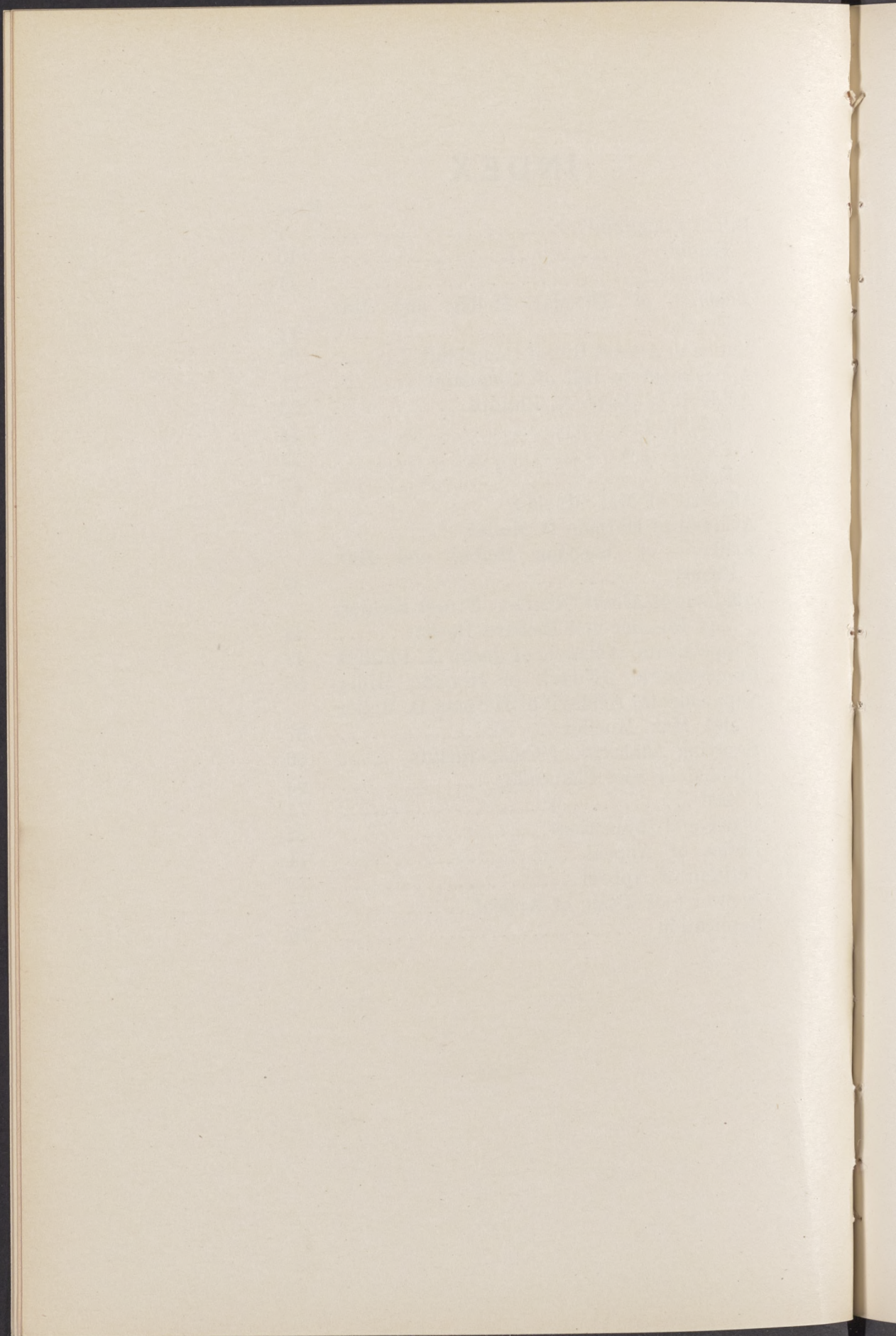


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Bill of Complaint.

Bill of Complaint.

Filed October 9, 1929.

In Chancery of New Jersey

To the Honorable EDWIN ROBERT WALKER, 10
Chancellor of the State of New Jersey.

Complainants, Theodor Helbig, Albert Scherzer, Max Franke, Emil Mueller, Hermann Miller, Ernst Eichler and Max Roscher, residing in the Towns of Bloomfield and Glen Ridge, Essex County, New Jersey, respectfully show that:

1. Complainants are stockholders of Brilliant Silk Hosiery Company, Inc., owning and holding the number of shares set opposite their respective names, as follows: 20

Theodor Helbig.....	128
Albert Scherzer.....	124
Max Franke.....	72
Emil Mueller.....	206
Hermann Miller.....	172
Ernest Eichler.....	48
Max Roscher.....	80

Total.....840 30

2. Complainants are informed and believe and charge the fact to be that in November, 1928, the balance of the capital stock of said corporation was held by the following named persons in the amounts set opposite their respective names:

Bill of Complaint.

	Linus Thiefelder.....	72
	Bruno Thiefelder.....	104
	Albert Meixner.....	96
	Richard Bohm.....	104
	Mr. Hook.....	40
	John Moller.....	288
10	Hermann Moller.....	320
	Max Mueller.....	300
	Jacob A. Phillips.....	400
	Total.....	1724

3. Brilliant Silk Hosiery Company, Inc., was incorporated under the laws of the State of New Jersey in about the year 1921. The Company owned and operated a factory building at Bloomfield, N. J. and manufactured and sold
20 silk hosiery. The authorized capital stock of the company was 3,200 shares of stock without nominal or par value.

4. In about July, 1923, the defendant, Jacob A. Phillips, became President and General Manager of the company and in full control of all of its affairs, including operation and business management and we had full confidence in his integrity and honesty and trusted him implicitly, particularly with reference to all of the
30 matters referred to in this bill of complaint and as set forth in the affidavit attached hereto.

5. For some time prior to August, 1928, said Jacob A. Phillips carried on negotiations for the sale of all of the capital stock of the said Brilliant Silk Hosiery Company, Inc. Said Phillips conducted all of the negotiations in New York and none of the stockholders were in direct contact with the purchasers in New York, and from
40 time to time the said Phillips reported to the

Bill of Complaint.

stockholders of the company the result of the negotiations. The result of these negotiations was that on or about August 15, 1928, a proposition was submitted to the Board of Directors of the Brilliant Silk Hosiery Company, Inc. for an option to sell all of the capital stock of the corporation. Under the terms of this option the purchaser secured the right to buy all of the capital stock of the corporation on or before January 15, 1929, upon payment to the respective stockholders of the sum of \$300 cash for each share of stock of the corporation with the option of paying \$200 in cash and issuing and delivering to each of the stockholders 3 1/3 shares of stock of the corporation purchasing the capital stock of the Brilliant Silk Hosiery Company, Inc. for each share of the capital stock of said company held by each of the stockholders thereof.

10

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There was paid on account of this option agreement to the Brilliant Silk Hosiery Company, Inc. the sum of \$5,000 in about August, 1928.

6. The option agreement was extended from January 15, 1929 to February 15, 1929, upon a further agreement by the purchaser to pay \$15,000 for said extension.

30

We understood that it was a part of said option agreement that the said shares of stock of the new company above referred to should be issued and delivered on or before August 15, 1929, and if not paid for, interest at the rate of 6% from February 15, 1929 on the balance of the money due and unpaid under the terms of said option agreement, should be paid to each

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Bill of Complaint.

of the stockholders up to the time of the actual delivery of the stock of the new company.

Complainants have been unable to secure a copy of said optional agreement.

10 7. In about November, 1928, pursuant to the terms of said option agreement, all of the stockholders of the Brilliant Silk Hosiery Company, Inc. delivered to said Jacob A. Phillips all of the capital stock of that company endorsed or with powers of attorney so that the same was negotiable, and we understand that the said Phillips delivered the same to the Bloomfield National Bank. At the time all of the officers and directors delivered their written resignations as such to said Phillips in order that the
20 said option agreement might be carried out and consummated.

8. About February 23, 1929, pursuant to the terms of said option agreement there was paid at the Bloomfield National Bank to each of the stockholders of said company the sum of \$200 per share for each share of stock held by them respectively, plus the same proportionate amount of the \$15,000.00 agreed to be paid for the extension above mentioned. These payments were
30 made on the proportionate basis of shares of stock held by the stockholders as heretofore stated.

9. On or about July 1, 1929, complainant (and we believe all the other stockholders) received a check drawn by Interstate Hosiery Mills, Inc. stated to be initial dividend of 45c per share on the capital stock of that company. These checks were drawn to the order of the stockholders of the Brilliant Silk Hosiery Company, Inc. for
40 the respective amounts of dividends to which

Bill of Complaint.

each of them were entitled under the terms of the aforesaid option agreement. Accompanying said check was a printed statement, a copy of the face and reverse side of which is attached hereto and marked "Exhibit 1."

10. On or about October 1, 1929, complainants (and we believe all the other stockholders) received a check drawn by Interstate Hosiery Mills, Inc. stated to be a dividend of 45c per share on the capital stock of that company. These checks were drawn to the order of the stockholders of the Brilliant Silk Hosiery Company, Inc. for the respective amounts of dividends to which each of them were entitled under the terms of the aforesaid option agreement. Accompanying said check was a printed statement, a copy of the face and reverse side of which is attached hereto and marked "Exhibit 2."

11. Neither the shares of stock of the Interstate Hosiery Mills, Inc. to which the various stockholders of the Brilliant Silk Hosiery Company, Inc. were entitled as above stated, were delivered to them, nor did they receive the equivalent in money as agreed, and said Jacob A. Phillips, although inquiries had been made of him, has not made any satisfactory response as to when complainants and other stockholders will receive either the money due or the stock due from Interstate Hosiery Mills, Inc.

12. Said Bloomfield National Bank consolidated with the Bloomfield Trust Company and is now known as the Bloomfield Bank & Trust Company. Said Bloomfield Bank & Trust Company has stated that said Jacob A. Phillips delivered to said Bloomfield National Bank the

Bill of Complaint.

shares of stock of complainants and other stockholders of Brilliant Silk Hosiery Company, Inc. and that the same were forwarded to a bank in New York, and that said Bloomfield Bank & Trust Company has received and holds in its possession a number of certificates of stock of
10 Interstate Hosiery Mills, Inc. drawn in favor of the various persons and believed to be said stockholders of Brilliant Silk Hosiery Company, Inc. for various amounts, but has refused to furnish complainants with a list of the certificates of said stock in its possession, and has stated that inasmuch as its transactions with reference to said stock were with said Jacob A. Phillips, that it will not deliver any of said shares
20 of stock of Interstate Hosiery Mills, Inc. to complainants and other stockholders, although said certificates are drawn in their favor, and that it would deliver all of said shares of stock of said Interstate Hosiery Mills, Inc. to said Phillips or make such other disposition of the same as said Phillips may direct.

13. Said Interstate Hosiery Mills, Inc. was organized under the laws of the State of New York. Its shares of capital stock are quoted on the curb market and the price thereof per share
30 has varied from a high of about \$32 $\frac{1}{4}$ to a low of about \$14. Under the aforesaid option agreement complainant and other stockholders were to receive 3 $\frac{1}{3}$ shares of the stock of that company for each one share of Brilliant Silk Hosiery Company, Inc., on a basis of a valuation of \$30.00 for each share of stock of said Interstate Hosiery Mills, Inc.

14. Brilliant Silk Hosiery Company, Inc. has fully performed all of its obligations under the
40 terms of said option agreement and extension.

Bill of Complaint.

The stockholders of that company have not received the entire amount of money or its stock equivalent in accordance with the terms of said option agreement, and the certificates of stock of the Interstate Hosiery Mills, Inc. belonging to complainants and other stockholders above stated of the Brilliant Silk Hosiery Company, Inc. are in the possession of and held by Bloomfield Bank & Trust Company under instructions from said defendant, Jacob A. Phillips, not to deliver the same to complainants and their associated stockholders. 10

15. Complainants are apprehensive that the aforesaid stock certificates belonging to them and their associated stockholders now in the possession of the Bloomfield Bank & Trust Company, may be returned to Interstate Hosiery Mills, Inc. in New York City, or to said Jacob A. Phillips, or otherwise removed from the jurisdiction of this court. 20

16. Complainants charge that all of the certificates of stock of Interstate Hosiery Mills, Inc. now in the possession of Bloomfield Bank & Trust Company belong to complainants and the other stockholders of Brilliant Silk Hosiery Company, Inc. in accordance with their respective stockholdings in that company as above stated, and that said Bloomfield Bank & Trust Company has no right, title or interest therein except to hold them as Trustee for complainants and their associated stockholders, and that said Jacob A. Phillips has no right, title or interest in said shares of stock; and complainants charge that under the facts and circumstances herein stated, a decree should be made accordingly, and that this Court should ascertain and determine the respective interests of 30 40

Bill of Complaint.

complainants and their associated stockholders in the said shares of stock of Interstate Hosiery Mills, Inc. now in the possession of said Bloomfield Bank & Trust Company.

10 Complainants are without adequate remedy in the Courts of Law, and therefore pray that:

1. Jacob A. Phillips and Bloomfield Bank & Trust Company, a corporation, who are defendants to this suit, may answer this bill of complaint and each statement therein made.

20 2. That this Court may ascertain and determine the respective interests of complainants and other stockholders above named of Brilliant Silk Hosiery Company, Inc. in and to the certificates of stock of Interstate Hosiery Mills, Inc. now held by and in possession of Bloomfield Bank & Trust Company, and when so ascertained, that a decree should be made authorizing and directing said Bloomfield Bank & Trust Company to deliver to complainants and other stockholders of said Brilliant Silk Hosiery Company, Inc. the respective number of shares of stock so ascertained and determined, and that this Court should decree that said Bloomfield Bank & Trust Company has no interest in said
30 shares of stock except to hold them as Trustee until the further order of this Court, and further decree that said Jacob A. Phillips has no right, title or interest in said shares of stock.

3. That said Bloomfield Bank & Trust Company set forth and discover the certificates of shares of stock of Interstate Hosiery Mills, Inc. now in its possession or at any time received or held by it, the number of shares of each certificate and the names of the persons in whose
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Bill of Complaint.

favor said certificates are drawn and the trust agreement or escrow agreement, if any, under which said certificates were received and held by it.

4. That said Jacob A. Phillips may set forth and discover the terms and conditions of the escrow agreement under which the certificates of stock of Brilliant Silk Hosiery Company, Inc. were sold and transferred to Interstate Hosiery Mills, Inc. and if the same is in writing that he set forth a copy of any and all writings and written instruments referring thereto, and that he likewise set forth and discover what books of account, minute books, papers and documents are in his possession or under his control relating to Brilliant Silk Hosiery Company, Inc. and particularly such provisions thereof as refer to the aforesaid sale and transfer of said stock to Interstate Hosiery Mills, Inc.

5. That a decree may be made restraining and prohibiting said defendants, Jacob A. Phillips and Bloomfield Bank & Trust Company, from selling, assigning, disposing of, hypothecating or delivering any certificates of stock of Interstate Hosiery Mills, Inc. to any person whatsoever until the further order of this Court, and that the respective officers, agents, attorneys and representatives be likewise restrained.

6. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

CARLYLE GARRISON,
Solicitor of Complainants.

ALFRED B. VAN HOUTEN,
Of Counsel. 40

*Bill of Complaint—Exhibit 1.***“EXHIBIT 1.”**

INTERSTATE HOSIERY MILLS, INC.
232 Madison Avenue, New York, N. Y.

10 Finery
Coral Band July 1, 1929.
Hosiery

The enclosed check represents initial dividend of \$.45 (45 cents) per share, payable to-day, on stock registered in your name at the close of business June 15, 1929.

The name and address which we use in mailing communications to you are intended to be in exact accordance with:—

- 20 (1) The name as inscribed on the stock certificate or certificates issued to you, and
(2) The address as furnished to us upon the issuance of stock in your name, or as changed in accordance with your instructions.

If you receive communications with an incorrect name or address your prompt advice will be much appreciated.

INTERSTATE HOSIERY MILLS, INC.

30 See change of address blank on reverse side.

Bill of Complaint—Exhibit 2.

REVERSE SIDE:

INTERSTATE HOSIERY MILLS, INC.
232 Madison Avenue
New York, N. Y.

Finery
Coral Band
Hosiery 10

Please change my address on your books as follows:

From

To

Dated (Sign Here)

Sign Name exactly as it appears on
stock certificate.

20

"EXHIBIT 2."

INTERSTATE HOSIERY MILLS, INC.
232 Madison Avenue, New York, N. Y.

Finery
Coral Band
Hosiery October 1, 1929

The enclosed check represents dividend of
\$.45 (45 cents) per share, payable to-day, on
stock registered in your name at the close
of business September 16, 1929. 30

The name and address which we use in mailing
communications to you are intended to be in exact
accordance with:—

- (1) The name as inscribed on the stock certificate or certificates issued to you, and
- (2) The address as furnished to us upon the issuance of stock in your name, or as 40

Affidavit of Theodor Helbig and Max Franke.

changed in accordance with your instructions.

If you receive communications with an incorrect name or address your prompt advice will be much appreciated.

10 INTERSTATE HOSIERY MILLS, INC.

See change of address blank on reverse side.

REVERSE SIDE:—

INTERSTATE HOSIERY MILLS, INC.
232 Madison Avenue,
New York, N. Y.

