir; but I believe I drove over.

Q And then you say that you drove to Mr. Wiener's home? A Yes. No, I came to Elizabeth. My custom was to call up the plant first, if he was not at the plant, they would tell me where he was, so they informed me he was at his home.

Q What time did you arrive at his home? A At Mr. Wiener's home? It was around one o'clock, or something like that. It was in the middle of the day. The sale was consummated possibly ten o'clock, and I didn't respect the speed limits, and I drove over in possibly three hours.

Q It was around one o'clock, you say? A Yes, sir.

Q And then you sat down to have your lunch?

A I gave him the check, and Mr. Wiener asked me to have lunch with him, which I did.

Q Did you give the check to Mr. Wiener at that time? A No, I didn't give it to him right away.

Q It was at the plant? A No, he didn't ask me for any check. He invited me to have lunch.

Q Then you went down, on your way over to the plant, and then you began talking about this transaction on your way to the plant? A Yes.

Q And then he took up with you the fact that you say that he was unwilling to pay you the full commission? A The full commission; yes, sir.

Q That he would not accept a sale unless you— A Would accept a lesser amount.

Q He would not take the check from Hetzell? A From me.

Q That was Hetzell's check? A Yes, sir.

Q Unless you cut your commission? A Yes, sir.

Q That you are sure about? A I was forced to take a cut—

Q Wait a minute. You are sure about that?

A Why, certainly, I am sure about that (p. 29, l. 36 to p. 31, l. 31).

It therefore appears that Vogel himself testified that Wiener acting for the company revoked the memorandum agreement by stating to Vogel that he would not pay him the same commission on sales as the memorandum agreement called for.

Taking the testimony of Vogel it leads to the result that there was a revocation of the offer contained in the memorandum agreement, P. 2,

and that that revocation took place prior to the disclosure by the plaintiff, Vogel, that he had actually made a sale to Hetzell of the 2,972 shares of stock. Vogel testified he telegraphed or telephoned, he didn't know which. He didn't state to whom he telegraphed, or whom he had on the wire if he telephoned or with whom he talked. Therefore, there was no notification of the sale until Wiener and Vogel reached the plant, or on the way over at a time when they commenced to talk about the transaction, but before the full disclosure was made of the sale Wiener told Vogel he was getting too much commission and would have to take less. This was tantamount to the revocation of the memorandum agreement which called for a fifty per cent. (50%) commission. The sum of Ten Thousand One Hundred Four dollars and eighty cents (\$10,104.80) was paid to Vogel amounting to thirty-four per cent. (34%) commission as per the understanding at that time between Vogel and Wiener, he having accepted the same and signed the receipt acknowledging payment of the commission (see Exhibit D. 1 (a) (b) and (c)).

(b) The memorandum agreement, P. 2, is indefinite in that it did not contain a quantity of bonds and stock which Vogel was authorized to sell nor was a definite price fixed.

Vogel testified on cross examination:

Q You say while you were in Florida you wired Mr. Wiener as to what price you were at liberty to sell bonds and stocks? A Yes, sir.

Q Then you considered it necessary, when you entered into any transaction for the sale of stocks and bonds, to first get the approval of Mr. Wiener? A No, sir.

Q In the transaction? A I beg pardon, Mr. Feit.

Q Why did you wire him in that particular transaction? A I will answer that question.

Q All right. A The common stock was destined to earn such big profits, and was to enhance in value in such short time, that I was not going to commit myself and take an order at ten dollars, if it was worth twenty or thirty, sir.

Q In other words, there was no definite price set for which you were to sell that stock, was there? A When?

Q Or bonds? At any time? A Oh, yes, there was a definite price. The minimum was to have been ten, upon which I was entitled to receive such commission.

Q That is not part of your memorandum? A Well, this is a verbal understanding between Mr. Wiener and myself, Mr. Feit.

Q When was that understanding entered into? A That was the understanding even prior to this little memorandum being drawn up.

Q Then, why did you consider it necessary to have the memorandum drawn? A I wanted to play safe, Mr. Feit.

Q Then, you wanted to have it corroborated what your actual bargain was in that memorandum, didn't you? A It was understood—it was told to me by Mr. Wiener that I was to receive twenty per cent. from the sale of bonds, and fifty per cent. from the sale of stock, whatever price is realized. Ten dollars was the minimum, and no maximum.

