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Notice of Appeal.

Filed August 17, 1931.

New Jersey Supreme Court

ESSEX COUNTY.

HERMAN MILLER, Plaintiff, vs. ALBERT STIEGLITZ, ALBERT J. ERDMANN, GEORGE M. SIDENBERG, STANLEY J. HALLE, LOUIS STRAUSS, GEORGE P. DAVIS, ROBERT ISAAC, DAVID M. HEYMAN, GEORGE M. SIDENBERG, JR., doing business under the name of HALLE & STIEGLITZ, Defendants.	Action at Law. Notice of Appeal.

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To SAMUEL PRESS, Attorney of Plaintiff, or to whom it may concern:

Sir:

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

Respectfully yours,

NATHANIEL WELTCHEK,
Attorney of Defendant.

40

Grounds of Appeal.

Filed August 17, 1931.

NEW JERSEY SUPREME COURT

ESSEX COUNTY.

HERMAN MILLER, Plaintiff, vs. HALLE & STIEGLITZ, *et als.*, Defendants.	Grounds of Appeal.

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To SAMUEL PRESS, Attorney for Plaintiff, or to whom it may concern:

20

The Grounds of Appeal upon which the Defendant will rely are as follows:

1. The Trial Court erred in allowing the plaintiff to read certain documents not yet admitted in evidence, to the Jury during Plaintiff's opening.

2. The Trial Court erred in striking out the Counter-claim as filed by the Defendant.

30

3. The Trial Court erred in refusing to allow counsel for the Defendant to ask the following question: "Did you request that they deliver the stock you actually ordered?".

4. The Trial Court erred in refusing to allow counsel for the defendant to ask the following question: "How did the stock come to be delivered to the Newark office?"

40

Grounds of Appeal.

5. The Trial Court erred in refusing to allow counsel for the Defendant to ask the following question: "When did you first know that there had been an error in the delivery to Mr. Miller?"

6. The Trial Court erred in refusing to allow Mr. Ryan to testify as to what transpired in Mr. Ryan's office. 10

7. The Trial Court erred in refusing to allow counsel for the Defendant to ask the following question: "When were you apprised of the fact that there had been an error in the delivery of stock to Mr. Miller?".

8. The Trial Court erred in making the following statements in open court during the course of the trial: "I have to wait until the case is closed, but I am telling you now that that will be the disposition of the case." "I think it would be useless. I told you what disposition I would make of the case. It isn't necessary to read it to the Jury because the Jury will not get the case. You have told me what your defense would be and I have told you what my disposition will be." 20

9. The Trial Court erred in refusing to charge any or all of the charges as requested by the Attorney for the Defendant. 30

10. The Trial Court erred in directing a verdict for the Plaintiff instead of allowing the case to go to the Jury.

11. The Trial Court erred in directing a verdict for the plaintiff inasmuch as said direction was contrary to the law and against the weight of the evidence.

NATHANIEL WELTCHEK,
Attorney of Defendant. 40

New Jersey State Library

Summons.

Filed January 30, 1931.

State of New Jersey

To Albert Stieglitz, Albert J. Erdmann, George M. Sidenberg, Stanley J. Halle, Louis Strauss, George P. Davis, Robert Isaac, David M. Heyman, George M. Sidenberg, Jr., doing business under the name of Halle & Stieglitz:

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(L.S.)

You are summoned to answer the annexed complaint of Herman Miller in an action at law in the New Jersey Supreme Court. And Take Notice, that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after service upon you of the writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

Witness, WILLIAM S. GUMMERE, Chief Justice of our New Jersey Supreme Court, at Trenton, this 22nd day of January, 1931.

FRED L. BLOODGOOD,
Clerk.

30

SAMUEL PRESS,
Attorney.

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New Jersey State Library

Complaint.

Filed January 30, 1931.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

HERMAN MILLER, Plaintiff, vs. ALBERT STIEGLITZ, ALBERT J. ERDMANN, GEORGE M. SIDENBERG, STANLEY J. HALLE, LOUIS STRAUSS, GEORGE P. DAVIS, ROBERT ISAAC, DAVID M. HEYMAN, GEORGE M. SIDENBERG, JR., doing business under the name of HALLE & STIEGLITZ, Defendants.	Action at Law. Complaint.

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Plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, complains of the defendants and for a cause of action alleges:

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1. Defendants, non-residents of the State of New Jersey, are partners doing a stock brokerage business and maintaining a place of business in the City of Newark, County of Essex and State of New Jersey.

2. That prior to January 14th, 1930, plaintiff had an account with the defendants.

3. That on the 14th day of January, 1930, defendants without authorization from the plaintiff, 40

bought and charged plaintiff with thirty-three and one-third shares of Tungsol Preferred stock at Thirty-seven Dollars per share, making a total of One Thousand One Hundred and Eighty Dollars and Seventy-eight Cents ($1,180.78).

4. At no time did plaintiff order or buy said stock nor ratify the buying and charging of said stock to his account.

5. There is also due plaintiff from defendants a further balance of One Hundred and Seven Dollars and Ten Cents ($107.10) admittedly due plaintiff from defendants as of December, 1930.

Plaintiff demands of the defendant the sum of One Thousand Two Hundred and Eighty-seven Dollars and eighty-eight Cents ($1,287.88) together with interest on the first mentioned sum of One Thousand One Hundred and Eighty Dollars and Seventy-eight Cents ($1,180.78) from the 14th day of January, 1930, and lawful interest on the balance of One Hundred and Seven Dollars and Ten cents ($107.10) from December, 1930.

SAMUEL PRESS,
Attorney for Plaintiff.

Amended Answer and Counterclaim.

Filed April 8, 1931.

NEW JERSEY SUPREME COURT

Essex County.

Herman Miller, Plaintiff, vs. Halle & Stieglitz, *et als.*, Defendants.	Action at Law. Amended Answer and Counterclaim.

10

Defendants, by way of answer to plaintiff's complaint, says that:

20

1. Paragraphs one and two are admitted.

2. Paragraphs three and four are denied.

3. Paragraph five is admitted.

4. Defendants deny that plaintiff is entitled to the sum of $1,287.88, together with interest as alleged in the concluding paragraph of the complaint.

30

FIRST SEPARATE DEFENSE:

Plaintiff denies and joins issue with the matters and things contained in paragraphs three, four and the concluding paragraph of the plaintiff's complaint.

SECOND SEPARATE DEFENSE:

At all times mentioned in the complaint, defendants were the agent of plaintiff and discharg-

40

ed their obligations as agent of plaintiff with the express and/or implied consent of plaintiff.

THIRD SEPARATE DEFENSE:

At all times mentioned in the complaint, defendants were the agents of the plaintiff, and as 10 such agents, discharged their duty, in full conformity of the rules of the particular stock exchange where the stock ordered by plaintiff was dealt in and in full conformity at the customs of duly accredited stock brokers.

FOURTH SEPARATE DEFENSE:

Plaintiff unlawfully and without authority converted to his own use, stock to which he never was 20 entitled, thereby causing defendant to pursue one of his elective remedies to cure the injury sustained by defendant by virtue of plaintiff's said conversion.

COUNTERCLAIM:

By way of counterclaim to the plaintiff's complaint, defendant says that:

1. They are partners doing a stock brokerage business in the City of New York and maintain- 30 ing a place of business in the City of Newark, County of Essex and State of New Jersey.

2. That on or about June 30, 1929, plaintiff had an account with the defendants.

3. On or about June 30, 1929, pursuant to plaintiff's instructions, defendants purchased for his account one hundred shares Tungsol Lamp, *new* stock, which consisted of one hundred shares 40 of common stock of said company.

4. Through error there was delivered to plaintiff, one hundred shares of Tungsol Lamp, *old* stock, which consisted of 66-2/3 shares common stock and 33-1/3 shares preferred stock.

5. At all times defendants had for the account of plaintiff and tendered themselves ready, willing, and able to deliver to plaintiff 33-1/3 shares of Tungsol Lamp, common, in completion of plaintiff's order as given, and as executed, though erroneously delivered. 10

6. Plaintiff refused to accept delivery of the remaining 33-1/3 shares of Tungsol Lamp, common stock, which defendant held for him, and insisted upon retaining the 33-1/3 shares of Tungsol Lamp, preferred stock.

7. That at all times aforementioned, defendant was the owner of and/or entitled to possession of the 33-1/3 shares of Tungsol Lamp stock, preferred, as aforementioned, of the value of One Thousand one hundred eighty dollars and seventy-eight cents ($1180.78). 20

8. By virtue of the acts and conduct of plaintiff as aforesaid, and by virtue of defendants' demand for return of said stock and plaintiff's refusal, the said plaintiff thereby unlawfully converted and retained same to his own use to defendants' damage of 30

Wherefore defendant demands as damages upon his counterclaim, the sum of One thousand one hundred eighty dollars and seventy-eight cents ($1180.78) together with interest and costs of suit to be taxed.

NATHANIEL WELTCHEK,
Attorney of Defendant. 40

Reply to Amended Answer and Answer to Counterclaim.

Filed June 23, 1931.

NEW JERSEY SUPREME COURT

ESSEX COUNTY.

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HERMAN MILLER, Plaintiff, vs. ALBERT STIEGLITZ, *et als.*, Defendants.	Action at Law. Reply to Amended Answer & Answer to Counterclaim.

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1. Plaintiff denies the allegations set forth in the Second Separate Defense filed by the defendants in the Amended Answer.

2. Plaintiff denies the allegations set forth in the Third Separate Defense filed by the defendants in the Amended Answer.

3. Plaintiff denies the allegations set forth in the Fourth Separate Defense set forth in the Amended Answer filed by the defendants.

30

ANSWER TO COUNTER-CLAIM.

1. Plaintiff admits the allegations set forth in paragraph 1 of the Counter-claim.

2. Plaintiff admits the allegations set forth in paragraph 2 of the Counter-claim.

3. Plaintiff denies the allegations set forth in paragraph 3 of the Counter-claim.

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Reply to Amended Answer and Answer to Counterclaim.

4. Plaintiff denies the allegations set forth in paragraph 4 of the Counter-claim.

5. Plaintiff denies the allegations set forth in paragraph 5 of the Counter-claim.

6. Plaintiff denies the allegations set forth in paragraph 6 of the Counter-claim. 10

7. Plaintiff denies the allegations set forth in paragraph 7 of the Counter-claim.

8. Plaintiff denies the allegations set forth in paragraph 8 of the Counter-claim.

FURTHER ANSWER.

1. On or about June 30th, 1929, plaintiff ordered one hundred shares of Tungsol Lamp, new stock. 20

2. That on or about the 5th day of August, 1929, the defendants, with full knowledge delivered to the plaintiff at the defendants' office in the City of Newark, N. J., 66-2/3 shares of common stock and 33-1/3 shares preferred stock which the plaintiff accepted in lieu of the one hundred shares of Tungsol Lamp new stock which he ordered with the full approval, knowledge and consent of the defendants. 30

3. That the plaintiff retained this stock with the full knowledge, understanding and agreement of the defendants.

4. Plaintiff never converted 33-1/3 shares preferred stock or any part thereof from the defendants.

5. Plaintiff or his agent, after delivery of said 40

stock during the months of August and September, directed the attention of the defendants, through its agents, of the delivery of said 66-2/3 shares common stock and 33-1/3 shares preferred stock. That the said agents of the defendants told the agent of the plaintiff to retain said preferred stock in place of said 33-1/3 shares Tungsol Lamp common, which was not delivered to the plaintiff.

SAMUEL PRESS,
Attorney for Plaintiff.

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Reply to Answer to Counterclaim.

Filed June 23, 1931.

NEW JERSEY SUPREME COURT

ESSEX COUNTY.

HERMAN MILLER, Plaintiff, vs. ALBERT STIEGLITZ, *et als.*, Defendants.	Action at Law. Reply to Answer to Counterclaim.

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Defendant by way of reply to plaintiffs answer to counterclaim, says that:

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1. Paragraph one is admitted.
2. Paragraph two is denied.
3. Paragraph three is denied.
4. Paragraph four is denied.
5. Paragraph five is denied.

FIRST SEPARATE DEFENSE.

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1. It was beyond the power of any agent of defendant to authorize the retention of stock incorrectly delivered to plaintiff, in lieu of the stock which should have been delivered. If such statements were made by any of defendant's agents, the said statements were beyond and outside the scope of the agency.

NATHANIEL WELTCHEK,
Atty. for defendants.

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Order.

Filed August 17, 1931.

NEW JERSEY SUPREME COURT

Essex County.

Herman Miller, Plaintiff, vs. Albert Stieglitz, *et als.*, Defendants.	Action at Law. Order.

10

This matter being opened to the Court by Elias D. Haut, appearing for Nathaniel Weltchek, and it appearing to the Court that the above matter was tried before this Court on the thirteenth day of April, 1931, and it further appearing that the Reply to Amended Answer and Answer to the Counterclaim, together with the Reply to the Answer to the Counterclaim were presented to the Court at that time and it further appearing that the above stated pleadings were inadvertently misplaced and not filed with the Clerk of the Supreme Court at Trenton until the twenty-third day of June, 1931, it is on this 14th day of August, 1931,

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30

Ordered

That the Postea filed in this cause on the sixteenth day of April, 1931, be and the same is hereby set aside and it is further Ordered

That an Amended Postea be filed and entered in this cause as of the twenty-third day of June, 1931.

40

WILLIAM A. SMITH,
Judge.

Amended Postea.

Filed August 17, 1931.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

HERMAN MILLER, Plaintiff, vs. ALBERT STIEGLITZ, ALBERT J. ERDMANN, GEORGE M. SIDENBERG, STANLEY J. HALLE, LOUIS STRAUSS, GEORGE P. DAVIS, ROBERT ISAAC, DAVID M. HEYMAN, GEORGE M. SIDENBERG, JR., doing business under the name of HALLE & STIEGLITZ, Defendants.	Action at Law. Amended Postea.

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This action was tried at the Essex County Circuit of the New Jersey Supreme Court Monday, April 13th, 1931, before Hon. William A. Smith with a jury, to whom the case had previously been referred for trial.

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1. On motion of the plaintiff, the counter-claim filed by the defendants in said cause, was dismissed.

2. The cause having been heard upon the complaint of the plaintiff and the amended answer of the defendants and the reply thereto, upon motion of counsel for plaintiff, and after hearing the arguments of counsel thereon, by direction of the Court,

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the jury returned a verdict in favor of the plaintiff and against all of the defendants and assessed the damages in favor of the plaintiff and against all of the defendants in the sum of One Thousand Three Hundred and Seventy-eight Dollars and Fifty-two Cents ($1,378.52).

10

WILLIAM A. SMITH,
Circuit Court Judge.

Dated:

Judgment.

Whereupon it is adjudged that the plaintiff, Herman Miller do recover of said defendants Albert Stieglitz, Albert J. Erdmann, George M. Sidenberg, Stanley J. Halle, Louis Strauss, George P. Davis, Robert Isaac, David M. Heyman, George M. Sidenberg, Jr., doing business under the name of Halle & Stieglitz, the sum of One thousand three hundred seventy-eight dollars and fifty-two cents damages together with his costs which have been taxed at the sum of Eighty-three dollars and thirty-two cents making in the whole the sum of One thousand four hundred sixty-one dollars and eighty-four cents.

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Damages	$1378.52
Costs	83.32
	$1461.84

Judgment signed and entered Aug. 17, 1931.

WM. S. GUMMERE,
C. J.

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Testimony.

NEW JERSEY SUPREME COURT

ESSEX CIRCUIT.

Monday, April 13, 1931.

HERMAN MILLER,
Plaintiff,

vs. — Action at Law.

ALBERT STIEGLITZ, *et als.*,
Defendants.

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Before—HON. WILLIAM A. SMITH, *J.*, and a jury.

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APPEARANCES:

For plaintiff appears SAMUEL PRESS.

For defendants appears NATHANIEL WELTCHEK.

A jury is called and sworn.

Mr. Press: If the Court please, since the original pleadings were filed, Mr. Weltchek has served on me an amended answer and a counterclaim. It was too late to bring it on in the original defense. It is my opinion that the counterclaim has no basis in this case.

30

The Court: I have a transcript here which shows a complaint and answer only.

Mr. Weltchek: I have a copy of the answer and counterclaim which was acknowledged as within time by Mr. Press. It is my contention that I

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am permitted to introduce inconsistent defenses, and that has to be decided during the trial. I am willing to agree with Mr. Press that we dispense with the transcript the Court has as to the subsequent pleadings.

The Court: I can only consider it by consent.
10 All I have before me is the transcript.

Mr. Press: I will consent for the purpose of my motion to dismiss it.

The Court: You will consent that the answer and counterclaim be considered?

Mr. Press: On this application, yes, sir.

Mr. Weltchek: Before the application, there is a subsequent pleading necessary by virtue of the further answer. This is the copy.

The Court: Do you want to make a motion ad-
20 dressed to the counterclaim, Mr. Press?

Mr. Press: Yes, sir.

Mr. Weltchek: And I have written in longhand the reply to the answer to the counterclaim.

Mr. Press: My application is to dismiss the counterclaim for this reason: we are suing on a stop notice for something that they took out of this plaintiff's account; something like $1200, with which they purchased certain 33-1/3 shares
30 of the stock which the plaintiff has and which upon request he refused to give up. They took the money and they evidently paid themselves for this stock, so that at all events, this man has this stock and they are paid and it is a closed transaction. Now they ask for an affirmative judgment against this plaintiff for that stock, which would be paying them twice.

The Court: (After argument) I will deny the
40 motion for the present and I will hear the case and dispose of it later.

Motion to dismiss Counterclaim.

Mr. Weltchek: Before opening the case I wish to deposit in court what we believe the plaintiff is rightfully entitled to. I wish to deposit 33-1/3 shares of Tungsol, Inc., common stock and 2.02 shares Park & Tilford stock, together with a sum of money which, for the purpose of tender, I am depositing in the amount of $115 which the defendant believes to be at least the amount due to the plaintiff together with any interest which may by any possibility be awarded.

Mr. Press: As to the cash, I have no objection; as to the Park & Tilford stock I have no objection; as to the Tungsol, Inc., stock, I object because the tender is made too late.

The Court: Why?

Mr. Press: Because under the evidence as it will develop, if this tender had been made at the time agreed upon between the parties here—

The Court: I will hear the case first.

Mr. Press opens for plaintiff.

(During his opening Mr. Press refers to certain documents).

Mr. Weltchek: I object to the use of exhibits until they are marked in evidence.

The Court: He is telling what his claim will be; the jury will have to decide it on the evidence.

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

Exception noted as ground of appeal.

Mr. Press continues with the opening.

Mr. Weltchek opens for defendants.

Mr. Press: I ask for a dismissal of the counterclaim. No demand was made for a refund of the money as claimed in the counterclaim.

The Court: I will grant the motion.

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

Exception noted as ground of appeal.

Mr. Weltchek: Before proceeding with the opening: I conferred with Mr. Press a short time ago and some things can be admitted.

10

The Court: Put them on the record.

Mr. Weltchek: Will you agree that the stock ordered was 100 shares of Tungsol common new?

Mr. Press: No question that he ordered it June 30, 1929.

Mr. Weltchek: Will you agree that 66-2/3 common and 33-1/3 was delivered?

Mr. Press: That's right.

20

The Court: The only thing at issue, as I understand it, is that the parties agreed that the 66-2/3 common and 33-1/3 preferred should be in lieu of the 100 shares of common stock.

Mr. Press: Yes. I claim, of course, that they had no right to pursue the course they did.

30

HERMAN MILLER, plaintiff, sworn in his own behalf.

Direct-examination by Mr. Press:

Q. Do you know any of the defendants personally? A. No.

Q. Did you ever meet them? A. No.

Q. Did you ever do any business with them? A. No.

Q. But you did do business with the firm? A. Yes.

40

Q. With whom did you do business? A. Mr. Stein.

Q. What is his first name? A. Clarence.

Q. What position does he hold here as far as you know? A. Manager.

Q. Where? A. In the office on Clinton Street.

Q. Whose office? A. Halle & Stieglitz. 10

Q. Is there anybody else there in the office as manager? A. Mr. Clark.

Q. And whenever you wanted to transact any business in the way of giving an order to buy or sell, through whom did you do that? A. Usually through Mr. Stein.

Q. How did you do it, in person or over the 'phone? A. Over the 'phone.

Q. Did you ever visit the office in person? A. Occasionally. I would say roughly at that time--not much after June or July. 20

Q. How often did you drop into the office? A. Not over twice a week.

Q. With whom would you talk there? A. I wouldn't speak much at all.

Q. Whom would you talk to? A. Mr. Stein or Mr. Clark.

Q. Did you ever see any of these defendants at the Newark office? A. Never. 30

Q. Did you deal for yourself or for your wife? A. For my wife.

Q. When you paid anything did you give your own checks or your wife's checks? A. Mrs. Miller's.

Q. Was she there much of the time? A. Only occasionally.

Q. Before June you had been ordering Tungsol Lamp? A. Yes.

Q. Did you ever buy on margin? A. Never on 40

margin; we always had money enough to pay.