Finery
Coral Band
20 Hosiery

Please change my address on your books as follows:

From

To

Dated

(Sign Here)

Sign name exactly as it appears
on stock certificate.

30

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.

THEODORE HELBIG and MAX FRANKE, both of full age, being duly sworn according to law, on their oaths severally depose and say that:

1. We are two of the complainants in the bill of complaint attached hereto and the other complainants named in the bill have joined with us and authorize the filing of the bill with us.

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Affidavit of Theodor Helbig and Max Franke.

2. Brilliant Silk Hosiery Company, Inc., was incorporated under the Laws of the State of New Jersey in about the year 1921. The company owned and operated a factory building in Bloomfield, N. J. and manufactured and sold silk hosiery.

3. In about July, 1923, the defendant, Jacob A. Phillips, became President and General Manager of the Company and in full control of all of its affairs, including operation and business management and we, together with the other complainants, had full confidence in his integrity and honesty and trusted him implicitly, particularly with reference to all of the matters referred to in the bill of complaint and hereinafter set forth in this affidavit.

4. For some time prior to August, 1928, said Jacob A. Phillips carried on negotiations for the sale of all of the capital stock of the said Brilliant Silk Hosiery Company, Inc. Said Phillips conducted all of the negotiations in New York and none of the stockholders were in direct contact with the purchasers in New York, and from time to time the said Phillips reported to the stockholders of the company the result of the negotiations. The result of these negotiations was that on or about August 15, 1928, a proposition was submitted to the Board of Directors of the Brilliant Silk Hosiery Company, Inc., for an option to sell all of the capital stock of the corporation. Under the terms of this option the purchaser secured the right to buy all of the capital stock of the corporation on or before January 15, 1929, upon payment to the respective stockholders of the sum of \$300 cash for each share of stock of the corporation with the option of paying

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Affidavit of Theodor Helbig and Max Franke.

\$200 in cash and issuing and delivering to each of the stockholders 3 1/3 shares of stock of the corporation purchasing the capital stock of the Brilliant Silk Hosiery Company, Inc., for each share of the capital stock of said company held by each of the stockholders thereof.

10 There was paid on account of this option agreement to the Brilliant Silk Hosiery Company, Inc., the sum of \$5,000 in about August, 1928.

5. The option agreement was extended from January 15, 1929, to February 15, 1929, upon a further agreement by the purchaser to pay \$15,000 for said extension.

20 We understood that it was a part of said option agreement that the said shares of stock of the new company above referred to should be issued and delivered on or before August 15, 1929, and if not paid for, interest at the rate of 6% from February 15, 1929, on the balance of the money due and unpaid under the terms of said option agreement, should be paid to each of the stockholders up to the time of the actual delivery of the stock of the new company.

30 6. In about November, 1928, pursuant to the terms of said option agreement, all of the stockholders of the Brilliant Silk Hosiery Company, Inc., delivered to said Jacob A. Phillips, all of the capital stock of that company endorsed or with powers of attorney so that the same was negotiable, and we understand that the said Phillips delivered the same to the Bloomfield National Bank. At the time all of the officers and directors delivered their written resignations as such to said Phillips in order that the said option agreement might be carried out and consummated.

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Affidavit of Theodor Helbig and Max Franke.

7. The following is a list of all of the stockholders of said company in November, 1928, and opposite their names are stated about the amount of stock that each of them held respectively.

Name of Stockholder	Number of Shares	
Theodor Helbig	128	10
Albert Scherzer	124	
Max Franke	72	
Emil Mueller	206	
Hermann Miller	172	
Ernst Eichler	48	
Max Roscher	80	
Linus Thiefelder	72	
Bruno Thiefelder	104	
Albert Meixner	96	
Richard Bohm	104	20
Mr. Hook	40	
John Moller	288	
Hermann Miller	320	
Max Mueller	300	
Jacob A. Phillips	400	

8. About February 23, 1929, pursuant to the terms of said option agreement there was paid at the Bloomfield National Bank to each of the stockholders of said company the sum of \$200 per share for each share of stock held by them respectively, plus the same proportionate amount of the \$15,000 agreed to be paid for the extension above mentioned. These payments were made on the proportionate basis of shares of stock held by the stockholders as stated in the foregoing paragraph.

9. On or about July 1, 1929, complainants (and we believe all the other stockholders) received a check drawn by Interstate Hosiery

Affidavit of Theodor Helbig and Max Franke.

Mills, Inc., stated to be initial dividend of 45 cents per share on the capital stock of that company. These checks were drawn to the order of the stockholders of the Brilliant Silk Hosiery Company, Inc., for the respective amounts of dividends to which each of them were entitled under the terms of the aforesaid option agreement. Accompanying said check was a printed statement, a copy of the face and reverse side of which is attached hereto and marked "Exhibit 1."

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10. On or about October 1, 1929, complainants (and we believe all the other stockholders) received a check drawn by Interstate Hosiery Mills, Inc., stated to be a dividend of 45 cents per share on the capital stock of that company. These checks were drawn to the order of the stockholders of the Brilliant Silk Hosiery Company, Inc., for the respective amounts of dividends to which each of them were entitled under the terms of the aforesaid option agreement. Accompanying said check was a printed statement, a copy of the face and reverse side of which is attached hereto and marked "Exhibit 2."

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11. Neither the shares of stock of the Interstate Hosiery Mills, Inc., to which the various stockholders of the Brilliant Silk Hosiery Company, Inc., were entitled as above stated, were delivered to them, nor did they receive the equivalent in money as agreed, nor did they receive the payment in lieu thereof, and on or about September 18, 1929, we, together with other stockholders, went to see said Jacob A. Phillips to inquire why we had not received either the money due or the shares of stock, and he did not give us any satisfactory answer as to when

Affidavit of Theodor Helbig and Max Franke.

we and the other stockholders would ever receive either the money due or the stock due from the Interstate Hosiery Mills, Inc.

12. On October 8, 1929, Mr. Ellis, an officer of the Bloomfield National Bank (now known as the Bloomfield Bank & Trust Company) stated to us that Jacob A. Phillips had delivered to the Bloomfield National Bank the shares of stock in question of the Brilliant Silk Hosiery Company, Inc., and that the same had been forwarded to a bank in New York, and that the Bloomfield Bank & Trust Company had received and held in its possession a number of the certificates of stock of the Interstate Hosiery Mills, Inc., all drawn in favor of the stockholders of Brilliant Silk Hosiery Company, Inc., for various amounts, but refused to give us a list of the shares of stock in the possession of his bank. Said Ellis further stated that inasmuch as his transactions had been wholly with said Jacob A. Phillips, and the stock of the Brilliant Silk Hosiery Company, Inc., had been delivered to his bank by said Phillips, that the Bloomfield Bank & Trust Company would not deliver any of the shares of stock of the Interstate Hosiery Mills, Inc., to us even though the certificates were drawn in our favor, and further that the Bloomfield Bank & Trust Company would deliver said shares of stock of the Interstate Hosiery Mills, Inc., to said Phillips or make such other disposition of the same as the said Phillips directed his bank to make.

13. We understand that Interstate Hosiery Mills, Inc. was organized under the Laws of the State of New York, and that its principal business office is No. 232 Madison avenue, New York City. Its shares of stock are quoted in the curb

Affidavit of Theodor Helbig and Max Franke.

market quotations. We understand that this company was organized at or shortly after the time the aforesaid option agreement was made, and that the quoted price per share on the curb market has varied from a high of about $\$32\frac{1}{4}$ to a low of about \$14. Under the option agree-
10 ment we were to receive $3\frac{1}{3}$ shares of stock of that company for each one share we held of the stock of the Brilliant Silk Hosiery Company, Inc., on the basis of a \$30 valuation of each share of stock of the Interstate Hosiery Mills, Inc.

14. Brilliant Silk Hosiery Company, Inc., has fully performed all of its obligations under the terms of said option agreement and extension. The stockholders of that company have not received the entire amount of money or its stock
20 equivalent in accordance with the terms of said option agreement, and the said stock certificates of the Interstate Hosiery Mills, Inc., which belong to the stockholders of the Brilliant Silk Hosiery Company, Inc., are now in the possession of and held by said Bloomfield Bank & Trust Company under instructions from said Jacob A. Phillips not to deliver them to us, and the other stock-
holders of the Brilliant Silk Hosiery Company, Inc.

30 15. We are fearful that the said stock certificates will be returned by said Bloomfield Bank & Trust Company to the New York Bank or the Interstate Hosiery Mills, Inc., in New York City, and thereby be removed from the jurisdiction of the courts of the State of New Jersey, or that they will be delivered to said Jacob A. Phillips, who has no right to possession thereof and has no title thereto.

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Affidavit of Theodor Helbig and Max Franke.

16. The matters and things set forth in the bill of complaint are true to the best of our knowledge, information and belief.

17. We have been unable to obtain from any source a copy of the above mentioned option agreement and we are filing this bill on behalf of complainants above mentioned and any other stockholders of the Brilliant Silk Hosiery Company, Inc., who come in this suit and share in the expense thereof. 10

THEODOR HELBIG,
MAX FRANKE.

Sworn and subscribed to before
me this 9th day of October,
1929. 20

ROBERT H. BRENNER,
A Master in Chancery of New Jersey.

A true copy.

CARLYLE GARRISON,
Solicitor of Complainants.

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Notice.

Notice.

IN CHANCERY OF NEW JERSEY.

	<p><i>Between</i></p> <p>10 THEODOR HELBIG, <i>et als.</i>, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>JACOB A. PHILLIPS, <i>et al.</i>, <i>Defendants.</i></p>	<p><i>On Bill, &c.</i> <i>Notice.</i></p>
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To M. Casewell Heine, Esq., solicitor of defendants, Jacob A. Phillips and Bloomfield Bank and Trust Co.

20 SIRs:

PLEASE TAKE NOTICE, that I shall apply to the Chancellor at the Chancery Chambers, Jersey City, New Jersey, on Monday, October 28, 1929, at 10 o'clock in the forenoon of that day to amend and supplement bill of complaint in the above cause, in accordance with the amendment and supplement of which a copy is hereto attached and herewith served upon you, and for such other and further relief and order in respect thereto as

30 to the Court shall seem equitable and just.

Dated October 24, 1929.

Respectfully yours,

CARLYLE GARRISON,
 Solicitor of Complainant.

*Amendment to Bill of Complaint.***Amendment.**

IN CHANCERY OF NEW JERSEY.

*Between*THEODOR HELBIG, *et als.*,
Complainants,*and*JACOB A. PHILLIPS, *et al.*,
Defendants.*On Bill, &c.*

10

Amendment.

To the Clerk in Chancery:

Complainants amend and supplement their bill of complaint by adding the following paragraph to be inserted after paragraph No. 16:

20

"SECOND CAUSE OF ACTION.

17. Complainants repeat the allegations and statements in paragraph No. 1 to 16, both inclusive.

The shares of capital stock of said Interstate Hosiery Mills, Inc., are listed on the New York Curb Exchange and sales thereof are made upon said exchange and have varied from a high price of \$32.25 to a low price of \$14 per share, and on October 24, 1929, sales upon said Exchange were reported of said shares of stock and on various other dates. By reason of the refusal of said defendants to deliver to complainants the several certificates of shares of stock of said corporation to which they are respectively entitled complainants are unlawfully deprived of their right to sell and transfer their respective shares of stock when the market

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Amendment to Bill of Complaint.

therefor is favorable and they are desirous of having the immediate right to sell, transfer, and dispose of their said shares of stock and by reason of the premises have suffered great loss.

10 18. Complainants charge that under the facts and circumstances above set forth an account should be taken of the loss suffered by the complainants respectively and the amount of such loss when so ascertained should, by decree of this court, be directed to be paid by said defendants to the complainants respectively."

20 Complainants further amend and supplement their bill of complaint by adding to the prayer thereof after paragraph No. 7, the following paragraph:

30 "8. That an account may be taken of the loss occasioned to the complainants respectively by reason of the unlawful retention by the defendants of the certificates of capital stock of said Interstate Hosiery Mills, Inc., to which complainants are respectively entitled and that a decree should be made directing that the amount of said loss when so ascertained be paid by the defendants to the complainants respectively."

CARLYLE GARRISON,
Solicitor of Complainant.

Affidavit of Jacob A. Phillips.

Affidavit of Jacob A. Phillips.

IN CHANCERY OF NEW JERSEY.

Between

THEODOR HELBIG, *et als.*,

Complainants,

and

JACOB A. PHILLIPS, *et al.*,

Defendants.

10

On Bill, &c.

Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

JACOB A. PHILLIPS, of full age, being duly sworn according to law, on his oath, deposes and says:

20

I reside in Glen Ridge, Essex County, New Jersey, and I was a stockholder, to the extent of 566 shares, Director and President of the Brilliant Silk Hosiery Company, a corporation of New Jersey, which I am advised has now been dissolved by appropriate legal proceedings to that end.

That I am informed by my counsel, M. Case-
well Heine, of Newark, New Jersey, the said
Brilliant Silk Hosiery Company was organized
as a close corporation with about sixteen stock-
holders in 1921, and it purchased land, erected a
plant and started in the manufacture of silk
hosiery at Bloomfield, New Jersey. No stock was
ever offered for sale outside the group who
organized the corporation and there was in the
files of the corporation an agreement signed by
all of the original stockholders providing that no
one should dispose of his holdings of stock of

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Affidavit of Jacob A. Phillips.

that company without first offering it to the other stockholders in accordance with a procedure set forth in said agreement.

10 That practically all of the original stockholders have remained in the company from its incorporation and since my connection with the company during the summer of 1923 and there has always been the closest harmony and cooperation among this group of stockholders including your deponent.

20 In the summer of 1928, I was approached by one, Albert Ullman, as to whether or not the Brilliant Silk Hosiery Company or its plant could be purchased as part of a consolidation of hosiery mills which he was engaged in working up. This matter was laid before the stockholders both informally and at the formal meetings with a result that all of the stockholders decided that upon acceptable terms they would be willing to sell or to option for sale their stock holdings which comprised the entire capital stock of the company with the exception of a few shares which remained in the treasury and would be carried by the sale of the stock of the said stockholders.

30 It was also understood and agreed between all of the stockholders during these negotiations that all of the stock of everybody should be sold or none should be sold. I was the active one in the negotiations but every stage of the same was reported to the stockholders, many of whom worked daily in the plant, and the progress of negotiations was at all times known to everybody who wished to know anything about it. A good deal of time was consumed in making the attorneys for said Ullman who was working on the consolidation of the various companies, understand that the sale was of the stock of the stock-

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Affidavit of Jacob A. Phillips.

holders and was not a corporate sale by the corporation of its assets. The negotiations finally came to a head in the agreement of all parties to sell all of their stock as a unit, being all of the stock of the company, in accordance with the agreement of November 21, 1928, a copy of which is annexed hereto, marked Exhibit 1, and which agreement was signed by all of the stockholders on or about the said November 21, 1928. 10

That shortly thereafter the stock of all the parties indorsed for transfer was deposited with the then Bloomfield National Bank, at Bloomfield, New Jersey. The bank which was to be used for the effecting of the consolidation of the various companies into a new company, was the American Exchange Irving Trust Company, of New York City, but I felt it would be for the protection of the stockholders to have the stock actually deposited at the company's own bank in New Jersey and then the transfer to the New York bank made by our own bank. 20

The date for the exercise of said option approached and Mr. Ullman applied for extension of the option date to February 15, 1929. The subject of this extension was considered informally and also at a special meeting of all of the stockholders called for that purpose at which Mr. Ullman and his New York attorney appeared and stated the reasons why said extension would be required and the result was that all of the stockholders agreed that upon the payment of \$15,000 additional as a consideration of the extension of the option they would be willing to so extend it to February 15, 1929, and this was done and an agreement extending the option was signed by all of the stockholders on or about January 18, 1929, a copy of which is annexed hereto, marked Exhibit 1-A. 30 40

Affidavit of Jacob A. Phillips.

On February 15, 1929, the option was exercised by Ullman through his assignees and the new company being the reorganization of the various silk hosiery companies involved, paid the cash as called for by the option to the American Exchange Irving Trust Company, at New York, which cash was in due course transmitted to the Bloomfield National Bank and by it distributed to the respective stockholders.

At the same time, on February 15, 1929, there was deposited with the American Exchange Irving Trust Company, stock of the new company known as the Interstate Hosiery Mills, Inc., a corporation of Delaware, in the proportions called for by the option agreement, and this stock was held pursuant to the terms of the option agreement, in escrow subject to purchase as provided in the option until August 15, 1929.

On the date last named, a claim was made by the Interstate Hosiery Mills and their representatives against the stockholders of the former Brilliant Silk Hosiery Company, which resulted in the detention of the stock by the American Exchange Irving Trust Company of some of the stock of the new company and the turning over of other shares of said stock of the new company to it or its representatives. That upon demand made through our attorneys, in order to test the validity of the detention of this stock, the American Exchange Irving Trust Company finally released and delivered to the Bloomfield National Bank all of the stock of the stockholders of the old Brilliant Silk Hosiery Company except the stock of Jacob A. Phillips, the deponent, which it had turned over to the Interstate Hosiery Mills, Inc., or its representatives.

Affidavit of Jacob A. Phillips.