Q When did he tell you that about the ten dollars minimum? A That has been our understanding from the very inception of our relationship in this particular business.

Q When did he tell you that, I repeat? A Do you want the exact date on it, Mr. Feit?

Q As near as you can tell it? A Well, I would say in July some time, the latter end, possibly.

Q July of when? A Of 1922.

Q Now, when you sold any stocks or bonds of the company, you, as a matter of fact, always communicated first with Mr. Wiener as to the quantum and as to the price, did you not? A No, sir.

Q Was there any limit set as to the amount of stock that you were to sell? A No, sir; there was never any limit set as to the amount of stock I was to sell. Never.

Q There was no limit set? A Never any limit.

Q You are positive about that? A Absolutely positive.

Q Any limit as to bonds? A No, sir. They had a half a million dollars' worth—

Q No. A No, sir; no limit (p. 27, l. 37 to p. 29, l. 32).

Therefore, according to Vogel's testimony there was a ten dollar minimum for the sale of stocks and bonds, but there was absolutely nothing mentioned in the memorandum agreement or orally between the parties as to the number of stocks or bonds which Vogel could sell for the company. In other words, there was absolutely no agreement as to the limitation as to the number of stocks or bonds.

It is a general rule that if a written agreement is indefinite or ambiguous oral testimony may be introduced to supply the deficiency, but in this case the plaintiff testified that there was absolutely no agreement upon the subject as to the amount of stocks or bonds that were to be sold. Therefore, the jury could have found none.

To constitute a contract all the essential terms must be settled and assented to by

both the parties. *William G. Shaw v. Woodbury Glass Works*, 23 Vroom, page 7.

Bird v. Prescott Co., 89 N. J. L. 591.

13 *Corpus Juris*, page 266, Sec. 59c (1).

The memorandum agreement was unambiguous in its terms. It is true that it was indefinite in that it left out certain particulars such as the quantity of stocks and bonds, but there was no testimony in the case so far as the quantity of the stocks and bonds that were to be sold was concerned. Therefore, the question of whether the parties were bound by this memorandum agreement and what its terms were was purely a question for the Court and not for the jury.

The meaning of an unambiguous written contract is for the court.

Decker v. Smith & Co., 88 N. J. L., p. 630.

Because of the indefiniteness of the contract it was not binding on either of the parties and when Vogel sold a quantity of shares of stock it would essentially follow that he would have to submit the sale for the company's approval and the latter could fix its own terms before it approved of the same. In other words each transaction which Vogel had with reference to the sale of stocks and bonds of this company was an individual item or offer which had to be proposed to the company for its acceptance. In this case Wiener acting for the company rejected the sale of 2,972 shares by Vogel to Hetzell unless Vogel accepted a commission of thirty-four per cent. (34%), and which rate Vogel accepted.

It is, therefore, respectfully submitted that on the plaintiff's case a non-suit against him should have been directed on the above grounds.

POINT FIVE.

The Trial Court erred in refusing to direct a verdict against the plaintiff-respondent and in favor of the defendant-appellant on the First Count of the complaint when thereunto moved by counsel for the defendant-appellant.

The learned Trial Court upon motion being made by counsel for defendant ruled as follows:

Mr. Feit: For the purpose of the record, I want to address myself to the first count, on the motion for a direction of a verdict.

The Court: You have argued that before. Are they the same reasons?

Mr. Feit: On the ground that—

The Court: I deny your motion, no matter what grounds you may make, and I will assume you may make anything it is possible to make.

Mr. Feit: All right, sir (p. 121, ll. 12 to 22).

The defendant most respectfully urges that the ruling of the learned Trial Court was in itself prejudicial to the interest of the defendant in that a ruling of this nature might naturally tend to prejudice the defendant's case in the eyes of the average jurymen, the jury being present in the court room at the time the ruling was made.

Under the Court's ruling it being impossible at the time for counsel to set forth his grounds for moving for a direction of a verdict in favor of the defendant, the same are hereinafter set forth under sub-divisions (a) (b) and (c).

(a) Same as sub-division (a) under motion for non-suit under Point Four, which in addition to the argument contained in the brief for a non-suit on this ground the defendant desires to embody the testimony of Wiener.