Q. Did you leave the certificates with the broker, or did you have physical possession of the certificates? A. All Curb stocks were bought for cash; they never sold Curb stocks on margin.

Q. Why did you do that? A. Halle & Stieglitz
10 Company told me and we understood it—

Q. Who told you that? A. Mr. Stein.

Q. What did he say about Curb transactions? A. We understood it was cash and we always had ample funds to buy those stocks.

Q. Did you always pay for it and take up the stock when you ordered it? A. Yes.

Q. You had this Tungsol stock before that, didn't you? A. Yes.

Q. Before June, 1930, did you have Tungsol
20 Lamp? A. Yes, sir.

Q. Around that time was there a new issue of stock, or an old issue, or what? A. I had already converted 100 shares of the old stock into the new stock. There was a conversion and I had it converted. The new issue was out about July 3rd or 4th, I believe.

Q. Around June 30th did you give an order to sell 100 shares of Tungsol, or did Mrs. Miller? A.
30 Everything was in her name.

Q. In June, 1929, did she have certificates for 100 shares of Tungsol Lamp? A. Yes, sir.

Q. Did you give orders to sell it? A. I did.

Q. When was that? A. I can't remember.

Q. Was it in the middle or around the end of June? A. It was around the end of June.

Q. What did you do with the certificates? A. I tendered them to Mr. Stein.

40 Q. What did you tell him? A. I ordered him to

convert them to new and Mr. Stein said to take them to the New York office.

Q. What did you do? A. I took the stock to New York.

Q. Did you hand it over? A. I handed it over to the register's office.

Q. Did you have it converted? A. I had it converted. 10

Q. What did you get for that 100 shares? A. To the best of my knowledge—

Q. Did you get certificates for new stock? A. I am sure I did. I may be—

Objected to unless it appears on the particular stock in question.

Objection sustained.

Q. After you converted the stock did you give an order to buy any more? A. Yes, sir. 20

Q. What was the order? A. I gave an order for 100 shares of stock, and by mistake they ordered 200.

Q. Who made the mistake? A. I made the mistake in buying 200, but I acquiesced in the transaction. I never mentioned that before, but I kept the stock. This is admitted.

Q. 100 of that lot was for what purpose? A. 100 was for the purpose of covering my short side, so called. 30

Q. Who called that to your attention? A. Mr. Clark.

Q. What did he say? A. He said, "Mr. Miller, you are technically short of this stock and if you don't deliver it you may be sold out under the rule." That got me confused— not confused, but worried, because we never sell short. I don't understand the transactions. 40

Q. Is that the reason you bought 200 shares; that 100 was to be handed over for the old stock? A. Yes, sir.

Q. And you kept 100 shares? A. Yes, sir.

Q. What was the condition of that account? A. There was ample funds.

10 Q. Was it your understanding you were to get a certificate or certificates— A. Yes, sir, for 100 shares of new stock.

Q. Was there enough money in your account to pay that? A. Yes, sir, decidedly; they never mentioned anything about money.

Q. I show you this statement. Is that what you got? A. Yes, sir, 200 shares, if it is there.

Q. That's the advice you received for the 200? A. Yes, sir.

20

Mr. Press: I offer it in evidence.

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

Q. Did you ask for a certificate for the 100 shares? A. Yes, sir.

Q. When was it you called for the certificate? A. About a week later.

Q. Where did you go to call for it? A. I went to the office in Newark.

30

Q. Whom did you see? A. Mr. Stein.

Q. What did you say to Mr. Stein? A. I said, "Mr. Stein, I want my certificate."

Q. What did he say? A. He said, "We haven't got it."

Q. Was there anything said to you about being short of money? A. Not a word.

Q. Did you go again for that certificate? A. Yes.

40

Q. When? A. Another week elapsed.

Q. What for? A. Because they didn't have it.

Q. In the meantime you had given up the certificate for the 100 shares you had? A. No, the hundred shares I had I kept; I had a hundred shares in Mrs. Miller's possession.

Q. That paid for 100 shares of new? A. Yes; I didn't need to put up $9000 because I had covered the other side. 10

Q. You were charged with 100 shares? A. Yes, it left me to pay for 100 shares.

Q. You say you had enough money to pay for that? A. Yes.

Q. You went there the following week, you say? What did you ask for? A. I asked for the stock and they didn't have it.

Q. Whom did you ask? A. Mr. Stein, and I was mad, too, because it took so long—

Q. What did he say? A. He said, "We haven't got it," or words to that effect. 20

Q. Did you go down there again? A. Yes, and then I called up the office in New York and I said, "You must deliver this stock," and I threatened to go to law, and they finally, after such a long delay —

Q. When was that? A. I presume over six weeks.

Q. Did you get any word from anybody about the stock? 30

Objected to as immaterial.
Objection overruled.

Q. Go ahead. A. After threatening to go to law all of the other stocks that they had sent to me they delivered by registered mail to my house—we had bought other Curb stocks. Finally, after a long delay the stock— they didn't telephone me; I went to the office and demanded the stock. 40

Q. When was that? A. That's about six weeks later.

Q. Was that in August? A. I presume so; I am sure it is.

Q. You went down to the office and whom did you see there? A. I saw Mr. Stein. There was a big crowd there and I suppose— I am sure that I saw Mr. Stein.

Q. What did you say to him? A. I said, "I want my stock."

Q. What did he say? A. He said, "The stock is here; you will find it in the office."

Q. What did you do? A. I went into the office, and sure enough the stock was there, and the office man—

Q. Who gave it to you? A. The clerk, or someone working there.

Q. Was it in an envelope sealed? A. No, sir.

Q. How did they hand it to you? A. There was four certificates.

Q. Do you remember the date? A. I am not sure.

Q. It was in August, wasn't it? A. Yes, I presume so.

Q. Was it the early part of August, would you say? A. I presume so.

Q. Did you say anything? A. Yes, I said, "This is not the stock I ordered." At that time Tungsol common was selling above the price of the preferred; Tungsol common was convertible and callable at $5.50. They kept me sweating for that stock—

Q. When you took the stock there did you sign any receipt for it? A. Yes, I did.

Q. Do you know what the receipt called for? A. I am not sure.

Mr. Press: Have you got the receipt, Mr. Weltchek?

Mr. Weltchek: I haven't got the receipt.

Q. How many receipts did you sign there? A. One receipt, to the best of my knowledge. Naturally, I haven't got the full recollection of it.

Q. Did Mr. Stein see you take these certificates? A. I took the stock and I said to the man, "What is this?" I had in mind— they didn't give me anything more valuable at the time I took the stock. 10

Q. Was the preferred stock higher or lower than the common stock? A. The common stock was higher.

Objected to on the ground that the witness is not qualified.

Q. Have you ever seen quotations of that stock? A. Quite often. I have a record of it here. 20

Q. When did you see the quotations? A. August 3rd and August 2nd.

Q. Can you tell us from the records what the quotations were?

Objected to.

Objection sustained.

Q. What did you do with the certificates? A. I said, "This is not the stock I ordered," and the man in there said, "That's what they gave me." He started out and said, "Mr. Stein, is that right?" or Mr. Clark—I'm not sure—and he said, "Yes," and I took the stock— 30

Q. In whose name were the certificates? A. In Mrs. Miller's name.

Q. Did you ever trade in your name there? A. No, sir. This was Mrs. Miller's account.

Q. You gave the orders for her? A. Yes, sir. 40

Q. Was it understood you were trading for her? A. Yes, sir, because she opened the account with her own check.

Q. You took the certificate to Mrs. Miller? A. Yes, sir.

Q. On the same day? A. No, I believe the stock was given to me on Wednesday and I went down to the shore on Friday and I gave her the stock. I said, "Isn't it funny that they should take—

Q. Never mind what you said. You gave her the stock? A. Yes, sir.

Q. Do you remember getting monthly statements from Halle & Stieglitz? A. Yes, sir.

Q. Is this the statement you received covering June and July and the transaction of 200 shares of Tungsol New? A. Yes, sir.

Mr. Press: I offer the statement in evidence.

(Same is received in evidence and marked Exhibit P-2.)

Q. And this is the statement for July showing the Tungsol New and the Old—the common and the preferred—all there on that statement? A. Yes, sir.

Mr. Press: I offer it in evidence.

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

Mr. Press: I offer this statement—

Objected to.

Objection overruled.

Q. I show you this statement. Is there anything in this statement for August charging you with any Tungsol stock? A. No, sir.

Q. So far as the statement is concerned, was that transaction cleaned up? A. Yes, sir, the transaction was closed. There was money there and I had not put another penny in there at that time.

Q. Is that the stock you carried? A. Yes, sir, that is what we carried, and there was money enough to pay for these. 10

Q. Outside of that there was nothing else? A. Nothing else.

Mr. Press: I offer it in evidence.

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

Q. Were you watching the market from day to day? A. No, sir, I haven't time for that.

Q. Were you getting news on it whether it was going up and down? A. No, sir. It was Mrs. Miller's account. 20

Q. Did you know whether it was going up or down? A. No, sir, I didn't bother with it.

Q. After that did you give any orders to buy and sell? A. Yes, sir, I believe so; things went on the same.

Q. Demands were made on you for money? A. Yes, margin.

Q. Did you answer those demands? A. Yes, sir, and I spoke to Mr. Ryan on the telephone— 30

Q. When did you first hear about this Tungsol preferred? A. From then on, as far as I was concerned, I bought the stock from Mrs. Miller and my dealings as far as any of it was—

Q. When did you first hear about this Tungsol preferred? A. Away in October or November.

Q. Did you buy any more Tungsol after that? A. No.

Q. Away in October or November you say you 40

heard from Halle & Stieglitz? A. Mrs. Miller.—

Q. Did you hear about it? A. Yes, I was acting for her.

Q. From whom did you hear? A. Mr. Stein.

Q. What did you hear? A. He wanted that stock back.

10 Q. Did he say that to you? A. No.

Q. When did you have the first transaction after that? A. I think about two or three days later Mrs. Miller spoke to me.

Q. I want to know when you heard, after you considered it closed— when did you next again hear from Halle & Stieglitz about this stock? A. Possibly three months later.

Q. What was the nature of that— A. They told me—

20 Q. Who told you? A. Mr. Stein.

Q. Where did he see you? At the house or where? A. Mrs. Miller told me—

Q. I want to know what you know about it. When did you hear from Stein or Clark or anybody from Halle & Stieglitz? A. I believe it was November— approximately about November 1st.

Q. What did you hear? A. They demanded that 33-1/3 shares back.

30 Q. Who wanted that? A. Mr. Stein.

Q. What did he say? A. He said, "The office wants that stock back."

Q. What did you say? A. I said if they are entitled to it they could get it back if they could show where they were justified, but we refused to give it back until they could show that they were entitled to it.

Q. Did you consider that stock as belonging to
40 Mrs. Miller instead of what you had ordered? A. Unquestionably, and so did they.

Mr. Weltchek: I object to that and ask that it be stricken out.

The Court: Strike it out.

Q. When did you hear from them again? A. On the 13th, I believe it was, Mr. Ryan—

Q. Do you know Mr. Ryan? A. No, sir. He said he was Mr. Ryan— Halle & Stieglitz wanted more margin. I said, "Mr. Ryan, you can get all the money you need to cover this, but I want you to assure me as man to man that the Tungsol matter will have no bearing on this stock," and Mr. Ryan assured me it would have no bearing and that could be settled, and I refused to give up the stock. 10

Q. You put up the money to strengthen your position there, did you? A. Yes, sir.

Q. When did you hear again, either by word or in writing? A. They wrote me that they would go— I haven't got all the letters. 20

Q. Did you have much correspondence? A. Yes.

Q. You wrote some letters to them, too, didn't you? A. Yes.

Q. Protesting against this whole thing? A. Yes, and I was willing to—

The Court: Never mind that.

Q. Did you hear again from them? A. Yes, we heard from them. 30

Q. When? A. In the final— instead of Mr. Ryan talking to me over the 'phone—it is very confusing calling them up because you talk to one and then to the other.

Mr. Weltchek: I ask that that be stricken out.

The Court: Strike it out. Just answer the questions. 40

Q. When did you hear again from anybody about this matter? A. They wrote me that unless I delivered the stock that they would go to court, and I suggested that they do.

Q. Do you know the date of that letter? A. No, but it is there; the letter is there that they would
10 take legal action.

Q. Did they take legal action against you? A. No.

Q. What action did they take? A. Then, instead of Mr. Ryan talking to me as man to man, another man spoke—

Objected to.

Objection sustained.

Q. Do you know who that man was? A. They
20 called up and there was a Mr. Sulzberger called up and he said that unless—

Objected to on the ground that no proper foundation has been laid for this testimony.

Objection sustained.

Q. Is this letter of November 26th the letter you received from them? A. I am sorry I haven't got my glasses— (reading) "While we regret any in-
30 convenience—

Q. Is that the letter? A. Yes, sir.

Mr. Press: I offer it in evidence.

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

(Mr. Press reads Exhibit P-5.)

Q. You didn't return the stock? A. No.

Q. And you started to write letters to the Stock
40 Exchange, didn't you? A. Yes. I would like to state—

Q. In other words, you wanted to settle this through the Stock Exchange. A. Yes.

Q. And you didn't get very far, did you? A. No.

Q. Did you receive this letter in December (handing paper to witness)? A. Yes, this is from Mr. Ryan and this is the letter I would like especially to mention. 10

Mr. Press: I offer it in evidence.

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

Q. Did you see that letter later (handing paper to witness)? A. Yes.

Mr. Press: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-7.) 20

(Mr. Press reads Exhibit P-6.)

Q. Did you communicate with the New York Curb Exchange? A. No.

(Mr. Press reads Exhibit P-7.)

Q. Before these communications did you see anybody from Halle & Stieglitz? A. No. May I make a statement?

Q. What is the statement you want to make? A. I telephoned Mr. Ryan— 30

Objected to.

Objection sustained.

Q. Did you know Mr. Ryan? A. No.

Q. You didn't know the man you spoke to? A. No.

Q. Your wife retained the stock? A. Yes, sir.

Q. And true to their word, on the 14th of January you got a notice, did you? A. Yes. 40

Q. That they had bought 33-1/3 shares of preferred stock? A. Over my objection.

Q. Did you order the stock at that time? A. Oh, no.

Q. Did you at any time ratify the buying of that stock? A. No.

10 Q. Your account was charged with these figures? A. Yes.

Q. Deducted from your account? A. Yes.

Mr. Press: I offer this in evidence.

(The two papers referred to are received in evidence and marked Exhibit P-8 and Exhibit P-9.)

Q. So that there was deducted from your account about $1180? A. Yes.

20 Q. You had no further communication with Halle & Stieglitz? A. No, sir, except to sell out some little odds and ends.

Q. Did you have any further conversations with Mr. Stein and Mr. Clark? A. No, sir, my conversation was with Mr. Sulzberger from then on.

Q. Over the telephone? A. Yes.

Q. Did he tell you he was Mr. Sulzberger?

30 Objected to.

Objection sustained.

Q. Did you watch the market in October regarding the Tungsol stock? A. I saw the fluctuation and I saw where the common went away down to $10 a share.

Objected to on the ground that the witness is not qualified to quote it.

The Court: That is not the best evidence.

40

Cross-examination by Mr. Weltchek:

Q. How long have you been doing business with Halle & Stieglitz? A. I really haven't been doing business— oh, yes; I started to buy something about four or five years ago and then closed my account. 10

Q. When did you subsequently have the account reopened? A. I never reopened it.

Q. Who reopened it? A. Mrs. Miller reopened it.

Q. How long ago did you say your account was originally opened? A. I haven't got the exact date.

Q. Approximately.? A. I presume about five years ago. I couldn't remember. My account had been closed. 20

Q. When was that account closed? A. I don't remember. The account had been closed for about two years or a year before Mrs. Miller reopened the account in her name; that is, for her, and over my objection.

Q. I show you a card, and ask you whether you ever saw this card before.? A. Yes, sir.

Q. Is that your signature? A. Yes, sir.

> Mr. Weltchek: I ask that it be marked for identification. 30
>
> (The same is marked Exhibit D-1 for identification.)

Q. This statement marked Exhibit P-2, June, 1929, is in your name, is it not? A. Yes, but this is not my account. It was started by—

Q. But the statement is in your name. A. Yes, sir. 40

Q. And this Exhibit P-4 for August, 1929, and

September, 1929, is in your name, is it not? A. Yes.

Q. And this Exhibit P-3 for July and August—

The Court: They speak for themselves.

Q. You never addressed any communications to Halle & Stieglitz with reference to the fact that the statements were in the name of the wrong party, did you? A. They knew that these—

Q. You never addressed any communications to Halle & Stieglitz with reference to the fact that the statements were in the name of the wrong party, did you? A. I never had any dealings with Halle & Stieglitz. I never—

Q. You ordered the stocks, did you not? A. No, I did not order many stocks; Mrs. Miller did the buying more than I did.

Q. You permitted her to use the account which was in your name, did you not? A. She permitted me to use the account. Of course, my account I closed with them three or four years ago, or two or three years before—

Q. You permitted her to use the account in your name, did you not? A. Yes.

Q. And you yourself ordered stocks, did you not, trading in this account? A. Well, yes. I didn't order much—

Q. You ordered the 200 shares of Tunsol, did you not? A. Yes, sir.

Q. And you ordered other stocks? A. Yes, sir.

Q. When you received communications from the firm of Halle & Stieglitz, from which office did they come; from the New York office or from the Newark office? A. The New York office.

Q. When you received confirmations, did they come from New York? A. Yes.

Q. Then the extent of your business with the Newark office was to place orders. A. Yes.

The Court: He got his stock from the Newark office.

Q. But all your confirmations came from the New York office. A. Yes.

Q. And all your letters came from the New York office. A. Yes.

10

Q. These letters which were marked in evidence were addressed to you from the New York office, were they not? A. Yes.

Q. And they bore upon the controversy with reference to the 33-1/3 shares of Tungsol common stock. A. Yes.

Q. Mr. Stein had nothing to do with this letter, did he? A. I don't know; I am not in their office.

20

Q. On December 11th you were advised by letter marked Exhibit P-6 that inasmuch as the Tungsol stock was not listed on the New York Stock Exchange, if you had any objections to make you should communicate with Mr. Eugene R. Tappen, Secretary of the New York Curb Exchange.? A. Yes.

Q. You testified you did not communicate with Mr. Tappen.? A. Can I explain that?

30

Q. Did you testify that you did not communicate with Mr. Tappen? A. Unquestionably no.

Q. Why didn't you communicate with Mr. Tappen? A. The reason I didn't communicate with Mr. Tappen or any member of the New York Curb was because I had absolutely no confidence in the New York Curb market.

Q. You purchased stocks listed on the New York Curb market, didn't you? A. For cash.

40

Q. Did you expect the New York Stock Exchange to arbitrate a matter for you for stocks listed on the Curb Exchange? A. Mr. Ryan told me to arbitrate this matter with Mr. Ashbel Green.

Q. Who is Mr. Ryan? A. I never knew him until I met him in the court room there (indicating).
10 I never saw him before and I went over to him and I said, "I believe you are Mr. Ryan." But I never wanted to arbitrate anything with the Curb Market.

Q. You received this letter marked Exhibit P-7 from Mr. Ryan advising you that you were to write Mr. Eugene R. Tappen, Secretary of the New York Curb market, 117 Greenwich Street, New York, explaining to him the entire transaction, did you not? A. Yes, I did.

20 Q. Didn't you also receive a letter advising you that inasmuch as the stock was not listed on the New York Stock Exchange it could not be arbitrated by Mr. Arsbel Green? A. Yes.

Q. And he advised you that because it was not listed on the New York Stock Exchange it could not be arbitrated there, didn't he? A. Yes.

Q. And didn't he advise you that inasmuch as—

The Court: The letters are in evidence.

30 Q. But you didn't go to the Curb Exchange. A. I wouldn't go.

Q. But you purchased stocks listed there, however.

Objected to.

Objection sustained.

Q. You testified that you asked Mr. Stein for the stock. A. Yes.

Q. When did you first ask Mr. Stein for the
40 stock? A. About a week after. It shouldn't take any longer.

Q. What did he reply to you? A. "We haven't got it."

Q. Then what happened? A. I asked him again and again.

Q. When was the final time you asked him before you obtained delivery of the stock? A. When I telephoned the New York office of Halle & Stieglitz and threatened to go to law to get delivery of this stock, and then I got it. 10

Q. Then at the time you noticed that there was an error in the stock did you actually receive it? A. Yes.

Q. What did you tell Mr. Stein at the time? A. There was a big crowd there. I went to the office and when the man gave me the stock I said, "Why this is not the stock." After waiting so long I naturally felt— and the man said, "That's what they gave me." I went out into the office and I said, "Is this stock O. K.?" or something to that effect, and he said, "Yes," or words to that effect. 20

Q. Did you offer to return the stock to accept the delivery of the proper stock?

> Objected to on the ground that it was not incumbent upon him to do that.
>
> Objection sustained. 30

Q. Did you request that they deliver the stock you actually ordered?

> Objected to.
>
> Objection sustained.
>
> Defendants' counsel prays an exception to this ruling of the Court.
>
> Exception noted as ground of appeal.

