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COMPLAINT.

(Filed December 23, 1933.)

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

FRANKLIN TRUST COMPANY,
WILLIAM D. GORDON, Sec-
retary of Banking of the
Commonwealth of Penn-
sylvania, in possession,
Plaintiff,
v.
EDMUND GOERKE,
Defendant.

Meyer L. Sakin,
Attorney of Plaintiff.
Saul and Joseph E.
Cohn,
Attorneys for
Defendant.

10

20

Summons issued Nov. 28, 1933.

The plaintiff, Franklin Trust Company, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession, shows that:

1. On December 26, 1930, the defendant, Edmund Goerke, executed and delivered to the Franklin Trust Company of Philadelphia, his certain note of that date for \$18,000.00, payable on demand, at the Franklin Trust Company. On or about October 5, 1931, the management of the affairs and business of the said Franklin Trust Company was duly placed

Complaint

in the charge of the Secretary of Banking of the Commonwealth of Pennsylvania and he is now in charge thereof, having possession of the note herein mentioned, copy of which is annexed hereto and made part hereof.

2. Demand has been made for payment of said
10 note, but same has not been paid.

3. Said note is now the property of the plaintiff and there is due thereon the sum of \$16,941.20, defendant being entitled to a credit on account of said indebtedness of \$1,058.80.

Plaintiff therefore demands of the defendant the sum of sixteen thousand nine hundred forty-one dollars and twenty (\$16,941.20) cents, with interest
20 from October 1, 1931, and costs of suit.

MEYER L. SAKIN,
Attorney for Plaintiff.

\$18,000.00 Philadelphia, December 26th 193
On Demand After date without defalcation for
Value received, I promise to pay to the order of
We

30 FRANKLIN TRUST COMPANY OF
PHILADELPHIA

EIGHTEEN THOUSAND 00/100 Dollars
in gold, for value received, without defalcation,
hereby waiving all right to stay of execution or ex-
emption of property in any suit on this note.

Complaint

With the foregoing obligation I have delivered

We

| | | |
|-------------|--------------------|-------|
| 200 shares | Fair Company | 39800 |
| 1825 shares | City Stores Common | |
| 700 shares | “ “ “A” | |
| 100 shares | Lit Brothers (new) | |
| 12 “ “ “ | (preferred) | |

as collateral security for the payment of this note 10
 and of any and all other obligations or liabilities of
 the undersigned to the Franklin Trust Company of
 Philadelphia, due or to become due, or which may
 be hereafter contracted or existing, whether direct
 or contingent, with the right on the part of the
 holder hereof to repledge the securities or any part
 thereof, or to substitute or exchange for the same
 other certificates or securities of like tenor and
 amount and with the right, upon the transfer of this
 note to deliver the securities or any part thereof to 20
 the transferee, who shall thereupon become vested
 with the powers and rights herein in any wise given
 to Franklin Trust Company of Philadelphia in re-
 spect of said note and securities, and Franklin Trust
 Company of Philadelphia shall thereafter forever
 be relieved and fully discharged from any liability
 or responsibility in connection therewith. Frank-
 lin Trust Company of Philadelphia shall have a
 lien upon and a pledge of all money and property
 of the undersigned, as well as of any and all en- 30
 dorser or endorsers, now or at any time hereafter
 in the possession of Franklin Trust Company of
 Philadelphia, including any balance of any deposit,
 trust or agency account of the undersigned with
 Franklin Trust Company of Philadelphia, for the

Complaint

note and/or the whole or any part of any and all of the obligations or liabilities of the undersigned shall become instantly due and payable as though it and they had actually matured upon demand and presentation thereof for payment; and in any such event Franklin Trust Company of Philadelphia shall have the right to sell, assign and deliver the whole or any part of the property hereinabove specifically described, or of any property substituted therefor, or of any additions thereto, or of any other property of the undersigned then in its possession, at any time or times, at any exchange or at any broker's board, or at public or private sale, either for cash or on credit, or for future delivery, without demand, advertisement or notice, which are hereby waived, and to apply the net proceeds to the payment of this note or of any or all other obligations or liabilities of the undersigned, in such order or preference as Franklin Trust Company of Philadelphia shall determine, and of all expenses, accounting for any, surplus the undersigned remaining liable for any deficiency. Upon any sale as aforesaid, Franklin Trust Company of Philadelphia may purchase and hold the whole or any part of the property sold, free from any claim or right of redemption of the undersigned, which is hereby waived and released.

Calls for Collateral and any notices to or demands may be given to the undersigned in person or by mail to the address given below.

Payable at Name Edmond Goerke
FRANKLIN TRUST COMPANY
of Philadelphia Address 601 Union Ave.,
Elizabeth, N. J.

Answer and Counter-Claim

| | |
|---------------------------------|-----------|
| Edmond Georke Demand | 18,000.00 |
| Offset by check account balance | 1,058.80 |
| | <hr/> |
| Balance | 16,941.20 |

10 ANSWER AND COUNTER-CLAIM.

(Filed December 22, 1933.)

The defendant residing in the City of Elizabeth, County of Union and State of New Jersey, answering the complaint, says:

1. He admits paragraph 1 of the complaint.
- 20 2. He admits that the demand has been made for the payment of the said note, but denies that the same has not been paid.
3. He neither admits nor denies that the note mentioned in this paragraph is the property of the plaintiff but leaves the same to the plaintiff's proof, and denies that there is due on the said note the sum of \$16,941.20, or any sum whatsoever.

30

COUNTER-CLAIM.

By way of counter-claim against the plaintiff, this defendant says that:

FIRST COUNT.

1. On or about December 26, 1930, and for a long time prior thereto, defendant was the owner and the holder of the following securities:

- 1825 shares of City Stores Common Stock
- 700 shares of City Stores A—
- 100 shares of Lit Brothers New 10
- 12 shares of Lit Brothers Preferred
- 200 shares of Fair Company

which were of the aggregate value of \$50,000.00.

2. On or about December 26, 1930, or at the time the note mentioned in the complaint was executed by this defendant, defendant left said securities with the Franklin Trust Company as collateral for a loan of \$18,000. 20

3. On or about February 1, 1931, this defendant was desirous of liquidating the obligation to the Franklin Trust Company, and demanded that the Franklin Trust Company dispose of the said securities, which securities had at that time a market value of \$30,000.

4. Plaintiff neglected and refused to sell the said shares of stock, although frequently requested so to do by this defendant. 30

5. Defendant has been damaged by the negligence of the plaintiff in the sum of \$25,000, and demands judgment on this count of his counter-claim in the sum of \$25,000 against the plaintiff.

SECOND COUNT.

1. On or about December 26, 1930, and for a long time prior thereto, defendant was the owner and holder of the following securities:

- 1825 shares of City Stores common stock
- 700 shares of City Stores A—
- 10 100 shares of Lit Brothers New
- 12 shares of Lit Brothers Preferred
- 200 shares of Fair Company

all of which had an aggregate market value of \$50,000.

2. On or about December 26, 1930, or at the time the note mentioned in the complaint was executed by this defendant, defendant left said securities
20 with the Franklin Trust Company as collateral for a loan of \$18,000.

3. On or about June 1, 1933, and subsequent thereto, the Franklin Trust Company converted the said securities to its own use, selling the same and keeping the proceeds thereof, without the knowledge or consent of this defendant.

4. Defendant has been damaged by the acts of the
30 plaintiff in the sum of \$25,000 and demands judgment on this count of his counter-claim in the sum of \$25,000 against the Franklin Trust Company.

SAUL AND JOSEPH E. COHN,
Attorneys for Defendant.

REPLY.

(Filed February 26, 1934.)

The plaintiff, Franklin Trust Company, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession, denies each and every allegation contained in the answer of the defendant. 10

ANSWERING THE FIRST COUNT OF THE COUNTER-CLAIM
FILED BY DEFENDANT, PLAINTIFF SAYS:

1. Paragraph one is admitted.
2. Paragraph two is admitted. 20
3. Paragraph three is denied.
4. Paragraph four is denied.
5. Paragraph five is denied.

Plaintiff denies liability of any kind as alleged by defendant in the first count of his counter-claim.

30

ANSWERING THE SECOND COUNT OF THE COUNTER-CLAIM FILED BY DEFENDANT, PLAINTIFF SAYS:

1. Paragraph one is admitted.
2. Paragraph two is admitted.

10

Reply

3. Paragraph three is denied.

4. Paragraph four is denied.

Plaintiff denies liability of any kind as alleged by defendant in the second count of his counter-claim.

10

MEYER L. SAKIN,
Attorney of Plaintiff.

20

30

TESTIMONY.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

————— 10

| | |
|---|--|
| FRANKLIN TRUST COMPANY, WILLIAM D. GORDON, Sec- retary of Banking, etc., <i>Plaintiff,</i> | } Action at Law. No. 102. December Term, 1934. |
| v. EDMUND GOERKE, <i>Defendant.</i> | |

————— 20

TESTIMONY.

—————

January 30th and 31st, 1935.

—————

APPEARANCES:

For the plaintiff, MEYER L. SAKIN, ESQ. 30
For the defendant, JOHN J. STAMLER, ESQ.

—————

Before PALMER, J., and a jury.

Mr. Sakin: It is stipulated between counsel that the name of the plaintiff William D. Gordon, Secretary of Banking, be changed to Luther A. Harr, Secretary of Banking.

The Court: All right, sir.

10

(Mr. Sakin opens the case for the plaintiff to the jury.)

(Mr. Stamler opens the case for the defendant to the jury.)

THE CASE FOR THE PLAINTIFF.

20

ANSON L. CRISPEN, SWORN.

By Mr. Sakin:

Q. Mr. Crispen, what is your capacity at the present time with the Department of Banking in Pennsylvania?

A. Employed by the Department of Banking to help in the liquidation and in direct charge of the loan department.

30

Q. Of where?

A. Of the Franklin Trust Company, Philadelphia.

Q. And when did the Secretary of Banking of the Commonwealth of Pennsylvania take possession of the Franklin Trust Company?

Anson L. Crispen—Direct

A. October 5th of 1931.

Q. And before October 5th, 1931, where were you employed?

A. With the Franklin Trust Company.

Q. And for how long before then?

A. About twenty-five years.

Q. And in what capacity during the past few years prior to October 5th, 1931? 10

A. Secretary and assistant treasurer.

Q. You are familiar with the account of Edmond Goerke?

A. Yes, sir.

Q. You may refer to your records, Mr. Crispen, if you will. The date of the note was December 26th, 1930?

A. What particular record do you want, the dates?

Mr. Stamler: We admitted the notes in the pleadings. 20

The Court: The answer admits the execution of the notes.

Mr. Stamler: And the deposit of the securities.

The Court: Yes.

Mr. Sakin: The original is probably in the file 30 there, but if there is no question I will use this copy.

Mr. Stamler: No objection, sir.

Mr. Sakin: I ask it be marked.

The Court: The copy is admitted as being a copy of the original note?

Mr. Stamler: I admit the note as it is on the main side, but the endorsement on the back of it showing debits and credits, I do not admit.

10 Mr. Sakin: We are not asking you to admit that.

Mr. Stamler: All right.

The Court: All right. Then the note other than the endorsements on the back is admitted as being a copy as originally made by the defendant.

Mr. Stamler: Those endorsements are not part of the exhibit.

20

(Said note marked Exhibit P1.)

Q. Will you tell us what payments were made on this \$18,000.00 note?

A. You want the amounts and dates?

Q. Yes, and the amounts.

A. On March 7th, 1932, \$1,058.80; July 5th, 1932, \$1,317.75; July 5th, 1933, \$184.18; July 17th, 1933, \$1,018.60. Now, they are all the amounts applied to
30 principal. We have had a number of payments that were applied to interest. Do you want those, too?

Mr. Stamler: I didn't hear it, sir.

The Witness: A number of payments applied to interest. Do you want those?

Q. Yes.

Mr. Stamler: If you got it from the same source.

The Witness: I got it right from my book here, from my card.

Mr. Stamler: All right.

10

A. June 5th, 1933, \$358.95; June 12th, 1933, \$415.58; June 12th, 1933, again, \$415.36; June 19th, 1933, \$64.85; June 19th, 1933, \$250.96; July 5th, 1933, \$222.94; July 17th, 1933, \$36.02. That is all.

Mr. Stamler: You say that was the interest account?

The Witness: Those last ones were applied to 20 interest.

Q. Now, Mr. Crispen, will you refer to your records there and tell us what payments were made in 1931 on account of interest?

A. Payments made each month down to and including October. Do you want the amounts and dates separate?

Q. Yes.

A. January 5th, 1931—these all are 1931 dates— 30
\$12.50; February 9th, \$77.50; March 5th, \$70.00; April 7th, \$77.50; May 8th, \$75.00; June 10th, \$77.50; July 8th, \$75.00; August 7th, \$77.50; September 12th, \$77.50; October 20th, which was after the bank closed, \$7500.

Q. Did you have any in 1932, Mr. Crispen?

A. No, none.

Q. Now, can you tell us which items were cash payments, or whether any of the monies were received from the sale of any of the collateral?

A. The first payment given was \$1,058.80, was an off-set, the balance that he had in his checking account. The next three payments —

The Court: That was the amount on deposit to his credit, which was taken and applied on the note?

The Witness: Yes, sir, that is right. The other three payments were all from the sale of securities. Now, as to interest, they are all from the sale of securities, except the 1931 payments, which my books indicate were paid by the depositor in cash or check.

20

The Court: The 1933 payments that you gave during June and July were all from the sale of securities?

The Witness: Yes, sir.

Q. What do you then have for the balance that is due and owing on this note?

A. Principal amounting to \$14,420.67; interest up to date, \$1,355.48.

Q. Totaling what, Mr. Crispen?

A. Totaling \$15,776.15.

The Court: That interest is calculated from what date?

The Witness: From July 15th, 1933.

The Court: From July 15th, 1933, to today?

The Witness: To today, yes, sir.

Q. Has any tender been made to your knowledge
of this obligation by the defendant? 10

A. Not to my knowledge.

Mr. Sakin: Cross-examine.

(At this point, a recess was taken until 1:30
o'clock P. M.)

(Trial of the case resumed at 1:30 o'clock P. M.,
pursuant to adjournment, in the presence of counsel 20
for the respective parties.)

ANSON L. CRISPEN, resumed.

Cross-examination.

By Mr. Stamler:

Q. Mr. Crispen, do I understand correctly that
you are the treasurer and secretary of this trust
company? 30

A. I was.

Q. And did you know Mr. Duphinee?

A. Yes, sir.

Q. What position did he occupy in the bank?

A. Vice president.

Q. And who was the president of the bank?

A. C. Edison Harris, Jr.

Q. And how long was Mr. Duphinee with the bank?

10 A. About twenty-five years before we closed.

Q. And did you bring with you the file in this case, the correspondence?

A. Some of it. I don't know whether I have all that you want or not.

Q. Did you make a search for all the correspondence in connection with this case?

A. I made a search for the notice that we had sent out.

20 Q. I see; well, have you any letters at all in your file from Mr. Goerke to the bank or to Mr. Duphinee?

A. No, sir.

Q. How big a bank was your bank?

The Court: How is this cross-examination, Mr. Stamler?

Mr. Stamler: In my opinion, sir, I alleged the fact that they had large blocks of this stock.

30 The Court: Well, how is this cross-examination of this witness?

Mr. Stamler: I think your Honor is correct, and I will withdraw that question.

Q. You said that the bank was closed by the

Comptroller or the Department on October 5th, 1931?

A. Yes, sir.

Q. And why was it closed?

A. Unable to keep up our reserve. They asked the Banking Department to take it over.

Q. Is that the only reason?

10

The Court: How is that cross-examination, Mr. Stamler?

Mr. Stamler: I beg your pardon, sir?

The Court: How is that cross-examination of this witness?

Mr. Stamler: It is a question of determining title to this note.

20

The Court: All right.

Q. Isn't it a fact that there was an impairment of capital of this bank?

A. Yes, sir.

Q. And what was it caused by?

A. Lots of reasons. I wouldn't want to tell you

Q. Well, the chief reason?

30

A. Well, the drop of the security market was one thing.

Q. That is what I wanted answered; a drop in the securities market; and how long had that drop continued prior to the closing?

Mr. Sakin: I don't see the relevancy of these questions, if your Honor please.

The Court: I don't, either.

Mr. Stamler: I will withdraw it.

10 Q. I show you a book and ask you whether you are familiar with that general publication?

A. I am not intimately familiar with it. I know what it is and what it is supposed to cover.

Q. Is it used by your bank?

A. It was at that time, yes, sir.

Q. It is used generally by bank examiners?

A. I believe it is.

20 Mr. Sakin: If your Honor please, I don't see the materiality of this.

The Court: It isn't cross-examination, in any event.

Mr. Stamler: That is quite true, sir. We will get to it as soon as I come to it. I would like to mark these four volumes for identification.

30 The Court: They may be marked.

Mr. Stamler: As one exhibit. I promise to develop it as proper cross-examination in the very near future with this witness.

The Court: It isn't, of this witness.

Mr. Stamler: I say, I will with this witness.

The Court: All right.

(Four volumes marked Exhibit D1 for Identification.)

Mr. Sakin: I don't see the materiality of this on 10
cross-examination. I have no objection if he wants
to introduce that —

The Court: He may identify these books from
the witness. That, I think, is quite all right.

Mr. Stamler: That is all I am asking.

Q. I show you a book containing a number of
sheets here. Are you acquainted with those? 20

A. No, sir.

Q. Never saw those in your bank?

A. No, sir.

Q. All right; now, on the date when the bank was
closed, how much money did the defendant owe the
bank?

A. \$18,000.00.

Q. \$18,000.00?

A. Yes, sir.

Q. Have you got the collateral card here? 30

A. No, sir.

Q. Where is it?

A. I have the collateral listed on this card. It
isn't the original record. I don't know whether it
will cover just what you want or not.

Q. You have used that card in order to testify before?

A. I haven't testified from this card.

The Court: No, he didn't testify anything as to collateral.

10 Mr. Stamler: All right. He naturally had to, if your Honor please; he testified to certain sales of securities.

The Court: Yes, he said certain securities were sold.

Mr. Stamler: I want to know what securities they were.

20 The Court: That is quite all right. Your question at that point didn't indicate it, but that is perfectly proper cross-examination. Go ahead.

Q. And you held all the securities on October 5th, 1931, that were originally pledged for the loan?

A. I presume so, but I couldn't tell you definitely.

Q. Haven't you got the records here to show that?

A. No, I have not.

Q. Don't you know that?

30 A. I do not know it; I believe it.

Q. In other words, you don't know what collateral there was in the bank on October 5th, 1931, to secure the loan of this defendant?

A. Our books would show, but I have nothing here to show. I don't remember.

Q. Well, have you any record here that would show it?

A. No, sir.

Q. Now, you testified that certain payments were credited against this loan. From what did you testify in order to give that evidence?

A. From the liability sheet.

Q. And have you got that?

10

A. I have.

Q. May I see it?

Mr. Stamler: I would like to have it marked for Identification, if your Honor please.

(Said paper marked D2 for Identification.)

Q. The bank did maintain a liability card which showed the amount of the loan and the securities against the loan, is that correct?

20

A. Yes, sir, they were on two separate cards; they were not on the same card.

Q. Well, two separate cards. And those cards were used by the bank, were they not, for the purpose of checking the values of the collateral at certain intervals?

A. You are right.

Q. And how often would your bank check the value of the collateral against the values of the stock?

30

A. Against the value of the stock?

Q. Withdraw the question. How often would your bank value the collateral against the loan?

A. It would all depend upon the condition of the

money market. If the market didn't change, we probably wouldn't do it for quite a period; if the market was changing rapidly, we would do it every day or two.

Q. Well, who would determine that.

A. What do you mean?

Q. Who would determine when to do it?

10 A. The loan department. I would, usually.

Q. I beg your pardon?

A. I would, usually.

Q. You would, under your supervision?

A. Yes, sir.

Q. During the months—I beg your pardon. When that calculation was made, it was made on this liability card?

A. Yes.

20 Q. And that would indicate exactly where the stock stood, as to its value?

A. Yes, sir.

Q. And that would also help you to determine whether or not the loan shall be called or additional margin called for or payment requested, is that correct?

A. Generally speaking; frequently the status of the borrower had something to do with that.

30 Q. I understand that, but as a general rule the object of making these calculations was for the purpose of aiding you, as an officer, to determine the value of the collateral in order to be guided as to what to do with your customer?

A. Yes.

Q. And you say you haven't got that record?

A. No, sir.

Q. Now, during the year 1931, say from February on, how often was that record made up until the date the bank closed?

A. From what date?

Q. From February, 1931?

A. I haven't the slightest idea.

Q. Well, would it be once a week?

A. I couldn't tell you.

10

Q. Well, it was under your supervision?

A. Yes, but those were hectic days, and don't ask me to remember too generally.

Q. The more hectic the days, the more often that information was given to you?

A. You are right.

Q. Would it be at least once or twice a week?

A. If the market was dropping all that time. It didn't drop all that time; it sometimes recovered a little.

20

Q. You had happy days, too?

A. No, we had a breathing spell.

The Court: There is no reason for this cross-examination.

Mr. Stamler: I beg your Honor's pardon.

The Court: There is no reason for your comment as to the character of the conditions at that time. Proceed.

30

Q. Now, where is that record?

A. It is at the bank, I presume. I might add, if I may, though, that it wouldn't do you much good

The Court: You don't need to add anything. Answer the question.

Q. Now, when the bank closed, who gave instructions to sell securities of customers, did you?

A. No, sir.

Q. Who did?

10 A. After the bank closed, there was a committee appointed by the Secretary of Banking to watch the securities and to sell them at a time that they thought was best to protect the depositors.

Q. Have you any record with you which will show the value of the defendant's securities, the market value of the defendant's securities on the date that the bank closed or at a reasonable time thereafter?

A. No, sir.

20 Q. Did you try to ascertain at any time what the value of those securities were on October 5th, 1931, or a reasonable time thereafter?

Mr. Sakin: I don't want to object, but I think it is immaterial, if your Honor please.

The Court: Well, the objection is sustained; it isn't cross-examination.

Mr. Stamler: I will make him my own witness,
30 if the Court please.

The Court: Well, this is not the time to do it. You may put him on as part of your case, if you want to, but I don't think this is the time to do it.

Mr. Stamler: All right.

Q. Now, you testified that on the 3rd of July of 1932, you sold—you realized \$1,058.80, which you credited against the loan, and that was \$1,058.80, the balance that the defendant had on deposit in the bank, is that correct?

A. You have my records there.

Q. Oh, I beg your pardon; you may have anything that I have.

10

A. That was March 7th, 1932, that the balance was used.

Q. Yes; that is what I said. Is that correct?

A. That is right.

Q. Who authorized you to do that?

A. I can't tell you definitely.

Q. I see; did the defendant authorize you to charge his account?

A. No, sir.

Q. With that sum of money?

20

A. No.

Q. Now, on July 5th of 1932, you credited a further sum of \$1,317.75 against this note. Where did you get the money to credit this item?

A. Sale of securities.

Q. What securities did you sell?

A. I can't tell you from this record.

Q. Who can tell?

A. Well, we have the records at the bank but I wasn't told to bring those and I didn't know you 30 wanted them.

Q. You haven't got them here?

A. Brokers' sales slips, we have.

Q. You further credited an item on July 5th, 1933, of \$184.18. Where did you get that money from?

A. Sale of securities.

Q. Do you know what you sold?

A. No, sir.

Q. Have you any record here to show it?

A. Not here.

Q. You further testified that on the 17th of July, there was credited the sum of \$1,018.60. Where did
10 you get the money?

