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**NOTICE OF APPEAL.**

Filed March 13, 1930.

**Essex County Circuit Court**

ARTHUR L. KUGEL,  <i>vs.</i>  CHARLES M. RIEDELL,	} <i>Plaintiff,</i>  <i>Defendant.</i>	} <i>Action at Law.  Notice of Appeal.</i>	10
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To Milton M. Unger, Esquire, attorney of plaintiff-respondent.

SIR: 20

TAKE NOTICE that the defendant, Charles M. Riedell, appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause.

HARRISON & ROCHE,  
Attorneys of Defendant-Appellant.

Service of a copy of the within notice of appeal is hereby acknowledged this 11th day of March, 1930. 30

MILTON M. UNGER,  
Attorney of Plaintiff-Respondent.

GROUNDS OF APPEAL.

Filed April 11, 1930.

**New Jersey Supreme Court**

10

ARTHUR L. KUGEL,  
*Plaintiff-Respondent,*

*vs.*

CHARLES M. RIEDELL,  
*Defendant-Appellant.*

*Action  
at Law.*

*Grounds  
of Appeal.*

20

The above-named defendant-appellant, Charles M. Riedell, states the following grounds of appeal from the judgment of the Essex County Circuit Court:

30

1. Because the trial judge, upon the trial of said cause, denied defendant's motion for a non-suit over the objection of said defendant, and submitted the case to the jury for its verdict.

2. Because the trial judge refused to find that plaintiff had failed to establish an oral agreement between himself and the defendant relating to the division of the proceeds of the sale of the stock mentioned in the complaint.

3. Because the trial judge permitted the substitution of a new and different cause of action against defendant, and failed and refused to allow defendant a reasonable opportunity to make his answer and present his defense.

40

4. Because the trial judge, in his charge to the jury, stated that the suit brought by the plaintiff against the defendant was an action in

*Grounds of Appeal.*

conversion and that the plaintiff sought damages for the unlawful conversion by the defendant of certain stock of said plaintiff, whereas plaintiff's complaint in the first count sets forth an alleged oral agreement between plaintiff and defendant and its alleged breach by defendant; and in the second count, a demand for money had and received; and said complaint nowhere sets forth a cause of action in trover and conversion or sounding in tort. 10

5. Because the trial judge, in his charge, submitted the case to the jury on the theory that plaintiff's action was founded on trover and conversion, and did, in fact, instruct the jury that it was an action in trover and conversion, without an application on plaintiff's part to amend his complaint and without giving defendant an opportunity to object to such amendment or to allege surprise and to have a reasonable time in which to meet and answer the new issues thus raised against him. 20

6. Because the trial judge, in his charge to the jury, incorrectly stated the rule establishing the measure of damages, so that the jury rendered a greatly excessive verdict.

7. Because the trial judge, in his charge to the jury, expounded the rule as to the measure of damages obtaining in an action in trover and conversion, and not in an action on contract. 30

8. Because the trial judge, in his charge to the jury, incorrectly instructed the jury as to the date of the alleged conversion, and as to the price per share which the jury might award to the plaintiff as damages against defendant.

9. Because the trial judge, in his charge to the jury, incorrectly stated the measure of damages. 40

*Grounds of Appeal.*

to be the highest intermediate value of the stock between the time of the alleged conversion, and a reasonable time after plaintiff had received notice of said conversion, and not the market value of the stock at the time of the alleged conversion.

10

10. Because the verdict of the jury cannot be supported under the instructions given by the trial judge in his charge to the jury, even on the theory that the cause of action was founded on conversion.

20

11. Because the verdict of the jury is erroneous, and exceeds by \$1,224.00 the largest amount which the jury could have rendered against the defendant upon the theory of the case as submitted and the instructions of the Court.

HARRISON & ROCHE,  
Attorneys of Defendant-Appellant.

Service of a copy of the within grounds of appeal is hereby acknowledged this 11th day of April, 1930.

MILTON M. UNGER,  
Attorney of Plaintiff-Respondent.

30

40

**SUMMONS AND COMPLAINT.**

Filed June 8, 1929.

The State of New Jersey to Charles  
M. Riedell,

(L. s.) YOU ARE SUMMONED to answer the 10  
annexed complaint of Arthur L.

Kugel, in an action at law in the  
Essex County Circuit Court. And Take Notice  
that unless you file your answer to said com-  
plaint with the Clerk of the Essex County Cir-  
cuit Court, at Newark, New Jersey, within  
twenty days after service upon you of this writ,  
and the annexed complaint, the plaintiff may  
proceed in the suit and judgment may be entered  
against you.

WITNESS, NELSON Y. DUNGAN, Judge of said 20  
Court at Newark, New Jersey, this 28th day of  
May, nineteen hundred and twenty-nine.

JOHN H. SCOTT,  
Clerk.

MILTON M. UNGER,  
Attorney.

30

40

*Complaint.*

ESSEX COUNTY CIRCUIT COURT.

10	ARTHUR L. KUGEL, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 0 10px;"><i>vs.</i></div> CHARLES M. RIEDELL, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law.  Complaint.</i>
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Plaintiff, residing at Morris Plains, in the County of Morris, and State of New Jersey, says that:

FIRST COUNT.

1. During the month of July, 1925, the plaintiff borrowed from the defendant the sum of \$3,600.00 and in order to secure the payment thereof, plaintiff assigned to the defendant forty shares of the fully paid capital stock of the W. A. Sheaffer Pen Company, a corporation, to be held by the defendant until such time as the plaintiff would repay to the defendant the said sum of \$3,600.00 with interest. In token of said debt the plaintiff delivered to the defendant a promissory note for \$4,000.00, which was \$400.00 in excess of the amount of said loan and which excess the defendant required plaintiff to pay in order to cover interest and the service charges due and to grow due to the defendant in connection therewith.

By its terms the said note fell due during the month of October, 1925, and was renewed upon the same security, until the month of January, 1926, at which time the defendant suggested to the complainant that it be not further renewed,

*Complaint.*

and that it be returned by the defendant to the plaintiff, but that the defendant retain the aforesaid shares of stock, and return the same to the plaintiff upon the payment of the aforesaid sum of \$4,000.00. The plaintiff agreed to this and it was then and there agreed between the plaintiff and the defendant that the defendant would continue to hold the aforesaid shares of stock as security for the indebtedness of the plaintiff. 10

2. During the month of November, 1926, plaintiff being indebted to the W. A. Sheaffer Pen Company in the sum of \$3,000, for thirty additional shares of stock purchased by the plaintiff of said Sheaffer Pen Company, and in order to pay said indebtedness and obtain said stock, the plaintiff applied to the defendant, who, with the plaintiff, was a stockholder and largely interested in the Kugel Corporation, a corporation, and was the treasurer thereof, for the payment of approximately \$3,225, owing by said Kugel Corporation to the plaintiff. The defendant being unwilling to allow the plaintiff to withdraw said monies from said Kugel Corporation, the defendant suggested to the plaintiff, and the plaintiff agreed with the defendant that the plaintiff should sell and dispose of the said thirty shares of stock for the best price obtainable, and that in consideration thereof and in consideration of the forbearance by the plaintiff to enforce the payment of said monies due to the plaintiff from the Kugel Corporation, and in further consideration that the plaintiff would agree that the said defendant should continue to hold said forty shares of stock of the W. A. Sheaffer Pen Company theretofore deposited with the defendant by the plaintiff, he, the said defendant, would continue thereafter to hold said shares of stock as security for the 20 30 40

*Complaint.*

10 payment of said debt, and that the said shares  
of stock should at some future time agreeable to  
both the plaintiff and the defendant be sold or  
disposed of and that upon such sale the plaintiff  
and the defendant would dispose of the proceeds  
of sale in manner following, and it was then and  
there expressly agreed between the parties, that  
out of the proceeds of sale there should be first  
paid to the defendant the amount of his loan of  
\$3,600.00, together with the additional sum of  
\$400.00, being a total of \$4,000.00, and that what-  
ever monies remained after paying said loan  
should be, and that the defendant would, divide  
the same equally between the plaintiff and the  
defendant. From time to time thereafter the de-  
fendant and the plaintiff reiterated and repeated  
20 said agreement.

3. During the month of October, 1927, plain-  
tiff requested the defendant to sell the aforesaid  
shares of stock and to divide the proceeds there-  
of in accordance with said last mentioned agree-  
ment. At said time the said shares of stock were  
worth approximately \$500 per share. The de-  
fendant was unwilling to allow a sale to be made  
then, claiming that the stock was rapidly ad-  
vancing in price, and that the division of profits  
30 would be greater if the stock was held. From  
time to time thereafter the plaintiff requested  
the defendant to make sale in accordance with  
said agreement, and the defendant refused to do  
so. And the defendant did, in violation of the  
agreement between the plaintiff and the defend-  
ant, transfer the said shares of stock to the de-  
fendant's wife, Sadie C. Riedell. Said transfer  
was, however, purely a colorable transaction,  
without a real or adequate consideration, and was  
40 made to the said Sadie C. Riedell merely as the

*Complaint.*

agent of the said defendant, and the said Sadie C. Riedell held and continued to hold the same as the agent of and for the said defendant, and the said Sadie C. Riedell, did, as the agent of and for the said defendant, and sometime during the month of January, 1928, make sale of the said shares of stock for the sum of \$865 per share, realizing therefrom a total of \$34,600, which said sum of money the said Sadie C. Riedell received as the agent of and for the benefit of the said defendant. At the time of the transfer of said shares of stock by the said defendant through said Sadie C. Riedell the same were of the reasonable market value of \$34,600. As a result thereof the defendant received the sum of \$34,600, and became and was obligated to pay over to the plaintiff one-half of said sum of \$34,600 after first deducting from the whole amount thereof the original indebtedness of \$4,000.00.

4. During the time the said shares of stock were in the possession of the defendant, the defendant received large dividends, approximating about \$500.00, and became and was obligated to add the amount thereof to the amount received on the sale of said shares, and to pay over to the plaintiff one-half thereof.

5. The plaintiff has demanded that the defendant do pay to him the aforesaid sums of money, and the defendant has neglected and refused and still neglects and refuses so to do.

Judgment will be claimed on the first count, in favor of the plaintiff and against the defendant, in the sum of \$20,000 with interest and costs.

*Complaint.*

## SECOND COUNT.

1. Plaintiff repeats all of the allegations contained in the first count.

2. By virtue thereof the defendant is indebted to the plaintiff in the sum of \$20,000, for money had and received by the defendant for the use of the plaintiff.

3. The plaintiff has demanded that the defendant do pay to him the aforesaid sums of money, and the defendant has neglected and refused, and still neglects and refuses to do so.

Judgment will be claimed on the second count, in favor of the plaintiff and against the defendant, in the sum of \$20,000 with interest and costs.

20

MILTON M. UNGER,  
Attorney of Plaintiff.

## Notice to the Within Named Defendant:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to said action, you must file an affidavit of merits within ten days from the date of service thereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing thereof judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of the rule under which this notice is given. (P. L. 1912, p. 394, Rule 56.)

40

MILTON M. UNGER,  
Attorney of Plaintiff.

**ANSWER.**

Filed July 15, 1929.

ESSEX COUNTY CIRCUIT COURT.

ARTHUR L. KUGEL,

*Plaintiff,**vs.*

CHARLES M. RIEDELL,

*Defendant.*

10

*Action  
at Law.**Answer.*

Defendant, Charles M Riedell, residing in the City of East Orange, Essex County, New Jersey, answering the complaint herein, says that:

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1. Defendant denies the allegations of paragraph 1 of the first count of the complaint.

2. Defendant denies the allegations of paragraph 2 of the first count of the complaint.

3. Defendant denies the allegations of paragraph 3 of the first count of the complaint, excepting that this defendant admits that the stock of the W. A. Sheaffer Pen Company was transferred by him to his wife, Sadie C. Riedell. This defendant denies that said transfer was without a real or adequate consideration, and denies that it was made to said Sadie C. Riedell as agent for this defendant. Defendant says that he sold said stock to his said wife, Sadie C. Riedell, for a full, fair and adequate consideration, actually paid by her. Defendant denies that said Sadie C. Riedell received the proceeds of the sale of said stock as his agent or for his benefit. Defendant denies that he became and was, or is, obligated to pay

30

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*Answer.*

over to plaintiff one-half of the sum of thirty-four thousand six hundred (\$34,600.00) dollars, after deducting an alleged sum of four thousand (\$4,000.00) dollars, or any other sum.

10 4. Defendant admits that he received certain dividends from said stock, as mentioned in paragraph 4 of the first count of the complaint, but defendant denies that he was obligated to add the amount thereof to the amount alleged to have been received on the sale of said shares and to pay over to plaintiff one-half thereof.

5. Defendant admits paragraph 5 of the first count of the complaint.

6. Defendant denies the allegations of paragraph 1 of the second count of the complaint.

20 7. Defendant denies the allegations of paragraph 2 of the second count of the complaint.

8. Defendant admits, as alleged in paragraph 3 of the second count of the complaint, that plaintiff has made certain demands for certain sums of money upon him, and defendant admits that he has refused to comply with said demands.

30 FIRST DEFENSE TO FIRST COUNT AND  
SECOND COUNT.

Defendant says that on or about July, 1925, the plaintiff herein, Arthur L. Kugel, being in need of money, applied to him for the purpose of interesting him in the purchase of forty (40) shares of the capital stock of W. A. Sheaffer Pen Company, a corporation, which, at that time, belonged to said plaintiff. After repeated requests on the part of plaintiff, defendant finally agreed to purchase, and did purchase, said stock from

40

*Answer.*

defendant at the price of ninety (\$90.00) dollars per share for said stock. Said purchase money was duly paid by defendant to plaintiff, and plaintiff duly transferred, set over and delivered to defendant said shares of stock. This defendant denies that said transaction was in the nature of a loan made by defendant to plaintiff, and that said stock was pledged as collateral security for said loan, or that said plaintiff gave to this defendant a promissory note for four thousand (\$4,000.00) dollars, or any other sum, as evidence of said loan. This defendant says that he purchased said stock outright from said plaintiff, and that no conditions or limitations were imposed upon him in purchasing said stock. This defendant denies that plaintiff applied to him as a stockholder and one largely interested in the Kugel Corporation for the payment of approximately three thousand two hundred and twenty-five (\$3,225.00) dollars, which plaintiff alleges was due him on or about November, 1926, from said Kugel Corporation. Defendant denies that in consideration for said plaintiff refraining from the withdrawal of said sum, this defendant agreed with him to hold, or to continue to hold, said forty (40) shares of stock of the W. A. Sheaffer Pen Company as security for plaintiff's alleged indebtedness to him, and defendant denies that he agreed at that time or at any other time to divide the profits realized from the sale of said forty (40) shares of W. A. Sheaffer Pen Company stock with plaintiff, as alleged in the complaint, after deducting therefrom the amount of plaintiff's alleged indebtedness to him. This defendant, as above stated, repeats that he purchased from plaintiff said forty (40) shares of W. A. Sheaffer Pen Company stock outright.

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*Answer.*

10 The defendant reserves the right, at or before the trial of the above-entitled case, to move to strike out paragraphs 1, 2, 3 and 4 of the first count of the complaint and paragraphs 1, 2 and 3 of the second count of the complaint on the ground that said paragraphs, some or all of them, are prolix, obscure and uncertain, irregular and defective, and so framed as to embarrass or delay a fair trial of this cause; and on the further ground that said paragraphs, some or all of them, disclose no cause of action against this defendant.

HARRISON & ROCHE,  
Attorneys of Defendant.

20 Answer and stipulation extending time to answer to July 15, 1929, filed in County Clerk's office, July 10, 1929.

30

40

**REPLY.**

Filed July 13, 1929.

## ESSEX COUNTY CIRCUIT COURT.

ARTHUR L. KUGEL,

*Plaintiff,**vs.*

CHARLES M. RIEDELL,

*Defendant.*

10

*Action  
at Law.**Reply.*

Plaintiff, replying to the answer of the defendant herein, says that:

1. He denies the first defense to the first 20  
and second counts.

MILTON M. UNGER,  
Attorney of Plaintiff.

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POSTEA.

ESSEX COUNTY CIRCUIT COURT.

JUDGE SMITH.

February 27, 1930.

10

No. 2744.

ARTHUR L. KUGEL,

vs.

CHARLES M. RIEDELL,

*Action  
at Law.*

20 The jury being called, all appeared and the trial progressed.

Plaintiff's attorney, Milton M. Unger.

Defendant's attorney, Harrison & Roche, by Auguste Roche, Jr.

Evidence continued.

30 The evidence being closed the jury retired to consider of their verdict, an officer being sworn to attend them when having returned into court they say they find in favor of the plaintiff and assess the damages against the defendant at the sum of seventeen thousand two hundred and twelve dollars and fifty cents (\$17,212.50) and so say they all.

40

**RULE FOR JUDGMENT.**

ESSEX COUNTY CIRCUIT COURT.

ARTHUR L. KUGEL,

vs.

CHARLES M. RIEDELL,

*Action  
at Law.*

10

*Rule for  
Judgment.*

This cause having been heard and submitted to the jury and the jury having returned a verdict in the sum of seventeen thousand two hundred and twelve dollars and fifty cents (\$17,212.50) in favor of the plaintiff and against the defendant on February 27, 1930,

Whereupon it is ORDERED and ADJUDGED that judgment be entered in favor of the plaintiff and against the defendant in the sum of seventeen thousand two hundred and twelve dollars and fifty cents (\$17,212.50) besides the costs of suit to be taxed. 20

On motion of

MILTON M. UNGER,  
Attorney of Plaintiff.

30

Rule entered this 28th day of February, 1930.

40

## TESTIMONY.

ESSEX CIRCUIT COURT.

Wednesday, February 26, 1930.

10     \_\_\_\_\_

          ARTHUR L. KUGEL,

*vs.*

          CHARLES M. RIEDELL.

          \_\_\_\_\_

                                  } *Action*

                                  } *at Law.*

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

For plaintiff appears Milton M. Unger.

For defendant appear Harrison & Roche (by  
Auguste Roche, Jr.)

20     (A jury is called and sworn.)

Mr. Unger opens for plaintiff.

30     Mr. Roche: I would like at this time to call  
your Honor's attention to the provision of our  
Statute of Frauds, Section 5, that no action shall  
be brought on any agreement not to be performed  
within one year unless the agreement or some  
memorandum thereof shall be in writing. On this  
opening it appears that there was an oral agree-  
ment. As far as I can see no time was set in  
which the agreement was to be performed, or  
that it was performed within one year. Nothing  
has been said about a memorandum in writing.

The Court: I think where you deny the making  
of the contract it has to be pleaded.

40     Mr. Roche: We also reserve the right to move  
to strike out on the further ground that the com-  
plaint does not disclose a cause of action against  
this defendant.

*Arthur L. Kugel, direct.*

The Court: I did not gather from what Mr. Unger said that this could not be performed in one year. It was a contract that should be held for some indefinite time, and when they decided to sell within the year one could require the other to sell. The time was not definite.

Mr. Roche: There seems to be nothing very definite about this whole transaction as stated by the plaintiff. I move to dismiss on the opening. 10

The Court: I will deny the motion.

Mr. Roche: I wanted to call it to your Honor's attention because I think it may have some bearing later on.

The Court: Very well.

Mr. Roche opens for defendant.

The Court: The contract you have alleged you must prove and therefore it does not come within the Statute of Frauds. I will hold it open on the question of whether it is a contract which could not be performed within one year. I don't know what he is going to testify to, so I will withhold my decision on that. 20

ARTHUR L. KUGEL, plaintiff, sworn in his own behalf.

*Direct examination* by Mr Unger. 30

Q Mr. Kugel, you are the plaintiff in this case? A I am.

Q Where do you live? A I live at Morris Plains, New Jersey.

Q What is your business now? A Insurance.

Q In 1925 what was your business? A 1925 I was interested in promoting the manufacture and sale of some pencil patents. 40

*Arthur L. Kugel, direct.*

Q With whom were you interested? A With Mr. Charles M. Riedell.

Q Is he the defendant in this case? A Yes, sir.

10 Q Had your business arrangements in the Kugel corporation started in 1925? A No, sir, it was just in the promotional stages.

Q Had you already a business arrangement between you? A We had a business arrangement at that time.

Q And you knew where he lived in New York? A Where his business was in New York.

Q Where was that? A At 1819 Broadway.

Q You had been there on a number of occasions? A A number, yes.

20 Q How long prior to July 15, 1925, was it you actually knew him? A I believe I got acquainted with Mr. Riedell about February of that year.

*By the Court.*

Q What year is that? A 1925.

*By Mr. Unger.*

30 Q At this time did you own forty shares of stock in the Sheaffer Pen Company? A I did.

Q Was the certificate in your name? A It was in my name.

Q Where was the certificate? A At the Chatham & Phenix, Thirtieth street and Fifth avenue branch, New York.

Q Why was it there? A I had a loan of \$3,000 and they held it as collateral.

Q Was your name endorsed on this certificate?

40 A It was.

*Arthur L. Kugel, direct.*

Q The certificate was fully paid, was it? A Fully paid.

Q In July, 1925, how much money did you owe to the Chatham and Phenix Bank on this certificate? A \$2,400.

Q At that time did you apply to Mr. Riedell for any money? A I did. 10

Q Will you tell us just what you said to him and what he said to you? A I had negotiations with the Wahl Company of Chicago—

*By the Court.*

Q Just tell us what you two said about it. A It was necessary for me to go to Chicago to consummate arrangements. I told Mr. Riedell I did not have the finances personally to go there. The company was not organized. One word led to another and I said, "Can't you raise the money somewhere?" I had some stock at the Chatham and Phenix Bank on which I had had a loan of \$3,000 and which had since been reduced to \$2,400. I asked him inasmuch as his interests were identical with mine in the sale of these patents, if he couldn't arrange to get a loan at the Gotham Trust which would enable me to have the difference between the \$2,400 and the \$3,000, which I had not been able to borrow and which he could borrow on that stock as I did in the past. Mr. Riedell said he would. I was authorized by him to draw a draft on him with the stock attached to the Gotham Trust Company for \$3,000 and the draft was paid. 20 30

Q I show you a draft for \$2,400 made by you and drawn on him and dated July 14, 1925, and ask you if this is the draft in question? A It is. 40

*Arthur L. Kugel, direct.*

Mr. Unger: I offer it in evidence.

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

*By the Court.*

10 Q That \$2,400 took up the \$2,400 you owed at the Chatham and Phenix? A Yes, sir.

*By Mr. Unger.*

Q Go on. A The draft was paid. The following day Mr. Riedell gave me a check for \$600. I then went to Chicago and met Mr. Riedell there about three or four days later. We had a conference with the president and vice-president and several other executives of the Wahl Company in Chicago. We returned to New York about 20 ten days from the date of my receiving the first \$600 check Mr. Riedell gave me and then he gave me an additional check for \$600.

Q That made how much? A \$3,600.

Q Go on. A I issued a note to Mr. Riedell for \$4,000, the difference between the \$3,600 which I had received and what he exacted from me on a loan at that time.

30 Q What was the \$400 for? A For a bonus.

Q Did you give him the note? A I did.

Q What was the date of the note? A The date of the note was July 13, 1925, and it ran for 90 days; it became due October 13, 1925.

Q Before you gave him that note what had happened to the 40 shares of stock in the Sheaffer Pen Company? A The 40 shares of stock was attached to the draft and it went to the Gotham Trust Company. It was up there, as I understood it from Mr. Riedell, for a \$3,000 loan. 40

*Arthur L. Kugel, direct.*

Q What did you do with the stock as far as he was concerned?

The Court: He said he sent it with the draft.

A He was the holder of the stock, yes. 10

Q Why did he hold the stock? What was your arrangement with him? A My arrangement with him was that he was short of the money at that time and that he could get a loan on the stock with the Gotham Trust Company.

Q And you gave him your note? A Yes, sir.

Q Did you sell him the stock at that time? A No, sir.

Q What was the agreement? A The agreement was that I would pay him back the \$4,000 and get back my stock at any time I was in a financial position to do so. 20

Q And you gave him a note for 90 days? A Yes, sir.

Q What happened at the end of the 90 days? A I got another extension of time for 90 days; I issued another note and he gave me back the original note which I destroyed at that time.

Q The note was destroyed at that time? A Yes, sir. 30

Q And then you gave him a new note? A Yes, sir.

At one o'clock P. M. the Court takes a recess until two o'clock P. M.

*Arthur L. Kugel, direct.*

AFTER RECESS.

Q I think you said that when this July note became due in October, 1925, it was renewed?

A It was.

10 Q You mean by that you gave a new note? A I gave a new note.

Q What became of the original note? A It was destroyed.

Q By whom? A By me.

Q When did that renewal note become due? A January 13, 1926.

Q Was that note renewed?

20 Mr. Roche: I have not objected to this oral testimony about a written instrument, but I do now unless a foundation is laid for it.

The Court: He said he destroyed it. I suppose after he talks about the one he did not destroy it will be up to him to produce it.

Q You signed a renewal note? A I did.

Q And that note came due when? A January 13, 1926.

30 Q What became of that note? A That note I kept.

Q You kept that note? A Yes.

Q Have you it now? A I have.

Q I show you a note dated October 13, 1925, for \$4,000 made by you to the order of Charles M. Riedell payable 90 days after date and ask you if that is the renewal note which you signed? A It is.

40 Q Is that the note which you presented to Riedell in October, 1925, in renewal of the July note? A Yes, sir.

*Arthur L. Kugel, direct.*

*By the Court.*

Q You got that back from him? A I got that back, yes, sir.

Mr. Unger: I offer it in evidence.

(The same is received in evidence and marked Exhibit P. 2.) 10

The Court: You deny its receipt, I suppose, Mr. Roche?

Mr. Roche: Yes, sir.

Q Referring again to this note, Exhibit P. 2, when did you get this back? A I got that back on either January 13th or January 14, 1926.

Q Who handed you this note back? A Mr. Charles M. Riedell. 20

Q The defendant in this case? A He did.

Q Is there anything on that note which indicates that it was in his possession? A There is.

Q What is it? A A notation in his handwriting to the effect that it was due January 1, 1926.

Q Is that the pencil notation following the word "due"? A Yes, sir.

Q How do you know it is in his handwriting? A Because I have seen a number of samples of his handwriting. 30

*By the Court.*

Q The rest of it is in your handwriting?

A Only the signature.

*By Mr. Unger.*

Q Who prepared the note? A His stenographer. 40

*Arthur L. Kugel, direct.*

*By the Court.*

Q Is the rest of the note in your handwriting?

A It is typewritten.

*By Mr. Unger.*

10 Q You say the notation of January 11, 1926, in pencil is in his handwriting? A Yes, sir.

Q Was that on the note when it was handed to him in October, 1925? A No, sir.

Q Was it on it when it was returned to you? A It was.

20 Q Why wasn't that note renewed in January, 1926? A Why, Mr. Riedell told me that he didn't feel that it was necessary, due to our close business relationship and the fact that he was out of town and I was out of town frequently, to constantly renew the notes, and he talked along the lines of getting me to accept the return of that note and not issue another piece of paper in renewal.

Q And you took it? A Yes, sir.

Q Was there any change from the arrangement which had been made? A No, sir.

Q And he continued to hold the stock? A Yes, sir.

30 Q And you had the note? A I had the note.

*By the Court.*

Q Did you pay any interest on the note? A I did not.

*By Mr. Unger.*

Q \$400 had been deducted, as I understand? A The \$400 bonus was to take care of the interest.

*Arthur L. Kugel, direct.*

Q That had been added to the note in July, 1925? A Yes, sir.

Q When next after January, 1925, did you discuss the matter of this stock and note with Mr. Riedell? A I believe it was in October—the latter part of October and beginning of November, 1926.

10

Q What was the occasion of your talking to him about it then? A I had 30 shares of stock on a purchase contract of 100 shares.

Q What kind of stock? A Sheaffer Pen Company. I had received 70 shares and there were still 30 shares at their office. They had my note for \$3,000 with interest. I had an account with the Sheaffer Pen Company and was notified it was adjusted the latter part of October or the 1st of November and there was a difference of \$1,300 I owed on this note over what the Sheaffer Pen Company owed me.

20

Q That was on another transaction? A Yes, sir.