Q. When did you first receive a demand for a return of the preferred stock? A. I presume— 40

from then on, from the time that stock was delivered to Mrs. Miller, as far as I was concerned, it was Mrs. Miller's stock, and I acting for Mrs. Miller, as Mr. Stein well knew— I don't remember exactly. The stock was made out in Mrs. Miller's name.

10 Q. At your request, was it not? A. No, not at my request especially. Mr. Stein at one time sent a check to Mrs. Miller when I didn't even ask him to send a check to Mrs. Miller.

Q. Are you sure that stock was not delivered in Mrs. Miller's name at your request? A. I believe I may have requested it, surely, because they understood it was Mrs. Miller's.

Mr. Weltchek: I move to strike out what they understood on the ground that it is in-
20 competent.

The Court: Strike it out.

Q. But you requested that the stock be delivered in Mrs. Miller's name, did you not? A. Yes.

Q. Didn't you receive a demand for the return of that stock in the middle part of August, 1929? A. No.

Q. Did you receive any telephone calls from New
30 York from the office of Halle & Stieglitz? A. No.

Q. Did you receive any calls from Mr. Stein? A. In the middle of August? No.

Q. Do you recall telling Mr. Stein that inasmuch as the stock was registered in your wife's name you could not do anything about it? A. No.

Q. Are you sure of that? A. No, I am not sure.

Q. Do you remember having said anything to him about that? A. After I got the stock, the
40 account— the stock was actually Mrs. Miller's, but I believe that the stock was in the possession

of Mrs. Miller for delivery at any time that they could show that it belonged to them. The stock remained in Mrs. Miller's possession. I didn't hedge; the stock was there for them if they could show that it belonged to them.

Q. That is not an answer to my question. Didn't you tell Mr. Stein that inasmuch as the stock was registered in Mrs. Miller's name you could not do anything about it? A. No, I have no recollection of that.

Q. You are sure you didn't tell them that? A. I don't remember that; I don't think I did.

Q. Will you tell us what you told him? A. In the month of August we were away a lot and I don't believe we were back until September or October.

Q. Then you didn't call up the office of Halle & Stieglitz during the month of August? A. Yes, casually.

Q. When during the month of August, 1929, did you call at the office of Halle & Stieglitz? A. It would be pretty hard for me to remember that.

Q. Was it the early part or the latter part? A. I am sure it was the early part; I don't remember the latter part. You couldn't expect me to remember all that.

Q. Would you say it was in the first week of August? A. I believe I was there the first week of August.

Q. Did you have these different conversations with Mr. Stein during the first week of August? A. Which conversations?

Q. With reference to the Tungsol stock. A. After I got the stock the transaction was closed.

Q. You didn't get the stock until the 6th of August? A. Oh, I see. Now I remember. It was about

the first part of August when they delivered the stock. My dates were a little confused.

Q. What I want to know is when you called at the office of Halle & Stieglitz with reference to this delivery. After you received this stock didn't Mr. Stein tell you, or didn't you tell Mr. Stein that
10 inasmuch as the stock was in your wife's name you could not do anything about it? A. Not a word in August.

Q. When did you tell it to him? A. If I said anything to Mr. Stein after the stock was delivered, it must have been the latter part of October or November.

Q. And at that time you told him that inasmuch as the stock was in your wife's name you could not do anything about it? A. I have no
20 recollection of having made any such assertion.

Q. You wouldn't say you didn't say it, would you? A. I wouldn't say that I did.

Q. You wouldn't say that you did not make that statement, would you? A. I wouldn't say that I did not or that I did.

Q. You testified with reference to a demand of Mr. Ryan for more margin. Will you kindly explain the circumstances surrounding that demand?
30 A. I remember on the 13th of November when the controversy arose as to this stock, they called for more margin. They wanted $1000 and I called up Mr. Ryan because Mr. Stein said, "We have nothing to do with it," although all transactions were in Newark. Then I called up Mr. Ryan and I asked him to assure me as man to man that if I gave him this money that this Tungsol incident would have no bearing whatever, and Mr. Ryan there assured me over the telephone that that
40 could be arbitrated satisfactorily.

Q. What was your reason for being so anxious about this Tungsol incident? A. After I got the stock it then was in Mrs. Miller's possession. She had control of it and I didn't feel like having Halle & Stieglitz get margin and use it for the purpose of other than what the margin account called for, and that's why I spoke to Mr. Ryan as I did, and Mr. Ryan told me all right over the telephone. 10

Q. You knew that outside of the Tungsol your account needed more margin, did you not? A. After the Tungsol matter closed stocks dropped.

Q. Before the Tungsol matter was closed you knew that your account needed more margin.? A. Absolutely not; nor was there any request made for more margin.

Q. Request was made for more margin at the time you communicated with Mr. Ryan, wasn't it? A. I communicated with him in November and the stock was delivered in August. 20

Q. Who deposited the margin? A. I did for her— for Mrs. Miller.

Q. You deposited the margin? A. I deposited it for Mrs. Miller.

Mr. Weltchek: I move that the last part of the answer be stricken out.

The Court: Strike it out. 30

Q. You testified that you wrote letters to the Stock Exchange with reference to the account. A. No, I wrote the letters but it was on behalf of Mrs. Miller.

Q. Did you advise them that it was on behalf of Mrs. Miller? A. They didn't recognize— Mrs. Miller called up Mr. Ryan and Mr. Ryan said, "We refuse to recognize you in this transaction," and I had to write in the name of Herman Miller 40

explaining her side— everything I explained to the New York Stock Exchange.

Q. Have you a copy of that letter? A. No, I didn't need any.

Q. Do you remember the contents? A. No, I don't.

10 Q. Do you recognize that (handing paper to witness)? A. (Reading from paper) We knew—

Q. Do you recognize that? A. Yes.

Q. Will you glance over it and tell me whether that is not what you wrote to the Stock Exchange? A. No, I wrote this on behalf of Mrs. Miller.

Mr. Weltchek: I move that that be stricken out.

Q. Will you glance at that and tell me whether

20 that is not what you wrote to the Stock Exchange?

By the Court:

Q. Is that a copy of your letter? A. Yes.

By Mr. Weltchek:

Q. Is that your signature? A. Yes.

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

30 (The same is marked Exhibit D-2 for identification.)

Q. I show you another letter dated March 17th and ask you whether this is not also a copy of the letter you sent to the Stock Exchange. A. Yes.

Q. And that is your signature? A. Yes.

Mr. Weltchek: I ask that it be marked for

40 identification.

(The same is marked Exhibit D-3 for identification.)

Q. Where do you live, Mr. Miller? A. I lived at 98 Milford Avenue, and now 58 Vermont Avenue.

Q. You lived on Milford Avenue on December 19, 1930? A. Yes. 10

Q. Did you ever receive this letter, or rather, this envelope? A. Yes.

Q. Do you recall returning that refused? A. Yes.

Q. A letter from Halle & Stieglitz? A. Yes.

Q. Did you know the contents of that letter? A. No.

Q. And you refused it? A. I refused all letters from them. 20

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

(The same is marked Exhibit D-4 for identification.)

Q. I show you this receipt and ask you if you ever saw that before (handing paper to witness)? A. What is the date of that?

Q. December 23, 1930. A. No, I never saw it. 30

Q. You never saw that before? A. I surely am kind of handicapped. I haven't got my glasses. I never saw this— I haven't any recollection of it.

Q. Did you ever see these securities before, referring to 33-1/3 shares of Tungsol and 2.02 shares of Park & Tilford? A. I know about this Tungsol because we own it, but I never saw the Park & Tilford.

Q. As a matter of fact, weren't these delivered to 40

you with this receipt and you refused to accept it? A. I refused to accept anything from Halle & Stieglitz.

Q. Did you imply the fact that something was tendered?

Objected to.

10 Objection sustained.

Q. Was anything tendered to you? A. It was never tendered.

Q. Then what did you refuse to accept? A. After that we got some other letters that I returned.

Q. Registered letters? A. I think so.

Q. Do you know how many registered letters you returned? A. No.

20 Q. Do you know whether it was one or two or three or four or more? A. I don't think there were more; there may have been two. It was a detail. I wouldn't accept anything from Halle & Stieglitz after this controversy.

Q. And you don't know what was contained in those letters? A. No.

Redirect-examination by Mr. Press:

30 Q. There is a letter here which you wrote to the Stock Exchange. I will ask you whether you received this answer in response. A. Yes, I remember that.

Mr. Press: I offer it in evidence.

(Same is received in evidence and marked Exhibit P-10.)

(Mr. Press reads Exhibit P-10.)

40

JULIA MILLER sworn in behalf of plaintiff.

Direct-examination by Mr. Press:

Q. Mrs. Miller, you are the wife of Herman Miller who was on the stand before you? A. Yes.

Q. Do you know Mr. Clarence Stein? A. Yes.

Q. How long have you known him? A. I know him for about fifteen years. 10

Q. Do you know what his business is? A. Yes.

Q. What is it? A. He is a manager of Halle & Stieglitz.

Q. Where is this office? A. On Clinton Street.

Q. Have you ever been in there? A. Yes, lots of times.

Q. During what period? A. For the last few years.

Q. Were you there during 1929? A. Yes. 20

Q. The early part or— A. All during the year.

Q. When did you go in? A. I went in and saw stocks that I purchased.

Q. How are you interested? A. It is my account.

Objected to.

Objection sustained.

Q. Did you ever speak to Mr. Stein about your ordering and selling stocks? 30

Objected to on the ground that there is no such allegation in the complaint.

Q. Did you ever talk to him? A. Yes.

Q. About what? A. About the stocks.

Q. Did you ever talk to him about buying stocks? A. Yes.

Q. What did he say? A. He said, "You can have the account here but it would have to be in Mr. 40

Miller's name because they do not take accounts in the name of a woman."

Q. Did they take your money? A. They took $15,000.

Q. Did you pay any money?

Mr. Weltchek: I ask that it be stricken out.

10

The Court: Strike it out.

Q. Did you ever pay any money to Mr. Stein? A. Yes.

Objected to.

The Court: The checks are the best evidence.

Q. Have you any checks with you? A. Yes.

Q. Whenever any stock was paid for who paid for it? A. I paid for it.

20

Q. I show you a check dated March 7, 1929, and ask you whose check it is, to whom it was given and how much it is for. A. $3300. I handed it to Mr. Stein and it is signed by me.

Q. Whom is it made out to? A. Halle & Stieglitz.

Q. What was it for? A. I put it there because I expected to buy Tungsol.

30

Q. What stock was that money to pay for? A. Tungsol.

Q. How about this account running in Mr. Herman Miller's name? Who paid for it? Who paid deposits on the account that was in your husband's name?

Objected to.

Objection sustained.

Q. For what account was that check? A. For my account. I had intended to buy Tungsol and

40

I left it there until I was ready to purchase the stock.

Objected to.

The Court: Strike it out.

Q. Did you have an account there in your name? A. No.

Q. Why not? A. They took the account but Mr. Stein said it would have to be in Mr. Miller's name because they would not take the account in the name of a woman. 10

Mr. Press: I offer the check for $3300 in evidence.

Objected to on the ground that this suit is brought by Herman Miller.

The Court: I suppose it is admissible as part of the moneys furnished to the defendants on this account. 20

Mr. Weltchek: For that purpose I am willing to admit it.

The Court: I will allow it.

(The same is received in evidence and marked Exhibit P-11.)

(Mr. Press reads Exhibit P-11.)

Q. How about this check (handing paper to witness)? A. This was given in payment of the Tungsol stock. 30

Q. Whom was it given to? A. January 30, 1929.

Q. To whom was it given? A. Halle & Stieglitz.

Mr. Weltchek: I object to these checks. We admit that the stocks were paid for.

The Court: I will allow it.

Q. Whom was it made out to? A. Halle & Stieglitz. 40

Q. Whom is it signed by? A. Julia Miller.

Mr. Press: I offer it in evidence.

(The same is received in evidence and marked Exhibit P-12.)

Q. Have you any other checks? A. Yes.

10 Objected to as immaterial.

Objection sustained.

Mr. Press: If there is any question about her paying all the money into the account I want to offer all the checks.

Mr. Weltchek: I object.

Mr. Press: I offer Mrs. Miller as a co-plaintiff.

The Court: As a matter of fact, I do not see how the defense will stand.

20 Mr. Weltchek: The plaintiff, Mr. Miller, says it was delivered at his instructions.

The Court: If that was a mistake you have to sue Mrs. Miller to get it back. How can you charge this plaintiff for it? I think we are wasting a lot of time.

Mr. Weltchek: It was a mistake brought about by the plaintiff's conduct.

30 The Court: But you delivered the stock in her name. You have to sue her to get it back. If it was a mistake, I can't see any possible rights you have. If you delivered the certificate by mistake to Mrs. Miller I don't see how you can charge Mr. Miller's account. How is he going to get it from Mrs. Miller if she doesn't want to give it to him?

Mr. Weltchek: It was delivered to Mrs. Miller.

40 The Court: It was delivered to Mr. Mil-

ler and made out to Mrs. Miller. Suppose she does not want to give it back to him?

Mr. Weltchek: The entire situation was brought about by the conduct of Mr. Miller and he certainly has to be answerable for it.

The Court: I have to wait until the case is closed, but I am telling you now that that will be the disposition of the case. 10

Q. Did you receive the Tungsol stock in August, 1929? A. Yes, sir.

The Court: It isn't disputed that she received it. It seems to me that we are wasting a lot of time.

Mr. Press: Then I will rely on the Court's decision. 20

The Court: They can't charge Mr. Miller's account for the value of stock that they delivered to Mrs. Miller. They have to get the stock back by suing either in replevin or in trover and conversion—

Mr. Weltchek: I don't like to argue with your Honor's opinion, but for the purpose of the record I do not think I can accept your Honor's view.

The Court: Then we will proceed with the examination of the witness. 30

Q. After you got this stock, what did you do? A. I saw Mr. Stein. I said, "Why didn't you give me the right stock? I bought 100 shares of common stock and I want what I bought." He said, "Why do you make a fuss? If you don't like the 33-1/3 shares of preferred, change it." I said, "You took so long to give it to me." I said, "Didn't you have the stock?" He said, "Probably not." He said, 40

"Why didn't you change it?" and I took the stock and put it in the vault and forgot about it.

Q. When was this conversation with Mr. Stein? A. I saw Mr. Stein, I can't just remember the date, but it was in the summer time when we had got the stock; maybe a week or so after— I can't re- 10 member the date, but it was when the price was practically the same that I saw him, and he said, "Change it if you don't like it."

Q. Did you speak to Mr. Clark? A. I spoke to both.

Q. When did you speak to Clark? A. That was sometime in July. I said to Clark, "I didn't buy that stock. I want what I bought."

Objected to on the ground that there is 20 no testimony here that she bought anything. Objection sustained.

Q. You kept this stock. Did you look at it? A. I got it.

Q. What was there? A. It was 66-2/3 common and 33-1/3 preferred.

Q. When did you get it? A. Sometime in July.

Q. Was it July or was it August? A. No, it wasn't July; it was August.

30 Q. As soon as you got it did you go down to the office of Halle & Stieglitz in Newark? A. Yes.

Q. Whom did you see there? A. I saw Clark and I saw Stein. The first time I went down there I saw Clark.

Q. Who is Mr. Clark? A. He takes charge of the office when Mr. Stein is away.

Q. Is he manager there? A. Yes.

Q. What did you say to him? A. I said to Mr. Clark I wanted what I bought. He said, "You know 40 it's convertible. Take it and change it." I said,

"Will it be all right?" He said, "Yes." I said, "You know if I wanted the preferred I would have bought the preferred." He said, "Change it." I said, "It took you so long to get the stock I suppose you didn't have the stock." He said, "Maybe we didn't."

Q. Did you have the stock with you? A. Yes. 10

Q. And you went away with the stock? A. Yes.

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

After Recess

JULIA MILLER resumes the stand. 20

Direct-examination (continued) *by Mr. Press*:

Q. What was the date? Was it August? A. Yes, sir.

Q. What day in August? A. The early part of August.

Q. Did you hear anything from Mr. Stein or hear anything from Mr. Clark or anybody after that? A. Well, I heard about the end of the year when they wanted the stock back. 30

Q. Did you see Mr. Stein in the meantime before that? A. After I had the stock and he said it was all right I didn't talk to him about Tungsol any more until I heard about giving the stock back. I was in there on other business but not on Tungsol.

Q. Did you talk to Mr. Stein on the Tungsol when he came back from Europe in October? A. Yes.

Q. Why did you say you didn't see him? A. I 40

talked to him when Mr. Stein came back from his vacation.

Q. What month was that? A. That was around October; it was right after he came back.

Q. Whom did you see? A. Mr. Stein.

Q. Where? A. At Halle & Stieglitz' office on Clinton Street.

10

Q. What did you say? A. I said, "Do you know what I got instead of my hundred shares of common? I got 66-2/3 common and 33-1/3 preferred." He said, "Why make a fuss over it? It's convertible." I said, "Is this a closed transaction?" He said, "Yes."

Cross-examination by Mr. Weltchek:

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Q. You say you spoke to both Mr. Stein and Mr. Clark with reference to this account? A. Yes.

Q. And they told you that inasmuch as the stocks were selling at the same level you should keep on? A. Yes.

Q. That was told to you by whom? A. Mr. Clark and Mr. Stein.

Q. When? A. I spoke to Mr. Clark around August and to Mr. Stein in October when he came back from his vacation.

30

Q. When did you speak to Mr. Clark? A. Right after Mr. Miller brought home the stock. He told me what I got and I said, "That isn't what I paid for, Herman. I don't want it." He said, "Go down and fight it out with Clark." I went down and saw Mr. Clark. He said, "Why are you making such a fuss for? It's convertible, isn't it? You can change it." I said, "You didn't send me the right stock." He said, "You can change it."

40

Q. What did you do? A. I put it in the vault

and didn't do anything until Mr. Stein came back. We were very friendly and he said it's all right.

Q. When did Mr. Stein tell you that? A. When he came back from his vacation. He said, "If you don't want it, convert it." I said, "Is it a closed transaction?" He said, "Yes."

Plaintiff rests. 10

JAMES J. RYAN sworn in behalf of defendants.

Direct-examination by Mr. Weltchek:

Q. Mr. Ryan, are you affiliated with the firm of Halle & Stieglitz? A. Yes, sir, I am.

Q. In what capacity? A. At present I am a partner. 20

Q. Are you familiar with the account of Herman Miller? A. Yes, sir.

Q. Do you know Mr. Clarence Stein, your Newark manager? A. Yes, sir, I do.

Q. Will you tell us in what capacity Mr. Stein is acting as manager of the Newark office? Just what his rights and authorities are.

Objected to.

Objection overruled. 30

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

Exception noted as ground of appeal.

A. Mr. Clark is manager of the Newark office. His duties are to receive orders, transmit those orders to New York, get reports from New York, give the customer that report— at times to pay out money from the Newark office on explicit instructions 40

from the New York office. He cannot pay moneys out of the Newark office without the O.K., as we call it, of the New York office.

Q. Has Mr. Stein as manager, or Mr. Clark, as assistant manager, the right to arbitrate disputed questions?

10

Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

A. No, sir.

Q. To whom should disputes be referred?

Objected to.

20

Objection overruled.

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

Exception noted as ground of appeal.

A. To the main office in New York.

Q. You heard Mr. Miller testify that he had a conversation with you regarding margin. Can you tell us the circumstances and the facts surrounding that conversation?

30

Objected to as immaterial.

Objection overruled.

A. Mr. Miller's conversation with me was that we called on Mr. Miller for additional margin on his account. He called me on the telephone and he asked me if this margin call was predicted on the difference in regard to Tungsol common stock and the preferred stock.

40

Objected to unless the witness knows that he was talking to Mr. Miller.

Witness: I was talking to a gentleman who called himself Mr. Miller.

Objection sustained.

Mr. Weltchek: Mr. Miller said he was talking to a gentleman who called himself Mr. Ryan. 10

The Court: I will allow it.

A. (Continuing) In response to the margin call Mr. Miller asked me if the margin call was predicated upon the fact that the difference in the Tungsol common and the Tungsol preferred existed. I told him it was not predicated on that difference; that the margin call went out at that time eliminating the difference on our books and 20 records concerning the Tungsol common and preferred; in other words, it went out irrespective of the difference on our books.

Q. Because of the fact that his account needed fortification by this additional margin?

By Mr. Press:

Q. May I ask when that was? A. I would have to refer to the records. 30

By Mr. Weltchek:

Q. Have you the records here? A. I think you have the records there. To the best of my knowledge it was in the latter part of October.

Mr. Press: Then I object to it as being too remote and as having no bearing on this transaction before us.

Objection overruled. 40

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

Exception noted as ground of appeal.