A. The same answer would apply to that as the others, the sale of securities the same as the others.

Q. Do you know what the securities were?

A. No.

Mr. Sakin: I might help Mr. Stamler, make it easier for him. He filed interrogatories and if he wants to refer to them, he can, so as to make it much easier for himself, that is all.

20

The Court: Well, he is cross-examining.

Mr. Stamler: Thank you very much.

Q. And the same is true in relation to all other securities that were sold which were credited against interest?

A. Yes, sir.

Q. And you don't know what the items were or
30 what securities were sold or at what price they were sold?

A. No.

Q. Now, will you please give me the entire sum of money that you credited, either as against principal or interest on this loan, excepting the \$1,058.80, which was the cash on hand?

A. \$4,285.19.

Q. During the period that the bank was open, did you at any time have occasion to examine the defendant's loan with your bank?

A. Yes.

Q. During that period, did you at any time find that loan under margin or in such condition that you couldn't at any day have sold it out and got 10 your money?

Mr. Sakin: I object to that; I don't think that is competent.

The Court: Objection sustained.

(Exception noted for the defendant.)

Q. Why didn't your bank, after the bank was 20 closed and on or about the the 7th day of March, 1932, sell all the securities as against this loan?

Mr. Sakin: I object, your Honor; I don't think that is proper cross-examination.

The Court: Well, it may be in view of the testimony that part of them were sold. I think, perhaps, that is proper cross-examination.

30

A. Why didn't we sell?

Q. Yes?

A. I presume it was the instructions of the committee that I mentioned before.

Q. And is the same true that the reason the en-

tire securities were not sold on July 7th of 1932, was because somebody directed not to sell it?

A. I presume that was the reason.

Q. And so as to the other dates?

A. Yes.

Q. Whom did that committee represent?

A. The closed banks.

10 Q. Well, who?

A. You mean who were on the committee?

Q. No, no, no; who did they represent?

A. They represented the Secretary of Banking.

Q. Who was in charge of this closed bank?

A. Yes, sir.

Q. When did they start to function, when did that committee commence to function?

A. I couldn't tell you.

Q. Was it after July 5th of 1932?

20 A. Previous to that.

Mr. Sakin: If your Honor please, I think we are getting a little off.

The Court: Yes, I don't see the pertinency of it at all, particularly as not being cross-examination.

30 Mr. Stamler: Well, here is the banker who is put on to testify that they sold securities, if your Honor please, and they credit our accounts. Now, I am asking this gentleman why it wasn't sold at that time.

The Court: You are asking him why somebody else didn't do something, which is quite different from asking him about what he himself did.

Mr. Stamler: Well, I wanted to know whether he knew why.

Q. Now, Mr. Crispen, did Mr. Duphinee maintain an independent file of correspondence in his bank?

Mr. Sakin: I object.

10

The Court: The objection is sustained.

Mr. Stamler: I demand the production of a letter written by the defendant to Mr. A. B. Duphinee, Vice President of the Franklin Trust Company, dated March 11th, 1931.

Mr. Sakin: There is no such letter in our files.

Q. I show you what purports to be a copy of a 20 letter dated May 11th, 1931, addressed to Mr. Duphinee. Did you ever see this letter, the original of this letter?

A. No, sir.

Q. You knew there was a demand made to produce the original thereof, did you not?

A. Yes, sir.

Mr. Stamler: I will mark that for Identification.

30

The Court: Was a demand served for the production of the original of that letter?

Mr. Stamler: Yes, sir.

The Court: All right.

(Said letter marked D3 for Identification.)

Q. That demand was made to you a year ago, was it not, to produce this letter?

A. I don't know; I can't tell you that.

Q. Did you make any effort to find such a letter?

A. There was an effort made by my assistant; he
10 looked through all the files and couldn't locate it.

Q. You do not know personally?

A. I didn't look personally.

Mr. Sakin: If your Honor please, I don't think this is cross-examination.

The Court: I don't, either.

Mr. Stamler: That is all.

20

By Mr. Sakin:

Q. Mr. Crispen, this claim against Mr. Goerke is still in the hands of the Secretary of Banking?

A. Yes, sir.

Mr. Sakin: And I ask for the production of a letter dated June 11th, 1932, from Mr. Stamler.

30 Mr. Stamler: Here it is.

Q. I show you a letter. Are you familiar with this letter, Mr. Crispen?

A. Yes, sir.

Mr. Sakin: And this is the letter to Mr. Edmund

Anson L. Crispen—Re-cross

Goerke, 601 Union Avenue, Elizabeth, New Jersey.
 "Dear Sir: Franklin Trust Company is now in possession of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania. Formal demand is hereby made for the payment of the principal and interest of your loan of \$16,941.20. Unless the above amount is paid on or before Wednesday, June 15th, 1932, the Secretary of Banking will 10
 exercise his rights with respect to your collateral whenever he shall decide that it is best to do so. Yours very truly, William D. Gordon, Secretary of Banking, per John J. Sullivan, Special Deputy, as Agent." I ask that be marked.

The Court: It may be.

(Said letter marked Exhibit P2.)

20

Q. Has any money been paid since that time?

A. Yes, sir, from the sale of securities.

Q. I mean, has there been any money paid by Mr. Goerke?

A. No, sir.

Mr. Sakin: That is all.

Mr. Stamler: I omitted to ask, and with the Court's permission, I would like to ask a question. 30

By Mr. Stamler:

Q. Do you know from what source there was credited against the loan for interest monies paid on June 10th, 1931, July 8th, 1931, August 7th, 1931, September 12th, 1931, and October 20th, 1931?

A. You are asking me the source?

Q. Yes, where did it come from, do you know?

A. From Mr. Goerke, as far as my records show.

Q. I am asking you, do you know?

A. Personally, no.

Q. You do not know personally?

A. No.

10 Q. Now, what records have you here to show that it came from Mr. Goerke?

A. We have a charge to the interest account of those amounts as of those periods and the payments made at the dates you have given us. All it is is dollars and cents; it doesn't show where it came from.

Q. And you don't know where they came from?

A. No, I don't know.

20 Mr. Stamler: That is all.

By Mr. Sakin:

Q. Mr. Crispen, they were payments made for the Goerke account?

The Court: He said that they were credited on account.

30 Mr. Sakin: All right, that is all. That is our case.

PLAINTIFF RESTS.

Offer of Evidence
Edmund Goerke—Direct

THE CASE FOR THE DEFENDANT.

Mr. Stamler: If your Honor please, I offer in evidence the notice to produce the letter of May 11th, 1931, which was marked for identification as 10 Exhibit D3.

The Court: Any objection?

Mr. Sakin: No objection.

(Said paper marked Exhibit D4.)

Mr. Stamler: I offer in evidence interrogatories served by the defendant upon the plaintiff and acknowledged by the plaintiff on the 29th day of August, 1934, and the answers thereto as one exhibit. 20

(Said papers marked Exhibit D5.)

EDMUND GOERKE, SWORN.

By Mr. Stamler:

30

Q. Mr. Goerke, where do you reside?

A. Elizabeth, New Jersey.

Q. And how long have you resided in Elizabeth?

A. Since 1915.

Q. And prior to that time?

A. New York.

Q. What was your occupation in the year 1930?

A. Vice-President of Lit Brothers and Vice-President of City Stores.

Q. Lit Brothers is the department store in Philadelphia?

10 A. That is right.

Q. And what is City Stores?

A. City Stores is a holding company for a group of department stores situated down south.

Q. Including Lit Brothers?

A. Including Lit Brothers.

Q. What was your salary?

A. I received \$10,000.00 a year from Lit Brothers and \$10,000.00 a year from City Stores.

20 Q. And what was your chief—what were you chiefly occupied with?

A. I was general merchandise manager of the southern group and assistant to Lit Brothers.

Q. And how much of your time did you spend north and how much south?

A. Well, I would say the greater part of my time was spent in the south and a little less than that up here in the north.

Q. Did Lit Brothers maintain an account with the Franklin Trust Company?

30 A. They did.

Q. In Philadelphia?

A. A large account.

Q. And did you personally keep an account there?

A. I did.

Q. Did you become acquainted with the officers of that bank?

Edmund Goerke—Direct

A. I became acquainted with Mr. Duphinee.

Q. What position did he occupy?

A. Vice-President.

Q. During the month of December of 1930, did you make an application to the Franklin Trust Company for a loan?

A. I did.

Q. And with whom did you arrange that loan? 10

A. Mr. Duphinee.

Q. And how much was the amount?

A. \$18,000.00.

Q. Did you deposit certain securities for the loan?

A. I did.

Q. And they consisted of the securities mentioned in Exhibit P1?

A. That is right.

Q. And the value of those securities is admitted in this case as being \$50,000.00? 20

A. That is right.

Q. As of that date, of course. And you did get the \$18,000.00?

A. It was credited to my account.

Q. It was credited?

A. That is right.

Q. After the granting of this loan, you paid interest, did you, monthly?

A. I think it was monthly, yes.

Q. Did you have occasion to go and see Mr. Duphinee after that? 30

A. I did.

Q. When?

A. The early part of February.

Q. What was the object of your call there?

A. I was worried about the loan, because the amount was dropping and things weren't good, and I told him I thought I would like to sell out.

Q. Sell out what?

A. Sell out my stock and cancel the note.

Mr. Sakin: Just a minute, please. I object to this
10 testimony, if your Honor please, as attempting to vary or alter the terms of a written instrument.

The Court: How does it do that?

Mr. Sakin: Well, apparently—Well, I don't suppose he has gone far enough, but I guess I can reserve my objection until he gets right to that point. He hasn't done it yet.

20 The Court: Well, so far then it is quite all right. Proceed.

Mr. Stamler: Now, let's get the question, please, and the answer.

(Question and answer repeated.)

Q. Did you have any discussion with Mr. Duphinee at that time as to what the value of that stock was
30 on that day when you were there in February?

A. I did.

Q. What was it?

A. It was in the neighborhood of \$30,000.00.

Q. What did Mr. Duphinee say?

A. Mr. Duphinee advised me not to do it. He

said it was only a condition and the market would come back and my securities would come back at the same time. He advised me not to. I wasn't satisfied, and he said, "Think it over for a day or two," which I did, and I called him on the phone and asked him to please sell out, I was going away. At that time he said he would give it out in small quantities as best he could, and I left it that way and I went on 10 a business trip down south.

Q. Did he give you any reason why he would advise you not to sell?

Mr. Sakin: If your Honor please, I object to this testimony. I don't think that this has any bearing on the answer filed. I mean, it isn't within the purview of the answer filed, and at the same time it is in direct contradiction of the terms of the written instrument, which doesn't prohibit the bank from 20 disposing whenever it sees fit.

The Court: You mean the provisions of the collateral note?

Mr. Sakin: That is right.

The Court: That doesn't prevent him testifying as to instructions he gave the bank, does it?

30

Mr. Sakin: No.

The Court: Isn't that the purport of his testimony?

Mr. Sakin: I mean, if he confines it to the note,

but I think all this is outside of the answer filed. I don't think any instructions that he could give to Mr. Duphinee could be binding upon the bank?

The Court: Why not?

Mr. Sakin: In the face of the written instrument.

10

The Court: What is there in the instrument that would prevent him telling the bank what he wanted done?

Mr. Sakin: With the collateral?

The Court: Yes.

Mr. Sakin: I mean, there is nothing in the instrument to prevent him telling the bank what he wants to do, but he has no right to instruct the bank what to do to bind the bank. That is what I mean.

20

The Court: Why not?

Mr. Sakin: In other words, it has no probative force, because the note here is a long collateral note and it specifies here as follows, that he is to deliver certain shares of stock to the company as collateral security for the payment of this note, "and of any all other obligations or liabilities of the undersigned to the Franklin Trust Company of Philadelphia, due or to become due, or which may be hereafter contracted or existing, whether direct or contingent, with the right on the part of the holder hereof to

30

repledge the securities or any part thereof, or to substitute or exchange for the same other certificates or securities of like tenor and amount and with the right, upon the transfer of this note to deliver the securities or any part thereof to the transferee, who shall thereupon become vested with the powers and rights herein in any wise given to Franklin Trust Company of Philadelphia in respect of said note and securities, and Franklin Trust Company of Philadelphia shall thereafter forever be relieved and fully discharged from any liability or responsibility in connection therewith. Franklin Trust Company of Philadelphia shall have a lien upon and a pledge of all money and property of the undersigned, as well as of any and all endorser or endorsers, now or at any time hereafter in the possession of Franklin Trust Company of Philadelphia, including any balance of any deposit, trust or agency account of the undersigned with Franklin Trust Company of Philadelphia, for the due payment of this note and of all obligations and liabilities. Any indebtedness due from the Franklin Trust Company of Philadelphia to maker or to any endorser or endorsers may be appropriated and applied against any debt or obligation of maker to the Franklin Trust Company of Philadelphia at any time as well before as after the maturity of such obligation.

Franklin Trust Company of Philadelphia shall have the right from time to time, whenever the collateral held shall become unsatisfactory to it, demand additional or other collateral security for the payment hereof, and the undersigned shall on demand deposit with Franklin Trust Company of

Philadelphia such additional collateral security so demanded, and any additions to, reductions of, or substitutions for any of the collateral securities above named, and payments on account of said note, or increase of same, shall be without impairing or affecting the validity hereof, or the endorsements hereon, and such securities so added or substituted
10 shall be held as if they were originally pledged for the security of this note.

Upon failure to pay this note or any of the afore-
said obligations and liabilities, or upon the failure
to fulfill any of the undertakings in this note by the
undersigned, or if undersigned shall become insol-
vent or make a general assignment for the benefit
of creditors, or file a voluntary petition in bank-
ruptcy, or if a petition in bankruptcy shall be filed
against the undersigned, or a receiver shall be ap-
20 pointed for the property or assets of the under-
signed, then or in such event the principal of this
note and/or the whole or any part of any and all of
the obligations or liabilities of the undersigned shall
become instantly due and payable as though it and
they had actually matured upon demand and pres-
entation thereof for payment; and in any such event
Franklin Trust Company of Philadelphia shall have
the right to sell, assign and deliver the whole or any
part of the property hereinabove specifically de-
30 scribed, or of any property substituted therefor, or
of any additions thereto, or of any other property
of the undersigned then in its possession, at any
time or times, at any exchange or at any broker's
board, or at public or private sale, either for cash
or on credit, or for future delivery, without demand,

advertisement or notice, which are hereby waived, and to apply the net proceeds to the payment of this note or of any or all other obligations or liabilities of the undersigned, in such order or preference as Franklin Trust Company of Philadelphia shall determine, and of all expenses, accounting for any surplus the undersigned remaining liable for any deficiency. Upon any sale as aforesaid, Franklin Trust Company of Philadelphia may purchase the whole or any part of the property sold, free from any claim or right of redemption of the undersigned, which is hereby waived and released." Now, according to this instrument, Franklin Trust Company has a right to dispose of the collateral as specified in the instrument, but there is nothing that this defendant can bind on the bank in his conversation with this gentleman they refer to in the face of this instrument?

10

20

The Court: Why not?

Mr. Sakin: Because the instrument speaks for itself.

The Court: What is there in what you have read that prevents the maker of the note telling the bank to sell his collateral and apply it on account of the loan?

30

Mr. Sakin: There is nothing that prevents him from telling the bank, but certainly he cannot bind the bank by making the request.

The Court: To whom did the collateral belong?

Mr. Sakin: The collateral belonged to the bank.

The Court: The collateral belonged to the man who had made the loan subject to the right of the bank to use that collateral to pay this note.

Mr. Sakin: That is right.

10

The Court: That is quite different.

Mr. Stamler: They were a trustee.

The Court: Wait a minute.

Mr. Sakin: The bank had the right to dispose of that collateral.

20 The Court: Yes. That doesn't prevent the owner telling them when and how to dispose of it.

Mr. Sakin: It doesn't prevent them, but it doesn't have the probative force of binding the bank.

The Court: Why not?

Mr. Sakin: Because it is varying the terms of the instrument.

30

The Court: The objection will be overruled. You may proceed.

(Exception noted for the plaintiff.)

Mr. Stamler: Let's get back to where we were.

(Question repeated.)

A. Yes, he told me that the market, he thought the market would come back.

Q. It would what?

A. The market would get higher again and I wouldn't have to take any loss, and it was on account of the foreign governments not paying their loans that the whole market was depressed, and he didn't want to sell on account of his other customers had a lot of collateral up at the bank, and he advised me not to, and I was very friendly with him and he was friendly with the store and he didn't want to do it at that time. 10

Q. Did he tell you what other collateral he had at the time?

A. He didn't say the names of the stock, no.

Q. Did he indicate to you he had other City Stores stock? 20

A. Yes, he had City Stores stock.

Q. Did he indicate what quantities?

A. No, just in large quantities.

Q. Just used the term "large quantities"?

A. That is right.

The Court: This conversation was in February of 1931?

30

The Witness: Yes, sir.

The Court: All that you have told us so far?

The Witness: That is right, the early part of February.

The Court: All right.

Q. Can you fix the date—I want to get the date, if we can, please. Do you remember being in the bank on the date when you paid interest in 1931?

A. I wouldn't remember.

Q. You don't remember that; all right. Now, after
10 you had that conversation, what did Mr. Duphinee agree to do?

Mr. Sakin: I object, if your Honor please. My argument is this, that an agreement can be made between the debtor and the creditor provided there is consideration for that agreement, when it comes to varying the terms of this instrument.

The Court: Well, I don't understand, Mr. Sakin,
20 that it does it; from what you have read me of the note, I can't see anything yet that varies the terms of that instrument.

(Exception noted for the plaintiff.)

(Question repeated.)

A. He agreed to sell the stock in small lots, so it wouldn't affect the market.

30

The Court: When was that made?

The Witness: That was made at that time that I called him on the phone, and that is why I left it and I went on a business trip at that time.

Mr. Sakin: I object to that testimony, and I think your Honor allowed me an exception.

The Court: Oh, yes, you may have an exception.

(Exception noted for the plaintiff.)

Q. Now, where did you go after that? 10

A. I went to New Orleans.

Q. And how long did you stay away?

A. I don't remember exactly, but I would say four to five weeks.

Q. And when you returned to Philadelphia, that is, to Lit Brothers' store—I suppose that is where you used to return?

A. That is right.

Q. Did you make inquiry as to what happened with your stock? 20

A. I didn't get in touch with Mr. Duphinee again until the early part of May.

Q. And how did you do that?

A. How did I do what?

Q. How did you get in touch with him?

A. I went to see him.

Q. Did you write him a letter prior to that time?

A. No.

Q. Didn't you write in May?

A. Yes, but I went to see Mr. Duphinee first. 30

Q. You did?

A. I went to see him to find out why he didn't sell any of my stock.

Q. That is right; then what did he tell you?

A. Then he told me he didn't want to do it, he

didn't think it was the right thing for me to do. I will admit he thought he was looking after my interests, and I felt bad about it at the time, because I thought ——

The Court: Never mind what you thought. You are asked about your interview with him early in
10 May.

Q. Go ahead.

A. He hadn't sold any of my stock. I told him I wanted it sold, that the market conditions were still dropping and I wanted to get rid of it. He advised me again not to do it, asked me to think of it a day or two again, which I went back to Lits.

Q. Wait a minute. Did he at that time mention why he didn't want that stock sold?

20 A. Just on the same reason as before.

The Court: Did he at that time mention it, and if so, what did he say?

Q. What did he say?

A. He told me at that time that they had large blocks of stock at the bank.

Q. What stock?

A. City Stores stock and other collateral. I don't
30 know what they were, and didn't want to lower the market, and asked me not to sell my stock. I told him I didn't care so much about the others, but I wanted to get out and free from my note.

Q. Did you then go away with the idea of thinking over Mr. Duphinee's advice to you?

A. I didn't go down south, no. I sent him a letter.

Q. You sent him a letter; I show you a letter dated May 11th, 1931, and marked D3 for identification, and ask you whether that is a duplicate copy or carbon copy, rather, of a letter that you sent to Mr. Duphinee at the bank?

A. That is a copy of the letter I sent Mr. Duphinee. 10

Mr. Stamler: I want to offer it in evidence.

Mr. Sakin: I object to the introduction.

The Court: It has been introduced and marked.

Mr. Stamler: For identification, sir. Now, I am offering it as a full exhibit. 20

Mr. Sakin: I object to that.

The Court: For what reason?

Mr. Sakin: On the ground that it can have no binding force on the bank.

The Court: Objection overruled. 30

(Exception noted for the plaintiff.)

(Said letter marked Exhibit D3.)

Mr. Stamler: The letter reads as follows: "May

11th, 1931. Mr. A. B. Duphinee, Vice-President, Franklin Trust Company, Philadelphia, Pa. My dear Mr. Duphinee. I was very much disturbed over the fact that you did not sell my collateral and liquidate my loan and I cannot agree with you that during these trying times, as you put it, a friend of the bank should not for selfish purposes throw on the
10 market a large block of City Stores stock, as it will tend to break the market and affect many of your customers who have pledged their stock with the bank as security for loans. As I told you more than three months ago, I felt very nervous about continuing to hold a large block on borrowed money, and therefore requested your good bank to sell it in order to liquidate my loan. I can see your point of view. If my circumstances were different, that is,
20 if my stock was fully paid for and I had no other outstanding obligations to meet, you may be right, but unfortunately I am not in that situation. I therefore urge a prompt sale of my collateral and use of proceeds in liquidation of my note and thus save me from further loss. I know that the stock dropped yesterday and that if the same is sold promptly at a price even much lower than quoted yesterday, your loan will be fully liquidated and I will receive some money, which I can use to very good advantage. regretting that my present financial situation does
30 not permit me to follow your kind suggestion, I remain, yours truly, Edmund Goerke."

Q. Now, after that letter was sent, did you get in touch with Mr. Duphinee?

A. I called him up a few days after that.

Q. What did you say to him?

A. I asked him if he received the letter and if he was going to sell my stock. He promised me at that time he would start to dispose of it. I told him then I wouldn't be responsible any more if he didn't sell that stock, I wasn't going to worry about it. I told him, I asked him to sell it so I wouldn't have to worry; I was away most of the time and I didn't want it on my mind, and I dismissed it from my mind 10 after I sent the letter, and I told him so.

Q. After that conversation, where did you go?

A. I went down south to Memphis, Tennessee.

Q. What store is that?

A. B. Lowenstein and Brother.

Q. What was the market value of your securities on May 11th?

A. Around \$30,000.00.

Q. You followed the market closely, naturally?

20

Mr. Sakin: If your Honor please, I object.

Mr. Stamler: I will withdraw it; I apologize for that statement.

Mr. Sakin: I mean, the value of the stock at the time.

The Court: He was asked as to its market value. Can't he tell what that was? 30

Mr. Sakin: If he knew.

The Court: Well, I am assuming he knows, if he says so.

Q. Now, when you came back from the south, did you learn that the bank was closed?

A. No, it wasn't closed when I came back from the next trip.

Q. How soon after you came back was the bank closed?

A. It was closed when I was away.

10 Q. Yes, that is what I thought.

A. Yes, the bank was closed when I was down south.

Q. When you came back, you found the bank closed?

A. That is right.

Q. What did you do about it?

A. I went to see a lawyer.

Q. You went to see your lawyer?

A. That is right.

20 Q. And consulted with him, consulted with your lawyer?

A. That is right.

Q. Who was your lawyer?

A. Mr. Cohn.

Q. Saul Cohn, of Newark?

A. Saul Cohn and Joe Cohn.

Q. Did you ever have occasion to go into the bank after it was closed?

A. I never went in it again.

30 Q. You left it entirely in the lawyer's hands?

A. That is right.

Q. I show you Exhibit P2, which was offered in evidence and ask you whether you received that letter?

A. I did.

Q. And what did you do with it?
A. Turned it over to my lawyer.

Mr. Stamler: Cross-examine.