Q Go on. A I had \$3,225 coming to me from the Kugel Corporation of which I was an officer and of which Mr. Riedell was also the treasurer. I had an arrangement with Mr. Riedell to advance the Kugel Corporation money to take care of the necessary things pertaining to his office. I pointed out to him that I had had this call for the money and I asked him for that out of the \$3,225 I had coming to me from the Kugel Corporation. Mr. Riedell told me he didn't have money available at that time and he told me to go out and sell my stock for the best price obtainable.

30

Q What stock? A The 30 shares of the Sheaffer Pen Company stock. He said that will relieve the pressure on me and the Kugel Cor-

40

*Arthur L. Kugel, direct.*

poration, and he assured me that he would also give me a square deal and would carry the loan on the 40 shares of the Sheaffer Pen Company stock which I had, amounting to \$4,000, and he said he will also make good with me when that stock was sold.

10 Q What was the arrangement at that time?  
A I acquiesced in it.

Q What was the arrangement? A That he would carry the loan of \$4,000 for an indefinite period of time and that when the stock was sold that he would deduct the \$4,000 and we would split the realization of profit if there would be any.

*By the Court.*

20 Q When was this? October and November?  
A Yes, sir.

*By Mr. Unger.*

Q What year? A 1926.

Q Did you and he agree to that at that time?  
A We agreed to it.

30 Q At that time did he make any statement to you regarding what he knew about the value of this stock? A He brought in to me several notices from brokers; I believe the name is Pynchon & Company, which showed that the stock was increasing in price. These notices were addressed to him and he turned them over to me.

Q When he brought those notices in to you what did he say in connection with them? A He said, "Here, look at these. The stock is going up."

40 Q Was that after the November, 1926, agreement? A It was.

*Arthur L. Kugel, direct.*

Q I show you a notice or a letter from Pynchon & Company to Charles M. Riedell purporting to be dated December 13, 1926, and ask you if this is one of the notices which you referred to? A It is, sir.

Q Containing quotation on Sheaffer Pen Company stock at that time? A Yes, sir. 10

Q Is this one of the notices he presented to you? A It is.

Mr. Unger: I offer it in evidence.

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

Q I show you another one dated December 20, 1926, and ask you if that was presented to you by Mr. Riedell? A It was. 20

Mr. Unger: I offer it in evidence.

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

Q These were given to you on the occasions when he spoke to you about the stock? A They were.

Q Between November, 1926, and October, 1927, did you discuss this matter with him? A I did. 30

Q On what occasion? A Why, we discussed the value of the stock on several occasions during that period.

Q What did he say? A Why, he said to me at the various times when we discussed it that the stock was going up, and conversation along those lines.

Q Did he on any of those occasions insist that he had bought the stock from you and that it was closed between you? A No, sir. 40

*Arthur L. Kugel, direct.*

Q Coming down to October, 1927, what happened at that time? A I received a telephone call from Mr. E. F. Spitz who had been my attorney. Mr. Spitz asked me to come down to his office and bring my Sheaffer Pen Company common stock with me. I told him that I didn't have it—

10 Q Don't testify as to what you told Mr. Spitz. A He asked me to call at his office and bring the Sheaffer Pen Company common stock.

Q Did you go there? A I went there the following day.

Q And you had a talk with him? A Yes, sir.

Q About the 40 shares of stock? A Yes, sir, with Mr. Riedell.

Q After you saw Mr. Spitz and as a result of what he told you, whatever it was, did you talk to Mr. Riedell? A The first intimation I had from Mr. Spitz relative to the Sheaffer Pen Company common stock was on the telephone, and later on I had a conversation with him at Barclay street and Broadway, and Mr. H. L. Neff was with me—we had finished our luncheon and we were practically out of the door when we met Mr. Charles Riedell coming in to get his luncheon.

20 Q This was when? A October 25, 1927.

Q Go on. A Mr. Riedell asked us whether we would come in and sit down while he had his luncheon. We sat at the table and in the course of the conversation I told him of the telephone call I had from Mr. Spitz. At that time I reiterated—

Q Tell us what you told him. A I told Mr. Riedell that Mr. Spitz wanted me to come to his office with the Sheaffer Pen Company stock and I suggested to Mr. Riedell that we go up there.

40

*Arthur L. Kugel, direct.*

At that time Mr. Riedell said, "We will hang onto that stock; we will not sell that stock." He said, "Why, the book value of that stock just two years ago was over \$250 a share." He said, "We will make a lot of money by hanging onto it."

Q Was Mr. Neff present at that time? A 10  
Yes, sir. I said to Mr. Riedell, "At any rate, it won't do any harm to go up and see what Mr. Spitz has to offer." He said, "I guess it won't." So the next day we went to Mr. Spitz's office and at Mr. Spitz's office Mr. Riedell signed an option—

Q Who was there? A Miss Rainess, Mr. Spitz, Mr. Riedell and I.

Q Who is Miss Rainess? A Mr. Spitz's 20  
stenographer.

Q Tell us what occurred at that time. A At that time Mr. Spitz told Mr. Riedell that he could sell the stock to advantage, and after conversation pro and con Mr. Riedell agreed to sign an option giving Mr. Spitz the right to dispose of the 40 shares of the Sheaffer Pen Company stock within 30 days at a price of \$400 or better.

Q Was that signed in your presence? A It 30  
was.

Mr. Unger: Will you produce that, Mr. Roche?

Mr. Roche: What is the date of it?

Mr. Unger: October 21, 1926.

Mr. Roche: Yes.

Q Is this the paper? A Yes, sir.

Q And that is the one that was signed by 40  
Mr. Riedell at that time? A Yes, sir.

*Arthur L. Kugel, direct.*

*By the Court.*

Q Then do you want to change your testimony as to October 25th? A Yes, sir. I made an error about October 25th being the date. The telephone conversation from Mr. Spitz was on October 20th. The following day we went to Mr. Spitz's office with Mr. Riedell to sign that option.

Mr. Unger: I offer it in evidence.

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

(Mr. Unger reads Exhibit P. 5.)

*By Mr. Unger.*

Q You were there when that was signed? A I was.

Q Were you at that time agreeable to selling the stock at \$400 a share? A I was.

Q On that occasion and while Mr. Reidell was with you in that office was anything said about any interest that you had in this stock? A After Mr. Riedell had signed the option I said to him, "Now, Charlie, I think it high time that we had a definite understanding as to splitting up whatever profits there may be." He said to me, "Well, let's wait until we get the cash. There's time enough to talk about it then." That was all said in the presence of Mr. Spitz.

Q Was that all that was said on that occasion regarding your interest in it? A That was practically all.

Q When next did you meet with Mr. Riedell on this transaction? A I saw him on, I believe it was, October 26th.

Q Where was that? A At Mr. Spitz's office.

*Arthur L. Kugel, direct.*

Q How did you happen to go there? A We had luncheon and we went there to Mr. Spitz's office due to the fact that he had told us in a telephone message that he felt he could get a better price. We went to Mr. Spitz's office—

Q Did you tell that to Mr. Riedell? A Yes, sir. 10

Q Before you went there? A Yes.

Q Go on. A We went to Mr. Spitz's office and Mr. Riedell signed an option for \$525.

Q Before he signed that option what was said? A I again stated to him that I felt it was high time that we had a definite understanding as to what our interests were and he said, "Well, I want to think it over and refresh my memory." I pointed out to him that he had quite some time to think it over and I asked him how much longer he desired. "Oh," he said, "Just a short time." I said, "Well, how about a couple of days? Is that perfectly satisfactory?" And then it was agreed by him and me that we would enter into a discussion as to what our definite split-up would be, and that Saturday—this was either on a Wednesday or Thursday— 20

Q Had you and Mr. Riedell changed your agreement of the preceding November as to the split-up? A No, sir. 30

Q That had not been changed at all? A No, sir.

Q You say he signed another paper at that time? A He did.

Mr. Unger: I would like to have produced a letter signed by Mr. Riedell dated October 26, 1927.

(Mr. Roche produces the paper called for.) 40

*Arthur L. Kugel, direct.*

Q Is this the paper which you say Mr. Riedell signed on October 26, 1927? A It is.

Q In Mr. Spitz's office? A Yes, sir.

Mr. Unger: I offer it in evidence.

10 (The same is received in evidence and marked Exhibit P. 6.)

(Mr. Unger reads Exhibit P. 6.)

Q When that paper was signed you were there? A I was.

Q Were you then satisfied to sell this stock for \$525 a share? A I was.

20 Q When next did you discuss this stock matter with Mr. Riedell? A On Saturday. I don't know whether Mr. Riedell was out of the office or out of town—

Q Did you have an appointment with him? A We had an appointment on that Wednesday for the following Saturday.

Q Where was that appointment to be held? A At our office.

Q Did he come? A No, sir.

Q Is that the appointment which you had made the previous Wednesday? A Yes, sir.

30 Q Did you take up the matter with him after that? A I did.

Q When? A On several occasions.

Q What did you say to Mr. Riedell? A I made a demand on him through Mr. Spitz in a letter to him and also addressed to his attorney at that time, Mr. Strouse of the firm of Strouse & Goldstone at New York City.

40 Q Do you know whether or not Mr. Riedell permitted the stock to be sold while it was in Mr. Spitz's hands? A No, sir.

*Arthur L. Kugel, direct.*

Q What happened to the stock? A It was in the Chatham Phenix National Bank on a loan for \$3,000 in favor of the Kugel Corporation. Mr Riedell authorized me to go up and make the loan for him. It was at the Chatham Phenix Eighteenth street branch. That was a four months' loan originally and it was renewed. It was paid off finally and then a new loan was made. I was having an audit of the Kugel Corporation's books made about the first week in December, 1927. The accountant came to me and told me that while he had— 10

Q Don't tell us what he told you. You can tell us what he pointed out to you on the books. A He pointed out to me that he was only to audit up to November 30, 1927, but that he had found some entries that he thought would interest me and he showed me entries where there had been a substitution of stock belonging to Sadie C. Riedell amounting to two International Acceptance bonds and one American Writing Paper bond. I may be off, but there was a substitution of \$3,000 collateral for the 40 shares of Sheaffer Pen Company common stock. This I did not know anything of— 20

Q In whose handwriting was the entry? A Mr. Riedell's I believe. 30

Q That, you say, was a change of collateral? A Yes, sir.

Q When was this? A This was in December.

Q 1927? A 1927.

Q Did you have any talk with him about that afterward? A No, sir.

Q In the course of the talks that you had with him between November, 1927, and the end of the year did you make any demand upon him 40

*Arthur L. Kugel, direct.*

for the return of the stock? A Verbally at the office.

Q What did he say? A He jumped on me at one time in the office in the presence of a Mr. Carson, saying that I was trying to put words in his mouth, and so forth.

10 Q What was it that you said that induced him to say that? A I started to talk about some other business we had in hand and he seemed to be very much perturbed at the fact that he had entered into this agreement.

Q What arrangement was that? A Signing the option.

Q What did he say? A He flew off the handle and said I was trying to put words in his mouth.

20 Q What did he say with reference to his arrangement with you? A Nothing at all.

Q Did he recognize it? A Yes, sir.

Q But you had not received anything? A No, sir.

*By the Court.*

Q He didn't deny it? A No, sir.

30 *By Mr. Unger.*

Q You had the matter in Mr. Spitz's hands? A Yes, sir.

Q Did he on that occasion tell you that this was not a loan and that this was an out and out sale? A No, sir.

Q Did he ever tell you anything like that? A Never.

Q You don't know what eventually became of this stock? A No, sir.

40

*Arthur L. Kugel, cross.*

Q And I take it you have never received anything from Mr. Riedell? A I have not.

*Cross examination by Mr. Roche.*

Q Mr. Kugel, the first transaction relating to this stock occurred in July, 1925, did it not? A 10  
Yes, sir.

Q And at that time, according to your testimony, you had transferred the stock to Mr. Riedell and gave him a promissory note for it, is that right? A I did.

Q How long was it before you asked Mr. Riedell to give you an agreement as to your alleged interest in that stock? A How long was it?

Q Yes. How much time elapsed before you demanded of Mr. Riedell that he acknowledge 20  
that he was to divide the proceeds of the sale of the stock with you? A Will you please repeat that?

Q How much time elapsed before you made the demand? A There was no definite time stated.

Q I asked you how much time you allowed to elapse before you demanded it? A There was a lapse of several months' time. 30

Q Do you know how long? A There was three months in the first instance and three months in the second instance when the note was due.

Q Haven't you just testified that you had an appointment with him to make your position clear and your interest in the stock clear for Saturday, October 26, 1927? A From that date?

Q Isn't that the first time that you tried to get Mr. Riedell to acknowledge that you had some interest in the stock? A No, sir. 40

*Arthur L. Kugel, cross.*

Q When was the first time? A We conversed on that subject in October of that particular year.

Q October of what year? A Of that particular year—no, it was October, 1926—October, 1927.

10 Q How long after the original transaction was that? A What do you mean by the original transaction?

Q I mean at the time you parted with the stock and transferred it to Mr. Riedell? A I will have to check over the records.

Q You know when the original transaction took place, don't you? A The original transaction was in July, 1925.

20 Q Do I understand you to say that the first demand that you made upon Mr. Riedell for a split on the proceeds of that stock was on or about October, 1927? A No, sir, we had any number of conversations at luncheon several times.

The Court: I don't understand that he made a demand for the split; he made a demand for putting the matter in evidential shape, I suppose. I haven't heard that he made any demand that he split the money for the stock.

30

Q I think you testified a little while ago that on October 26, 1927, you told Mr. Riedell that you wanted a definite understanding about this stock? A Yes, sir.

Q Did you at any time prior to October 26, 1927, say to him that you wanted a definite understanding about the stock? A We talked it over and it was agreed at the time I made the sale of

40

*Arthur L. Kugel, cross.*

the 30 shares of the Sheaffer Pen Company stock—

Q You haven't answered my question. A He had definitely assured me repeatedly that he would not at any time take advantage of me—

*By the Court.*

10

Q That is not the point. You are asked whether you asked him before that time to put the matter in shape or have a definite understanding?

A We had a definite understanding of that at the time of the sale of the 30 shares of stock.

Q Had you asked him about a definite understanding at any time previous to October 26, 1927? You say you asked him at that time to enter into a definite arrangement. Counsel wants to know whether you asked him to have a definite arrangement before that time? A No, sir, I don't think I asked him because I was resting assured on his promises.

20

*By Mr. Roche.*

Q Then as I understand your testimony you did not ask Mr. Riedell for a definite understanding until October 26, 1927. That was the meeting at Mr. Spitz's office? A In reference to what?

30

Q In reference to a definite understanding as to the arrangement obtaining between you and Mr. Riedell concerning this stock? A I had asked him several times. As to definite or specific dates I couldn't tell you exactly. We were associated in the same office and we had conversations frequently on the same subject.

Q But not before October 26, 1927, did you tell him that you wanted a definite understanding, is that right? A Why, yes, October, 1926.

40

*Arthur L. Kugel, cross.*

*By the Court.*

Q October 26, 1927. You say at that time you asked him to have a definite understanding with you. Did you ever ask him for a definite understanding before then? A No.

10 *By Mr. Roche.*

Q You stated that Mr. Riedell told you that he would think it over and a time for discussion of the matter was fixed for the following Saturday, is that right? A Yes, sir.

Q Mr. Riedell did not attend that meeting according to your testimony? A Yes, sir.

Q Referring to Exhibits P. 5 and P. 6, these are the papers which you say were prepared and signed in your presence by Mr. Riedell in Mr. Spitz's office? A Yes, sir.

Q Will you read the first sentence of Exhibit P. 5? A "I hereby represent that I am the owner of 40 shares of the Common stock of the Sheaffer Pen Company."

Q That is signed by Mr. Charles M. Riedell, is it not? A Yes, sir.

Q That was signed in Mr. Spitz's office? A Yes, sir.

30 Q That is the office of your attorney? A Yes, sir.

Q Didn't you deny that he was the owner of that stock? A No, sir.

Q Why not? A For the simple reason that we had an arrangement that at any time—we had an arrangement in November, 1926, at the time that I sold the 30 shares of stock, when I agreed not to press Mr. Riedell or the Kugel corporation for the \$3,225 which I had due me at that time. Mr. Riedell made me a proposition

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*Arthur L. Kugel, cross.*

and told me at that time that he would hold that 40 shares of stock; that there was no definite time set as to when he would hold that and I could rest assured that he would take care of me and give me a square deal and I trusted the man. I didn't feel it was necessary for me to bring up the subject every week or every month. 10

Q Is that your answer to my question as to why you stood by and let Mr. Riedell sign a paper and represent himself as the owner of the stock? A Yes, sir, because we had that definite understanding.

Q Will you read the next exhibit dated five days later? A "I herewith authorize the sending of a letter in the form herewith annexed offering them for sale until 5:00 P. M. of October 31, 1927, forty shares of common stock of W. A. Sheaffer Pen Company owned by me at \$525 a share." 20

Q "Owned by me." That was signed by Charles M. Riedell? A Yes, sir.

Q And you let that go by? A No, I made a demand on him at the time of the signing of these documents.

Q I have just asked you about that demand and you have told us that you wanted a definite understanding, and so stated for the first time at the meeting of October 26, 1927? A Yes, sir. 30

Q And that you made an appointment which Mr. Riedell did not keep? A Yes, sir.

Q Now you tell me there was a definite understanding? A From October, 1926, to the time that we went to Mr. Spitz's office there was no reason for me to go and ask for a definite understanding because we had our understanding for the first time in October, 1927, the stock was 40

*Arthur L. Kugel, cross.*

going to be sold and something was going to be realized as a result of that sale.

Q I show you a letter dated November 7, 1927, addressed to Mr. Riedell and signed Edward F. Spitz. Do you recognize that signature? A Yes, sir.

10 Q Whose signature is that? A Mr. Spitz's.

Q Your attorney? A Yes, sir, he was.

Q The gentlemen in whose office these papers marked Exhibits P. 5 and P. 6 were signed? A Yes, sir.

Mr. Roche: I ask that it be marked for identification.

(The same is marked Exhibit D. 1 for identification.)

20

Q In October and November, 1926, you testified that Mr. Riedell agreed to split with you anything you got for the stock? A Yes, sir.

Q Under that arrangement when was the stock to be sold? A There was no definite time set.

Q At what price was the stock to be sold? A There was no definite price set.

30 Q Who was to decide when and at what price it was to be sold? A We had not decided.

Q Suppose you did not agree on the price at which it was to be sold? A There was no thought of not agreeing on it. Our relations were pleasant at that time.

Q Do you know what became of the stock? A I only know from the entries that I saw in the Kugel Corporation's books that it was transferred to Sadie C. Riedell. That's all that I personally know about it.

40

*Arthur L. Kugel, cross.*

Q When did you sever your connection with the Kugel Corporation? A In 1928.

Q What became of the company? A A receiver was appointed in equity.

Q Was there any arrangement between you and Mr. Riedell as to whose name this stock should be in pending its sale? A In the first place it was endorsed in blank and it was understood and agreed that when he made the loan that it was to go into his name. 10

Q What was said about the price of that stock when the original transaction was had in July, 1927, when the transfer of that stock was made? What was said about price?

Mr. Unger: July, 1925, you mean?

Q July, 1925? A About price? 20

Q Yes. A There was no stipulation about price at all.

Q What was the value of the stock at that time? A The stock had a value for loan at the Chatham & Phenix Bank of 75 to 80 per cent. of its par value. The market value fluctuated. I don't know exactly because I was not interested in disposing of it at that time.

Q Did you ever ask Mr. Riedell to pay \$100 a share for that stock? A I did not. 30

Q Did you ever tell him that you would take 10 per cent. off if he would buy the stock? A I did not.

Q What was the reason which permitted you to make the transaction of July, 1925? A Which transaction?

Q The transaction with Mr. Riedell concerning this stock? A It was necessary to go to the City of Chicago on a proposed conference toward 40

*Arthur L. Kugel, cross.*

the selling of the Hasselquist pencil patents of which I had the sole rights through a purchase contract. Mr. Riedell was interested with me in the sale of these pencil patents. It was necessary for me to go to Chicago because I knew at that time more about the pencil and the patents  
10 than Mr. Riedell did. There was no corporation formed and it was up to me to further the interests of both of us to lay out the necessary money for the expenditures on that particular trip. I told Mr. Riedell that I did not have the finances and he told me that he was short at that time and he said he was very anxious for me to go, which was evidenced by my meeting him in Chicago. I told him I had the Sheaffer Pen Company stock loan at the Chatham Phenix National Bank. I told him I had it on a \$3,000 loan  
20 which had been reduced to \$2,400 and I asked him if he could make a loan at the Gotham Trust Company which would enable me to get the \$3,000 or enough to go to Chicago to have the conferences. He told me he had made an arrangement and told me to draw a sight draft on him with the stock attached, which I did, for \$2,400 at the Gotham Trust Company.

Q What became of the stock? A It was attached to the draft at the Chatham Phenix Bank and it went to the Gotham Trust Company in Mr. Riedell's name endorsed in blank by me. It had been endorsed in blank, by the way, for five years prior to that.  
30

Q What interest did Mr. Riedell have in this business you were transacting in Chicago at that time? What interest did Mr. Riedell have in the business that he would get a split of whatever the selling price might be? A What do you mean?  
40

*Arthur L. Kugel, cross.*

Q You said that you and Mr. Riedell were interested in these pencil patents and that you had to go to Chicago? A Yes, sir.

Q At that time was Mr. Riedell interested in that pencil business? A He was.

Q In what way? A He was interested in the selling of them as an adviser. 10

Q Was he a stockholder in the same company with you? A There was no company formed at that time.

Q Was he a partner in any business enterprise with you? A He was not a partner, no, sir.

Q In what way was he interested in that particular business? A To this extent; that when the corporation was formed he entered into an agreement with me in July, 1925, to the effect that he would purchase 200 shares of the stock he was to receive out of this corporation, allowing me to hold them in my name for the voting rights in July, 1925. 20

Q Is this agreement explanatory of your relations at that time (handing paper to witness)? A Yes, sir, in part.

Q Is that your signature on it? A It is.

Q And Mr. Riedell's? A It is.

Mr. Roche: Have you any objection to the offer of this agreement dated October 9, 1925? 30

Mr. Unger: No.

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

(Mr. Roche reads Exhibit D. 2.)

Q That is the arrangement that existed between you? A That was just in part pertaining to that particular transaction. 40

*Edward F. Spitz, direct.*

Q That stock of the Kugel Corporation was part of the payment for Mr. Riedell's services as accountant in organizing the Kugel Corporation?

A No, sir, that was to qualify him to be on the board of directors. I wanted him to be on the board of directors; I had an agreement for the purchase of 50 additional shares at that time.

Q I call your attention to the date of the paper which we have just offered in evidence, October 9, 1925? A Yes, sir.

Q The transaction relating to the Sheaffer stock was in July, 1925? A In July. This was after our trip to Chicago when I met him and Mr. McEwen, who was the attorney associated with Arthur Levy, attorney in New York. He attended the conference with me at the Wahl Company.

Q The point I am trying to bring out is relating to any interest Mr. Riedell may have had in the company was four months after the Sheaffer stock transaction? A That's true.

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EDWARD F. SPITZ, sworn in behalf of the plaintiff.

30 *Direct examination by Mr. Unger.*

Q Mr. Spitz, where do you live? A 56 Park avenue, Suffern, New York.

Q You practice law in the City of New York? A I do, with my office at 141 Broadway, New York City.

Q How long have you been a member of the New York Bar? A Admitted in 1908.

Q You are a writer of law books? A I have the satisfaction of being the author of Spitz on

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*Edward F. Spitz, direct.*

conditions and future interests of property, published in 1912, still being used in the law schools of this country, which is a rather exceptional record for a law book.

Q You knew Mr. Kugel and Mr. Riedell, did you? A At what time?

Q In 1925? A I knew Mr. Kugel in 1925. I had known him probably for five years prior thereto. I doubt if I had met Mr. Riedell in 1925. 10

Q When did you first meet Mr. Riedell? A My acquaintance with Mr. Kugel had been in connection with various pencil development propositions with which he had been associated, and one of those propositions which eventuated, so far as my knowledge is concerned, along about in 1925 or 1926, in a certain Kugel Products Corporation proposition, and I represented Mr. Kugel on several legal matters in connection with that company or proposition, and on those matters I had the pleasure of making Mr. Riedell's acquaintance. The situation was that Mr. Riedell— 20

The Court: We don't want to go into all that. 30

Q You met Mr. Riedell as a result of that business? A Yes, and on all those occasions Mr. Riedell was represented by his own attorney, a Mr. Turkel, and I represented Mr. Kugel.

Q Did you know that Mr. Kugel was the owner or had been the owner of 40 shares of stock in the Sheaffer Pen Company? A I knew that Mr. Kugel owned some stock in the Sheaffer Pen Company and acquired that knowledge, if I may state, in this fashion— 40

*Edward F. Spitz, direct.*

The Court: We don't want to know about that.

A (Continuing.) I knew he had it because I had some legal work for him in connection with it.

10 Q In October, 1926, to be exact, having that in mind, did you have any knowledge of the value of that stock which you communicated to Mr. Kugel? A Yes, sir.

Q Did he, as a result of that communication, come to your office? A He came to my office the following day with Mr. Riedell, the defendant in this action.

20 Q Can you give us the date? A On account of press of other matters my recollection is somewhat indistinct, unless it be refreshed by a memorandum from my office records, and I can testify from it. If I may refresh my recollection from it. On October 20, 1927, I telephoned Mr. Kugel. On October 21, 1927, following that telephone conversation, and as a result thereof, Mr. Kugel and Mr. Charles Riedell, the defendant in this action, came to my office. There were present at that conference and at the succeeding conference with the same parties on October 26th, Mr. Kugel, Mr. Riedell, myself and my secretary, Miss Rainess, who is here in court. She was present throughout both conferences.

30 Q Will you tell us what transpired at that first conference? A When Mr. Kugel and Mr. Riedell came into my office we passed the time of day and then I said, "Gentlemen, I would like to communicate with you in regard to your Sheaffer Pen Company stock. There has come to my attention an opportunity to get what I consider to be a very fair price for this stock. I would not be surprised if through certain sources and

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*Edward F. Spitz, direct.*

channels which are open to me but which I do not believe would be open to you, I might get somewhere in the neighborhood of \$400 a share for this stock." I told them, "You understand, I don't guarantee I can get that figure, but I think there is sufficient likelihood of it to warrant your authorizing me to try to get it. If you are interested, the first question for you to decide, gentlemen," I said, "is whether you want to sell the stock at that figure if I can get it, bearing in mind that I can give no guarantee in the matter, and with the understanding that if I can make my sale there will be no expense to you." Thereupon Mr. Riedell and Mr. Kugel discussed the matter in my presence. Mr. Riedell spoke first. He said, "I have a favorable opinion of this stock. I am not anxious to sell it. I have examined the books of the company and the book value is very high. I think it is a good stock to hold, and if we hold it long enough we may get a very good price for it." Then he turned to Mr. Kugel and he said, "Art, what do you think about it?" Mr. Kugel then spoke up. He said, "Charlie, I am inclined to feel like Mr. Spitz." I omitted to state that previously I had stated, "Gentlemen, you know there is always a time to run and always a time to fight. Stocks can't keep on going up for ever. I think if you can get \$400 a share it would be a good time to sell, especially as you need money in your business." Mr. Kugel said, "I agree with Mr. Spitz. I think if we can get \$400 a share it is a good proposition." He said, "You know we need money." Mr. Riedell said, "Well, Art, if you feel that way I don't see how we can lose by trying to let Mr. Spitz sell it for \$400." Then I said, "Gentlemen, do I understand you are will-

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*Edward F. Spitz, direct.*

ing to have me try to sell it for you at \$400 a share?" They spoke, or nodded in acquiescence. Then I said, "I won't do a thing unless I am authorized in writing, because if I offer the stock for sale and somebody accepts it they will look to me for the delivery, not to you. The thing I  
10 want to know is in whose name it stands of record." I said, "Does it stand in your name, Mr. Riedell?" He said, "Yes." Then I said to Mr. Riedell, "I will dictate a letter from you to me authorizing me to put it on sale at \$400 or better, but it must be signed by you, and if anything goes wrong and I make the sale I don't care about your arrangements. I will look to you personally. Is that distinctly understood?" Mr. Riedell said, "Yes." I said, "All right, then, I  
20 will dictate such an authorization."