Q. I show you a letter marked Exhibit D-4 for identification and ask you whether this is the margin call you refer to. A. No, sir, it was previous to that time.

10

Q. Have you your book showing the account? A. Yes, sir, we have.

Q. Does the record appear here as to the date you sent out the margin call? A. No, sir, it would not be.

Q. Will you refer to the account of Herman Miller? A. Yes, sir.

Q. With reference to the purchase of the shares of Tungsol stock, will you please trace for us the development of the particular transaction involving Tungsol stock? A. Mr. Miller had sold through our office 100 shares new Tungsol common stock at 48¼. That was on the ledger date of July 1st. Mr. Miller did not have that stock in our office at that time. Under date of July 3rd Mr. Miller bought 200 shares Tungsol New, 100 shares of which was applied against the sale of July 1st; the other hundred shares was what we call a long position; in other words, he had an interest in 100 shares of Tungsol common.

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30

Q. Was that stock fully paid for at the time? A. No, sir, it was not.

Q. It was carried on margin? A. Yes, sir.

Q. Are you in a position to state the percentage of margin that was carried against the purchase? A. From this record, no, because it would depend entirely on the price of the other stocks he was carrying on that date.

40

Q. Does the record reveal that he had not paid for the stock entirely? A. It revealed that he owed us $173.40 plus interest when we sold it.

Q. Then what happened to the Tungsol transaction? A. We received instructions at a later date to transfer 100 shares of Tungsol stock to Mrs. Miller's name. 10

Q. Through whom did you receive that notice? A. From the Newark office.

Q. Go on. A. The old Tungsol A was transferred on the basis of 66-2/3 and 33-1/3 Old, and through an error on the part of one of our clerks in the office—

Mr. Press: I object to that unless Mr. Ryan knows who made the error or unless the clerk is here. 20

Q. Do you know who made the error? A. I couldn't tell you. There are fifty clerks there.

Objection sustained.

Q. Is the work in the cage under your supervision? A. Yes, sir.

Q. Are you familiar with it all? A. Yes, sir.

Q. Are you familiar with these accounts? A. Yes, sir. 30

Q. Will you tell us how it came that the preferred stock was delivered to Mr. Miller instead of common?

By the Court:

Q. Do you deliver the stock? A. No, we deliver the stock to our Newark office.

The Court: He can testify only to what he did himself. 40

By Mr. Weltchek:

Q. How did the stock come to be delivered to the Newark office? A. The instructions came to transfer 100 shares of Tungsol to Mrs. Miller's name in the account of Herman Miller. One of the transfer clerks taking the instructions from
10 our Newark office—

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q. Do you know what stock was delivered to your Newark office? A. Yes, sir.

20 Q. What stock was delivered to your Newark office? A. 66-2/3 Tungsol New common and 33-1/3 preferred.

Q. Do you know what stock was ordered? A. 100 shares Tungsol new.

Q. When did you first discover that there had been an error in the delivery? A. It was—

Objected to unless it was discovered by Mr. Ryan himself.

30 Mr. Weltchek: Mr. Ryan testified that the work was done under his general supervision.

The Court: It doesn't make any difference. He can testify what he knows of his own knowledge.

Q. When did you first know that there had been an error in the delivery to Mr. Miller?

40 Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q. When were you apprised of the fact that there had been an error in the delivery of stock to Mr. Miller?

10

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q. Do you know of your own knowledge whether or not there was an error in the delivery of stock to Mr. Miller?

20

Objected to.

Objection sustained.

Q. Did you have any negotiations with Mr. Miller relative to the Tungsol stock? A. I had conversations with Mr. Miller.

Q. Did you have any communications with him by mail? A. Yes, sir, I did.

Q. I show you a letter marked Exhibit P-5 and ask you whether you wrote that letter. A. Yes, sir, I did.

30

Q. I show you a letter marked Exhibit P-6, and ask you whether you wrote that letter. A. Yes, sir, I did.

Q. I show you a letter marked Exhibit P-7 and ask you whether you wrote that letter. A. Yes, sir.

Q. I show you this letter marked Exhibit D-4 for

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identification and ask you whether you ever saw that letter before. A. Yes, sir, I did.

Mr. Weltchek: I offer it in evidence.

Objected to on the ground that the stock having been delivered to Mrs. Miller, Mr. Miller is not responsible.

10 Objection overruled.

(Same is received in evidence and marked Exhibit D-4.)

Mr. Weltchek: I would like to read it to the jury.

The Court: I think it would be useless. I told you what disposition I would make of the case. It isn't necessary to read it to the jury because the jury will not get the case. You have told me what your defense
20 would be and I have told you what my disposition will be.

Q. I show you a letter dated January 23rd from the New York Stock Exchange. Did you ever receive that letter? A. Yes, sir, we did.

Q. Was D-2 for identification included with that letter? A. Yes, sir.

30 Mr. Weltchek: I offer these in evidence.

(The same are received in evidence and marked Exhibit D-2 and Exhibit D-5.)

Q. I show you a letter dated March 24th from the New oYrk Stock Exchange. Did you ever receive that? A. Yes, sir.

Q. Was Exhibit D-3 for identification included with it? A. Yes, it was.

Mr. Weltchek: I offer them in evidence.

40 Objected to.

Objection overruled.

(The same are received in evidence and marked Exhibit D-3 and Exhibit D-6.)

Q. When was the delivery of the 66-2/3 shares of Tungsol common and 33-1/3 shares of Tungsol preferred made from your office?

10

Objected to on the ground that the statement shows when it was made.

Objection overruled.

A. Mailed from the New York office on August 5th.

Q. Referring to that account, can you tell us when demand was made on Mr. Miller for the return of the 33-1/3 shares of preferred stock?

20

Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

A. This record does not show when the demand was made.

Q. Did you purchase 33-1/3 shares of Tungsol preferred for the account of Herman Miller?

30

Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

A. Yes, sir, we did.

Q. When did you purchase 33-1/3 shares of Tungsol preferred? A. January, 1930.

40

Q. Will you relate the circumstances surrounding the purchase of 33-1/3 shares of Tungsol preferred? A. I can answer it in a general way if I am allowed to do that.

Q. Go on. A. After various communications after the matter was brought to Mr. Miller's notice, we told him we would apply it to his account and charge him. After he did not return the stock to us we charged his account and charged the account with the cost.

Q. What was that? A. The notice we sent to Mr. Miller will show that; I don't remember it. I. think it was around $35 a share; the statements will show the exact price.

Q. I show you these exhibits P-8 and P-9 and ask you if that is the price you paid for the stock. A. Yes, sir, we bought 33 shares at 35½, and a third of a share at 12.50.

Q. Did you make tender of the 33-1/3 shares of common stock and the 2.02 shares of Park & Tilford?

Objected to.

By the Court:

Q. Did you do anything with it personally? A. No, sir.

By Mr. Weltchek:

Q. Did you personally do anything with the 33-1/3 shares? A. No, sir, not personally; my firm did.

Q. Do you know who did it? A. Yes, sir.

Q. Who?

Objected to.

Objection sustained.

Q. Referring to the account of Herman Miller, can you tell us whether any dividends on the account of Herman Miller were credited to his account while the common stock was being held for him by you? A. No, sir.

Q. If there were any dividends declared would they have been credited to his account? 10

Objected to as speculative.

Objection sustained.

Cross-examination by Mr. Press:

Q. On the statement of August and September, or September and October, you made no mention of Mr. Miller's having 33-1/3 shares common in his account. A. No, sir.

Q. You know about the delivery of the common and the preferred stock in August, don't you? A. I wasn't permitted to answer that question before. 20

Q. You knew about the delivery of the common and the preferred stock in August, did you not? A. Yes, sir.

Q. Mr. Miller had sufficient money in Janaury when you charged him with this preferred. A. Yes, sir.

Q. Are you familiar with the prices of the common and preferred stock around June and July and August? 30

Objected to.

Objection sustained.

Mr. Weltchek: If your Honor please, I offer in evidence the sheet pertaining to the account of Herman Miller.

Objected to as now having been proved by the proper person. 40

Mr. Weltchek: Mr. Ryan testified that it was made under his direction.

The Court: It is not admissible; he is not the bookkeeper.

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

10 Exception noted as ground of appeal.

CLARENCE STEIN sworn in behalf of defendants.

Direct-examination by Mr. Weltchek:

Q. Mr. Stein, what is your occupation? A. Manager, Newark office, Halle & Stieglitz.

20 Q. Do you know Mr. Miller? A. I do.

Q. Do you know Mrs. Miller? A. I do.

Q. Do you recall the transaction involving 100 shares of Tungsol stock? A. I do.

Q. Do you recall Mr. Miller's coming to your office and telling you that he received 66-2/3 shares of Tungsol common and 33-1/3 shares of Tungsol preferred? A. I do.

Q. Did he ask you what to do about it? A. I told him I would ask New York.

30 Q. Did you tell him that inasmuch as they were selling at about the same price he should keep them? A. No, sir, I did not.

Q. Whom did you deliver the stock to? A. Mr. Miller.

Q. Did he request that it be delivered in his wife's name? A. Yes, sir.

Q. Was it so delivered in accordance with his request? A. It was.

40 Q. When Mr. Miller called at your office and

asked you for the stock did you say you did not have it? A. The first time, yes; I told him it had not come back from transfer yet.

Q. And you told him you would check up on it? A. I did.

Q. Do you recall Mrs. Miller's saying to you, "Mr. Stein, this isn't the stock that I ordered. I don't want it?" A. I do not. 10

Q. Did Mrs. Miller ever open an account with Halle & Stieglitz? A. No.

Q. Did she ever endeavor to open an account? A. Yes.

Q. What was she told? A. We do not carry women's accounts on collateral; we do for cash.

Cross-examination by Mr. Press: 20

Q. You saw this stock before it was delivered? A. I did not.

Q. You had it in your office? A. It comes in registered mail and the young man there takes care of all deliveries.

Q. Wasn't that in the one office? A. My office is in the front, if you recall.

Q. Did you see the stock that day? A. No, sir.

Q. Do you remember Mr. Miller's being in the office and getting it? A. No, sir. 30

Q. Don't you usually get receipts for the stock? A. Yes, sir, we usually do.

Q. Have you got it with you? A. No.

Q. Do you remember Mrs. Miller's being down to your office and talking to you about this transaction? A. I don't remember her, no; I remember him speaking several times about it.

Q. You are general manager here, aren't you? A. Of the office. 40

Q. You sign checks? A. Yes, sir.

Q. And receive money? A. Yes.

Q. And hand over stock certificates? A. Occasionally, if the young man isn't there.

Q. You decide disputes here, don't you? A. No.

Q. There is nobody here in Newark that knows Halle & Stieglitz.

10

Objected to.

Objection sustained.

Q. Anybody wanting to do business here does business with you or Mr. Clark. A. No, there are several customers' men too.

Q. But the members of the firm do not come here, do they? A. Occasionally.

Q. You are in full charge, aren't you? A. Yes.

20

Q. You do anything you want? A. Not anything I want.

Q. You have the collateral. A. The collateral is in New York.

Q. You sign checks? A. Yes, and others do, too.

Q. And pay customers when they want money? A. Not always; up to certain amounts.

Redirect-examination by Mr. Weltchek:

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Q. These bank accounts and the checks you sign, what are they for? A. People bring in stock to sell stock— for the proceeds of the sale; and sometimes on the collateral account they have money there.

Q. Do you ever have matters of dispute come to you on stocks? A. From the home office?

Q. No, with customers. A. Occasionally.

Q. What do you do?

40

Objected to.

Q. What did you do in this case? A. After I checked up with New York and found he got the wrong stock I said, "Just deliver the stock and we will straighten it up and it will be all right."

Q. Did he ever tell you that it was his wife's stock and he couldn't do anything? A. Yes, he said, "It is not in my jurisdiction. I turned it over to my wife and I can't get it." 10

HERMAN V. CLARK sworn in behalf of defendants.

Direct-examination by Mr. Weltchek:

Q. Mr. Clark, what is your occupation? A. Assistant manager of the Newark office of Halle & Stieglitz. 20

Q. Do you know Mr. Miller? A. I do, sir.

Q. Did you ever have any dealings with him? A. Very few.

Q. Did Mr. Miller ever speak to you of 100 shares of Tungsol stock, 66-2/3 of which was common and 33-1/3 preferred? A. Not except asking for the stock.

Q. What did you tell him? A. That it was not transferred. 30

Q. Do you know Mrs. Miller? A. Yes, sir.

Q. Did she ever tell you about the stock? A. I think not.

Q. Did you ever tell Mr. or Mrs. Miller that inasmuch as the stocks were selling at the same levels they could keep either in lieu of the other? A. I did not.

Q. You heard Mrs. Miller testify that she spoke to you about this stock? A. Yes, sir. 40

Q. Did you say that she never spoke to you about the stock? A. To the best of my knowledge and ability I would.

Q. With reference to Mr. Miller, do you recall any particular occasion that he spoke to you about the stock? A. I am inclined to think that I spoke to him about it.

10

Q. Do you remember what you said to him about it? A. That I asked him to return the 33-1/3 shares that he received in error.

Q. What did he say about it? A. He said he no longer owned it; that he had delivered it to Mrs. Miller.

Q. Were you present when Mr. Miller asked that it be delivered in his wife's name? A. That I am not sure of.

20

Q. As assistant manager do you know who controlled that account? A. It was generally considered Mr. Stein's account.

Q. I mean do you know whether Mr. or Mrs. Miller was the owner? Who actually had the account? A. It was Mr. Miller's account.

Q. When the stock was finally delivered who took possession of it? A. You mean when it went out of Halle & Stieglitz' office?

30

Q. Yes. A. Mr. Miller called for it.

Q. Did he say anything to you at the time? A. No, sir.

Q. Were you present? A. I was in the office, yes, sir.

Q. Do you know whether he said anything to Mr. Stein? A. I didn't hear it if he did.

Cross-examination by Mr. Press:

Q. Are you familiar with the prices and quotations of this stock in July and August? A. No, sir.

40

Q. You are not familiar with it? A. No, sir, I couldn't quote each price from day to day; not now.

Q. Do you know whether it is a custom of your firm that when a man buys Curb stock he has to pay for it outright? A. Some Curb stocks.

Q. Isn't that the rule of all Curb stocks? A. No, sir. 10

Q. You don't know the state of Mr. Miller's account? A. No, sir, I did not actually see it. I am informed of it from day to day.

Q. Did you actually see this stock taken in August? A. No, sir.

Mr. Weltchek: I am prepared to show the different price ranges of these stocks. I am perfectly willing that it go into evidence and be admitted as to the course of prices of both stocks, common and preferred. 20

The Court: I don't see that it makes any difference.

Defendants Rest.

Mr. Press: I move for the direction of a verdict in favor of the plaintiff.

The Court: (After argument) The defense here set up is that by mistake the defendants here delivered this stock to Mr. Miller made out in Mrs. Miller's name. To rectify that the defendants set up that he purchased the proper stock and charged it to the plaintiff here. I do not see that that is a proper defense in this action, because the stock was made out in somebody else's name. Therefore I will grant the motion for the direction of a verdict in favor of the plaintiff and against the defendants. 40

and direct the jury to return a verdict of $1378.52.

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

Exception noted as ground of appeal.

Defendants' counsel prays an exception to the Court's refusal to direct the requests to charge.

10

Exception noted as ground of appeal.

Mr. Weltchek: I suppose there is no objection to the deposit being returned.

The Court: (After argument) I will return the stock.

Mr. Weltchek: I would like the return of the excess of the interest.

The Court: The money is paid into court and there is a judgment against your clients, therefore that money is applied to the reduction of the judgment.

20

DEFENDANTS' REQUESTS TO CHARGE.

1. Where a person lawfully comes into possession of certain goods to which he is actually not entitled and a demand is made of him for return of said goods, which demand is refused, that person is guilty of a conversion of the goods of another and then the person whose goods has been so converted has the following right:

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> "He may, within a reasonable time, after the conversion, place himself in the position he would have been in had not his rights been invaded."

40

Dimock v. U. S. Nat'l bank, 55 Law 296.

2. If you find in the evidence herein that the plaintiff converted to his own use, stocks belonging to the defendant and refused to return them as demanded, then I charge you that the defendant had the right to go out into the open market and purchase stocks of an identical character within a reasonable time after the conversion, so as to place himself in the position he would have been in had not the plaintiff converted the said stock. 10

Dimock v. U. S. Nat'l bank, 55 Law 296.

3. If you find from the evidence that stock, other than that which was ordered by plaintiff was actually delivered to him and retained by plaintiff, despite the defendant's demand for a return of same and if you find from the evidence that at all 20 times, defendant had the stock actually ordered by plaintiff and was ready, willing and able to deliver same, then I charge you that the plaintiff's retention of the stock incorrectly delivered, was a conversion of the defendant's property.

4. If you find from the evidence that the plaintiff converted the defendants' stock, then I charge you that the defendant had the right within a reasonable time, after the conversion, to place himself 30 in the position he would have been in had his rights not been invaded and to that end to replace the stock unlawfully retained by the plaintiff and charge the cost of same to plaintiff.

Dimock v. U. S. Nat'l bank, 55 Law 296.

5. If you find from the evidence that five days after the plaintiff refused to return defendant's 40

stock to him, defendant went into the open market and purchased stock of an identical character, then I charge you that said five days was a reasonable time in which to purchase said stock.

6. If you find from the evidence that the plaintiff received stock other than that to which he was entitled and retained same, despite his refusal to accept the stock originally ordered by him, then I charge you that the plaintiff is held to have elected to keep the unordered stock, in addition to the ordered stock and is estopped to deny defendant's authority to purchase and charge the cost of said stock to him.

Mahaffay v. Sarshik, 101 Eq. 297.

7. If you find from the evidence that more valuable stock was delivered to plaintiff than that ordered by him, I charge you that the defendant is entitled to receive from the plaintiff, the more valuable stock.

Newburger v. Weaver, 150 Atl. 298.

8. If you find from the evidence that tender of the balance of the money remaining in plaintiff's account was made to plaintiff and if you find from the evidence that the balance of the stock remaining in plaintiff's account was made to plaintiff, then I charge you that your verdict must be for the defendant, if you are satisfied that all that plaintiff was entitled to was that which was tendered to him. In such an event, however, the plaintiff will be entitled to have and keep the money and stock tendered.

9. I charge you that if you find from the evidence that Mr. Clark and/or Mr. Stein was the agent of Halle & Stieglitz in charge of their Newark office with authority to receive orders which they were to send on to their New York office any statements made by Clark or Stein will not be binding on the firm of Halle & Stieglitz nor will any change in an order, which had once been submitted to the New York office, be binding on Halle & Stieglitz unless the new contract had been resubmitted to the New York office.

10

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Exhibit P-1.

HALLE & STIEGLITZ

25 Broad St.

Telephone Hanover 9050

New York

We have this day BOUGHT for your account and risk July 2, 1929

Purchased From whom	Quantity	Description	Price	Amount	Comm.	Total	Customeror Account
Levy Bros	200	Tungsol Lamp New	49 3/8	9,875.00	30.00	9,905.00	Herman Miller

It is hereby understood and agreed that all transactions are subject to the rules and customs of the New York Stock Exchange and its Clearing House. That all securities from time to time carried in your marginal account or deposited to protect the same, may be loaned by us, or may be pledged by us either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to you.

HALLE & STIEGLITZ.

Exhibit P-2.

Mr. Herman Miller,
98 Milford Ave.,
Newark, N. J.

In Account with HALLE & STIEGLITZ
Telephone Hanover 9050

Date	SECURITIES Bought or Recd.	Sold or Del'd.	Description	Price	Debit	Credit	BALANCE Debit	Credit
1929								
June							1604.33	
30			Balance					
			Long					
	26		Am Intl Corp					
	100		Am La France					
	50		Tex Pac Ld Tr					
	200		Mother Lode					
	50		Sinclair					
	50		Huds & Manh					
	50		N Y Ont & West					
July								
1		100	Tungsol A New Com	48 1/2		4806.00		3201.67
2		26	Am Intl Corp	71 3/8		1850.16		5051.83
3	200		Tungsol New	49 3/8	9905.00		4853.17	
15			Div 50 Sinclair			37.50	4815.67	
16		50	N Y Ont & West	27		1340.50	3475.17	
17	100		Gen Bak	7 7/8	795.00			
		50	Huds & Manh	43		2140.50	2129.67	
31			Int 9 3/4%		24.32		2153.99	
July 31			Balance				2153.99	
	100		Am La France					
	50		Tex Pac Ld Tr					
	200		Mother Lode					
	50		Sinclair					
	100		Tungsol New					
	100		Gen Bak					

E. & O. E. The preservation of this Statement will assist you in making up your next Income Tax Return.

Exhibit P-3.

Mr. Herman Miller,
98 Milford Ave.,
Newark, N. J.