Cross-examination.

By Mr. Sakin: 10

Q. Where are you employed now, Mr. Goerke?

A. Goerke Company of Newark.

Q. In what capacity?

A. Merchandise manager.

Q. Aren't you connected with Lit Brothers any more?

A. No more, no, sir.

Q. Why not?

The Court: What difference does that make? 20

Mr. Sakin: It was brought out on direct examination.

The Court: Beg pardon?

Mr. Sakin: I say, he brought that out on direct examination.

The Court: Yes, but I was wondering what difference it made as to why he was not connected with them. 30

Mr. Sakin: I think it might be interesting.

The Court: It has to be something more than interesting. If it has some pertinency, all right.

Mr. Sakin: All right.

Q. Are you connected with the City Stores?

A. No, sir.

10 Q. You don't draw \$10,000.00 a year from each of those companies any more?

A. No more, no, sir.

Q. Now, as Vice-President of Lit Brothers and the City Stores, you handled, I presume, a lot of money?

A. I didn't handle any money.

Q. You bought a lot of goods?

A. I didn't buy five cents' worth.

Q. Did you buy any stock?

20 A. My own stock?

Q. For the company?

A. No.

Q. Did you buy any stock, much stock outside of your affiliation with the company?

A. Only for my personal accounts.

Mr. Stamler: Are you talking of shares of stock or merchandise?

30 Mr. Sakin: Stock.

The Court: He said "stock", and the question has been answered.

Mr. Sakin: Shares of stock, I referred to.

Q. Did you ever produce a buyer to the Franklin Trust Company to buy your stock?

A. No, sir.

Q. What is the answer?

A. No, sir.

Q. Did you ever tell them that you had a prospective purchaser for your stock?

A. No, sir.

10

Q. Did you ever go down to a stock broker and have the stock broker call the bank and tell the bank that they were ready to sell your stock that the bank was holding?

A. No, sir.

Q. Why didn't you do either one of those three things, if you were such an executive as the Vice-President of —

A. The bank had the stock; I hadn't the stock.

20

Mr. Stamler: I object to it, if your Honor please, why he didn't do it.

The Court: He may ask him why.

Q. Why didn't you do one of those three things?

A. I didn't have the stock; the bank had the stock.

Q. Don't you know, as a business man, that it isn't necessary that you have the stock in your possession to sell it to a broker?

30

A. No, I didn't know that. If I sell stock and I haven't got it, how am I going to deliver it?

Q. Don't you know you can walk into a broker's office and arrange to sell the stock without showing him the stock, that you are in physical possession of the stock?

Mr. Stamler: I object.

The Court: What has that to do with the situation, Mr. Sakin?

Mr. Sakin: I think it shows him being fully aware of what could be done. He just didn't do those
10 things which he could have done under the circumstances.

The Court: I don't think it has any pertinency to this issue at all. The issue as made by the pleadings is whether or not—he having admitted the execution of the note, whether or not the bank was instructed to sell his stock and pay the notes. That is the only issue there is, as I see it.

20 Mr. Sakin: All right.

Q. Now, Mr. Goerke, when did you say this was that you requested that the bank dispose of your collateral?

A. The early part of February.

Q. The early part of February?

A. That is right.

Q. You don't know what date, do you?

A. No, I wouldn't know the date.

30 Q. And your conversation was with Mr. Duphinee?

A. That is right.

Q. And he was advising you how to dispose of your securities, he was advising you what should be done with your securities?

A. He advised me what to do, yes.

Q. And you followed his instructions?

A. I did.

Q. And did you ever produce to Mr. Duphinee or tell Mr. Duphinee that you had a prospective purchaser for the stock?

A. No.

Mr. Stamler: I object to it.

10

The Court: Well, he said he didn't. I don't think it makes any material difference.

Mr. Stamler: All right.

Q. Now, you heard Mr. Crispen testify?

A. Yes.

Q. Did you hear the various payments made averaging \$75.00 each month in 1931?

20

A. I did.

Q. And that was subsequent to February, 1931—you heard that?

A. Yes, I heard him.

Q. Why did you make those payments?

A. Because I owed the money, the interest on the money that I owed.

Q. Didn't you make a payment of \$75.00 after October 5th, 1931, when the bank had closed?

A. No.

30

Q. Did you make a payment on October 20th, 1931, of \$75.00?

A. Not that I remember.

Q. Did you ever take any action against the bank to collect any monies that may have been due you, as you claim?

Mr. Stamler: I object to it. The suit is right here; we are trying it now.

The Court: The objection is sustained.

Q. Did you make an offer to the bank to settle this claim?

10 A. I did not.

Mr. Stamler: I object to that.

The Court: The objection is sustained.

Q. I show you an affidavit here, Mr. Goerke. Is this your signature?

A. That is right.

Q. And what is the date of the affidavit?

20 A. The 23rd day of July, 1932.

Q. And annexed to this affidavit you have a list of your assets and liabilities, is that so?

A. That is right.

Q. And do you have the Franklin Trust Company listed as a creditor of yours?

A. No, sir, not at the time.

Q. Will you read this for us, please, under "Liabilities"?

30 The Court: What has that to do with the situation, Mr. Sakin?

Mr. Sakin: Well, it merely shows that it was always an admission of the indebtedness subsequent to any conversation with any official of the bank.

The Court: For what purpose was the affidavit made?

Mr. Sakin: I will bring that out on direct examination; I merely wanted to introduce this.

The Court: Well, so far as the cross-examination of this witness is concerned, then you may identify the affidavit, is all. 10

Mr. Sakin: All right; I offer this for identification.

(Said paper marked P3 for identification.)

Mr. Stamler: May I look at it?

Mr. Sakin: Yes, sure. 20

The Court: Well, it isn't offered, Mr. Stamler, unless your adversary is agreeable.

Mr. Stamler: He said he is.

The Court: All right.

Q. Did you ever make a demand on the Secretary of Banking of the Commonwealth of Pennsylvania to sell any of your securities? 30

Mr. Stamler: I object to it; we don't allege it.

The Court: Objection is sustained.

(Exception noted for the plaintiff.)

Q. Mr. Goerke, this request that you made was to whom?

A. What request?

Q. Request to sell your securities?

A. Mr. Duphinee.

10 Q. And he was connected with what bank?

A. The Franklin Trust.

Q. And did you ever make any demand other than the demand on Mr. Duphinee in February, 1931?

A. Say that again, please?

Q. Did you make any demand to any other person connected with the bank?

A. I only knew Mr. Duphinee.

Q. You only knew Mr. Duphinee?

A. That is right.

20 Q. Did you ever send any communications to any other officers of the bank?

A. Not to my recollection.

Mr. Sakin: That is all.

By Mr. Stamler:

Q. Did you make any payments on account of interest after May 11th, 1931, on this note?

30 A. No.

Mr. Stamler: That is all.

Edmund Goerke—Re-cross
Anson L. Crispin—Direct

By Mr. Sakin:

Q. Just a minute. Whenever any payments were made on this note, did somebody ever make them for you or did you make them all yourself?

A. I made all the payments myself.

Q. What did you do, send them in? 10

A. I don't remember if I mailed them in or sent them up with a messenger.

Mr. Sakin: That is all.

Mr. Stamler: That is all.

ANSON L. CRISPEN, recalled. 20

By Mr. Stamler:

Q. Mr. Crispin, do you know whether or not the City Stores stock were quoted on the New York Stock Exchange and traded in generally on the New York Stock Exchange?

A. I do not know.

Q. You don't know that?

A. I don't know that, no. 30

Q. Did you know at that time?

A. I don't know whether I did then or not.

Mr. Stamler. I offer in evidence now Exhibit D1 for identification.

The Court: Any objection?

Mr. Sakin: I don't have any objection as far as the identification is concerned.

The Court: Well, he is offering it in evidence now.

10

Mr. Sakin: I object to that, if your Honor please.

The Court: For what reason?

Mr. Sakin: I object because it is immaterial and from the standpoint of not being properly identified.

The Court: Well, that is a different proposition from materiality. I will have to sustain the objection.

20

Mr. Stamler: May I be heard on that?

The Court: Yes.

Mr. Stamler: The witness testified, if I understood correctly, that he was familiar with this publication, banks and bank examiners using it and his own bank used it.

30

The Court: Yes. How does that prove its correctness or make it possible to offer it in evidence?

Mr. Stamler: The theory, if your Honor please, where a document is used by a special group and

each one relies upon it, as in a bank, as this journal is, it has some probative force.

The Court: What is the purpose of the offer?

Mr. Stamler: The object is to show that this stock had a general market, was traded in daily on the New York Stock Exchange and could have been 10
sold any day desired in large or small quantities.

The Court: All right. The publication that you have shows what with regard to that point?

Mr. Stamler: It shows the trading of each day and each day of the week and the prices at which it was sold at the New York Stock Exchange, of this particular stock.

20

The Court: Why isn't that admissible, Mr. Sakin, as for that purpose as a matter of showing—not showing the value, but as a mere matter of showing that this particular stock was sold on the Stock Exchange in daily transactions?

Mr. Sakin: I don't suppose we would have any serious objection to that point, except this; we object to the admission of this particular paper for the reason that there is no verification of these facts. 30
We don't know whether they are true or not.

The Court: The purpose of this offer is merely to show that upon the New York Stock Exchange this particular City Stores stock was dealt in prac-

tically daily. Now, why isn't it admissible for that purpose?

Mr. Sakin: For the same reason, that there is nothing to indicate how authentic it is. The authenticity hasn't been shown.

10 The Court: I think I will admit the publication for the purpose solely of showing that this particular stock was dealt in upon the New York Stock Exchange.

(Exception noted for the plaintiff.)

(Said papers marked Exhibit D1.)

20 Q. I show you Exhibit D1 and ask you to tell this Court and jury whether you find that the stock of City Stores were generally sold during the week of February 1st, 1931, on the New York Stock Exchange?

A. Yes, sir.

Q. What do you find as to what date or the week, how many shares were sold that week?

A. 2600.

Q. Now, how many shares—This was City Stores, new, wasn't it?

30 A. New, yes.

Q. How many shares of the City Stores was sold—Look at it, will you?

A. I don't know how to use this book; I used a newspaper.

Q. You say you have never used this book?

Anson L. Crispen—Direct

A. Not enough to become acquainted with it. We used the daily newspaper, largely.

Q. But your bank did use this book?

A. Yes, we subscribed to it.

Mr. Stamler: Then I will prove it by another witness, if your Honor please.

10

Q. Where is Mr. Duphinee?

A. What do you mean, where does he live or where is he employed?

Q. Yes, where is he now; is he in court?

A. No, he isn't here.

Q. Is he connected with the bank at this time?

A. No, sir.

Q. Was he connected with the bank in February of 1931?

A. Yes.

20

Q. And after the bank closed?

A. Shortly.

Q. How long a period?

A. Oh, not more than a month, I don't think.

Q. When did you last see him?

A. When can you see him?

Q. When did you last see him?

A. Oh.

The Court: What has that to do with it, Mr. Stamler? 30

Mr. Stamler: I just want to account for him.

The Court: For what?

Anson L. Crispen—Cross
Maurice J. Ferris—Direct

Mr. Stamler: For his absence.

The Court: How do you have to account for it?

Mr. Stamler: Well, possibly I am over-proving
my case. That is all, Mr. Crispen.

10

Cross-examination.

By Mr. Sakin:

Q. On these stock certificates that were pledged
by Mr. Goerke, did they contain powers of attor-
ney?

A. Yes, sir.

Q. And how were they signed?

20

A. Well, they were signed in blank, but I don't
know just how the signature was.

Mr. Sakin: That is all.

MAURICE J. FERRIS, SWORN.

By Mr. Stamler:

30

Q. Mr. Ferris, you reside where?

A. In South Orange, New Jersey.

Q. And with whom are you connected?

A. With the firm of Eisele, King and Nugent.

Q. And what kind of business do they operate?

A. They are members of the New York Stock Exchange.

Q. In what capacity are you there?

A. Statistician.

Q. Prior to your employment with Eisele, King and Nugent, where were you employed?

A. In the credit department of the National City Bank. 10

Q. You are generally acquainted with Market quotations?

A. Yes, sir.

Q. And keep yourself posted on them?

A. Yes, sir.

Q. Do you of your own knowledge know whether or not there was a ready market for City Stores, City Stores A, the Fair Company, Lit Brothers common and Lit Brothers preferred during the first two weeks in February, 1931? 20

A. There was a market for each security.

Q. And did that market so continue up to and including the 11th day of May of 1931 and a reasonable time thereafter?

A. Do you mean was it possible to trade in these securities?

Q. Yes.

A. Yes, it was.

Q. And the entire year of 1931, there was a ready market for this stock, was there not? 30

A. It was possible to trade in them over the market, yes, sir, through the open markets.

The Court: What do you mean by "the open market," the New York Stock Exchange.

The Witness: Through the recognized Stock Exchanges where these securities were listed, your Honor. I didn't understand Mr. Stamler's question; at one point you had some adjective in there.

Q. A ready market?

A. I don't understand what you mean by a ready
10 market.

Q. You have answered the question.

The Court: No. On what exchanges were these stocks sold?

Mr. Stamler: All right.

Q. On what exchanges were City Stores or City Stores A sold or bought?

20 A. They were traded in on the New York Stock Exchange.

Q. And the Fair?

A. The Fair was traded on the New York Stock Exchange.

Q. Lit Brothers common and preferred?

A. They were traded on the New York Curb Exchange and the Philadelphia Stock Exchange.

Q. Are they recognized stock exchanges in this country?

30 A. Yes, they are.

Q. And they were so recognized the entire year of 1931?

A. I hesitate to say about the Philadelphia Stock Exchange, because I had no occasion, but the New York, the New York Curb and New York Stock were recognized at that time.

A. I show you Exhibit D1, and ask you whether you are familiar with the publication known as the Commercial Financial Chronicle?

A. I am.

Q. Is or is not that publication a recognized publication used by bankers and stock exchange houses generally?

A. It is, yes, sir.

10

Q. Can you tell me—tell us now by using this publication as to what the market value of the City Stores was during the first week in February of 1931?

A. You asked for the City Stores common?

Mr. Sakin: I object, if your Honor please.

The Court: For what reason?

20

Mr. Sakin: On the ground that it is not the best evidence.

The Court: What is the best evidence?

Mr. Sakin: Someone from the New York Stock Exchange would be a better witness. This is tantamount to hearsay.

The Court: What have you to say, Mr. Stamler, 30 as to that?

Mr. Stamler: He is an expert, if your Honor please.

The Court: Well, that is not the point. He isn't

testifying from his own knowledge; he is going to testify from a publication, isn't he?

Mr. Stamler: No human being could possibly testify that way.

The Court: You urge the testimony?

10

Mr. Stamler: I beg your pardon?

The Court: You urge the testimony?

Mr. Stanley: I do, sir.

The Court: The objection will be overruled.

(Exception noted for the plaintiff.)

20

Q. Yes, City Stores common?

A. The City Stores common stock, it was known at that time as City Stores new, sold during the week beginning Monday, February 2nd, there were 2600 shares traded in.

Q. What was the price, what was the range?

A. The range that week was $2\frac{3}{4}$, the minimum price, and \$4.00 a share was the highest price.

Q. What was the bid and offer?

30 A. Well, the bid and offer ——

The Court: The question of sale is the controlling factor.

Mr. Stamler: I see.

The Court: He has given that.

Q. Now, what is the next week? Maybe it will help you, since you have it. How about City Stores A?

A. City Stores A stock was sold that week, that is, the week beginning February 2nd, the high was \$24.00 a share—I beg your pardon. The low was \$24.00 a share and the high was \$24.00 a share. 10

Q. How about the week following?

A. City Stores stock, the week beginning Monday, February 9th, there was 7000 shares traded in. The high price for that week was four and three-eighths dollars per share; the low price was $2\frac{3}{4}$ per share, and the City Stores A stock was traded that same week, the low price was \$24.50 a share; the high price was \$25.00 a share.

Q. And how many shares were traded in that 20 week?

A. There were 100 shares of the City Stores class A stock traded that week.

Q. Now, have you got with you the Chronicle showing the value of these stocks during the first week in May of 1931?

A. It would be early in the month that I have. It may not include the first week-day of that month.

Q. All right; just give us that time?

A. During the week beginning Monday, May 11th, 30 there were 1000 shares of City Stores common stock traded in. The low price was \$2.50 a share and the high price was $4\frac{3}{8}$. I beg your pardon, I am wrong on that point. The high was \$3.00 per share and the low was $2\frac{7}{8}$ dollars a share.

Q. How about the preferred?

A. The preferred stock was traded in that same week. The high and low prices are \$15.00 per share, and there were 50 shares traded in that week.

Q. How about the next week, the week following?

A. The week following, the common stock, during the week beginning Monday, May 18th, there
10 were 1001 shares traded in. The high price paid was \$3.00 and the low price paid was $2\frac{3}{4}$ dollars.

Q. How about the A stock?

A. City Stores A stock, during that same week there was 70 shares traded in. The low price paid was $12\frac{7}{8}$ dollars and the high price was \$13.00 per share.

Q. Now, have you got any records with you to show what the Fair stock was sold at during the same periods?

20 A. These same publications will show the Fair stock.

Q. Will you look at them, please, and give it to us?

A. Did you want them in the same way?

Q. If you please. The first week in February?

A. The February books are not here.

Q. Oh, I have got them here.

A. During the week beginning Monday, February
30 mon stock traded in.

Q. What was the price?

A. The high price was \$22.00 per share and the low price was $21\frac{1}{4}$ dollars per share.

Q. And the week following?

A. During the week beginning Monday, February

9, 1931, there were 700 shares of the common stock of the Fair traded in. The high price paid was $22\frac{1}{4}$ dollars and the low price paid was $21\frac{1}{8}$. I beg your pardon; there is an error there. That was on the previous Saturday. $21\frac{1}{2}$ dollars.

Q. How about in May, the first two weeks in May?

A. During the week beginning Monday, May 11th, 1931, there were 200 shares of the common stock of the Fair traded in. The high price was $22\frac{1}{2}$ dollars a share and the low price was \$21.00 a share, and during the following week beginning Monday, May 18th, there were 300 shares of the Fair common stock traded in. The high price paid was $21\frac{3}{4}$ dollars per share and the low price was $19\frac{1}{4}$ dollars. 10

Q. Do these publications contain the quotations on Lit Brothers' stock?

A. If there were any transactions over the New York Curb Exchange during that time, they would indicate those. 20

Q. Did you examine those volumes to see whether there were any in there?

A. There were no transactions on the New York Curb Exchange during those periods.

Q. There were not?

A. There were not.

Q. Now, I show you another book and ask you whether you are familiar with it? 30

A. Yes, I am.

Q. What does this book contain?

A. It contains the transactions in securities dealt in on the New York Stock Exchange, the New York Curb Exchange, and the New York produce market by the hour, on the days indicated by the hour.

Q. You say that is published by the New York Stock Exchange?

A. No, it isn't.

Q. By whom?

A. By Francis Emory Fitch, Incorporated.

Q. Where do they get that information, do you know?

10 A. The New York Stock Exchange doesn't produce official sheets. They have an arrangement with Francis Emory Fitch whereby the official figures are furnished to Francis Emory Fitch. The New York Stock Exchange isn't responsible for those figures and neither is Fitch.

Mr. Stamler: All right, I am not going to press this one. You may cross-examine.

20 Mr. Sakin: No questions.

(No cross-examination.)

Mr. Stamler: That is our case, if your Honor please.

DEFENDANT RESTS.

PLAINTIFF'S REBUTTAL.

CLAUDE B. WAGONER, SWORN.

By Mr. Sakin:

Q. Mr. Wagoner, what is your occupation?

10

A. I am a lawyer and practice at 1000 Packard Building, Philadelphia, Pennsylvania.

Q. How long have you been an attorney in Pennsylvania?

A. Ten years.

Q. Now, are you at present practicing law in Pennsylvania?

A. I am, sir.

Q. Now, I show you an affidavit, Mr. Wagoner. 20
Will you tell us just what that is?

Mr. Stamler: I object to it. The paper speaks for itself.

The Court: Well, it is an affidavit, but I presume what counsel means by that question is more the circumstances or conditions under which it was made rather than the contents of it.

30

Mr. Stamler: That is perfectly agreeable.

Q. Tell us what that represents?

A. I received this affidavit from Joseph E. Cohn, a member of the New Jersey bar, 972 Broad Street,

Newark, New Jersey, together with certain other papers that I think you have, Mr. Sakin. On or about March 8th, 1932, on behalf of the Secretary of Banking of the Commonwealth of Pennsylvania and as his special counsel, I wrote to Mr. Edmund Goerke at 601 Union Avenue, Elizabeth, New Jersey, demanding payment of this \$18,000.00 note.

10

Mr. Stamler: What date, sir?

The Witness: March 8th, 1932.

Mr. Stamler: If your Honor please, I object to that.

The Court: Why?

20

Mr. Stamler: Unless they show that we actually received such letter.

The Court: This is preliminary to the affidavit, showing as I get it, the circumstances under which this gentleman received the affidavit.

Mr. Stamler: All right.

The Court: Proceed.

30

The Witness: A few days after that time, Mr. Morris Wolf, a Philadelphia lawyer with offices in the Packard Building, the same building in which my offices are, came to my office with the original letter which I had written and mailed to Mr. Goerke

—I have that here—and asked me if I wouldn't hold the matter in abeyance.

Mr. Stamler: I object to that conversation.

The Court: I don't see how this is rebuttal, Mr. Sakin, at this point so far. I presumed what counsel was saying was merely preliminary to the picture and let it go, but we are getting things now that are properly not rebuttal. 10

Mr. Sakin: I asked the defendant on the stand whether he made an offer of payment.

Mr. Stamler: Settlement.

Mr. Sakin: Offer of settlement.

20

Mr. Stamler: The Court overruled it.

The Court: It was objected to and I sustained the objection.

Mr. Sakin: This is strictly rebuttal, from the standpoint of the defendant that he is not indebted to the bank. This will show that a proposition was made by him which would rebut any theory or story of his that he is not indebted to the bank. 30

The Court: He says he is not indebted for the very simple reason that there was stock which he says the bank should have sold to pay his indebtedness. That is the theory of this case.

Mr. Sakin: Yes.

The Court: Of the defendant, at least. Other than that, he doesn't deny indebtedness.

Mr. Sakin: This will also go to attack the credibility of the defendant on the ground that he said
10 he made certain statements or made certain requests and that he was not obligated in any way. Assuming he wasn't obligated, this testimony will rebut any argument and will go to show that he was fully aware of the fact that the obligation was due from him, that he so specified it and that it would go to show he made no request to have the stock sold. In other words, it would rebut —

The Court: A request to whom?
20

Mr. Sakin: As to the testimony given by the defendant, to Mr. Duphinee at the bank.

The Court: Well, now, any testimony, of course, that will contradict the defendant's story of those conversations is perfectly competent, but I don't see how you are going to get it inferentially. May I see that affidavit?