Q Did you dictate such an authorization? A I thereupon did.

Q Is this the paper which is marked Exhibit P. 5? A That's it.

Q That was signed then, was it? A That was signed and witnessed by my secretary in duplicate, as I recall. One copy was delivered to Mr. Riedell, one copy was delivered to Mr. Kugel and the third copy I retained for my files.

30 Q Do you know why Mr. Kugel received a copy? A I gave him a copy; that is, I saw him receive it.

Q Was there any objection on the part of Mr. Riedell to giving him a copy? A Certainly not.

Q What transpired after that? A Then this transpired which has a direct bearing on the matter here today. After this conversation and when this authorization to me had been signed and delivered by me to Mr. Riedell and Mr. Kugel  
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*Edward F. Spitz, direct.*

and a copy kept for myself, that matter was finished so far as I was concerned and I said, "All right, gentlemen, I will proceed to get busy at once." And I did, by telephone and telegraph. When I made that statement, I think Mr. Kugel rose from his seat. I visualize it very clearly. Mr. Riedell was seated on that side of my desk on the right and Mr. Kugel on the left, and my recollection is that Mr. Kugel rose from his chair and said, "Now, Charlie, now that that is finished I think we ought to have a definite understanding in regard to my interest in the stock in case Mr. Spitz makes a sale." Mr. Riedell hesitated a moment and said something to the effect: "I would like to think it over." But he used this language, I am very positive, "Art, what's the hurry? There may not be any sale. Haven't I always given you a square deal?" And he left it in that fashion. Mr. Kugel said nothing further at that time and we passed the pleasantries of the day and they departed and I assured them I would at once carry out this authorization to sell.

Q Did you after that report the result of your efforts to sell to Mr. Riedell? A I did.

Q When? A On October 21st I sent wires and telephone calls to out of town markets in regard to this stock.

*By the Court.*

Q We are not interested in how you attempted to sell it? A On October 24th I received an offer by telephone from out of town for \$490 a share for this stock. I thereupon telephoned—my recollection is that at that time I spoke to Mr. Riedell. I am not sure whether I spoke also to

*Edward F. Spitz, direct.*

Mr. Kugel. I had Mr. Riedell put on the phone, but I am pretty clear I spoke to Mr. Riedell as part of that telephone conversation and told him I had very good news for him and suggested that they come over to my office and I would make a report that would please them. I don't believe I  
10 mentioned the figure over the telephone because I wanted to talk to them personally about it. As a result of that telephone conversation they came to my office the following day, which was October 26th, and I reported that whereas they had authorized me to sell for \$400 I had not taken advantage of it, although I could have sold for considerably more, for \$490. I said to Mr. Riedell, "I want you to feel the utmost confidence in me. I have a written authorization  
20 from you to sell it at \$400 or better, but I want you to feel perfectly sure that I won't do anything that does not meet with your full approval." I said on that day I felt I could have sold it under the authorization which Mr. Riedell signed, but I had not done it because I wanted him to be at the helm throughout but I told him I recommended trying to get \$500 or more for this stock. I said to him, "I think you have a good chance to do it because I have already received an offer of \$490 by telephone."  
30 There was some discussion between Mr. Riedell and Mr. Kugel and the upshot of it was that they said, "All right, we will give you an opportunity to sell at \$500 or better." I said that I also thought that ought to be in writing and I would want it to be in writing by the owner of record so there would be no question about it, and I dictated a copy of that authorization and to show my care in these matters I annexed a copy of the subsequent letter which I was authorized in to sell,  
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*Edward F. Spitz, direct.*

offering the stock at \$525 for a limited period of time.

*By Mr. Unger.*

Q Is that the letter (handing paper to witness)? A Yes, but the subsequent authorization is not annexed to it. I have a copy of it here. 10

Q Will you produce the copy of the subsequent authorization? A Yes, sir. This pink sheet which I am handing you without the address now written in is the copy of the authorization which was annexed to that paper signed by Mr. Riedell.

Mr. Unger: I offer it in evidence. 20

Mr. Roche: I see no purpose in it; it is immaterial.

Mr. Unger: It is a part of this exhibit.

Mr. Roche: We already have Exhibit P. 6 in the case authorizing the sale by Mr. Spitz at a certain price.

The Court: As I understand the witness, he says when this was signed there was a copy annexed.

The Witness: Yes, sir, and the letter so says. 30

The Court: I will allow it.

(The same is received in evidence and marked Exhibit P. 7.)

(Mr. Unger reads Exhibit P. 7.)

Q Following that letter, and pursuant to that authorization did you sell the stock at \$525 a share or better? A If I may interrupt—I had 40

*Edward F. Spitz, direct.*

not finished with the conversation on the day that this paper was signed.

Q Very well. A Again, after that paper had been signed by Mr. Riedell—

Q Did you immediately offer it over the phone on that day at \$525? A The following day by  
10      telegraph and telephone.

Q Tell us what further transpired? A On  
October 26th, this second authorization was dictated and directed by me to be typewritten in triplicate. It was typewritten in triplicate by my secretary, was signed in triplicate by Mr. Riedell, one copy was given by me to Mr. Riedell, one copy was given by me to Mr. Kugel and one copy was retained by me, as in the other transaction. Again, after that paper had been signed  
20      on October 26th, Mr. Kugel reopened the subject which had been previously mentioned, in this wise: By saying again, "Charlie, I want to say to you once more that I think I should have a definite written understanding about my share in this stock. It looks very much now as though we are going to be able to sell it. Spitz has \$525 now and I think you ought to give me something in writing so that there will be no question of my share in the stock." Mr. Riedell said, "Art, I  
30      think you are in a hurry. Wait until we get some money and then it's time to talk about dividing it. I have always given you a square deal and you know it and you don't need to have any worry." We again passed the time of day and I assured the gentlemen I would put the matter at work, and they left my office.

Q Did you try to sell the stock after that? A Yes, sir. This authorization signed by Mr. Riedell on October 26th had a time limit authorizing me to sell until October 31st at \$525  
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*Edward F. Spitz, direct.*

a share. I did not succeed in getting an offer of \$525 a share on or before October 31st, that time limit. On November 2nd, however, I received by long distance telephone an offer of \$485 a share; that was \$5 less than the prior offer I had gotten a few days before. On receipt of that offer I telephoned Mr. Riedell personally and I said, "Mr. Riedell—

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*By the Court.*

Q Just tell us what happened. What did he do about it? We don't want to go into the negotiations.

Mr. Unger: This is a conversation with Mr. Riedell.

The Court: Yes, but I want him to tell us what resulted.

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A I told him I could get \$485 a share for the stock. I told him I had a right to sell under the original paper which had not expired, but I would not do it unless it was agreeable to him, and what does he wish me to do. He said, "Don't do a thing." The following day I received a letter from Mr. Riedell's attorney dated November 2nd, the same day as I had the conversation in making the report of the offer of \$485 which I have here, which told me in effect not to do anything further in the matter.

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*By Mr. Unger.*

Q Did that letter withdraw the right of sale from you? A The letter speaks for itself.

Q Have you the letter? A Yes, sir.

Mr. Unger: I offer it in evidence.

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*Edward F. Spitz, direct.*

(The same is received in evidence and marked Exhibit P. 8.)

(Mr. Unger reads Exhibit P. 8.)

Q Upon receipt of that letter what did you do?

10 A I got in touch with Mr. Riedell's attorneys and told them that I had not violated any instructions, and I told them I was entitled to compensation and it was up to Mr. Riedell whether he wanted to accept my offer of the sale that I could make, but I was entitled to compensation in view of my courtesy in not selling without any discussion with him, and they paid me for my services very satisfactorily and I delivered to his attorneys the originals in this matter.

20 Q Between the time you delivered back the authorization and the 28th of November, 1927, did you have any talk with Mr. Riedell regarding any arrangement between him and Mr. Kugel? A I had no conversation with Mr. Riedell between those dates that I recall.

Q Did you subsequently communicate with Mr. Riedell by letter? A I did, on November 28, 1927, which was answered.

Mr. Unger: I call for that letter.

30 (The letter is produced by Mr. Roche.)

Q I show you a letter on your letterhead dated November 28, 1927, addressed to Mr. Riedell and ask you if that is the letter to which you refer? A It is.

Mr. Unger: I offer it in evidence.

40 Mr. Roche: I have no objection providing the reply goes in evidence, too. I think Mr. Unger has no objection to the reply.

*Edward F. Spitz, direct.*

(The letter is received in evidence and marked Exhibit P. 9.)

(Mr. Unger reads Exhibit P. 9.)

Q In answer to that letter did you get any communication from Mr. Riedell? A That letter was addressed to Mr. Riedell's attorney. 10

Q No, it was addressed to Mr. Riedell? A I beg your pardon.

Q Did Mr. Riedell answer that letter himself? A Not personally.

Q Who did? A His attorneys, the same gentlemen, Messrs. Strouse & Goldstone, with whom I had settled the compensation for the obtaining of those offers of stock. They answered it. .

Q I show you a letter dated November 30, 1927, signed by Mr. Louis H. Strouse. Is that the letter to which you refer? A Yes, sir. 20

Mr. Unger: I offer it in evidence.

(The same is received in evidence and marked Exhibit P. 10.)

(Mr. Unger reads Exhibit P. 10.)

Q Is that the only reply that was received in answer to this communication of yours? A The only reply. 30

Q Did you answer that letter from Strouse & Goldstone? A I did, and they answered me in reply, but I don't know that it is especially germane.

*By the Court.*

Q They reiterated their contention? A Yes, sir. 40

*Edward F. Spitz, cross.*

*By Mr. Unger.*

Q Did that end your connection with the matter insofar as Mr. Riedell was concerned? Did you have any further communication with him? A No further communication with Mr. Riedell or his attorneys.

10 Q Have you any interest in this suit or in this transaction? A I want to state in answer to that question, in all fairness to the Court and jury, that I have an interest in a case of this character after writing the letter of November 28, 1926, to Mr. Riedell. I was to take up the action as Mr. Kugel's attorney, and when I learned that Mr. Riedell lived in New Jersey I referred the matter to Mr. Unger so that I have an interest in this case, gentlemen, as forward-  
20 ing counsel, and I think it is fair that you gentlemen and the Court should know that.

*Cross examination by Mr. Roche.*

Q You have put in evidence all the letters in this connection, have you?

Mr. Unger: There are several matters we  
30 passed over.

The Court: I don't think this witness is called upon, if there are any letters that have been omitted, to put them in. You may call them to his attention.

Q I call your attention to Exhibit D. 1 for identification and ask you whether that is a letter which you wrote to Mr. Riedell? A There is no question about my having written that letter to  
40 Mr. Riedell.

*Edward F. Spitz, cross.*

Q And this letter to Strouse and Goldstone of November 10, 1927? A Yes, sir, no question about that.

Mr. Roche: I offer in evidence Exhibit D. 1 for identification.

(The same is received in evidence and marked Exhibit D. 1.) 10

Q When you reported the \$485 sale was Mr. Kugel willing to sell at that price? A I didn't report a \$485 sale; I assume you mean a \$485 offer.

Q Yes. A Mr. Kugel was.

Mr. Roche: I offer in evidence letter of November 10, 1927, addressed to Strouse & Goldstone. 20

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

(Mr. Roche reads Exhibits D. 1 and D. 3.)

Q In your letter which I have just read you referred to this stock as stock owned by Mr. Riedell, did you not? A I did and do.

Q There was no question in your mind about it then? A No question that Mr. Riedell was the legal owner of the stock, not at all. The stock was registered in his name and he told me so and my dealings were with him for that reason. 30

Q What have you to say about those papers marked Exhibits P. 5 and P. 6 which were prepared in your office? They were prepared in your office, were they not (handing papers to witness)? A When you ask me what I have to say about those papers, I assume you mean what have I to say about my references in these papers to the 40

*Edward F. Spitz, cross.*

stock being owned by Mr. Riedell, is that what you mean?

10 Q Yes. A I tried to make plain in my direct examination that I was very careful to have my dealings with a man I could put my fingers on legally and had to deliver it and could not deliver—if I had to deliver it I would be legally  
20 responsible as I explained to these gentlemen. If I put it up for sale the out of town houses would look to me and I would be responsible, but I wanted to be in a position so I could hold legally responsible the man who was the legal owner of the stock and before dictating these papers I specifically inquired on that point and told these gentlemen I wanted to know that specifically; namely, that I could look to somebody legally in case I effected a sale and the stock was not produced.

Q To whom would you have paid the money if you had sold the stock and received the money?  
A Mr. Riedell; no question about it.

30 Q Why didn't you, when you prepared the first one of those papers, ask Mr. Riedell to sign an agreement to the effect that Mr. Kugel should share in the proceeds? A I had two reasons which I shall be glad to give you: The first is that so far as this particular transaction is concerned, it had nothing to do with me what arrangements Mr. Riedell and Mr. Kugel had as between themselves except insofar as they might affect the authority of Mr. Riedell to deal with me, and it was to cover that contingency that I twice put in about the stock being owned by Mr. Riedell so there would be no question about it; and secondly, because I assumed that Mr. Riedell was a man of his word and there would be no  
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*Edward F. Spitz, cross.*

occasion so far as I was concerned for me to go into that matter.

Q Then if I understand you correctly, Mr. Kugel had no concern with the stock? A You don't understand me correctly, and I do not see how you can misunderstand me. The first time Mr. Kugel stood up and said, "I think we should have a definite written understanding in case Mr. Spitz makes a sale," and he repeated it, and each time Mr. Riedell assured him he would get a square deal. That was Mr. Riedell's exact language. I am just as positive of it now as I was on the day it happened. 10

Q I think you said the words were, "Charlie, I want a definite written understanding." Is that it? A That's what I said.

Q But such a written understanding was not prepared at that time? A I had nothing to do with that; that was Mr. Kugel's suggestion to Mr. Riedell. 20

Q Your letter of November 28th, about two weeks later, indicates you did have a great deal to do with it later on? A On November 28, 1928, I had so much to do with it that if Mr. Riedell had lived in the State of New York I should have had the privilege of being the attorney of record in this case. But you will note that that letter of November 28th was written after this transaction had been entirely closed between Mr. Riedell and myself. I had delivered to him all the papers in the matter and I acknowledge receipt of the check for my services in that letter, and I think the letter recites why it was sent at that time; namely, to bring the matter to a head. 30

Q Prior to this had you known an alleged claim to a share of the proceeds of the sale of this stock asserted by Mr. Kugel? A Yes, I had. 40

*Miriam Rainess, direct.*

Q Did you ever make that known to Mr. Riedell? A Not prior to November 28th for the reason that I had no occasion to discuss it with Mr. Riedell, but it was made plain in my presence, and I will say emphatically that Mr. Riedell never made any denial of it when Mr. Kugel  
10 raised the question in my presence.

Q Made a denial of what? A Mr. Kugel said, "Charlie, I think it's time now for us to have a definite understanding of my interest in this matter." He said that twice and each time these papers were signed Mr. Riedell never said, "What! You have no interest." He said each time, "Wait until we get the money and I will give you a square deal." Both times he said, "I  
20 will give you a square deal." I am absolutely certain of that.

Q You said that you knew Mr. Kugel owned some Sheaffer stock and therefore communicated with him in regard to its sale? A I did.

Q That stock you knew about was the 30 shares he held in addition to the 40 shares transferred to Mr. Kugel? A Partly so; the 30 shares were the ones I had in connection with some legal work, and he told me at that time he had 40 shares, and I assumed when I telephoned him that  
30 he was still the legal owner of the forty shares.

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MIRIAM RAINESS, sworn in behalf of plaintiff.

*Direct examination by Mr. Unger.*

Q Miss Rainess, you are in the employ of Mr. Spitz who has just left the witness stand? A  
40 Yes, sir.

*Miriam Rainess, direct.*

Q In what capacity? A As his secretary.

Q Were you employed by him in 1925? A I was.

Q Were you also employed by him in October of 1927? A I was.

Q Do you recall an occasion in October, 1927, at which there appeared in his office Mr. Riedell and Mr. Kugel? A I do. 10

Q Have you any way of fixing the date? A To my recollection that was on October 21st that Mr. Kugel and Mr. Riedell came.

Q You have refreshed your recollection before coming here? A Yes, sir.

Q Do you remember the occasion? A Yes, sir.

Q Will you tell us who was there? A On October 21, 1927, Mr. Kugel and Mr. Riedell were at our office and I was present at that time. 20

Q Were you in the same room? A I was.

Q Was Mr. Spitz there? A Yes.

Q Can you tell us what transpired at that time? A Mr. Spitz reported to Mr. Kugel and Mr. Riedell that he believed he could aid them in obtaining a good price for some Sheaffer stock, and at that time he learned that that stock was in the possession of Mr. Riedell. He obtained a written authorization from Mr. Riedell to sell the 40 shares of Sheaffer stock in question if he could obtain \$400 for it. At that time when the negotiations between Mr. Riedell and Mr. Spitz were completed, Mr. Kugel said he believed it was time that they entered into some definite understanding as to what Mr. Kugel was to receive when the stock was sold, and Mr. Riedell replied that there was no need to enter into it at that time; that they would wait until it was sold 30 40

*Miriam Rainess, cross.*

and the money received for it, and that Mr. Riedell would give Mr. Kugel a square deal.

Q You were present when that was said? A Yes.

Q Did you subsequently have those people in your office? A On October 26th.

10 Q Who was present on that occasion? A The same; Mr. Spitz, Mr. Riedell, Mr. Kugel and myself.

Q What happened then? A I believe they came to our office in response to a telephone call from Mr. Spitz. At that time Mr. Spitz informed Mr. Riedell he could have sold it for \$400 but he believed it was rising and that he did not exercise his authorization, and a further agreement was entered into between Mr. Riedell and Mr. Spitz, authorizing Mr. Spitz to sell it for a limited period to October 31st at \$525 a share. As on the previous occasion, Mr. Kugel asked Mr. Riedell for a definite understanding between the two of them regarding what he would receive when the stock was sold, and Mr. Riedell replied substantially the same way. He said, "You know me, Art. I will treat you right; I will give you a square deal when we receive the money."

20 30 Q On either of those occasions did Mr. Riedell state that he had bought the stock outright? A No.

Q Or did he state any words to that effect? A No, he just said that he would give Mr. Kugel a square deal.

*Cross examination by Mr. Roche.*

Q Do you know whether Mr. Riedell and Mr. Kugel came to your office together? A They did.

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*Harry L. Neff, direct.*

Q On each occasion? A I believe on both occasions.

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HARRY L. NEFF, sworn in behalf of plaintiff.

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*Direct examination* by Mr. Unger.

Q What is your business, Mr. Neff? A Life insurance.

Q Do you know Mr. Kugel? A I do.

Q How long have you known him? A I met him, I think, about fifteen years ago.

Q Do you know Mr. Riedell? A I do.

Q How long have you known him? A I believe I met him about 1925.

20

Q You knew both of these gentlemen, I take it, in October, 1927, then? A I did.

Q Did you have occasion during the month of October, 1927, to take lunch with them in New York? A I did.

Q Where was this? A In the restaurant in the Transportation Building.

Q In whose presence were you? A Mr. Kugel.

Q How did you happen to meet Mr. Riedell? 30

A We had just finished our luncheon and started out and Mr. Riedell came in and he said, "I am going to have a fight. Come in and sit with me."

Q Did you overhear all the conversation which took place? A I didn't pay attention to all of it.

Q Did you hear the conversation between Mr. Riedell and Mr. Kugel with respect to stock in the Sheaffer Pen Company? A I did.

40

*Harry L. Neff, direct.*

Q Will you tell us what was said? A I think Mr. Kugel opened the conversation by saying, "I just had a telephone message from Spitz asking me to come over to the office and he had some information for me about the Sheaffer stock. He said, 'Bring your stock with you if you can. I think I can make some money for you.'"

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*By the Court.*

Q Who said that? A Mr. Spitz—

Q He was reporting what Mr. Spitz said? A Yes.

*By Mr. Unger.*

Q He was saying this to Mr. Riedell? A Yes.

20

Q Go on. A Mr. Riedell said, "Well, there may be something doing on that and we will hang onto it." Mr. Kugel said, "It won't do any harm going over and finding what information he's got." He said, "By the way, I told Mr. Spitz about our arrangements and the deal we have made on the Sheaffer stock." Then they went on and had some further conversation and I did not pay much attention to it.

Q You didn't go with them to Mr. Spitz's office? A I did not.

30

Q Subsequently to that time did you have occasion to talk to Mr. Riedell about this matter? A Before that?

Q Afterward. A I think about a week afterward I happened to walk into the same restaurant and Mr. Riedell was there having lunch and I had the tray—that's the way they eat over there—and I happened to sit down at his table. I said, "Charlie, I heard a little of the conversa-

40

*Harry L. Neff, cross.*

tion a few days ago about that Sheaffer stock." I said, "Tell me your story about it." He said, "You are getting into something you don't know anything about. You'll get yourself in trouble." I said, "What do you mean I'll get myself in trouble? I am not interested in it. I heard the first few words." He said, "What did you hear about it?" I said, "You said you will hang onto it." He said, "I didn't say anything of the kind." I said, "I am not going to argue about it. I am not interested in any way." We went on and had dinner and he told me something about the story and I wasn't enough interested at that time to try to remember it. 10

*Cross examination by Mr. Roche.*

Q What insurance company are you with? A I am with the Bankers Life Company at Des Moines, Iowa. 20

Q You are located here? A Yes, sir, in New York City.

Q In what company is Mr. Kugel at the present time? A With the Bankers Life Company.

Q The same as yourself? A Yes, sir.

Q Is he in your office? A He is registered in my office, but his office is in his home at Morris Plains, New Jersey. 30

*By Mr. Unger.*

Q Have you any interest in this controversy?  
A Not at all.

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*Charles M. Riedell, for Plaintiff, direct,*

CHARLES M. RIEDELL, defendant, sworn in  
behalf of plaintiff.

*Direct examination by Mr. Unger.*

Q You are the defendant, Mr. Riedell? A  
10 I am.

Q When did you have transferred to your  
name the 40 shares of stock in the Sheaffer Pen  
Company which you received from Mr. Kugel?  
A In January, 1926.

Q Did you at that time have the stock certi-  
ficate made out to Mr. Kugel, and which had  
been endorsed in blank, surrendered and a new  
one made out to you? A Yes, sir.

Q In your name? A Yes, sir.

Q In January, 1926? A Yes, sir.  
20

Q How long did it continue to remain in your  
name? A It was registered in my name until  
it was sold.

Q When was that? A In January, 1928.

Q Was it in your possession from January,  
1926, until January, 1928? A No, sir.

Q In whose possession was it? A At vari-  
ous times I had loaned the stock to the Kugel  
Corporation to get loans on to help finance the  
corporation, and subsequently the stock came  
30 back to me—

*By the Court.*

Q Outside of being used for collateral it con-  
tinued in your name and under your control? A  
No, sir. I gave the stock to my wife in 1927—  
in the fall of 1927.

*By Mr. Unger.*

Q I asked you when you sold it and you said  
40 January, 1928. A I didn't sell it. That's when

*Charles M. Riedell, for Plaintiff, direct,*

it was sold. It was in my name when it was sold but I didn't have it.

Q Until what time did it stand in your name?

A Until it was sold.

Q When? A In January, 1928.

Q You passed the certificate over to your wife? A I did. 10

Q When was that done? A The actual transfer I believe was in October or November; I'm not sure.

*By the Court.*

Q Let me understand you. In January, 1928, there was a sale of this certificate? A Yes.

Q And at that time it stood in your name on the books of the company? A Yes, sir. 20

Q To whom was it transferred? To your wife or some third party? A To a third party.

Q In other words, it was a direct transfer to a third party? A Yes, sir.

*By Mr. Unger.*

Q When you passed it to your wife in 1927 did you sell it to her? A Yes.

Q An absolute sale? A I would say yes, it was. 30

Q For how much money? A It was for money and other consideration. In July, 1927, was the first time I had made any arrangements with the Kugel corporation to assist in the financing of that corporation. I had made a contract whereby I would finance \$15,000 and take over the management of the Kugel corporation—

Q I want a categorical answer if you can give it to me. How much did your wife pay you for the stock? A I am leading up to that. 40

*Charles M. Riedell, for Plaintiff, direct,*

The Court: If you can't give us the specific amount, don't give it to us. A

(Continuing) He gave me \$5,000 and enabled me to obtain a mortgage on my house for \$10,000, of which she was half owner—

10 Q I want to know what you got for turning the stock over to her?

The Court: As I understand it, \$5,000, and she joined with him in a mortgage on his house.

Q The mortgage was how much? A \$10,000.

Q Then you raised \$10,000 by that transaction? A Yes.

20 Q So that am I right in assuming that the consideration was \$15,000? A No, sir, \$5,000.

Q But you got \$10,000 as a result of her signing a mortgage. A Half of it belongs to her and half of it to me; that was \$10,000 and half was \$5,000.

Q \$10,000 outside of the \$5,000 which she paid you at that time. She gave you nothing more and did nothing more about a mortgage on the house. A She consented to the mortgage being put on the house.

30 Q \$10,000 was raised? A Yes, sir.

Q And you and she owned the property together? A Yes, sir.

Q In both names? A Yes, sir.

Q This was in July, 1927, do I understand? A No, it was in August; August 31, 1927.

Q So that this was prior to October 21, 1927? A Right.

40 Q And you signed, did you not, the paper dated October 21, 1927, which is in evidence and

*Charles M. Riedell, for Plaintiff, direct,*

which says that you at that time owned 40 shares of stock? A Right.

Q Although you say now that you had passed this stock over to your wife in July, 1927? A I didn't pass the actual delivery of the stock to her at that time because the stock was in the bank as collateral. 10

Q So that it was not an actual delivery in August, 1927? A No, sir.

Q Then, subsequently you sold the stock in January, 1928? A I didn't sell it, no, sir.

Q Who did? A My wife.

Q Did you give her permission to do it? A I had nothing to do with it; she did it of her own volition.

Q Did you know that she did it? A I did. 20

Q How much was realized on it?

Mr. Roche: The point is what did he get for the stock. I object to that question.

The Court: He has testified already that he treated this stock as his own subsequent to the time that he says he gave it to his wife. He never made delivery of the certificate.

*By the Court.* 30

Q How much was paid for it when it was transferred by you, as you say, for your wife in January 1928? A By my wife?

*By Mr. Unger.*

Q How much was received for it? A The stock was sold at \$865 a share.

Q That would be \$34,300? A \$34,600. 40

*Charles M. Riedell, cross—re-direct.*

*Cross examination by Mr. Roche.*

Q In connection with this transfer of the stock to Mrs. Riedell, did you make an actual transfer to her? A No, I made a promise of delivery of it. I didn't have the stock in my possession at  
10 the time. She did not acquiesce in my raising a mortgage on my home and objected to it, and in order to induce her so that I could get this money to complete my contract with the Kugel corporation, I told her if she would consent to raising the mortgage and letting me have the money I would give her the Sheaffer stock, which she agreed to.

Q And subsequently the stock certificate was delivered to her? A Yes, sir.

20 Q When? A Either in October or November, 1927.

Q Did you sell it or did she sell it? A She sold the stock. I was in Oklahoma at the time it was sold.

Q Do you know through what office it was sold? A I believe through the Manufacturers Trust Company of New York.

Q Did the proceeds go to you? A No, it was delivered to Mrs. Riedell.

30 Q Has she a separate estate from your estate? A Yes.

Q The house that you live in, you say, stands in your joint names? A Yes, sir, the house is in joint names.

*Re-direct examination by Mr. Unger.*

Q Why did she get the money? A She sold the stock.

40 Q Is that the only reason? A Yes, sir.

*Motion for a Non-suit.*

Q Just simply because she sold it? A Yes, sir.

Q She was not entitled to it, was she? A Yes, sir.

Q When did she become entitled to it? A She became entitled to it when I made good on my promise of delivery.

10

Q When did you make that promise? A I said in October or November, 1927.

Q You agreed with her then to deliver the stock? A I did deliver it.

Q When you delivered the stock what did you get from her outside of the \$5,000 you then had? A Nothing.

Q Who ordered the stock sold in January, 1928? A My wife.

Q Why, if you passed the stock over to her in August, 1927, did you represent that you were the owner on October 26, 1927? A I believed I could deliver it over if it was advantageous to be sold; that she would consent to it.