In Account with Halle & Stieglitz
Telephone Hanover 9050

Date	SECURITIES Bought or Recd.	Sold or Del'd.	Description	Price	Debit	Credit	BALANCE Debit	Credit
July								
31			Balance				2153.99	
	100		Am La France					
	50		Tex Pac Ld Tr					
	200		Mother Lode					
	50		Sinclair					
	100		Tungsol New					
	100		Gen Bak					
Aug.								
1			Div 100 Tungsol			50.00	2103.99	
6	25		National Power & Light	66 5/8	1670.01		3774.00	
12	25		National Power & Light	68 5/8	1720.01			
	25		Amer Intl Corp	71 1/4	1785.25			
5		100	Power & Light Deld			1682.12	5597.14	
		66 2/3	Tungsol Com	Deld				
		33 1/3	do Pfd	Deld				
5	66 2/3		Tungsol Com	Recd				
	33 1/3		do Pfd	Recd				
		100	Tungsol Com	Recd				
14		25	Amer Intl	72		1794.62		
		25	National Power & Lt	69 1/2		1732.12		
		100	American La France	4 1/2		438.50	1631.90	
28	25		Hudson & Manhattan	52 3/4	1323.13			
		200	Mother Lode	3		577.00	2378.03	
31			Int 9 1/8%		18.95		2396.98	
1929								
Aug.								
31			Balance		2396.98		2396.98	
			Long					
	50		Tex Pac Ld Tr					
	50		Sinclair					
	25		Hudson & Manhattan					

E. & O. E. The preservation of this Statement will assist you in making up your next Income Tax Return.

Exhibit P-4.

Mr. Herman Miller,
98 Milford Ave.,
Newark, N. J.

In Account with
HALLE & STIEGLITZ
Telephone Hanover 9050

Date	SECURITIES Bought or Recd.	Sold or Del'd.	Description	Price	Debit	Credit	BALANCE Debit	Credit
1929								
Aug.								
31			Balance		2396.98		2396.98	
			Long					
	50		Tex Pac Ld Tr					
	50		Sinclair					
	25		Hudson & Manhattan					
Sept								
3			Div 25 Nat Power & Lt			6x25	2390.73	
30			Int 09 1/2%		18.92		2409.65	
Sept								
30			Balance				2409.65	

E. & O. E. The preservation of this Statement will assist you in making up your next Income Tax Return.

Mr. Herman Miller,
98 Milford Ave.,
Newark, N. J.

In Account with HALLE & STIEGLITZ

Sept 30	Security	Position
		Long
50	Texas Pacific Land Trust	
50	Sinclair Cons	
25	Hudson & Manhattan	

Exhibit P-5.

HALLE & STIEGLITZ
Established 1889
25 Broad Street
New York

November 26th, 1929.

Mr. Herman Miller
10 Newark N. J.

Dear Sir:

On June 3rd, we purchased for your account
100 shares Tung Sol new stock.
Against this purchase, we delivered to you in error on August 5th 66-2/3 shares of common and 33-1/3 shares of preferred stock.

While we regret any inconvenience which our
20 error has caused you, we fail to understand why you have paid no attention to both our telephone and mail communications requesting you to return to us 33-1/3 shares of preferred stock, in exchange for which we would return to you 33-1/3 shares of common to make up the 100 shares of common stock which you purchased.

We sincerely trust that it will not be necessary for us to take legal action in this matter, which we will be compelled to do unless you return to
30 us the 33-1/3 shares of preferred stock sent you in error.

Yours very truly,

HALLE & STIEGLITZ,
David Sulzburger.

JJR:VII
R

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Exhibit P-6.

HALLE & STIEGLITZ
Established 1889
25 Broad Street
New York

December 11th, 1929

Mr. Herman Miller
98 Milford Avenue 10
Newark N. J.

Dear Sir:

Replying to your letter of the 10th inst., and in accordance with our telephone conversation of even date, we beg to inform you that we did not buy in for your account today

33-1/3 shares Tung Sol Co. preferred stock. 20

As explained to you on the telephone, these shares are listed on the New York Curb Market and not on the Stock Exchange; therefore, you should communicate with

Mr. Eugene Tappin, Secretary
New York Curb Market
113 Greenwich Street
New York N. Y.

explaining to him the entire transaction in detail.

It will be necessary for you to communicate 30 with Mr. Tappin immediately as we do not wish to have this transaction open any longer than necessary.

Kindly advise us when you have communicated with the New York Curb Market, and oblige

Yours very truly,
HALLE STIEGLITZ,
by Jas. J. Ryan.

JJR:VH 40

Exhibit P-7.

HALLE & STIEGLITZ
Established 1889
25 Broad Street
New York

January 10th, 1930

Mr. Herman Miller
98 Milford Avenue
Newark, N. J.

Dear Sir:

Under date of December 6th, 1929, we wrote you in reference to 33-1/3 shares of Tung Sol Co. preferred stock, and advised you that unless this matter was adjusted, we would purchase this stock at the open market for your account and charge same with the purchase price thereof.

Under date of December 11th, in answer to your communication of December 10th, we informed you that the stock had not been purchased, in accordance with your request, and stated that in accordance with our mutual understanding, you were to write Mr. Eugene Tappin, Secretary of the New York Curb Market, 113 Greenwich Street, New York, explaining to him the entire transaction in detail and requesting him to advise you as to your status in this matter. We are now informed by the New York Curb Market that they have never received any communication from you

Exhibit P-7.

regarding this matter, and we hereby wish to inform you that unless you return to us

33-1/3 shares Tung Sol Co. preferred stock by twelve (12) o'clock noon on Tuesday, January 14th, 1930, we shall be obliged to purchase said stock in the open market and to charge your account with the purchase price thereof. 10

As you have already been informed, 33-1/3 shares of Tung Sol Co. common stock, to which you are entitled, are at present in your account.

Yours very truly,

HALLE STIEGLITZ,

JJR:VH
R

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Exhibit P-8.

HALLE & STIEGLITZ

Members of the New York Stock Exchange

25 Broad Street

We have this day BOUGHT for your account and risk New York Jan 14 1930

No.	From whom Bought	Quantity	Description	Price	Amount	Comm.	Net Amt	Customer
21	McDonnell & Co.	1/3	Tungsol Pr	37	1233	25	1258	Herman Miller

It is hereby understood and agreed that all transactions are subject to the rules and customs of the New York Stock Exchange and its Clearing House. That all securities from time to time carried in your marginal account or deposited to protect the same, may be loaned by us, or may be pledged by us either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to you.

HALLE & STIEGLITZ.

Exhibit P-9.

HALLE & STIEGLITZ

Members of the New York Stock Exchange

25 Broad Street

We have this day BOUGHT for your account and risk New York Jan 14 1930

No.	From whom Bought	Quantity	Description	Price	Amount	Comm.	Net Amt	Customer
22	Levy Bros	33	Tungsol & Pr	35 1/4	1163.25	4.95	1168.20	Herman Miller

It is hereby understood and agreed that all transactions are subject to the rules and customs of the New York Stock Exchange and its Clearing House. That all securities from time to time carried in your marginal account or deposited to protect the same, may be loaned by us, or may be pledged by us either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to you.

HALLE & STIEGLITZ.

Exhibit P-10.

NEW YORK STOCK EXCHANGE

Committee on Business Conduct

May 22, 1930

Herman Miller, Esq.,
c/o H. Miller Brass & Copper Co.,
98 Milford Avenue,
Newark, N. J.

10

Dear Sir:

With reference to your claim against Messrs. Halle & Stieglitz, submitted to the Exchange, I am directed by the Committee on Business Conduct to say that in view of the statements contained in the communication of that firm sent to the Committee under date of January 25, 1930, of which a copy has been furnished to you, the Committee does not see how it can be of assistance to you in the matter.

20

Very truly yours,

L. R. HARRISON,
Secretary of the Committee.

L

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Exhibit P-11.

No. 270 Newark, N. J. March 7th 1929

UNITED STATES TRUST COMPANY

Pay to the order of Halle & Stieglitz $3300.00/100
Thirty Three Hundred no/100 Dollars

J. B. LOWY MILLER.

10

(Printed on side of check): J. B. Lowey Miller.

Endorsed:

Pay Broad & Mkt. Natl. Bank & Trust Co.—Newark, N. J. or order—Halle and Stieglitz.

Received payment through the Newark Clearing House March 8, 1929—New Jersey National Bank & Trust Co. of Newark—No. 10.

20

Exhibit P-12.

No. 1494 Newark, N. J. January 2nd 1929

The Broad & Market National Bank
and Trust Company

Pay to the order of Halle & Stieglitz $1525.no/100
Fifteen Hundred & Twenty Five no/100 Dollars

J. B. LOWY MILLER.

30

Endorsed: Pay Federal Trust Co., Newark, N. J. or order—Halle & Stieglitz.

Pay Broad & Mkt. Natl. Bank & Trust Co., Newark, N. J. or order—Halle and Stieglitz.

New Jersey National Bank & Trust Co. Newark, N. J. Jan. 4, 1929.

40

Exhibit D-1.

March 18, 1925

Messrs. Halle & Stieglitz
New York

Dear Sirs:

Referring to Paragraph 956 of Chapter 500 of the Laws of New York 1913, quoted on reverse
10 side, consent is hereby given that, Whenever and as Long as I am Indebted to You, all stocks, bonds and other securities carried by you in the account of the undersigned or deposited to secure the same, now or in the future may be pledged or loaned by you either separately or in common with other stocks or securities and either for the sum due thereon or for a greater sum, and irrespective of the kind or amount of other stocks or
20 securities retained by you in your possession and subject to your control, all without notice to the undersigned.

Yours very truly,
HERMAN MILLER.

(Reverse Side).

Extract from Chapt. 500 of the Laws of New York, 1913.

30 §956. Hypothecation of customers' securities. A person engaged in the business of purchasing and selling as a broker stocks, bonds or other evidences of debt of corporations, companies or associations, who

1. Having in his possession, for safe keeping or otherwise, stocks, bonds or other evidences of debt of a corporation, company or association belonging to a customer, without having any lien
40 thereon or any special property therein, pledges

or disposes thereof without such customer's consent; or

2. Having in his possession stocks, bonds or other evidences of debt of a corporation, company or association belonging to a customer on which he has a lien for indebtedness due to him by the customer, pledges the same for more than the amount due to him thereon, or otherwise disposes thereof for his own benefit without the customer's consent, and without having in his possession or subject to his control, stocks, bonds or other evidences of debt of the kind and amount to which the customer is then entitled, for delivery to him upon his demand therefor and tender of the amount due thereon, and thereby causes the customer to lose, in whole or in part, such stocks, bonds or other evidences of debt, or the value thereof.

Is guilty of a felony, punishable by a fine of not more than five thousand dollars or by imprisonment for not more than two years, or by both.

Every member of a firm of brokers, who either does, or consents or assents to the doing of any act which by the provisions of this or the last preceding section is made a felony, shall be guilty thereof.

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Exhibit D-2.

Phone Waverly 0724

H. MILLER BRASS AND COPPER CO.
Brass Tubing, Showers, Rods, Sheets and Castings
98 Milford Avenue

Newark, N. J. January 21st, 1930.

10 Committee On Business Conduct,
New York Stock Exchange,
New York City N. Y.

Gentlemen:

On June 30th the writer purchased from Halle & Stieglitz 100 Shares of Tung-Sol Lamp and asked that the stock be made out in the name of Mrs. Julia Lowy Miller; it was to be a cash transaction as all my other purchases of Tong-Sol Lamp
20 bought previously were for cash.

I repeatedly requested delivery of this stock, they had stated it would be a matter of about ten days or two weeks for this delivery to be made. When delivery was finally made it was in the form of 66-2/3 shares of Common Stock and 33 1/3 shares of Preferred stock. When I called their manager's attention to the fact that this delivery was not as the original order of 100 shares
30 of Common Stock, Mr. Stein, their Newark manager, stated in as much as the Preferred was selling at practically the same price as the Common and was convertible. In as much as it took them two months to make this delivery I thought it would be wise to accept the delivery in this form. This I agreed to do in order to settle the matter as I was very much aggreviated at being unable to obtain this delivery.

40 About five months after this delivery was made

Exhibit D-2.

Messrs. Halle & Stieglitz wrote that they delivered this stock in error. The statement on the following month showed a purchase of 33 1/3 Shares of Common and a shortage of 33 1/3 shares of Preferred stock which naturally jeopardizes my margin account with them.

After considerable telephoning Mr. Ryan, the New York Manager, asked if I would be willing to leave the entire matter to Mr. Ashbell Green for arbitration and be willing to abide by his decision. I promptly accepted this suggestion. Much to my surprise the following day Mr. Ryan stated that he had made a mistake, that the matter could not be left to Mr. Green but to the New York Curb Market. This suggestion I declined to accept. It seems to me that my grievance is not only with the purchase of the Tung Sol Lamp Stock, but the manner of handling my margin account.

I would greatly appreciate you investigating this matter and would be glad to come over and see the committee bringing all my papers on the matter.

Very truly yours,

HERMAN MILLER.

HM:SL

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40

Exhibit D-3.

Phone Waverly 0724

H. MILLER BRASS AND COPPER CO.
Brass Tubing, Showers, Rods, Sheets and Castings
Copper Tubing, High Grade Brass Goods.
98 Milford Avenue

10 Newark, N. J. Mar 17/30

Att Mr L R Harrison Sec'y
New York Stock Exchange
Committee on Business Conduct
New York, N. Y.

Gentlemen:

Answering your letter of the 3rd inst. will say thet the letter of Halle & Stieglitz, dated Jan 25th, is not in complete accordance with the facts.
20
You have copies of letter dated Nov 6th and December 26th, and would ask you to note contradictions therein, this is evidently more of their errors of which I have been a Victim, I have a statement of October and on Oct 24th they have me charged with the following item, *short Dividend 100 Tung Sol Lamp $50.00,* this is another error, and when called to the attention of their manager, he knew nothing of it, and could not ex-
30 plain it.

These Statements by the way would reach me in some instances from two to three weeks later than they should, this last statement reached me after phoning them for it, Mar 15th.

In the copy of their letter to your committee dated Nov 26th and Dec 6th, you will note it took them over two months to deliver this stock and this only after repeated demands on my part, and
40 when stock was finally delivered to me in their

Exhibit D-3.

Newark Office, with the understanding that inasmuch as the common and preferred was selling at the same level and that the preferred was *convertible* into common, I should be satisfied.

In reference to Telephone conversation with Mr Ryan, Mr Ryan *Demanded* that I leave this with Mr Green, otherwise he would buy this stock for my account, and I agreed to this, but Mr Ryan went further, he demanded that I write them a letter agreeing to abide by Mr Greens Decision, and this letter must be in their hands by Twelve noon the following day, I agreed to do this and phoned Mr. Ryan the following Day asking him if he recieved this letter Mr Ryan stated that he did, but he found that I would have to leave this matter with the New York Curb Market, but I wrote Mr Green despite this but failed to recieve a reply from Mr Green.

When Halle & Stieglitz finally bought stock for me over my protest I Phoned the New York Stock Exchange asking for Mr Green, and as to disposition of my letter to him, and a Miss Rogers stated that I should write your Committee which I did.

I have kept no copies of these letters, I do not need same as this is a correct statement of my transaction with the Halle & Stieglitz Firm up to the time of Phoning your Exchange and asking for Mr Green I did not know that the Business Conduct Committee had these matters in charge, and it seems to me that Mr Ryan should have known of it,

Respectifully submitted.

HERMAN MILLER.

(Italics indicate underscoring).

Exhibit D-4.

(Envelope)

Halle & Stieglitz
25 Broad Street
New York, N. Y.

20c Postage Stamp
(cancelled)
320427

Registered Mail
10 Return Receipt Requested.

Mr. Herman Miller,
98 Milford Ave.,
Newark, N. J.

(Rubber Stamped): Returned to Writer Unclaimed—Clinton Hill Sta., Newark, N. J.

(Written on edge): Refused H511 12/17/30

20

(Postmarked): New York (Wall Street Sta.) N. Y.—Dec 16 1930—Registered.

30

40

Exhibit D-4

HALLE & STIEGLITZ
Established 1889
25 Broad Street
New York

December 16, 1930

Mr. Herman Miller,
98 Milford Avenue,
Newark, N. J.

10

Dear Sir:

Not having received any response to our several requests for payment of the debit balance on your account, we herewith beg to inform you that unless we have the balance due us on your account, as per enclosed memorandum, amounting to

20

$155.67

in hand from you by 10 A. M. on Friday, December 19th, 1930, or that you take up your account with us prior to that time, we will sell on the New York Stock Exchange at 10:30 A. M. on Friday, December 19th, 1930, or as soon thereafter as it is possible to effect the sale

52 2/100 shares Park & Tilford

and will sell on the New York Curb Exchange at 10:30 A. M. on Friday, December 19th, 1930, or as soon thereafter as it is possible to effect the sale

30

33 1/3 shares Tungsol Lamp Works Common New

and hold you responsible for any loss resulting therefrom.

We trust that you will give this your immedi-

40

Exhibit D-4

ate attention so that it will not be necessary for us to take this step, and remain,

Your very truly,

HALLE & STIEGLITZ,
by A. S. Bamberger.

10

ASB:AW
Encl.

Memorandum

HALLE & STIEGLITZ

To Herman Miller New York 12/16/30

20

Newark NJ

Dr.

11/30	To Bal.	$155.27
12/18	Int.	.40
		155.67
12/18	Balance	$155.67

Long
33-1/3 Tungsol Com New
30 52-2/100 Park & Tilford

Cr.

12/18	Balance	$155.67
		155.67

40

Exhibit D-5.

NEW YORK STOCK EXCHANGE

Committee on Business Conduct

January 23, 1930.

Messrs. Halle & Stieglitz,
25 Broad Street,
New York, N. Y.

10

Gentlemen:

The enclosed photostatic copy of a letter, received from Mr. Herman Miller, of Newark. New Jersey, is sent to you upon the instructions of the Committee on Business Conduct with the request that you please advise it with respect to the matter about which he writes.

Very truly yours,

20

L. R. HARRISON,
Secretary of the Committee.

A.

30

40

Exhibit D-6.

NEW YORK STOCK EXCHANGE

Committee on Business Conduct

March 24, 1930.

Messrs. Halle & Stieglitz,
25 Broad Street,
10 New York, N. Y.

Gentlemen:

With reference to the claim against you submitted to the Exchange by Mr. Herman Miller, I am directed by the Committee on Business Conduct to say that it forwarded to Mr. Miller a copy of your communication to it of January 25, 1930. A copy of his reply is enclosed herewith for your
20 comment.

Very truly yours,

L. R. HARRISON,
Secretary of the Committee.

M

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40

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

HERMAN MILLER, *Plaintiff-Appellee,* *vs.* ALBERT STIEGLITZ, *et als.,* *Defendants-Appellants.*	*On Appeal from Supreme Court.*

Sat below WILLIAM A. SMITH, *C. C. J.*

BRIEF FOR PLAINTIFF-APPELLEE.

Facts.

From a verdict directed against them at the Circuit at the end of the case, defendants appeal. Was there error in this ruling? Appellee says no.

Plaintiff sued defendants, a firm of stock brokers with main offices in New York and a branch office in Newark, upon the following claim. See Complaint printed case, page 5.

> 3. That on the 14th day of January, 1930, defendants without authorization from the plaintiff, bought and charged plaintiff with thirty-three and one-third shares of Tungsol Preferred stock at Thirty-seven Dollars per share, making a total of One Thousand One Hundred and Eighty Dollars and Seventy-eight Cents ($1,180.78).
>
> 4. At no time did plaintiff order or buy said stock nor ratify the buying and charging of said stock to his account.

While in their answer defendants denied these allegations, in a counter-claim filed it was admitted that the plaintiff did not buy this particular stock but that the brokers, having made

a mistake in the delivery of stock to the wife of the plaintiff, charged the price of Thirty-three and one-third shares of Tungsol Preferred stock to plaintiff's account on the theory that he, plaintiff-appellee, should have returned to defendants stock made out in the name of plaintiff's wife, and not doing so, were therefore justified in taking of the plaintiff's money in their possession the amount sued for and appropriating the same to themselves and telling the plaintiff that they have placed to his account thirty-three and one-third shares of Tungsol Common stock.

Plaintiff-appellee did not agree with the defendants and sued them for the return of this money.

At the trial, it appeared that instead of delivering to Mrs. Miller, wife of the plaintiff-appellee, certificates for one hundred shares of Tungsol Common stock, appellants delivered to her and made out in her name, so instructed by appellee, sixty-six and two-thirds shares of Tungsol Common and thirty-three and one-third shares of Tungsol Preferred. Mrs. Miller was the owner of these certificates of stock. It was claimed by the appellants that the delivery of the certificates for the thirty-three and one-third shares of Tungsol Preferred stock made out in the name of Mrs. Miller was a mistake and a demand for the return of this stock was made of Mr. Miller, appellee, and not of Mrs. Miller, and appellee not returning this Preferred stock of thirty-three and one-third shares, appellents claim that they bought in the open market thirty-three and one-third shares of Tungsol Preferred stock and deducted the price of the same from the money of the appellee in their hands, assuming that they had the right to do that. The

amount so deducted from appellee's account was eleven hundred and eighty dollars and seventy-eight cents ($1,180.78).