30 Mr. Sakin: Yes, yes.

The Court: I don't think that this is contradictory of anything that the defendant said, not anything that is included in this affidavit.

Mr. Stamler: If your Honor please, I am willing

that the affidavit go in evidence. I have no objection to that.

Mr. Sakin: I offer it, then.

Q. Will you read it, Mr. Wagoner?

Mr. Stamlér: No, I object to him reading it. 10

The Court: What is the purpose of the offer?

Mr. Sakin: The purpose of the offer is to show the state of responsibility insofar as the defendant is concerned to the plaintiff. This affidavit will indicate that the defendant admits his obligation to the bank. There isn't any claim of any kind for any set-off or counter-claim or anything.

20

The Court: How does that change the picture, so far as this case is concerned?

Mr. Sakin: It is an admission of liability, to a certain extent. He is denying liability; he is coming in Court here and denying liability.

The Court: No, he never has denied liability, not in the sense that I understand that. We may be talking at cross purposes as to what we have in 30 mind as to denial of liability, but as I get the theory of the case, it is not that the note was not given by him or not that he didn't owe the money at the time the note was given and subsequent thereto, but he says that the note should have been paid by his

securities which were pledged as collateral. Now, the fact that he lists that as a liability somewhere, I don't see how it contradicts it. However, if you want it in and there is no objection, I will permit the affidavit to be offered.

(Said paper marked Exhibit P3.)

10

Mr. Stamler: I will object to the witness reading it.

Mr. Sakin: No, I am not going to ask him to read it. I am going to ask him one question on it.

Q. Mr. Wagoner, what reference does the defendant make in the affidavit to the Franklin Trust Company?

20

Mr. Stamler: I object to it; the affidavit speaks for itself.

The Court: The affidavit speaks for itself.

Mr. Sakin: I merely wanted to bring that out, instead of reading the affidavit.

30 The Court: The jury is going to have the affidavit, it becomes a matter of evidence and goes to the jury and presumably they will read it.

Mr. Sakin: All right.

Q. Now, Mr. Wagoner, the Franklin Trust Company is located where?

A. 15th and Chestnut Street, Philadelphia.

Q. And the note was made in Pennsylvania?

A. That is correct, sir.

Mr. Stamler: I object to it. It doesn't make any difference where the note was made, if your Honor please.

The Court: This testimony so far is quite all right. 10

Mr. Sakin: That is all.

(No cross-examination.)

BOTH SIDES REST.

20

(At this point, Court and counsel retired to sidebar.)

Mr. Sakin: If your Honor please, I want to make a motion for a directed verdict on behalf of the plaintiff, on the following grounds; the first is this, it is our contention that a pledgee of a demand note is not obliged to dispose of the collateral at the mere request of the pledgor, particularly in the light of a note similar to the one which was executed by the defendant in this case. It is our contention that these notes with the collateral pledges specify and it is the intent of the parties and the understanding of the parties at the time that the bank 30

shall have a right to dispose of the collateral in its discretion, and not—nor does the law make it a duty on the part of the bank to dispose of the stock. Now, in this particular instance the defendant is endeavoring to make a duty or impose a duty on the bank purely at the request of the obligor or the pledgor that the stock be sold.

10

(After further argument.)

The Court: The motion to direct a verdict for the plaintiff will be denied, because as I understand the law the Franklin Trust Company should have sold the collateral when requested to do so by the defendant, and it is a question for the jury as to whether or not the request was made, and I am therefor going to submit the question to the jury.

20

(Exception noted for the plaintiff.)

(At this point, the further trial of the case was adjourned until January 31st, 1935, at 10:00 o'clock A. M.)

30

Camden, N. J., January 31st, 1935.

Trial of the case resumed on the above date at ten o'clock A. M., pursuant to adjournment, in the presence of counsel for the respective parties. 10

CHARGE OF THE COURT.

PALMER, J.:

Ladies and gentlemen of the jury:

This is a suit brought by the Franklin Trust Company, Luther A. Harr, Secretary of Banking of the Commonwealth of Pennsylvania in possession of the Franklin Trust Company, as plaintiff against Edmund Goerke as defendant to recover the amount alleged to be due upon a certain demand note dated December 26th, 1930, in the sum of \$18,000.00, signed by the defendant Goerke and for the payment of which note there were pledged certain stocks which are listed on the face of the note. This is what is known as a collateral note, that is, one given by the maker thereof and certain collateral, in this case stock, given as security for the payment of that note. 20 30

The defendant admits the execution of this note, admits the delivery of the stock listed on this note as collateral security for its payment, and the de-

defendant further admits that if the plaintiff is entitled to a verdict against him, it should be for the sum of \$15,776.15. That is the sum that the plaintiff alleges to be due, with interest to date and after having given credit on the face of the note for the amount received from the sale of securities, the amount received by the appropriation of a deposit that the defendant had with the bank, and interest on the indebtedness. So that if you find that the plaintiff is entitled to a verdict, it would be for the sum of \$15,776.15.

The defendant presents, ladies and gentlemen, a counter-claim to this amount. That, in effect, is a suit by the defendant Goerke against the Franklin Trust Company, the plaintiff, to recover the amount alleged to be due to the defendant by reason of the negligence of the plaintiff in not selling stock belonging to the defendant which had been pledged as collateral for this note at a time when the defendant ordered the plaintiff to sell that stock. You will recall some testimony to the effect that the defendant, in February of 1931, had an interview with an officer of the plaintiff bank and stated to such officer that he wanted the stock sold. You will recall that subsequent thereto, namely, in May of 1931, a letter was written which you will have. The exact date of that letter I do not have before me, but a letter in May of 1931 told the plaintiff bank that the defendant wanted the stock sold and the proceeds applied to his indebtedness to the bank and the balance paid to him.

If you find that the plaintiff bank was ordered by the defendant to sell the stock held as collateral

Charge of the Court

and to apply the proceeds to the note and to pay the balance to the defendant, then it became the duty of the bank to sell that stock within a reasonable time thereafter, and if you find that the plaintiff bank neglected to fulfil such duty, then the defendant is entitled to recover on his counter-claim the loss occasioned by such negligence, and that amount is to be measured by the difference in the market value of the stock within a reasonable time after the plaintiff was ordered to sell it and the price that was received by the plaintiff bank for the stock when sold. There is testimony in this case as to the market value of the stock at certain periods of time; there is also certain testimony as to the value of the stock as a whole. From that testimony you are to determine what would have been the value of that stock within a reasonable time after the bank was ordered to sell it.

You see, ladies and gentlemen, this counter-claim is founded upon the theory of negligence of the plaintiff bank in not performing its duty to sell the stock when ordered to do so by the defendant. Negligence is the failure to do that which a reasonably prudent person should do under the circumstances with which he is confronted, or the doing of some act that a reasonably prudent person should not do under the circumstances with which he is confronted.

The burden is upon the defendant, as to his counter-claim, to satisfy you by the greater weight of the believable testimony of the truth of his allegations as to that counter-claim. That, of course, does not mean the greater number of witnesses; it means

the quality of the testimony rather than the quantity, but so far as the defendant's claim upon his counter-claim is concerned, I say to you that the burden is upon him to satisfy you by the greater weight of the believable testimony as to the truth of his allegations.

If you find, ladies and gentlemen, that the defendant is entitled to a verdict upon his counter-claim, then that verdict, that amount that you find is to be set off as against the note in controversy. If you find that the defendant is entitled to a verdict, then you are to take the face of the note, which was \$18,000.00, and credit on the face of that note the amount that you find to be the value of the stock if sold within a reasonable time after the plaintiff was ordered to do it and the amount of the defendant's deposit with the Franklin Trust Company which was appropriated on account of the note. Those two things, ladies and gentlemen, if you find that the defendant is entitled to a verdict, should be considered by you as to the amount of that verdict, namely, what you find to be the value of the stock within a reasonable time after the plaintiff bank was ordered to sell it plus the amount on deposit with the bank at the time it was closed, namely, the sum of \$1058.80, which was subsequently appropriated by the bank, which it had a right to do, on account of the note.

You see, I am trying to indicate to you the situation in the event that you find that the defendant is entitled to a verdict on his counter-claim. If you find that he is, then you are to take as a basis the amount due from him to the plaintiff bank, the face

Charge of the Court

of the note, and make the allowances that you find. If the amount that you find the defendant to be entitled to on the counter-claim, if you find that he is entitled to any sum, is in excess of the sum of \$18,000.00, then the defendant is entitled to a verdict for that excess.

Now, I have tried to make the situation plain to you. If the defendant is not entitled to anything on his counter-claim, then the verdict should be for the plaintiff in the sum of \$15,776.15. If you find from the testimony that the defendant is entitled to a verdict on his counter-claim, then you must reach that amount by taking \$18,000.00 as being the amount due to the bank—or rather, being the amount against which the counter-claim is to be credited, and if you find from the testimony that the defendant is entitled to more than \$18,000.00 upon his counter-claim, then he should have a verdict on his counter-claim for the difference between the amount that you find he is entitled to and the sum of \$18,000.00.

I have certain requests to charge from the plaintiff, the first of which is refused.

The second: “The defendant is bound to show before he would be entitled to any damages on his counter-claim that the bank was guilty of negligence; and, that the mere failure to sell collateral is only some evidence of negligence, and not conclusive,” and I so charge.

The third is refused.

Fourth: “If the jury finds that the defendant made interest payments on the note after the request was made by him to the bank to dispose of

his collateral, and which collateral was not sold, that such conduct is some evidence of the acknowledgment by defendant of his indebtedness to the bank," and I so charge you.

Mr. Stamler: If your Honor please, I withdraw mine. I think your Honor has covered practically
10 all of my requests to charge.

The Court: The defendant's requests, then, are withdrawn.

Ladies and gentlemen, this is a case of importance to all of the parties. It is to be decided by you solely and entirely upon the facts as you find them. You are to find the facts from the testimony of the witnesses and the exhibits that have been offered. To those facts apply the rules of law as
20 I have given them to you, bearing in mind that you are solely and entirely the judges of the facts in this case. What counsel may have said or what I may have said with regard to the testimony is not controlling upon you. You are to take your recollection of the testimony and find the facts from the testimony, and to those facts apply the rules of law as I have given them to you.

You may retire.

30

PLAINTIFF'S EXCEPTIONS TO CHARGE.

Mr. Sakin: I take exception to your Honor's refusal to charge plaintiff's requests Nos. 1 and 3, as follows:

Plaintiff's Requests for Charge

“First: The plaintiff, being the holder of the note, had the right in the event of default to sell the collateral at any time, without demand, in accordance with the terms of the note, and, the plaintiff was not duty-bound to dispose of the collateral at the request of the defendant unless the plaintiff and the defendant entered into an agreement, which agreement in order to be valid in law would have 10 to be supported by consideration. In this case there was no consideration to support any such agreement.”

“Third: In the event of a verdict in favor of the defendant, such verdict would have to be directed against the Franklin Trust Company, and not against the Secretary of Banking of the Commonwealth of Pennsylvania, for the reason that there is no evidence to show any mutual dealing 20 between the Secretary of Banking of the Commonwealth of Pennsylvania and the defendant.”

 PLAINTIFF'S REQUESTS FOR CHARGE.

First: The plaintiff, being the holder of the note, had the right in the event of default to sell the collateral at any time, without demand, in ac- 30 cordance with the terms of the note, and, the plaintiff was not duty-bound to dispose of the collateral at the request of the defendant unless the plaintiff and the defendant entered into an agreement, which agreement in order to be valid in law would have

to be supported by consideration. In this case there was no consideration to support any such agreement.

Second: The defendant is bound to show before he would be entitled to any damages on his counter-claim that the bank was guilty of negligence; and, that the mere failure to sell collateral is only some evidence of negligence, and not conclusive.

Third: In the event of a verdict in favor of the defendant, such verdict would have to be directed against the Franklin Trust Company, and not against the Secretary of Banking of the Commonwealth of Pennsylvania, for the reason that there is no evidence to show any mutual dealing between the Secretary of Banking of the Commonwealth of Pennsylvania and the defendant.

Fourth: If the jury finds that the defendant made interest payments on the note after the request was made by him to the bank to dispose of his collateral, and which collateral was not sold, that such conduct is some evidence of the acknowledgment by defendant of his indebtedness to the bank.

JUDGMENT.

NEW JERSEY SUPREME COURT.

FRANKLIN TRUST COMPANY,
LUTHER A. HARR, Secretary of Banking of the Commonwealth of Pennsylvania in possession,
Plaintiff,
v.
EDMUND GOERKE,
Defendant.

Action at Law.
On Postea.
Judgment for Defendant.
John J. Stamler,
Attorney.

10

20

Judgment entered this fifth day of February, A. D. nineteen hundred and thirty-five in favor of defendant and against the plaintiff for the sum of \$12,983.00 twelve thousand nine hundred eighty-
51.50 three dollars damages and fifty-one dol-
lars and fifty cents costs.
\$13,034.50

30

THOMAS J. BROGAN,
Chief Justice.

10 I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in above-stated cause, which said judgment is recorded in this office in Vol. 52 of Judgments, page 409.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this fourth day of June, A. D. nineteen hundred and thirty-five.

FRED L. BLOODGOOD,
Clerk.

20 (Seal)

NOTICE OF APPEAL AND GROUNDS.

(Filed June 15, 1935.)

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

10

FRANKLIN TRUST COMPANY,
(LUTHER A. HARR, Secretary of Banking of the State of Pennsylvania, succeeding WILLIAM D. GORDON, former Secretary of Banking of the State of Pennsylvania),
Plaintiff-Appellant,
v.
EDMUND GOERKE,
Defendant-Appellee.

Action at Law.
Notice of Appeal and Grounds. 20

To John J. Stamler, Esquire, Attorney for the Defendant-Appellee in the above cause: 30

Take notice that the plaintiff in the above cause appeals to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered in this cause on the following grounds:

1. The Supreme Court, through the Circuit Judge before whom the trial of the above action was had, erred in that it admitted testimony tending to show that the defendant, during the time that the Franklin Trust Company held the note, which was the subject of the suit, requested the said Franklin Trust Company to sell the collateral which had been
10 assigned to the Franklin Trust Company as surety for the said note, which testimony was immaterial, irrelevant and in contravention of the terms of a written instrument, to wit: the note in suit, in that it was attempted by such testimony to show that there was an obligation upon the said Franklin Trust Company to sell the said collateral upon the request of the defendant when no such obligation was set forth or appeared in the said note, to which said
20 testimony the plaintiff objected at the trial, and to the admission of which it duly took an exception.

2. The Supreme Court, through the Circuit Judge before whom the trial of the above action was had, erred in admitting testimony to the effect that a certain Mr. Duphinee, an agent of the Franklin Trust Company, agreed to sell the collateral which had been assigned by the defendant to the Franklin Trust Company as security for the payment of the note in suit, which said testimony was immaterial
30 and irrelevant and in contravention of the terms of a written instrument, to wit: the note in suit, and showed no consideration for the alleged agreement on the part of the said Duphinee to sell the said collateral, which testimony was admitted over the objection of the plaintiff and an exception duly noted for the plaintiff.

Notice of Appeal and Grounds

3. The Supreme Court, through the Circuit Judge before whom the trial of the above action was had, erred in admitting as Exhibit B3 a certain letter addressed by the defendant under date of May 11, 1931, to Mr. A. B. Duphinee, Vice-President, Franklin Trust Company, Philadelphia, Pa., which letter was immaterial and irrelevant and had no legal bearing upon the matters in controversy in said suit, which said letter was admitted over the objection of the plaintiff, to which admission an exception was duly taken by the plaintiff. 10

4. The Supreme Court, through the Circuit Judge before whom the trial of the above action was had, erred in permitting a witness on the part of the defendant, one Maurice J. Ferris, to testify as to the value of certain of the stock which was pledged as collateral security for the said note in the suit from a publication known as the "Commercial Financial Chronicle" and not from his own knowledge, which said testimony was incompetent and admitted over the objection of the plaintiff, to which said admission an exception was duly taken by the plaintiff. 20

5. The Supreme Court, through the Circuit Judge before whom the trial of the above action was had, erred in refusing the plaintiff's motion to direct a verdict in its favor against the defendant, when upon the testimony produced at said trial such motion should have been granted, to the refusal of which said motion plaintiff duly took an exception. 30

6. The Supreme Court, through the Circuit Judge

before whom the trial of the above action was had, erred in refusing to charge plaintiff's first request to charge, as follows:

10 “The plaintiff, being the holder of the note, had the right in the event of default to sell the collateral at any time, without demand, in accordance with the terms of the note, and, the plaintiff was not duty-bound to dispose of the collateral at the request of the defendant unless the plaintiff and the defendant entered into an agreement in order to be valid in law would have to be supported by consideration. In this case there was no consideration to support any such agreement.”

To which refusal the plaintiff took an exception.

20 7. The Supreme Court, through the Circuit Judge before whom the trial of the above action was had, erred in refusing to charge plaintiff's third request to charge, as follows:

30 “‘In the event of a verdict in favor of the defendant, such verdict would have to be directed against the Franklin Trust Company, and not against the Secretary of Banking of the Commonwealth of Pennsylvania, for the reason that there is no evidence to show any mutual dealing between the Secretary of Banking of the Commonwealth of Pennsylvania and the defendant.’”

To which refusal the plaintiff took an exception.

MEYER L. SAKIN,

Attorney for Plaintiff.

[ENDORSED]

Service of the within notice of appeal and grounds is hereby acknowledged this 13th day of June, 1935.

John J. Stamler,
Attorney for Defendant.

10

Exhibit P1 is the note in suit and is set forth in full on pages 2-6 of this State of the Case, and, therefore, is not reprinted.

EXHIBIT P2.

1-30-35 J. C. K.

20

William D. Gordon, Secretary of Banking, of the
Commonwealth of Pennsylvania, in Possession
of the Business and Property of
Franklin Trust Company
Of Philadelphia
Fifteenth and Chestnut Streets

June 11th, 1932.

Mr. Edmund Goerke,
601 Union Avenue,
Elizabeth, N. J.

30

Dear Sir:—

Franklin Trust Company is now in possession of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania. Formal demand

the home I live in is owned by my wife, Margaret Goerke. The premises consist of a plot of ground 85 feet front by 260 feet in depth, upon which is erected a one family frame stucco dwelling house containing nine rooms and a two car garage. This house has been owned by my wife since 1930. The premises are now encumbered by a mortgage in the sum of \$17,000. held by the Jersey Mortgage and Title Company of Elizabeth. At the time the house was built, which was in 1926, the land and building cost approximately \$26,000. The taxes for 1932 are unpaid, and the interest due July 13th, 1932, has also not been paid. Under a forced sale, I doubt whether the property would bring in the amount of the mortgage, taxes and interest. A fair valuation of the property, as of the date hereof, would also indicate that the premises are worth but little above the mortgage, interest and taxes. I will furnish an appraisal under affidavit, from a reputable realtor of the City of Elizabeth, substantiating the above.

The cash in the bank cannot be used by me for the payment of obligations, because the respective banking institutions retain the deposits and have the right to apply such deposits towards the obligations due them. It is my desire to effect a compromise with the various banking institutions to whom I am indebted, and the only manner in which I can effect a compromise or make any payments, is through borrowing the requisite funds if a compromise can be effected. I have no resources of my own with which to make any cash payments to effect a compromise.

I am at present employed as manager of the

Plaintiff's Exhibits

Goerke-Kirch Company store in Elizabeth, New Jersey, and my total income for the year 1932 will be less than \$10,000. I am not certain as to how long this position will last, as the business, of which I am the manager, is not at the present time progressing very favorably.

Edmund Goerke.

10 Sworn and Subscribed to)
before me, this 23rd day)
of July, 1932.)

Milton Lowenstein
A Master in Chancery of N. J.

20 STATEMENT OF ASSETS AND LIABILITIES
OF EDMUND GOERKE, AS OF JULY 22nd,
1932.

ASSETS

| | | |
|----|--|-----------|
| | Cash, on deposit in Federal Trust Company of Newark (required in connection with loan of \$14,800. due to said bank) | \$1402.00 |
| | Central Home Trust Company of Elizabeth, savings account | 54.00 |
| 30 | National State Bank of Elizabeth, savings account | 785.00 |
| | Central Home Trust Company of Elizabeth, checking account | 157.59 |
| | National State Bank of Elizabeth, checking account | 273.00 |

SECURITY

| | |
|---|----|
| 336 Shares of the Goerke-Kirch Holding Company deposited as collateral with the Federal Trust Company of Newark (shares have no market value at present time) | |
| 500 Shares of City Stores Investment Corporation. Present value 50¢ per share. | 10 |

LIABILITIES

| | | |
|--|-----------|----|
| Due to Central Home Trust Company, of Elizabeth | \$1750.00 | |
| Due to National State Bank of Elizabeth, on endorsement for Howard R. Goerke (note recently due was protested and bank looks for payment) | 2000.00 | 20 |
| Philadelphia National Bank | 3630.50 | |
| Federal Trust Company of Newark | 14800.00 | |
| Franklin Trust Company of Philadelphia (in connection with which bank holds collateral of present market value of \$700.) | 15623.00 | |
| R. J. Goerke, Jr., of Newark, N. J. | 800.00 | |
| Due to R. J. Goerke, Sr.; 5000 shares of City Stores Company common stock; 500 shares City Stores Company class A stock and 500 shares of The Fair Company. The last group of stocks were | | 30 |

Defendant's Exhibits

loaned me by Mr. Goerke and deposited as collateral with various banks which have sold said stocks and applied the proceeds towards their loans.

10

EXHIBIT D3.

May 11, 1931.

Mr. A. V. Duphinee,
Vice Pres. Franklin Trust Company,
Philadelphia, Pa.

My dear Mr. Duphinee:

I was very much disturbed over the fact that you did not sell my collateral and liquidate my loan, and I cannot agree with you that during these trying times, as you put it, a friend of the bank, should not, for selfish purposes throw on the market, a large block of City Stores stock, as it will tend to break the market and affect many of your customers who have pledged their stock with the bank as security for their loans.

As I told you more than three months ago, I felt very nervous about continuing to hold this large block on borrowed money and therefore requested your good bank to sell it in order to liquidate my loan. I can see your point of view; if my circumstances were different, that is, if my stock was fully paid for and I had no outstanding obligations to meet you may be right, but unfortunately I am not in that situation; I therefore urge a prompt sale of my collateral and use the proceeds in the

Defendant's Exhibits

liquidation of my note and thus save me from further loss.

I note that the stock dropped yesterday and that if same is sold promptly, at a price even much lower than quoted yesterday, your loan will be fully liquidated and I will receive some money which I can use to very good advantage.

Regretting that my present financial situation 10 does not permit me to follow your kind suggestion, I remain

Very truly yours,
Edmund Goerke

 EXHIBIT D4.

NEW JERSEY SUPREME COURT. 20
CAMDEN COUNTY.

FRANKLIN TRUST COMPANY,
WILLIAM D. GORDON, Secretary of Banking of the Commonwealth of Pennsylvania, in possession,
Plaintiff,
—vs—
EDMUND GOERKE,
Defendant.

Action at Law.
NOTICE TO
PRODUCE.

30

Meyer L. Sakin, Esquire,
Attorney for Plaintiff.
Dear Sir:

Defendant's Exhibits

PLEASE TAKE NOTICE, that at the trial of the above entitled cause, the defendant will demand the production of an original letter, dated May 11, 1931, addressed to Mr. A. D. Duphinne, Vice President of the Franklin Trust Company, Philadelphia, Pa. Said letter was signed by the defendant, Edmund Goerke, and the same was delivered to Mr. 10 A. D. Duphinne aforesaid, at the Franklin Trust Company, at Philadelphia, Pa., on the 11th day of May, 1931.