At the present time, the stock of all stockholders except my stock, is in the Bloomfield National Bank, and my stock as far as can be ascertained has been returned to the Interstate Hosiery Mills, Inc., or its representatives, and legal proceedings are now underway to compel the return of this stock and its delivery to me. 10

I have throughout this entire transaction acted as the agent and representative of the entire group of stockholders of the old Brilliant Silk Hosiery Company and have given them my time and services to the best of my ability and when certain real estate liens were discovered in searching title of the property of the old Brilliant Silk Hosiery Company, I acquiesced voluntarily in the withholding of \$35,000 of the cash coming to me on February 15, 1929, until those liens were cleaned up. 20

The entire deal, however, from the beginning has been one of the entire group of stockholders and realizing as I did and as many of them did, that there might be troubles involved in connection with the six months escrow period during which the American Exchange Irving Trust Company was to hold said stock subject to the options provided in the original deposit agreement, I took up with the stockholders the matter of possible legal expense and charges by bank, trust company, etc., which might be involved in the event of trouble, and all of the stockholders, on February 21, 1929, signed an agreement, a copy of which is annexed hereto and marked Exhibit 2, authorizing me to pro-rate among the stockholders all necessary expenses and charges until the entire matter was cleared up. 30

Just what the amount of these charges will be in view of the legal action which has been made 40

Affidavit of Jacob A. Phillips—Exhibit 1.

necessary in order to secure the delivery of my stock as well as that of the others, it is impossible now to state and I have considered it fair that the stock of all of the parties should be held by the Bloomfield Bank until such time as all of the stock, delivery of which was called for under the option, of all of the stockholders should be delivered and when the deal is thereby finally concluded and the expense determined, that the latter should be pro-rated, and in the meantime that the stock of the parties should be held as security as otherwise I would have no protection against non-payment for any reason on the part of any stockholder of his proportionate share.

JACOB A. PHILLIPS.

20 Subscribed and sworn to before
me this 30th day of October,
A. D. 1929.

MARIE SULLIVAN,
Notary Public of New Jersey.

EXHIBIT 1.

November 21, 1928.

30 American Exchange Irving Trust Co.,
60 Broadway,
New York City.
Bloomfield National Bank,
Bloomfield, N. J.

Dear Sirs:

The undersigned hand you herewith certificates of stock representing 2,880 shares of the capital stock of the Brilliant Silk Hosiery Co., a New Jersey corporation duly endorsed in blank for delivery, to be held in escrow and delivered

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Affidavit of Jacob A. Phillips—Exhibit 1.

by you in accordance with the following instructions:

Name of Stockholders	No. of Shares	Certifi- cate No.
Jacob A. Phillips	566	10
Max Mueller	292	
Herman D. Moller	438	
Theodor Helbig	128	
Emil A. Mueller	206	
Bruno Thierfelder	96	
Linus Thierfelder	72	
Ernest Richler	48	
Willy Hug	70	
Albert Mihsner	104	
Max Frunke	72	
Herman Miller	176	20
Max Roscher	80	
Richard Boehm	104	
Est. of John Moller	292	
	136	

1. To deliver to Albert L. Ullman or his nominees the aforesaid certificates of stock upon receiving therefor, for our account, either the sum of \$300. per share in cash, or \$200. per share in cash and \$100. per share in stock of no par value of the Brilliant Silk Hosiery Co., Inc. a new corporation to be formed under the laws of the State of Delaware, or other corporation having a similar name, computed at the price at which other no par value shares of said company shall be offered to the public by bankers, as such offering price shall be evidenced by the filing with you of the circular or circulars of said bankers offering said stock to the public duly subscribed by the said bankers, and upon receipt in addition

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Affidavit of Jacob A. Phillips—Exhibit 1.

of the signed resignations of the officers and directors of the "Brilliant Silk Hosiery Co." of New Jersey, which you will please deliver to Mr. Albert L. Ullman or his nominees, together with said stock of the existing corporation deposited hereunder, the cash so received by you for the
10 account of the undersigned to be immediately paid out to each of the said undersigned.

2. Upon receipt by you as aforesaid of the stock of the Brilliant Silk Hosiery Co. Inc. of Delaware, which represents the partial payment for the stock of the existing Company, you will please hold the said stock of the new company in escrow for a period of six months from the date thereof. During such escrow period said
20 Albert L. Ullman or his nominees shall have the option to repurchase any or all of said stock *do* deposited at the price at which other shares of said new company shall be offered to the public by the bankers as aforesaid; and in the event of the exercise of said option by the bankers to purchase said stock, and upon receiving payment therefor in cash you will please pay the proceeds thereof to the undersigned in proportion to the stockholdings of the undersigned respectively in the existing company as herein set forth. In the
30 event that the party of the second part shall not exercise said repurchase option within said period of six months you will deliver to the undersigned their respective holdings of said stock in the Brilliant Silk Hosiery Co. Inc., a corporation of Delaware, received by you for the account of the undersigned, as hereinabove provided.

You shall not be bound or in any way affected by any notice of the modification or abrogation of this agreement unless signified to you in writing
40 signed by all of the parties hereto, nor in the

Affidavit of Jacob A. Phillips—Exhibit 1.

case of a modification unless the same shall be satisfactory to you. You shall not be liable or responsible for any matter or thing connected with this agreement or the deposited stock or the proceeds thereof, except the holding and delivery or payment thereof as herein provided.

If the purchase price for the stock herewith deposited in cash and/or stock is not paid to your bank for our account on or before January 19, 1929, the stock herewith deposited shall be without any conditions or restrictions whatsoever returned to us. 10

If and when the six months from the date of the deposit with your bank of the shares of the stock of the Brilliant Silk Hosiery Company of Delaware, the new company, which are to be held in escrow for that period, expires, you are forthwith instructed to deliver the said certificates to the undersigned without any conditions or restrictions unless such shares have been purchased by said Ullman or his nominees under the option to repurchase provided for herein, and in that event any shares which have not been so purchased shall be delivered to the undersigned. 20

Kindly acknowledge receipt of the foregoing certificates and of your agreement to hold the same as depository under the terms of this letter at the place indicated below. 30

Names	Addresses
Jacob A. Phillips	
Max Mueller	
Herman D. Moller	
Theodor Helbig	
Emil A. Mueller	
Bruno Thierfelder	
Linus Thierfelder	
Ernest Eichler	

Affidavit of Jacob A. Phillips—Exhibit 1-A.

Willy Hug
 Albert Miehsner
 Max Frunke
 Herman Miller
 Max Roscher
 Richard Boehm
 10 Estate of John Moller

EXHIBIT 1-A

Jan. 18, 1929.

American Exchange Irving Trust Co.
 60 Broadway,
 New York City.
 Trust Department.

20 Dear Sirs:

Please be advised that the letter addressed to you by the undersigned under date of November 19, 1928, depositing with you 2880 shares of the capital stock of the Brilliant Silk Hosiery Company of New Jersey, owned by the undersigned, to be delivered to Albert L. Ullman or his nominees upon the terms and conditions therein set forth is modified so as to extend the time for the complainance by Mr. Ullman or his nominees with the terms and conditions of said escrow letter, to and including the 15th day of February, 1929.

This extension of time granted to Mr. Ullman is in consideration of Mr. Ullman or his nominees paying for said stock on or before the 15th day of February, 1929, the sum of \$15,000. in cash in addition to and in excess of the price provided for in the escrow letter referred to, which addition \$15,000. when received shall be distributed pro rata among the undersigned stockholders.

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Affidavit of Jacob A. Phillips—Exhibit 2.

The said escrow letter of November 19, 1928 is otherwise in every respect confirmed, and nothing herein shall tend to modify or change the terms of said escrow except as herein specifically provided.

Very truly yours,

10

Jacob A. Phillips
 Max Mueller
 Herman D. Moller
 Theodor Helbig
 Emil A. Mueller
 Bruno Thierfelder
 Linus Thierfelder
 Ernest Eichler
 Willy Hug
 Albert Miehsner
 Max Frunke
 Herman Miller
 Max Roscher
 Richard Boehm.
 Est. of John Moller

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EXHIBIT 2

Bloomfield Bank & Trust Company
 Bloomfield, New Jersey

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Feb. 21, 1929.

Mr. Jacob A. Phillips, President,
 Brilliant Silk Hosiery Company,
 Bloomfield, N. J.

Dear Sir:

We, the undersigned, constitute the sixteen present stockholders of the Brilliant Silk Hosiery Company of Bloomfield, New Jersey. We understand that in the reorganization of the company

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Affidavit of Jacob A. Phillips—Exhibit 2.

which you are directing, which is to consolidate the Brilliant Silk Hosiery Company as part of the International Silk Hosiery Company, Inc., there will be certain charges of a legal nature to clear the title of the property of the Brilliant Silk Hosiery Company and bank charges in connection with the escrow and such other incidental charges as may arise.

10

We hereby authorize you to pay these charges and to pro rate the total amount of the charges among us in proportion to our holding of stock in the Brilliant Silk Hosiery Company, billing us for our proportionate share. Our signature at the bottom of this letter concedes to you our sanction of the charges and our willingness to pay our share upon presentation of our bill from

20 you.

Albert Scherzer
 Estate of John Moller, Paula E. Moller, Ex.
 Richard Boehm
 Max Roscher
 Hermann Miller
 Max Franke
 Albert Meichsner
 Willy Hug
 Ernst Eichler
 Louis Thierfelder
 Bruno Thierfelder
 Emil A. Mueller
 Theodor Helbig
 Max Mueller
 Herman D. Moller

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Affidavit of Max Mueller.

Affidavit of Max Mueller.

IN CHANCERY OF NEW JERSEY.

Between

THEODOR HELBIG, *et als.*,

Complainants,

and

JACOB A. PHILLIPS, *et al.*,

Defendants.

On Bill, &c.

Affidavit.

10

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

MAX MUELLER, of full age, being duly sworn according to law, on his oath deposes and says:

20

I am a former Director and Vice-President of the old Brilliant Silk Hosiery Company, and a stockholder to the extent of 292 shares.

I have read the affidavit of Jacob A. Phillips and practically all of the matters therein stated are within my knowledge, except certain negotiations which he may have had in New York and of which I have not a direct knowledge. The other facts are to the best of my knowledge and belief, true and correct statements of the situation. There was a complete understanding among the stockholders of the old Brilliant Silk Hosiery Company that they were to act as a unit and to sell either all of their stock or no one was to sell, and the negotiations proceeded on this basis.

30

The option agreement of November 21, 1928, and the extension of January 18, 1929, were executed by all of the stockholders pursuant to their understanding that they were acting as a

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Affidavit of Max Mueller.

unit and that Jacob A. Phillips was the active negotiator with the parties desiring to purchase the stock.

10 There was never any talk or understanding on the part of any of the stockholders with whom I have talked, and I think I have talked with all of them at various stages of the negotiations, that would in any way authorize one stockholder to receive his money or stock from the new company unless all of the stockholders received theirs. I signed both the option agreement and the extension of it and when it became apparent shortly after February 15, 1929, that there might be trouble during the holding period of six months, February 15th to August 15th, and that charges by the banks and possibly legal expenses
20 might be involved, I with the other stockholders, signed the agreement of February 21, 1929, authorizing Mr. Phillips to hold at the Bloomfield bank my stock and that of the other stockholders until any charges that might be involved could be ascertained, pro rated and paid by the respective stockholders.

MAX MUELLER.

30 Subscribed and sworn to before me this 30th day of October, A. D. 1929.

MARIE SULLIVAN,
Notary Public of New Jersey.

Affidavit of Herman D. Moller.

Affidavit of Herman D. Moller.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>THEODOR HELBIG, <i>et als.</i>, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>JACOB A. PHILLIPS, <i>et al.</i>, <i>Defendants.</i></p>	}	<p><i>On Bill, &c.</i></p> <p><i>Affidavit.</i></p>	10
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STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

HERMAN D. MOLLER, of full age, being duly 20
 sworn according to law, on his oath deposes and
 says:

I am a former Director and Treasurer of the
 old Brilliant Silk Hosiery Company, and a stock-
 holder to the extent of 448 shares, and I am also
 executor of the estate of my cousin, John Moller,
 which estate has an interest of 292 shares.

I have read the affidavit of Jacob A. Phillips
 and practically all of the matters therein stated
 are within my knowledge, except certain negotia- 30
 tions which he may have had in New York and of
 which I have not a direct knowledge. The other
 facts are to the best of my knowledge and belief,
 true and correct statements of the situation.
 There was a complete understanding among the
 stockholders of the old Brilliant Silk Hosiery
 Company that they were to act as a unit and
 to sell either all of their stock or no one was to
 sell, and the negotiations proceeded on this
 basis. 40

Affidavit of Herman D. Moller.

The option agreement of November 21, 1928, and the extension of January 18, 1929, were executed by all of the stockholders pursuant to their understanding that they were acting as a unit and that Jacob A. Phillips was the active negotiator with the parties desiring to purchase
 10 the stock.

There was never any talk or understanding on the part of any of the stockholders with whom I have talked, and I think I have talked with all of them at various stages of the negotiations, that would in any way authorize one stockholder to receive his money or stock from the new company unless all of the stockholders received theirs. I signed both the option agreement and the extension of it and when it became apparent
 20 shortly after February 15, 1929, that there might be trouble during the holding period of six months, February 15th to August 15th, and that charges by the banks and possibly legal expenses might be involved, I with the other stockholders, signed the agreement of February 21, 1929, authorizing Mr. Phillips to hold at the Bloomfield bank my stock and that of the other stockholders until any charges that might be involved could be ascertained, pro rated and paid by the
 30 respective stockholders.

HERMAN D. MOLLER.

Subscribed and sworn to before
 me this 30th day of October,
 A. D. 1929.

MARIE SULLIVAN,
 Notary Public of New Jersey.

Affidavit of Theodor Helbig and Max Franke.

Affidavit of Theodor Helbig and Max Franke.

IN CHANCERY OF NEW JERSEY.

Between

THEODOR HELBIG, *et als.*,
Complainants,

and

JACOB A. PHILLIPS, *et al.*,
Defendants.

On Bill, &c.
Affidavit.

10

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.

THEODOR HELBIG and MAX FRANKE, both of full age, being duly sworn according to law, on their respective oaths each for himself deposes and says that:

20

1. We are both familiar with the statements and contents of the affidavits of Jacob A. Phillips, Herman D. Moller and Max Mueller, all verified October 30, 1929, and with Exhibits No. 1, 1-A and 2.

2. The entire agreement and understanding of complainants with reference to the sale of their respective shares of stock of Brilliant Silk Hosiery Company referred to in said affidavits, is embodied in said Exhibits No. 1, 1-A and 2. There was no understanding or agreement with reference to the sale of said stock that was not embodied in said exhibits.

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3. We did not agree at any time with said Phillips or anyone else that our shares of stock should be held by the Bloomfield bank until such

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Affidavit of Theodor Helbig and Max Franke.

time as all of the stock, delivery of which was called for in the said option agreement, of all the stockholders, should be delivered; and we did not agree with said Phillips or anyone else that when said deal was finally concluded and the expenses determined that the latter should be pro rated (except as stated in said Exhibit No. 2).

10
20
4. Exhibit No. 2 was signed by us at the request of said Phillips on February 21, 1929. At that time said Phillips stated that there would be some charge of legal nature to clear up the title of the factory property in Bloomfield, and a charge of something over \$300 by one of the banks, and he wanted us to sign said Exhibit No. 2 so that we would each bear our share of these specific charges. Prior to February 21, 1929, said Phillips had not advised us of these expenses or of any other expenses that we would have to pay, nor had he advised us at that time or prior thereto that the bank in New York had refused to deliver to said Phillips the shares of stock to which he claims to be entitled in the new company (Interstate Hosiery Mills, Inc.).

30
Shortly after February 21, 1929, we received a bill from said Phillips stating our indebtedness to him in accordance with said agreement, Exhibit No. 2, and paid the same (said Helbig paid about \$60 or \$70 and said Franke about \$36). We never received any other bill from said Phillips.

40
5. About three weeks ago, not having received our stock, we went to said Phillips' house in Glen Ridge, together with complainants Ernest Eichler and Max Roscher, and asked him why the Bloomfield bank was withholding our stock. Said Phillips stated to us at that time that he had

Affidavit of Theodor Helbig and Max Franke.

instructed the bank not to deliver our stock to us, that his stock was being held up in New York, and that he would not permit the bank to deliver our stock to us and our associate stockholders until he got his stock.

6. We did not agree, nor did the other complainants agree, so far as we are advised, and we have talked to all of them, with said Phillips or anyone else that said shares of stock should be held as security for payment of any claim of said Phillips, or any other person, bank, or corporation. 10

Complainants are all residents of the State of New Jersey, and are well able, financially, to pay and satisfy any just claim of said Phillips.

7. The exhibits attached to said affidavit were all prepared by said Phillips or by attorney and counsel selected by him or by the new company, and none of them were prepared by personal attorney or counsel of complainants—complainants had no personal attorney or counsel individually in the transaction. M. Casewell Heine, Esq., who appears as counsel for said Phillips, had been counsel for said Brilliant Silk Hosiery Company from the date of its incorporation. 20

8. Complainants did not agree with said Phillips or anyone else to authorize said Phillips to hold at said Bloomfield bank the stock of complainants until any charges that might be involved could be ascertained, pro rated and paid by the respective stockholders. 30

MAX FRANKE,
THEODOR HELBIG.

Affidavit of Theodor Helbig and Max Franke.

Sworn and subscribed to before
me this 2nd day of November,
A. D. 1929.

ALBERT BARBER,
A Notary Public of New Jersey.