Q In reference to this 2,972 shares that was made in the month of November, November 9, 1922, did you have any conversation immediately prior to that time, with Mr. Vogel, with reference to the sale of stocks? A Mr. Vogel, after making that sale, where the check will show Ten Thousand Seven Hundred Fifty dollars (\$10,750) on some bonds and stock, I told Mr. Vogel expressly that I hadn't any more stock for sale, because if I should sell any more stock, I am going to lose control of it and, therefore, not to consummate any sales whatever, unless there is some stock that was held out by Huntley, Gordon & Company, which I have written them a letter, that was introduced by him, on these 29,724, that it was to be round up on the outside. Otherwise, I said, Mr. Vogel, you can sell bonds, but no stock, because this is the limit. And furthermore, Mr. Lewis cannot lose any of his holdings either.

Q Who was Mr. Lewis? A The president at that time from the company. He worked on a re-sale of these 2,970 some odd shares, which I was supposed to round up and pick up from Huntley, Gordon & Company, and there was no price agreed on it, no sale consummated, but Mr. Vogel came along ready with a check in his pocket, and I didn't know that he had his check in his pocket. He came along to my house and had lunch with me, and then we came along to the plant, and in presence of the bookkeeper, he started to tackle me on the transaction of making the sale of twenty-nine hundred and some odd shares, which he said Mr. Hetzell would like to buy, to make up a certain amount of shares, that he should be a part holder, and make it worth while. I told him that there isn't any stock for sale, with the exception those shares

that I contemplated to pick up from the Huntley-Gordon, which I have written him the letter. And, then, furthermore, I said, Vogel, I don't think that I would part with one share of stock, unless you are committed, and if you are committed, and you will charge a smaller commission, I will take a chance to assign my personal stock, on the contemplation of reimbursing myself by the stock which I am going to pick up from Huntley, Gordon & Company, pursuant to the letter which I have written him.

Q Then, this paragraph which says, "I am very anxious to get hold of these 29,724 shares of common stock that he pledged to those people." A Yes, sir.

Q To what people does that refer to? A Huntley, Gordon & Company had pledged with Clark, Waters, Levinson & Company, and several other people, and I found they have pledged some of the common stock which they didn't have clear title to.

Q "At the rate of ten dollars per share, and as a matter of fact, I am much disturbed about leaving the common stock out in sources where I will not be able to get hold of them and redeem them within a reasonable time and for a reasonable term." A Correct.

Q Is that the time that you informed him about he was not to sell any further common stock? A Yes, sir. That is the letter that I have given him the information that the only stock that could be picked up is over there. But as far as my personal stock is concerned, Mr. Lewis neither, or the company's stock, nothing for sale whatever. Even at fifty dollars a share.

Q When he came to you on November 9, 1922, did he inform you that he had made a sale?

A No, he did not. He tried to fish, he walked around with me around the plant for three-quarters of an hour, while I was walking, and was trying to induce me to accept the sale for twenty-nine hundred shares, three thousand shares, at the same basis as before. I said no, nothing doing.

Q Did he at that time tell you that he had actually effected a sale? A No, he did not.

Q Now, then, will you please give us the conversation that took place at that time between you and Mr. Vogel, that led up to your giving this check for Ten Thousand One Hundred Four dollars and eighty cents (\$10,104.80)? A After he tackled me for an hour or an hour and a quarter in the plant, we had lunch—

A Absolutely, at each and every sale.

Q (Question and answer repeated by stenographer.) A We finally came in in the office and he said, won't you give me forty per cent. on this sale. I said, no. We was in my office, where the bookkeeper sits right at the next desk. Well, I said, I will tell you, Vogel, you are impressing on me that you are committed for this here amount of shares, I am going to take a chance and I will give you one-third of the whole commission, that means thirty-three and one-third. He said, make it thirty-four per cent. I said to Mr. Gunter, at the next desk, figure out what thirty-four per cent. makes. Mr. Gunter took a pencil and a rough piece of paper and he said Ten Thousand One Hundred Four dollars and eighty cents (\$10,104.80). I said to Mr. Vogel, are you satisfied with this amount? I said, I am going to call Donovan, the secretary, and tell him exactly what to do. He said, perfectly all right. Now, I said, look here, it looked to me that you been working an hour and a half, I