Unless the same is produced secondary evidence will be offered to prove the contents of the same. Dated August 27th, 1934.

John J. Stamler,
Attorney for Defendant.

20

[ENDORSED]

Service of the within Notice to Produce is hereby acknowledged this 29th day of August, 1934.

Meyer L. Sakin
Attorney for Plaintiff.

30

EXHIBIT D5.
1-30-35 J. C. K.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

FRANKLIN TRUST COMPANY,
WILLIAM D. GORDON, Secretary
of Banking of the
Commonwealth of Penn-
sylvania, in possession,
Plaintiff,
—vs—
EDMUND GOERKE,
Defendant.

Action at Law.
INTERROGA-
TORIES.

10

To Franklin Trust Company, William D. Gordon,
Secretary of Banking of the Commonwealth of
Pennsylvania, in possession, plaintiff.
Gentlemen:

20

PLEASE TAKE NOTICE that the defendant in
pursuance to the statute in such case made and
provided require that you shall answer the within
interrogatories, within ten days from the date of
the service thereof upon you:

30

1st INTERROGATORY: On February 15, 1931;
March 15, 1931; April 15, 1931 and on May 11, 1931,
how many shares of the following stocks, City
Stores Common; City Stores A; Lit Brothers New;

Defendant's Exhibits

Lit Brothers, Preferred and Fair Company, did the Franklin Trust Company hold as collateral security for loans made to its customers and others?

2nd INTERROGATORY: on February 15, 1931; March 15, 1931; April 15, 1931 and on May 11, 1931, how many shares of stock did the Franklin Trust
 10 Company own of the following designated stocks: City Stores, Common; City Stores A; Lit Brothers New; Lit Brothers Preferred and Fair Company?

3rd Interrogatory: Did the plaintiff sell the defendant's securities described in the plaintiff's complaint?

4th Interrogatory: If the foregoing interrogatory is answered in the affirmative, give date, name
 20 and address of the person to whom the same was sold and the consideration received therefor, itemizing each and every transaction concerning the sale of the stocks mentioned in the foregoing interrogatories.

Dated August 27th, 1934.

John J. Stamler,
 Attorney for Defendant.

[ENDORSED]

30

Service of the within Interrogatories is hereby acknowledged this 29th day of August, 1934.

Meyer L. Sakin,
 Attorney for Plaintiff.

EXHIBIT D6.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

FRANKLIN TRUST COMPANY,
WILLIAM D. GORDON, Secretary
of Banking of the
Commonwealth of Penn-
sylvania, in possession,
Plaintiff,
—vs—
EDMUND GOERKE,
Defendant.

Action at Law.
ANSWERS TO IN-
TERROGA-
TORIES.

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20

To the defendant, Edmund Goerke, and his attorney, John J. Stamler, Esquire:

PLEASE TAKE NOTICE that the following are the answers to the Interrogatories served upon me on August 29th, 1934, in the above-captioned matter.

30

1. The first interrogatory propounded is irrelevant.

2. The second interrogatory propounded is irrelevant.

Defendant's Exhibits

3. Plaintiff has sold the securities as set out in the fourth interrogatory with the exception of 100 shares of Lit Brothers common, and 12 shares of Lit Brothers preferred.

4. The following is the list of securities sold, together with the dates thereof, and the net amounts received therefor, after deductions of taxes and commissions, the moneys realized being applied against the indebtedness of the defendant. The securities were sold through the Philadelphia National Company, who did not advise as to the names of the purchasers:

| | | | |
|----|---------|--------------------------------|---------|
| | 6-29-32 | 100 shares City Store Co. Com | |
| | | @ $\frac{3}{8}$ | \$27.50 |
| | 6-29-32 | 1700 shares City Store Co. Com | |
| | | @ $\frac{3}{8}$ | 467.50 |
| 20 | 6-29-32 | 25 shares City Store Co. Com | |
| | | @ $\frac{1}{4}$ | 3.75 |
| | 6-28-32 | 200 shares The Fair Co. Com- | |
| | | mon @ $4\frac{1}{4}$ | 819.00 |
| | 5-31-33 | 50 shares City Stores Co. "A" | |
| | | @ $3\frac{1}{4}$ | 159.81 |
| | 5-26-33 | 30 shares City Stores Co. "A" | |
| | | @ $3\frac{1}{4}$ | 95.82 |
| | 5-26-33 | 30 shares City Stores Co. "A" | |
| | | @ $3\frac{1}{2}$ | 103.32 |
| 30 | 6- 3-33 | 100 shares City Stores Co. "A" | |
| | | @ $3\frac{3}{4}$ | 369.81 |
| | 6- 5-33 | 10 shares City Stores Co. "A" | |
| | | @ $4\frac{1}{4}$ | 41.32 |
| | 6- 6-33 | 100 shares City Stores Co. "A" | |
| | | @ $4\frac{1}{4}$ | 419.81 |

Defendant's Exhibits

| | | | |
|---------|--------------------------------|--|-----------|
| 6-12-33 | 80 shares City Stores Co. "A" | | |
| | @ 4 | | 315.81 |
| 6-22-33 | 50 shares City Stores Co. "A" | | |
| | @ 4 $\frac{1}{8}$ | | 203.56 |
| 6-22-33 | 50 shares City Stores Co. "A" | | |
| | @ 4 $\frac{1}{8}$ | | 203.56 |
| 7- 6-33 | 100 shares City Stores Co. "A" | | |
| | @ 5 $\frac{1}{8}$ | | 502.31 10 |
| 7- 7-33 | 100 shares City Stores Co. "A" | | |
| | @ 5 $\frac{5}{8}$ | | 552.31 |

Respectfully,

Meyer L. Sakin,

Attorney for Plaintiff.

Dated: September 7th, 1934

STATE OF PENNSYLVANIA } SS: 20
 COUNTY OF PHILADELPHIA }

JOHN J. SULLIVAN, of full age, being duly sworn according to law, on his oath, deposes and says:

That I am the deputy receiver appointed by William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, to assist in the continuing or liquidation of the business and affairs of the Franklin Trust Company, the affairs of which Bank were taken into possession by the Department of Banking of the Commonwealth of Pennsylvania, and he is authorized by said William D. Gordon, Secretary of Banking as aforesaid, the plaintiff in the foregoing matter, in which the in-

terrogatories and the answers thereunto are made to make these statements in his behalf;

That he is familiar with the case, and the facts set out in the said answers and the statements therein are true to the best of his knowledge as he verily believes.

J. J. S.

10 Sworn to and subscribed :
before me, this 11th day :
of September, 1934 :
Jane L. Sheldon

20

30

Order Substituting Plaintiff

ORDER SUBSTITUTING PLAINTIFF.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

10

FRANKLIN TRUST COMPANY,
 WILLIAM D. GORDON, Sec-
 retary of Banking of the
 Commonwealth of Penn-
 sylvania, in possession,
Plaintiff,

v.

EDMUND GOERKE,
Defendant.

Action at Law.
 Order Substituting
 Plaintiff.

20

It being represented to the Court, that the term of office of William D. Gordon, as Secretary of Banking of the Commonwealth of Pennsylvania, has terminated, and that the present Secretary of Banking of the Commonwealth of Pennsylvania, is one, Luther A. Harr; and application now being made in open Court, by the Attorney for the plaintiffs, for leave to substitute Luther A. Harr, Secretary of Banking of the Commonwealth of Pennsylvania, in possession, as plaintiff, in the place and stead of William D. Gordon; 30

It is on this 30th day of January, 1935, Ordered that Luther A. Harr, Secretary of Banking of the

Order Substituting Plaintiff

Commonwealth of Pennsylvania, in possession, be and is hereby substituted as party plaintiff, in the place and stead of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession. Order actually signed March 22nd, 1935.

10

V. CLAUDE PALMER,
Judge.

We consent to the making of the foregoing Order.

MEYER L. SAKIN,
Attorney for Plaintiff.

Entered March 25, 1935, on motion of

JOHN J. STAMLER,
Attorney for Defendant.

20

30

POSTEA.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

| | | |
|---|-----------------------------|----|
| FRANKLIN TRUST COMPANY, LUTHER A. HARR, Secretary of Banking of the Commonwealth of Penn- sylvania, in possession, <i>Plaintiff,</i> | } Action at Law. Postea. | 10 |
| v. EDMUND GOERKE, <i>Defendant.</i> | | 20 |

This cause was tried before V. Claude Palmer, Judge, with a jury, at the Camden Circuit on January 30th and 31st, 1935.

The jury rendered a general verdict against the plaintiff and in favor of the defendant for Twelve Thousand nine hundred and eighty-three dollars (\$12,983.00).

V. CLAUDE PALMER,
Judge. 30

STIPULATION.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10

FRANKLIN TRUST COMPANY,
LUTHER A. HARR, Secretary of Banking of the
Commonwealth of Pennsylvania, &c.,
Plaintiff-Appellant,

v.

20 EDMUND GOERKE,
Defendant-Appellee.

Action at Law.
Stipulation.

In lieu of printing the four volumes of the Commercial Financial Chronical, offered in evidence and marked "Exhibit D1," it is stipulated as follows:

1. That said publication has been printed weekly since June 23, 1879.

30

2. That the four volumes so referred to are dated February 7, 1931, February 14, 1931, May 16, 1931 and May 23, 1931, respectively.

3. That the said publication records and reports

Stipulation

weekly, the total sales of all stocks and bonds traded in on the New York Stock Exchange and the New York Curb Exchange, and the prices at which they were traded. Dated August 19, 1935.

MEYER L. SAKIN,
*Attorney for Plaintiff-
Appellant.*

JOHN J. STAMLER, 10
*Attorney for Defendant-
Appellee.*

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NOTICE.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

| | | |
|--|---|---------------------------|
| <hr style="width: 10%; margin: 0 auto;"/> | | 10 |
| FRANKLIN TRUST COMPANY, WILLIAM D. GORDON, Sec- retary of Banking of the Commonwealth of Penn- sylvania, in possession, <i>Plaintiff,</i> | } | Action at Law. Notice. |
| v. | | |
| EDMUND GOERKE, <i>Defendant.</i> | } | 20 |
| <hr style="width: 10%; margin: 0 auto;"/> | | |

*To Saul and Joseph E. Cohn, Esqrs., Attorneys for
Defendant:*

Sirs:

Please Take Notice that I shall apply to the Hon-
orable Henry H. Eldredge, Circuit Court Judge, as
Supreme Court Commissioner, at the Circuit Court 30
Room, Court House Annex, in Camden, on Friday,
January 12, 1934, at the hour of ten o'clock in the
forenoon, or as soon thereafter as counsel can be
heard, for an order to strike the answer and counter-
claim filed by you in the above-entitled cause on the

Affidavit

ground that the allegations contained in said answer and counter-claim are untrue, and sham, and that the allegations contained in said answer and counter-claim are also frivolous, and for summary judgment herein. My application shall be supported by the affidavit annexed hereto.

10

MEYER L. SAKIN,
Attorney for Plaintiff.

AFFIDAVIT.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

| | | |
|----|--|--------------------------------|
| 20 | FRANKLIN TRUST COMPANY, WILLIAM D. GORDON, Sec- retary of Banking of the Commonwealth of Penn- sylvania, in possession, <i>Plaintiff,</i> | } Action at Law. Affidavit. |
| | v. | |
| | EDMUND GOERKE, <i>Defendant.</i> | |

30 State of Pennsylvania, }
County of Philadelphia, } ss.

JOHN J. SULLIVAN, of full age, being duly sworn according to law, upon his oath, deposes and says:

That I am Deputy Receiver of the Franklin Trust Company appointed by William D. Gordon, Secre-

Affidavit

tary of Banking of the Commonwealth of Pennsylvania to assist in the continuing or liquidation of the business and property of the said Franklin Trust Company, the affairs of which bank were taken into possession by the Department of Banking of the Commonwealth of Pennsylvania; I am familiar with the facts concerning the within matter, having possession of all the records and things 10 dealing with said transaction;

That the obligation of the defendant, Edmund Goerke, arose by virtue of a note executed by him to the Franklin Trust Company, dated December 26th, 1930, a copy of which note is hereto annexed; that at the time the Secretary of Banking took possession of the business and property of the Franklin Trust Company on October 6, 1931, there was due from the said defendant, Edmund Goerke, the sum of \$18,000.00, nothing having been paid on account of said loan; 20

That the said Edmund Goerke is entitled to a credit of \$1,058.80 being the proceeds of a checking account in said bank of the said Edmund Goerke, which reduces said obligation to the sum of \$16,941.20;

That the said Edmund Goerke delivered as collateral security for said obligation, the following shares of stock at the time the note was originally executed: 30

- 1825 shares of City Stores Common Stock
- 700 shares of City Stores A
- 100 shares of Lit Brothers new
- 12 shares of Lit Brother Preferred
- 200 shares of Fair Company

Affidavit

That there has been realized from the sale of most of said stock the sum of \$4,285.19, which was applied against interest due on the obligation and also on account of principal thus reducing the obligation of the defendant to the sum of \$14,420.67, with interest from July 15, 1933. The stocks sold and the amounts received for each are as follows:

| | | |
|----|--------------------------------|----------|
| 10 | 200 shares Fair Company | \$819.00 |
| | 25 shares City Stores Common | 3.75 |
| | 1700 shares City Stores Common | 467.50 |
| | 100 shares City Stores Common | 27.50 |
| | 30 shares City Stores—Class A | 103.32 |
| | 30 shares City Stores—Class A | 95.82 |
| | 50 shares City Stores—Class A | 159.81 |
| | 100 shares City Stores—Class A | 419.81 |
| | 10 shares City Stores—Class A | 41.32 |
| | 100 shares City Stores—Class A | 369.81 |
| 20 | 80 shares City Stores—Class A | 315.81 |
| | 50 shares City Stores—Class A | 203.56 |
| | 50 shares City Stores—Class A | 203.56 |
| | 100 shares City Stores—Class A | 552.31 |
| | 100 shares City Stores—Class A | 502.31 |

That the note in question is the property of the plaintiff in the suit;

That said note was complete and regular upon its face;

30 That there are no other off-sets or credits to which the defendant is entitled other than as heretofore mentioned;

That to the best of deponent's knowledge and belief the said bank was at no time requested to dispose of the securities by the defendant; that the bank has disposed of the securities above named,

Affidavit

and has applied the proceeds therefrom to the said obligation due on the note of the said defendant;

That no agreement of any kind was entered into with the defendant whereby the stocks were to be sold at any particular time or in any manner, inasmuch as the note, on its face, specifically provides and sets out the rights and privileges of the holder thereof; 10

This deponent verily believes that the allegations set out in the answer and counter-claim of the defendant are untrue; that the said defendant has no legal defense to the said action; and that the said answer and counter-claim is filed solely for the purpose of hindrance and delay;

Deponent further says that there is justly due and owing from the defendant to the plaintiff, the sum of \$14,420.67 with interest thereon from July 15, 1933. 20

JOHN J. SULLIVAN.

Sworn to and subscribed before me, this 28th day of December, 1933.

ALBERT E. LEONARD,
Notary Public.

(Seal)

My commission expires March 8, 1937.

I hereby certify that I am not a stockholder, director or officer of said corporation. 30

[ENDORSED]

Due and legal service of the within Notice acknowledged this 3rd day of January, 1934.

Saul and Joseph E. Cohn,
Attorneys for Defendant.

AFFIDAVIT.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

10

FRANKLIN TRUST COMPANY,
WILLIAM D. GORDON, Sec-
retary of Banking of the
Commonwealth of Penn-
sylvania, in possession,
Plaintiff,

v.

20 EDMUND GOERKE,
Defendant.

Action at Law.
Affidavit.

State of New Jersey, }
County of Essex, } ss.

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

I am the defendant in the above stated action.
30 I have read the affidavit of John J. Sullivan filed by him in the above cause in connection with a motion to strike out my answer and counter-claim.

In reply to the said affidavit and for the purpose of stating the true facts in connection with my answer and counter-claim, I do hereby say that I do

Affidavit

admit that on or about December 26th, 1930, I did execute a demand note in the principal sum of \$18,000.00 to the Franklin Trust Company of Philadelphia. I deposited as collateral for the said obligation the following certificates:

| | |
|---|----|
| 1825 shares of City Stores Common Stock | |
| 700 shares of City Stores A— | |
| 100 shares of Lit Brothers new | 10 |
| 12 shares of Lit Brothers Preferred | |
| 200 shares of Fair Company. | |

At the time that I borrowed the sum of \$18,000.00 I had a substantial account and sum of money on deposit with the bank. On or about February 1st, 1931, I still owed the Franklin Trust Company the entire principal sum of the note and I decided that it would be better business for me to liquidate the obligation. Thereupon I communicated by telephone 20 with Mr. A. B. Dauphinee, the vice-president of the Franklin Trust Company and requested him to sell my collateral at the then market price. This was on or about February 1st, 1931. At that time I calculated the stock, if sold in the open market at the market price, would realize over \$30,000.00. I would therefore, have had a substantial sum of money over and above the obligation due to the Franklin Trust Company. For the purpose of further confirming these instructions to the Franklin 30 Trust Company, within forty-eight hours after February 1st, 1931, I called at the office of the Franklin Trust Company, at Chestnut and 15th Streets, Philadelphia, as at that time I was employed by Lit Brothers, a corporation of the State of Penn-

sylvania, having its business at Eighth Street and Market Street, Philadelphia, Pa., and I was attendant at said business in the City of Philadelphia daily. When I called at the bank, I spoke to Mr. A. B. Dauphinee with whom I had communicated a day or two before, and I again instructed him, and told him, to sell the collateral that I had deposited
10 with the bank.

Shortly thereafter, the stock began to fall in price and I again asked him why they had not sold the stock. At that time the stock might not have brought sufficient to liquidate the obligation, and this officer stated to me that he thought the stock would go up so that I would have enough out of the sale of the securities to satisfy the obligation in full. It was not long after this that the bank was taken over by the Secretary of Banking of the Commonwealth of Pennsylvania, and not long after this
20 occurred the stock went down greatly in price, and, without consulting me in any manner whatsoever, practically all of the said stock was thrown upon the market and sold at ridiculously low prices.

During all this period I was connected with City Stores Company, in the capacity of vice-president, whose stock represented the greatest part of the collateral deposited, and I was thoroughly familiar with the situation of City Stores Company, and
30 knew that at the end of 1931 an obligation of \$11,200,000 was maturing and that the company had no immediate prospects of raising funds to meet this obligation. I therefore deemed it advisable to take advantage of the favorable market price existing in February, 1931, and sell the stock at that

Affidavit

time. It is therefore untrue that I am indebted to the Franklin Trust Company or its successor, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession, in any sum whatsoever, but maintain that had the Franklin Trust Company followed my instructions, that the debt would have been liquidated and I would have been left with ten or twelve thousand dollars 10 for myself.

EDMUND GOERKE.

Sworn and subscribed to before me, this 5th day of January, 1934.

CHARLES E. COHEN,
*Attorney at Law of New
Jersey.*

20

30

ORDER.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

| | | | |
|----|--|---|--------------------------|
| 10 | FRANKLIN TRUST COMPANY, WILLIAM D. GORDON, Sec- retary of Banking of the Commonwealth of Penn- sylvania, in possession, <i>Plaintiff,</i> | } | Action at Law. Order. |
| v. | EDMUND GOERKE, <i>Defendant.</i> | | |

20 This matter being opened to the court by Meyer L. Sakin, attorney for the plaintiff, in the presence of Saul and Joseph E. Cohn, attorneys for the defendant, on application for an order to strike the answer and counter-claim filed by the defendant herein; and the Court having heard and considered the arguments of counsel and being satisfied with the same, and good cause being shown for the entry of this order;

30 It is, on this 5th day of March, 1934, Ordered that the motion to strike the answer and counter-claim filed herein by the defendant, be and the same is hereby denied, with costs.

HENRY H. ELDREDGE,
*Circuit Court Judge, and Su-
 preme Court Commissioner.*

AMENDED GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

10

FRANKLIN TRUST COMPANY
(LUTHER A. HARR, Sec-
retary of Banking of the
State of Pennsylvania,
succeeding WILLIAM D.
GORDON, former Secre-
tary of Banking of the
State of Pennsylvania),
Plaintiff-Appellant,

v.

EDMUND GOERKE,
Defendant-Appellee.

Action at Law.
Amended Grounds of
Appeal.

20

The plaintiff hereby amends its grounds of appeal in the above stated cause by having the same read as follows:

30

1. That upon motion duly made by the plaintiff before the Honorable Henry H. Eldredge, then Circuit Court Judge, the plaintiff moved to strike the answer and counter-claim of the defendant; but the said Circuit Court Judge, upon such motion, re-

fused the same, and thereupon committed error and gross abuse of his judicial discretion in refusing such motion, the same going not only to the merits of the case, but also being a challenge to the jurisdiction of this Court to entertain the said answer and counter-claim.

- 10 2. The Supreme Court, through the Circuit Court before whom the trial of the above action was had, erred in refusing to charge plaintiff's third request to charge, as follows:

20 "In the event of a verdict in favor of the defendant, such verdict would have to be directed against the Franklin Trust Company, and not against the Secretary of Banking of the Commonwealth of Pennsylvania, for the reason that there is no evidence to show any mutual dealing between the Secretary of Banking of the Commonwealth of Pennsylvania and the defendant."

To which refusal the plaintiff took an exception.

3. The Supreme Court, through the Circuit Judge before whom the trial of the above action was had, erred in refusing to charge plaintiff's first request to charge as follows:

30 "The plaintiff, being the holder of the note, had the right in the event of default to sell the collateral at any time, without demand, in accordance with the terms of the note, and the plaintiff was not duty-bound to dispose of the collateral at the request of the defendant unless

Amended Grounds of Appeal

the plaintiff and the defendant entered into an agreement in order to be valid in law would have to be supported by consideration. In this case there was no consideration to support any such agreement.”

To which refusal the plaintiff took an exception.

4. The Supreme Court, through the Circuit Court Judge before whom the trial of the above action was had, erred in that it admitted testimony tending to show that the defendant during the time that the Franklin Trust Company held the note, which was the subject of the suit, requested the said Franklin Trust Company to sell the collateral which had been assigned to the Franklin Trust Company as security for the said note, which testimony was immaterial, irrelevant and in contravention of the terms of a written instrument, to wit: the note in suit, in that it was attempted by such testimony to show that there was an obligation upon the said Franklin Trust Company to sell the said collateral upon the request of the defendant when no such obligation was set forth or appeared in the said note, to which said testimony the plaintiff objected at the trial, and to the admission of which it duly took an exception as follows, to wit:

“Q. Did you have any discussion with Mr. Duphinee at that time as to what the value of that stock was on that day when you were there in February? 30

A. I did.

Q. What was it?

Amended Grounds of Appeal

A. It was in the neighborhood of \$30,000.00.

Q. What did Mr. Duphinee say?

10 A. Mr. Duphinee advised me not to do it. He said it was only a condition and the market would come back and my securities would come back at the same time. He advised me not to. I wasn't satisfied, and he said, 'Think it over
for a day or two,' which I did, and I called him on the phone and asked him to please sell out, I was going away. At that time he said he would give it out in small quantities as best he could, and I left it that way and I went on a business trip down south.