10

Telephone Bloomfield 1330

BRILLIANT SILK HOSIERY COMPANY, INC.
Manufacturers of

FULL FASHIONED SILK HOSIERY

82-88 Llewellyn Avenue Bloomfield, N. J.

Jacob A. Phillips,
49 Midland Ave.,
Glen Ridge, N. J.

20

April 11th, 1929.

Richard Boehm Dr.

To expenses, adjusting etc., to clearing title of
Brilliant Silk Hosiery Co., Inc.,\$49.92
Over paid on account of \$5000 Deposit.... .61

Total\$50.53

30

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Affidavit of Theodor Helbig and Max Franke.

Telephone Bloomfield 1330

BRILLIANT SILK HOSIERY COMPANY, INC.

Manufacturers of

FULL FASHIONED SILK HOSIERY

82-88 Llewellyn Avenue Bloomfield, N. J.

Jacob A. Phillips, 10
 49 Midland Ave.,
 Glen Ridge, N. J.

April 11th, 1929.

Max Franke Dr.

To expenses, adjusting, etc., to clearing Title
 of Brilliant Silk Hosiery Co., Inc.,.....\$34.56
 Overpaid on account \$5000 Deposit..... .40

Total\$34.96 20

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Affidavit of Albert Scherzer and Others.

Affidavit of Albert Scherzer and others.

IN CHANCERY OF NEW JERSEY.

10	<p style="text-align: center;"><i>Between</i></p> <p style="text-align: center;">THEODOR HELBIG, <i>et als.</i>, <i>Complainants,</i> <i>and</i> JACOB A. PHILLIPS, <i>et al.</i>, <i>Defendants.</i></p>	}	<p><i>On Bill, &c.</i></p> <p><i>Affidavit.</i></p>
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STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

20 ALBERT SCHERZER, ERNEST EICHLER, MAX ROSCHER and RICHARD BOEHM, all of full age, being duly sworn according to law, on their respective oaths, each for himself deposes and says that:

1. We are both familiar with the statements and contents of the affidavits of Jacob A. Phillips, Herman D. Moller and Max Mueller, all verified October 30, 1929, and with Exhibits No. 1, 1-A and 2.

30 2. The entire agreement and understanding of complainants with reference to the sale of their respective shares of stock of Brilliant Silk Hosiery Company referred to in said affidavits, is embodied in said Exhibits No. 1, 1-A and 2. There was no understanding or agreement with reference to the sale of said stock that was not embodied in said exhibits.

40 3. We did not agree at any time with said Phillips or anyone else that our shares of stock should be held by the Bloomfield bank until

Affidavit of Albert Scherzer and Others.

such time as all of the stock, delivery of which was called for in the said option agreement, of all the stockholders, should be delivered; and we did not agree with said Phillips or anyone else that when said deal was finally concluded and the expenses determined that the latter should be pro rated (except as stated in said Exhibit No. 2). 10

4. Exhibit No. 2 was signed by us at the request of said Phillips on February 21, 1929. At that time said Phillips stated that there would be some charge of legal nature to clear up the title of the factory property in Bloomfield, and a charge of something over \$300 by one of the banks, and he wanted us to sign said Exhibit No. 2 so that we would each bear our share of these specific charges. Prior to February 21, 1929, said Phillips had not advised us of these ex- 20
penses or of any other expenses that we would have to pay, nor had he advised us at that time or prior thereto that the bank in New York had refused to deliver to said Phillips the shares of stock to which he claims to be entitled in the new company (Interstate Hosiery Mills, Inc.).

Shortly after February 21, 1929, we received a bill from said Phillips stating our indebtedness to him in accordance with said agreement, Exhibit No. 2, and paid the same. We never received any other bill from said Phillips. 30

5. We did not agree, nor did the other complainants agree, so far as we are advised, and we have talked to all of them, with said Phillips or anyone else that said shares of stock should be held as security for payment of any claim of said Phillips, or any other person, bank, or corporation. 40

Affidavit of Albert Scherzer and Others.

Complainants are all residents of the State of New Jersey, and are well able, financially, to pay and satisfy any just claim of said Phillips.

10 6. The exhibits attached to said affidavit were all prepared by said Phillips or by attorney and counsel selected by him or by the new company, and none of them were prepared by personal attorney or counsel of complainants—complainants had no personal attorney or counsel individually in the transaction. M. Casewell Heine, Esq., who appears as counsel for said Phillips, had been counsel for said Brilliant Silk Hosiery Company from the date of its incorporation.

20 7. Complainants did not agree with said Phillips or anyone else to authorize said Phillips to hold at said Bloomfield bank the stock of complainants until any charges that might be involved could be ascertained, pro rated and paid by the respective stockholders.

8. We are familiar with the statements and contents of affidavit of complainants Theodor Helbig and Max Franke verified November 2, 1929, and the same are true to the best of our knowledge, information, and belief.

30 ALBERT SCHERZER,
ERNEST EICHLER,
MAX ROSCHLER,
RICHARD BOEHM.

Sworn and subscribed to before me
this 2nd day of November, A. D.
1929.

BENJAMIN D. VAN KEUREN,
Commissioner of Deeds of New Jersey.

40

*Supplemental Affidavit of Jacob A. Phillips.***Supplemental Affidavit of Jacob A. Phillips.**

IN CHANCERY OF NEW JERSEY.

<i>Between</i>	}	<i>On Bill, &c.</i>	10	
THEODOR HELBIG, <i>et als.</i> , Complainants,			<i>Supplemental Affidavit by Court's Permission.</i>	
<i>and</i>				
JACOB A. PHILLIPS and BLOOM- FIELD BANK & TRUST COM- PANY, a corporation, Defendants.				

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.* 20

JACOB A. PHILLIPS, of full age, being duly sworn according to law, on his oath, deposes and says:

With reference to paragraph 4 of the affidavits of Theodor Helbig, Max Franke and others filed on November 2, 1929 for complainants, I desire to point out that on February 21, 1929 when the agreement, Exhibit 2, was entered into to reimburse me for expenses incurred in the common enterprise, it was physically impossible for me to have been able to inform these parties of any retention in my stock in New York as this did not occur until August 15, 1929, as will be more particularly pointed out herein. 30

The stockholders of the old Brilliant Silk Hosiery Company were a unit in the sale of their stock and although representatives of the purchasers and their attorney came to Bloomfield to urge the purchase as pointed out in my pre- 40

Supplemental Affidavit of Jacob A. Phillips.

vious affidavit, nevertheless I was the representative acting for the entire group and the only one in contact with the purchasers. This position I assumed as of necessity as many of the stockholders were workmen in the plant, unfamiliar with financial details and the proposed purchase of the stock had to be and was very carefully explained to them on many occasions prior to the actual agreement on the terms when the first option was given.

When the terms of the option as evidenced in Exhibit 1 were agreed upon (and there is no question in any of the affidavits in this case which I have read that this Exhibit embodied the agreement for the sale of the stock) I was the representative of the group who under advice of Mr. Heine, our counsel, was charged with the duty of carrying out the terms of the agreement, seeing that the stock was escrowed with the Bloomfield Bank and the Irving Trust Company and that the money and stock called for were paid at the time specified in the option.

Throughout all this period of negotiation, I attended the conferences at the counsel's office, went with counsel to New York and discussed legal agreements there, arranged with the banks for the escrow, and on February 15, 1929 I attended without counsel, as everything was supposed to be settled, and agreed upon the formal papers, etc., for the purpose of seeing that the deal was put through.

At this time myself and the other officers and the directors had all resigned and our resignations were handed in on February 15th in New York, to Mr. Ullman and his associates, so at that time I was there only in the capacity as agent for the group of stockholders, the sale

Supplemental Affidavit of Jacob A. Phillips.

of whose stock was being negotiated and consummated at that time.

At the meeting in New York on February 15th, Ullman and the brokers, Ernst & Company, stated to me that as the former officers of the other companies going into the combination or new company, had signed a statement or were going to sign statements that the assets of their respective companies were as set forth in the audits and appraisals made, that they would expect me to do the same thing for the Brilliant Silk Hosiery Company. They stated that the object of this was in order to have a balanced prospectus for use in selling the stock to the public, which would show an O. K. or guarantee by the former officers of each of the companies. 10

I demurred to this, told them that they had Haskins & Sells and the American Appraisal Company go over everything at our company's plant, and that it was not up to me to satisfy them as they had already had their own information through these two concerns. They reiterated that it was a matter of form and that in order for the deal to go through and the money and stock to be paid pursuant to the option, I would have to sign as did the officers of the other two companies. 20

The situation then was that the option would not be exercised and my group of stockholders, including myself, would not receive the money and stock specified in the option unless I would sign this guarantee specifically represented to me to be only a matter of form and for the purpose of getting up a proper prospectus. Having seen and being familiar with the audit made by Haskins & Sells and the appraisal of the American Appraisal Company and knowing that the 30 40

Supplemental Affidavit of Jacob A. Phillips.

assets of the Brilliant Silk Hosiery Company were 100% as found and reported by these parties, I saw no harm in signing a guarantee that our assets were as represented and I did so sign in order to put the whole deal through and for the benefit of the entire group of stock-
10 holders who were selling their stock and as their representative. Without such action on my part the deal would not have been consummated and in so signing I acted for the entire group.

At this meeting I was not represented or advised by counsel as all papers in connection with the deal had already been approved by counsel and the signing of this guarantee for the prospectus was entirely new, and I did not feel that it was necessary to advise with counsel about it
20 as it appeared to be nothing more than an indorsement of the audit and appraisal above referred to which I knew were correct.

In the paper which I signed as above stated, there was a provision which I did not notice and of which I had at the time of signing no knowledge, which provided as follows:

“In the event that you receive at any time during said period of six months” (referring to the period from February 15th to August 15,
30 1929), “a notice in writing subscribed by Messrs. Ernst & Company and Messrs. Strupp & Company and by the new company stating that a breach of a condition, representation, warranty, guarantee or agreement on the part of Phillips contained in his contract letters dated February 15, 1929, and February 15, 1929 has occurred (without specifying such breach) you shall * * *

“(b) Deliver said one thousand eight hundred and eighty-six (1886) shares of said capital
40 stock” (the stock due Mr. Phillips) “as directed

Supplemental Affidavit of Jacob A. Phillips.

in said notice upon the termination of said six (6) months period.”

On or about August 15, 1929 when according to the terms of the escrow, the stock held by the Irving Trust Company was distributable to the stockholders of the Brilliant Silk Hosiery Company, we failed to receive it and the stock of all parties was held by the Trust Company, I went to our counsel and stated that the stock had not been received as called for, with the result that under my instructions he wrote to the Irving Trust Company demanding an explanation and delivery of the stock. He also informed me that he would make a technical demand in order to legally test the Irving Trust Company's right to withhold the stock, and I believe this was done through Max Mueller.

On or about August 23, 1929, a reply was received from the Irving Trust Company by Mr. Heine from William Macalister, Jr., Assistant Secretary which states:

“We also showed Mr. Molloy” (one of Mr. Heine's associates) “The notice in writing dated August 14th, 1929 subscribed by Messrs. Ernst & Company, Messrs. Strupp & Company and by the Interstate Hosiery Mills, Inc. stating; ‘* * * we hereby notify you that breaches of conditions, representations, warranties, guarantees and agreements on the part of the said Jacob A. Phillips contained in his said contract letters dated February 15th, 1929 have occurred. We hereby notify you to deliver the said One Thousand Eight Hundred and Eighty-six (1886) shares of the capital stock of Interstate Hosiery Mills, Inc. formerly International Hosiery Mills, Inc., on August 15th,

Supplemental Affidavit of Jacob A. Phillips.

1929 to Interstate Hosiery Mills, Inc. 232
Madison Avenue, New York City.”

10 The contract letters of February 15, 1929
above referred to is the prospectus agreement
which was signed by the President of the various
constituent companies which I have above re-
ferred to. Upon the receipt of this I took the
matter up with my counsel, Mr. Heine, and he is
now initiating proceedings against the Irving
Trust Company in New York, and in the Court of
Chancery of New Jersey against the Interstate
Hosiery Mills, Inc.—the new company—to which
my stock was delivered as I am informed by the
extract from the letter of the Irving Trust Com-
pany above.

20 As a result of the proceedings taken by Mr.
Heine, the stock of all of the other stockholders
was sent to the Bloomfield National Bank.

Acting as agent and representative of the entire
group of stockholders, I acted in the utmost good
faith and to the best of my judgment under the
emergency circumstances which were presented
at the time of closing the stock sale on February
15, 1929, and if a mistake was made in signing it,
it was an honest mistake which I am now taking
legal proceedings to rectify, and which was done
30 as the representative of and for the benefit of
all the stockholders and without which action at
that time the sale would not have been completed.

This entire transaction has been one of an
entire group of stockholders of which I was the
active representative and it was never contem-
plated that the transaction should be considered
closed and a final distribution of the stock made
until everybody's stock was ready for delivery
through the Bloomfield Bank in their respective
40 proportions. If the other stockholders are per-

Supplemental Affidavit of Jacob A. Phillips.

mitted to receive their stock and I am forced to incur substantial expense in order to get my stock, the result will be that while acting gratuitously as agent, I will be personally saddled with the expense of the transaction which was for the benefit of all and incurred in my capacity as agent for the completing of the original trans-
action. 10

It is true that the complainants have received \$200 per share in cash already and that they might have been at that time financially responsible but they are workingmen and whether they have dissipated the money received in the stock market or elsewhere or whether they remain financially responsible or will be at the time when the amount of expense involved in securing my stock may be determined is problematical and if they are permitted to withdraw their stock without protecting me against the expense already incurred and about to be incurred, I will be deprived of my agent's lien on such stock now in the Bloomfield Bank and I may be deprived of the contribution of the proportionate shares due from the complainants. 20

The funds which they have received from the cash paid on the sale of their stock as a practical matter, can very easily be placed beyond the reach of any execution and in the event that any of the complainants felt so inclined, and the making of this application indicates that they very well might be, they could make it exceedingly difficult, if not impossible, for me to recover expenses billed against them at law. 30

JACOB A. PHILLIPS.

Supplemental Affidavit of Jacob A. Phillips.

Subscribed and sworn to before me
this 7th day of November, A. D.
1929.

MARIE SULLIVAN,
Notary Public of New Jersey.

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*Supplemental Affidavit of Herman Miller.***Supplemental Affidavit of Herman Miller.**

IN CHANCERY OF NEW JERSEY.

*Between*THEODORE HELBIG, *et als.*,
*Complainants,**and*JACOB A. PHILLIPS and BLOOM-
FIELD BANK & TRUST COM-
PANY, a corporation,
*Defendants.**On Bill, &c.* 10
Supplemental
Affidavit by
Court's
*Direction.*STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

20

HERMAN MILLER, of full age, being duly sworn according to law, on his oath deposes and says:

I am one of the former stockholders of the Brilliant Silk Hosiery Company and own 176 shares of stock in that company, which I agreed to sell along with all the other stockholders.

When I agreed to sell my stock, I understood that we were all selling and that there would be no sale unless everybody came in. Mr. Phillips who was the President of the Brilliant Silk Hosiery Company, told us about the deal and the stockholders talked it over many times, and we agreed on the terms and Mr. Phillips was the one who was arranging to carry out the sale of the stock for us.

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I received my share of money from the Bloomfield Bank, \$200.00 for each of my shares, and when it came August, 1929, I was waiting for my stock in the new company to come to me. I did

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Supplemental Affidavit of Herman Miller.

not get it and I found that there was some trouble over Mr. Phillips' stock in New York which he was trying to straighten out and that just as soon as this was fixed up so that all the stock would be over in the Bloomfield Bank, then I would get mine.

10 Along in October Mr. Ernst Eichler and some others came to me in the factory and talked to me about Phillips not giving me the stock and that it was Phillips' fault and they got me to say that I would have their lawyer go after Mr. Phillips and get my stock. Later when I found out that they were trying to get their stock before Mr. Phillips got his, I wrote to their lawyer and told
20 him I would not go in that matter, that I did not want my stock until Mr. Phillips and everybody else got theirs and that it was understood all along that we were all to sell and all to get our stock and if there was any trouble about anyone that would have to be fixed up first before there was a final delivery of the stock coming to each of the stockholders.

I signed the agreement of August 21st, to pay my share to Mr. Phillips of any expense that might be involved in the deal and am willing to have my stock remain until everything is fixed
30 up.

HERMAN MILLER.

Subscribed and sworn to before me
this 6th day of November, A. D.
1929.

MARIE SULLIVAN,
Notary Public of New Jersey.

Supplemental Affidavit, H. D. Moller & M. Mueller

**Supplemental Affidavit of Herman D. Moller
and Max Mueller.**

IN CHANCERY OF NEW JERSEY.

Between

THEODOR HELBIG, *et als.*,
Complainants,

and

JACOB A. PHILLIPS and BLOOM-
FIELD BANK & TRUST COM-
PANY, a corporation,
Defendants.

10

On Bill, &c.