At the end of the case, the Court made the following disposition: See printed case, page 71.

> Mr. Press: I move for the direction of a verdict in favor of the plaintiff.
>
> The Court: (After argument) The defense here set up is that by mistake the defendants here delivered this stock to Mr. Miller made out in Mrs. Miller's name. To rectify that the defendants set up that he purchased the proper stock and charged it to the plaintiff here. I do not see that that is a proper defense in this action, because the stock was made out in somebody else's name. Therefore I will grant the motion for the direction of a verdict in favor of the plaintiff and against the defendants.

There was no dispute as to the facts. Mrs. Miller was the owner and in possession of this stock. No demand was ever made upon Mrs. Miller for this stock. It belonged to her and Mr. Miller had no right to it. Demanding of him to return something which he never had or never got, and making his inability to return stock which he, appellee, did not have, the basis for a conversion is entirely frivolous and absurd.

POINTS.

I.

The direction of a verdict in favor of the plaintiff-appellee and against the defendants was the proper disposition to make under the facts in the case.

This property, evidenced by certificates of stock belonging to Mrs. Miller and made out

in her name, was her property. If, as the defendants-appellants claim, a mistake was made in the delivery of these certificates and the transfer of ownership to Mrs. Miller, an appropriate demand upon and suitable action should have been taken against her. To say to Mr. Miller "Give us back this stock," is to demand of him something he never had and never received from the appellants. The defense set up by way of answer to appellee's complaint was altogether without merit, sham and frivolous, and no defense at all. The trial judge so decided, his decision is a correct one. The entire brief of the appellants is based upon the assumption that appellee was the owner of this stock. Under their own proof that is not so. It is not so under the appellee's proof. The evidence is unanimous upon the point that appellee was not the owner or possessor of this stock. A demand upon him for the return of this stock was futile and the consequent action taken by the appellants in deducting from appellee's funds in their possession, was illegal and no justification can be found for what they did, in any citation of law made by appellants. Their whole defense is based upon the premise that he, appellee, had the possession of stock by mistake. That is not so. Their defense fails.

II.

The Counter-claim filed at the last minute by the defendants contains nothing to support the same.

The basis for it is that appellee converted thirty-three and one-third shares of Tungsol Preferred stock which belonged to defendants-appellants. There is nothing in the proof to up-

hold this claim. The action of the Court in dismissing the Counter-claim is legally correct.

The verdict and judgment should be upheld.

Respectfully submitted,

SAMUEL PRESS,
Attorney for and of Counsel
with Plaintiff-Appellee.

New Jersey State Library

New Jersey Court of Errors and Appeals

HERMAN MILLER, Plaintiff-Appellee, vs. ALBERT STIEGLITZ, *et als.*, Defendants-Appellants.	On Appeal from Supreme Court. Sat below: Wm. Smith, *C. C. J.*

BRIEF OF DEFENDANTS-APPELLANTS.

Statement of Facts.

This action was brought by Herman Miller, plaintiff-appellee, against Albert Stieglitz, et als., co-partners trading under the name of Halle & Stieglitz, defendants-appellants.

The complaint sets forth that the plaintiff-appellee had an account with the defendants-appellants, who were stockbrokers, and that on January 14th, 1930, the said defendants-appellants, without authority, purchased and charged the account of the plaintiff-appellee with 33-1/3 shares of Tungsol preferred stock, at $37.00 per share. The complaint further sets forth that the said purchase was not ordered by the plaintiff-appellee or ratified by him, and further, that a balance in the account, in the sum of One Hundred seven dollars and ten cents ($107.10) was admittedly due him by the defendants-appellants.

The answer filed in the cause was a general denial, save in respect to the fifth paragraph of the complaint. This paragraph was not answered be-

cause, as alleged by plaintiff-appellee, the sum claimed therein was admittedly due. This sum, together with certain stocks, was tendered to plaintiff-appellee through the court. (State of Case pg. 19, ll. 1-13).

The answer filed, however, denies the right of the plaintiff-appellee to recover upon the remaining allegations in the complaint and sets forth that the defendants-appellants were the agents of the plaintiff-appellee and discharged their obligations as agents with the express and/or implied consent of the plaintiff-appellee.

A separate defense was interposed to the effect that the plaintiff-appellee unlawfully and without authority, converted to his own use, stock to which he was never entitled, thereby causing the defendants-appellants to pursue one of their elective remedies to cure the injuries sustained by them by virtue of the plaintiff-appellee's said conversion; and that in charging the said plaintiff-appellee's account with the value of the said stock so converted, they were doing that which they were entitled to do.

Defendants-appellants also filed a counterclaim, which set forth the following facts:

That on or about June 30th, 1929, pursuant to plaintiff-appellee's instructions, the defendants-appellants purchased for his account, 100 shares of Tungsol Lamp (New) stock, which consisted of 100 shares of the common stock of the said company. It sets forth further that, through error, there was delivered to the plaintiff, 100 shares of Tungsol Lamp (Old) stock, which consisted of 66-2/3 shares common stock and 33-1/3 shares preferred stock. It was further alleged that defendants-appellants demanded a return of the 33-1/3 shares of the preferred stock and were ready, will-

ing and able to deliver to the plaintiff-appellee, the 33-1/3 shares of common stock, which had been ordered by him, purchased for him and held in his account.

The defendants-appellants' ownership or possessory right to the 33-1/3 shares of "Tungsol (New) Stock" was alleged, as was the demand for return from the plaintiff-appellee, his refusal and conversion.

Plaintiff-appellee's answer to the counter-claim was in the light of a general denial. By way of further answer, it was alleged that any retention of the 33-1/3 shares was with the knowledge and consent of the defendants-appellants, through their agents, and went on to deny the conversion. This was all denied in defendants-appellants reply to said answer and an additional separate defense was set forth to the effect that if authorization for the retention of the stock was given to plaintiff- appellee, by an agent, said authorization was beyond and outside the scope of the agency.

Immediately upon the conclusion of the opening to the jury by counsel for the defendants-appellants, the plantiff-appellee moved to dismiss defendants-appellants' counter-claim, stating to the Court that no demand was made for a return of the money as claimed in the counterclaim. This was a mere conclusion, since no evidence whatsoever had been introduced to that effect. (State of Case, pg. 19, lines 38-40, pg. 20, lines 1-6), and an erroneous conclusion, as seen from the pleadings which alleged a demand. (See Counterclaim—State of Case, pg. 8, paragraph 6 and also paragraph 8, lines 27-32.

It is to be noted that the counter-claim did not ask for money but actually for the stock or the value thereof. The motion to dismiss was grant-

ed, however, and exception taken thereto by the defendants-appellants.

The issues to be tried were condensed by stipulation between counsel, entered upon the record. This is contained on page 20, lines 8-25; of the State of Case.

> "Mr. Weltchek: Before proceeding with the opening: I conferred with Mr. Press a short time ago and some things can be admitted.
>
> The Court: Put them on the record.
>
> Mr. Weltchek: Will you agree that the stock ordered was 100 shares of Tungsol Common new?
>
> Mr. Press: No question that he ordered it June 30, 1929.
>
> Mr. Weltchek: Will you agree that 66-2/3 common and 33-1/3 was delivered?
>
> Mr. Press: That's right.
>
> The Court: The only thing at issue, as I understand it, is that the parties agreed that the 66-2/3 common and 33-1/3 preferred should be in lieu of the 100 shares of common stock.
>
> Mr. Press: Yes. I claim, of course, that they had no right to pursue the course they did."

It is seen from the above that the only issue to be decided by the trial court, was whether there was an agreement that the 66-2/3 common and 33-1/3 preferred stock should be in lieu of the 100 shares of common stock, and whether the defendants-appellants had the right to pursue the course they did.

The action of the trial court in directing a verdict in favor of the plaintiff-appellee and against the defendants-appellants, as set forth above, is appealed from.

APPELLANT'S PRINTED POINTS.

Defendants-Appellants' Points are three in number, namely:

1. The trial court erred in directing a verdict in favor of the Plaintiff-Appellee and against the Defendant-Appellants.

2. The trial court erred in directing a verdict for the Plaintiff-Appellee:

A. Because plaintiff-appellee's retention of the stock was a conversion and the defendants-appellants had the legal right to charge plaintiff-appellee's account for the value thereof.

B. Because defendants-appellants' Newark agents had no power to arbitrate or ratify any transactions and in view of the conflicting testimony, the case should have been submitted to the jury.

C. The circumstances indicated a ratification of defendants-appellants' acts by the plaintiff-appellee.

3. The trial court erred in dismissing the counterclaim as filed by the Defendants-Appellants.

Argument.

At the outset, it is submitted that the Appellate Court is guided solely by the State of the Case presented and filed with the Court.

An examination of said State of the Case will indicate that the error of the trial court was threefold.

In the first place, defendants-appellants submit that the motion of the plaintiff-appellee for the direction of a verdict in his favor should have been denied because he had failed to sustain the proof of his own case in conformity with the primary rules of evidence and that upon the basis of the testimony produced by him at the trial, his case was legally insufficient and a direction could not be predicated thereon.

In the second place, it is submitted that the trial court erred in directing a verdict for the plaintiff-appellee because, as a matter of law, plaintiff-appellee in fact converted the stock and attempted to found a cause of action upon his own unlawful act; and because defendants-appellants or their agents did not ratify an incorrect delivery, nor did the agents have the power to ratify an incorrect delivery. It is submitted, that if this point was proven by the defendants-appellants, it should have been dispositive of the entire case, since the only issue was whether there had been an agreement to accept one type of stock in lieu of another type.

It is the further contention of the defendants-appellants that the plaintiff-appellee by his own conduct, ratified defendants-appellants acts and is estopped to deny said ratification.

The final contention of the defendants-appellants is that the trial court erred in dismissing the counter-claim filed by the defendants-appellants, since it was an affirmative pleading, which was not sham or frivolous and which set forth a cause of action.

The respective contentions of the defendants-appellants will be developed in the ensuing "points" and references made therein to the pertinent testimony, exhibits and law.

POINT 1.

The trial court erred in directing a verdict in favor of the Plaintiff-Appellee and against the Defendants-Appellants.

The first question considered is whether the learned trial court should have directed a verdict in favor of the plaintiff-appellee. The basis for such direction was the fact that the stock had been delivered to Mrs. Miller, the wife of plaintiff-appellee and therefore defendants-appellants could not charge Mr. Miller's account. The exact words of the court are quoted as follows:

> "The defense here set up is that, by mistake, the defendants here delivered this stock to Mr. Miller made out in Mrs. Miller's name. To rectify that, the defendants set up that he purchased the proper stock and charged it to the plaintiff here. I do not see that that is a proper defense in this action, because the stock was made out in somebody else's name. Therefore, I will grant the motion for a direction of a verdict in favor of the plaintiff and against the defendants and direct the jury to return a verdict of $1,378.52"

It is the contention of the defendants-appellants that the trial court based its decision upon a wrong premise. The suit was instituted in the name of the plaintiff-appellee. His pleadings indicated that the account was between him and the defendants-appellants. As the agents of the plaintiff-appellee, defendants-appellants were obliged to comply with his directions regarding the manner of delivery. He was exercising dominion over his own property

and with said exercise, the defendants-appellants could not interfere. If he wished stock delivered in his name, his instructions had to be complied with. There could be nothing to prevent him from taking his own stock certificates and personally having them transferred to his wife's name. Instead, he instructed his agents to have that done for him. His instructions were complied with. It is readily seen that defendants-appellants could not question his purpose. He was entitled to control and manage the account in the way he desired. To hold otherwise would be to deny him the right of dominion over his own property.

It is therefore submitted, that his request to have the stock delivered in his wife's name was not unusual, and that this mere fact standing alone, did not give legal justification for the avoidance of liability.

Turning our attention to the testimony, in the plaintiff-appellee's case, with no consideration given to any of the other testimony, we find the contention of the plaintiff-appellee that although the account is in his name, it in fact belonged to his wife, who paid for the purchases and that he merely acted for her in the capacity of an agent. This gives rise to several considerations which will shortly be developed.

The testimony of the plaintiff-appellee indicates that he dealt for his wife. (pg. 21, lines 31, etc.).

> "Q. Did you deal for yourself or for your wife? A. For my wife."

The testimony on pg. 21, lines 33, etc., indicates that the payment for the purchases were made with his wife's checks. This is also corroborated by Exhibits "P-11" and "P-12" on page 87.

The plaintiff-appellee further indicates by his testimony on pg. 27, line 38, etc.

> "Q. Did you ever trade in your name there? A. No, sir. This was Mrs. Miller's account.
> Q. You gave the orders for her? A. Yes, sir."

The entire page 36 of the State of Case indicates that plaintiff-appellee actually regarded the account as that of his wife.

Furthermore, on page 28, lines 1 to 8.

> "Q. Was it understood you were trading for her? A. Yes, sir, because she opened the account with her own check.
> Q. You took the certificate to Mrs. Miller. A. Yes, sir."

The testimony of the wife, Julia Miller corroborated the testimony of the plaintiff-appellee, on p. 47, lines 15-25.

> "Q. Where is this office? A. On Clinton Street.
> Q. Have you ever been in there? A. Yes, lots of times.
> Q. During what period? A. For the last few years.
> Q. Were you there during 1929? A. Yes.
> Q. The early part or— A. All during the year.
> Q. When did you go in? A. I went in and saw stocks that I purchased.
> Q. How are you interested? A. It is my account."

Mrs. Miller went on to testify on page 47 and 48, lines 29-40 and 1-4, respectively, as follows:

> "Q. Did you ever speak to Mr. Stein about your ordering and selling stocks?

> Objected to on the ground that there is no such allegation in the complaint.
>
> Q. Did you ever talk to him? A. Yes.
>
> Q. About what? A. About the stocks.
>
> Q. Did you ever talk to him about buying stocks? A. Yes.
>
> Q. What did he say? A. He said, "You can have the account here but it would have to be in Mr. Miller's name because they do not take accounts in the name of a woman."
>
> Q. Did they take your money? A. They took $15,000."

And further we see on page 49, lines 8-13:

> "Q. Did you have an account there in your name? A. No.
>
> Q. Why not? A. They took the account but Mr. Stein said it would have to be in Mr. Miller's name because they would not take the account in the name of a woman."

From a reference to the testimony quoted, *supra*, it is manifest that the plaintiff-appellee, by his own admission, was not the owner of the account for which the stocks were purchased but was merely acting as an agent for his wife, who was the real party in interest, without disclosing this fact to the defendants-appellants. In considering this point, three situations must necessarily be dealt with.

A. If Mrs. Miller was the owner of the account and the real party in interest, was the trial court justified in directing a verdict on the theory that since the stocks were erroneously delivered to a third party, not a party to the suit, that the defendant to the suit could not interpose the defense against the plaintiff?

B. If the testimony shows that Mr. Miller, the plaintiff-appellee was in fact the agent of

Mrs. Miller, the real owner of the stock, was he possessed of authority to maintain the suit in his own name?

C. Since the pleadings set up the fact that Mr. Miller was the owner of the account and the evidence adduced at the trial was that he is the agent of the real owner, should not the trial court have non-suited the plaintiff, because of his failure to substantiate the allegations of the complaint rather than direct a verdict for him?

A discussion of the above three sub-divisions and the law applicable thereto will be taken up in the order set forth above.

1-A. If Mrs. Miller was the owner of the account and the real party in interest, was the trial court justified in directing a verdict on the theory that since the stocks were erroneously delivered to a third party, not a party to the suit, that the defendants to the suit could not interpose the defense against the plaintiff?

Upon consideration of the testimony offered in plaintiff-appellee's case we can be led to but one conclusion and that is that the account was actually his wife's. For the purpose of arguing the legal application, the truth of this is assumed by the defendants-appellants.

It is submitted that the plaintiff-appellee is bound by the testimony produced by him at the trial and accepting his own testimony and assuming its truth, as aforesaid, there can be but one conclusion and that is that Mrs. Miller was the owner of the account, paid for the stocks, as she herself testified, and had the stocks delivered to her, through Mr. Miller, as in the situation at bar,

where the stocks were made out in her name. This conclusion is reached without any consideration of the case of the defendants-appellants.

Accepting this testimony, it would follow therefor, that since the stocks were delivered to the real party in interest, through her agent, the reason assigned by the trial court to the effect that no defense was presented, should fail for the following reason. Mrs. Miller was the actual owner of the account, and the stocks were delivered in error to her and charged up against her account, being conducted in the name of her agent.

It cannot be contended by the plaintiff-appellee that Mrs. Miller did not know that she had received more valuable stock than that which had been ordered by the plaintiff-appellee, for he, himself testified on pg. 40 and 41, lines 38-40 and 1-5, respectively, that the stock could have been returned.

> "Q. * * * A. After I got the stock, the account—the stock was actually Mrs. Miller's, but I believe that the stock was in the possession of Mrs. Miller for delivery at any time that they could show that it belonged to them. The stock remained in Mrs. Miller's possession. I didn't hedge; the stock was there for them if they could show that it belonged to them."

See also testimony of the State of the Case, pg. 30, lines 33-37.

The testimony of Mrs. Miller, on page 54, lines 11-16, further strengthens defendants-appellants' contention that Mrs. Miller knew she had received stock of a different description than that ordered.

> "Q. What did you say? A. I said "Do you know what I got instead of my hundred shares of common? I got 66-2/3 common and 33-1/3 preferred." He said, "Why make

> a fuss over it? It's convertible." I said, "Is this a closed transaction?" He said, "Yes."

As far as the defendants-appellants were concerned, their transactions were with the plaintiff-appellee and delivery was made in the manner requested. It was not within their province to in-inquire into the reasons motivating the plaintiff-appellee's direction for the delivery in any particular manner. They merely followed his instructions.

It is readily seen, therefore, that to permit the direction of a verdict in favor of the plaintiff-appellee, in a case such as the one at bar, would be, in effect, allowing a principal to institute a suit in the name of an agent and effectually preventing the defendant from interposing defenses against the principal.

Defendants-appellants executed their contract with the plaintiff-appellee, according to his instructions and had a right to look to him and to the account which was vested in his name. To hold otherwise, would be to tacitly approve of the circumvention of the elementary rules of legal procedure.

By virtue of the premises enumerated above, it is urged that the trial court was in error in directing a verdict in favor of the plaintiff-appellee and that the matter should have been left to the jury, since there appeared to be some question as to whether or not the plaintiff-appellee was an agent or the principal.

It is to be remembered that these conclusions must be arrived at from a consideration of the plaintiff-appellee's case alone, without considering any of the defenses interposed. It is apparent

therefore, that the direction of a verdict in favor of the plaintiff-appellee was error, since a consideration of his own case alone, shows a failure to sustain his burden of proof.

1-B. If the testimony shows that Mr. Miller, the plaintiff-appellee was in fact the agent of Mrs. Miller, the real owner of the stock, was he possessed of authority to maintain the suit in his own name?

Defendants-appellants assume, for the purpose of argument, without admitting however, that Mrs. Miller was the owner of the account in qeustion and that the plaintiff-appellee was her agent. The pleadings in the cause bear no reference to an agency existing between Mr. and Mrs. Miller. The testimony of both, who were the only witnesses for the plaintiff-appellee, is to the effect that such an agency existed. Consequently, the question presenting itself, is whether the plaintiff-appellee, as the agent of Mrs. Miller, can maintain this suit.

There is a line of cases holding that a suit cannot be maintained in the name of an agent, on behalf of the principal, unless the authority so to do is expressly alleged and proven. These cases are collected in Volume 2, Corpus Juris, page 655, section 303. The case of Honolulu Rapid Transit Co. vs. American-Hawaiian Steamship Co., 3 Hawaii Fed. 1, holds that "the authority of an agent to bring suit for his principal must be shown unless he is an attorney at law licensed by the court. This ruling is supported by the decisions in the following cases:

Markham v. Burlington Ins. Co., 69 Iowa, 515, 29 N. W. 435;

Grant City v. Simmons, 167 Mo. A. 183, 151 S. W. 187;
Fishburne v. Engledove, 91 va. 548, 22 S. E. 354.

In the case of Markham vs. Burlington Ins. Co., *Supra,* it was held: "The authority to contract confers no power to sue upon the contract." It was also held in the case of Kuite v. Lage, 152 Mich. 638, that:

> "A special power of attorney only authorizing the institution of legal proceedings in the 'name, place and stead' of the principal does not confer authority on the agent to institute suit in his own name."

In our own State, we have the case of Cleveland vs. United States Trust Company of New York, reported in 106 N. J. L. 563. While not exactly in point, it is cited because there is an indication of a support of the theories enunciated in the cases cited *supra.* It was held in the case of Cleveland vs. U. S. Trust Co., *supra,* that a power of Attorney conferred upon a Surrogate, was limited to the powers expressed. The language of the power of Attorney is as follows:

> "do hereby make, constitute and appoint Isaac Shoenthal, surrogate of the County of Essex in the State of New Jersey, and his successors, in office, my true and lawful attorney, upon whom may be served all original process in any action at law, or in equity, against the aforesaid estate of George Cleveland, deceased."