Q. Did he give you any reason why he would advise you not to sell?

20 Mr. Sakin: If your Honor please, I object to this testimony. I don't think that this has any bearing on the answer filed. I mean, it isn't within the purview of the answer filed, and at the same time it is in direct contradiction of the terms of the written instrument, which doesn't prohibit the bank from disposing when ever it sees fit.

* * * * *

The Court: The objection will be overruled. You may proceed.

30 (Exception noted for the plaintiff.)"

5. The Supreme Court, through the Circuit Judge before whom the trial of the above action was had, erred in refusing the plaintiff's motion to direct a verdict in its favor against the defendant, when upon the testimony produced at said trial such mo-

Amended Grounds of Appeal

tion should have been granted, to the refusal of which said motion plaintiff duly took an exception.

6. The Supreme Court, through the Circuit Judge before whom the trial of the above action was had, erred in admitting testimony to the effect that a certain Mr. Duphinee, an agent of the Franklin Trust Company, agreed to sell the collateral which had been assigned by the defendant to the Franklin Trust Company as security for the payment of the note in suit, which said testimony was immaterial and irrelevant and in contravention of the terms of a written instrument, to wit; the note in suit, and showed no consideration for the alleged agreement on the part of the said Duphinee to sell the said collateral, which testimony was admitted over the objection of the plaintiff and an exception duly noted for the plaintiff, as follows, to wit: 10 20

“Q. Did he give you any reason why he would advise you not to sell?

A. Yes, he told me that the market, he thought the market would come back.

* * * * *

Q. You don't remember that; all right. Now, after you had that conversation, what did Mr. Duphinee agree to do?

Mr. Sakin: I object, if your Honor please. My argument is this, that an agreement can be made between the debtor and the creditor provided there is consideration for that agreement, when it comes to varying the terms of this instrument. 30

The Court: Well, I don't understand, Mr.

Sakin, that it does it; from what you have read me of the note, I can't see anything yet that varies the terms of that instrument.

(Exception noted for the plaintiff.)"

7. The Supreme Court, through the Circuit Judge before whom the trial of the above action was had, 10 erred in admitting as Exhibit B3 a certain letter addressed by the defendant under date of May 11, 1931, to Mr. A. B. Duphinee, Vice-President, Franklin Trust Company, Philadelphia, Pa., which letter was immaterial and irrelevant and had no legal bearing upon the matters in controversy in said suit, which said letter was admitted over the objection of the plaintiff, to which admission an exception was duly taken by the plaintiff as follows, to wit:

20 "Q. You sent him a letter; I show you a letter dated May 11th, 1931, and marked D3 for identification, and ask you whether that is a duplicate copy or carbon copy, rather, of a letter that you sent to Mr. Duphinee at the bank?

A. That is a copy of the letter I sent Mr. Duphinee.

Mr. Stamler: I want to offer it in evidence.

Mr. Sakin: I object to the introduction.

The Court: It has been introduced and marked.

30 Mr. Stamler: For identification, sir. Now, I am offering it as a full exhibit.

Mr. Sakin: I object to that.

The Court: For what reason?

Mr. Sakin: On the ground that it can have no binding force on the bank.

Amended Grounds of Appeal

The Court: Objection overruled.
(Exception noted for the plaintiff.)
(Said letter marked Exhibit D3.)

8. The Supreme Court, through the Circuit Judge before whom the trial of the above action was had, erred in permitting a witness on the part of the defendant, one Maurice J. Ferris, to testify as to the value of certain of the stock which was pledged as collateral security for the said note in the suit from a publication known as the "Commercial Financial Chronicle" and not from his own knowledge, which said testimony was incompetent and admitted over the objection of the plaintiff, to which said admission an exception was duly taken by the plaintiff as follows, to wit:

"Q. Can you tell me—tell us now by using this publication as to what the market value of the City Stores was during the first week in February of 1931? 20

A. You asked for the City Stores common?

Mr. Sakin: I object, if your Honor please.

The Court: For what reason?

Mr. Sakin: On the ground that it is not the best evidence.

The Court: What is the best evidence?

Mr. Sakin: Someone from the New York Stock Exchange would be a better witness. This is tantamount to hearsay. 30

The Court: What have you to say, Mr. Stamler, as to that?

Mr. Stamler: He is an expert, if your Honor please.

Amended Grounds of Appeal

The Court: Well, that is not the point. He isn't testifying from his own knowledge; he is going to testify from a publication, isn't he?

Mr. Stamler: No human being could possibly testify that way.

The Court: You urge the testimony?

10

Mr. Stamler: I beg your pardon?

The Court: You urge the testimony?

Mr. Stamler: I do, sir.

The Court: The objection will be overruled. (Exception noted for the plaintiff.)"

MEYER L. SAKIN,

*Attorney for Plaintiff-
Appellant.*

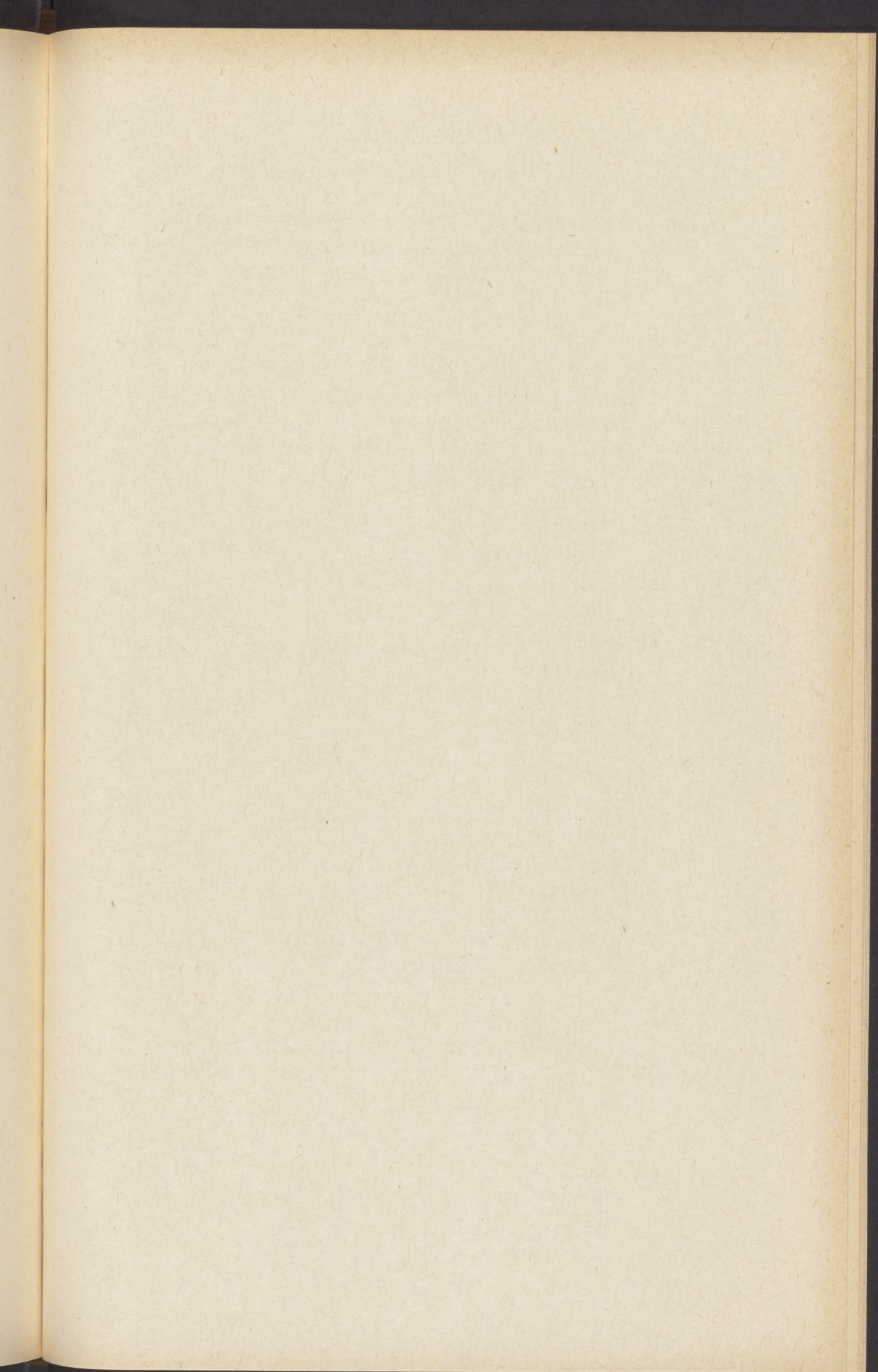
20 Consent is hereby given to the filing of the above amended grounds of appeal; legal service of a copy hereof is hereby acknowledged this 16th day of September, 1935.

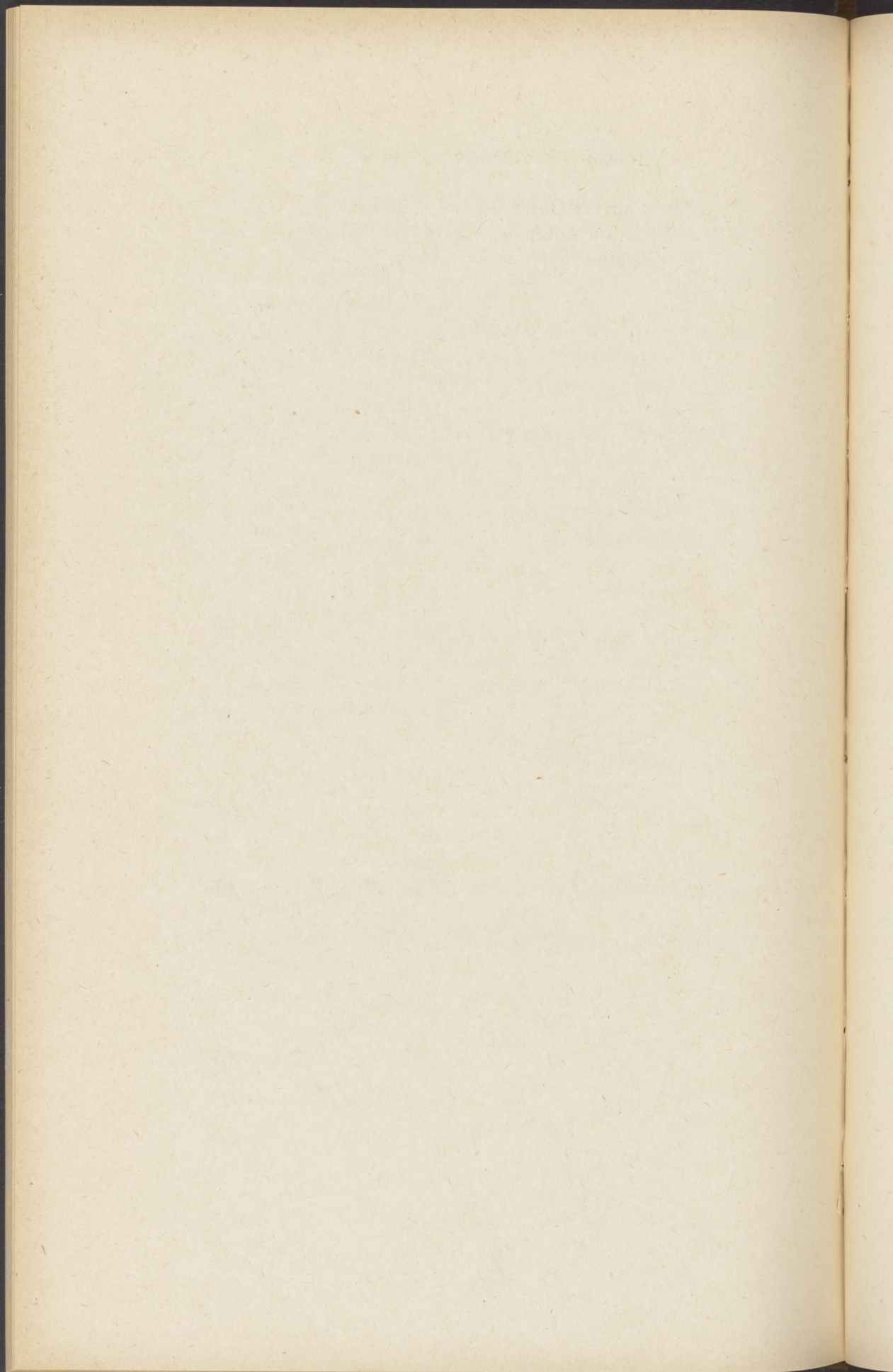
JOHN J. STAMLER,

*Attorney for Defendant-
Appellee.*

30 9-18-35 Filed with Clerk of New Jersey Supreme Court.

9-18-35 Filed with Clerk of Court of Errors and Appeals.





NEW JERSEY COURT OF ERRORS
AND APPEALS.

FRANKLIN TRUST COMPANY, LUTHER A. HARR, Secretary of Banking of the Commonwealth of Pennsylvania, succeeding WILLIAM D. GORDON, former Secretary of Banking of the Commonwealth of Pennsylvania, in possession,
Plaintiff-Appellant,

v.

EDMUND GOERKE,
Defendant-Appellee.

ACTION AT LAW.

ON APPEAL FROM SUPREME COURT, CAMDEN COUNTY.

BRIEF OF FRANKLIN TRUST COMPANY,
LUTHER A. HARR, SECRETARY OF BANKING OF THE COMMONWEALTH OF PENNSYLVANIA, SUCCEEDING WILLIAM D. GORDON, FORMER SECRETARY OF BANKING OF THE COMMONWEALTH OF PENNSYLVANIA, IN POSSESSION.

(The parenthetical references are to the State of Case.)

STATEMENT OF FACTS.

This is an appeal from a judgment of thirteen thousand thirty-four dollars and fifty cents (\$13,034.50) awarded on a counter-claim to defendant-appellee against plaintiff-appellant by a jury in the Supreme Court, Camden County, on January 30, 1935.

The suit was originally instituted by William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession of Franklin Trust Company of Philadelphia, against Edmund Goerke, to recover the sum of sixteen thousand, one hundred ninety-four dollars and twenty cents (\$16,194.20) with interest from October 1st, 1931, and costs of suit. The claim was based upon failure of the defendant-appellee to pay in full a collateral promissory note dated December 26, 1930, in the sum of eighteen thousand dollars (\$18,000) made by Edmund Goerke to the Franklin Trust Company of Philadelphia, a copy of which note is annexed to complaint (pages 2, 3 and 4). The defendant-appellee filed an answer and counter-claim (pages 6, 7 and 8) in which he admitted the execution of note but denied that the same had not been paid. By way of counter-claim defendant-appellee sought judgment for twenty-five thousand dollars (\$25,000) on each of two separate counts, the first count basing the cause of action on the failure of the Franklin Trust Company of Philadelphia to sell at the request of

defendant-appellee on February 1, 1931, the collateral pledged at the time of the execution of the collateral note upon which plaintiff-appellant's cause of action was predicated. The second count of the counter-claim was based upon an alleged conversion of said collateral on the part of the Franklin Trust Company of Philadelphia to its own use, by selling the same and keeping the proceeds thereof without the knowledge or consent of the defendant-appellee.

A motion to strike out the answer and the two counts of the counter-claim was made upon the ground that the same were sham and frivolous which notice of motion was accompanied by affidavit. (pages 117-118-119-120-121). The reply (page 9) denied any liability on either of the two counts of counter-claim, admitting only the execution of the collateral note and the delivery of collateral by defendant-appellee to the plaintiff-appellant under said collateral agreement.

After hearing, the trial Judge refused to strike out the answer and counter-claim and allowed the same to stand. A trial was had in the Supreme Court, Camden County, before Circuit Court Judge V. Claude Palmer, and a jury, on January 29, and January 30, 1935.

It was testified by plaintiff's witness, Anson L. Crispin, who was employed by the Department of Banking in Pennsylvania (p. 12), that at the time of the trial there was due on the principal \$14,420.67, with interest up to that time amounting to \$1,355.48, totaling \$15,776.15 (p. 16). The witness further

testified that the sum of \$1,058.80 credited against the note on March 7, 1932, was given by reason of the absorption of the defendant's deposit, and that the balance of the credits were the result of sales of the securities pledged.

The defendant, produced as a witness in his own behalf, testified (p. 37) that he had arranged the loan with a Mr. Duphinee, the vice-president of the trust company, depositing as security for the loan the securities enumerated in the note (p. 2). He was further permitted to testify, over objection, that he called on Mr. Duphinee and "I told him I thought I would like to sell out" the stock and cancel the note; and that Mr. Duphinee advised him not to sell, and the parties had some colloquy, following which the defendant stated that he called him on the 'phone and requested him to sell the securities, to which he replied that he would give them out "in small quantities as best he could," following which the defendant left on a business trip; and the defendant was then asked whether Mr. Duphinee gave any reason why he advised the defendant not to sell the stock. At this point objection was made to the testimony (p. 39) which, after considerable argument, was overruled by the Court (p. 44). He further testified that Mr. Duphinee "agreed to sell the stock in small lots so it would not affect the market" (p. 46). Objection was made by the plaintiff to such testimony, which was overruled and exception allowed (p. 47). He further testified, over objection, which was overruled (p. 49, *et seq.*), that he wrote a letter under date of May 11, 1931, to Mr. Duphinee,

Brief of Plaintiff-Appellant

urging a prompt sale of the collateral, the letter having been read fully in evidence (p. 49), following which he called Mr. Duphinee on the 'phone and stated that the latter promised him that he would start to dispose of the stock.

One Maurice J. Ferris, a witness produced on the part of the defendant, was permitted to testify, over the plaintiff's objection, from a publication known as the "Commercial Financial Chronicle" (p. 69-70) as to certain dealings on the New York Stock Exchange with respect to the stock which was pledged as collateral security for the note.

At the close of plaintiff-appellant's case plaintiff-appellant's attorney made a motion for a directed verdict in favor of plaintiff-appellant as follows:

"If your Honor please, I want to make a motion for a directed verdict on behalf of the plaintiff, on the following grounds: the first, is this, it is our contention that a pledgee of a demand note is not obliged to dispose of the collateral at the mere request of the pledgor, particularly in the light of a note similar to the one which was executed by the defendant in the case. It is our contention that these notes with the collateral pledges specify and it is the intent of the parties and the understanding of the parties at the time that the bank shall have a right to dispose of the collateral in its discretion, and not—nor does the law make it a duty on the part of the bank to dispose of the stock. Now, in this particular instance the defendant is endeavoring to make a duty or im-

Brief of Plaintiff-Appellant

pose a duty on the bank purely at the request of the obligor or the pledgor that the stock be sold."

which motion was denied by the Court as follows:

"The motion to direct a verdict for the plaintiff will be denied, because as I understand the law the Franklin Trust Company should have sold the collateral when requested to do so by the defendant, and it is a question for the jury as to whether or not the request was made, and I am therefore going to submit the question to the jury."

to which an exception was noted on record for plaintiff-appellant (page 82).

Plaintiff-appellant took exceptions to the Court's refusal to charge plaintiff-appellant's written requests to charge, as follows:

"First: The plaintiff, being the holder of the note, had the right in the event of default to sell the collateral at any time, without demand, in accordance with the terms of the note, and, the plaintiff was not duty-bound to dispose of the collateral at the request of the defendant unless the plaintiff and the defendant entered into an agreement, which agreement in order to be valid in law would have to be supported by consideration. In this case there was no consideration to support any such agreement." (page 89.)

"Third: In the event of a verdict in favor of the defendant, such verdict would have to be

Brief of Plaintiff-Appellant

directed against the Franklin Trust Company, and not against the Secretary of Banking of the Commonwealth of Pennsylvania, for the reason that there is no evidence to show any mutual dealing between the Secretary of Banking of the Commonwealth of Pennsylvania and the defendant." (page 89.)

GROUPS OF APPEAL.

It is noted that the grounds of appeal as originally framed, or afterwards amended by the consent of the defendant-appellee, and the amended grounds (p. 127, *et seq.*), may be summarized as follows:

1. That the Circuit Court Judge refused, upon motion, to strike the defendant's answer and counter-claim.

2. That the trial Judge refused to charge the jury pursuant to the plaintiff's third request that if there were any verdict for the defendant it would have to be against the Franklin Trust Company and not against the Secretary of Banking of the Commonwealth of Pennsylvania.

3. That the trial Judge refused to charge the jury in accordance with the plaintiff's first request that plaintiff is not bound to dispose of the collateral at the request of the defendant except in pursuance of some agreement entered into between them, supported by a consideration, no consideration for

the alleged agreement to sell the collateral being shown in this case.

4. That the trial Court admitted testimony which was immaterial, irrelevant and in contravention of the note in suit to show that there was an obligation upon the plaintiff to sell the collateral upon the defendant's request, and no such agreement appeared on the note.

5. That the trial Judge refused to direct a verdict in favor of the plaintiff, upon its motion.

6. That the trial Judge admitted testimony that the Franklin Trust Company, through its agent, agreed to sell the collateral, no consideration for his agreement in that respect being shown.

7. The trial Court admitted a certain letter, Exhibit D3 (p. 49), addressed by the defendant to the said Duphinee, requesting him to sell the collateral, which it is claimed was immaterial and irrelevant and had no legal bearing upon the matters in controversy.

8. That the trial Court permitted one Maurice J. Ferris to testify as to the value of certain of the stock which was pledged as collateral, using a publication known as the "Commercial Financial Chronicle" as the basis of his testimony.

FIRST: THE COURT ERRED IN REFUSING PLAINTIFF - APPELLANT'S MOTION TO STRIKE OUT THE ANSWER AND COUNTER-CLAIM.

A. A pledgee is under no duty to sell collateral held by him, upon the request of the pledgor, to save the pledgor from loss.

The law upon the rights and liabilities arising out of collateral notes was decided by the New Jersey Court of Errors and Appeals in the case of *Bardsley v. First National Bank and Trust Co. of Montclair*, 111 N. J. L. 512, 168 Atl. 665. The facts in that case were almost identical with the case at bar, and the law as set out in the Bardsley case should have been applied to the instant case. Justice Heher, speaking for the Court of Errors and Appeals in that case, said:

“As stated by Mr. Justice Williams, in *Glidden v. Mechanics' Nat. Bank*, 53 Ohio St. 588, 42 N. E. 995, 998, 43 L. R. A. 737: ‘Under a contract of pledge, the right of the pledgee to retain possession of the property continues until the debt or engagement for the security of which it was pledged has been discharged by payment or performance, or a tender and demand for its return. * * * On the other hand, in the absence of any stipulation to the contrary, it is the duty of the debtor to seek the creditor at the proper place and pay the debt, or tender

its payment, before he is entitled to receive back the pledge. These obligations of the parties are reciprocal, and neither can require performance by the other without himself being able and ready to perform on his part; so that, the possession of the pledgee being lawful as long as he retains the actual control and custody of the pledge, with the ability to perform his obligation, by restoring it, he is not in default until a demand, accompanied by a tender of the debt, is made. If he then refuse or fail to restore the pledge, he may be charged with its value. The action for its recovery, though treated as one for conversion, is in reality founded on the breach of the contract, and hence the creditor is entitled to recoup his debt.' Such is the prevailing rule. Jones on Collateral Securities (3d Ed.), Sec. 637; 49 C. J. 1006; Bowers on Conversion, Sec. 48."

The Bardsley case is the leading case in New Jersey and is in accord with the almost unanimous authorities in other States.