*Supplemental
Affidavit by
Court's
Direction.*

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

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HERMAN D. MOLLER and MAX MUELLER, severally of full age, being duly severally sworn according to law, on their oaths depose and say:

We are the persons who made the affidavit filed herein and we further depose and say that this proposed sale of stock of the Brilliant Silk Hosiery Company was from the very beginning talked about by the stockholders, the majority of whom worked right in the factory, and was the sole subject of conversation and discussion during the summer of 1928 and down until the agreement was signed to sell and deposit our stock in the bank. Most of the stockholders were workmen in the plant and had no experience in financial negotiations. Mr. Phillips was the president and executive of the company and had successfully operated it and he was the one who was in contact with the purchasers, Ullman and

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Supplemental Affidavit, H. D. Moller & M. Mueller

the others, and it is beyond question but that every stockholder looked upon Mr. Phillips as his agent in this sale of stock and consented gladly to have Mr. Phillips act for and represent him in negotiations and in closing out the deal. It was from the very beginning a single transaction
10 in which agreement of all the stockholders was necessary and if any one had objected there would have been no sale, or if the objection had not been considered good, the other stockholders might have bought him out.

After we deposited our stock, Mr. Phillips was the one who represented us and all of the stockholders authorized him to represent them in putting the deal through seeing that the terms of the escrow were carried out.

20 Mr. Phillips had full authority to act in his discretion in carrying out the specified objects as set forth in the escrow agreement and so far as we have knowledge, the signing of the so-called guarantee of the assets of the Brilliant Silk Hosiery Company which he did in New York, was for the benefit of all the stockholders and in order to put the deal through.

30 We have always considered the final distribution of the stock after August 15, 1929 meant the distribution of everybody's stock and in view of the agreement of August 21st, which we signed, to proportionately reimburse Phillips for any expense that the getting of his stock loose from the Trust Company and the new company, would be part of the expense properly chargeable against the whole deal.

HERMAN D. MOLLER,
MAX MUELLER.

Supplemental Affidavit, H. D. Moller & M. Mueller

Subscribed and sworn to before me
this 6th day of November, A. D.
1929.

MARIE SULLIVAN,
Notary Public of New Jersey.

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*Replying Affidavits of Complainants.***Replying Affidavits of Complainants.**

IN CHANCERY OF NEW JERSEY.

10	<p style="text-align: center;"><i>Between</i></p> <p style="text-align: center;">THEODOR HELBIG, <i>et als.</i>, Complainants, <i>and</i> JACOB A. PHILLIPS, <i>et al.</i>, Defendants.</p>	} <i>On Bill etc. Replying Affidavits of Com- plainants.</i>
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STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.

20 Theodor Helbig, Ernst Eichler, Emil A. Mueller, Max Roscher, Richard Boehm and Max Franke, of full age, each being duly sworn according to law, each for himself deposes and says that:

1. The affidavit of Jacob A. Phillips, verified November 7, 1929, has been read to us and we understand the contents thereof.

30 2. Complainants never authorized said defendant Phillips to sign any papers, statement, or guarantee on their behalf, nor did they know that he had signed any guarantee, and they first learned of the facts with reference to said guarantee signed by said Phillips at the hearing before Vice-Chancellor Bentley November 5, 1929 and from his aforesaid affidavit. If we had been informed that it was necessary to sign the guarantee therein referred to we would not have done it ourselves nor would we have authorized anyone to do it for us. We were not informed by
40 said Phillips or anyone else that it was necessary

Replying Affidavits of Complainants.

to sign any papers or documents in order to consummate the deal and secure our money and stock (except defendant's exhibits 1, 1A, and 2).

3. Complainants never saw and had no information with reference to the letter from Irving Trust Company dated August 23, 1929, until advised of the fact in said affidavit of said Phillips. 10

4. Complainants were not advised and had no information from any source until said affidavit of said Phillips was read to them today that Mr. Heine had instructed proceedings against the Irving Trust Company and in the Court of Chancery of New Jersey against Interstate Hosiery Mills, Inc.

5. Complainants never authorized said Phillips to act as their agent and representative or bind them in any way. 20

6. Defendant has no agent's lien of stock in the Bloomfield Bank and has no right of contribution from complainants. The only rights and obligations of complainants and defendant Phillips are those set forth in defendant's Exhibits 1, 1A, and 2, and no rights or obligations exist between them except those arising from said written exhibits. 30

7. The affidavit of Herman D. Moller and Max Mueller, verified November 6, 1929, has been read to us, and we understand its contents.

Said Phillips did not have authority to act in his discretion in carrying out the specified objects set forth in the escrow agreement, and he had no authority from the complainants to sign the so-called guarantee of the assets of said Brilliant Silk Hosiery Company. 40

Replying Affidavits of Complainants.

Complainants never agreed to proportionately reimburse Phillips for any expense he may have in getting his stock loose from the Trust Company and the new company, Interstate Hosiery Mills Inc., and complainants never agreed that such expense would be properly chargeable against the whole deal.

8. The affidavit of Herman Miller, verified November 6, 1929, has been read to us, and we understand its contents thereof.

Complainants never agreed that if there was any trouble about anyone that it would have to be fixed up first before there was a final delivery of the stock coming to each of the stockholders, and never agreed to repay to said Phillips any and every expense that might be involved in the deal.

9. The affiant, Herman Miller, is a brother of said Max Mueller, both of whom have made affidavits for the defendants, and both of whom are engaged in business at the present time with the defendant Phillips. We believe that said Herman D. Moller, who made an affidavit for the defendants, is also connected in business with said Phillips.

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K. THEODOR HELBIG,
ERNST EICHLER,
EMIL A. MUELLER,
MAX ROSCHER,
RICHARD BOEHM,
MAX FRANKE.

Sworn and subscribed to before me
this 8th day of November, 1929.

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GERALDINE ZIEGENER,
A Notary Public of New Jersey.

Opinion of Vice-Chancellor.

Opinion of Vice-Chancellor.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>THEODOR HELBIG, <i>et als.</i>, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>JACOB A. PHILLIPS and BLOOM- FIELD BANK & TRUST COM- PANY, a corporation, <i>Defendants.</i></p>	}	<p><i>On Bill, &c.</i></p> <p><i>Opinion.</i></p> <p>75-444.</p>	<p>10</p>
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Nov. 14, 1929. 20

Carlyle Garrison, Esq., solicitor for the complainants.

Heine & Laird, Esq'rs, solicitors, M. Casewell Heine, Esq., of counsel for defendant Phillips.

OPINION.

SYLLABUS:

1. An agent who exceeds his authority is ordinarily not entitled to indemnity. 30
2. To be entitled to indemnity where his authority has been exceeded, an agent must show that he was faced by an emergency and that it was impracticable for him to have communicated with his principal.
3. Where facts are not in dispute and the law is settled a preliminary mandatory injunction may issue where it is necessary to prevent irreparable injury. 40

Opinion of Vice-Chancellor.

BENTLEY, V.-C.:

On motion for preliminary mandatory injunction.

10 In 1921 a corporation known as Brilliant Silk Hosiery Company, Inc., was incorporated. All of the capital stock thereof had come into the hands of men employed in various capacities by the corporation in the year 1928, when a man named Ullman commenced negotiations for the purchase of the business conducted by that corporation for a merger with other similar mills. Eventually, a contract was executed on November 21, 1928, whereby the American Exchange Irving Trust Company of New York City and the Bloomfield National Bank of New Jersey were made depositories of all of the stock held by these
20 shareholders, upon condition to deliver the same to Ullman or his nominees "upon receiving therefor, for our account, either the sum of \$300 per share in cash, or \$200 per share in cash and \$100 per share in stock of no par value" of a new corporation to be organized. It was also provided that if such payment was made in part by stock of such corporation so to be formed, then the same was to be retained by the depositories for a period of six months, during which time
30 the said Ullman or his nominees was to have an option to purchase such stock upon terms and conditions therein described. It should have been said that any cash consideration coming into the hands of the depositories was to be immediately distributed among the former holders of the old stock, proportionately according to their respective holdings.

40 Ullman, or those he represented, not being prepared to take up the shares of stock so deposited at the time fixed in this agreement, an extension

Opinion of Vice-Chancellor.

was granted for which a consideration of \$15,000 was exacted and paid. On February 15, 1929, those shares were finally purchased by the Ullman interests and payment was made therefor, partly by cash and partly by capital stock of the new company. The cash consideration has been distributed among the stockholders of the old company and as to that there is no complaint. That portion of the consideration, however, which is represented by stock issued by the new corporation is now in the hands of the Bloomfield Trust Company which refuses to distribute the same among the complainants or anyone else without the consent of the defendant Phillips. 10

Phillips was the president of the old corporation and was entrusted by his former associates with the management of the transaction for the sale of their stock. It was represented to me by his counsel on the argument of this motion that on February 15th, when the option to purchase was exercised, Phillips was tricked into signing a warranty as to the extent and value of the assets of the old company, upon the information that it was a mere matter of form and that his warranty as president of that company was merely desired for the purpose of making the new corporation's statement more attractive. The net result of his act in that respect has been to cause the impounding of his share of the new stock by the new corporation upon the pretense, he says, that such warranty was untrue. 20 30

The complainants ask that a mandatory injunction issue forthwith to compel the Bloomfield Trust Company to deliver to them immediately, each his respective shares of the new corporation. This is resisted by the defendant Phillips, and he is joined by some of the former asso- 40

Opinion of Vice-Chancellor.

ciates, because he says that his acts which have now led to his present embarrassment were done as an agent on behalf of the complainants and that he is entitled to be indemnified by them so that they shall all stand on a proportionate footing in the proceeds of the sale of the stock of the old company.

10 The only appearance in opposition to this motion is entered on behalf of Phillips. The Bloomfield National Bank, the title of which has been amended to The Bloomfield Bank & Trust Company, the only other defendant, has taken no part in the motion.

20 The position taken by Phillips is that under the law of agency he is entitled to be indemnified by the complainant and all other shareholders of the old company. He says that when he entered into negotiations with Ullman and his associates he did so on behalf of his fellow stockholders, and that by implication an agency was created wherein he became the agent and the others became the principals. It is true that the doctrine of indemnity applies in favor of an agent for liabilities incurred in the performance of an act on behalf of the principal which is not illegal and which he does not know to be wrong. 2 C. J., 793; 30 1 Mech. on Agency, sec. 1603, (2nd ed.). There is also a limitation on that rule that such an agent is not entitled to indemnity where he incurs an obligation growing out of an act which exceeds his authority. 2 C. J., 797; 1 Mech. on Agency, sec. 1609.

My difficulty with Phillips' argument grows out of the fact that if he did occupy the position of an agent he clearly exceeded his authority when he entered into the warranty of the audit of the old company. Attached to Phillips' affi-
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Opinion of Vice-Chancellor.

davit in the form of an exhibit is a copy of the deposit agreement of November 21, 1928, which has been referred to above. After fixing the terms upon which the depositories were to make delivery of the stock in escrow and the six months' option in favor of the new company, the instructions continue as follows:

10

You shall not be bound or in any way affected by any notice of the modification or abrogation of this agreement unless signified to you in writing signed by all the parties hereto, nor in the case of a modification unless the same shall be satisfactory to you.

* * *

If the purchase price for the stock herewith deposited in cash and/or stock is not paid to your bank for our account on or before January 19, 1929, the stock herewith deposited shall be without any conditions or restrictions whatsoever returned to us.

20

Then further instructions were included for the distribution of the stock to be issued by the new company if it should not exercise its option. This instrument, it will be observed, amounts to a naked bailment upon the single condition that the bailees were to exchange the deposit for a certain sum in cash, or cash and shares of stock, without any discretion, and under an absolute agreement to either do so or to return the deposited shares and without any other alternative. In view of these facts, I do not see how it can be said that Phillips was endowed with any power to bind his fellow stockholders by the execution of the warranty. It was urged on his behalf upon the argument that his agency was made manifest by the unity of action and interest of all the stockholders of the old company. It seems to me that

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Opinion of Vice-Chancellor.

unity of purpose and equality of standing went no further than to attempt to provide an offer which, if accepted, would be proportionately beneficial to everyone of the stockholders and did not extend to any intention that a loss brought upon himself by any one of their number should be

10 proportionately borne by all. Their purpose clearly was to use the advantage of collective bargaining for their mutual advantage, after accomplishing which it was "every man for himself." The argument was also made and admitted that originally the negotiations with Ullman contemplated a sale of all the assets of the old company, but that was abandoned in favor of the simpler process of a sale of all the capital

20 stock and was adopted to avoid the very difficulty that Phillips has brought upon himself by his gratuitous warranty. It may be that he entered into it with the best intentions in the world. It may have seemed to him that otherwise this advantageous offer might be withdrawn; but even if he did there was no such emergency as justified him in assuming an authority which he did not possess. *Mech. on Ag.*, sect. 718. The complainants and the other stockholders were available and they might at least have been consulted

30 upon an unforeseen contingency which, if Phillips' claim is allowed, will result in their property and rights being withheld from them over the period of time necessary to complete a long litigation. *Gwilliam v. Twist*, 2 Q. B., 84. For this reason and because of the clear-cut intention and desire of the stockholders of the old company, I repeat that if there was an agency the agent exceeded his authority.

40 But it is said that the execution of the warranty by Phillips has been ratified, and in proof

Opinion of Vice-Chancellor.

thereof there is exhibited with his affidavit another document under date of February 21, 1929, signed by all of the stockholders except Phillips, in which the latter is told that the signers' understanding is that in the negotiations of merger—

there will be certain charges of a legal nature to clear the title of the property of the Brilliant Silk Hosiery Company and bank charges in connection with the escrow and such other incidental charges as may arise. 10

We hereby authorize you to pay these charges and to pro rate the total amount of the charges among us in proportion to our holding of stock in the Brilliant Silk Hosiery Company, billing us for our proportionate share. Our signature at the bottom of this letter concedes to you our sanction of the charges and our willingness to pay our share upon presentation of our bill from you. 20

In the first place, as counsel for the complainants points out, there is not a thing in this language to authorize or ratify the signing of the warranty by Phillips, and, in the second place, it is elementary that there can be no ratification without notice or knowledge. There is not a thing to show that any of the complainants had any information when this exhibit was signed by them that any such action had been taken by Phillips. 30

A preliminary injunction is a most drastic process and should never go except to prevent irreparable injury, and this is especially so in a mandatory injunction. But where the facts are not in dispute and the law is settled as it applies to a particular case, and such relief is necessary to prevent irreparable injury to the complainant the writ should be allowed. *Hodge v. Giese*, 43 N. J. Eq. 342. That the Court may issue 40

Opinion of Vice-Chancellor.

the writ in a proper case has been decided time and again, at least as early as *Bailey v. Schnitzius*, 45 N. J. Eq., 178, and as recently as *McCran v. Public Service Ry. Co.*, 95 N. J. Eq., 22, and *Rockaway Rolling Mill v. D. L. & W. R. R. Co.*, 138 Atl., 650. In the case at bar it is undisputed that the value of the stock held by the Bloomfield Trust Co. has declined to one-half the value at the time of issue. In these circumstances and the present condition of the stock market it seems to me that the complainants, who have not been shown incapable of being made to respond in damages, should not be compelled to await the outcome of a long litigation, at the end of which they may find that their property will have lost more, if not all, of its value.

20 An injunction should issue forthwith to compel the delivery of the stock in question to the complainants.

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*Notice.***Notice.**

IN CHANCERY OF NEW JERSEY.

<i>Between</i>	}		
THEODOR HELBIG, <i>et als.</i> ,		<i>On Bill etc.</i>	10
Complainants,			
<i>and</i>		<i>Notice.</i>	
JACOB A. PHILLIPS, <i>et al.</i> ,			
Defendants.			

SIRS:

Please take notice that I shall apply to Honorable John Bentley, Vice-Chancellor, at the Chancery Chambers, Jersey City, New Jersey, on Monday, November 18, 1929, at two P. M. for an order and injunction (a copy of which said order and injunction is attached hereto), in accordance with the opinion in the above cause dated November 14, 1929, and for such other and further order in the above cause as to the Court shall seem proper and just.

Respectfully,

CARLYLE GARRISON,
Solicitor of Complainants. 30

To

HEINE & LAIRD,
Solicitors of Defendants.

*Order and Injunction.***Order and Injunction.**

IN CHANCERY OF NEW JERSEY.

	<i>Between</i>	}	<i>On Bill etc. Order and Injunction.</i>
10	THEODOR HELBIG, <i>et als.</i> , Complainants,		
	and		
	JACOB A. PHILLIPS, <i>et al.</i> , Defendants.		

20 This matter being opened to the Court by Carlyle Garrison, solicitor of complainants, and it appearing by affidavit filed in the above cause that the order to show cause heretofore made, and bill and affidavits have been served upon the defendants, Jacob A. Phillips and Bloomfield Bank & Trust Company as directed in said order, and upon reading and filing said bill and affidavits and answering affidavits of the defendants, and supplemental affidavits of defendants, and replying affidavits of complainants, and upon hearing and considering the arguments of Carlyle Garrison, solicitor of complainants, and M. Casewell Heine, solicitor of defendants, and due cause ap-

30 pearing.

IT IS, on this 18th day of November, nineteen hundred and twenty-nine, on motion of Carlyle Garrison, solicitor as aforesaid,

ORDERED that the defendant, Bloomfield Bank and Trust Company forthwith deliver to each of the complainants, Theodor Helbig, Albert Scherzer, Ernst Eichler, Emil A. Mueller, Max Roscher, Richard Boehm, Max Franke, Linus Thierfelder, Bruno Thierfelder, or Carlyle Gar-

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Order and Injunction.

ri-son, their solicitor, all certificates of capital stock in its possession or under its control of Interstate Hosiery Mills, Inc., a corporation, which said certificates of stock are drawn in favor of said complainants respectively.