In construing this power of attorney, Chief Justice Gummere said:

> "This language, as I read it, clearly limits the power of the surrogate to represent

> the executor to actions brought against the estate of the decedent—i. e., against the executor thereof—and does not include a right to represent the executor in a suit brought, not against the decedent's estate, but against one of the beneficiaries named in the will of the decedent."

The Cases enumerated indicate clearly that the plaintiff-appellee, assuming that his was a relationship of agency, had no authority to prosecute this suit, since no such authority was alleged nor was authority proven. Even if such authority had been proven, it is submitted that the trial court should have taken into consideration the fact that the stock, for which the plaintiff-appellee was claiming compensation, had actually been delivered to his principal.

To permit, therefore, a direction of a verdict upon such a set of circumstances, would be to allow an undisclosed principal, through the medium of an agent, to secure the stock, free of charge and to be unjustly enriched thereby.

We see again that upon the case of the plantiff-appellee, alone, without considering the defenses, there was sufficient reason for the refusal to direct a verdict. Whether the guise of an agent for an undisclosed principal was a subterfuge or not, is not known. One thing is certain, however, and that is that it was not the invention of the defendants-appellants.

The above point indicates once more that the plaintiff-appellee did not establish a prima-facie case, and therefore, the direction of a verdict was improper.

Dierkes v. Hauxhurst Land Co., 80, N. J. L. 369;

1-C. Since the pleadings set up the fact that Mr. Miller was the owner of the account and the evidence adduced at the trial was that he is the agent of the real owner, should not the trial court have non-suited the plaintiff, because of his failure to substantiate the allegations of the complaint, rather than to direct a verdict for him?

It is a well settled rule of pleading that a plaintiff must sustain the essential allegations of his complaint or be non-suited. In the case at Bar, the plaintiff-appelee alleged that he was the owner of a certain account from which moneys had been unauthorizedly deducted. The proof in the case at Bar is to the effect that the account actually belonged to Mrs. Miller, the wife of the plaintiff-appellee. There does not appear to be a scintilla of evidence supporting the allegations contained in the complaint of the plaintiff-appellee to the effect that the account belonged to him. The complaint was never amended to change these allegations. In this state of affairs it seems obvious that the plaintiff-appellee should have been non-suited because the variance would indicate that he is not a proper party or by virtue of the variance it would become impossible to determine who the proper party was. Defendants-appellants rely on the case of Jordan vs. Reed, 77 N. J. L., pg. 584. In this case, Jordon, the plaintiff, set up as a cause of action, a note made by the Land Company to the Dredging Company and alleged that Reed undertook the obligation of the note. At the trial, the plaintiff proved that the defendant, Reed, orally undertook to pay the note of the Land Company by reason of the fact that the Land Company conveyed certain land to the defendant and three other people. Justice Green, in deciding this case, said:

"Applying the doctrine to the facts in evidence, we think that there was a substantial variance between the case declared upon and the case proven, inasmuch as no defendant would anticipate that an alleged absolute and primary undertaking by A. to pay money to Z. would be supported or be thought to be supported by proof of an undertaking by A., B., C. and D. to pay the same money in consideration of the transfer of property to them by Y.

Variance, or discrepancy, between a material averment in pleading and the evidence adduced in support of it was, in early times, of vital importance. Since the enactment of the provisions now embodied in the Practice Act (Pamph. L. 1903, p. 571, par. 125), variance has with us been of less consequence. Nevertheless, today, it is sound law and sound reason that there must be no variance to the prejudice of the adverse party between the case declared upon and the case proven, and that a recovery must be "*secundum allegata et probata.*"

In the case at Bar, we have a similar situation. The plaintiff-appellee alleges in his pleadings that he is the owner of a certain account against which charges were made for certain stocks which never had been ordered by him. The proofs of the plaintiff-appellee show that the plaintiff-appellee was not the owner of the account, but was, in fact, the agent of the owner of the account and that the real owner, his wife, Mrs. Miller, actually received delivery of the stock. On Page 54, lines 11 to 16, we find Mrs. Miller's testimony to the following effect:

"Q. What did you say?"

A. I said, "Do you know what I got instead of my hundred shares of common? I got 66-2/3 common 33-1/3 preferred." He

> said, "Why make a fuss over it? It's convertible." I said, "Is this a closed transaction?" He said, "Yes."

This testimony furnishes indisputable strength to the contention of defendants-appellants that there was an absolute variance between the allegations of the complaint and the proof adduced at the trial. For this reason, it is respectfully urged that a non-suit of the plaintiff-appellee would have been proper. Reviewing his own testimony, it is clear that he failed to make out a prima facie case and that it was error for the Trial Court to direct a verdict in his favor, in view of the variance between the pleadings and the proof, which, it is submitted to the Court, was fatal. (38 Cyc. 1565 and 1566). Furthermore, it is submitted that a verdict should not be directed unless the proof is free from substantial conflict. (38 Cyc. pg. 1567 and 1568 —Bauman vs. Hamburg-American Packet Co., 67, N. J. L. 250).

The rule is well settled in this State that a trial Judge is only justified in directing a verdict on a court question arising from admitted or uncontroverted facts and that where there is a conflict of testimony or a conflict of inferences, the matter should be submitted to the jury for their consideration and determination.

> Fulton vs. Grieb Rubber Co., 72, N. J. L. 35;
>
> Dierkes vs. Hauxhurst Land Co., 80, N. J. L. at bottom of pg 374 and top of pg. 375;
>
> Dickinson vs. Erie R. R. Co., 85, N. J. L. 586;
>
> Clark vs. Public Service Electric Co., 86, N. J. L. pg. 151;

Tilton vs. Pennsylvania Railroad Co., 86, N. J. L. 709;
Devicenzo vs. John Sommers Faucet Co., 87, N. J L. 646;

POINT 2.

The trial court erred in directing a verdict for the plaintiff.

A. Because plaintiff-appellee's retention of the stock was a conversion and the defendants-appellants had the legal right to charge plaintiff-appellee's account for the value thereof.

B. Because defendants-appellants' Newark agents had no power to arbitrate or ratify any transactions and in view of the conflicting testimony, the case should have been submitted to the jury.

C. The circumstances indicated a ratification of defendants-appellants' acts by the plaintiff-appellee.

A. *Because plaintiff-appellee's retention of the stock was a conversion and the defendants-appellants had the legal right to charge plaintiff-appellee's account for the value thereof.*

Heretofore, the discussion regarding the case at Bar was directed to matters brought out in the testimony of the palintiff-appellee's case alone, without considering the questions raised by the pleadings. It was felt that it was very material to consider the testimony because the Trial Court pre-

dicated the direction of a verdict on the theory that Mrs. Miller had nothing to do with the account, whereas the testimony throughout plaintiff-appellee's case clearly showed that she was the actual principal. True, this was at variance with the pleadings, and for this reason, defendants- appellants urge a consideration of all of the testimony, with which, it is difficult to support the view of the Trial Court, and without which the case of the plaintiff-appellee should have necessarily fallen because of its failure to support the material allegations of the complaint.

If, at this time, we approach this situation from a strict consideration of the pleadings alone and an exclusion of the testimony to the effect that the account was the account of plaintiff-appellee's wife, we would then have a set of circumstances where stock was ordered by the plaintiff-appellee with the request that it be delivered in a definite manner, which request was carried out by delivery to the party designated, but in error as to the kind of stock. As far as the defendants-appellants were concerned, the account was the account of the husband, since that is the way it appeared on their records and the manner in which all statements and confirmations were sent to the plaintiff-appellee. This is borne out by every exhibit in the cause. The testimony of Mrs. Miller on Page 47, lines 39 to 40, inclusive and Page 48 to line 4, indicates that the defendants-appellants would not take an account in the name of a woman.

> "Q. What did he say? A. He said, "You can have the account here but it would have to be in Mr. Miller's name because they do not take accounts in the name of a woman."

Also on pg. 49, State of Case, lines 8-13:

> "Q. Did you have an account there in your name? A. No.
>
> Q. Why not? A. They took the account but Mr. Stein said it would have to be in Mr. Miller's name because they would not take the account in the name of a woman.

Also the testimony of Clarence Stein, Newark Manager for the defendants-appellants, is to the same effect:

> "Q. What was she told? A. We do not carry women's accounts on collateral; we do for cash.
>
> (State of Case, Pg. 67, lines 16 & 17)

All of the testimony and the Exhibits, indicates that this was a margin account. (Exhibits "P-3" and "P-4," pages 78 and 79; Exhibit "D-4," pages 94 and 95, pg. 23 lines 35-40, pg. 31, lines 9 etc., pg. 42, lines 30-40, pg. 43, lines 23-30).

If the plaintiff-appellee and his wife had an agreement between themselves regarding the manner in which they would deal, it was not an arrangement created by the defendants-appellants. The account appeared as the husband's account and the defendants-appellants were entitled to regard it as such. The testimony (Herman Miller, pg. 36, lines 28 to 33, incl.) indicates that all the stocks were ordered by the plaintiff-appellee:

> "Q. And you yourself ordered stocks, did you not, trading in this account? A. Well, yes. I didn't order much—.
>
> Q. You ordered the 200 shares of Tungsol, did you not? A. Yes, sir.
>
> Q. And you ordered other stocks? A. Yes, sir."

No where in the case is there a question or denial of the fact that the stock in question was delivered to the plaintiff-appellee in the name of his wife. As previously pointed out, there is nothing unusual in the making of such a request. Mr. Miller could have asked for the certificates in his own name and thereafter personally attend to a transfer of same to the name of his wife. Operating in that manner, there would be no one that could question his motive. What difference, is there then, if he should decide to save himself the work and request his agent to attend to the transfer of the certificates for him so that the same would appear in the name of his wife and have them delivered in that manner? Certainly the agents could not question his purpose. He was doing what he was entitled to do, exercising the right of dominion and control over his own property and giving instructions to the defendants-appellants, as his agents, as to the form and the manner in which he wished his own orders executed.

It is also to be remembered that at the trial below, the issue was reduced to a single question, and that was, whether the parties agreed that 66-2/3 shares common stock and 33-1/3 shares preferred stock should be considered as in lieu of 100 shares of common stock.

This brings us again to a consideration of the testimony which shows that the correct stock was purchased for the plaintiff-appellee, and though, through an error, it was not delivered to him, it was actually credited to his account pending the returning of the stock incorrectly delivered. pg. 80, Exhibit "P-5," p. 82-83, Exhibit "P-7"), (pg. 58, lines 26 to 32, testimony of James J. Ryan):

> "Under date of July 3rd, Mr. Miller bought 200 shares Tungsol New, 100 shares

> of which was applied against the sale of July 1st; the other hundred shares was what we call a long position; in other words, he had an interest in 100 shares of Tungsol common."

The testimony further shows that instead of the Tungsol new common being delivered in accordance with the order, through error, the equivalent of 100 shares of Tungsol old was delivered. (pg. 60, lines 20 to 24, testimony of James J. Ryan).

> "Q. What stock was delivered to your Newark office?
>
> A. 66-2/3 Tungsol New Common and 33-1/3 preferred.
>
> Q. Do you know what stock was ordered?
>
> A. 100 shares Tungsol new."

(Pg. 70, lines 7 to 13, testimony of Herman V. Clark):

> "Q. With reference to Mr. Miller, do you recall any particular occasion that he spoke to you about the stock?
>
> A. I am inclined to think that I spoke to him about it.
>
> Q. Do you remember what you said to him about it?
>
> A. That I asked him to return the 33-1/3 shares that he received in error."

With this State of Facts clearly before us, the only remaining consideration is whether the broker, after crediting the account of the plaintiff-appellee,, with the stock which had actually been ordered and demanding the return of the stock which had been delivered erroneously, could, upon refusal to return, charge the said account with the value of the stock erroneously delivered and withheld by the plaintiff-appellee.

It is contended that the reason stated by the

trial court that the defense was not proper because Mr. Miller could not return the stock in view of the fact that said stock was in the possession of Mrs. Miller, lacks legal sufficiency, in face of Mr. Miller's testimony to the effect that the stock could have been returned.

Upon referring to page 40 and 41, lines 33-40 and 38 respectively, we find the following testimony of the plaintiff-appellee:

> "Q. Do you recall telling Mr. Stein that inasmuch as the stock was registered in your wife's name you could not do anything about it? A. No.
>
> Q. Are you sure of that? A. No, I am not sure.
>
> Q. Do you remember having said anything to him about that? A. After I got the stock the account—the stock was actually Mrs. Miller's but I believe that the stock was in the possession of Mrs. Miller for delivery at any time that they could show that it belonged to them. The stock remained in Mrs. Miller's possession. I didn't hedge; the stock was there for them if they could show that it belonged to them."

Did the defendant-appellants, in view of all the facts and circumstances previously set forth, have the right to treat the refusal to surrender the stock erroneously delivered to plaintiff-appellee as a conversion of said stock and to charge plaintiff-appellee's account for the same?

It is well settled law that property in the hands of a person, to which said person is not entitled, and which he refuses to surrender after demand, creates a conversion of said property on the part of the one withholding it. The delivery of the stock to Mrs. Miller, through Mr. Miller, is admitted and the demand for the return is clearly shown by Exhibit "P-7" (page 82), also pg. 30,

lines 28, etc., spelling out, upon the refusal to return, a conversion. In face of this conversion, the question presenting itself, is whether the defendants-appellants, had the right to pursue the course they did. As previously pointed out, this really was the only question to be tried.

Defendants-appellants rely upon the case of Dimmock vs. the United States National Bank, 55 N. J. L. 296, which appears to be the leading case of its character in the State of New Jersey. It has been so extensively cited and followed that it is felt that it is unnecessary to give a resume of it.

This case defines the right of the owner of stocks which have been converted. At the bottom of page 304 and at the top of page 305, of said case, we find the following:

> "In such cases the customer has a choice of remedies. He may claim the benefit of the sale and take the proceeds; he may require the broker to replace the stock, or replace it himself and charge the broker for the loss, or he may recover the advance in the market price up to a reasonable time within which to replace it after notice of the sale."

In the case at bar, the defendants-appellants (the brokers) elected to replace the stock and charge the cost of same to the plaintiff-appellee. It is submitted that that was the broker's right by virtue of Dimmock vs. The United States National Bank, *supra*, and that defendants-appellants had a right to replace the stock and charge the plaintiff-appellee for the amount of the loss.

Therefore, when a broker is called upon to show why he charged an account with the value of stock erroneously delivered, as was the situation in the case at bar, it appears that the con-

version would be a proper defense. Certainly a counter-claim should be entitled to be predicated upon such a set of facts and by the same token, a defense based upon the same set of facts should also be sufficient. The case of Dimmock vs. United States National Bank, *supra,* is cited, although in that case the principles enunciated were the result of a suit brought against the broker. It is submitted, however, that the legal application would in nowise be changed by virtue of the broker claiming the same benefits under the law, as expounded in said case.

To the same effect is the case of Newburger vs. Weaver, 300 PA 163 and also reported in 150 Atlantic Reporter 298, wherein the facts were very similar to those in the case at bar.

In Newburger vs. Weaver, *supra,* stock of greater value than the stock ordered was erroneously delivered to the purchaser. The broker demanded a return of the said stock, which demand was refused. The broker thereupon instituted a suit in equity to compel a transfer of the stock back to the broker and it was held that a decree of the Court of Equity restraining two defendants from in anywise disposing of a certain certificate of stock for 100 shares (Old series) City Service Company and ordering the defendant Weaver to transfer and deliver the certificate in question to the plaintiffs and the plaintiffs to transfer and deliver to Weaver, a certificate for 100 shares of the new stock of the beforementioned company, with a proper order for the adjustment of dividends, be affirmed.

The above case is cited to show that the trend of the law is uniform in its views, in a case where a purchaser comes into possession of stock to which he is not entitled, and showing further that the broker may recover the stock. His remedies

and the manner of being compensated has already been set forth in Dimmock vs. The United States National Bank, *supra.* It is submitted that the course of conduct pursued by the defendants-appellants was clearly within the law as expounded in said case.

2-B. Defendant-appellants' Newark agents had no power to arbitrate or ratify any transactions, and in view of the conflicting testimony the case should have been submitted to the jury.

B-1. *Defendants-appellants' agents had no authority to ratify.*

Heretofore, defendants-appellants' arguments were directed primarily toward the proof of the plaintiff-appellee contending that said proof of itself, indicated that the plaintiff-appellee's case was not sufficiently proven and that upon said proof alone it was apparent that error existed in the direction of a verdict.

At this time, the matter will be considered from the viewpoint of the defenses interposed by the defendants-appellants at the trial.

The plaintiff-appellee, in a pleading entitled "Reply to Amended Answer & Answer to Counterclaim" (pg. 10) under the heading of "Further Answer" (pg. 11) set forth in lines 33-36; of the State of Case.

> "That the plaintiff retained this stock with the full knowledge, understanding and agreement of the defendants."

And further on said pg. 11, line 40 and p. 12, lines 1-13, as follows:

> "Plaintiff or his agent, after delivery of said stock during the months of August and September, directed the attention of the defendants, through its agents, of the delivery of said 66-2/3 shares common stock and 33-1/3 shares preferred stock. That the said agents of the defendants told the agent of the plaintiff to retain said preferred stock in place of said 33-1/3 shares Tungsol Lamp common, which was not delivered to the plaintiff."

In Reply to Answer to Counterclaim, the defendants-appellants denied the right of the agent to authorize the retention of the stock, (pg. 13, lines 31-37, inclusive).

> "It was beyond the power of any agent of defendant to authorize the retention of stock incorrectly delivered to plaintiff, in lieu of the stock which should have been delivered. If such statement were made by any of defendant's agents, the said statements were beyond and outside the scope of the agency."

On the face of the pleadings, it is readily seen that an issue was raised as to the powers of compromise or ratification vested in the agent or agents. On said issue, the case should have been submitted to the jury, particularly in view of the following testimony, which raised a clear question of fact, capable of being decided only by the jury.

It is the contention of the defendants-appellants that their Newark agents had no authority to ratify or arbitrate discrepancies or errors in delivery.

The following excerpts of the testimony are quoted so that a better understanding may be arrived at regarding the powers of the Newark employees of the defendants-appellants. The testi-

mony of the plaintiff-appellee, quoted below, tends to convey the impression that the employees of the defendants-appellants ratified or arbitrated the incorrect delivery (pg. 27, lines 30-35, Mr. Miller):

> "Q. What did you do with the certificates? A. I said, "This is not the stock I ordered," and the man in there said, "That's what they gave me." He started out and said, "Mr. Stein, is that right?" or Mr. Clark,—I'm not sure—and he said "Yes," and I took the stock—"

(On pg. 29, lines 1-6).

> "Q. So far as the statement is concerned, was that transaction cleaned up? A. Yes, sir, the transaction was closed. There was money there and I had not put another penny in there at that time."

Plaintiff-appellee's further evidence of the ratification is seen on (pg. 39, lines 13-23).

> "Q. What did you tell Mr. Stein at the time? A. There was a big crowd there. I went to the office and when the man gave me the stock I said, "Why this is not the stock." After waiting so long I naturally felt—and the man said, "That's what they gave me." I went out into the office and I said, "Is this stock O. K.?" or something to that effect, and he said, "Yes, or words to that effect."

Plaintiff-appellee's wife, Julia Miller, also testified to the same effect on pg. 54, lines 11-16:

> "Q. What did you say? A. I said, "Do you know what I got instead of my hundred shares of common? I got 66-2/3 common and 33-1/3 preferred." He said, "Why make a fuss over it? It's convertible." I said, "Is this a closed transaction?" He said, "Yes."

The testimony indicates that all of these conversations and negotiations took place in the branch offices of defendants-appellants in Newark, with the employees in that office. Contrasting with the previous contentions of the the plaintiff-appellee, is the testimony of said employees. Mr. Stein, the manager of the Newark Office, testified that it was not within his power to decide disputes. (pages 67 and 68, lines 39 and 40 and 1-8):

> "Q. You are general manager here, aren't you? A. Of this Office.
> Q. You sign checks? A. Yes, sir.
> Q. And receive money? A. Yes.
> Q. And hand over stock certificates? A. Occasionally, if the young man isn't there.
> Q. You decide disputes here, don't you? A. No."

Mr. Stein's testimony further indicated that in cases such as the one at bar, he would have to consult the New York office to determine what was to be done concerning mistakes. pg. 66, lines 24-29):

> "Q. Do you recall Mr. Miller's coming to your office and telling you that he received 66-2/3 shares of Tungsol common and 33-1/3 shares of Tungsol preferred? A. I do.
> Q. Did he ask you what to do about it? A. I told him I would ask New York."

From a consideration of the testimony quoted, a conflict is apparent and said conflict gives rise to two questions; the first of which is whether the matter was arbitrated; and the second is, whether the agent had authority to arbitrate.