20

Q Did you at that time tell Mr. Kugel or Mr. Spitz that it was in her possession and her name? A No, sir, I didn't; it wasn't in her possession at that time—not her physical possession.

Q Did you tell them you had made a transfer to her? A No.

30

Q Or agreed to sell it to her? A No, I didn't.

## PLAINTIFF RESTS.

Mr. Roche: If your Honor please, I respectfully submit that there does not appear to be in any of the testimony which has been adduced on the part of the plaintiff any evidence of an agreement existing between this plaintiff and this defendant to divide the

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*Motion for a Non-suit.*

proceeds of this stock. On the contrary, it appears from the testimony of the witnesses we have heard that there was an attempt on the part of the plaintiff to cause the defendant to make such an agreement and that the defendant continually refused to make it. As  
 10 I said in the beginning, if a binding agreement of this kind is made it must be in writing. The Statute of Frauds specifically provides that any agreement not to be performed within a year shall be in writing.

The Court: I don't see anything here that could not be performed within a year. It is true it took longer than a year, but that is not the test; the test is whether it cannot be performed.

20 Mr. Roche: I agree with your Honor that it might have been performed the next day.

The Court: Yes, and therefore it does not come within the Statute of Frauds.

Mr. Roche: I asked the plaintiff when it was to be sold and at what price and by whom it was to be sold, and he could not answer those questions. I said, "Supposing you and Mr. Riedell could not agree?" He  
 30 said, "We were such good friends at that time that we would agree." Certainly that agreement is so indefinite even on his own statement, that there can be nothing binding on this defendant.

Furthermore, the only evidence of the price obtained for the stock is what Mr. Riedell has just given us. He got \$5,000 for for the stock from Mrs. Riedell. What she got, it seems to me, is of no consequence in  
 40 this case. I submit that the agreement is

*Motion for a Non-suit.*

altogether too indefinite in character to permit the case to go to the jury and I move for a non-suit.

The Court. (After argument.) What bothers me is whether this suit is for breach of contract or whether it is a suit in conversion.

10

Mr. Unger: It may be either. There are two counts in the case.

The Court: There is a breach of contract, which is the first count; the second count is an accounting for money had and received.

Mr. Unger: The third paragraph of the first count in itself would support a claim for a conversion of the stock if the stock was our stock or if we had an interest in it at that time. But we have a clear claim on the allegations for the breach of the contract because the contract, although verbal, is made out clearly.

20

The Court: As far as the claim made out by the plaintiff is concerned, he says that this stock was deposited as collateral and he does not make any claim that he ever gave up all interest in the collateral. He does testify that he made a new agreement. I think that would be sufficient to defeat the motion for non-suit at the present time. I will deny the motion.

30

Adjourned until tomorrow, Thursday, February 27, 1930, at ten o'clock A. M.

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*Motion for a Non-suit.*

SECOND DAY.

Thursday, February 27, 1930.

Continued pursuant to adjournment.

Present, counsel as before stated.

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Mr. Unger: If your Honor please, I find that I neglected to offer in evidence a stipulation which ought to appear on my case.

The Court: What is it?

Mr. Unger: It is a stipulation of some of the facts without prejudice to the rights of either party to object to its admission in evidence on the ground that it is irrelevant and immaterial.

20

The Court: Read it.

30

Mr. Unger: "It is hereby stipulated and agreed between the attorneys for the respective parties to the above entitled cause that the market prices of the stock of W. A. Sheaffer Pen Company were as follows, on the following dates: July 15, 1925, no market value at this time; January 30, 1926, \$78.00; October 27, 1926, \$86.50; November 24, 1926, \$87.00; January 10, 1927, \$99.00; January 14, 1927, \$97.00; February 7, 1927, \$100.00; March 4, 1927, \$101.00 ex div.; May, 1927, \$220.00; October, 1927, \$400.00; January, 1928, \$865.00."

Mr. Roche: I would like to renew my motion for a non-suit. I want to call your Honor's attention to the fact that the answer reserves the right to move to strike out paragraphs 1, 2, 3 and 4 of the first count, and further that those paragraphs or some

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*Motion for a Non-suit.*

of them disclose no cause of action against this defendant.

Mr. Unger: The motion is not timely.

The Court: I suppose that is a matter that should have been disposed of before we tried the plaintiff's case.

Mr. Roche: It is in the pleadings and I wanted to call your Honor's attention to the fact that it was there.

The ground of my motion is that there is no evidence produced by the plaintiff of a binding contract. There is no count for trover and conversion. I submit that the plaintiff has utterly failed to make out a contract either written or oral to bind this defendant.

The Court: I indicated last night my views. I think that if there was not a contract proved; that is, if we assume the plaintiff's story to be the true story; if that did not prove a contract, then we would be left in the position that the stock should be held by the defendant as collateral for this \$4,000 loan because the plaintiff's story is that he delivered it as security and there was no subsequent disposition of the loan other than the arrangement he testifies was made as to the time of the disposal of the stock. That would be within a reasonable time. As to the price, Mr. Unger has indicated that they did come to an understanding, and after they came to an understanding as to price it was repudiated by the defendant here. I think that disposes of that question, where the parties have an indefinite contract, but the parties have relieved the indefiniteness, and the law always tries to carry out the inten-

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*Motion for a Non-suit.*

10 tion of the parties. I am still of the opinion that the first count, if it stands, will have to stand as an action of conversion; the second count is an action for money had and received, and I think the plaintiff will have to elect whether he will stand on trover and conversion. I will deny the motion.

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

Exception noted as ground of appeal.

The Court: I don't want to foreclose you, Mr. Unger, if you feel that this is not trover and conversion.

20 Mr. Unger: Your Honor said I would have to elect. My thought was that I am entitled to keep the last count in the case because the last count is for money had and received, which is one of the counts at common law.

30 The Court: (After argument) I think you will have to elect at the end of the whole case, Mr. Unger. I don't think you have to elect now because you are entitled to know what proof you have before you. What I had in mind was whether you had a view contrary to mine that this was a suit for a breach of contract.

Mr. Unger: I think your Honor is quite right that my first count is a count for conversion and my second one is for money had and received under the deposit of the stock.

*Charles M. Riedell, for Defendant, direct.*

CHARLES M. RIEDELL, defendant, recalled  
in his own behalf.

*Direct examination by Mr. Roche.*

Q Mr. Riedell, where do you reside? A 249  
Prospect street, East Orange. 10

Q What is your business? A Public ac-  
countant and auditing.

Q Where is your office? A 217 Broadway,  
New York City.

Q Have you any other business offices be-  
sides that one? A I have, in Washington and  
Oklahoma City.

Q Do you recall when you first became ac-  
quainted with the plaintiff Kugel? A Several  
months prior to July, 1925. 20

Q State how you became acquainted with  
him. A He was referred to me by my brother  
who advised me that Mr. Kugel was promoting  
a pencil proposition and wanted my advice and  
assistance in the preparation of forming or or-  
ganizing a corporation for that purpose.

Q Do you mean assistance in your profes-  
sional capacity? A As an accountant.

Q What were your business relations with the  
plaintiff in July, 1925? A Up to the time of  
the stock transactions they were purely profes-  
sional relations. 30

Q Now, state briefly what happened with re-  
gard to the purchase of this Sheaffer Pen Com-  
pany stock by you. A Mr. Kugel, about a week  
prior to July 14th, approached me to purchase  
40 shares of Sheaffer stock, and told me at the  
time that he had 40 shares of stock as collateral  
in the Chatham & Phenix Bank; that the bank  
had called him on his loan and he was trying to  
sell the stock so as to avoid any losses, and he 40

*Charles M. Riedell, for Defendant, direct.*

offered me the stock at that time at \$100 a share. I declined to buy it because I said I would prefer to invest in marketable securities because that was the trouble with those investments, that at any time you wanted to realize money on it you couldn't. A week later, on July 14th, he again approached me on the subject and he said, "Mr. Riedell, I want you to buy this stock. I will sell it to you at a ten per cent. discount." Those were the very words he used. I said, "I am not interested in buying this stock." He said, "It will help me a whole lot. I need the money." He said, "If I don't pick up this stock I am going to lose it. The bank will sell me out." After some persuasion I decided to buy it from him. I had him draw a draft on me and had him have his bank forward it to my bank and it would be paid. He immediately asked me for a payment of \$600 on account and I said, "Wait until the stock comes in and I will give you a payment."

*By the Court.*

Q What were the terms on which you agreed to buy? A For \$3,600, 40 shares of stock at \$100 par value with 10 per cent. discount, which made it \$3,600.

*By Mr. Roche.*

Q These are your check and draft? A This is the check which I gave him for \$600 on July 16th; this is a draft paid by the bank for the \$2,400 when the stock arrived in the bank. On July 23rd I paid him the balance of \$600, making the total of \$3,600.

The Court: What is the date of the draft?

*Charles M. Riedell, for Defendant, direct.*

Mr. Roche: July 15, 1925. I offer the two checks and the draft as one exhibit.

(The same are received in evidence and marked Exhibit D. 4.)

Q Do you know when the Kugel corporation was organized? A I believe it was organized in Washington in November, 1925. 10

Q Who were the organizers of the company, do you know? A There was a Washington group which Mr. Kugel had gotten together to finance his corporation, to organize the corporation in Washington under the laws of the State of Delaware.

Q Were you interested in promoting the company at that time? A No, sir.

Q Will you please look at these corporate books and see whether you can find the certificate of incorporation and the names of the incorporators? 20

The Court: What do you want to show? That he wasn't one of them?

Mr. Roche: Yes, sir.

The Court: I don't suppose it is claimed that he was one of the incorporators. 30

*By the Court.*

Q Were you one of the incorporators? A No, sir.

*By Mr. Roche.*

Q And you were not interested in promoting the corporation? A No, sir.

Q What became of the Sheaffer stock which you purchased? A The stock was received by 40

*Charles M. Riedell, for Defendant, direct.*

the bank for paying the draft and they held the stock down there for safe keeping with some other securities that they had of mine, until January, 1926. At that time I forwarded it to the Sheaffer Pen Company for transfer to me.

10 Q Did you make inquiry as to the value of Sheaffer stock? A In January, 1926, I did. At that time when I bought it Mr. Kugel submitted a statement showing the condition of the company on which basis I placed the value of the stock.

Q I show you this stipulation which has been offered in evidence and ask you to glance at the market values of the stock. Just read the first few market values and the dates.

20 The Court: What is the use of that? They have already been read to the jury.

Mr. Roche: It is leading to my next question.

The Court: Ask it.

Q What was the value in January, 1926?

The Court: 78.

30 Q When you discovered that what did you do? A I spoke to Mr. Kugel about it and told him that I felt I had paid him too much for the stock; that I had paid him 90 and that I was advised by the Sheaffer Company that the stock was selling at around \$78 a share.

Q What did he say to that? A He said, "You got the stock. You will never lose any money on it."

40 Q Did he ever offer to make good to you any losses you had on the stock? A No, sir.

*Charles M. Riedell, for Defendant, direct.*

Q Did Mr. Kugel, the plaintiff, ask you to visit his attorney, Mr. Spitz, early in October, 1927? A He asked me several times to do it. The first time he asked me to go there I declined to go because I was not interested in the matter, and later he asked me to go up and I went up with him. He said he wanted to find out from Mr. Spitz what was doing with the stock. 10

Q What stock? A The Sheaffer stock. So I went up with him to Mr. Spitz's office. When we got there Mr. Spitz—

Q Was that October 21, 1927? A Yes, sir, October 21st. When I got there Mr. Spitz elaborated very enthusiastically on the advantage of selling the stock and mentioned at the time that he did not think it was good business on our part for me to be carrying the stock in a competitive organization. I said, "Mr. Spitz, this stock does not belong to the Kugel corporation." He said, "I understand that and there is a time when to sell the stock." After we were talking about five or ten minutes I asked him, "What is this wonderful price you are talking about for the stock?" He said, "Well, I believe I can get you \$350 a share." I said, "From what I have learned of the company's earnings in 1926, which was very large, they could pay a dividend of that much and never miss it, so I don't think it is a good price." He said, "Let me act for you. I can probably get \$400 for it." I said, "If you can get \$400 I may be willing to do so." Then he drew up this option. 20 30

Q This paper marked Exhibit P. 5, dated October 21, 1927, is what you then signed? A Yes.

Q Did you say at that meeting on October 21st say to Mr. Spitz or to Mr. Kugel, "We will hang onto that stock. We will make a lot of 40

*Charles M. Riedell, for Defendant, direct.*

money"? A I did not. There was no mention made by Mr. Kugel at that time with relation to any interest he had in that stock. I told Mr. Spitz that it was my stock and the Kugel Corporation had nothing to do with it.

10 Q Didn't Mr. Kugel at that time ask you for a definite understanding with regard to his interest in that stock? A He did not.

Q Did Mr. Spitz at that time ask for that? A No, sir.

Q Did you give a copy of the paper marked Exhibit P. 5, which you have just looked at, to the plaintiff Kugel? A No, sir, I didn't know that he had a copy of it.

20 Q Did you at that time make an agreement with Kugel as to the selling price of this stock? A No, sir.

Q Did you say at that meeting, "There is no hurry. You know I have always given you a square deal"? A No, sir.

Q Were any words had to that effect? A There was no mention made about it at all. Mr. Spitz was interested in getting me to sell the stock and what commission he would get on the selling of the stock.

30 Q Did you go to that meeting at Mr. Kugel's request? A I did.

Q Was it prearranged between you? A No, it was not.

Q How did it come about? A We happened to be out to lunch together and he asked me to go up and see Mr. Spitz; that Mr. Spitz had some information as to the Sheaffer stock; that there was something doing in the company and that he had worked there and he was interested in that situation.

40

*Charles M. Riedell, for Defendant, direct.*

Q Did you go to Mr. Spitz's office again? A I did, on October 26th. On that date I received a letter from the W. A. Sheaffer Pen Company offering to buy the stock, and advising me that the market price on it was \$400 bid and \$440 asked. Upon receiving this letter I immediately called Mr. Spitz on the telephone and made an appointment to see him, as I had received a letter from Sheaffer that I would like to show him. So I went up to Mr. Spitz that afternoon, I believe it was about two o'clock, alone. When I got there Mr. Kugel was there and I asked him, "What are you doing here when you ought to be out selling pencils?" He said, "I have some business to take up with Mr. Spitz." Then I discussed with Mr. Spitz this letter and showed him the letter I had received from the Sheaffer Pen Company and I told him my opinion was right relative to the value of this stock. I then told him in view of this that it would be necessary for us to change our arrangement and that I thought if we got \$550 or \$525 for the stock within the next ten days I would sell it, and if not, I would hold the stock until such time as I thought it would be more advantageous to sell it.

Q Did you at that meeting withdraw or cancel the authorization, Exhibit P. 5? A I did, and a new arrangement was drawn up.

Q That is, Exhibit P. 6? A Yes, sir.

Q Have you it there? Is it before you? A No.

Q This is the second authorization, marked Exhibit P. 6 (handing paper to witness). Is that the paper that you signed? A Yes, sir. At that time Mr. Spitz asked me if I would deliver the stock to him in the event we had a sale. I said no; that I would forward the stock

*Charles M. Riedell, for Defendant, direct.*

through my bank and pay him his commission after I had received the money in the event that he was successful in putting over the sale within the allotted time, October 31, 1927.

Q In other words, that paper is dated October 26th and had until the 31st to run for him to sell the stock? A Yes, sir. On October 31st at five  
10 P. M. I called Mr. Spitz's office on the telephone. I had heard nothing from him in the meantime and his secretary answered. I asked for Mr. Spitz and she said he was not there and I told her to tell Mr. Spitz it was five o'clock, October 31st, and I had heard nothing from him in relation to the sale of the Sheaffer stock, and the matter was ended as far as I was concerned at that time. The next morning Mr. Spitz called  
20 me on the telephone and told me he was unable to get \$525; that the best offer he could get was \$490. I believe that was the amount. He said, "I think you ought to do something for me for the work I have done in trying to sell this stock." I said, "Our original arrangement was that if you did not sell the stock you would not get any commission." He said, "I could have sold it for \$400." I said, "I recognize that you were working on the stock. I don't want anybody to work for  
30 nothing. What do you want for your trouble?" He said, "I think you ought to give me \$500." I said, "All right. I can't give it to you today. I will give you a check next week for \$500." He said, "Make it a check dated in advance and I will be around in half an hour for the check." I said, "All right." At the expiration of half an hour Mr. Spitz did not come to my office. He called me on the telephone and told me he had changed his mind about the arrangement; that  
40 he wanted a check immediately for \$750 or he

*Charles M. Riedell, for Defendant, direct.*

wanted a check dated ahead for the next week for \$800. I said I thought as a professional man he ought to keep his word he had made and keep the agreement with me on the settlement, and I told him I thought it was unfair not to live up to the agreement and he said he would sue me if I wouldn't pay him. I said, "Very well, I will turn the matter over to my attorneys." 10

Q Who were they? A Strouse & Goldstone. But on October 26th at that meeting after Mr. Spitz had drawn this second arrangement and I had signed it and I was about to leave the office, then Mr. Kugel for the first time said to me, "What are you going to do for me on the Sheaffer stock?"

Q What did you say to that? A I said, "What do you mean by that?" He said, "Well, I think you ought to take care of me. You are making a large profit on that stock and it was through me that you got it. I think you ought to take care of me." He said, "You told me you would divide with me if you sold it." I said, "What are you trying to do? Are you trying to stuff words down my throat?" Mr. Spitz said, "I see where we are going to have a lawsuit." I said, "Well, I never had a better one." I left the office and as I was leaving I said, "But I don't see how I can get the costs out of you." 20 30

Q Had Mr. Kugel mentioned to you anything about the stock? A No, sir.

Q Did he ever mention it again? A Our relations practically ceased about that time, and the next thing I heard was that my attorney, Mr. Strouse, had settled with Mr. Spitz for \$500, and the last thing I heard was a letter from Mr. Spitz which I turned over to Mr. Strouse. 40

*Charles M. Riedell, for Defendant, direct.*

Q After October 26, 1927, did you make an appointment with Mr. Kugel for the following Saturday? A No, sir.

Q Was anything said to you about an appointment for the following Saturday? A No, sir, I left the office under very much surprise to see  
10 the position he had taken in the matter.

Q When did you actually deliver this stock to Mrs. Riedell? A I believe it was November 7th; I am not sure of the date. It was about November 7th.

Q Was that 1927? A 1927, yes, sir.

Q How do you fix the time? A I had withdrawn the stock from the bank in order to have it available for delivery in the event the stock was sold, and I had discussed with Mrs. Riedell  
20 about selling it and she was satisfied if that price could be obtained at that time to sell it, and I held the stock until after my negotiations were concluded with Mr. Spitz, and then I turned the stock over to Mrs. Riedell and made the actual delivery.

Q You had promised her that stock before that date? A I did, in August, 1927.

Q What happened in August, 1927? A In August, 1927, I had—or practically in July, 1927  
30—I had a discussion with Mr. Kugel about the continuation and the management of the Kugel Corporation. Mr. Kugel in June had fallen down and fractured his kneecap. He had had full management of the Kugel Corporation up to that time.

Q Had you in the meantime acquired an interest in the Kugel Corporation? A I had invested some money, yes, sir, and I had induced  
40 several of my clients to invest some money, but I

*Charles M. Riedell, for Defendant, direct.*

had only a small portion. He had 75 per cent. of the common stock.

Q Then what happened? A After Mr. Kugel was injured in June, 1927, he was laid up at home unable to attend to the business. It made it necessary for me in order to protect the interests of the corporation to supervise the production and management of the corporation. I had complained to Mr. Kugel several times that the product that was being manufactured was not right, and I was convinced of this after I had taken the matter under my own supervision, and I requested Mr. Kugel to shut down the plant and not proceed any further until proper pencils could be made. In fact, I discharged his— 10

The Court I don't think we ought to go into the management of the corporation. I don't think we are interested in that. 20

Q Did Mrs. Riedell advance you some money at that time? A Yes. In my final argument with Mr. Kugel which I was leading up to, your Honor—

The Court: We are not interested in it.

A (Continuing.) I agreed to furnish \$15,000. 30

Q Tell us what you did with Mrs. Riedell with reference to that money? A I agreed to furnish \$15,000 to the Kugel Corporation and finance it to that extent. I had raised \$5,000 of my own money and wanted to raise \$5,000 or \$10,000 on the mortgage on the house. Mrs. Riedell would not agree to it and I offered to raise the money on the mortgage and give her the 40 shares of stock which I owned at that time in the Sheaffer Pen Company. 40

*Charles M. Riedell, for Defendant, direct.*

Q To whom did your home belong? A It was in both names; Mrs. Riedell and my name.

Q Joint ownership? A Yes.

Q Have you the checks which were paid over on that mortgage transaction? A Yes, sir.

10 Q And the bank book? A Yes, sir.

Mr. Roche: Have you any objection to these being offered in evidence?

Mr. Unger: These are advances made to the Kugel Corporation?

Mr. Roche: Yes.

20 Mr. Unger: I think they are immaterial; they are checks made by Mr. Riedell to the Kugel Corporation.

The Court: Do you want to show that the moneys raised by him went into the Kugel Corporation?

Mr. Roche: Yes, sir.

The Court: I will allow it.

*By the Court.*

30 Q This was the money that you raised to put into the Kugel Corporation? A Yes, sir.

Mr. Roche: I offer together the bank book of Sadie C. Riedel in the First National Bank, East Orange, New Jersey, and six checks signed by Mrs. Charles M. Riedell, aggregating \$9,500.

The Court: Very well.

40 (The same are received in evidence and marked Exhibits D. 5a, D. 5b, D. 5c, D. 5d, D. 5e and D. 5f.)

*Charles M. Riedell, for Defendant, direct.*

*By Mr. Roche.*

Q I call your attention to the entry on August 31st of this account of \$9,627.50. Can you explain that entry? A That was the amount of money received from the Fidelity Union Trust Company less the interest and cost charges for the mortgage. 10

*By the Court.*

Q And that was entered to her credit and then she drew the checks? A Yes, sir.

*By Mr. Roche.*

Q Did you pay the difference of the cost of getting the mortgage? A Yes, sir.

Q So that how much was actually paid over to the Kugel Corporation out of this money? A \$9,500. 20

Q Any more than that? A She advanced me some cash a short time before that.

Q How much? A \$500.

Q Did that go into the Kugel Corporation also? A Yes, sir.

Q When did your friendly business relations with Mr. Kugel cease? A In October.

Q Of what year? A 1927. 30

Q What happened then? A Mr. Kugel's arrangement at that time—I agreed to put the money into the corporation so that he was to take full charge of the sales management and production of the factory and draw a salary. He failed to produce the orders and failed to produce the pencil as he agreed to.

The Court: Are we interested in this? There is no claim that the relationship con- 40

*Charles M. Riedell, for Defendant, direct.*

tinued after this period in 1927; in the fall of 1927.

Mr. Unger: We don't claim any relationship after that.

10 Q Did you ever receive a promissory note from Mr. Kugel in connection with the purchase of this Sheaffer Pen Company stock by you? A No, sir.

Q I show you Exhibit P. 2, which purports to be a \$4,000 note to your order signed by Mr. Kugel. Did you ever see that before? A I know of no relations regarding any notes with Mr. Kugel.

*By the Court.*

20 Q That isn't the question. The question is did you ever see that note before? A No, sir.

Q You never received it? A No, sir.

*By Mr. Roche.*

Q Something was said about a pencil notation on the side of that note. Is there a pencil notation on it? A Yes, sir.

30 Q Did you make that pencil notation on it? A Not that I know of; I never saw the note before yesterday.

Q Is it in your handwriting? A No, sir.

Q What is that pencil notation? A It says 1/11/26.

Q That is not your handwriting? A No, sir.

Q Did you have a note before that one in this connection? A No, sir.

40 Q Did Mr. Kugel ever tell you that he owned 30 additional shares of Sheaffer Pen Company stock? A He said that he had 30 shares but that the Sheaffer Pen Company was holding it

*Charles M. Riedell, for Defendant, cross.*

for moneys due them and that his account then was in dispute. He asked me to stop at Fort Madison on one of my trips to the West to try to straighten out this account for him, which I did.

Q Did you at that time agree to finance the corporation? A No, sir. 10

Q Did Mr. Kugel request payment of money due him from the Kugel Corporation? A There was no money there to pay him.

Q There was no money in the Kugel Corporation? A No, sir.

Q Did you agree, in consideration of Kugel's leaving money in the Kugel Corporation, to divide the proceeds with him that were to be realized from the sale of the 40 shares which you had purchased? A No, sir. 20

Q I show you Exhibits P. 3 and P. 4, stock quotations on Sheaffer Pen Company's stock and ask you if you gave those to Mr. Kugel? A I do not recall giving him these cards. I received numbers of these cards from the bankers showing quotations on the stock, and Mr. Kugel had access to the papers in the office, and he may have gotten them out of the files somewhere, but I do not recall ever giving him those notices.

Q Did you consult with Mr. Kugel, the plaintiff, from time to time on the market quotations of this stock? A I did not consult with him. I told him on several occasions that I had not as yet been able to see the stock come up to the price that I had paid for it. 30

*Cross examination by Mr. Unger.*

Q You say that this stock was offered to you in July at a 10 per cent. discount? A Yes, sir. 40

*Charles M. Riedell, for Defendant, cross.*

Q July, 1925? A Yes, sir.

Q And that at first you refused to buy it and later on when you were again asked you consented to buy it for \$3,600, is that right? A Yes, sir, I consented to buy it for \$3,600.

10 Q You say that at that time you paid it by honoring a \$2,400 draft and by giving him two checks of \$600 each? A That's right.

Q Do you say that you were not interested in the Kugel Corporation at that time? A There was no Kugel Corporation at that time.

Q One was being organized? A No, sir.

Q You knew that one was being organized? A Not in July.

20 Q You had already been consulting with Mr. Kugel about the formation of the company? A It was in the promotion stage only.

Q You were going to be interested in the company when it was formed? A No, sir, I told him definitely at that time when he first came to my office that if he expected me to put any money into the proposition I would not do so.

Q When did you say that? A After the Washington interests had organized the company.

Q That was in November? A Yes, sir.

30 Q And between July and November you had talked the matter over with Mr. Kugel? A We had conferences at various times during that period.

Q And you became a stockholder subsequently? A Yes, sir.

Q You became its first vice-president? A I think that was done in Washington at his request.

40 Q I don't care where it was done. A I am not sure.

*Charles M. Riedell, for Defendant, cross.*

Q Look at the stock book before you and see whether that isn't so. A Yes, I was elected the first vice-president.

Q And then you were made treasurer, too, weren't you? A No, sir.

Q Look at this. Look at the stock certificates and see whether you didn't sign them as treasurer. A That was later. 10

Q But you did become treasurer? A That was after the Washington group had withdrawn from the proposition.

Q I am not asking you when it was. A Yes, I was treasurer.

Q And then you put your money in it? A Yes, sir.

Q And you had your money in it from that time on? A Yes, sir. 20

Q In July, 1925, when you bought this stock, the stock certificate was turned over to you, was it? A No, sir, it went to the bank.

Q That is, you allowed it to remain in the bank in order to secure money that you borrowed at the bank? A I allowed it to remain there for any further loans I made.

Q It was your loan that it was there as collateral for? A It was personal loans in my own business. 30

Q It was pledged in the bank to secure a loan for the Kugel Corporation, wasn't it, after that? A Yes, sir.

Q There is no doubt about that, is there? A No, sir.

Q Then you don't mean it was in the bank to secure your personal loan? A It was not pledged for the Kugel Corporation until afterward. 40

*Charles M. Riedell, for Defendant, cross.*

Q It was pledged for the Kugel Corporation. The bank held it as collateral for the Kugel Corporation? A Yes, sir.

Q The certificate was in your name at that time? A Yes, sir.

10 Q This, as I understand it, was in January, 1926? A Yes, sir.

Q Why, if you bought this stock in July, 1925, did you wait until January, 1926, to put it in your name? A Because I left the stock downstairs and in about January the dividends would be paid on the stock.

Q I want to know why you waited until six months before you bought the stock? A Just that I left it downstairs in the bank.

Q You had bought the stock? A Yes, sir.

20 Q Was there any reason why you should not put it in your name after you had bought it? A Only pressure of business.

Q And your pressure of business was sufficient to prevent you from getting that valuable piece of paper transferred? A Yes, I had them hold it in trust for me.