The earliest pronouncement in this court upon the subject that we have been able to locate is contained in a charge made by the late Chief Justice, then associate Justice, Depue, in the case of *New York Fire Ins. Co. v. Tooker*, 4 N. J. L. J. 334, which was tried in the Essex Circuit, where Justice Depue presided. Suit was brought upon a collateral note secured by 116 shares of Bull's Head Bank stock. Justice Depue directed a verdict against the

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defendant in this case and commented as follows after summarizing some other factors in the case:

“This covers the whole of this case, with the exception of one point on which I am asked to charge the jury, and that is that the plaintiff was under an obligation to realize out of this stock sooner. He held the stock as collateral security. He was under no obligation to exercise any diligence whatever on that subject. A party who pledges stock as collateral security takes upon himself the responsibility of the continuing solvency of the institution issuing the stock. If he fears that the institution may fail to redeem the stock, his remedy is to discharge the indebtedness. In other words, if a man borrows money of you, and gives stock as collateral security, you undertake no obligation with regard to the continuing solvency of the institution issuing that stock, but the responsibility rests on the other party.”

Justice Depue's views are born out by the decision in *Peoples' National Bank v. Ginsburg*, 108 N. J. L. 415, 156 A. 491. In that case suit was brought by the plaintiff to recover the amount due upon a note made by the defendants, for which it held certain shares of stock as collateral security. Later the defendants agreed with a third party to sell the collateral stock and called upon the Bank to turn the stock over to the purchaser upon his paying to it the price agreed upon. The bank refused to do this because the consummation of such transaction would have left a balance unpaid. The Court said:

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“After the refusal of the bank to deliver the stock in compliance with the defendants’ demand, there was a still further depreciation in the market value thereof, and the counter-claim of the defendants is based upon the theory that the refusal of the bank to comply with their demand to make the sale was without legal justification, and that, for this reason, they are entitled to recover from the bank the amount of the depreciation in the value of the stock between the time of the bank’s refusal to comply with their request and the time of the institution of the present suit.

‘The ground upon which the present appeal is rested is that the trial court erred in refusing to direct a verdict in favor of the appellants for the amount covered by their counter-claim. The argument in support of this contention is that the pledgee of stock has no right to refuse to sell the same when directed to do so by the pledgor, and that its failure to make the sale within a reasonable time thereafter constitutes negligence on its part, rendering it liable for the moneys lost by the pledgor as a result of the refusal to comply with his demand. In our opinion, this contention is without legal justification. Normally, the pledgee of stock is entitled to hold it as security for the payment of the debt so long as that debt remains unsatisfied, and, in order to entitle the pledgor to require a sale thereof by the pledgee, where the price produced by such sale would not sat-

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isfy the debt for which the stock was pledged, the pledgor, as a condition precedent, must pay to the pledgee such an amount of money as will, together with the price for which the stock is to be sold, satisfy the debt which the pledge was given to secure."

It is true that in the above case the pledgor was asking the pledgee to take, or assume the risk of a loss, and it is to this that the Court refers in the last sentence. But the reasoning of the decision is sufficiently broad to cover the case at bar.

The pledgor can always protect himself by paying off the loan. This is quite a different case from that in which the pledgee sells to a third party or otherwise puts the pledged property out of his control without giving the pledgor notice of his intention. There the pledgee may be liable because the pledgor was given no opportunity to protect himself. But here the pledgor can watch the market, and pay off the loan or have it taken up by another lender when the market is favorable. He may be entitled to protection against certain acts of the pledgee but he cannot, in the absence of contract, require affirmative duties of the pledgee. This is the tenor of all of our cases.

And so stands the weight of authority in other jurisdictions.

In *Tradesmens National Bank v. Cummings Bros. Company*, 306 Pa. 280, 159 A. 452 (1932), in a suit upon a note, the defense was raised that "plaintiff refuses to sell the collateral originally posted with

it." The Court held that this did not avail the defendant for while the plaintiff might have the right to sell the collateral, it was under no obligation to do so.

In *Union Trust Company v. Long*, 309 Pa. 470, 164 A. 346 (1932), the suit was founded upon a collateral note similar to the one in the instant case, the note giving

"Full power and authority to the holder hereof to sell and assign and deliver the whole of the above mentioned security, or any part thereof, or any substitute therefor, or any additions thereto, at any brokers' board or at public or private sale, at the option of the holder hereof, on the non-performance of any promise herein or the non-payment of any liability above mentioned at any time or times, hereafter, without demand, advertisement or notice, and with the right in the holder hereof to purchase as any other bidder at any such public sale, free from any right of redemption by the undersigned."

Default was made in the conditions of the note and plaintiff thereupon sold the securities to a third party at market prices and credited defendant's account, leaving a deficiency. Defendant alleged that shortly following the notice to furnish additional security he notified the plaintiff to sell the securities which were of a value then in excess of the debt, and that

"Defendant agreed with the plaintiff * * *
that plaintiff would immediately sell, * * *

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credit the proceeds * * * and pay the balance to the defendant.”

claiming further that the plaintiff did not sell immediately and counter-claiming for the difference between the market price which he averred would have been received if an immediate sale had been had and the price actually received. The defendant contended that plaintiff's promise to sell immediately released him from his obligation, or in other words, that the debtor-creditor relation was extinguished and that the obligor-obligee relation was likewise destroyed and there was substituted for both relations a new arrangement whereby plaintiff would immediately sell the collateral and deduct from the proceeds the defendant's indebtedness. The Supreme Court of Pennsylvania, in discussing this, said:

“The parties were of course competent to discharge their existing contractual relations and to replace them by a new contract. As judgment was entered on the pleadings, we must therefore turn to defendant's pleading to see whether he has averred facts that adequately support his contention that a substitution of obligations was made. When we do so, we can find no averments that show plaintiff's position to be without foundation. Plaintiff asks, if such contract was made, which it denies, Where is the averment of consideration? Defendant does not aver that he gave anything for the promise, or suffered any legal detriment, or

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was any worse off afterward than before. He does not say that he has 'done, foreborne or undertaken to do anything' or undertaken any counter obligation or service; his position remained what it was from the time he delivered his note and collateral. Nor does he suggest that plaintiff gained anything or received any benefit."

In the case of *National Bank v. Gallagher*, 243 Ky. 740, 49 S. W. (2d) 1006, the Court said:

"The contract of pledge contains no provision which can be construed as requiring the bank to sell the stock upon the request of the pledgor. It authorized the bank to sell the collateral but did not obligate it to do so. The power to sell was a right and not a duty. The pledgee may waive the right to sell the pledge upon default, but in the absence of a special agreement that he shall sell it within a specified time there is no legal obligation to do so. Nor can the pledgor cast that duty and responsibility upon him by requesting or directing him to make a sale. Consequently he cannot be held liable for depreciation in value of the property after he declines to sell it, in the absence of bad faith or negligence."

In the case of *Conlew, Inc. v. Newman*, 270 N. Y. S. 695, the defendant claimed that the pledgee had agreed to sell the collateral on April 16, 1931, and asserted that he was entitled to credit for the market value of the security as of that date.

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“The assignor (*sic.*) was under no duty to sell the collateral security even though it was instructed to do so by the defendant. Under the terms of the collateral note, the assignor (*sic.*) had the option either to sell the collateral upon defendant’s failure to pay the notes or to retain it until the defendant redeemed it. * * * The plaintiff has the right to maintain the action as against the maker of the note without demanding payment and offering to surrender the collateral.”

In the case of *First National Bank v. Hattaway*, 172 Ga. 731, 158 S. E. 595, the Court decided:

“One who receives collateral security is bound to the use of reasonable diligence in connection therewith. If the collateral be promissory notes or like evidences of debt, he is bound to use ordinary diligence to collect them. But where chattels, personal property, such as cotton, was deposited as collateral security, the creditor was not compelled, on failure of the debtor to pay the debt, to sell the collateral, although he had the option to do so, in the manner provided by the Civil Code, 3530. His not selling, although the pledgor demanded that he sell the same, and there was a subsequent depreciation of the value of the cotton, constituted no defense to the action on the indebtedness.”

This case was thought to be of sufficient importance to call for an annotation on the subject, the

case referred to being reported 77 A. L. R. 375, and the annotation on the subject beginning at page 379. We particularly call the Court's attention to that part of the annotation on page 382, bearing upon the effect of a request or direction by the pledgee to sell.

Finally we should like to call the Court's attention to an as yet unreported case decided by President Judge Horace Stern in the Court of Common Pleas No. 2, of Philadelphia County, September Term, 1934, No. 3203, *Gordon, Secretary of Banking, v. Mitchell*. While this case has been appealed to the Supreme Court of Pennsylvania and is as yet undisposed of by that Court (the case being on all fours with the present case), the reasoning of Judge Stern is so persuasive, and the conclusions reached by the Judge are so sound, that we are quoting from the Opinion at length.

Suit was brought by the Secretary of Banking in possession of Franklin Trust Company upon three notes executed by the defendant to Franklin Trust Company. The Court granted a motion or rule for judgment for want of a sufficient Affidavit of Defense, saying:

“As to these notes the defendant contends that his liability was cancelled because on two different occasions he ordered the plaintiff to sell and liquidate the collateral but the plaintiff refused to do so. The defendant sets up a counter-claim based upon damages which he alleges he sustained by reason of the refusal of the plaintiff to sell the collateral as ordered by the defendant.

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“It has been so consistently and clearly held that a creditor-pledgee is under no duty to sell collateral upon the request or order of the debtor-pledgor that it is thought that no discussion of this principle is necessary. As stated in *Tradesmen’s National Bank, etc., v. Cummings Bros. Co.*, 306 Pa. 280 (283), 159A. 452;

‘It is averred that plaintiff refuses to sell the collateral originally posted with it. This likewise does not avail defendant, for while plaintiff may have the right to sell collateral, it is under no obligation to do so. If defendant wishes the collateral returned, it is its duty to pay the note, whereupon it would become the duty of plaintiff to return the collateral.’

“The defendant also avers in his affidavit of defense that when the plaintiff refused to sell the collateral it ‘verbally promised and contracted to carry defendant until after the financial panic then in progress was over, and said bank stocks had returned to the values they had prior thereto.’

“Apart from the manifest absurdity and improbability of such a promise being made, it is sufficient to say that even if in fact made it would be invalid because unsupported by consideration. Even if the plaintiff, instead of refusing to sell the collateral, had agreed to do so, such agreement would have been without consideration and therefore unenforceable. *Union Trust Co. v. Long*, 309 Pa. 470 (pp. 474,

475). Accepting the test laid down in that case as to what constitutes a good consideration, it is to be noted that in the present case the defendant does not claim or allege that the plaintiff's promise induced him to forbear or to omit any action which he otherwise might or would have performed."

As indicated in the above cases, the remedy of the obligee under the circumstances is plain. If the stock is of such value as to discharge his obligation, it is his duty to raise the money to redeem it and in doing so pay the amount which he owes to the obligor, and he is then free to deal with the stock as he sees fit. It may be inconvenient for him to do this, and perhaps under some circumstances impossible; but this is a contingency which he should have had in mind at the time he signed the note; and if he did not see fit to incorporate in that instrument a stipulation and agreement that the obligee should sell upon his request or direction, he must suffer the consequences of the pledgee's non-action in that respect.

B. The Circuit Court Judge should have stricken off the counter-claims since the matters set forth therein did not constitute a proper set-off or counter-claim.

Set-off exists only by virtue of the statute and was unknown at common law. *Roseville Trust Co. v. Barney*, 89 N. J. L. 550, 99 Atl. 343; *Curtiss War-*

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ner Corporation v. Thirkettle, 99 N. J. Eq. 806, 134 Atl. 299, affirmed 101 N. J. Eq. 279, 137 Atl. 408.

The question of the right to counter-claim a tort action against a contract action has never been definitely determined in this State.

There are innumerable decisions in the State holding that unliquidated damages cannot be made the subject of set-off. *Godkin v. Bailey, et al* (1907) 74 N. J. L. 655, 65 Atl. 1032, in a Court of Errors and Appeals decision it was held, "A claim for damages for failure to deliver goods in pursuance of an executory contract of sale is a claim for unliquidated damages and not the proper subject of set-off." In re: *Yeskel v. Gross, et al.*, 105 N. J. L. 308, 44 Atl. 312 (Supreme Court, 1929), Justice Katzenbach laid down the principle that unliquidated damages are not the subject of set-off. This was affirmed by the Court of Errors and Appeals, 106 N. J. L. 611, 148 Atl. 920. If unliquidated damages are not the subject of set-off, no tort action could be the subject of either counter-claim or set-off.

In innumerable cases where the lower Court has stricken out counter-claims based on a tort, this Court has upheld such striking out. In *Elizabeth Trust Co. v. Central Lumber Co.*, 112 N. J. L. 522, 171 Atl. 810, the Court of Errors and Appeals upheld the Supreme Court, which sustained the action of the Circuit Court Judge in striking out the answer and counter-claim filed by the defendants. In that case defendant sought to counter-claim for an alleged conversion of stock and set-up the conversion as a defense to the suit which the Elizabeth

Trust Company brought against the defendant on a promissory note. The issues are identical with those in our case. Justice Perskie in upholding the action of the trial Judge and the affirmance of the Supreme Court said:

“We are of the opinion that the Supreme Court reached a right result. We prefer, however, to base our affirmance on and limit it to the sole ground that the defendant’s counterclaim sounding in trover and conversion, hence in tort could not be conveniently tried with the other cause of action joined in the same suit.”

After a learned discussion on rules and motions, the Court, on page 529, further says.

“In the instant case the trial Judge affirmatively, and we think, properly, stated the grounds upon which he acted in the premises. We can readily understand and visualize the confusion that would necessarily be created on the trial of both causes in the same suit, as well as the difficulties and inconveniences that the jury might well encounter in attempting to dispose of them. Defendant as accurately pointed out by the trial Judge is not without remedy.”

In re: Kelley v. Faitoute Iron and Steel Co., 87 N. J. L. 567, on page 571, 94 Atl. 802, 803, this Court in an opinion by Justice Trenchard, held:

“Section 12 of Practice Act, 1912 (P. L., p. 379) provides that ‘Subject to rules, the de-

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defendant may counter-claim or set-off any cause of action. He may, and when required by the Court, shall issue summons against any third party necessary to be brought in; but in the discretion of the Court, separate trials may be ordered or if the counter-claim cannot be conveniently disposed of in the pending action, the Court may strike it out.'

Rule 66 of the Supreme Court (E. 1913) provides that: 'a counter-claim is deemed to be a cross action and the rules respecting the form and manner of pleading the complaint apply to the counter-claim.'

Rule 21 (F) provides that: 'The Court may strike out causes of action which cannot be conveniently tried with the other causes joined in the same suit.' "

Justice Trenchard, on page 571, proceeds:

"As we have shown, the defendant in this counter-claim sought to recover against the plaintiff who was suing on the contract, an affirmative judgment for unliquidated damages for a tort committed by the plaintiff's assignor and thereby raised an issue which was separate and distinct from those raised by the plaintiff's claim and the defendant's other counter-claims. In that situation the Court might very properly find and we will assume did find that it could not be conveniently tried with the other causes of action in the same suit."

The decisions of this Court on this question may be distinguished as those before the passage of the 1912 Practice Act and those after which have to deal with the provision of the 1912 Practice Act, which allows counter-claims with the proviso that the Court may strike out a counter-claim which cannot be conveniently tried. The numerous instances wherein trial Judges have stricken out such answers and counter-claims would indicate that their experience had been such that counter-claims or set-offs based on tort could not be conveniently tried. In the *Kelley v. Faitoute Iron and Steel Co.* case, *supra*, Justice Trenchard did state:

“The English courts seem to have held that it is permissible under their rules to counter-claim damages in tort in an action of contract or vice versa. * * * It may be that we should and would follow them in a proper case. But that question we ought not now to determine, because it is not essential of the case in hand.”

Justice Trenchard wrote that opinion in 1915 which was within a few years of the passage of the 1912 Practice Act, and before the Courts had an opportunity to test the practical operation of that section of the Practice Act that permitted counter-claims of whatever nature which might be conveniently tried.

No decision of this Court has held it proper to counter-claim on a tort in a contract action. The decisions of this Court have consistently upheld the action of trial Judges who have stricken out coun-

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ter-claims based on torts in contract actions on the ground same could not be conveniently tried. In view of the decisions of this Court, we submit that the act of the trial Judge in our case in refusing to strike out the counter-claim was error.

SECOND: THE SUPREME COURT THROUGH THE CIRCUIT JUDGE BEFORE WHOM THE TRIAL OF THE ABOVE ACTION WAS HAD ERRED IN REFUSING TO CHARGE PLAINTIFF'S THIRD REQUEST (PAGE 89) TO CHARGE AS FOLLOWS:

“In the event of verdict in favor of the defendant such verdict would have to be directed against the Franklin Trust Company of Philadelphia and not against the Secretary of Banking of the Commonwealth of Pennsylvania, for the reason that there is no evidence of any mutual dealings between the Secretary of Banking and the Commonwealth of Pennsylvania and the defendant.”

The pleadings and proofs show that the claim of Edmund Goerke was predicated upon the failure of the Franklin Trust Company of Philadelphia to sell collateral as directed prior to the Secretary of Banking of the Commonwealth of Pennsylvania taking over said institution and not upon any wrong upon the part of the Secretary of Banking of the Commonwealth of Pennsylvania. Edmund Goerke did not pay the note or tender payment of the note

and hence was not in a position to direct the sale of the collateral until he had done so. *Bardsley v. First National Bank*, 111 N. J. L. 512, 168 A. 665.

Granting for the purpose of this argument, but not conceding the right of Edmund Goerke to direct the sale of the collateral, any liability arising out of the failure of the Franklin Trust Company of Philadelphia to do so would not constitute the basis of an action on which a monetary judgment could be rendered in favor of Goerke and against the Secretary of Banking of the Commonwealth of Pennsylvania. The Secretary of Banking of the Commonwealth of Pennsylvania was in the position of an assignee. If an assignee brings suit the debtor would have no right to recover a judgment on a counter-claim unless the same arose out of mutual dealings between the assignee and the debtor. *In re Receivers v. Paterson Gas Light Company*, 23 N. J. L. 283, the Court of Errors and Appeals, discussed in detail the law relative to assignments. That action was brought by the plaintiffs as receivers of the President and Directors of the People's Bank of Paterson appointed by the Chancellor under an Act to prevent frauds by incorporated companies on a draft or bill of exchange for five hundred (\$500) dollars, accepted by the defendants payable to the order of the Machine Company and by them endorsed to the Peoples' Bank of Paterson. The bank stopped payment on September 24, 1851, and a bill and an injunction granted on the following day. Receivers were appointed the following day. In the suit on the note defen-

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dants were permitted to counter-claim, but the counter-claim was allowed to stand only by virtue of a provision of a particular statute discussed in detail in said case. In discussing the question, the then Chief Justice propounded the following question:

“Does the defendant’s claim constitute a technical set-off at law?”

The Court in answer to said question, on page 288, laid down the following rule:

“1. It is clear that the case is not within the provisions of the statute authorizing a set-off at law. As between the plaintiffs and the defendants, the claims are not mutual debts. Where there are mutual debts, there must be mutual remedies. But the defendants have no claim against the receivers. They could maintain no action against them. Nor could the defendants have judgment against the receivers in this action in case the set-off should exceed the plaintiffs’ demand. *Cumberland Bank v. Hann*, 3 Harr. 222; *Ryall v. Larkin*, 1 Wilson 155; *Buller’s N. P.* 181; *Eden’s Bank Law* 186.”

The Court allowed the counter-claim on an interpretation of the Act to prevent frauds, so far as it relates to the estate of an insolvent corporation. On page 292, the Court stated:

“The statute, moreover, in cases of mutual dealing between the corporation and any other person or persons, expressly authorizes the re-

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ceivers to allow just set-offs in favor of such persons, in all cases in which it shall appear to the receivers that the same ought to be allowed according to law and equity.

The claim of the defendants in this case does not, as has been seen, from technical considerations, constitute a set-off at law. But as the claim was a clear legal and equitable set-off against the bank at the time of the insolvency, and as the receivers took the rights and property of the corporation in the same plight and condition, and subject to the same equities, that the bank held them, it is clear that the claim of the defendants is an equitable set-off against the demand of the receivers.”

The *Receivers of the President and Directors of the People's Bank at Paterson v. The Paterson Gas Light Company* case was cited with approval by the New Jersey Court of Errors and Appeals in the matter of *Singac Trust Company by Kelly, Commissioner, v. Totowa Lumber and Supply Co.*, 112 N. J. L. 99, 169 Atl. 673.

The cases uniformly hold that in order to counter-claim there must be mutual dealing between the parties. In cases where counter-claims were permitted in contravention to that principle, the Court permitted same by virtue of some particular statute such as the one relative to insolvent corporations of the Act relative to insolvent estates.

At the time of the trial the Secretary of Banking of the Commonwealth of Pennsylvania did not come

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within the provisions of any statute in this State which would have permitted a judgment to be entered against him for a claim which defendant-appellee might have against the Franklin Trust Company of Philadelphia. *In re: Stone, Receiver, v. The New Jersey and Hudson River Railway & Ferry Company*, 75 N. J. L. 172, the Supreme Court, in an opinion by Justice Swayze, on page 173, held:

“The right of set-off as against the receiver of an insolvent corporation does not rest upon the statute of set-off but upon the provision of the Corporation Act authorizing the receivers to settle debts due the company upon such terms as he shall deem just and beneficial to the corporation and in case of mutual dealings to allow just set-offs. *Receivers v. Paterson Gas Light Company*, 3 Zab. 283.”

We concede that the position of the Secretary of Banking of the Commonwealth of Pennsylvania was that of assignee and that any defenses such as payment, etc., which Edmund Goerke had against the original note might be set up against the Secretary of Banking of the Commonwealth of Pennsylvania, but submit that no monetary judgment could be rendered in the suit against the Secretary of Banking of the Commonwealth of Pennsylvania under the prevailing law and that no defense such as set-off arising out of a separate transaction or cause of action might be set up against the Secretary of Banking.

The Court should have charged the jury as re-

quested and his failure to do so was error prejudicial to plaintiff-appellant.

THIRD: THE AGREEMENT OF THE PARTIES
IMPOSES NO OBLIGATION UPON PLAINTIFF
TO SELL THE COLLATERAL AT
THE DEMAND OF THE DEFENDANT.

(Embracing the Third, Fourth, Sixth and Seventh
Grounds of Appeal.)

**A. The written agreement of pledge places no duty
upon the plaintiff to sell the collateral at defen-
dant's request, and any attempt to vary this by
any oral understandings is inadmissible.**

Assuming without conceding that the evidence as to the request made by the defendant to the plaintiff that the stock be sold at a certain time, and that at that time the stock had a certain value, was sufficient to warrant the jury's finding in this respect, yet defendant is still in no position to recover on its counter-claim, since the contract of the parties gave it no right to compel such sale by the plaintiff at its request.

As we have before stated, the note in suit (p. 2) was not extraordinary in form, being the usual form of collateral note used by financial institutions. The note was payable on demand; and while it contained a number of provisions under which the collateral might be sold by the trust company, none

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of these have any application to the instant case, with the exception of the maturity of the note.

It would seem elementary that where the parties have established their relations by means of a written instrument that their relative rights and duties must necessarily grow out of that writing. The most searching examination of the note in suit would fail to disclose any agreement on the part of the trust company to sell the collateral upon a request or direction of the maker of the note and the terms of the note are utterly inconsistent with any such agreement. Under those circumstances it seems quite apparent that if the defendant had the right to have the collateral sold by the trust company it must have been by virtue of some valid and binding subsequent arrangement between the parties.