ORDERED that said Bloomfield Bank & Trust Company deliver all of said certificates of stock 10
to said complainants or Carlyle Garrison, their solicitor, forthwith upon presentation of a copy of this order certified by Carlyle Garrison, solicitor as aforesaid, to be a true copy.

E. R. WALKER,

C.

Respectfully advised,

JOHN BENTLEY,
V.-C.

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Notice of Appeal.

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>THEODOR HELBIG, <i>et als.</i>, <i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>JACOB A. PHILLIPS, <i>et al.</i>, <i>Defendants.</i></p>	<p><i>On Bill etc.</i></p> <p><i>Notice</i></p> <p><i>of Appeal.</i></p>
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20 The defendants, Jacob A. Phillips, and Bloomfield Bank & Trust Company, hereby appeal from the order and injunction made and issued in the above-entitled cause on the 18th day of November, 1929, and from the whole and every part thereof to the Court of Errors and Appeals In the Last Resort In All Causes.

HEINE & LAIRD,
 Solicitors for Defendants.

M. CASEWELL HEINE,
 Of Counsel.

30 Dated November 18, 1929.

Petition of Appeal.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

THEODOR HELBIG, <i>et als.</i> , <i>Complainants-Appellees,</i> <i>vs.</i> JACOB A. PHILLIPS, <i>et al.</i> , <i>Defendants-Appellants.</i>	}	<i>On Appeal from the Court of Chancery. Petition of Appeal.</i>	10
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To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Jacob A. Phillips, the appellant in the above-entitled cause, respectfully shows: 20

1. Petitioner finds himself aggrieved by a final order made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey bearing date November 18, 1929, in a certain cause in said Court of Chancery wherein Theodor Helbig, *et als.*, were complainants and the said Jacob A. Phillips and the Bloomfield Bank & Trust Company were defendants, in this respect, to wit: that said order is a mandatory order directing the defendant, Bloomfield Bank & Trust Company to forthwith deliver to complainants certain certificates of the capital stock of the Interstate Hosiery Mills, Inc. now in its possession. 30

And your petitioner appeals from the said mandatory order and injunction of the Chancellor which decrees the immediate delivery of said certificates of stock by defendant, Bloomfield Bank & Trust Company to the complainants on 40

Petition of Appeal.

the ground that the same is contrary to the written agreement entered into between the complainants and defendant, Phillips, and the true and legal intendment and construction thereof, and in that said order directs the delivery of said certificates of stock to complainants as principals
 10 in disregard of the legal rights of defendant Phillips as agent, and that said defendant, Phillips, was not the agent of complainants as principals; and in that said order erroneously holds that the complainants as principals are not bound by the acts of their agent, and further, that the acts of the agent, defendant Phillips, were outside of the scope of his agency and authority.

Petitioners therefore pray:

20 That said order of the said Chancellor may be wholly reversed, set aside and for nothing holden and that petitioners may have such other relief in the premises as to this Court may seem proper.

HEINE & LAIRD,

Solicitors for Defendants-Appellants.

M. CASEWELL HEINE,
 Of Counsel.

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Answer to Petition of Appeal.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

THEODOR HELBIG, <i>et als.</i> , <i>Complainants-Appellees,</i> <i>vs.</i> JACOB A. PHILLIPS, <i>et al.</i> , <i>Defendants-Appellants.</i>	}	<i>On Bill etc.</i> <i>Answer to Petition of Appeal.</i>	10
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The answer of the above named complainants-respondents to the petition of appeal of the above named defendants-appellants says that:

These respondents, not acknowledging all or any of the matters which in said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a decree and order was on the eighteenth day of November, 1929, made and entered in the Court of Chancery, in a cause for that purpose mentioned in said petition, as is therein stated; but for the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said decree and order is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

CARLYLE GARRISON,
Solicitor of Complainants-Respondents.

ALFRED B. VAN HOUTEN,
Of Counsel with Complainants-Respondents.

New Jersey Court of Errors and Appeals

THEODOR HELBIG, <i>et als.</i> , <i>Complainants-Appellees,</i>	}	<i>On Appeal from the Court of Chancery.</i>
<i>vs.</i>		
JACOB A. PHILLIPS, <i>et al.</i> , <i>Defendants-Appellants.</i>		

APPELLANTS' BRIEF.

Statement.

This is an appeal from a preliminary mandatory injunction order of the Chancellor made and dated November 18, 1929, directing the defendant, Jacob A. Phillips, and the defendant, Bloomfield Bank & Trust Company, to deliver forthwith to the complainants, certificates of the capital stock of the Interstate Hosiery Mills, Inc., standing in the names of the various individual complainants.

Facts.

The Brilliant Silk Hosiery Company was a New Jersey corporation organized in 1921 to manufacture silk hosiery at Bloomfield, Essex County, New Jersey. About 1923 Jacob A. Phillips became a stockholder, president and manager of this corporation and it was very successful in the conduct of its business under his management.

The Brilliant Silk Hosiery Company was a close corporation organized by some sixteen stockholders, and to protect themselves in their group control, they entered into an agreement providing that in the event of anyone selling his

stock it should first be offered to the others proportionately (State of Case, p. 24).

In the summer of 1928, a promoter by the name of Ullman approached the defendant, Phillips, and the stockholders with a proposition to purchase all of the stock of the entire group, the company's property and plant to become part of a consolidation of hosiery companies which Mr. Ullman was promoting (State of Case, p. 24).

None of the stockholders of the Brilliant Silk Hosiery Company can be considered as financial or business men except the defendant Phillips—many of the stockholders and most of complainants worked in the mill at Bloomfield and the company's operation had many elements of a cooperative operation under the guidance of Phillips.

In connection with the negotiations for the purchase of the entire stock holdings of these stockholders, Phillips was their counsellor and representative and the interests of all were identical and it was a case of a sale of all of the stock or none (State of Case, pp. 24-25). None of the stockholders participated in the negotiations with the proposed purchasers, their representatives or attorneys, although on one occasion the promoter, Ullman, came to a meeting of the directors and stockholders of the Brilliant Silk Hosiery Company at Bloomfield. Phillips was the representative through whom all negotiations were had and had entire charge of them (State of Case, pp. 24, 36, 13). An audit of the books was made by Haskins & Sells and an appraisal of the company's property by the American Appraisal Company, and the negotiations culminated in the execution by all of the stockholders including defendant Phillips of an

option agreement to sell Ullman dated November 21, 1928 (Exhibit 1, State of Case, p. 28) and an extension of this option dated January 18, 1929 (Exhibit 1-A, State of Case, p. 32), also signed by all of the stockholders.

The closing date fixed under the option as extended was February 15, 1929.

Prior to this date and in order to carry out their side of the option agreement, all of the stockholders had delivered their certificates indorsed in blank to Phillips and the directors and officers also executed and delivered to Phillips their resignations as officers and directors of the Brilliant Silk Hosiery Company.

The depository through which the option was to be exercised was the American Exchange Irving Trust Company. Phillips, however, deposited all of this stock delivered to him, in the Bloomfield National Bank, now the Bloomfield Bank & Trust Company, together with the resignations to be by this institution forwarded to the depository in New York. Evidently he considered it the part of wisdom to select a New Jersey depository as a better medium for completing the transaction than to deposit directly in a depository out of the State (State of Case, pp. 25, 14).

On the appointed day, February 15, 1929, Phillips attended at the offices of the promoters in New York for the closing, and prior to the exercising of the option and the payment and delivery of the cash and stock to the depository in New York for the account of the Brilliant Silk Hosiery Company stockholders, a demand was made upon Phillips that he with the former officers of the other companies involved in the consolidation, should certify or guarantee the

correctness of the audit and appraisal of their respective companies and as to Phillips, this meant the Brilliant Silk Hosiery Company. It was stated to him, that in connection with the flotation of the securities of the new or consolidated company, that it would be necessary to put out to the public or to the financial backers of the enterprise, a guarantee by the former officers of the respective consolidating companies that the assets as audited and appraised for each company were correct. Without such a guarantee on the part of Phillips, the option would not be exercised.

Phillips signed this guarantee of the correctness of the audit and appraisal made of the Brilliant Silk Hosiery Company's assets and thereupon the promoters exercised the option and paid the required cash and deposited the stock of the new company with the Irving Bank as called for by the deposit agreement to the credit of the stockholders of Brilliant Silk Hosiery Company.

The cash was thereupon transmitted by the Irving Trust Company to the Bloomfield Bank and ratably distributed to the Brilliant Silk Hosiery Company stockholders.

There was some question raised about liens for compensation judgments against the real estate of the Brilliant Silk Hosiery Company and one or two other minor matters turned up by the Title Company in their search of the property for the promoters. In order not to delay the matter, Phillips permitted \$35,000 of the money coming to him to be retained by the Irving Trust Company until these real estate liens were cleared up. Phillips then, through his attorney, got in touch with the Title Company and arranged for

the clearing up of the liens after which his \$35,000 in cash was paid to him.

Part of the consideration moving to the stockholders of the Brilliant Silk Hosiery Company for the sale of their stock was 9,600 shares of stock of the new or consolidated company known as the Interstate Hosiery Mills, Inc., and under the terms of the option agreement these 9,600 shares were to be held in escrow by the Irving Trust Company, the New York depository, until August 15, 1929 subject to certain rights of purchase given to the promoters. See Exhibit 1, State of Case, p. 30.

On August 15, 1929, optional purchases of this stock not having been made by the promoters, the 9,600 shares of the Interstate Hosiery Mills, Inc., became deliverable to the stockholders of the Brilliant Silk Hosiery Company. The depository, however, failed to deliver them and claim was made by the new company, Interstate Hosiery Mills, Inc., against this stock on the guarantee of the audit and appraisal signed by Phillips at the time of the closing. Phillips, through counsel, took the matter up with the Irving Trust Company, with the result that all of the shares of stock due to the Brilliant Silk Hosiery Company stockholders was transmitted by the Irving Trust Company to the Bloomfield Bank except the proportion of said stock due to defendant Phillips. Refusal to deliver this was made on the ground that Phillips was responsible on the guarantee of the audit and appraisal and that the new company was entitled to damages by reason of alleged incorrectness of said audit and appraisal, for which it was to be reimbursed out of this stock. This matter is now in litigation.

On February 21, 1929, complainants and the other stockholders of the Brilliant Silk Hosiery Company entered into an agreement with Phillips (Exhibit 2, State of Case, p. 33) to reimburse him for expenses, etc., involved in the sale transaction ratably according to their respective stockholdings.

At this date, February 21, 1929, Phillips, of course, had no notice of the claim which was first made on August 15, 1929, to subject all stock of the Brilliant Silk Hosiery Company stockholders and then to subject his stock alone, to liability on the above-mentioned guarantee. Phillips now refused to deliver the stock which is in the Bloomfield Bank & Trust Company to the various stockholders until the settlement of the dispute with the Interstate Hosiery Mills, Inc., over the guarantee of the audit is settled and his proportionate share of stock released. Complainants objected to this, demanded the immediate delivery of their proportionate shares of stock of the Interstate Hosiery Mills, Inc., on deposit with the Bloomfield Bank and secured upon the filing of their suit, the preliminary mandatory injunction order complained of.

ARGUMENT.

The position which defendant Phillips takes is that he was the general agent of the group as a unit in the sale of its stockholdings; that the transaction involves a single entity, the sale of all the stock of the Brilliant Silk Hosiery Company for an entire consideration less the necessary expenses. That as such general agent or agent with general powers, it was within the scope of his powers to guarantee the correctness of the audit and appraisal of the assets of the Brilliant Silk Hosiery Company as a condition

of the promoters taking up the option and for the largely formal purposes to which that guarantee was represented to him as necessary. His contention is that it was within the normal scope of his authority as agent, although from a certain angle it might be considered as an act in an emergency in which he had to exercise his best judgment, and his good faith is not questioned in this proceeding. Phillips further contends that as the stock was sold as a group unit, although the ownership was distributed among the stockholders proportionately, that all of the expenses connected with the sale including the settlement of the dispute about the guarantee of the audit must be completed and determined before the group are entitled to receive from him the net proceeds of the sale which he negotiated.

If there should be any loss in connection with this dispute over the guarantee resulting in a lesser number of shares being received by the group as a result of the sale of their holdings in the Brilliant Company, there would be a difference in the *pro rata* shares receivable by each member of the group.

As an agent with an interest and in possession (the stock was all delivered to him) of the subject matter of the sale, he is entitled to be reimbursed for expenses and liabilities incurred in the performance of his agency. He is not required to make distribution of the proceeds of the group sale to the members of the group until the entire sale transaction and its incidental expenses, disputes and claimed liabilities are settled, and the final net *pro rata* share of each determined.

The Decision of the Court Below.

The Court below held:

1. That Phillips was a special agent and as such agent of the group in the sale of its holdings in stock of the Brilliant Company, exceeded his authority in signing the guarantee of the audit and appraisal of the assets.

2. That the group unit existed only until the option agreement of November 21, 1928, was executed as a collective bargain, and that thereafter everyone was for himself.

3. That there was no ratification by the agreement of February 21, 1929, or otherwise on the part of the stockholders of Phillips' action in signing the guarantee.

It is submitted that the Court erred in its findings and we shall discuss them in their order.

POINT ONE.

The defendant Phillips was a general agent of the group of stockholders including himself for the sale of the stock of the Brilliant Silk Hosiery Company.

We desire to stress at the outset the unity of this small group of stockholders. From the very beginning as evidenced by their agreement to sell their stock to the others in case anyone withdrew, there is the intention of keeping the business in the hands of this close group.

The only proposition of sale of their stock which was considered was a sale of all or none. Phillips had put the company on its feet after 1923, had made it an outstanding success, and was the manager of the business and the leader of this group and the only one who actually con-

ducted negotiations or who was capable of so doing. There is no written agency agreement. Phillips simply continued to act in the negotiation as he acted in the business, as the general manager. The stockholders after the option was signed did not deposit their respective holdings separately. They delivered all their stock indorsed for transfer to Phillips. The individual stockholders had nothing to do with the selecting of a New Jersey depository as an intermediary to safeguard them in dealing with the New York depository. This was done by Phillips in the exercise of his discretion. None of the individual stockholders participated in any way in the negotiations for the sale. This was done by Phillips. The inventory, audit and appraisal taken by Haskins & Sells and the American Appraisal Company for the promoters was known to all of the stockholders, many of whom worked in the plant while this was going on, and they knew the fact that negotiations for the sale of their stock holdings were based upon this audit and appraisal and that Phillips in conducting the negotiations was using this audit and appraisal as the basis thereof. All of these facts were known to the group but the use of them in the negotiation was by Phillips alone. It was Phillips who attended the conferences in New York. It was Phillips, when the Title Company's report was delayed and there appeared to be liens on the real estate holdings of the company, arranged to secure the data to straighten this out and who left \$35,000 of his money on deposit until this was done, purely a discretionary action of which no stockholder complained. The carrying out of the whole deal to sell the group stock was in Phillips' hands and he had an interest in the subject matter of the sale and possession of the actual certificates (the indicia of the ownership of the assets), was delivered to him along with the resignations. If ever an

agency to sell were general in its character, it is this one. And it did not end with the signing of the option agreement on November 21, 1928, as the Court below seems to think (Case, p. 68, l. 10) and that after that it was every man for himself. It was after the signing of the option that the stockholders delivered their stock to Phillips. The duty still rested by consent of all upon Phillips to arrange the deposit of the stock, to check up the consolidation proceedings in New York, to watch the actions of the promoters and in the event that the option was exercised (which would not be known for months after the agreement was signed) to see that it was carried out according to its terms. The agreement of November, 1929, was no termination of the agency of Phillips—it marked but a stage with the most important stages to follow if the consolidation went through. The Court's idea of every man for himself after November, 1929, is contrary to the facts—nobody lifted a hand—it was up to Phillips as before to carry through the option deal he had negotiated and with the same general broad powers as theretofore.

A general agent is one who represents his principal in all matters within the ordinary limits of the principal's business (Wait's "Actions and Defenses" Vol. p. 216) one who signs all contracts, all deeds, who buys all goods, etc.

Where the business of a principal is a single transaction an agent may have a general authority in regard thereto—where is to accomplish a certain object for the principal without any limitation on the means or method.

As Mr. Justice Black said, *Scherer v. Post Office B. & L. Assn.*, 91 N. J. L. 66, at p. 670: "While the courts have very often defined and

distinguished general and special agents, the great trouble is that they are totally unable to define general and special agents in terms which make the distinction applicable to each particular case" (31 Cyc. 1338); a collection of many cases will be found illustrating the distinction between a general and special agent applying to an almost endless variety of circumstances in *Id.* 134 *et seq.*

In the Scherer case the agent was given a check to deliver in exchange for a bond and mortgage. Obviously it was a special agency for that particular purpose without discretion. In the case at bar Phillips negotiated the deal resulting in the signing of the option agreement and upon him devolved all of the details of depositing the stock with the depository to be selected by him, of watching the progress of the deal of the promoters to consolidate the other companies and seeing that the terms of the option were carried out—in other words, he is exactly what Mr. Wait calls an agent for a particular transaction but with general authority covering all elements and details of the transaction.

Perrine v. Cooley, 42 N. J. L. 623; *Whitehead v. Tuckett*, 15 East. 408; *Anderson v. Coonley*, 21 Wend. 279; *Dierkes v. Hauxhaurst Land Co.*, 80 N. J. L. 369; *Calhoon v. Buhre*, 75 N. J. L. 439.