Q You knew that dividends were being declared on that stock? A Not until the following year.

30 Q You knew that Mr. Kugel collected the dividends on that stock? A With my consent.

Q Why did you allow him to take the dividend if you owned the stock? A Because when I transferred the stock with Sheaffer they wrote back and asked me whether Mr. Kugel was to get the dividend and if so to get a letter from him authorizing them to pay the dividend, and he pleaded with me and told me he needed the money, and in view of the fact that he had paid interest in the Chatham Phenix National Bank,

40

*Charles M. Riedell, for Defendant, cross.*

and in order to help him at that time, I let him have the dividends.

Q You say he paid interest in the Chatham Phenix National Bank when? A Until July, 1925, when I took over the stock.

Q This dividend was payable in July, 1926?

A For the year 1925. 10

Q If he paid up the interest in the bank only until July, 1925, and you gave him \$3,600 in July, 1925, why weren't you entitled to the dividend? A I was entitled to it.

Q Why didn't you ask for it? A I did.

Q And upon his plea that he needed the money you let him have it? A Yes, sir.

Q That amounted to how much money? A I believe around \$280.

Q Although you had bought the stock outright you let him have the dividend? A Yes, sir. 20

*By the Court.*

Q When was that dividend payable? A About January, 1926; I don't know exactly.

*By Mr. Unger.*

Q And you voluntarily gave him that money, is that right? A Yes, sir. 30

Q Although in July, 1925, you had hated to pay \$3,600. A Yes, sir.

Q In January, 1926, did you tell him you were transferring it to yourself? A Yes, sir.

Q Why? A I called his attention to the fact that the Sheaffer Company wrote me—

Q Why did you tell him in January, 1926, that you were transferring the stock to yourself? A So that I could get the dividends on it. 40

*Charles M. Riedell, for Defendant, cross.*

Q Why did you have to tell him? A I didn't have to tell him.

Q Why did you? A I told him because I had got this letter from Sheaffer about the value of the stock.

10 Q I know that, but in order for you to get the dividends all you had to do was transfer the stock in your own name, wasn't it? A Right, which I did.

Q If you owned the stock and had bought it, why did you have to tell him in January, 1926, that you had put it in your own name? A I told him after they had written for him to give me an order in order for the dividends to be made to me. I didn't ask him before I sent the stock. It was only when Sheaffer wrote me that there was a dividend payable on the stock which was declared before I transferred the stock.

20 Q He got that dividend, didn't he? A Not before the transfer.

Q But he got it? A Yes.

Q Why, if you bought the stock from him in July, 1925, did you have to tell him you were transferring it to your own name in January, 1926? A I told you.

30 Q You know that when stock is transferred the dividend is paid to the record owner on the books? A Right.

Q What I want to know is why you had to tell him in January, 1926, that you were transferring the stock to your name if you, in fact, owned it. Why did you have to tell him that? A I didn't have to tell him until afterward.

Q What do you mean by afterward? A When I had heard from Sheaffer.

40 Q When was it? A In January. They asked me for an order from Kugel in order that the dividend would be paid to me.

*Charles M. Riedell, for Defendant, cross.*

Q And that is your best answer? A Yes.

Q You wrote a letter telling him that? A Sheaffer.

Q You sent Kugel a letter. A I don't recall.

Q You sent him a copy of the letter to Sheaffer? A Yes, sir. 10

Q And you wrote him that he would know what was happening to the stock? A It was to get the dividend.

Q If you put it in your own name he couldn't get the dividend, could he? A Yes, sir, because the stock was in his name when the dividend was declared.

Q He had gotten the January dividend? A No, sir. 20

Q It had been declared? A Yes, sir, to stockholders as of January 31st.

Q And you wrote to the Sheaffer Corporation at the end of January, 1926, is that right?

A I wrote them the middle of January or the end of January to transfer the stock to me.

Q Which was it? The middle or the end? A About the end of January.

Q January 27, 1926? A Yes, sir.

Q And you sent him a copy of the letter which you wrote to the Sheaffer Pen Company, didn't you? A Yes, sir. 30

Q And you wrote him a letter enclosing him a copy of that? A Yes, I wrote him. This is a copy of the letter.

Q And you signed both of them? A Yes, sir.

Q And January, 1926, is the time he testified yesterday that he made an arrangement that the note was not to be renewed but was to be car- 40

*Charles M. Riedell, for Defendant, cross.*

ried on without a renewal? A January 13th was the date.

Q I said January, 1926. A I said January 13th.

Q It was in January? A January 13th.

10 Q You may have it your way. That's the time that you sent him copies of that letter to show him that you had put the stock in your name? A Yes, sir.

Q And you did that so that he would know exactly what was happening to this stock? A No, sir, so that I would get the dividends.

Q Is there a word in these letters about the dividends? A No, they wrote me about the dividends after they had gotten that letter.

20 Q So that when that letter was written it had nothing whatever to do with the dividends? A Not at that time.

Mr. Unger: I offer the letters in evidence.

(The same are received in evidence and marked Exhibits P. 11 and P. 12.)

(Mr. Unger reads Exhibits P. 11 and P. 12.)

30 Q I understand you to say that in January, 1926, you complained to Mr. Kugel that this stock was selling for \$78 a share, or only \$78 a share. A I told him about it at the time I got the reply from the Sheaffer Company.

Q Have you the reply from the Sheaffer Pen Company to that letter? A I think I have.

Q Is this the letter of January 30, 1926? A Yes, sir.

40 Q And that, I take it, is the answer to the letter which you wrote to the Sheaffer Pen Company? A Yes, sir.

*Charles M. Riedell, for Defendant, cross.*

Q You reported to Mr. Kugel, did you, that the stock was \$78 a share, or that there had been offers of \$78 a share, and he told you to keep the stock because you would make money. That was a good prophecy, wasn't it? A It wasn't for two years.

Q From \$78 to \$875 is a pretty good prophecy. He asked you to go to Mr. Spitz several times, and you say the reason he gave was that he wanted to find out from Mr. Spitz what was doing? A Yes, sir. 10

Q If he wanted to find out from Mr. Spitz what was doing, why did you have to go along? A He used that as an excuse.

Q You were busy? A Yes, sir; I refused to go up.

Q On October 21, 1927, you went there for the first time? A Yes, sir. 20

Q And I understand that you went there as a result of the meeting you had in the restaurant? A No, I would not say that.

Q Didn't you say you had met him at lunch? A We had been to lunch.

Q That is a restaurant, isn't it? A Yes.

Q Then you do say so? A Yes.

Q Did you meet him there accidentally? A We went out to lunch together. 30

Q Was a man named Neff there? A At that time? No, sir.

Q You know a man by the name of Mr. Neff? A Yes, sir, I know him.

Q You heard him here testifying yesterday? A Yes, sir.

Q Was it Thompson's Restaurant in New York? A No, sir.

Q Whose restaurant was it? A I believe it was a little French restaurant on Vesey street. 40

*Charles M. Riedell, for Defendant, cross.*

Q You say that Mr. Neff was not there? A Neff was at a later one—the lunch Neff refers to was at a later date; it wasn't on that date.

Q There was some time that you met Kugel— A We often dined together.

Q Do you remember the occasion on which  
10 you dined with Neff and Kugel, whenever it was, when Mr. Kugel said that Spitz wanted to see you and him about this stock? A I think Mr. Kugel asked me to go up there before we went to lunch. He said, "While we are out to lunch today we will drop up to see Mr. Spitz."

Q Do you recall discussing it while Mr. Neff was there? A No, sir.

Q Do you remember Mr. Kugel telling you what Mr. Spitz had told you about that stock?  
20 A No, sir.

Q In any event, you went with Mr. Kugel to Mr. Spitz's office? A Yes, sir.

Q And this was the time you agreed to sell for \$400 or better? A Yes, sir.

Q That was October 21, 1927? A Yes, sir.

Q Had you in the meantime, between January, 1926, when you got this letter from the Sheaffer Pen Company, and October, 1927, when you were in Mr. Spitz's office, made any investigation into the affairs of the Sheaffer Pen Company to find out what the stock was worth? A  
30 Yes, sir. I didn't make any special investigation, but I received financial statements from them showing the earnings.

Q And you knew that the company was in such fine shape that it could pay a dividend of as much as you were authorizing Mr. Spitz to sell for? A I felt so, yes, sir; I thought so.

Q You mean that the stock was worth somewhere around \$700? A \$500.  
40

*Charles M. Riedell, for Defendant, cross.*

Q You said you thought it could pay a dividend of \$300 or \$400. A About that amount.

Q So that when you signed the authorization you were fully familiar with the value of the Sheaffer Pen Company stock? A I wasn't fully familiar with it, no.

Q You were familiar to that extent? A 10  
Yes, sir.

Q It had no market at that time, had it? A Yes, it had. I received offers at various times from the brokers.

Q These cards produced here, were those offers? A Yes, sir.

Q You did get these cards from the brokers, didn't you? A Yes.

Q And in December, 1926, it appears? A 20  
Yes.

Q These are addressed to you at 1819 Broadway. Is that your office? A I moved to 217.

Q That was not the office of the Kugel Corporation, was it? A Yes, we had adjoining offices together.

Q You think, do you, or at least you have intimated, that Mr. Kugel took these out of your office and held onto them? A Yes, sir.

Q Until he brought them here yesterday? 30  
A Yes, sir.

Q That he stole them? A No, sir, I didn't say he stole them.

Q He just picked on these two papers to bring them here yesterday? A I have a number of others.

Q Probably the reason you have the others, may I suggest to you, is that this showed that the stock was going up and that you read them to him? A I don't recall it.

*Charles M. Riedell, for Defendant, cross.*

Q Is there any reason why you should not have shown them to him? A There is no reason why.

Q He says that those cards were shown to him as an indication on your part that the stock was going up all the time, is that so? A  
10 I don't admit that I showed him those cards; I don't know how he got them.

Q But you may have shown them? A I may have.

Q Why would you show them to him in December, 1926, if you had no interest in the Sheaffer Pen Company? A Because I wanted him to know that I had not made a profitable investment. The stock was below 90.

Q This says 96 or 98? A Yes.

Q Did you show them to him for the purpose  
20 of showing him that you had gotten a lemon or a bargain? A I showed him that it was below what I had paid for it, and I mentioned that maybe I could get my money out of it yet.

Q You say that Mr. Spitz got you in there and was interested only in making a commission out of you? A Yes.

Q How do you reconcile that statement when you know he could have sold it for \$400 and he didn't do it? A He didn't have the offer then.  
30

Q He reported to you a \$485 offer? A That was later.

Q He told you he had an offer of \$400 or more? A He told me at that time it was \$350.

Q He told you \$490, didn't he? A That I believe was after October 26th.

Q And although he had it in his power at one time to sell your stock out under that authorization of \$400 or better, he didn't do it, did he? A No.  
40

*Charles M. Riedell, for Defendant, cross.*

Q Is that the reason you paid him the \$500?

A I paid him the \$500 because he asked for it for the trouble he had been put to in the matter.

Q And his failure to sell you out or sell the stock at \$400 resulted in your selling it for a great deal more money, and you were glad of that, weren't you? A Yes, sir. 10

Q Now do I understand you to say that there was no talk at all, either on October 21, 1927, or October 26, 1927, while you were in his office about any division of this money? A Only on October 26th.

Q There was talk on that day, was there? A Yes, sir.

Q And that was mentioned, as I understand it, by Mr. Kugel? A Yes. 20

Q When he made that statement on October 26, 1927, did you then and there say that you had bought this stock outright in July, 1925? A Yes, sir; and I told him I had paid him more for it than it was worth.

Q You said that at that time? A Yes, sir.

Q You didn't tell us on direct examination? A Yes, sir.

Q And you are answering yes because I reminded you of it? A I remember distinctly telling him I had paid more for it than it was worth. 30

Q What did you say Kugel said to you on that occasion? A I asked him what he meant by that.

Q What do you say he said to you? A He said, "What are you going to do for me on this stock?"

Q Is that all? A I said, "What do you mean by that?" 40

*Charles M. Riedell, for Defendant, cross.*

Q Yes. A He said, "You promised to divide with me if you made any profits on the stock."

Q He charged you with that at that time? A Yes, sir.

Q And that made you very mad? A Yes, sir; I denied it.

10 Q You saw half of your profits slipping away at that time? A No, sir; it was not my arrangement at all.

Q You were very anxious that Mr. Spitz should not sell your stock? A No, I made a new arrangement with him on October 26th.

Q Although he had an authorization to sell for \$500 or better you withdrew it? A No, sir; it expired October 31st.

20 Q Did you see the letter written by your lawyers withdrawing all rights from Mr. Spitz to dispose of this stock? A I did.

Q Did you sanction that? A My attorney handled it and he handled it with the point in mind that Mr. Spitz was still trying to maintain that the first option was still in effect.

Q Did you authorize them to send that letter cancelling his authority to do anything further for you? A I retained them to handle my interests in the matter.

30 Q Did you know that they had done it? A They sent me a copy of the letter.

Q It was done with your authority, then? A Yes.

Q So that you were anxious to get the authority to sell the stock out of Mr. Spitz's hands? A It automatically came out of his hands.

Q Whether it was automatic or not, you told him not to take any further steps? A Yes, sir.

40 Q And the reason was that you feared that if the money came into his hands that there

*Charles M. Riedell, for Defendant, cross.*

might be a division between Kugel and yourself at that time? A No, sir.

Q You wanted to get it out of that office, didn't you? A No, sir; because before we had this argument I told Mr. Spitz that the stock would be forwarded through the bank and I would pay him his commissions. 10

Q You were so anxious to get it out of Mr. Spitz's hands that you were willing to pay \$500? A No, sir. I believe he was sincere in the matter when he told me he had expenses, and I paid him for it.

Q Then you do believe he was sincere? A I do.

Q As early as January, 1926, you had gone to the office of the Sheaffer Pen Company in Fort Madison, Iowa, hadn't you? A No, sir. 20

Q When did you go there? A I think it was later in that year.

Q It was about that time, wasn't it? A I think it was later in the year; I don't remember the exact dates. I think it was in the summer or in May, or somewhere around that time; I am not sure of the dates.

Q Do you remember getting this letter of January 16, 1926, from Mr. Kugel (handing paper to witness)? A I recall a letter something like that. 30

Q That letter is addressed to you, isn't it? A Yes.

Q You got it, didn't you? A I believe so, yes.

Q That's all I want to know. A Yes.

Q Do you notice in there that you would stop at Fort Madison, Iowa, about the 20th? A Yes. 40

*Charles M. Riedell, for Defendant, cross.*

Q Did you go there? A I don't think I stopped that trip; I think it was later that I went.

Q When did you go there? A I think it was later in the year; I don't remember the exact date.

10 Q Did you examine the Sheaffer Pen Company's books? A No, sir; I went to call on Mr. Polla, who took me to the office of the Sheaffer Pen Company, and there we tried to straighten out the differences on Mr. Kugel's account.

Q Is this your handwriting on the back of that letter? A Yes.

Q They are your figures, aren't they? A Yes.

20 Q What are those figures in reference to? A I don't know.

Q They are your figures? A Just a memorandum. The letter has been in my pocket a long time.

Q They are your figures? A Yes, sir.

Q In your handwriting? A Yes, sir.

Q In pencil? A Yes, sir.

30 Mr. Unger: I ask that it be marked for identification.

(The same is marked Exhibit P. 13 for identification.)

Mr. Unger: May I put the letter and the figures in evidence at this time?

Objected to as entirely immaterial and irrelevant.

40 Mr. Unger: I don't want to put the letter in. I offer to put the figures in in order to furnish a standard of comparison with the figures on the notes.

*Charles M. Riedell, for Defendant, cross.*

The Court: At the present time there is no proof as to what they are.

Mr. Unger: He says they are his figures and I want to put them in in order to furnish a standard of comparison between them and another disputed handwriting. Those figures he admits are his. Those are admittedly genuine. 10

The Court: You mean you want to show his handwriting?

Mr. Unger: Yes, sir.

The Court: I will allow it for that purpose.

(Exhibit P. 13 for identification is received in evidence and marked Exhibit P. 13.) 20

Q I understand you to say there was no \$4,000 note in the transaction in the beginning?

A Not that I know of.

Q Is it possible that you have forgotten about it? A No, sir.

Q You have not forgotten about it? A No, sir.

Q Is it possible that there was a note given to you in July, 1925, by Mr. Kugel for \$4,000? A Not that I know of. 30

Q Do you say now that no note was given to you? A Not that I know of; I do not know of any note given to me at that time.

Q That is not what I am asking you. I am asking you whether you say now that no note was given you by Mr. Kugel for \$4,000 in July, 1925? A I do not know of any note at that time.

Q Why do you evade the question? A I do not evade the question. 40

*Charles M. Riedell, for Defendant, cross.*

Q I am asking you again more definitely whether or not Kugel gave you a \$4,000 note in July, 1925? A No, he did not.

Q He did not? A No, sir; he did not.

Q Did you hand him the note in October, 1925, which he destroyed? A I did not.

10 Q Was there a \$400 bonus or interest charge made to him in connection with this Sheaffer Pen Company stock? A No, sir; that was a 10 per cent. discount on the purchase of the stock.

Q You didn't exact from him any promise to pay you \$400? A No, sir.

Q And there is no doubt that that was an out-and-out sale? A Yes, sir.

20 Q So that there would be no necessity for a note at that time? A No, sir.

Q You have seen this note, have you? A Yes, sir.

Q It is signed by Mr. Kugel except where it has been torn off? A Yes, sir.

Q You heard him testify that this note was prepared on the typewriter in your office? A I believe so.

Q Is that so? A He said so.

30 Q Is that so? A I believe so; I don't recall definitely if he did.

Q It is so that this note was typewritten in your office? A I don't know of its being typewritten in my office—no, it is not.

Q Why don't you say so? A I am saying so.

Q You don't know whether it was typewritten there or not? A I don't know whether it was.

Q Is it possible that it was? A It is possible.

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*Charles M. Riedell, for Defendant, re-direct.*

Q Would there be any reason why it should be typewritten in your office? A Not that I know of. Mr. Kugel had access to my office at that time.

Q You think that may be he got the note from your office? A I don't know.

Q Did you have a note book in the office where notes are contained—promissory notes? A I believe so. 10

Q Where you can tear notes out of a book? A Yes.

Q You will observe that this note has been torn out from a book? A Yes, sir.

Q Did you have notes upon which the printing was like that? A Yes.

Q Whom did you buy your stationery from? A I bought it from various concerns. 20

Q Will you name some? A George F. Merrick Press and Arcade Printing Company.

Q That's where the note came from, isn't it, the Arcade Printing Company? A Yes, certainly.

*Re-direct examination by Mr. Roche.*

Q How much money did you put into the Kugel Corporation? 30

The Court: How is that important?

Mr. Roche: Mr. Unger brought that out. He said at that time you put money into the Kugel Corporation and he said yes. I am asking him how much.

The Court: At that time?

Mr. Roche: Yes, sir.

The Court: What time do you refer to? 40

*Arthur L. Kugel, in rebuttal, direct.*

Mr. Roche: About the time he became first vice-president and treasurer of the company.

*By the Court.*

10 Q How much money did you put in? A I put in about \$5,000.

*By Mr. Roche.*

Q Did you put more in later? A Yes, sir.

20 Q Did you say that you recognized this note as being on some particular stationery? A I know I had notes something like that; I don't know whether it is the same piece of paper. I notice it is the Arcade stationery. It was around the corner from where we had our office. It is printed small in the corner (indicating).

Q And that's how you know it comes from there? A Yes, sir.

Q You are sure you never had that note in your possession? A Yes, sir.

Q But you are not sure whether or not the note was prepared by him or someone else in your office? A I am not sure about that.

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30 ARTHUR L. KUGEL, plaintiff, recalled in rebuttal.

*Direct examination by Mr. Unger.*

Q Mr. Kugel, did you tell Mr. Riedell that the bank in which you had your \$2,400 loan had threatened to sell out your stock? A No, sir.

40 Q Did you in Mr. Spitz's office on October 26, 1927, say for the first time to Mr. Riedell, "What are you going to do for me—

*Edward F. Spitz, in rebuttal, direct—cross.*

The Court: That has all been gone over. He has testified as to what he said and he has testified that he said it before.

Mr. Unger: I won't press that.

Cross examination waived.

DEFENDANT RESTS.

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EDWARD F. SPITZ, recalled in rebuttal.

*Direct examination* by Mr. Unger.

Q Mr. Spitz, did Mr. Riedell come to your office alone on October 26, 1927, and find Kugel there and express surprise and ask him why he wasn't tending to the pencil business, or something of that kind? A Not in accordance with my recollection. My recollection is—

20

*By the Court.*

Q Just answer categorically. A No.

*Cross examination* by Mr. Roche.

Q Mr. Spitz, I show you Exhibit P. 9, your letter to Mr. Riedell of November 28th, in which you say, "You will recall that Mr. Kugel had this stock pledged as security for a \$2,400 loan, and that when the bank requested him to take up the loan you offered to assist him by replacing the loan in your bank." Did you write that? A I wrote the entire letter, yes, sir.

30

Q Your information on that point came from Mr. Riedell—

Mr. Unger: I object. This is not cross examination on rebuttal.

40

*Edward F. Spitz, in rebuttal, cross.*

Mr. Roche: As to what Mr. Kugel, the preceding witness, just testified to. He denied the bank had called his loan.

Mr. Unger: I have not asked this witness anything like that on rebuttal.

10 The Court: I think you are entitled to recall him for further cross examination if you wish to.

Mr. Roche: I will not press it.

PLAINTIFF RESTS IN REBUTTAL.

Mr. Roche sums up for defendant.

Mr. Unger sums up for plaintiff.

20 The Court: I take it you have elected to stand on the first count, Mr. Unger?

Mr. Unger: Yes, sir.

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*Charge to Jury.*

**CHARGE.**

The Court charges the jury as follows:

SMITH, J.

Members of the Jury:

This suit is brought by the plaintiff to recover damages from the defendant for what he claims to be an unlawful act on the part of the defendant. He charges the defendant with what we call conversion; that is, the defendant took this stock originally as collateral for a loan and then converted it to his own use, not to discharge the loan; in other words, that the defendant took it for himself instead of treating it as collateral to the loan. The plaintiff asks damages for that unlawful conversion of the stock. 10

The claim which the plaintiff makes is in reference to these forty shares of W. A. Sheaffer Pen Company stock. It is not disputed that the stock was in the name and was the property of the plaintiff and was delivered by the plaintiff to the defendant in July, 1925, I think it was. That much is admitted. The claim is over what that transaction was and whether or not the parties made a subsequent agreement or agreements in reference to the stock. 20

The facts, as I say, are in dispute, and under the law the case is submitted to you for your determination of the true facts in the case and you do that from the evidence as you hear it here on the witness stand and from the various exhibits that are introduced in evidence. You should not rely upon my reference to the testimony in determining the facts because the responsibility is yours to find those facts. My duty is to tell you the legal rules which govern you in that determination. 30 40

*Charge to Jury.*

In order to recover, the plaintiff must sustain his case. He comes here asking at your hands a verdict for the payment of money, and in order to be entitled to that he must sustain his case by a fair preponderance of the evidence; that is, the evidence must weigh in his favor.

10 If he fails in this he is not entitled to your verdict.

As I have said, you judge the facts, and in determining the facts you are the judges of the credibility of the testimony of the witnesses in the case. You decide what you are going to believe or disbelieve in reference to their testimony. In doing that, you may consider their interest in the outcome of the suit; whether or not what they say is probable or improbable;

20 the way they impress you as far as their testimony is concerned.

The defendant says here that he was approached by the plaintiff a short time after they had established some business relationships with reference to some work the defendant says he was doing in this company which the plaintiff was promoting. He was an accountant. He says that the plaintiff asked him to buy these forty shares of the stock of the Sheaffer Pen Company which the plaintiff said he had. The

30 plaintiff wanted par for it. He said that he needed money; that the bank where it was placed as collateral was calling the loan and that he had to make some disposition of it; that he refused it at first but finally the arrangement was made that the defendant was to buy it at par less ten per cent., which was \$3,600, and he paid for it in several payments. He says he paid for it by a draft which was drawn by the plaintiff's bank on the defendant's bank of

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*Charge to Jury.*

\$2,400 on July 15, 1925, and that was the amount of the loan, as I understand it, that this stock was up as collateral for on a loan made by the plaintiff at his bank; that the defendant paid the balance of the \$3,600 by one check dated January 16, 1925, of \$600 and another check dated July 23, 1925, of \$600, and he says that that was an out and out purchase of the stock. 10

Of course, if that was the transaction, that settles the case then and there and the plaintiff cannot recover. But the claim made here by the plaintiff is entirely different. He says that he borrowed and received \$3,600—the same \$3,600 referred to by the defendant—but that it was a loan of \$3,600 that he made at this time, and that he gave for that loan a note of \$4,000; that the difference was to be for interest and bonus, and that he gave the forty shares of stock endorsed in blank as collateral security for the repayment of that loan; that that loan was renewed. It was a three months' note, as I recall it, and when that three months' note came due he gave the defendant a new note and destroyed the original; that when the new note became due on January 13, 1926, the defendant said to him, "There is no need of renewing these notes. I will give you this back and we will let the matter stand. When you pay off this loan I will give you back the stock." I think that is the language which the plaintiff claims was used in the transaction at that time; in other words, the stock was going to be continued to be held by the defendant as collateral for the loan. 20

The plaintiff produces here a note which is important evidence for you to consider. The plaintiff claims that that is the note that had been in the possession of the defendant and re- 30

*Charge to Jury.*

turned to him. The defendant claims he never saw this note; that he never had it in his possession, and as far as he is concerned, it is unconnected with him.

10 The plaintiff testifies that in October and November there was some money due him from the Kugel corporation in which they were both interested. We are not concerned with the affairs of that corporation; they are not in direct issue in this case; that is why I have endeavored to keep that testimony out as far as possible, but it is a matter for you to consider, of course. The plaintiff's claim as to what took place in October and November, 1926, is important. The plaintiff said he wanted to get some commissions from the Kugel company that  
20 were due him and that the company was not then able to pay it; that the defendant was then doing the financing or was doing some financing for the corporation. The plaintiff says that he wanted to get the money to take up some other shares of the Sheaffer Pen Company; that he asked for this money and Mr. Riedell said he did not want to do that; that he did not want to have to pay that, and he made the suggestion that the plaintiff let his thirty shares go. The  
30 plaintiff says that there was then a new understanding arrived at with regard to this stock which he says was then on deposit as collateral with the defendant. He says that the defendant told him that he would give him a square deal on this stock; that he would carry the loan and would split with the plaintiff when the stock was sold and would deduct the \$4,000, which was the amount of the loan, and divide the balance with the plaintiff. No time was specified as to  
40 when the sale was to be made and the price was

*Charge to Jury.*

to be a price mutually agreed upon. He says that that was the understanding then and there entered into between them. That, in substance, is what he claims was the arrangement that was then entered into in consideration for his doing what he said he did in accordance with this claim against the Kugel corporation.

10

I do not need to review all the circumstances of the case and go over the testimony. It is largely presented here as bearing upon the probability of the truthfulness or untruthfulness of the respective claims of the parties. It is to put before you the claims and the circumstances surrounding the transaction for your determination on the issue involved.

Where no time was specified as to when the stock should be sold, of course, the law says that that should be within a reasonable time. The price, they say, was to be agreed upon between them, and it is claimed by the plaintiff that they did arrive at an agreement in October, 1927. There was first one price and then another price agreed upon, and that that was followed by a repudiation of the agreement by the defendant; that is, that the defendant, after the prices had been suggested or agreed upon, said he would go and put the matter in written shape. It is claimed that the defendant did not do that; that it was followed by a demand of the plaintiff to have that put in shape setting forth his claim, and repudiation of that claim, and then by a divestment of the defendant of his ownership or holding of this stock. The plaintiff therefore claims that there was a conversion of this stock by the defendant.

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To make a conversion of the stock there must be a change of the relationship of the holding

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*Charge to Jury.*

under the agreement under which the stock is held; a repudiation followed by a divestment of himself of the stock would be a conversion of the stock if he was not entitled to do it.