These questions, being questions of fact, the decision of which would rest primarily upon the evidence which was adduced at the trial, they fell clearly within the province of the jury to decide

whether the matter was arbitrated and whether the agents had authority to arbitrate.

This becomes doubly important in view of the fact that the only question to be tried was whether there was an agreement for the retention of the 66-2/3 common and 33-1/3 shares preferred instead of the 100 shares of common stock (State of Case, pg. 20, lines 8 to 26.)

The law in this State as expounded in one of the leading cases, Dierkes vs. Hauxhurst Land Co., 80, N. J. L. on pg. 374, is as follows.

> "In cases involving the law of principal and agent, when it is sought to hold the principal for the acts of the agent and the question of agency is in issue, plaintiff must, of course, prove the agency, and that the acts complained of were within the scope of authority of the agent. This, however, is ordinarily peculiarly a jury question."

It is interesting to note that in defendants-appellants' request to charge, pg. 75, lines 1-14, the particular situation was covered in a request to charge the jury as follows:

> "I charge you that if you find from the evidence that Mr. Clark and/or Mr. Stein was the agent of Halle & Stieglitz in charge of their Newark office with authority to receive orders which they were to send on to their New York office any statements made by Clark or Stein will not be binding on the firm of Halle & Stieglitz nor will any change in an order, which had once been submitted to the New York office, be binding on Halle & Stieglitz, unless the new contract had been resubmitted to the New York office."

A reference to the text in 21 Ruling Case Law, page 882, paragraph 6, shows the following:

> "It is within the province of the court to determine whether, under an ascertained state of facts, an agency did exist; but it is for the jury to determine the existence of facts sufficient to constitute an agency.
>
> Although the evidence is not full or satisfactory, it is the better practice to submit the question to the triers of fact."

Upon the premises aforementioned, it is submitted that the facts pertinent to the agency, were in dispute; that the question was essentially one to be decided by a jury, and, that the trial court was in error in directing a verdict in favor of the plaintiff-appellee in face of such conflicting testimoney regarding the powers of the agent to ratify or compromise discrepancies or errors in the delivery of stock.

Fulton vs. Grieb Rubber Co., 72 N. J. L., 35;
Klitch vs. Betts, 89, N. J. L., 348;
Devicenzo vs. John Sommers Faucet Co., 87, N. J. L., 646;
Tilton vs. Penn. RR. Co., 86, N. J. L., 709;
Clark vs. Public Service Electric Co., 86, N. J. L., 151;
Dierkes vs. Hauxhurst Land Co., *supra.*

B-2. *Assuming that defendants-appellants' Newark agents had the power to ratify the transactions in the case at bar were not, in fact, ratified.*

For the purpose of argument it is assumed by the defendants-appellants that their Newark agents

had the power to ratify the transaction. This is not admitted, however. The purpose of this discussion is to show that nowhere in the record can be found any testimony to support this contention. Its importance is accentuated by the fact that the only issue in the case was whether there had been an agreement between the parties that the plaintiff-appellee could retain 66-2/3 shares common stock and 33-1/3 shares preferred stock in lieu of 100 shares of common stock.

We must, therefore, consider with whom this agreement was made. Defendants-appellants have alleged in the previous point that it was beyond the power of their agents to ratify or compromise transactions. Assuming the proof of this contention, it is apparent that if such an agreement did exist it would not have been valid, since the agents had no such powers. The question of the agents powers was a jury question as indicated in the line of cases cited in support of the previous note.

The trial court peremptorily divested the jury of its right to decide this question. There can be but one conclusion as to its reason for doing so since the court itself on pg. 20 of the State of Case recognized the limitation of the issue. That conclusion is that the defendants-appellants or their agents agreed or ratified an agreement that 66-2/3 shares common stock and 33-1/3 shares preferred stock could be retained in lieu of 100 shares of common stock. The purpose of this note is to determine whether the record, in fact, discloses any such ratification.

The agreement or ratification is denied in the pleadings as seen in the Reply to Answer to Counterclaim, pg. 13, State of Case, paragraph 5, which denies paragraph 5 of plaintiff-appelee's further

answer, p. 11, state of Case, Paragraph 5, which alleges the agreement or ratification.

The only evidence in the case tending to show a ratification is that of Herman Miller on pg. 39, lines 21, etc., and the testimony of Julia Miller on Pg. 51, of the State of Case, merely alleges: (line 38).

> "If you don't like the 33-1/3 shares of preferred, change it."

and further on pg. 52, line 38:

> "I said to Mr. Clark I wanted what I bought." He said, "You know it's convertible. Take it and change it." I said, "Will it be all right?" He said, "Yes." I said, "You know if I wanted the preferred I would have bought the preferred." He said, "Change it." I said, "It took you so long to get the stock I suppose you didn't have the stock." He said, "Maybe we didn't."

and again her testimony on pg. 54, lines 10 to 16 inc.:

> "Q. What did you say? A. I said, "Do you know what I got instead of my hundred shares of common? I got 66-2/3 common and 33-1/3 preferred." He said, "Why make a fuss over it? It's convertible." I said, "Is this a closed transaction?" He said, "Yes."

This is the plaintiff-appellee's entire case concerning ratification of an agreement for the retention of the preferred stock in lieu of the common. The defendants-appellants denied any such agreement or ratification as seen by the testimony of Clarence Stein, defendants-appellants' Newark manager, on pg. 66, of the State of Case, lines 31 to 33 inc.:

> "Q. Did you tell him that inasmuch as

> they were selling at about the same price he should keep them? A. No, sir, I did not."

Also the testimony of Herman V. Clark, defendants-appellants' assistant manager in Newark, pg. 69, State of Case, lines 33 to 40 and on pg. 70, lines 1 to 5 inc.:

> "Q. Did you ever tell Mr. or Mrs. Miller that inasmuch as the stocks were selling at the same levels they could keep either in lieu of the other? A. I did not.
>
> Q. You heard Mrs. Miller testify that she spoke to you about this stock? A. Yes, sir.
>
> Q. Did you say that she never spoke to you about the stock? A. To the best of my knowledge and ability I would."

It is readily seen that defendants-appellants' testimony flatly contradicts the testimony of the plaintiff-appellee, regarding a ratification or an agreement to retain the preferred stock in lieu of the common stock. Upon this particular question hinged the entire case and since the testimony was in conflict it became primarily a jury question and to direct a verdict was improper.

Fulton vs. Grieb Rubber Co., 72, N. J. L., 35;
Klitch vs. Betts, 89, N. J. L., 348;
Devicenzo vs. John Sommers Faucet Co., 87, N. J. L., 646;
Tilton vs. Penn. R. R. Co., 86, N. J. L., 709;
Clark vs. Public Service Co., 86, N. J. L., 151;
Dierkes vs. Hauxhurst Land Co., 80, N. J. L., 369.

2-C. The circumstances indicate a ratification of defendants-appellants' acts by the plaintiff-appellee.

The discussion heretofore has been regarding a ratification on the part of the defendants-appellants. The ensuing discussion deals with the ratification on the part of the plaintiff-appellee. Since the issue was confined to the exclusive question as to whether the defendants-appellants or their agents, ratified or agreed that the preferred stock could be retained in lieu of the common, this particular point becomes very pertinent.

If, in fact there was no such agreement or ratification, in what status would the plaintiff-appellee be?

His own case would not have been proven and the retention of the stock by him could not be justified unless under a claim of title which would necessarily have to come by purchase.

It is the intention of the defendants-appellants to show briefly that the circumstances indicate a ratification by implication, of the defendants-appellants' acts, by the plaintiff-appellee, and that said plaintiff-appellee is estopped to deny said ratification.

It is alleged in defendants-appellants' answer (pg. 7, line 39; pg. 8, lines 1-14).

Second Separate Defense.

> At all times mentioned in the complaint, defendants were the agent of plaintiff and discharged their obligations as agent of plaintiff with the express and/or implied consent of plaintiff.

Third Separate Defense.

At all times mentioned in the complaint, defendants were the agents of the plaintiff, and as such agents, discharged their duty, in full conformity of the rules of the particular stock exchange where the stock ordered by plaintiff was dealt in and in full conformity with the customs of duly accredited stock brokers."

It is the contention of the defendants-appellants that they were the agents of the plaintiff-appellee and that he tacitly ratified the conduct of his agent in accepting delivery and retaining possession of stock other than that ordered by him, in face of his knowledge, to the effect that the balance of the stock actually ordered by him was, in fact, credited to his account. The plaintiff-appellee knew, as all of the testimony and exhibits previously referred to will indicate, that he was in possession of 33-1/3 shares of Tungsol preferred stock which he had not ordered and that 33-1/3 shares of Tungsol common was credited to his account in completion of his order as originally given. This was stipulated to on the record as seen on page 20, lines 8 to 25:

"Mr. Weltchek: Before proceeding with the opening: I conferred with Mr. Press a short time ago and some things can be admitted.

The Court: Put them on the record.

Mr. Weltchek: Will you agree that the stock ordered was 100 shares of Tungsol common new?

Mr. Press: No question that he ordered it June 30, 1929.

Mr. Weltchek: Will you agree that 66-2/3 common and 33-1/3 was delivered?

Mr. Press: That's right.

The Court: The only thing at issue, as I understand it, is that the parties agreed that

> the 66-2/3 common and 33-1/3 preferred should be in lieu of the 100 shares of common stock.
>
> Mr. Press: Yes. I claim, of course, that they had no right to pursue the course they did.

The Trial Court, as aforesaid, had the issue resolved into the single question as to whether the 66-2/3 shares of Tungsol common and 33-1/3 shares of Tungsol preferred, which actually comprises 100 shares of Tungsol (old) stock, should be in lieu of the 100 shares of common which actually consisted of 100 shares of Tungsol "New" stock.

In order to decide this question it became essential to determine whether the plaintiff-appellee was estopped from interposing any such claim. Defendants-appellants requested the Court to charge the law concerning estoppel in this regard. On page 74, lines 8 to 16, State of Case, the Request to Charles is as follows:

> "If you find from the evidence that the plaintiff received stock other than that to which he was entitled and retained same, despite his refusal to accept the stock originally ordered by him, then I charge you that the plaintiff is held to have elected to keep the unordered stock, in addition to the ordered stock and is estopped to deny defendant's authority to purchase and charge the cost of said stock to him."
>
> Mahaffay v. Sarshik, 101 Eg. 297.

A jury question was raised again to determine whether the plaintiff-appellee, by his own conduct, tacitly ratified or approved the purchase of the 33-1/3 shares preferred stock which he had never ordered. Furthermore, to determine whether, by his own conduct and refusal to return said stock

in exchange for the common stock which he actually ordered, he is to be charged with a ratification of the purchase of same and estopped to deny said implied authority.

Since it appears that the Trial Court attempted to limit the matters in issue and that the real issue was whether there was an agreement of the parties that the stock should be considered as interchangeable, it would seem that the question of ratification and/or estoppel on the part of the plaintiff-appellee should have been submitted to the jury, together with defendants-appellants' Request to Charge, as quoted above, and that the direction of a verdict was improper.

POINT 3.

The trial court erred in dismissing the counterclaim as filed by the defendants-appellants.

The concluding point of the defendants-appellants deals with a principle of pleading and in nowise touches upon the evidence of the case at bar.

A counterclaim was filed in the case at bar and at the trial was dismissed, upon motion of counsel for the plaintiff-appellee, before the introduction of a single line of testimony on the part of any witness, as a matter of fact, no witness had yet been sworn. It is the contention of the defendants-appellants that, as a matter of law, it was error to dismiss the counterclaim.

A reference to the counterclaim on Page 8 of the State of Case will show that through error, certain stocks were delivered by defendants-appellants to plaintiff-appellee, who, upon demand for

return of same, refused to return them. Whereupon defendants-appellants elected to treat the transaction as a conversion. A general denial is interposed as the defense to the counterclaim, as seen on page 10 of the State of Case. It is submitted that the trial court was without power to dismiss the counterclaim, except, for the reason that it was sham or frivolous. Only in such cases can the court strike such a pleading.

The practice act of New Jersey, Compiled Statutes, page 4087, Section 111, is to the following effect.

> "*Frivolous Pleas Stricken Out.* Any frivolous plea or demurrer or sham plea may be struck out by the court or a judge on four days' notice, unless the court or judge shall, for special reason, direct shorter notice; if an affidavit shall be presented to the court or judge, setting forth that the party or his attorney by whom such plea or demurrer is filed cannot be found, said notice shall not be necessary; and on such application the court or judge may by order direct the taking of testimony to be used on the hearing. (P. L. 1903, p. 569)

The above provision is very clear in its statement that it pertains only to pleas and since the act applies only to pleas, it is well to determine first, just what a plea is.

At common law, the first pleadings were the declaration, pleas, and replication. Under the Practice Act, the second pleadings, namely the plea, is called the Answer. Bouvier defines plea as:

> "The defendant's Answer by matter of fact, to the plaintiff's declaration."

In brief, the practice act, relative to striking out pleadings, applies only to answers or a pleading

which is the answer to a former pleading and does not apply to those pleadings which set up an affrmative cause of action.

A line of cases support this contention. In Coykendall vs. Robinson, 39 N. J. L., page 98, it was held as follows:

> "A justice of the Supreme Court has power to strike out as a sham *plea,* the general issue, accompanied by the statutory affidavit. If the *plea* is false, it is not an invasion of the right of trial by jury."

Quoting from this case on page 99, we read:

> "Section 133 of the practice act is not, in terms, an infringement of this constitutional provision. *It is limited in its exercise to frivolous pleas*—that is, pleas manifestly immaterial or inapplicable to the case—and sham pleas, which are false pleas. In these cases, the defendant has failed to set up a legal defense; he has presented no issue to be tried by a jury, there existing, in fact, nothing to try. It is struck out as a sham plea, and therefore, in this argument, it must be conceded to be a false plea."

From this quotation, it follows: that so long as an Answer sets up a defense which is not false or frivolous, it presents a question for the jury and "a fortiori," as a counterclaim, sets up a cause of action, it cannot be stricken. This very question was decided in the Court of Chancery in the case of South Camden Trust Company of Camden, New Jersey, vs. Michael Stiefil, reported in 101 N. J. Eq., page 41.

This was a motion in the Court of Chancery to strike out a counterclaim under the Chancery Act. Pamphlet laws 1915, page 185, section 4. This act

which is almost identical with the Practice Act, reads as follows:

> 33-117. "*Sham Defense.* 4. Any frivolous or sham defense may be struck out on notice, and a decree pro confessor entered, or the defendant may be allowed to defend on terms, or such other order or decree may be made in the premises as may be just."

While this act relates to striking out answers, the appellant believes it to be almost synonomous with the Practice Act, since a plea, and an answer are the same and for this reason, it is submitted that the practice act should be given the same construction as the Chancery Act, especially since the Court of Chancery refers and relies upon the following cases, decided in the law courts.

> Coykendall vs. Robinson, 39, N. J. L. 98, referred to *supra;*
> Brown vs. Warder, 44, N. J. L., 177;
> Mershon vs. Castree, 57, N. J. L. 484;

Quoting from South Camden Trust Co., vs. Stiefil, 101 Eq. on page 42, we read:

> "The affidavits filed in support of the motion may be said to adequately disclose that the averments on which the counter-claim bases affirmative relief are false. This raises the important question whether, in the absence of statutory sanction, there is in this court, the inherent power to strike this counter-claim from the files for the reason stated.
> There appears to be no doubt of the existence of a power inherent in the superior courts of this state to strike out a purely defensive pleading as sham. In our courts of law, the power has been recognized from the earliest times, independently of legislative sanction, and the exercise of the power is de-

> clared to be in harmony with the antecedent practice in the common law court of England.

And on page 42 of the same case, we read:

> "It will be observed that in all the cases above cited the motion has been directed to purely defensive pleadings. Since a pleading which bases a defense on matters which are untrue is a mere sham and an obstruction of justice in a pending suit, in this state it has been thought to be within the powers of the court to test the truth of the defensive matter by affidavits filed in support of a motion to strike the pleadings from the records. In some jurisdictions, this procedure has been held violative of the constitutional right of trial of issues of fact by a jury or by orderly examination and cross-examination of witnesses (as to such cases see an extended note on "Sham Pleadings," in 113 Am. St. Rep. 639), but in this state, the procedure is regarded as merely an inquiry whether there is an issue of fact to be tried, a distinction being recognized between the determination whether there is a real issue to be tried and the trial of an issue upon a motion; whether what in form is an issue is a real issue. Coykendall vs. Robinson, *supra*. But no case appears to exist in this jurisdiction or elsewhere in which a motion has been presented much less entertained, to strike out a declaration at law or a bill in equity on the ground that the averments on which relief is based are false. The right to thus summarily dismiss a suitor would seem to subvert all established conceptions of orderly procedure, and so far as I am aware, no court has ever assumed to exercise the power to strike out as sham, any pleading other than a purely defensive pleading, and no legislature appears to have ever given sanction to the exercise of such a power."

The question as to the power of a court to strike out a counterclaim again came up in the case of Turnbull vs. Eight Creditors Corporation, Incorporated. Reported in 108 N. J. E. pg. 9.

This was a motion to strike out a counterclaim as sham. The counterclaim was stricken, not because a counter-claim may normally be stricken out, but because it was based upon and in substance, set up the same facts which had been stricken out as a false answer.

Concluding this point, it appears that in the case at Bar, a counterclaim was filed and the same was summarily stricken on motion of the plaintiff, although there is nothing to indicate that said counterclaim was based upon a false answer. The court, in the case of Turnbull vs. Eight Creditors Corporation, *supra,* indicated that a counterclaim could not be stricken unless it is based upon a false answer, and in conclusion, the following is quoted from page 11 of the aforesaid case.

> "Bills and counter-claims are not, on principle, stricken as sham; the facts alleged are assumed to be true for the purpose of the motion. Suitors are not to be dismissed summarily, upon ex parte proof, if their complaint shows they are entitled to relief; they are entitled to the judgment of the court after trial."

It would appear then, that the only reason for which a counterclaim could be stricken would be for legal insufficiency, in that the counterclaim failed to set forth a cause of action. This necessarily would have to be brought by motion to strike, due notice of the application for same being given to the adverse party.

This was not the situation in the case at bar and since the counterclaim is an affirmative pleading,

which cannot be stricken because of sham or frivolity and since it is submitted that the counterclaim set forth a cause of action, it is contended that the trial court erred in dismissing said counterclaim.

Conclusion.

Defendants-appellants respectfully submit that a direction of a verdict in favor of the plaintiff-appellee and against the defendants-appellants was improper.

The testimony has been quoted extensively and the situation has been approached from various angles for the purpose of demonstrating that, regardless of the method of approach, there can be but one conclusion and that is that there was error in the direction of a verdict. As to matters of fact, defendants-appellants were entitled to have same passed upon by a jury. The trial court recognized in the entire case that there was but one issue and that was whether there was an agreement that one type of stock could be retained in lieu of another type of stock.

All of the evidence discloses a conflict in testimony regarding questions of fact, and it is submitted under the authority of the cases cited, *supra*, that it was error to take the case from the jury.

It is realized that in this State, it is not suffcient for the defendants-appellants to show merely that there was a trial error, but that it is necessary to go further and show that by virtue of such error, they were prejudiced. (Practice Act of 1912, Section 27).

It is the contention of the defendants-appellants that the error relating to matters of fact was prejudicial.

Briefly reviewing these errors, it is apparent that the question of Mrs. Miller's interest in the account should have been submitted to the jury for their determination, regarding the ability to return the stock incorrectly delivered.

Furthermore, it is submitted that the variance in the proofs of plaintiff-appellee's case was fatal. The testimony indicated that his wife was the owner of the account, whereas the pleadings indicated that he was the owner of the account. Furthermore, no authority was shown for the maintenance of the suit in the plaintiff-appellee's name, and for these reasons, his case should have necessarily failed.

It is submitted further that the trial court erred in directing a verdict because a serious question of fact was raised in the defenses. The defendants-appellants charged that plaintiff-appellee converted certain stocks and forced them to pursue the course that was pursued. This raised a question of fact which certainly should have gone to the jury.

Again, since the issue was narrowed down to the question of an agreement for the retention of one stock in lieu of another, the question of the powers to enter into such agreement was magnified in its importance. The record discloses unquestionably that the testimony was in conflict on this point and that this also was a matter which could only be passed upon by a jury as was the situation with the question concerning plaintiff-appellee's ratification of defendants-appellants' acts.

The defendants-appellants aver that the disputed questions of fact briefly out-lined above, raised jury questions and that the failure to submit them to the jury was not a matter of simple harmless error but was prejudicial error, since the questions

of fact were directly concerned with the exclusive issue at the trial.

Defendants-appellants further submit that the dismissal of the counterclaim filed by them was a summary divestment of their affirmative rights, contrary to the law, as defined in this State and justifying a reversal of a judgment.

It is respectfully submitted that by virtue of the premises aforementioned, the defendants-appellants are entitled to a reversal of the judgment and a venire de novo.

Respectfully Submitted,

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with Defendants-Appellants.

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