In the case at bar, in addition to the interest which Phillips had in the group stock holdings, his position is very analogous to that of a factor as agent for the sale of goods in his possession or consigned to him. All the stock endorsed in blank had been delivered to Phillips to complete the deal. The general character of such an agency is well recognized.

21 R. C. L. 853; *Sáúvin v. Union Bldg. Assn.*, 95 Iowa 477 (64 N. W. 401).

POINT TWO.

It is within the scope of the agency of defendant Phillips to sign the guarantee of the correctness of the audit and appraisal of the assets of the Brilliant Silk Hosiery Company.

Phillips, the general agent for the sale of the stock holdings of the group, was confronted at the closing with the entirely reasonable request on the part of the purchaser that for the purpose of flotation and getting out a prospectus, etc. they wanted a formal guarantee by him as former President of the Company (his resignation as President and Director had then been deposited with the Irving Trust Company) that the assets represented by the purchase of the stock were correctly shown by the audit and appraisal made.

This audit and appraisal had been the basis of the sale negotiations. That it was correct was, and still is, Phillips' contention. That there was any liability to be incurred on the part of him or his group by certifying to the correctness of this audit and appraisal was at that time, to his mind practically unthinkable. No sound reason for refusing this request was apparent. He realized that the purchasers in floating the stock of the consolidated company wished to present in the prospectus or to their financial associates, a tangible and written statement of the correctness of the audit and appraisal of the consolidating companies as a matter of assurance. What it amounted to is exactly the same as a request for an affidavit of title or an estoppel certificate. It was a perfectly reasonable request and Phillips was faced with the proposition that unless he acceded to this the option would not be exercised; in other words, he and his group would

lose their deal. In the exercise of his judgment at the time, and in good faith, he signed the guarantee.

The Court speaks of the possibility of his having communicated with the various stockholders of the group. It would have been impossible as they were widely scattered, the closing was on, the sale of the stock was either to be made or not to be made at that time, and he had no opportunity to go around to the various stockholders in Bloomfield, Dover and elsewhere (one I think was in Europe), to put up to them the matter of whether he should sign a statement that the assets as represented by the audit and appraisal were correct. Not a single stockholder, we contend would for a minute have questioned but that the audit and appraisal on the basis of which the sale of their stock had been negotiated was correct. Not a single stockholder could have conscientiously or fairly, and in good faith, contended that the signing of such a guarantee was improper without convicting himself of some knowledge that there was fraud or discrepancy of some serious nature which would amount to a fraud as a result of which they were going to receive a consideration for something which was not as had been represented. None of these stockholders charge that what they sold was not as represented, and how can they complain if Phillips also felt the same way at the time of the closing and was willing to show his good faith by okaying the audit and appraisal of what he was selling for the entire group including himself.

Suppose, for instance, that Phillips had refused to sign that guarantee, and that the option as a result had not been exercised and that the group had lost the advantage and profits of this sale. We submit that in such a case these stock-

holders would have brought action against Phillips claiming that he was negligent in the performance of his duties as agent in failing to execute this affidavit of title, this guarantee of the correctness of the audit and appraisal of the assets in question.

The stockholders would have argued, that the audit and appraisal, the basis of the negotiations of sale, were correct. Of course the Brilliant stockholders were not trying to sell something to the purchaser which was not as represented 100%, and the idea of this man Phillips refusing to certify to this and thereby upsetting the deal when he knew just as well as they did that everything was as represented, was criminal negligence and deprived them of their profit, and they undoubtedly would have brought suit against him.

It is respectfully submitted that whether or not it can be considered an emergency in which Phillips was placed, that it certainly was a position in which he as the general agent was warranted in signing for the group sale of stock, the guaranty of the audit and appraisal as he did.

The scope of a general agent's authority extends to the exercise of all *usual* and *necessary* means in such manner as to accomplish the object of the principal (Wait's Actions and Defenses, Vol. 1, p. 221).

A. & E. Ann. Cas. 1913 D. 480;

Calhoon v. Buhre, 75 N. J. L. 439;

Dierkes v. Hauxhaurst, 80 N. J. L. 369;

Law v. Stokes, 32 N. J. L. 249;

Salter v. Kirkbride, 4 N. J. L. 223.

Examples are the execution by an agent to sell land of a deed with warranty.

Valentine v. Piper, 22 Pick. (Mass.) 85,
92;

LeRoy v. Beard, 8 How. (U. S.) 451;
Voggard v. Stanbury, 2 McLean 543;
 23 Fed. Cas. No. 13724.

In *Trenton Banking Co. v. Haverstick*, 6 Halstead 171, an agent to collect a debt was held to have authority to issue an attachment and his principal would, of course, have been liable in damages had it been vacated.

Phillips exercised no greater authority in guarantying the audit than did these agents in warranting title or incurring possible liability by attachment.

In *Bloomer v. Denman*, 12 Ill. 240, an agent's act in rescinding a sale and thereby making his principal liable for a refund was approved.

Warranty of quality and condition is a general incident of sale of personalty for a general agent.

L. R. A. Digest, Vol. 7, page 7961; 53-21 R. C. L. 866;

Nelson v. Cowing, 6 Hill 336;

Bryant v. Moore, 26 Me. 84;

Hercules Powder Co. v. Rich, 3 Fed. (2nd) 12;

Lewis v. Pope Motor Co., 202 N. Y. 402 (95 N. E. 815),

where a warranty by a distributor of matters the same as were set forth in the circular furnished him by his company was held proper.

Phillips' warranty of the audit was no greater than the facts in the audit furnished him by his principals as a basis of negotiation of sale of their and his property.

The subject matter of sale in the case at bar was shares of stock—strictly speaking not chat-

tels rather in the nature of choses in action but universally recognized as personal property.

Bouvier's Law Dict. (Cent. Ed.) 1134.

These shares are evidence of the ownership of corporate assets and Phillips' warranty of these assets as audited and appraised is practically a warranty of quality and condition of the subject matter of the sale.

The request of the purchaser was for the same thing as an affidavit of title or of the quality of seed—quite the expected and usual thing—necessary they deemed it and compliance was normal (L. R. A. (N. S.) 1916 C. 414-427).

The principals gave Phillips, the agent, the audit and appraisal as the basis upon which to negotiate the sale of their stock. Can they call it unusual or outside the scope of his authority that he certified that they were correct? Can they assert that if the audit was incorrect the discrepancy is chargeable to Phillips and not to them!

Estoppel in Pais.

Further, complainants may not now assert that Phillips' warranty of the audit of the old Brilliant Co. assets was outside the scope of his employment. They have accepted the benefits. True not all, but the major portion. The stock sold at \$300 per share—\$200 in cash and \$100 in new company stock. Complainants have received and kept since February, 1929, all of the cash secured through Phillips' action for their benefit.

As Backes, V.-C., says in *Pappas v. Foster Screen Co.*, 133 Atl. Rep. 616, at page 617, "Where a person acts for another, who accepts

the fruits of his efforts, the letter must be deemed to have adopted the methods employed" * * * "with the benefits of the contract he must accept the responsibilities."

21 R. C. L. 932.

In determining the agency scope and acts of Phillips, the facts of the case at bar must be construed according to the spirit as well as the letter. *Taylor v. Howard*, 11 Barb. 232.

The clear intent of the parties was to give Phillips authority, which made the assurance by him of the audit's correctness a normal and usual act to further the object of his principal.

POINT III.

The equities all lie with the defendant, Phillips.

The Court on Case p. 68, seems impressed by the fact that the dispute over the warranty of the assets if Phillips in the meantime is allowed to retain the undistributed stock will result in complainants' property being withheld from them over a period of time necessary to complete the litigation to settle the question involved in the warranty and claimed breach thereof.

Granting this, we must point out that if the stock is now distributed to complainants, Phillips will be required to stand all possibilities of loss against his individual share in the event that the decision on the warranty is unfavorable to the Brilliant Company, and to receive a smaller proportion of stock than all of the other stockholders would receive if it were turned over to them at the present time.

The matter may be summed up in two proportions: first, if the assets are not as rep-

resented by the audit (there is no fraud or bad faith involved) the new company is entitled by all the rules of fair dealing to complain and to receive a compensatory reduction corresponding to the discrepancy of assets and the consideration moving to the Brilliant stockholders will be correspondingly reduced and the individual shares of each stockholder that much less.

Inasmuch as the \$200.00, two-thirds of the share price, has already been paid, the only thing on which this reduction could operate would be the 9,600 shares of stock of the new company which Phillips now holds on deposit in the Bloomfield Bank.

In such a situation it is inequitable that Phillips should have deducted from his proportionate share alone the total amount by which the consideration is reduced against the whole group.

Second, if the assets prove to be as represented and warranted by Phillips and the new company's claim is a "strike" when it is beaten all the Brilliant group of stockholders will receive full consideration (to be proportionately divided) and in addition full damages resulting from the prosecution of its unfounded claim by the new company, which damages will include of course, any market depreciation in the price of the stock by reason of its being tied up during the litigation. This full consideration (the balance of the stock which Phillips now holds) and also the full amount of damages, if any, will then properly be divided among the group of Brilliant stockholders in the proper proportion to each.

It is significant that the new company endeavored to assert its claim against the entire 9,600 shares belonging to the group which were not delivered on the date required, namely, Au-

gust 15, 1929. It was action by Phillips, through his attorney, which brought the matter promptly to an issue and resulted in the abandonment of the new company's claim to all of the stock except that of Phillips. The new company evidently felt that it might have a more colorable claim against the personal stock of Phillips. It seems highly probable that in taking this position the new company realized the unsubstantial character of its claim, and further, realized that any claimed damages would be covered by the individual balance of stock of Phillips; and it is further inferable that they foresaw the development of the situation indicated by this suit which could be used as a club to force Phillips to make a settlement with them on a basis other than that of the merits.

Further inequitable results of the preliminary mandatory injunction.

The distribution of the stock at the present time would deprive Phillips of his lien upon the group stock for his expenses and as reimbursement for any loss resulting from the litigation with the new company involving the reduction of the total stock moving to the Brilliant group. In the event of this reduction as pointed out, the entire amount of reduction against the group would be charged against Phillips' individual proportionate share. Thereupon, Phillips would be put to his remedy by suit against the various complainants for reimbursement. This would involve a multiplicity of suits; it would also involve the possibility of various complainants becoming judgment proof.

If immediate delivery of the stock by complainants is to be given, it should only be upon enter-

ing into bond to indemnify Phillips against any liability or loss.

POINT IV.

The order of the court below disregards the right of defendant Phillips to adequate indemnity and disregards his lien.

The liability of a principal to indemnify his agent is not confined to actual loss but extends to all liabilities of the agent incurred on behalf of the principal. *Rodman v. Weinberger*, 81 N. J. L. 44; *Smith v. Belleville Trustees*, 16 Grant Ch. (N. C.) 130; 31 Cyc. p. 1537.

The cases even go so far as to hold that even after revocation of the agency, advances by the agent or liabilities incurred are the proper subject of reimbursement. *Gelpcke v. Quentell*, 74 N. Y. 599; *U. S. v. Jarvis*, 26 Fed. Cases No. 15468.

It was held in *Henderson v. Eckern*, 115 Minn. 410, that the law implies the promise of indemnity for damages resulting approximately from the good faith execution of an agency.

In notes 68-A on page 795, Vol. 2 C. J., the general principle above stated is supported by a Connecticut case which holds that when an agent acting in the service and for the benefit of the principal is subjected without any fault of his own to a loss by means of groundless suit brought against him by a third party, such loss will constitute a sufficient consideration to support a promise by the principal to indemnify the agent.

In note 69-A, Vol. 2 C. J., the principle is laid down that with a request to undertake an agency, the property execution of which involves the ex-

penditure of money on the part of the agent, there arises not only an implied request on the part of the principal to incur such expenditure, but also, a promise to repay it.

There is no imputation of bad faith on the part of Phillips. There was a possible liability comparable to a groundless suit to which he is subjected by reason of warranting the assets. He is entitled to be protected against this possible liability even though it has no merit and the completion of the sale is entitled to be suspended until this liability is removed or until he is indemnified against the same. See C. J. Vol. 2, p. 797.

Phillips has a lien on the stock which remains in his hands undistributed. He received it lawfully and the transaction is yet incomplete. He is entitled to hold it for reimbursement not only under the agreement of August, 1929, but also under general legal principles. In this the rule at law and in equity is the same.

Oxenham v. Esdaile, 2 Younge & Jarv. 493.

To deprive him of this lien and the protection it affords is error.

POINT V.

The issuance of the preliminary mandatory injunction was unwarranted.

The leading case upon which the Court bases its action in the case at bar is *Bailey v. Schnitzius*, 45 N. J. Eq. 178.

In the *Bailey* case it was sought to restrain defendant from filling in an ancient water course running over the lands of complainant crossing a public highway and the lands of defendant and directing the removal of obstructions placed therein by the defendant. A mandatory order

was issued by the court below and this court reversed the action of the lower court and laid down the doctrine that such a writ should issue only to prevent extreme or very serious damage. In *Rockaway Rolling Mills v. D., L. & W. R. Co.*, 137 Atl. page 50, also cited by the court below, at page 654, limits the doctrine of the Bailey case to obstruction "to easements or rights of like nature." In the *Rockaway* case, the Court at page 654 states that such writs should only issue "in cases of extreme necessity."

It need hardly be pointed out that the right of possession of the shares of stock—being the remaining part of the consideration for the transfer of the stock of the Brilliant Silk Hosiery stockholders—does not come within the rule above stated.

The complainants, we contend, have an entirely adequate remedy at law and a motion to dismiss the bill is now pending but as a matter of practical disposition of a litigation defendants have no objection to the determination of the matter by Chancery but at final hearing only.

The radical preliminary determination of the matter, if permitted, will cause irreparable damage to Phillips and is unwarranted.

The element of extreme necessity is absent from the case at bar. There is no allegation or proof in the allegations that complainants had contracted to sell their stock at a profit or at any price—there is no allegation that they wished to sell it at all—all they seek is possession.

The only motive of this demand for possession which can be inferred under the circumstances of this case, is the desire to unload on Phillips all of the trouble and expense and any loss resulting from the claim of the new company that the

assets of the old Brilliant Company were not in accordance with the audit, although the complainants have already received \$200 cash per share or two-thirds of the actual consideration and have retained this benefit since August, 1929.

The fact that the price at which the stock of the new company was offered to the public and on which price the number of shares coming to complainants was figured, and if the market of said stock is now less, is immaterial. By the time the matter of the correctness of the audit is determined, the stock of the new company may be above the original price.

If at the time of distribution, at the end of the fight over the correctness of the audit, there is any loss, this is chargeable to the new company, Interstate Hosiery Mills, Inc., and not to Phillips. Certainly not until by a trial or a final hearing it is established that he acted without authority; and even in that case, as we have pointed out, the complainants have accepted two-thirds of the consideration without objection and any remedy by reason of Phillips exceeding his authority is by rescission against the purchaser and not against Phillips.

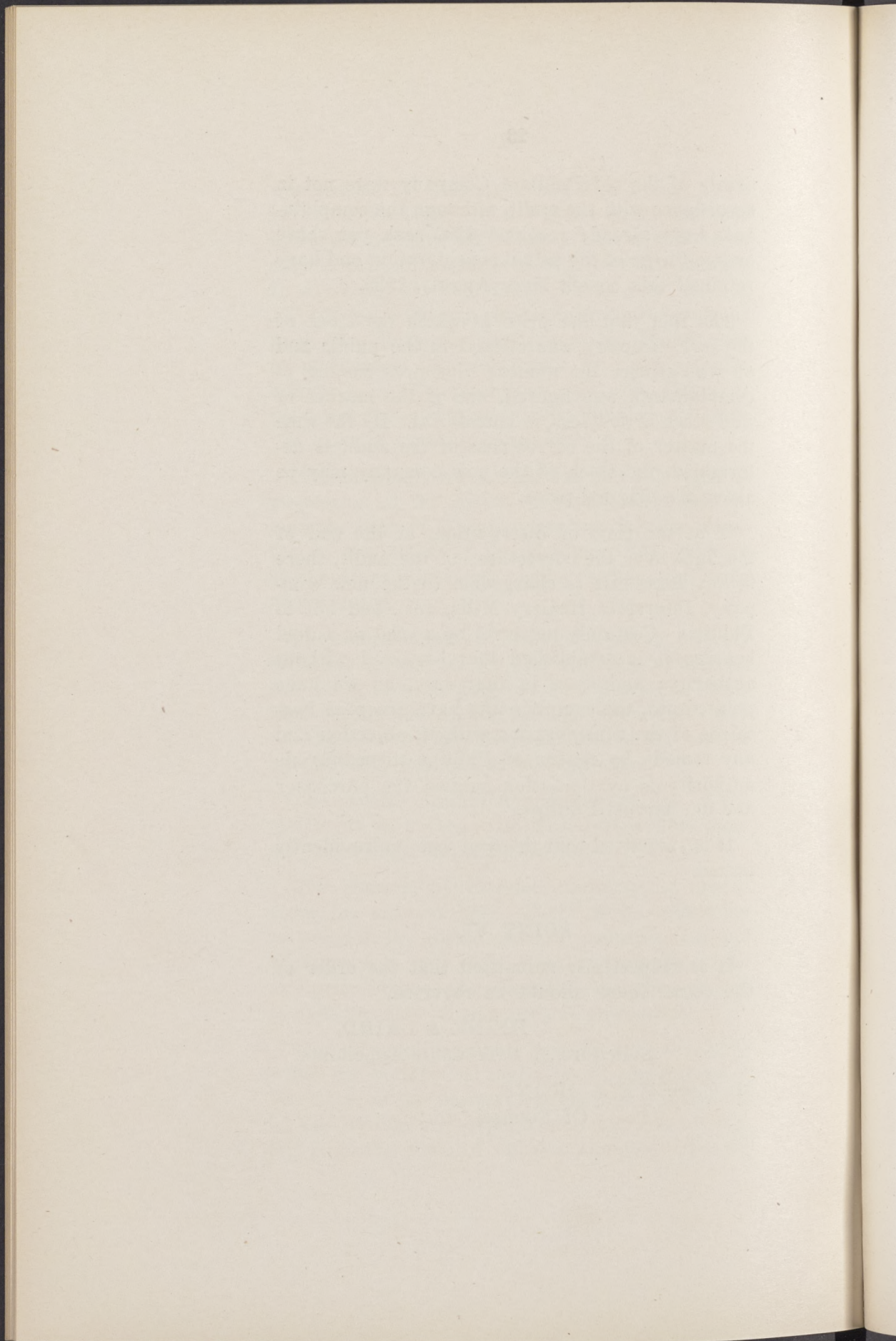
It is submitted that the writ was improvidently issued.