10 It is claimed that the defendant asserted the ownership in himself as against the plaintiff's right and then disposed of the stock to his wife. I think the claim is that he gave it to her, although he had agreed to give it to her before that. An agreement would not be a divestment of the stock because he retained control over it, but he turned it over to his wife about November 7, 1927, and this repudiation was on November 30, 1927, following the letter of November 28, 1927, and that was followed by the actual sale of the stock in January, 1928. The plaintiff  
20 therefore says he made out a case of conversion; that is, that the defendant has taken this stock and converted it to his own use instead of applying it to the use for which it was delivered to him or to which it was agreed to be subjected. That use is claimed to be that \$4,000 was to be deducted from the proceeds of sale and that the balance should be divided equally between them.

30 These are the issues which you have before you for your consideration and upon which you should render your verdict. If you find that the plaintiff has sustained his case by the fair preponderance of the evidence; that he has established a conversion and established his rights in this stock, then you will return a verdict in his favor; if not, you will return a verdict for the defendant.

40 If your verdict is for the plaintiff you will then have to consider the question of damages. The highest intermediate value of this stock between the time of conversion, if you find that

*Charge to Jury.*

it was converted, and a reasonable time after the plaintiff has received notice of the conversion, is the price which you should fix on that stock; that is, the value of the stock. Let me repeat that. The highest intermediate value between the time of conversion and a reasonable time after the plaintiff has received notice of that conversion, and the reasonable time is what is reasonable under the circumstances from the facts as you find them. Sales of the stock are evidence of its value, and there is a stipulation here on the question of the value of this stock giving you certain dates. One sale of the stock proved is to the defendant's wife in January, 1928, of \$865. The nearest other value is fixed as of October, 1927, of \$400. Those figures are per share. If you should take the \$865 price per share and decide that that was a reasonable time after the notice of conversion, you would figure forty times \$865, making \$34,600. Subtracting \$4,000 would be \$30,600, and one-half would be \$15,300; that is provided you find that this second arrangement was made. Then to that you would add interest from May 28, 1929, the date of the beginning of the suit, to date, on the amount you find due. That interest should be figured in and one verdict rendered by you.

The reason for the rule of taking the highest intermediate value between the time of conversion and a reasonable time after the plaintiff has received notice of that conversion is that it is applied to something which fluctuates in value. I might illustrate it in this way: If you deposited some stock with a bank or somebody as security for ninety days or one hundred twenty days and there would be a big slump in the market, and they say, "We don't want to

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*Exceptions to Charge.*

take any chances now," and they sell out, then the ordinary rule of conversion, which would be the market value of the thing at the time it is converted, would not be fair. You can readily see that, because the man would be sold out of the stock at the low price. So the law says he shall have a reasonable time after he knows of the conversion to protect himself, and they fix the highest price from the time of the conversion up to a reasonable time after notice of the conversion; in other words, they do that so that he can go out and buy that stock and he would have as his damages the difference between that and the highest value, because whatever he collected from the defendant would help him in purchasing the stock. In short, it is a fairer method of compensating him.

Defendant's counsel prays an exception to that portion of the Court's charge wherein the Court laid down the rule of damages as charged.

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that portion of the Court's charge wherein the Court charged that this is an action in conversion, whereas it appears from the complaint that it is an action on contract.

Exception noted as ground of appeal.

*Exhibit P. 1.***EXHIBIT P. 1.****PROTEST WAIVED.**

Take this off before presenting Draft.

\$2400— New York July 14 1925  
 At sight Pay to the Order of A. L. Kugel 10  
 Twenty four hundred dollars  
 Value received and charge the same to account of  
 A. L. Kugel

To Chas M. Riedell  
 No. Gotham Natl Bank Dr.  
 Mfgers Trust Co. N Y C  
 40 shs W. A. Sheaffer Pen Co. Com—Atta

Endorsement—A. L. Kugel  
 Stamp—4 PAID 4 N Jul 14 1925 T—Chatham 20  
 Phenix Natl. Bank and Trust Co., New York,  
 N. Y. H. R. Johnston Cashier H

30

40

*Exhibit P. 2.*

**EXHIBIT P. 2.**

Exhibit P. 3.

EXHIBIT P. 3

\$4,000.00  
 NINETY DAYS --  
 the order of  
 FOUR THOUSAND  
 Payable at  
 Value received  
 No.  
CENTRAL BANK No. 501 THE ARCADE

We are quoting the market on the above stock  
 92½ bid, 94 offered. Inquiries solicited.

Respectfully,  
 PYNCHON & CO.  
 Trading Department.

We shall be pleased to receive your inquiries 30  
 regarding Listed and Unlisted Securities in all  
 markets.

\$4,000.00

New York, October 13th,

EXPZ  
SAK

1925

NINETY DAYS

after date I promise to pay to

the order of

CHARLES M. RIEDELL

FOUR THOUSAND and no/100

D

Payable at

1819 BROADWAY, NEW YORK CITY

Value received

No.

Due 11/1/26

Arthur L. P.

*Exhibit P. 4.*

**EXHIBIT P. 4.**

Stamp—Chicago Ill.  
 PYNCHON & COMPANY  
 Investment Department  
 209 S. La Salle Street  
 CHICAGO

10

Mr. Chas. N. Riedell  
 217  
~~1819~~, Bdwy  
 New York City, N. Y.

PYNCHON & COMPANY  
 Member of the New York & Chicago  
 Stock Exchanges  
 209 S. La Salle St., Chicago

20

December 20, 1926

**SHEAFFER PEN COMPANY**

Common Stock

We are quoting the market on the above stock  
 96 bid, 98 offered. Inquiries solicited.

Respectfully,  
 PYNCHON & CO.

Trading Department

30

*We shall be pleased to receive your inquiries re-  
 garding Listed and Unlisted Securities in all  
 markets.*

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*Exhibit P. 5.*

**EXHIBIT P. 5.**

October 21st, 1927.

Edward F. Spitz, Esq.  
141 Broadway  
New York City

10

Dear Mr. Spitz:

I hereby represent that I am the owner of forty (40) shares of the common stock of W. A. Scheaffer Pen Company. For a period of thirty days from date, I authorize you to sell this stock at a price of not less than \$400. a share; and in the event that you obtain such price, agree to furnish you said stock for delivery to consummate the sale thereof at said price.

In the event that you are unable to effect a sale of said stock at a figure of not less than \$400. a share, it is understood that I am to be under no financial obligation to you whatever.

20

In the event that you should be able to effect a sale of said stock at \$400. a share, I agree to pay you \$500. for your services in the matter.

At said price of \$400. a share, there would be a total price of \$16,000 received for said forty (40) shares of stock. If you are able to obtain for me anything in excess of said sum of \$16,000 for said stock, I agree to pay you 10% of any such excess, in addition to said sum of \$500.

30

You are not authorized to effect any such sale of said stock at less than said sum of \$16,000.

Very truly yours,

CHARLES M RIEDELL

M. M. Rainess

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*Exhibits P. 6, P. 7.*

**EXHIBIT P. 6.**

October 26th, 1927.

Mr. Edward F. Spitz  
141 Broadway  
New York City

10

Dear Mr. Spitz:

I herewith authorize the sending by you of a letter in the form hereto annexed offering for sale until 5 P. M. of October 31st, 1927, of forty (40) shares of common stock of W. A. Scheaffer Pen Co. owned by me, at \$525. a share.

20

In the event that a sale is effected by you at this figure, you are to receive from me for your services in this matter the sum of \$1050. Should the stock be sent to the purchasers with sight draft attached, I will give you my check in that sum at the time of transmission of stock.

Very truly yours,

CHARLES M RIEDELL

**EXHIBIT P. 7.**

October 26th, 1927.

30

Swift, Langill & Henke  
137 So. La Salle Street  
Chicago, Ill.

Gentlemen:

I am now in a position to advise that a client has authorized me to offer for sale forty (40) shares of common stock of W. A. Sheaffer Pen Co. at a price of \$525. a share, such offer to remain open for acceptance until 5 P. M., October 31st.

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*Exhibit P. 8.*

If this offer is accepted by you within that period, let me have your instructions as to whether you are in a position to close this sale through a representation in New York City, or whether you wish the stock sent to Chicago with a sight draft attached.

Very truly yours,

10

EFS:MMR  
AIR MAIL

**EXHIBIT P. 8.****STROUSE & GOLDSTONE**

Attorneys at Law  
271 Madison Avenue  
New York

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Louis H. Strouse  
Lazarus Goldstone

November 2nd, 1927.

E. F. Spitz, Esq.,  
141 Broadway,  
New York City, N. Y.

30

Dear Sir:—

Mr. Charles M. Riedell has consulted me in respect of your conference with him this morning concerning the stock of W. H. Scheaffer Pen Company.

In view of previous correspondence and of your talk with Mr. Riedell I, acting upon his instructions, hereby withdraw from you any right of sale or negotiation in respect of the sale of said stock.

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*Exhibit P. 9.*

By virtue of your failure to comply with the agreement made with Mr. Riedell, you are hereby instructed to have no further transactions or negotiations in respect thereto.

Very truly yours,

10

LOUIS H STROUSE

APPROVED:—

CHARLES M RIEDELL.

**EXHIBIT P. 9.**

EDWARD F. SPITZ

Counsellor at Law

141 Broadway

New York

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November 28th, 1927

Charles M. Riedell, Esq.

217 Broadway

New York City

Dear Mr. Riedell:

30 Since there appears to be no immediate prospect of your disposing of the forty shares of W. A. Sheaffer Pen Company common stock turned over to you by Mr. Kugel, we think it only fair to have a definitive understanding in regard to this matter.

40 You will recall that Mr. Kugel had this stock pledged as security for a \$2,400 loan, and that when the bank requested him to take up the loan, you offered to assist him by replacing the loan in your bank. That you did this and obtained a loan of \$3,000 upon the stock and with this paid off the \$2,400 and gave Mr. Kugel \$600. That

*Exhibit P. 9.*

subsequently you gave Mr. Kugel a further \$600. That you told him at the time that you were glad to aid him, and that any time he might be in a position to repay you the amount of money laid out by you in the transaction, you would be glad to turn back the stock to him. That when subsequently, as a result of your failure to provide funds for the Kugel Corporation, Mr. Kugel was compelled to consider the disposal of the thirty additional shares of this W. A. Sheaffer Pen Company stock held by him, you told him to go ahead and sell such thirty shares on the understanding that you would give him one-half of any profit derived on the forty shares previously turned over by him to you. 10

Mr. Kugel tells me that you did not deny this arrangement subsequently, in the presence of a witness. And I recall that on the two occasions when he asked you in my presence to confirm it, you first stated that you wished to think the matter over. And that when the matter was again brought up, you said, as I recall, "Let us first get the money for the stock, and then it will be time enough to talk about this". 20

The advisability of your continuing to hold the stock is something as to which you necessarily are the controlling judge, in the circumstances. However, Mr. Kugel thinks it only fair to have your position as to any profits derived from this stock, whenever disposed of, a matter of record, while all these facts and circumstances in connection with this arrangement for a division of such profits are still fresh in mind. 30

I would accordingly thank you to confirm the foregoing.

Very truly yours,

EFS:MMR

EDWARD F. SPITZ

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*Exhibit P. 10.***EXHIBIT P. 10.****STROUSE & GOLDSTONE**Attorneys at Law  
271 Madison Avenue10 Louis H. Strouse  
Lazarus Goldstone

November 30th, 1927.

Edward F. Spitz, Esq.,  
141 Broadway,  
New York City.

Dear Mr. Spitz:

Your letter of November 28th, addressed to  
Mr. Riedell, in reference to Sheaffer stock, is re-  
ceived and noted.20 The gentle suggestions contained in your letter  
are hereby refuted.

Very truly yours,

LHS:MK

LOUIS H. STROUSE  
K.

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*Exhibit P. 11.*

**EXHIBIT P. 11.**

CHARLES M. RIEDELL & CO.  
Accountants and Auditors  
Member American Institute of Accountants  
Income Tax Specialists  
1819 Broadway  
New York

10

January 28th, 1926.

Mr. A. L. Kugel,  
Illinois Athletic Club,  
Chicago, Ill.

Dear friend Kugel,

I am enclosing herewith letter received to-day from the Industrial Bureau, Chamber of Commerce, Bridgeport, Conn.

20

I am also sending you herewith four blank checks on the corporation, No. 150 to 153, inclusive. According to the check-book, there is a balance in the bank of \$311.79.

I received your letter of January 26th relative to Philips subscription, which will help. Keep up the good work. I have had a telephone call from our friend, Mr. Kilbourne and he has another party in view and inquired as to what progress is being made. I told him that we expected to have some machine made samples out in the near future and he has requested me that as soon as some arrive in New York, for us to get in touch with him. He also has another party in view who he believes will be very much interested in our proposition.

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I would thank you to advise me what progress you are making along these lines so I may advise him accordingly.

40

*Exhibit P. 12.*

I am writing the W. A. Sheaffer Pen Co. to-day, as per copy of letter enclosed herewith.

Hoping to hear from you shortly, I am,

Yours very truly,

CMR\*BH

CHARLES M RIEDELL

10 encl.

**EXHIBIT P. 12.**

January 27th, 1926.

W. A. Sheaffer Pen Co.,  
Fort Madison,  
Iowa.

Gentlemen:—

20 I am the holder of forty shares of stock in your company, bearing certificate No. 1795. The original certificate was issued to Mr. A. L. Kugel and I am desirous of having this stock transferred to me and would like to know if you have a transfer office in New York or whether the same should be forwarded to Fort Madison for transfer.

30 Please send me a copy of the latest financial *statement* of your company or report to stockholders. I would also appreciate it if you would favor me with a statement of the earnings for the past year. With this information, I will be in a position to place a fair value on the stock I own. I would thank you to advise me if you know at what price this stock was recently sold as I am unable to ascertain same from any of the brokers in New York.

Thanking you for a prompt reply, I am,

Yours very truly,

CHARLES M RIEDELL

40 CMR\*BH



Exp 13  
Sax

1000 -  
 1000 300 - 450.00  
 1000 240 - 450.00  
 1000 180 - 450.00  
 1000 120 - 450.00  
 1000 60 - 450.00

900 -  
 4750  
 1650 - 2250.2

1000 x 4  
 1000 x 3  
 1000 x 2  
 1000 x 1

2650 -  
 2250  
 4900 - 3150  
 200  
 3600  
 3

1075 -  
 5000  
 6000 -  
 1000 -  
 1000 -  
 1000 -  
 1000 -  
 1000 -

6000  
 3500 -  
 5000 -  
 3500 -  
 1000 -  
 1000

200 x 4 80 -  
 400 x 3 120 -  
 600 x 2 120 -  
 800 x 1 80 -  
 400

NOTARCOCCO

*Exhibit D. 1.*

**EXHIBIT D. 1.**

EDWARD F. SPITZ  
Counsellor at Law  
141 Broadway  
New York

10

November Seventh  
1927

Charles M. Riedell, Esq.  
217 Broadway  
New York City

Dear Mr. Riedell:

20

Confirming our understanding of this day, I beg to advise that my claim for services rendered you in connection with the proposed sale of forty (40) shares of common stock of W. A. Sheaffer Pen Co. owned by you, has been adjusted as follows. You are to send me your check for \$500 and on receipt thereof, I am to return to you your letters to me of October 21st and October 26th, 1927, and shall accept said sum of \$500. in full payment and discharge of all claims against you.

Very truly yours,

30

EDWARD F. SPITZ

EFS:MMR

40



*Exhibit D. 2.***EXHIBIT D. 2.**

CHARLES M. RIEDELL & CO.  
 Accountants and Auditors  
 Member American Institute of Accountants  
 Income Tax Specialists  
 National Metropolitan Bank Bldg. 10  
 Washington, D. C.

*AGREEMENT*

It is hereby agreed between Charles M. Riedell and A. L. Kugel that said Kugel will for and in consideration of the sum of \$1.00, receipt of which is hereby acknowledged, deliver to Charles M. Riedell 200 shares of the common stock of the proposed Kugel Products Company, to be received by him in accordance with subscription agreement when and as said stock is received by him at the time or organization of the proposed corporation. 20

It is further agreed that Charles M. Riedell agrees to let said stock delivered to him remain registered in the name of A. L. Kugel until such time as both agree otherwise.

CHARLES M. RIEDELL  
 ARTHUR L. KUGEL

Dated October 9, 1925. 30

*Exhibit D. 3.***EXHIBIT D. 3.**

EDWARD F. SPITZ  
 Counsellor at Law  
 141 Broadway  
 New York

10

November Tenth  
 1927

Strouse & Goldstone  
 271 Madison Avenue  
 New York City

Gentlemen:

I acknowledge receipt of check of Charles M. Riedell to my order for \$500. herewith delivered by you to my representative.

20

In return, I surrender to you herewith Mr. Riedell's letters to me of October 21st and 26th. The letter which I dictated in your presence was mailed by me to Mr. Riedell yesterday and a copy of it is enclosed herewith. By such letter I confirm our understanding that this check for \$500. when paid is to be in full settlement of all claims and demands against Mr. Riedell, in connection with the authorization to me to sell for him his forty (40) shares of common stock of

30

W. A. Sheaffer Pen Company at a price of not less than \$400. a share.

With assurance of my appreciation of your offices in this matter, I am

Very truly yours,

EDWARD F. SPITZ

EFS:MMR  
 Encs. (3)

40







## STIPULATION.

## NEW JERSEY SUPREME COURT.

10	ARTHUR L. KUGEL, <i>Plaintiff-Respondent,</i> <i>vs.</i> CHARLES M. RIEDELL, <i>Defendant-Appellant.</i>	}	<i>Action at Law.  Stipulation.</i>
----	--	---	---

20 It is hereby stipulated and agreed by and between the parties in the above entitled case, through their respective attorneys, that the following exhibits need not be printed with the State of the Case on appeal:

Exhibit D. 5a-b-c-d-e and f—Bank book of Sadie C. Riedell in First National Bank, East Orange, N. J., and six checks signed by her to the order of Charles M. Riedell, aggregating \$9,500.00.

MILTON M. UNGER,  
Attorney of Plaintiff-Respondent.

30 HARRISON & ROCHE,  
Attorneys of Defendant-Appellant.

Dated: April 15, 1930.

## NOTICE OF ARGUMENT.

NEW JERSEY SUPREME COURT.

ARTHUR L. KUGEL, <i>Plaintiff-Respondent,</i>  <i>vs.</i> CHARLES M. RIEDELL, <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i>	10
		<i>Notice of Argument.</i>	

To Milton M. Unger, Esq., Attorney of Plaintiff-Respondent:

TAKE NOTICE that the argument of the issue joined in this cause will be moved before the New Jersey Supreme Court, holden at the State House, in the City of Trenton, New Jersey, on the first Tuesday of May next, at 10 o'clock in the forenoon, or as soon thereafter as the Court can attend to the same. 20

Yours respectfully,

HARRISON & ROCHE,  
Attorneys of Defendant-Appellant.

Dated: April 15, 1930. 30

Service of the within notice of argument is hereby acknowledged this 15th day of April, 1930.

MILTON M. UNGER,  
Attorney of Plaintiff-Respondent.

LETTERS OF AGREEMENT

THE UNITED STATES OF AMERICA

10      WHEREAS the Government of the United States of America and the Government of the Republic of Cuba have agreed to enter into a treaty of amity, commerce and consular rights between the two countries, and

20      WHEREAS the said treaty has been duly ratified by the Senate of the United States and the Assembly of the Republic of Cuba, and the ratifications have been deposited in the archives of the Government of the United States of America, and

30      WHEREAS the said treaty has been duly published in the United States of America and in the Republic of Cuba, and the said treaty is now in force between the two countries,

40      Therefore, the Government of the United States of America and the Government of the Republic of Cuba have agreed to publish the said treaty in the United States of America and in the Republic of Cuba, and to give it the same force and effect as if it had been published in each of the said countries.

50      IN WITNESS WHEREOF, the President of the United States of America has hereunto set his hand and the seal of the said United States of America, and the President of the Republic of Cuba has hereunto set his hand and the seal of the said Republic of Cuba, this 15th day of August, 1902.

60      WITNESSED by the President of the United States of America, and by the Secretary of State, at the City of Washington, this 15th day of August, 1902.

70      WITNESSED by the President of the Republic of Cuba, and by the Secretary of State, at the City of Havana, this 15th day of August, 1902.

80      WITNESSED by the President of the United States of America, and by the Secretary of State, at the City of Washington, this 15th day of August, 1902.

**OPINION OF SUPREME COURT.**

Filed March 24, 1931.

NEW JERSEY SUPREME COURT.

#85 MAY TERM, 1930.

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<p>ARTHUR L. KUGEL, <i>Respondent,</i></p> <p><i>vs.</i></p> <p>CHARLES M. RIEDELL, <i>Appellant.</i></p>
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Submitted May Term, 1930. Decided March ,  
1931.

20

On appeal from Essex Circuit Court.

For appellant, Harrison & Roche.

For respondent, Milton M. Unger.

PER CURIAM:

This is the defendant's appeal from a judgment rendered against him in the Circuit Court of Essex County and it is contended that there should have been a non-suit in the trial court and that erroneous instructions were given to the jury.

30

The motion for non-suit was rested on the ground that the case as proved by the plaintiff presented a different cause of action from that averred in the complaint and that there was not sufficient evidence of a contract between the parties.

The complaint alleged an agreement that the stock, which seems to have been increasing in value, should, in consideration of the continuance

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*Opinion of Supreme Court.*

of a loan, be held by the defendant until a time agreeable to both parties, when it should be sold and the proceeds divided equally between them; that the defendant, disregarding the agreement and without adequate consideration, transferred the stock to his wife who subsequently  
10 sold it at a greatly advanced price.

There was ample proof of the facts set forth in the complaint and from them we think there can be no doubt that the transfer was a tortious invasion of the plaintiff's rights. The stock belonged to him. The defendant held it as security only, with an added agreement that with the plaintiff's acquiescence he might sell it. This was the limit of his powers. When, instead of retaining it according to the trust imposed, he  
20 transferred it to his wife without plaintiff's consent it was not only a violation of the agreement, but an unlawful conversion of the plaintiff's property, and the learned trial judge was right in so holding. The motion for non-suit was, therefore, properly denied.

The criticisms of the charge to the jury, with a single exception, are predicated on the correctness of the defendant's contentions on the motion for non-suit. As we disagree with these conten-  
30 tions, we conclude that the grounds of appeal respecting these portions of the charge are not well founded.

It is also said that the Court incorrectly instructed the jury as to the date of conversion and as to the price per share which the jury might award to the plaintiff. The first is of no material consequence, and as to the damages (assuming the charge to have been adequately ex-  
40 cepted to, which is doubtful) the rule laid down was in accord with the decision of the Court

*Opinion of Supreme Court.*

of Errors and Appeals in the case of *Dimock v. National Bank*, 55 N. J. L. 296.

It appears, however, from the record and from the proofs that the verdict includes an incorrect and excessive amount of interest to the extent of \$1,224, and this the respondent concedes may be corrected by this Court. The judgment which was for \$17,212.50 will, therefore, be reduced to \$15,988.50, and for this amount it is affirmed. 10

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**RULE ON AFFIRMANCE AND  
REMITTITUR.**

NEW JERSEY SUPREME COURT.

10

ARTHUR L. KUGEL,

*Respondent,**vs.*

CHARLES M. RIEDELL,

*Appellant.*

*On Appeal  
from Essex  
County  
Circuit Court.*

*Rule on  
Affirmance  
and  
Remittitur.*

20

This cause having been argued at the May, 1930, term of this court by Harrison and Roche, attorneys of the appellant, and Milton M. Unger, attorney of the respondent, and the Court having considered the same, and finding no error in the record or proceedings in the Essex County Circuit Court, except that the judgment as entered in said court for \$17,212.50, includes an incorrect and excessive amount of interest to the extent of \$1,224;

30

It is thereupon ORDERED and ADJUDGED, that the judgment of the Essex County Circuit Court be reduced from \$17,212.50 to \$15,988.50, and in all other respects be affirmed, with costs; and that the record be remitted to the Essex County Circuit Court to be proceeded with in accordance with this judgment, and the practice of said court.

Entered March 28, 1931, on motion of  
MILTON M. UNGER,  
Attorney of Respondent.

40

Rule actually entered March 28, 1931.

**NOTICE OF APPEAL AND GROUNDS  
OF APPEAL.**

Filed April 17, 1931.

NEW JERSEY SUPREME COURT.

<p>ARTHUR L. KUGEL, <i>Plaintiff-Respondent,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>CHARLES M. RIEDELL, <i>Defendant-Appellant.</i></p>	}	<p><i>Action at Law.</i></p> <p><i>Notice of Appeal and Grounds of Appeal.</i></p>	10
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*To Milton M. Unger, Esq., attorney for Arthur L. Kugel, plaintiff-respondent, or To Whom It May Concern:*

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PLEASE TAKE NOTICE that Charles M. Riedell, defendant in the above-entitled cause, appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes, from so much of the judgment of the Supreme Court entered in this cause as affirms the judgment of the Essex County Circuit Court for the sum of Fifteen Thousand Nine Hundred Eighty-eight Dollars and Fifty Cents (\$15,988.50), upon the following grounds:

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1. Because the Supreme Court erred in giving judgment to the plaintiff-respondent instead of to the defendant-appellant for the following reasons:

(a) The trial judge, upon the trial of said cause, denied defendant's motion for a non-suit over the objection of said defendant, and submitted the case to the jury for its verdict.

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*Notice of Appeal and Grounds of Appeal.*

(b) The trial judge refused to find that plaintiff had failed to establish an oral agreement between himself and the defendant relating to the division of the proceeds of the sale of the stock mentioned in the complaint.

10 (c) The trial judge permitted the substitution of a new and different cause of action against defendant, and failed and refused to allow defendant a reasonable opportunity to make his answer and present his defense.

(d) The trial judge, in his charge to the jury, stated that the suit brought by the plaintiff against the defendant was an action in conversion and that the plaintiff sought damages for the unlawful conversion by the defendant of certain stock of said plaintiff, whereas plaintiff's  
20 complaint in the first count sets forth an alleged oral agreement between plaintiff and defendant and its alleged breach by defendant; and in the second count, a demand for money had and received; and said complaint nowhere sets forth a cause of action in trover and conversion or sounding in tort.

(e) The trial judge, in his charge, submitted the case to the jury on the theory that plaintiff's  
30 action was founded on trover and conversion, and did, in fact, instruct the jury that it was an action in trover and conversion, without an application on plaintiff's part to amend his complaint and without giving defendant an opportunity to object to such amendment or to allege surprise and to have a reasonable time in which to meet and answer the new issues thus raised against him.

(f) The trial judge, in his charge to the  
40 jury, incorrectly stated the rule establishing the

*Notice of Appeal and Grounds of Appeal.*

measure of damages, so that the jury rendered a greatly excessive verdict.

(g) The trial judge, in his charge to the jury, expounded the rule as to the measure of damages obtaining in an action in trover and conversion, and not in an action on contract.

10

(h) The trial judge, in his charge to the jury, incorrectly instructed the jury as to the date of the alleged conversion, and as to the price per share which the jury might award to the plaintiff as damages against defendant.

2. Because the Supreme Court erred in rendering a judgment in favor of the plaintiff-respondent and against the defendant-appellant in the sum of Fifteen Thousand Nine Hundred Eighty-eight Dollars and Fifty Cents (\$15,988.50) or in any other sum.