am not quite satisfied the way you tackled me, I had better draw a memorandum to make sure that there is no come back on it, and I called Betty Macken in, the stenographer, I said, Betty, take down something. All right. Enclosed please find check for Ten Thousand One Hundred Four dollars and eighty cents (\$10,104.80), in payment of difference on the Hetzell transaction to the extent of 2,972 shares of common stock; I hope everything will be agreeable to both of us. Kindly acknowledge by signing copy of this letter. I said, Vogel, before Gunter makes out the check, I want you to sign this. Well, he took it and thought a minute and then he went with a pencil and scratched out the two words "of difference." He said, we have no differences, why do you have to put that in? And he signed it and accepted the check. I said, Vogel, from today on we haven't any further business, you haven't treated us right. Now, if you have anything to do, I said, act fair and square, tell me before you make a sale what you contemplate doing, and have my consent. He said, all right. Now, he said, you know, Wiener, I am going to leave for Florida, I am kind of ashamed about that proposition, Hetzell is a public man, and a big man in Philadelphia, I think I loaded him up with enough stuff, now I am going to Florida; and he went to Florida and stayed there for four months. When he came back from Florida, seeing the plant going up, everything materialized, he came along to me, how are you, Mr. Wiener, the same as he done yesterday at the lunch table, very glad to see you. All right. Now, he said, Wiener, I am back from Florida, I feel that you owe me some money; I said, we owe you some money; he said, yes, I talked it over in Florida with my lawyer and he thinks I have a good

case, you compelled me to take that amount of money. Well, I said, if that is the case, Hetzell loaned me twenty-five thousand dollars. You may ask some commission, and then go on, have half of the plant. Well, he said, I want a little money, if you can, get me some money to straighten it out. That passed away two or three weeks, I finally got a lawyer letter from Philadelphia stating a balance on this here transaction and Twelve Thousand Five Hundred dollars (\$12,500). Well, I don't have to tell you, Mr. Feit, that you yourself seen that they were trying a fishing expedition.

Q Is this the memorandum? A Yes, sir; that is the memorandum.

Q That was signed at that time? A By Vogel, yes. I told Mr. Gunter not to give him the check until he signs that memorandum, and I walked out in the plant.

Q Is this the check that was given to him at that time? A Yes, sir; that is the check for Ten Thousand One Hundred Four dollars and eighty cents (\$10,104.80), and then he took a pencil and figured that out of Twenty Nine Thousand Seven Hundred Twenty dollars (\$29,720), at the agreed price, and brought him thirty-three and one-quarter per cent., and he said, well, make it thirty-four; and I told Mr. Gunter to figure it out and he figured it out, it is just the amount? Why should a check be made out Ten Thousand One Hundred Four dollars and eighty cents (\$10,104.80) on account? That is a silly idea, stating there that he got that on account; just that eighty cents which was made out (p. 59, l. 7 to p. 65, l. 19).

This testimony showing that a revocation had taken place and it is respectfully submitted that a direction of a verdict should have been granted

in favor of the defendant on the ground of the offer to Vogel to sell shares of stock to the defendant company was revoked and such revocation barred the plaintiff collecting any further commission.

(b) This ground is the same as that alleged in the brief under the same sub-division under Point Four. In addition to the testimony of Vogel, Wiener on direct examination in substance testified that the understanding between him and Vogel was that he, Wiener, on behalf of the company, was to approve of each individual sale made by Vogel before it was binding upon the company. That he was to approve both the price and the amount (pp. 56-57-58).

It is respectfully submitted that a verdict should have been directed in favor of the defendant on this ground.

(c) That the plaintiff, Vogel, prior to consummating the sale of 2,972 shares of stock to Hetzell was informed by Wiener, acting for the company, that the company had no common stock for sale and in order to earn some commission induced Wiener to part with Wiener's personal stock owned by Wiener the consideration for the same being a reduction of the commission by Vogel of sixteen per cent. (16%). Wiener testified that he notified Vogel that there was no more common stock for sale, but that he could sell bonds, but that if Vogel was committed to the sale in question to Hetzell he would part with his personal stock provided Vogel charged a smaller commission (pp. 59-60). This conversation was not denied by Vogel. Counsel for the plaintiff admitted that it was the personal stock of Mr. Wiener that was sold (p. 41, l. 33).

John J. Donovan, a witness for the plaintiff, testified:

Q On November 9, 1922, was there 2,972 shares of stock transferred? A November 9, 1922, yes

Q Was that treasury stock? A No, that was charged against the account of David Wiener.