POINT VI.

It is respectfully submitted that the order of the court below should be reversed.

HEINE & LAIRD,
Solicitors of Defendants-Appellants.

M. CASEWELL HEINE,
Of Counsel.



SUPPLEMENTAL MEMORANDUM.

Since the writing of the foregoing brief I have received the February, 1930, American Bar Association Journal, in which appears, on page 117, an article entitled, "Problems in Restatement of the Law of Agency" by Warren A. Seavey, Professor of Law at Harvard University.

Professor Seavey deals with several questions which have come before his Committee of the American Law Institute, including among its members Mr. Floyd R. Mechem, and among these, see page 118, is the question of the relation of the principal and third party when the agent has made a contract which he was not directed to make, or which he was directed not to make. The question involves "apparent authority" and the basis of this. Two questions are considered,

1. Is principal liable because the third party acted relying upon the appearance of authority, or
2. Is the principal a party to a true contract in which we have the ordinary elements of assent by both?

Under the first of these questions liability seems to rest upon the theory of misrepresentation by the principal although it may be entirely innocent—and the doctrine of estoppel. The principal does not make a contract. In fact by the true facts not being made apparent to the third party the latter is misled and the principal is therefore bound by the apparent authority regardless of the true facts.

The Committee are in doubt as to whether the principal could hold the third party although the third party can hold him under the estoppel the-

ory. Whether or not this is a true contract Mr. Mechem is apparently reluctant to say, and Professor Seavey calls attention to the dearth of authority, and the necessity of seeking for the underlying principle. In the middle of the second column, p. 118, he says:

The principal may be said to have made an offer to the third person by manifesting to him that the agent has been authorized to express his assent in a certain manner. This offer the third person accepts by dealing with the agent in accordance with the appearance of authority which the agent has. It would seem to follow therefore, that there is a real contract in any case where, although the agent disobeys the orders of his principal, the third person because of conduct for which the principal is responsible, reasonably believes that the agent is authorized.

With his usual caution Mr. Mechem felt that the "objective theory of contracts" might not explain all the situations. The group therefore agreed to submit two sections covering this entire matter, as follows:

Section 47—"Apparent authority as defined in Section 10 may result from a manifestation of consent made to third persons,

(a) by formal or informal writing or by spoken word;

(b) by implication from apparent authority of the purported agent;

(c) by inference from words or conduct,

(i) which ordinarily indicate such consent, or

(ii) which, although not ordinarily indicating such consent, cause the third person, because of facts known to both parties, rea-

sonably to believe that such consent exists, either where the apparent principal intended to cause such belief on the part of the third person, or where he ought to have anticipated that such belief would be caused."

Section 48—"The same rights and liabilities exist as if he had conferred apparent authority, where, by words or conduct which, because of circumstances not known to him but which a reasonable person under the conditions would have known, are likely to cause such belief, one person causes a third person reasonably—

- (a) to believe that he has authorized another to act as agent of such first person, and
- (b) to act on such belief."

The writer then states that Section 48 has been deemed unnecessary, and that there is apparent authority in all cases where the principal has reason to believe that the third person will draw the conclusion of authority from the conduct for which the principal is responsible, and the third person draws such conclusion.

The above, which is the latest statement of the Committee of the American Law Institute, bears out the arguments of counsel in the foregoing brief.

Certainly the principals in this case, the group of stockholders of the Brilliant Silk Hosiery Company, by entrusting their stock to Phillips, and the resignations of their officers, and giving him full power of negotiating, and later of carrying out the terms of the proposed agreement arrived at, must be held to have clothed Phillips with apparent authority which the purchasers of the stock must reasonably have supposed that Phillips had, and which would include reason-

ably, normally and in the ordinary course of affairs the formal guarantee of the correctness of the audit by Phillips, which audit had been the basis of the negotiations for the sale of the stock. Whether upon the theory of estoppel or upon the theory that a true contract was entered into, the authority of Phillips to bind his group by certifying the correctness of the audit is apparent and has been demonstrated in the arguments in the preceding pages of the brief.

HEINE & LAIRD,
Attorneys of Appellants.

M. CASEWELL HEINE,
Of Counsel.

New Jersey Court of Errors and Appeals

Between

THEODOR HELBIG, et als.,
Complainants-Appellees,

and

JACOB A. PHILLIPS, et al.,
Defendants-Appellants.

On Appeal
from
Chancery.

BRIEF FOR COMPLAINANTS- APPELLEES.

Statement of Facts.

The material facts and the law governing this case are tersely and fairly stated in the opinion below by Vice Chancellor Bentley in language, we are content to adopt as our own (pp. 63-70).

We supplement the statement of facts as follows: The three written agreements in evidence are:

November 21, 1928—Escrow Agreement, signed by complainants and defendant, Phillips for sale of stock to Ullman (Ex. I, p. 28).

January 18, 1929—Extension Agreement, signed by complainants and defendant, Phillips (Ex. I-A, p. 32).

February 21, 1929—Letter by complainants to Phillips to pay certain charges of a legal nature to clear the title of the property of the Brilliant Silk Hosiery Company and bank charges in connection with the escrow and such other incidental charges as may arise (Ex. 2, p. 33).

All of these written agreements were formally laid before the complainants and adopted after due consideration (p. 24, ll. 18, 31; p. 25, ll. 2, 27).

All of the foregoing exhibits were prepared by said Phillips, or by attorney and counsel selected by him or the New Company—complainants had no personal attorney or counsel in the transaction—M. Casewell Heine, Esquire, who appears as counsel for said Phillips, had been counsel for said Brilliant Silk Hosiery Company since its incorporation (p. 41, ll. 20-30).

The entire agreement and understanding, with reference to the sale of their respective shares of stock is embodied in said Exhibits I, I-A and II, and there was no understanding or agreement with reference to the sale of said stock that is not embodied in said written exhibits (p. 39, ll. 29-36; p. 44, ll. 29-36). Complainants did not agree with said Phillips, or anyone else, to authorize said Phillips to hold at said Bloomfield Bank the stock of complainants until any charges that might be involved could be ascertained, prorated and paid by the respective stockholders (p. 41, ll. 30-35; p. 46, ll. 17-24). Complainants never authorized said Phillips to sign any papers, statement, or guarantee on their behalf, nor did they know that he had signed any guarantee, and they first learned of the facts with reference to said guarantee signed by said Phillips on November 5, 1929; and if they had been informed that it was necessary to sign

the guarantee they would not have done it themselves nor would they have authorized anyone to do it for them, and they were not informed by said Phillips or anyone else that it was necessary to sign any paper or documents in order to consummate the deal and secure their money and stock (except said Exhibits I, I-A and 2) (p. 60, ll. 28-40, p. 61, ll. 1-3).

We desire to call attention particularly to the following statements in the opinion of Vice Chancellor Bentley:

At page 65:

It was represented to me by his counsel on the argument of this motion that on February 15th, when the option to purchase was exercised, Phillips was tricked into signing a warranty as to the extent and value of the assets of the old company, upon the information that it was a mere matter of form and that his warranty as president of that company was merely desired for the purpose of making the new corporation's statement more attractive.

Again at page 68:

The argument was also made and admitted that originally the negotiations with Ullman contemplated a sale of all the assets of the old company, but that was abandoned in favor of the simpler process of a sale of all the capital stock and was adopted to avoid the very difficulty that Phillips has brought upon himself by his gratuitous warranty.

Decree.

The decree adjudged that,

the defendant, Bloomfield Bank and Trust Company forthwith deliver to each of the complainants, Theodor Helbig, Albert Scherzer, Ernst Eichler, Emil A. Mueller, Max Roscher, Richard Boehm, Max Franke, Linus Thierfelder, Bruno Thierfelder or Carlyle Garrison, their solicitor, all certificates of capital stock in its possession or under its control of Interstate Hosiery Mills, Inc., a corporation, which said certificates of stock are drawn in favor of said complainants respectively, and that said Bloomfield Bank & Trust Company deliver all of said certificates of stock to said complainant or Carlyle Garrison, their solicitor, forthwith upon presentation of a copy of this order certified by Carlyle Garrison, solicitor as aforesaid, to be a true copy (p. 72, l. 34; p. 75, l. 15).

Grounds of Appeal.

Defendant Jacob A. Phillips appealed from said mandatory order and injunction decreeing the immediate delivery of said certificates of stock by defendant, Bloomfield Bank & Trust Company (p. 75, l. 36) :

“* * * on the ground that the same is contrary to the written agreement entered into between the complainants and defendant, Phillips, and the true and legal intendment and construction thereof, and in that said order directs the delivery of said certificates

of stock to complainants as principals in disregard of the legal rights of defendant, Phillips as agent, and that said defendant, Phillips, was not the agent of complainants as principals; and in that said order erroneously holds that the complainants as principals are not bound by the acts of their agent, and further, that the acts of the agent, defendant Phillips, were outside of the scope of his agency and authority" (p. 76, ll. 1-18).

Defendant, Bloomfield Bank & Trust Company's name appeared in the notice of appeal, but it did not join in the petition of appeal. The petition of appeal is filed solely by "Jacob A. Phillips."

I.

This court should not consider points numbered III and IV in Appellant's Brief.

On appeal from Chancery, the petition of appeal shall state the grounds of appeal (Rule 21). The petition of appeal in this case has not stated the grounds of appeal set forth by appellant in his points numbered III and IV (p. 17; p. 20).

We submit that these Points are not before the court for consideration. Grounds for reversal not set forth in the petition of appeal cannot be considered by this court. An appellant can "neither in accordance with Rule 21 nor with the plain principles of justice assail a decree in the case below upon grounds of appeal which are nowhere stated in his petition." *N. J. B. L. & I. Co. v. Lord*, 66 N. J. E. page 344, at page 350:

“* * * generality of objection would scarcely seem to be a compliance with the rule requiring the grounds of appeal to be stated.”

Butterfield v. Third Avenue Savings Bank, 25 N. J. E. 533, 536, approved in *N. J. B. L. & I. Co. v. Lord*, 66 N. J. E. 344.

The following cases apply the principle:

Prudential Insurance Co. of America v. Godfrey, 77 N. J. E. 267;
Johnson v. Argueso, 77 N. J. E. 598;
Supplee v. Cohen, 81 N. J. E. 500;
Sargent v. Realty Traders, 82 N. J. E. 331.

The Court of Errors and Appeals, in the case of *Boice v. Conover*, 63 N. J. E. 273, at 274, in its opinion delivered by Mr. Justice Dixon, says:

“The first and second objections to the decree below urged in the brief of counsel for the appellant are not set forth in the petition of appeal, and, so far as appears, were not adverted to in the court below; they therefore require no consideration here. *Insurance Co. v. Sempel*, 11 Stew. Eq. 575; *Cumberland Lumber Co. v. Clinton Mfg. Co.*, 12 Dick. Ch. Rep. 627.”

This case is cited with approval by the Court of Errors in the case of *Engelhardt v. Schroeder*, 92 Eq. 663, at page 666 (decided February 28th, 1921).

II.

No appeal from the decree below is properly before the court.

The decree below adjudged that the Bloomfield Bank & Trust Company forthwith deliver to complainants certain certificates of capital stock of Interstate Hosiery Mills, Inc. The certificates were admittedly in the possession of said bank. There was no decree below against appellant Jacob A. Phillips nor any adjudication of his rights. Neither defendant filed any answer to the bill and appellant Phillips filed no pleading seeking affirmative relief against complainants or said Bank.

Appellant Phillips alone filed petition of appeal.

Said Bloomfield Bank & Trust Company filed no petition of appeal and so far as the record shows, is entirely satisfied with the decree below, from which appellant Phillips alone appeals.

We respectfully submit that the present status of the matter before this court is anomalous in that appellant Phillips is appealing from a decree in which his rights are not adjudicated and with which said Bloomfield Bank & Trust Company (against which the decree is directed) is apparently entirely satisfied, and that the appeal of appellant Phillips should be dismissed for the reasons above stated.

III.

If an agency existed, Phillips, as agent, exceeded his authority by executing the warranty, and is not entitled to indemnity.

Our contentions are that after the execution of the escrow agreement (Ex. 1, p. 28) whatever agency may have existed in favor of appellant Phillips ceased, and that this instrument amounted to a naked bailment. This escrow agreement was executed by complainants and said Phillips after due consideration, and embodied all the terms and conditions of the escrow and sale of their capital stock. It is addressed to the American Exchange Irving Trust Company and Bloomfield National Bank (named changed to Bloomfield Bank & Trust Company), and contains the following significant provision (p. 30, l. 35).

You shall not be bound or in any way affected by any notice of the modification or abrogation of this agreement unless signified to you in writing signed by all of the parties hereto, nor in the case of a modification unless the same shall be satisfactory to you.* * *If the purchase price for the stock herewith deposited in cash and/or stock is not paid to your bank for our account on or before January 19, 1929, the stock herewith deposited shall be *without any condition or restrictions whatsoever returned to us.*

If and when the six months from the date of the deposit with your bank of the shares of the stock of the Brilliant Silk Hosiery Company of Delaware, the new company, which are

to be held in escrow for that period, expires, you are forthwith instructed to deliver the said certificates of the undersigned *without any conditions or restrictions* unless such shares have been purchased by said Ullman or his nominees under the option to repurchase provided for herein, and in that event any shares which have not been so purchased shall be delivered to the undersigned. (Italics are ours.)

The language of the foregoing escrow agreement cannot be stretched to mean, even by implication, that appellant Phillips at any time was authorized to execute any warranty binding on complainants.

The doctrine of indemnity raised by Counsel for appellant Phillips is limited by the rule that such an agent is not entitled to indemnity where he incurs an obligation growing out of an act which exceeds his authority.

An agent who advances money for account of his principal or incurs expenses or losses in transacting the agency is not entitled to reimbursement and indemnity, where the money was paid out or the loss incurred with respect to a matter as to which the agent acted in excess of his authority, or in violation of his instructions, unless the principal ratifies the agent's acts in this respect. Thus, in the absence of ratification, where an agent pays a judgment recovered against him on an unauthorized warranty he cannot recover the same from his principal.

2 Corpus Juris, 797;

1 Mich. on Agency, sec. 1609.

Counsel for appellant Phillips argues that the execution of the warranty by Phillips was ratified and refers to a letter signed by complainants to appellant Phillips dated February 21, 1929 (Ex. 2, p. 33). It is apparent, from reading this letter, that it refers to certain charges of a legal nature to clear up the title to the property of the Brilliant Silk Hosiery Company and bank charges in connection with the escrow, and such other incidental charges as might arise, and said Phillips rendered bills for these incidental charges which were paid by complainants shortly after the date of the letter (p. 40, l. 28; pp. 42-43). There is nothing in the record to show that any of the complainants had any information when this exhibit was signed by them that any warranty had been executed by Phillips, and, in fact, they emphatically deny that they had any such information until appellant Phillips filed his affidavits in the cause below (p. 60, l. 38; p. 61, l. 4).

The rule is stated in 21 R. C. L., p. 835, par. 17, as follows:

If, however, the agent exceeds his authority, and does acts not within the scope of his agency, he will not be permitted to recover from the principal for money advanced or for liabilities incurred in respect of such unauthorized acts.

Corbin v. American Mills, 27 Conn. 274,
71 Am. Dec. 63;

Fuller v. Ellis, 39 Vt. 345, 94 Am. Dec.
327.

As to the discussion of the Law of Agency referred to on page 23a of supplemental memorandum of counsel for appellant Phillips, we respect-

fully submit that the statement of the questions therein discussed has no application to the instant case. The discussion in the supplemental memorandum relates to the question of the relation of the principal and third party when the agent has made a contract which he was not directed to make or which he was directed not to make, whereas the question in the instant case is the relation between the principal and the agent and the right of the agent to indemnity against the principal where the agent has exceeded his authority.

In conclusion appellees respectfully submit that the decree below should be affirmed.

Respectfully submitted,

CARLYLE GARRISON,
Solicitor of Complainants-Appellees.

ALFRED B. VAN HOUTEN,
of Counsel.

Dated, February term, 1930.

PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.

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