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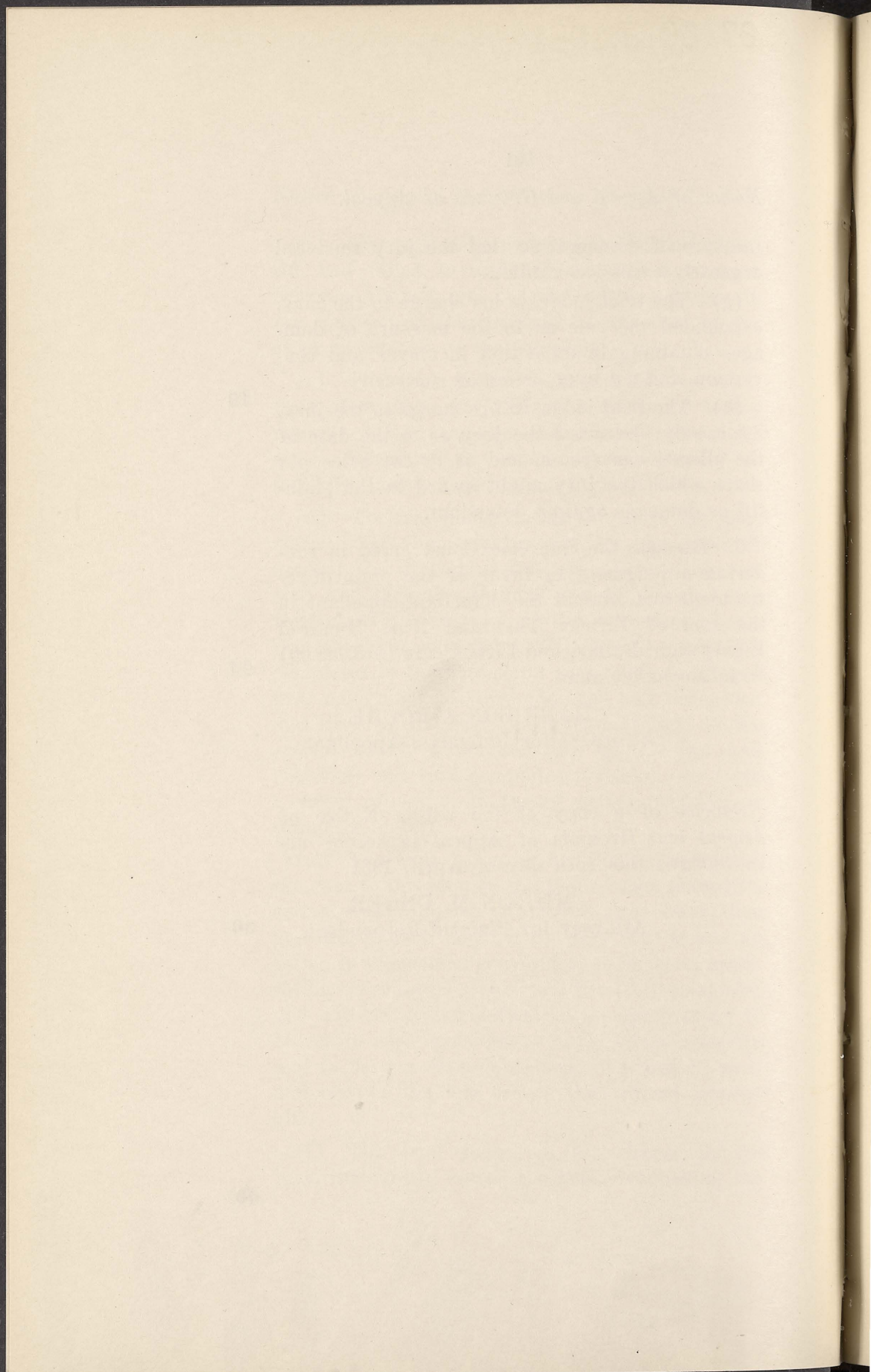
HARRISON & ROCHE,  
Attorneys for Defendant-Appellant.

Service of a copy of the within Notice of Appeal and Grounds of Appeal is hereby acknowledged this 15th day of April, 1931.

MILTON M. UNGER,  
Attorney for Plaintiff-Respondent.

30

40



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

## New Jersey Court of Errors and Appeals

ARTHUR L. KUGEL,  
*Plaintiff-Respondent,*

*vs.*

CHARLES M. RIEDELL,  
*Defendant-Appellant.*

*Action  
at Law.*

### BRIEF FOR DEFENDANT-APPELLANT.

This is an appeal by defendant-appellant, Charles M. Riedell, from that part of the judgment of the Supreme Court rendered March 24, 1931, which affirms the judgment of the Essex County Circuit Court to the extent of \$15,988.50. The Supreme Court reduced the amount of the judgment by \$1,224.00, as the verdict included this incorrect and excessive amount of interest.

This suit was instituted in the Essex County Circuit Court by plaintiff-respondent against defendant-appellant to recover damages for the breach of an alleged oral agreement. The alleged agreement was that defendant, upon the sale of certain stock theretofore transferred by plaintiff to defendant, would first deduct \$4,000.00 from the proceeds realized and then divide any profits over and above that sum with plaintiff (See Complaint—par. 2 of first count; State of Case, p. 7, l. 12, to p. 8, l. 20, and plaintiff's testimony, p. 28, ll. 12-18). Defendant denied the existence of the alleged oral agreement, stating that at plaintiff's request he purchased the stock outright (Case, p. 79, l. 2 to p. 80, l. 40). The jury rendered a verdict of \$17,212.50 against defendant-appellant (State of Case, p. 16).

Defendant here presents two main grounds of appeal (Case, pp. 149, 150 and 151), the first containing eight reasons, among which are the following—that the Supreme Court erred in sustaining the action of the trial judge in denying defendants' motion for a non-suit, and in permitting the action to be changed from one on contract to one in tort, and in sustaining the correctness of certain parts of the trial judge's charge to the jury as to the measure of damages and the method of computing the damages, to which exceptions were duly taken; and the second being that the Supreme Court erred in rendering judgment in favor of the plaintiff-respondent and against the defendant-appellant.

#### **Facts.**

The defendant-appellant, Charles M. Riedell, first became acquainted with plaintiff-respondent, Arthur L. Kugel, several months prior to July, 1925 (p. 79, ll. 18-20). As an accountant, he was called to assist in the organization for the plaintiff of a pencil manufacturing company (p. 79, ll. 26-31). In July, 1925, plaintiff requested defendant to purchase from him forty shares of stock of the W. A. Sheaffer Pen Company at \$100.00 per share (p. 80, l. 1). This stock had been pledged as collateral with the Chatham-Phoenix National Bank in New York City to secure plaintiff's loan of \$2,400.00 which the bank was about to call (p. 80, ll. 16-18). At first defendant refused to purchase the stock, but later bought it when plaintiff offered it at \$90.00 per share (p. 80, ll. 28-30). Defendant paid therefor by paying off plaintiff's loan at the bank of \$2,400.00 and giving plaintiff two checks for \$600.00 each (p. 81, ll. 1-4, and Exhibit D. 4, pp. 139-140 and 141). In July, 1925, this Sheaf-

fer Pen Company stock had no market value. Thereafter it fluctuated in value from \$78.00 a share in January, 1926, to \$99.00 a share in January, 1927 (See stipulation, p. 76, ll. 21-30). Plaintiff alleges that at the time of the purchase of the stock by defendant he gave defendant a promissory note for \$4,000.00 (p. 22, l. 25), which was later renewed (p. 24, ll. 27-30), and that subsequently he and defendant agreed that defendant should carry the so-called \$4,000.00 loan for an indefinite period of time, and that, after repayment to defendant of \$4,000.00, he and defendant would divide any profits realized from a sale of the stock (p. 28, ll. 12-18). Defendant denies that the note or notes were given (p. 92, ll. 20-22; p. 110, ll. 1-6) and denies that the agreement relating to the division of the proceeds of the sale of the stock was made (p. 93, ll. 15-20). Defendant states that plaintiff had access to his office, and that the note might have been prepared by plaintiff or someone else in defendant's office (p. 112, ll. 24-29). The stock in question was transferred into defendant's name in January, 1926 (p. 68, ll. 9-20; p. 97, l. 33; Exhibit P. 12, p. 134).

#### POINT 1.

The alleged agreement was too vague, uncertain, indefinite and incomplete to constitute a binding agreement, and the Supreme Court erred in sustaining the action of the trial court in refusing to grant defendant's motion for a non-suit.

Plaintiff's evidence consisted of his own testimony, the testimony of his own attorney in New York, one Edward F. Spitz, and Mr. Spitz's secretary, Miriam Rainess. Plaintiff produced

another witness, Harry L. Neff, but his testimony appears to be of little or no value. Plaintiff states (p. 23, ll. 18-22); "The agreement was that I would pay him back the \$4,000.00 and get back my stock at any time I was in a financial position to do so"; and (at p. 28, ll. 12-18) in answer to the question "What was the arrangement?" he says: "That he (defendant Riedell) would carry the loan of \$4,000.00 for an indefinite period of time and that when the stock was sold that he would deduct the \$4,000.00 and we would split the realization of profit if there would be any." At page 32, line 27, plaintiff testifies that he said to defendant "Now, Charlie, I think it high time that we had a definite understanding as to splitting up whatever profits there may be." At page 33, line 16, plaintiff says: "I again stated to him that I felt it was high time that we had a definite understanding as to what our interests were \* \* \* ." On cross examination (p. 40, ll. 1-4), plaintiff says that he never asked defendant for a definite understanding about the stock until October 26, 1927, two years and four months after the stock was sold. On cross examination (p. 42, ll. 24-35), when asked "And when was the stock to be sold?" plaintiff replied: "There was no definite time set" \* \* \* "At what price? \* \* \*" he replied: "There was no definite price set \* \* \* " "Who was to decide?" he replied: "We had not decided \* \* \* " "Suppose you did not agree? \* \* \* " he replied: "There was no thought of not agreeing on it. Our relations were pleasant at that time." It is worthy of note that when plaintiff began to make his claim of an interest in the stock in October, 1927, its market value was rapidly increasing. (See Stipulation, Case, p. 76, ll. 26-33.)

Plaintiff's New York attorney, Edward F. Spitz, called as a witness on his behalf, testified with regard to the alleged agreement as follows, quoting plaintiff (p. 51, ll. 13-16): "Now, Charlie, now that that is finished, I think we ought to have a definite understanding in regard to my interest in the stock in case Mr. Spitz makes a sale"; and again (at p. 54, ll. 22-25), this witness says that plaintiff asked defendant for "a definite written understanding about my share in this stock." Miriam Rainess, Mr. Spitz's secretary, testified to the same effect (p. 63, l. 36; p. 64, l. 24).

Furthermore, the exhibits produced by plaintiff and forming part of his case clearly tended to show that no agreement existed between plaintiff and defendant as to a division of the proceeds of the sale of the stock. Exhibit P. 5 (p. 127), defendant's letter of authorization to Spitz to sell the stock, states that defendant is the owner of the stock; likewise the letter, Exhibit P. 6 (p. 128). Plaintiff was present on each occasion when these letters were signed by defendant Riedell, and made no protest or claim that he had an interest in the stock (p. 40, ll. 17-32). Even the letter written about a month later by Spitz, as attorney for plaintiff, after Spitz had been paid his fee and ceased to represent defendant Riedell, making demand upon defendant "to have your position as to any profits derived from this stock whenever disposed of a matter of record" (Exhibit P. 9, p. 131, ll. 31-35), indicates that even as late as the date of that letter, November 28, 1927, there was no understanding between the parties as to a division of the proceeds of the stock.

This, in brief, was the testimony offered by plaintiff in support of the alleged oral agree-

ment between him and the defendant to divide the profits of the sale of the stock. At the conclusion of plaintiff's case, a motion for a nonsuit was made on the ground that there was no proof of a binding agreement between the parties (p. 73, l. 32, to p. 74, l. 9; p. 74, ll. 24-35; p. 74, l. 39, to p. 75, l. 3; p. 76, l. 35; p. 77, ll. 13-20). The trial court denied the motion, to which an exception was duly taken by defendant and noted as ground of appeal (p. 78, ll. 11-13).

The terms of the alleged contract were so vague, uncertain and indefinite that the plaintiff himself could not state at what price, at what time, or at whose order the stock in which he claimed to have an interest should be sold. The time for performing the alleged contract might never have arrived. The essential elements of a binding contract are altogether lacking. Furthermore, plaintiff in his complaint is so uncertain that he alleges two contracts; in par. 1, he says that he made a loan from defendant and to secure payment thereof assigned the stock to him, and "in token of said debt" delivered to defendant a promissory note; in the second paragraph of the complaint he says that for certain alleged consideration it was agreed that the plaintiff would continue to hold said stock and would divide the net proceeds when sold, after first deducting \$4,000.00. These are two entirely different alleged agreements, plaintiff having apparently shifted his ground to meet what appeared to him the necessities of the case.

It is elementary law that in order to have a binding contract between two parties, all of its terms must be distinctly settled, understood and agreed upon.

13 C. J., p. 264:

“If any portion of the proposed terms is not settled and no mode is agreed on by which it may be settled, there is no binding agreement, etc.”

and cases cited.

*Bonicamp v. Starbuck*, L. R. A. 1917 B. 141:

“A contract which on its face leaves some essential terms to future agreement is incapable of enforcement for uncertainty.”

*Shaw v. Woodbury Glass Works*, 52 N. J. L., p. 7.

“To constitute a contract, all the essential terms must be settled and assented to by both the parties.” At page 9, the court quotes from *Ridgeway v. Wharton*, 6 H. L. Cas. 268. “An agreement to be finally settled must comprise all the terms which the parties intended to introduce into the agreement. An agreement to enter into an agreement to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement until the terms of that agreement are settled. Until those terms are settled, he is perfectly at liberty to retire from the bargain.”

Likewise in the case of *Morgan Realty Co. v. Pazen*, N. J. Adv. Rep., Vol. 6, p. 21, the Court says:

“To warrant such a decree it would have to be shown that the contract was complete in all its material parts; and when any material part was unexpressed, or left open for subsequent negotiation and determination by the parties it could not be regarded as a contract.” Citing *Binns v. Smith*, 93 N. J. Eq. 33 (at p. 36); *Brown v. Brown*, 33 N. J. Eq. 650 (at p. 655); *Bettcher v. Knapp*, 94 N. J. Eq. 433; *Quinn v. Amendola*, 138 Atl. Rep. 693; *Shaw v. Woodbury*, 52 N. J. Law 7.

It is evident from plaintiff's testimony, as above outlined, that many of the terms of the alleged contract were unsettled, and that the time for the performance of the contract might never arrive, inasmuch as it was to be performed at such time as plaintiff and defendant might mutually agree upon, which time might never arrive. Furthermore, it appears from the testimony of the plaintiff and his two supporting witnesses and from the exhibits offered by the plaintiff that there was no definite understanding between plaintiff and defendant as to a division of the proceeds of the sale of the stock. On the contrary, it again and again appears from the testimony of these witnesses that plaintiff sought, without success, more than two years after the stock had been sold to the defendant, to obtain what he called a definite understanding from him as to the division of the proceeds which might be realized from the sale of the stock.

We respectfully submit that the Supreme Court erred in sustaining the action of the trial court erred in refusing, upon the evidence offered by plaintiff, to grant defendant's motion for a non-suit. Exception was duly taken and noted as ground of appeal (p. 78, ll. 11-13).

#### POINT 2.

The Supreme Court erred in sustaining the action of the trial court in permitting the substitution of a new and different cause of action against the defendant.

A consideration of this point leads to an inquiry as to the kind of action instituted by the plaintiff against the defendant. There are two counts in the complaint. Paragraphs 1, 2 and 3 of the first count (pp. 7, 8 and 9) repeatedly

allege an agreement between the parties. At (p. 7, ll. 5-10), this count of the complaint recites: "The plaintiff agreed to this and it was then and there agreed between the plaintiff and the defendant, etc." Again (p. 7, l. 34), "and in further consideration that the plaintiff would agree, etc." (p. 8, l. 18); "From time to time thereafter the defendant and the plaintiff reiterated and repeated said agreement" (p. 8, l. 34); "And the defendant did, in violation of the agreement between the plaintiff and the defendant, etc." The second count (p. 10, ll. 1-20) is also a count on contract for money had and received. Plaintiff's action is founded on contract, the breach of an alleged agreement, and not in tort. Nowhere in the complaint is there an allegation indicating a tort action or charging the defendant with conversion. It is plain that plaintiff's attorney intended his action to be on contract, for a notice to plead was endorsed upon the summons and complaint (p. 10, ll. 22-40), which is permitted only in actions on contract. Practice Act, Rule 56, P. L. 1912, p. 394. The trial court and plaintiff's attorney comment on the nature of the plaintiff's action as follows (p. 75, ll. 4-24):

"The Court: (After argument.) What bothers me is whether this suit is for breach of contract or whether it is a suit in conversion.

Mr. Unger: It may be either. There are two counts in the case.

The Court: There is a breach of contract, which is the first count; the second count is an accounting for money had and received.

Mr. Unger: The third paragraph of the first count in itself would support a claim for a conversion of the stock if the stock was our stock or if we had an interest in it at that time. But we have a clear claim on the

allegations for the breach of the contract because the contract, although verbal, is made out clearly.”

And at page 78, lines 1-10, the Court says:

“I am still of the opinion that the first count, if it stands, will have to stand as an action of conversion; the second count is an action for money had and received, and I think the plaintiff will have to elect whether he will stand on trover and conversion. I will deny the motion.”

After further comments by the Court and plaintiff's attorney, the defendant proceeded to put in his defense. Nothing further was said as to the nature of the action, and no motion to amend the pleadings was made. No opportunity was given defendant to meet any other or different issues or charges except those set forth in the complaint. After the attorneys had summed up, the Court said (p. 114, l. 19): “I take it you have elected to stand on the first count, Mr. Unger?” to which Mr. Unger replied: “Yes, sir.” So far as known to defendant or his attorney, that count still remained a count for breach of contract, which both the Court and plaintiff's attorney had stated it to be. Nothing had been said or done during the trial to apprise defendant that the alleged cause of action against him had been changed from one on contract to one in tort for conversion. But, after the comments above quoted, the Court charged the jury as follows (p. 115, ll. 1-20):

“Members of the Jury:

This suit is brought by the plaintiff to recover damages from the defendant for what he claims to be an unlawful act on the part of the defendant. He charges the defendant with what we call conversion; that is, the defendant took this stock originally as col-

lateral for a loan and then converted it to his own use, not to discharge the loan; in other words, that the defendant took it for himself instead of treating it as collateral to the loan. The plaintiff asks damages for that unlawful conversion of the stock, etc.”

Exception was duly taken by defendant to the Court’s charge and noted as ground of appeal (p. 122, ll. 27-33).

In the case of *Goodyear Tire & Rubber Company v. Kruvant*, 96 N. J. L., 352, Justice Parker, at page 355, says:

“The power of the court over amendments is, as we have said, one of discretion, but it is one of judicial discretion, and the bounds of that discretion are transgressed when at the trial of a cause in which plaintiff has decreed on a written contract, a new count in deceit, essentially an action in tort, is introduced, and defendant properly alleging surprise is denied either time to meet it or the privilege of a counter-claim in mitigation of the damages. Under these circumstances, the ruling is not so much the exercise of discretion as the denial of a fundamental right and the defendant is legally aggrieved.”

See also *Defiance Fruit Company v. Fox*, 76 N. J. L. 482, at pages 486, 487, 488, in which this Court holds reviewable on appeal decisions rendered in the exercise of the equitable powers of a court of law or in the course of its statutory or summary jurisdiction, provided they result in the final disposition of the matter and have not rested in the discretion of the Court.

In the case at bar, defendant did not know until the Court began to charge the jury, that the action against him was for conversion. The comments of the Court and plaintiff’s attorney had up to that time, led to no application for an

amendment by plaintiff or any definite statement as to whether the action was one on contract or in tort for conversion. Not only was the defendant deprived of his right to allege surprise; he was not even apprised that a new count in conversion had been introduced against him. No application for an amendment was made, and none was granted.

We are not unmindful of the provisions of our Practice Act permitting the trial court, in its discretion, to allow amendments and, in particular, the provisions of Section 24 (P. L. 1912, p. 382), as follows: "In addition to the present powers of amendment, the Court may, *upon terms*, permit before or at the trial the statement of a new or different cause of action in the complaint or counter-claim"; and the cases upholding the trial court's broad powers of amendment. *Thompson v. Peppler*, 91 N. J. L., 160; *Miller v. West Jersey & Seashore Railroad Company*, 76 N. J. L. 282, etc.

But it will be observed that the statute above quoted gives the Court the right, *upon terms*, to change the cause of action. As stated in *Goodyear Tire & Rubber Company v. Kruvant* (*supra*), the bounds of the Court's discretion are transgressed when a new and different count is introduced and defendant is denied time to meet it. Such is the situation in the case at bar; the suit against the defendant was an action on contract throughout the entire trial of the case, including the summing up by the attorneys. Suddenly, the defendant was called upon to answer to the charge of conversion without an opportunity of meeting or answering that charge. Such a charge had its effect upon the jury. We respectfully submit that defendant's rights were

greatly prejudiced in this change of the cause of action and in the Court's charge throughout. Exception was duly taken to the Court's charge for this reason and noted as ground of appeal (p. 122, ll. 25-33).

In fact, it appears from the evidence in the case that the plaintiff could not have instituted an action in trover and conversion against the defendant even if he had chosen or elected to do so.

Bouvier's Law Dictionary, Third Rev., Vol. 1, p. 669:

"A constructive conversion takes place when a person does such acts in reference to the goods or personal chattels of another as amount in view of the law to appropriation of the property to himself.

A direct conversion takes place when a person actually appropriates the property of another to his own beneficial use and enjoyment or to that of a third person, or destroys it or alters its nature."

*Mount v. Cubberly*, 19 N. J. L. 124.

"In an action for trover, etc., the plaintiff must prove property in himself, a right of possession at the time of the conversion."

A right of possession in the plaintiff in this case is totally lacking and not even claimed. As stated in his complaint, his alleged right or claim against the defendant arises only out of the alleged agreement or contractual relationship between them, that is, the alleged agreement to divide the proceeds of the stock when sold.

Again, even admitting that plaintiff had a cause of action against defendant in trover and conversion, by electing to bring his suit on con-

tract he has waived his remedy in trover and conversion, and such election is irrevocable.

*Heller v. Elliott*, 44 N. J. L. 467;

*Claron v. Thommessen*, 96 N. J. Eq. 650;

*Kvedar v. Shapiro*, 98 N. J. L. 225;

*Blum v. Ingersoll*, 99 N. J. Eq. 563, aff.  
101 N. J. Eq. 291.

Again, if the verdict was based upon an erroneous theory of the law as submitted by the trial judge, it cannot now be sustained on a theory which was excluded and which the jury had no opportunity to consider.

*Flammer v. Morelli*, 100 N. J. L. 314.

In this case this Court held (p. 16):

“And the rule is settled that a verdict erroneous on the theory adopted in the trial court cannot be sustained on a theory excluded in that court and which the jury had no opportunity to consider.”

*Barnes v. Wallington & Company*, 78 N. J. L. 490:

“When a plaintiff’s case is rested at the trial on two theories, the first of which is supported by legal evidence, and the second in material part by evidence illegally admitted, and the case is submitted to the jury on the second theory alone, a judgment for the plaintiff cannot be sustained on the ground that the evidence lawfully received would have justified a finding for the plaintiff on the first theory.”

The jury were instructed and charged by the Court that the defendant took the stock in question originally as collateral for a loan and then converted it to his own use, not to discharge the loan; that the defendant took it for himself instead of treating it as collateral to the loan. It was on this theory, that the defendant had

done something wrongful to the plaintiff by unlawfully converting his property to his own use, over and above a mere breach of contract, that the jury rendered its verdict against the defendant. Probably this was the inducing cause for the jury's verdict. If, for the reasons hereinabove set forth, the jury's verdict cannot be sustained because the case was submitted as an action in trover and conversion, it cannot here be sustained on the theory that the action was on contract, because that theory was excluded and the jury had no opportunity of considering it.

### POINT 3.

The Supreme Court erred in sustaining the trial court in its instructions to the jury as to the amount or measure of damages which might be awarded against the defendant.

The trial court, in his charge to the jury says (p. 120, l. 37, to p. 121, l. 4):

“If your verdict is for the plaintiff you will then have to consider the question of damages. The highest intermediate value of this stock between the time of conversion, if you find that it was converted, and a reasonable time after the plaintiff has received notice of the conversion, is the price which you should fix on that stock; that is, the value of the stock.”

He then proceeds to refer to the sale in January, 1928, of the stock *by* (the record reads “to” p. 121, ll. 16-18), defendant's wife at \$865.00 per share, and refers to one other value of the stock in October, 1927, of \$400.00 per share. The Court computes (p. 121, l. 25) by using the highest value of the stock as sold by defendant's wife in January, 1928 (see p. 71, ll. 38-40),

that \$15,300.00 is a proper amount for the jury to consider in arriving at a verdict against defendant, to which interest should be added from May 28, 1929.

Plaintiff produced evidence to show that defendant, on October 21, 1927, had authorized a sale of the stock at \$400.00 per share (Exhibit P. 5, p. 127) and then in answer to the question (p. 32, l. 21), "Were you at that time agreeable to selling the stock at \$400.00 a share," he replied, "I was." Plaintiff also produced evidence to show that defendant on October 26, 1927 (Exhibit P. 6, p. 128), had authorized a sale of the stock at \$525.00 per share, and, again, in answer to the question (p. 34, l. 16), "Were you then satisfied to sell this stock at \$525.00 a share," he replied, "I was." Obviously, the purpose of introducing this evidence was to show a breach by defendant of the alleged agreement to sell the stock and divide the proceeds. Plaintiff's evidence therefore shows that the first alleged breach by defendant of the alleged agreement occurred on October 21, 1927, after both plaintiff and defendant had agreed that the stock should be sold for \$400.00 per share. On this basis the selling price of the 40 shares of stock would have been \$16,000.00; deducting \$4,000.00 and dividing the remainder would result in \$6,000 as the amount of damages to which the plaintiff would have been entitled on the theory either of breach of contract, or conversion, with lawful interest.

Such damages as were in the contemplation of the parties at the time of making the contract could be recovered on this theory. *Vacuum Ash & Soot Conveyor Co. v. Huyler's*, 101 N. J. L. 147; *Spencer Heater Co. v. Abbott*, 91 N. J. L. 594; *Warwick v. Hutchinson*, 45 N. J. L. 61;

*Wolcott v. Mount*, 36 N. J. L. 262. If plaintiff's theory that the stock should be sold when he and defendant agreed to a sale, and that the proceeds should be divided after first deducting \$4,000.00 for defendant, is accepted as true, then a breach of this agreement by defendant occurred October 21, 1927, when the price of the stock was \$400.00 per share, and the largest amount of damages in contemplation of the parties was \$6,000.00, as shown above. In other words, it is very plain that if, as claimed by plaintiff, there was a violation of an agreement, or a conversion, either one occurred October 21, 1927, when the defendant and plaintiff had both agreed upon a sale at \$400.00 per share. The price which the stock thereafter brought, after it had been transferred and sold by a third party, could in no wise furnish the basis for the measure of damages as between plaintiff and defendant and resulted in a grossly excessive verdict.

Furthermore the trial court, in his charge to the jury above quoted, expounded the rule as to the measure of damages as stated in the case of *Dimock v. United States National Bank*, 55 N. J. L. 296, and then referred to the sale of the stock at \$865.00 per share by the defendant's wife in January, 1928, and said (p. 121, ll. 20-25): "If you should take the \$865 price per share and decide that that was a reasonable time after the notice of conversion, you would figure forty times \$865, making \$34,600. Deducting \$4,000 would be \$30,600, and one-half would be \$15,300." We respectfully submit that the trial court erred in so charging the jury. Even assuming the rule laid down by him to be correct, if there was a conversion by the defendant, it occurred, as above pointed out, on October 21, 1927, when the price of the stock was \$400.00 per share. Plaintiff had

had ample opportunity long before January 28, 1928, when defendant's wife sold the stock, of replacing it to protect himself, if he so desired, in which event the basis for the measure of damages against the defendant would have been \$400 or \$500 a share or thereabouts, and not \$865.00 per share. (See Stipulation as to market values of the stock, Case, p. 76, ll. 20-33.)

But we respectfully submit that the rule as to the measure of damages as laid down by the trial court has no application to the case at bar. The stock in question was not held by the defendant as a commercial security within the intent and meaning of the decision in the case of *Dimock v. United States National Bank* (*supra*). Assuming that the Court properly charged the jury that the action was in conversion, then the general rule that the measure of damages was the market value of the property at the time of the conversion, should have been applied, and would have resulted in a verdict for plaintiff of \$6,000.00 with interest, as above noted, instead of \$15,300.00 with interest.

The Supreme Court in its opinion (Case, p. 146, ll. 33-37), referring to the date of the alleged conversion of the stock, says— "The first (*i. e.*, the date) is of no material consequence etc." We respectfully submit, as above pointed out, that the date is of very material consequence to the extent of the difference of \$465.00 per share in the value of the stock, or a total for forty shares of \$18,600.00.