Edward J. Gunter, bookkeeper of the defendant corporation, referring to the transaction of November 9, 1922, that is, the Hetzell sale of 2,972 shares of stock, testified as to the conversation which took place between Wiener and Vogel with reference to the reduced commission as follows:

Q Can you give us any of the language? A Well, Mr. Wiener mentioned that he didn't want to sell too much of his own personal stock, but due to the fact Mr. Vogel had made a commitment, why, if he could come down in commission a little bit, he would willingly do it; so talking back and forth there for awhile, and finally mentioned thirty-four per cent. (34%) as the commission (p. 108, l. 24).

It must be conceded from the testimony that the stock which was actually delivered and sold to Hetzell by Vogel was stock which personally belonged to Wiener, the vice-president of the company, and that Vogel knew that. It therefore follows that as Vogel was not authorized by Wiener to sell stock for Wiener, Wiener could strike his own bargain with Vogel with reference to the commission to be paid to Vogel by the company in consideration of Wiener delivering his personal stock to Hetzell. If Vogel was informed, as he was, that the company had no common stock for sale and he chose to accept Wiener's bargain with him to the effect that

he, Vogel, would accept a reduced commission of thirty-four per cent. (34%) on this Hetzell sale then he, Vogel, certainly could not recover any further commission and the learned Trial Court erred in leaving that matter to the jury as the testimony conclusively shows this to be a fact.

POINT SIX.

The Trial Court erred in charging the jury:

(a) Was it that Vogel, until he was actually stopped by Wiener, or someone else representing the company, had the right to sell this stock at the price of Ten dollars a share or more if he could get it, to anyone to whom he could sell it? Or was it that every sale he made had to be confirmed by Wiener or the company as to the amount that was to be paid, and as to the personality of the purchaser?

(b) It is admitted, as I understand it, that so far as this stock is concerned that it was the company's stock, the 2,972 shares.

(c) There is a memorandum, gentlemen, which provides that in case of a sale of this stock by Vogel, Vogel is entitled to fifty per cent. of the amount secured for the stock; that is a memorandum that concerns itself alone with the compensation that is to be paid to Vogel for a sale effected according to whatever you find was the agreement between Wiener, or the company, and Vogel.

(d) If you find, from a preponderance of evidence in this case, that the agreement was that Vogel had the right to sell this stock under authority given to him by the company, or Wiener,

representing the company, at Ten dollars a share, to whomever he could sell it, then if he effected this sale, which is undisputed, that he effected the sale, he was entitled to fifty per cent. of Twenty Nine Thousand Seven Hundred Twenty dollars (\$29,720).

(e) If Vogel had the right, under the power given him by this company, through Wiener, or the company, to sell this stock at Ten dollars a share to whomever he saw fit, and he effected this sale to Mr. Hetzell, and there was nothing in their agreement whereby the company, or Mr. Wiener, could veto that, under the terms of the agreement, then because he was the effective cause of such a sale, under such an agreement, if such an agreement existed, he was entitled to fifty per cent.

The exception taken to the Court's charge is as follows:

Mr. Feit: I take an exception to the Court's charge to the jury to the effect that the agreement, that it was only for the jury to determine as to the construction of the agreement, without submitting to the jury the fact that this was David Wiener's personal stock, and inasmuch as it was his personal stock, he was at liberty to arrange for the payment of such commission as he deemed it best with Vogel, and that arrangement would be effective to all intents and purposes, it being no part of the stock of the company that was sold, and consequently did not come within the purview of the original memorandum, or the original contract, as testified to by the parties.

The Court: That is what you call a trick, isn't it?

Mr. Feit: Your Honor did not permit me to move for a direction of a verdict on the first count, and I intended to include that in it, and that is why it wasn't included in the motion for a direction of a verdict on the first count, because your Honor would not permit me to do it.

The Court: All right, if that is the way you want to practice law (p. 126, l. 7 to p. 127, l. 15).

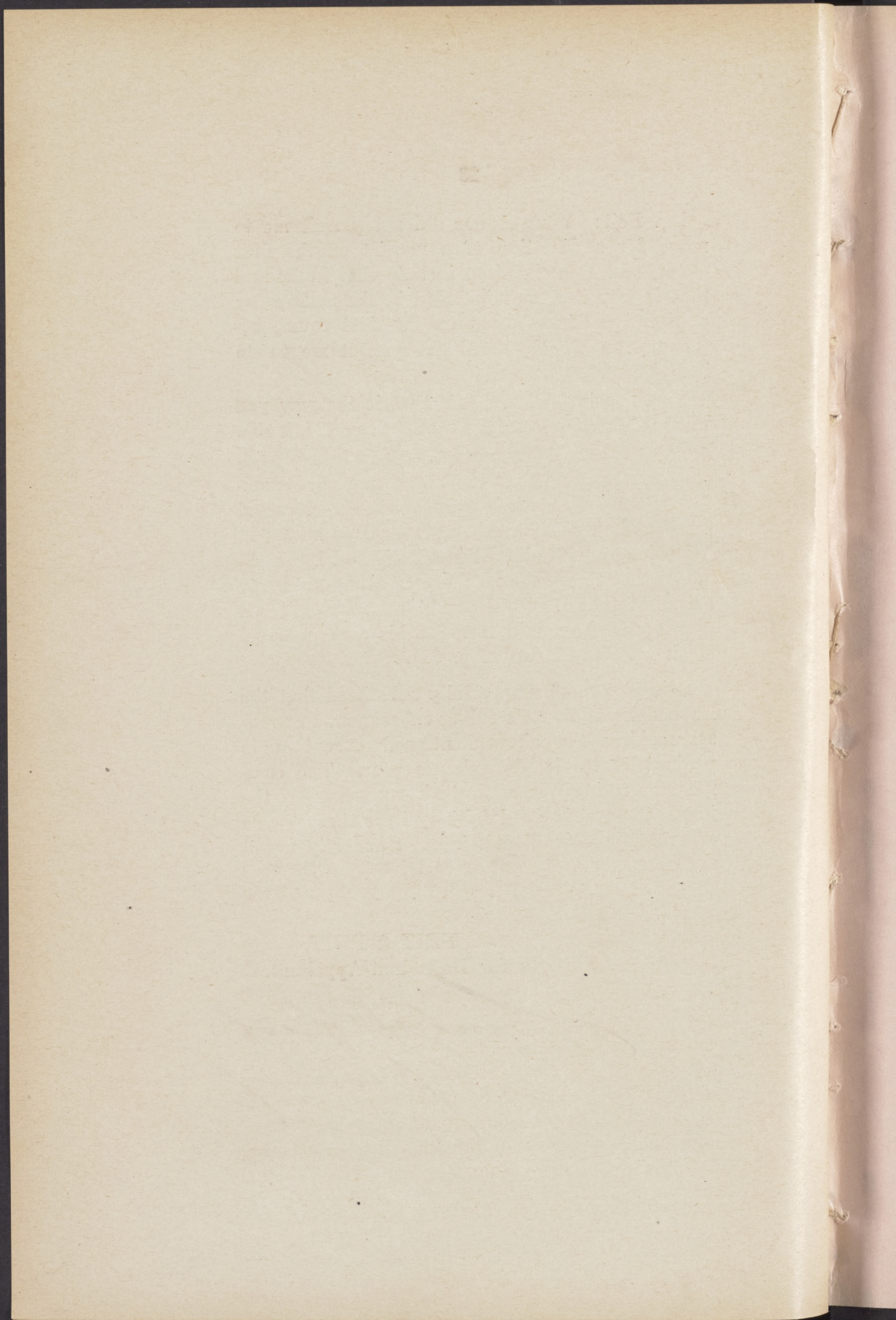
The Court's charge failed to take into consideration the fact that the stock actually transferred and delivered was Wiener's personal stock and that Wiener had testified as stated in the brief under Point Five that he had informed Vogel that there was no more treasury stock for sale, but that if Vogel would accept a reduced commission he would transfer his own personal stock (p. 59 and top of p. 60).

It is also most respectfully submitted that the learned Trial Court's ruling subsequent to counsel making the above-mentioned exception is prejudicial to the defendant's case. The comment or ruling was made in the presence of the jury. Counsel in good faith and for the purpose of protecting his client's interest honestly urged the exception.

Respectfully submitted,

FEIT & FEIT,
Attorneys for Defendant-Appellant.

Samuel J. Feit
of counsel



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