We again respectfully call the Court's attention to the reasons (a) through (h) set forth in the first ground of appeal (Case, pp. 149, 150 and 151). Reasons (a) and (b) are discussed above under Point 1; reasons (c) (d) and (e) under

Point 2; and reasons (f) (g) and (h) under Point 3.

We respectfully submit that the judgment in this case as affirmed by the Supreme Court in the sum of \$15,988.50 in favor of the plaintiff and against the defendant, must be in all respects reversed and set aside.

Respectfully submitted,

HARRISON & ROCHE,  
Attorneys for Charles M. Riedell,  
Defendant-Appellant.

Dated: April 24, 1931.

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

## New Jersey Court of Errors and Appeals

ARTHUR L. KUGEL,  
*Plaintiff-Respondent,*

*vs.*

CHARLES M. RIEDELL,  
*Defendant-Appellant.*

*Action  
at Law.*

*On Appeal  
from  
Supreme  
Court.*

### BRIEF OF PLAINTIFF-RESPONDENT.

#### Statement of Facts.

The judgment to which this appeal is directed rests upon a complaint, the allegations of which are in substance as follows:

During the month of July, 1925, respondent borrowed from the appellant \$3,600.00 and gave to him a note of \$4,000.00, the excess of \$400.00 representing interest and service charges due and to grow due, and in addition assigned to the appellant 40 shares of the capital stock of the W. A. Sheaffer Pen Company, a corporation, to be held as collateral security for the loan.

The note was renewed at its maturity upon the same security, and thereafter the appellant suggested that the loan be continued without the execution of a new note or notes, but that he, the appellant, retain the shares of stock until the loan was paid.

The respondent was indebted to the W. A. Sheaffer Pen Company in the sum of \$3,000.00 for 30 additional shares of stock and in order to pay that indebtedness and obtain the stock last referred to the respondent applied to the appellant, who, together with the respondent, was a stockholder and largely interested in the Kugel Cor-

poration, a corporation, for the payment of approximately \$3,225.00, owing by the Kugel Corporation to the respondent. The appellant was unwilling to permit the respondent to withdraw the said monies and suggested to the respondent, with which suggestion the respondent agreed, that the respondent should sell the 30 shares of stock and that in consideration of his raising the money in that manner and forbearing to enforce payment of his claim against the Kugel Corporation, and in further consideration that the respondent would agree that the appellant should continue to hold the before-mentioned 40 shares of stock as security for the loan formerly evidenced by the note of \$4,000.00, the shares of stock should at some future time agreeable to both parties be sold or disposed of, in which event the appellant was to be repaid his loan and the proceeds remaining thereafter would be equally divided between them.

The complaint goes on to allege that the respondent requested the appellant to sell the 40 shares of stock and divide the proceeds, at a time when the stock was worth \$500.00 per share. The appellant was unwilling, claiming the stock was rapidly advancing in price. The allegations continue to the effect that the appellant thereafter in violation of the agreement between the respondent and appellant transferred the shares of stock to the wife of the appellant by a colorable transaction without real or adequate consideration, and that the stock was held by the appellant's wife as his agent and as such she sold it at \$865.00 per share realizing \$34,600, of which sum, the complaint alleges, the appellant was obliged to pay to respondent one-half of the residue after deducting the amount of the loan, namely, \$4,000.00. The complaint then alleges a demand of payment and refusal.

An additional count set forth in the complaint repeats the allegations contained in the first count which have been recited hereinabove, and sets forth an indebtedness of the appellant to the respondent for money had and received as a result of the transaction between the parties.

The allegations of the complaint were amply sustained by the evidence adduced at the trial, and judgment was entered for \$17,217.50. The verdict upon which judgment was entered awarded an amount of interest in excess of that which could rightfully have been allowed *under the charge of the Court*.

Pending the appeal to the Supreme Court, the respondent applied by motion for a reduction of the verdict and waived the excessive interest which amounts to \$1,224.00. In the argument of the appeal before the Supreme Court, the respondent conceded that the verdict and the judgment thereon erroneously included this excessive amount of interest. The opinion of the Supreme Court indicates the position taken by the respondent and also indicates that the judgment was affirmed after it was reduced by a sum equal to the amount of the excessive interest found by the jury.

The alleged errors are discussed by the appellant under three points. Three general questions are therefore presented upon this appeal. They are as follows:

1. Did the Supreme Court err in sustaining the action of the trial court in refusing to grant the appellant's motion for a non-suit?
2. Did the Supreme Court err in sustaining the action of the trial court in permitting the substitution of a new and different cause

of action against the appellant, if, in fact, such a substitution was made?

3. Did the Supreme Court err in sustaining the trial court in its instructions to the jury respecting the measure of damages?

The respondent will discuss these questions under three distinct points, which are as follows:

#### **POINT ONE.**

No error was committed in the denial of the appellant's motion for a non-suit.

#### **POINT TWO.**

The trial court neither permitted the substitution of a new cause of action without allowing to the appellant a reasonable opportunity to make answer and present his defense, nor was it called upon to do so, nor did it commit error in any ruling in that behalf, and the Supreme Court committed no error in finding the facts accordingly.

#### **POINT THREE.**

No error exists in the charge of the trial court to the jury respecting the amount or measure of damages or any matters relating to the determination of the question of damages.

#### **POINT ONE.**

No error was committed in the denial of the appellant's motion for a non-suit.

The principal objection made by the appellant in arguing the first and second grounds of appeal is that no definite binding contract between the parties was proved by the respondent. The

argument made by the appellant indicates a failure to discriminate between the want of proof of a contract and the proof of contract providing for performance at an indefinite time in the future. The latter is the situation which the proof adduced in the trial court established.

The respondent testified that after all of the negotiations between the parties already referred to, the following arrangement was concluded between them (S. C., p. 28):

“Q What was the arrangement?

A That he would carry the loan of \$4,000 for an indefinite period of time and that when the stock was sold that he would deduct the \$4,000, and we would split the realization of profit if there would be any.”

The subsequent discussions between the parties indicate that the appellant recognized the community of interest of both parties in the shares of stock.

Teh testimony of Mr. Spitz, sworn on behalf of the respondent, demonstrates that the appellant was referred to as the owner of the stock only to protect Mr. Spitz who was endeavoring to sell it for the parties, in case demand for delivery should be made upon him, if he should be successful in effecting the sale (S. C., pp. 48-51).

The respondent, on several occasions, according to the testimony, sought to have the appellant agree that the stock should be sold. The appellant did agree that the stock should be sold for \$400 per share and signed an authorization to that effect (Exhibit P. 5, S. C., p. 127).

When it was obvious that more money could be obtained, Mr. Spitz so advised the parties, but he was informed by them that he should not sell under that authorization, so that they might

be able to give him a new one to sell at \$525 (S. C., p. 52; Exhibit P. 6, S. C., p. 128).

The second authorization expired by its own limitation and thereafter Mr. Spitz informed the appellant that he had received an offer of \$485 a share for the stock and he was advised by the appellant not to do a thing (S. C., p. 55). On the following day Mr. Spitz received a letter from the appellant's attorney directing him to do nothing further in the matter (Exhibit P. 8, S. C., p. 129).

Throughout these negotiations with Mr. Spitz, there was, according to the testimony, consultation between the parties to this appeal respecting the steps to be taken in connection with the proposed sale of the stock. When the first authorization was signed it appeared that the parties first disagreed as to whether the stock should be sold at \$400 per share, and Mr. Spitz relates that their conversation was as follows (S. C., p. 49):

“Mr. Kugel said, ‘I agree with Mr. Spitz I think if we can get \$400 a share it is a good proposition.’ He said, ‘You know we need money.’ Mr. Riedell said, ‘Well, Art, if you feel that way I don’t see how we can lose by trying to let Mr. Spitz sell it for \$400.’ Then I said, ‘Gentlemen, do I understand you are willing to have me try to sell it for you at \$400 a share?’ They spoke, or nodded in acquiescence. Then I said, ‘I won’t do a thing unless I am authorized in writing, because if I offer the stock for sale and somebody accepts it they will look to me for the delivery, not to you. The thing I want to know is in whose name it stands of record.’ I said, ‘Does it stand in your name, Mr. Riedell?’ He said, ‘Yes.’ Then I said to Mr. Riedell, ‘I will dictate a letter from you to me authorizing me to put it on sale at \$400 or better, but it must be signed by you, and if anything goes wrong and I make the

sale I don't care about your arrangements. I will look to you personally. Is that distinctly understood?' Mr. Riedell said, 'Yes.' I said, 'All right, then, I will dictate such an authorization.' "

This conversation, it should be noted, took place on October 21, 1927, a long period of time after the agreement for the division of the proceeds of the sale was entered into.

It is a cardinal rule of construction that the interpretation given to a contract by the parties, and their actions, are most valuable indications of intention, and a construction of the contract to which high regard is given. The parties here interpreted the contract, according to the testimony, in a manner which substantiates the allegations of the respondent that a contract such as he has indicated, did in fact exist.

It is not unusual that a contract should provide for performance at an indefinite time in the future. This does not vitiate it or render it unenforceable. There is, none the less, a meeting of the minds. The failure to provide for a definite time for the performance of the contract, does not prevent the parties from creating a binding obligation. In construing such a contract courts seek to discover the intention of the parties and to give effect to it.

In *Rue v. Rue*, 21 N. J. L. 369, a decision of the Supreme Court, Chief Justice Green said:

"The courts however very reluctantly reject an agreement regularly and fairly made, as unintelligible or insensible. They will, if possible, give effect to the contract. If the meaning of the parties can be ascertained, either from the express terms of the instrument or by fair implication, and the purpose of the contract be lawful, the court will in all cases carry it into effect, and for this

purpose words or phrases will be supplied, transposed, or rejected as surplusage. *Lloyd v. Say*, 10 Mod. 46; 1 Bro. Par. Cas. 379, S. C.; *Langlon v. Goole*, 3 Lev. 21; *Coles v. Hulme, B. & Cress*. 568; *Targus v. Puget*, Ves. Sen. 194; *Worthington v. Hillyer*, 4 Mass. 196; *Sumner v. Williams*, 8 Mass. 183.”

A kindred idea is expressed in the following excerpt from 6 R. C. L. 841:

“Where the language of a contract is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred. If one construction would make it unreasonable, while another would do justice to both parties, the latter will be adopted.”

Simply because the contract contemplates a performance at an indefinite time in the future, does not warrant the court in rejecting and holding vain a real meeting of the minds. On the contrary, the courts construe such contracts and determine the time for performance.

In *Weinstein v. Sheer*, 98 N. J. L. 511, a decision of the Court of Errors and Appeals, Justice Minturn said:

“The delimitation of time by judicial construction for the performance of an act within a reasonable time, arises in those cases where no time is specified for the performance of an act; or where by reason of the peculiarity of the transaction, the parties *ex necessitate* have been held to have so contracted. 6 R. C. L. 964, and cases.”

It is evident from this statement that the trial court was, and this court is bound to construe the contract under consideration to ascertain the intention of the parties. The trial court found such an intention, and in denying the motion for non-suit, held that from all of the circumstances testified to, the parties intended to enter into a legal and binding relationship. This is the uniform practice of courts of law in construing contracts of this type.

The trial judge found the stock was to be disposed of within a reasonable time and so charged the jury (S. C., pp. 77, 119). The rule which was applied has been broadly stated in 13 C. J. 683, as follows:

“Where no time for performance is fixed by the contract, the law implies generally that the performance is to take place within a reasonable time \* \* \*”

It is further stated in the same volume of *Corpus Juris* at page 685, that:

“Where the agreement is to pay a certain sum over a fixed price received from the sale of certain property, there is an implied obligation to sell within a reasonable time after which the agreement to pay becomes absolute.”

It is well established that the courts will go very far to uphold a contract, and where all that is left in an undefined condition is the time for performance of the contract, the courts will by judicial construction ascertain the intention of the parties and give effect to the contract.

The matter of performance is involved in this appeal only to the extent that it becomes necessary to determine whether or not a contract was consummated between the parties. The suit and the judgment entered in the cause are based upon

a conversion and are not dependent upon any *particular* construction. Under the charge of the Court, the jury did decide that no unreasonable time for performance had elapsed at the time of the conversion, and that the contract was then in force and binding upon the appellant.

The respondent's action was not directly based on contract, but upon the appropriation by the appellant of securities and the monies realized from their sale. According to the testimony offered on behalf of the respondent up to the motion for a non-suit, it appeared that the securities were pledged as collateral for a loan evidenced by promissory notes, and thereafter continued to remain as collateral for the same loan without a promissory note evidencing the indebtedness. The extension of credit continuing thereafter as it did, according to the testimony, the right to hold the collateral continued and that right was one to hold it simply *as collateral and nothing more*. There is no evidence in the case of any other agreement, except the one stated by the respondent. Had this agreement not been made and had the appellant sold the stock, he would have been required to pay the entire proceeds after deducting the amount of the loan, to the respondent. At no place in the respondent's case did it appear that the loan was ever called or that demand was ever made for payment, after the failure to consummate a sale at \$400.00 per share. The parties by their conduct, treated their agreement as continuing in force, for they subsequently attempted a sale at a higher price.

The propriety of the refusal to non-suit is well stated in the following ruling by the trial judge on the motion (S. C., p. 77):

“The Court: I indicated last night my views. I think that if there was not a con-

tract proved; that is, if we assume the plaintiff's story to be the true story; if that did not prove a contract, then we would be left in the position that the stock should be held by the defendant as collateral for this \$4,000 loan because the plaintiff's story is that he delivered it as security and there was no subsequent disposition of the loan other than the arrangement he testified was made as to the time of the disposal of the stock. That would be within a reasonable time. As to the price, Mr. Unger has indicated that they did come to an understanding, and after they came to an understanding as to price it was repudiated by the defendant here. I think that disposes of that question, where the parties have an indefinite contract, but the parties have relieved the indefiniteness, and the law always tries to carry out the intention of the parties. I am still of the opinion that the first count, if it stands, will have to stand as an action of conversion; the second count is an action for money had and received, and I think the plaintiff will have to elect whether he will stand on trover and conversion. I will deny the motion."

#### POINT TWO.

The trial court neither permitted the substitution of a new cause of action without allowing to the appellant a reasonable opportunity to make answer and present his defense, nor was it called upon to do so, nor did it commit error in any ruling in that behalf, and the Supreme Court committed no error in finding the facts accordingly.

The statement of the trial judge set forth above indicates that he construed the first count of the complaint to be one based upon trover and conversion. The allegations of the complaint already hereinabove referred to, indicate that such a cause of action is adequately pleaded. It is

not necessary, of course, to resort to a statement, in the fictitious common law manner, that respondent casually lost and the appellant found and converted the property in question. In fact, under the Practice Act and Supreme Court Rules, the respondent is required to plead with considerable particularity, and according to the fact, which requires more than a mere fictitious statement in the common law form.

The action of trover and conversion was originally an action of trespass on the case for damages against the finder of goods who refused to deliver them on demand to the owner, but converted them to his own use. Anciently in this type of action, wager at law was not open to the defendant, as it was in an action of detinue, and the action of trover was extended to embrace suits against any person who had in his possession by any means whatever the personal property of another, and disposed of it without the consent of the owner.

Lord Mansfield defined this type of suit in the following language (1 Burr. 31; 1 Bla. Rep. 67):

“\* \* \* in form it is a fiction; in substance it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use; the form supposes that the defendant might have come lawfully by it and if he did not, yet by bringing this action, the plaintiff waives the trespass; no damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or maleficium, and to entitle the plaintiff to recover, two things are necessary: 1st, property in the plaintiff; 2ndly, a wrongful conversion by the defendant.”

In declaring on trover or any tort the requisites of the complaint are stated as follows in 1 Chitty on Pleading, 376:

“In actions for wrongs, the declaration should state, 1st, The matter or thing affected; 2ndly, The plaintiff’s right thereto; 3rdly, The injury, and, 4thly, The damage sustained by the plaintiff.”

The first count of the complaint in the instant case refers to the shares of stock as the thing affected. It proceeds to state the respondent’s right by setting forth the agreement between the parties. The injury is alleged to consist of the appropriation by the appellant through a colorable transaction with his wife, of the interest of the respondent. The damages are alleged with particularity.

The complaint being in proper form to state a cause of action for conversion, certainly the Court did not permit the substitution of a new cause of action, for the cause of action upon which the verdict and judgment were given was already adequately stated.

No amendment was suggested by the Court nor was application to amend made at any time. The decision of *Goodyear Tire & Rubber Company v. Kruvant*, 96 N. J. L. 352, cited by the appellant, which deals with the right of the Court to permit to an amendment, does not, therefore, apply. The complaint being in itself sufficient, no amendment was necessary.

A statement is made in the appellant’s brief that he did not know until the Court charged the jury that the action was one for conversion. He should have known that when he was served with the complaint, and if he was in doubt it was open to him to inform himself by demanding a

bill of particulars, or by serving interrogatories, which would have quickly apprised him of the nature of the respondent's claim. The appellant contends that he was deprived of his right to alleged surprise, but it is evident from the observations of the trial court made at the time the non-suit was sought, that the appellant was informed that the action would continue on the first count, as one of conversion. No further motion was made at that time, however, nor did the appellant plead surprise, but proceeded to produce his proof.

A further objection by the appellant is that the trial court permitted the respondent to state a new cause of action without placing the respondent upon terms for the protection of the appellant. The appellant's brief contains the following statement, *which is entirely inconsistent with such a contention* (p. 12):

“No application for an amendment was made, and none was granted.”

If, for the sake of argument, it be assumed that the Court permitted the substitution of a new cause of action, no application of any kind was made by the appellant at the time the Court disposed of the motion for non-suit, and stated that the action would have to stand as one of conversion on the first count, nor did the appellant ask that the respondent be put upon terms. The appellant was content to proceed, and *did* proceed to prove his case. He should not now, when the result of the submission of the case to the jury is adverse, be permitted to allege that the Court should have accorded to him something for which he did not ask, and which most likely would have been denied if he did, because of his failure during the many months which preceded the trial, to apprise himself by proper legal

steps, of the nature of respondent's claim, if he had any doubt about it.

The appellant attacks the right of the respondent to maintain an action for conversion for the reason that a right of possession by the respondent is not alleged. This is not so. Such a right was pleaded and proved. Not only a possessory right, but also a proprietary interest sufficient to support the action, was proved, as alleged in the complaint.

It is further contended by the appellant that the respondent elected to sue on contract and then substituted in place of the first count of the complaint, a claim for trover and conversion, which substitution was ineffective because of his alleged binding election to sue on contract. In the first place, as has already been alleged, the action on the first count was originally in trover. Furthermore, assuming again, for the purpose of argument, that a new cause of action was substituted, there was no election to prevent this. Both an action for conversion and an action on contract are based upon an *affirmance* of the contract. They are not inconsistent. The situation is not that one affirms and the other disaffirms the contract. The cases cited by the appellant on this point indicate this very important distinction to be the *ratio decidendi*. They are all distinguishable, so far as they hold a given act to be a binding election, upon the ground that dual remedies sought to be pursued, were inconsistent.

It is further alleged by the appellant that the case was submitted to the jury upon an erroneous theory of law. This is not the fact.

In support of this contention the appellant relies upon his previously advanced argument to the effect that the trial court improperly sub-

mitted the case to the jury as one of trover and conversion. It is manifest, however, from the foregoing observations, that the action always was of that type and that the appellant had adequate opportunity to remove any doubts which he may have had in that behalf and failed to do so, and that he proceeded with his defense in the trial court after it was made clear that the action would stand as one in trover. No amendment was made and no request was made on behalf of the appellant based upon an allegation of surprise, that the appellant be given leave to prepare a defense to an action for which he had not prepared. The appellant knew, from the time the motion for a non-suit was denied, just how the court would treat the case, and was lax, to say the least, if he did not know the suit was one in trover, long before that motion was made.

When there is added to all of this the fact that a case in trover was adequately pleaded and proved, and was submitted to the jury under a charge which cannot be assailed in the light of the record, there is no substance to the claim that the case was submitted to the jury upon an erroneously theory of law.

### POINT THREE.

**No error exists in the charge of the trial court to the jury respecting the amount or measure of damages or any matters relating to the determination of the question of damages.**

The trial court charged the jury according to the rule laid down in *Dimock v. United States National Bank*, 55 N. J. L. 296. To make sure that the jury understood his meaning, the trial judge twice repeated the rule under which they were to compute the damages.

The appellant contends that the rule laid down does not apply to this case, for the reason that the appellant did not hold the stock as a commercial security within the intent and meaning of the decision in the *Dimock* case. In that case suit was brought on a note, the holder of which held certain stocks as security for the payment of the note. The situation in its essence was analogous to the one presented in the instant case. Moreover, the Court laid down a rule designed to serve as a *general* one and not merely for the particular situation under consideration. Its language is plainly indicative of a purpose to state the law applicable to the relationship under consideration.

It is further contended that the conversion took place, if at all, either on October 21, 1927, when the parties attempted to sell at \$400.00 per share, or on a later date, when they attempted to sell at \$525.00 per share, and that, therefore the damages must be computed with one of these two values as the basis of computation.

There being a conversion, it would seem to be inconceivable that a wrongdoer should be able to benefit by his wrong. It is the established policy of this State, laid down in many branches of our jurisprudence, that a wrongdoer should not be permitted to profit by his own wrong. The rule that a landlord who causes a partial eviction of his tenant cannot claim even a portion of the rents reserved is but one example of the application of this salutary principle.

The jury was entitled to find under the evidence, that the appellant retained control over the stock, after he disposed of it to his wife.

After he disposed of it to his wife in July, 1927, he signed Exhibit P. 6, hereinabove referred to. He testified (S. C., p. 70):

“Q And you signed, did you not, the paper dated October 21, 1927, which is in evidence and which says that you at that time owned 40 shares of stock?

A Right.

Q Although you say now that you had passed this stock over to your wife in July, 1927?

A I didn't pass the actual delivery of the stock to her at that time because the stock was in the bank as collateral.

Q So that it was not an actual delivery in August, 1927?

A No, sir.”

The following testimony is also highly significant (S. C., p. 73):

“Q Who ordered the stock sold in January, 1928?

A My wife.

Q Why, if you passed the stock over to her in August, 1927, did you represent that you were the owner on October 26, 1927?

A I believed I could deliver it over if it was advantageous to be sold; that she would consent to it.”

It was competent for the jury, therefore, to find under this, and all of the rest of the evidence, that the proceeds realized from the sale at \$865.00 per share were to be computed as the damages. It was competent for the Court to charge the jury it might so find. The stock was not disposed of when the figures of \$400.00 and \$525.00 per share were respectively considered. Nor was the jury required to regard the sum realized by the appellant from his wife, when he transferred the stock to her, as the true measure of damages. It was competent for the jury to disbelieve the *bona fides* of this transfer. It was

therefore competent for the Court to leave it to the jury to do so.

Furthermore, the Court left it to the jury to determine which of the figures should be taken as a criterion in arriving at the damages.

The trial judge in his charge stated (S. C., p. 121):

“One sale of the stock proved, is to the defendant’s wife in January, 1928, of \$865. The nearest other value is fixed as of October, 1927, of \$400. Those figures are per share. If you should take the \$865 price per share and decide that that was a reasonable time, after the notice of conversion, you would figure forty times \$865, making \$34,600. Deducting \$4,000 would be \$30,600, and one-half would be \$15,300; that is provided you find that this second arrangement was made. Then to that you would add interest from May 28, 1929, the date of the beginning of the suit, to date, on the amount you find due. That interest should be figured in and one verdict rendered by you.

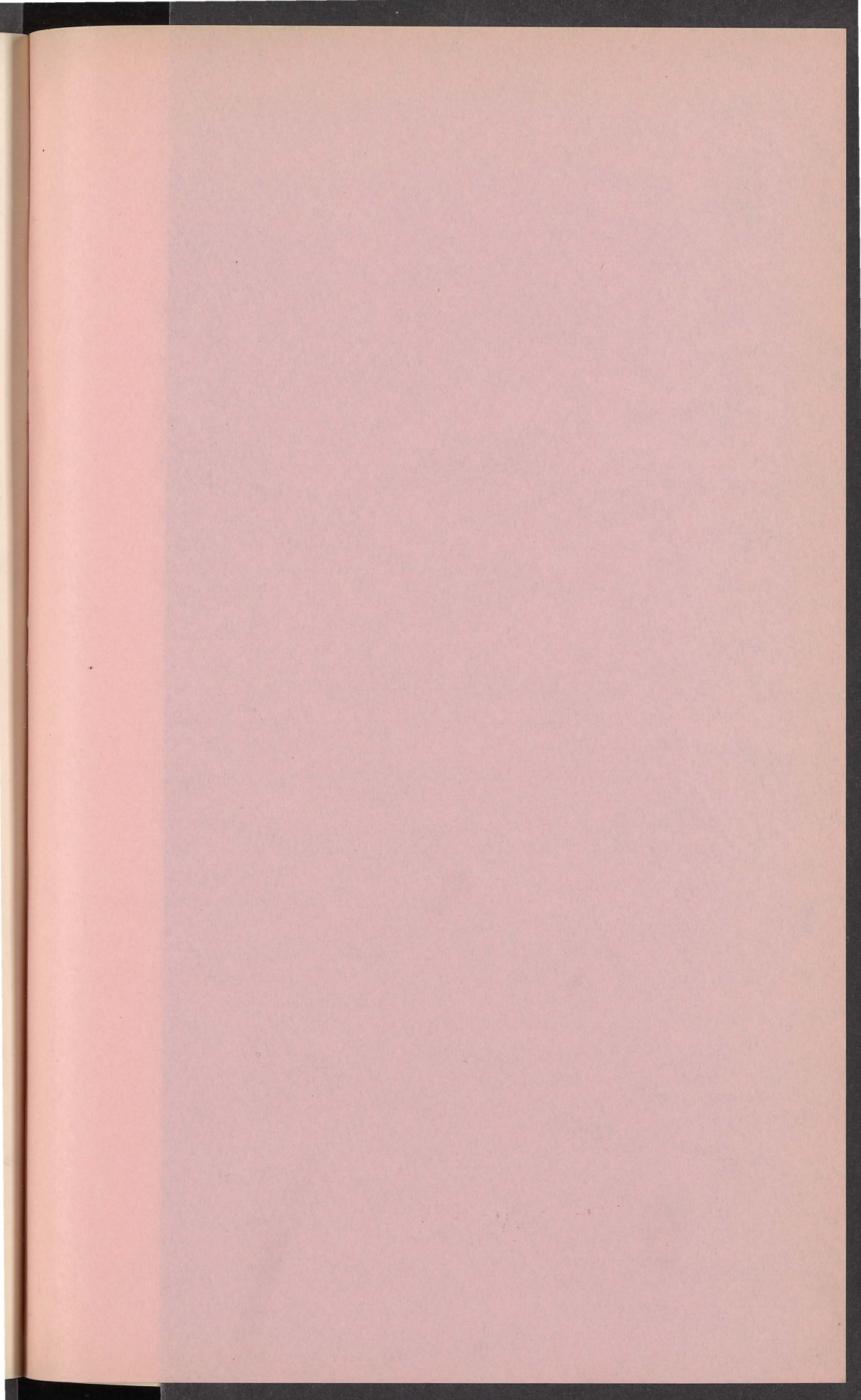
The reason for the rule of taking the highest intermediate value between the time of conversion and a reasonable time after the plaintiff has received notice of that conversion, is that it is applied to something which fluctuates in value. I might illustrate it in this way: If you deposited some stock with a bank or somebody as security for ninety days or one hundred twenty days, and there would be a big slump in the market, and they say, ‘We don’t want to take any chances now,’ and they sell out, then the ordinary rule of conversion, which would be the market value of the thing at the time it is converted, would not be fair. You can readily see that, because the man would be sold out of the stock at the low price. So the law says he shall have a reasonable time after he knows of the conversion to protect himself, and they fix the highest price from the time

of the conversion up to a reasonable time after notice of the conversion; in other words, they do that so that he can go out and buy that stock and he would have as his damages the difference between that and the highest value, because whatever he collected from the defendant would help him in purchasing the stock. In short, it is a fairer method of compensating him.”

It is respectfully submitted that under the charge and the evidence it was competent for the jury to find as it did, that the charge is free from error, and that the judgment below was in all respects proper and should be affirmed.

Respectfully submitted,

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