B. A duty could have been placed upon the plaintiff to sell the collateral at defendant's request only by reason of a subsequent valid contract based upon sufficient consideration, which was neither pleaded nor proved in this case.

In view of the fact that normally a pledgee is under no duty to sell the collateral which he holds at the request of the pledgor (*New York Fire Insurance Company v. Tooker*, 4 N. J. L. J. 334, *supra*, p. 10; *Peoples National Bank v. Ginsburg*, 108 N. J. L. 415, 156 Atl. 491, *supra*, p. 11; *Bardsley v. First National Bank and Trust Company*, 111 N. J. L. 512, 168 Atl. 665, *supra*, p. 9; and other

cases cited in First A, *supra*, pp. 9-20) there would have to be a very clear statement in the agreement of pledge to impose a duty to sell upon the pledgee, and such duty will not easily be inferred. Since there is no such statement in this case, the only method by which a duty to sell could have been placed upon the pledgee would be by a subsequent valid and binding agreement between the parties based upon sufficient consideration.

The defendant testified (p. 49) as to the sending by him of the letter under date of May 11, 1931, to Mr. Duphinee, Exhibit D3, and further (p. 51) he testified to a conversation shortly after the sending of this letter, with Mr. Duphinee, in which "I asked him if he received the letter and if he was going to sell my stock. He promised me at that time that he would start to dispose of it." This is the only evidence in the case of any agreement on the part of the trust company to dispose of the collateral.

No attempt was made to prove that there was any consideration for the subsequent oral agreement that was attempted to be proved by this testimony.

Since plaintiff was under no duty to sell at defendant's request, the subsequent assumption of that duty by plaintiff would become binding upon him only if supported by good consideration moving to him from the defendant.

While we have found no cases in this State which are exactly similar on facts, yet it is a principle consistently followed in this Court that a subsequent agreement changing the terms of an existing

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contract must be supported by valid consideration. *Sommers v. Myers*, 69 N. J. L. 24, 54 Atl. 812; *Moneyweight Scale Company v. Van Sciver*, 76 N. J. L. 215, 68 Atl. 905.

The weight of authority in other jurisdictions supports the above cited cases. For example see *National Bank v. Gallagher*, 243 Ky. 740, 49 S. W. 1006, *supra*, page 16.

In *Union Trust Co. v. Long*, 309 Pa. 470, 164 Atl. 346 (*supra*, page 14), which was a suit founded upon a collateral note similar to the one in the instant case, defendant alleged that shortly following notice to furnish additional security he notified the plaintiff to sell the securities, which were of a value then in excess of the debt, and he agreed with the plaintiff that plaintiff would immediately sell, credit the proceeds and pay the balance to him. Defendant then went on to claim that plaintiff did not immediately sell, and counter-claimed for the difference between the market price which he averred would have been received had an immediate sale been had, and the price actually received. The defendant contended that the plaintiff's promise released him from his original obligation and created a new contract under which plaintiff was under a duty immediately to sell the collateral and deduct from the proceeds defendant's indebtedness. The Supreme Court of Pennsylvania conceded that the parties were of course competent to discharge their existing contract and replace it by a new contract. Turning to defendant's pleadings, however, it found that there was no averment sufficient to sustain defendant's contention.

“The plaintiff asks if such contract was made, which he denies. Where is the averment of consideration? Defendant does not aver that he gave anything for the promise or suffered any legal detriment or was any worse afterward than before. He does not say that he has done, foreborne, or undertaken to do anything, or undertaken any counter obligation of service. His position remained what it was from the time he delivered his note and collateral, nor does he suggest that the plaintiff gained anything or received any benefit.”

Defendant in this case in his answer and counterclaim does not plead any such contract.

Defendant in his proofs does not offer any evidence whatever of any consideration for any such contract.

To summarize, defendant has neither pleaded nor proved that either the written contract of pledge or any subsequent valid and binding contract obligated the plaintiff to sell the collateral at defendant's request.

FOURTH: THE TESTIMONY OF THE WITNESS MAURICE J. FERRIS WAS INCOMPETENT FOR ANY PURPOSE.

(Embracing the Eighth Ground of Appeal.)

The witness Maurice J. Ferris (p. 69) was examined as follows:

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Q. I show you Exhibit D1, and ask you whether you are familiar with the publication known as the Commercial Financial Chronicle?

A. I am.

Q. Is or is not that publication a recognized publication used by bankers and stock exchange houses generally?

A. It is, yes, sir.

Q. Can you tell me—tell us now by using this publication as to what the market value of the City Stores was during the first week in February of 1931?

Objection was interposed by plaintiff's attorney at this point, which after argument was overruled (p. 70).

The witness was then permitted to testify as to the price which the collateral stock was traded in at or about the time the alleged request was made to sell. The only additional qualification as to the admissibility of these books which were marked Exhibit D1 (p. 69), was the alleged familiarity of the witness with the publication, his statement being that "it was a recognized publication used by bankers and stock exchange houses generally" (p. 69).

The witness was further asked (p. 73):

"Q. Now, I show you another book and ask you whether you are familiar with it?

A. Yes, I am.

Q. What does this book contain?

A. It contains the transactions in securities dealt in on the New York Stock Exchange, the

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New York Curb Exchange, and the New York produce market by the hour, on the days indicated by the hour.

Q. You say that is published by the New York Stock Exchange?

A. No, it isn't.

Q. By whom?

A. By Francis Emory Fitch, Incorporated.

Q. Where do they get that information, do you know?

A. The New York Stock Exchange doesn't produce official sheets. They have an arrangement with Francis Emory Fitch whereby the official figures are furnished to Francis Emory Fitch. The New York Stock Exchange isn't responsible for those figures and neither is Fitch."

It is submitted that there is no sufficient qualification of these books upon which the evidence of the witness Ferris in testifying from the same was admissible. While it is true that stipulation between counsel (p. 114), with regard to the publication, *Commercial Financial Chronicle*, Exhibit D1, admits the dates of the four volumes admitted in evidence that the publication records and reports the total sales of all stocks and bonds traded in New York Stock Exchange and New York Curb Exchange and the prices at which they were traded, yet we submit that this adds nothing in support of the ruling of the Court on the subject.

"The weight of authority is to the effect that a price current list, published in a newspaper,

Brief of Plaintiff-Appellant

is not competent evidence of market value without proof as to the source from which the information therein was obtained, or whether the quotations of prices were from actual sales or otherwise. The credit to be given the paper must depend upon some such extrinsic proof. It cannot be determined by the publication itself. The mere fact of publication is not enough. This publication was properly rejected as a piece of evidence."

E. Clemens Horst Co. v. Peter Breidt City Brewery, 94 L. 230, 109 A. 727.

In the case of *National Spun Silk Co. v. Peerless Silk Mills Corporation*, 96 L. 49, 114, A. 312, the contention was made that the Court should have admitted in evidence copies of a newspaper entitled "Women's Wear." The Supreme Court in passing upon this, stated

"This paper contained a list of the current prices of spun silk, but there was no proof as to the verity of the quotations, nor of the method used to ascertain market prices, or whether the quotations were from actual sales or otherwise. The Court of Errors in *E. Clemens Horst Co. v. Peter Breidt City Brewery*, 109 A. 727, said:

"The credit to be given the paper must depend upon some such extrinsic proof."

In *Crowley v. E. Homan Co.*, 3 Misc. 968, 130 A. 372, a witness was permitted to testify from a

book known as the Blue Book of the National Used Car Market Report, published by the Chicago Automobile Trade Association. The Supreme Court in commenting upon this stated:

“The only justification for the use of this book in the state of facts sent up with the record is, ‘that the said book from which he was reading was one generally used in the automobile trade.’ This is not sufficient to admit it in evidence or to permit it to be read from under the case of *E. Clemens Horst Co. v. Breidt City Brewery*, 94 N. J. L. 230, 109 A. 727.”

It is, therefore, respectfully submitted that since the witness was permitted to testify from a document without proof as to its authenticity and that this was the only evidence as to the value of the stock which was submitted to the Court, which the jury was entitled to consider, the trial Court in admitting such evidence committed error to the prejudice of the plaintiff.

FIFTH: The Fifth Ground, which involves the error of the trial Court in refusing to direct a verdict on behalf of the plaintiff (p. 81) need not be argued *in extenso*. The argument which we have used in commenting upon the other grounds of appeal raised by the plaintiff, bears with equal force upon this ground of appeal.

CONCLUSION.

To the appellant's clear cause of action set forth in the Complaint in this case, appellee set up an Answer and Counter-claim which has every appearance of being an afterthought in a desperate endeavor to avoid the fulfillment of his obligation under his note held by appellant.

Nothing in the note changes the normal relationship of pledgor and pledgee as between appellee and appellant. Normally such relationship gives the pledgor no right to impose any affirmative duty upon the pledgee to sell the collateral or do anything else except to turn back the collateral to the pledgor when he has fulfilled the terms of his contract by paying the amount of his obligation when due. Not only was there nothing in the contract of the parties to vary this normal rule, but appellee failed either to plead or to prove any subsequent valid or binding contract based upon any consideration whatever, under which said duty might have been assumed by the appellant. Therefore, the Court below was in error in failing to grant plaintiff's motion to strike the Answer and the Counter-claim of the defendant, as set forth in the First Ground of Appeal.

It was likewise in error later in refusing at the trial to direct a verdict in favor of the plaintiff and against the defendant, as set forth in the Fifth Ground of Appeal.

It was likewise in error in failing to charge in accordance with these principles, as set forth in the Third Ground of Appeal.

The Court was also in error in admitting oral testimony which did not in itself amount to a new contract and which tended to vary the written contract of the parties, as set forth in the Fourth and Sixth Grounds of Appeal.

It was also in error in admitting the letter marked "Exhibit D3" (p. 102), since in view of the principles above set forth, said letter was totally immaterial and irrelevant as tending to prove merely a request by appellee to appellant to sell the collateral, without any offer upon his part to pay the balance due on his loan as set forth in the Seventh Ground of Appeal.

The Court was also in error in admitting incompetent testimony of Maurice J. Ferris, as set forth in the Eighth Ground of Appeal.

The Court was also in error in allowing the defendant to obtain judgment against the Secretary of Banking on his counter-claim, as set forth in the Second Ground of Appeal, since the counter-claim was upon an unliquidated cause of action in tort and was moreover directed not against the Franklin Trust Company but against the Secretary of Banking of the Commonwealth of Pennsylvania.

For all of these reasons it is respectfully submitted that the trial Court committed manifest error to the prejudice of the plaintiff, and particularly in

Brief of Plaintiff-Appellant

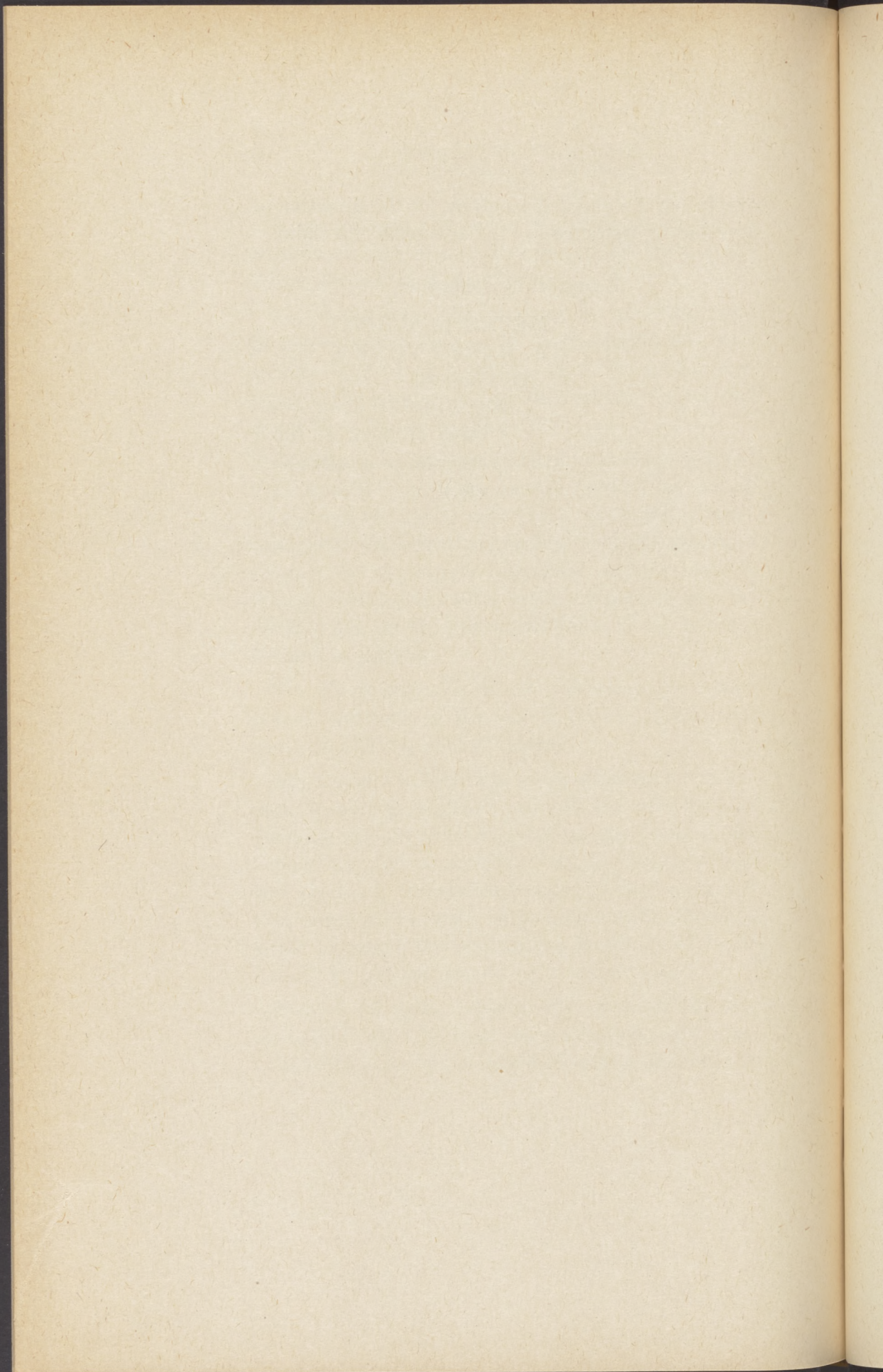
overruling the plaintiff's motion for the direction of a verdict in its favor for the amount of its claim.

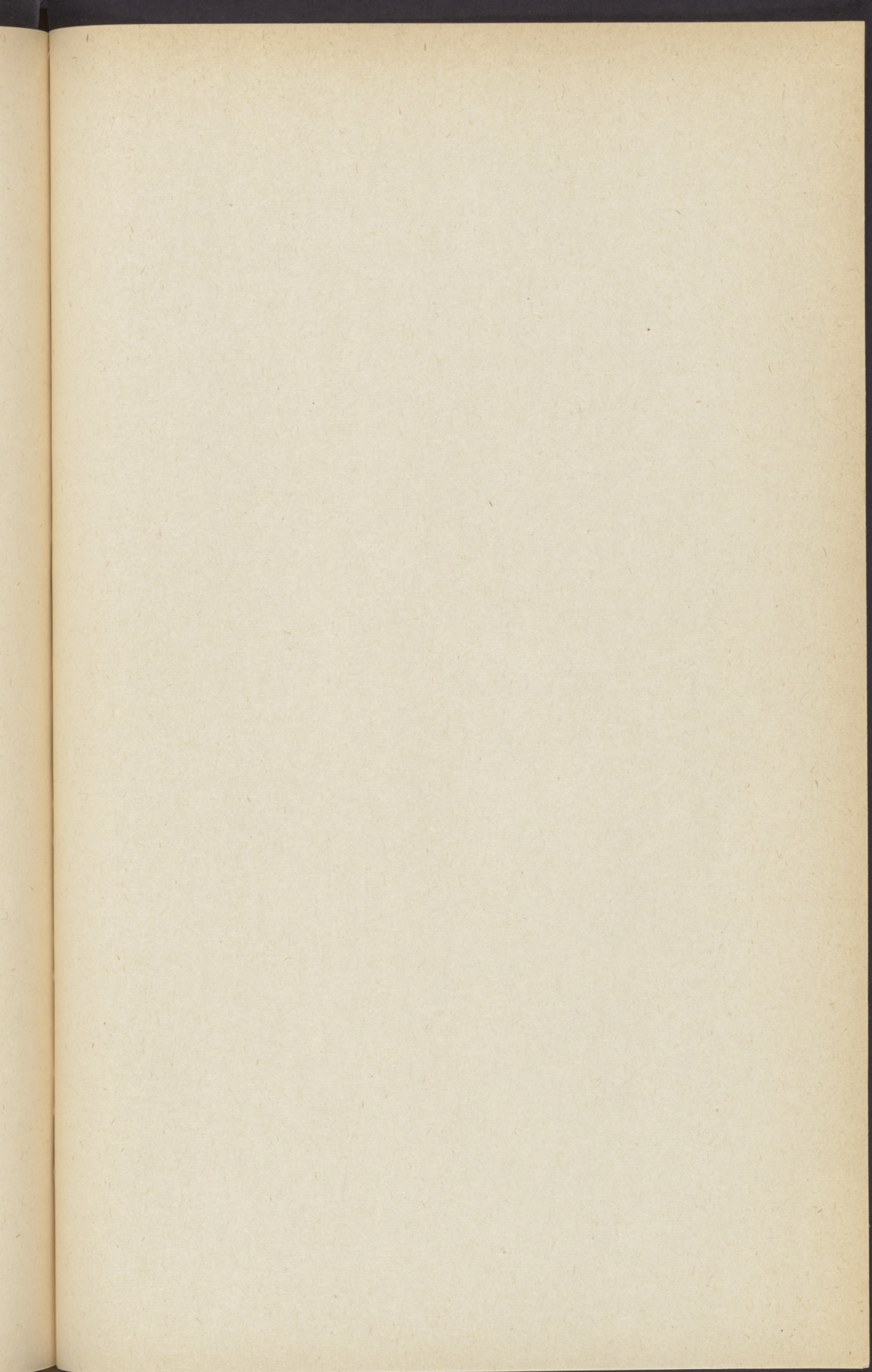
Respectfully submitted,

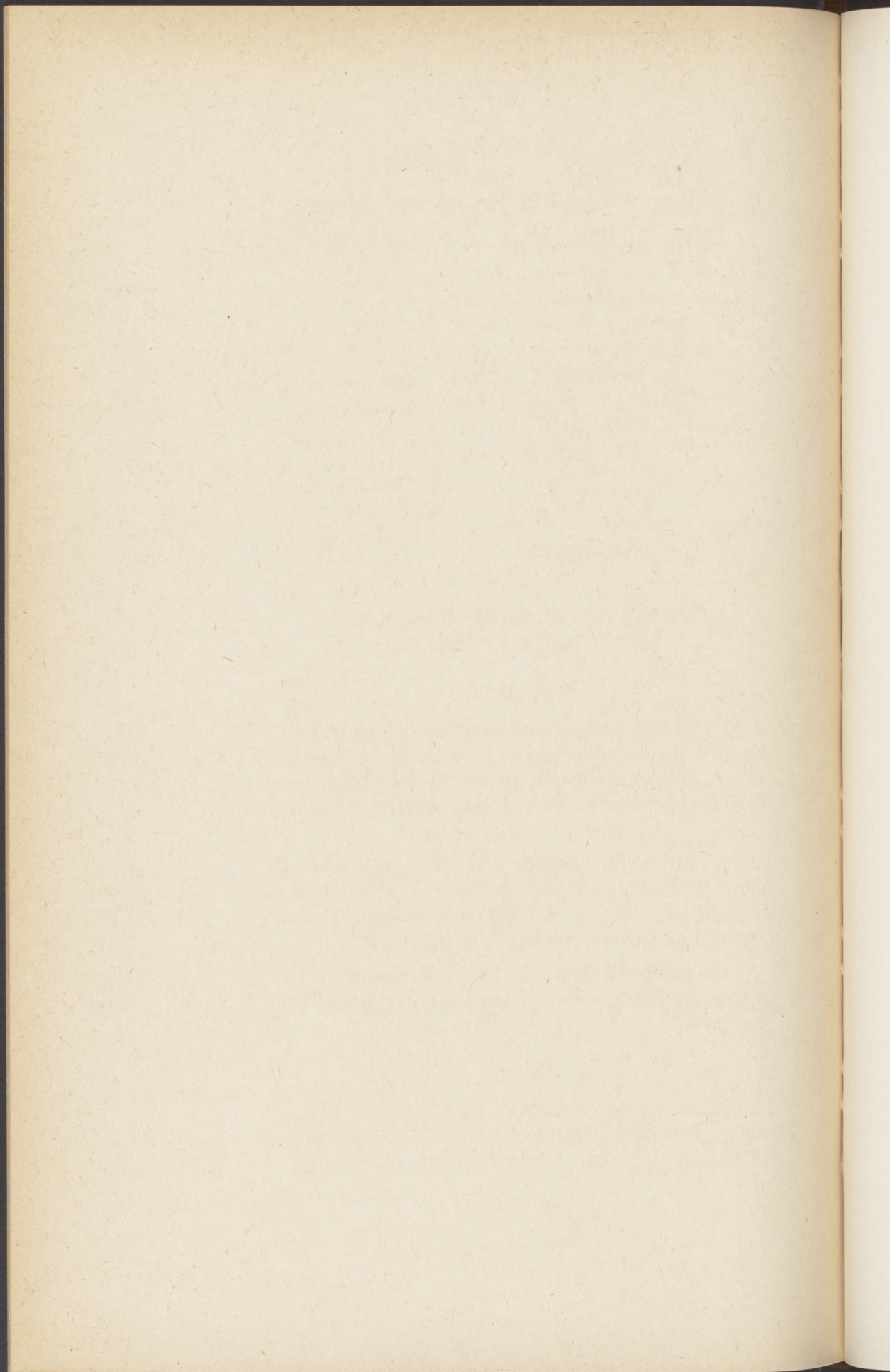
MEYER L. SAKIN,
A. HARRY MOORE,

Of Counsel,

*For Franklin Trust Com-
pany (Luther A. Harr,
Secretary of Banking,
etc.).*







153 OCT. 7. 1935

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

FRANKLIN TRUST COMPANY
(Luther A. Harr, Secretary
of Banking of the State
of Pennsylvania, succeeding
William D Gordon, former
Secretary of Banking of the
State of Pennsylvania),
Plaintiff-Appellant,
vs.

EDMUND GOERKE,
Defendant-Appellee.

*Action
at Law.*

*On Appeal
from
Supreme
Court,
Camden
Circuit.*

BRIEF OF EDMUND GOERKE, DEFENDANT-APPELLEE.

Statement.

The plaintiff-appellant commenced an action against the appellee in the New Jersey Supreme Court, Camden Circuit, to which complaint, defendant-appellee answered and filed a counter-claim.

At the trial of the cause a verdict was rendered against the plaintiff and in favor of the defendant, in the sum of \$12,983, and judgment was entered on the verdict (S. C. p. 91).

This case now comes before this Court on an appeal by the appellant from the entering of this judgment.

Facts.

The complaint herein was filed by the Franklin Trust Company, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsyl-

vania in possession (S. C. p. 1). At a later date, Luther A. Harr was substituted for William D. Gordon, having succeeded the latter as Secretary of Banking of the State of Pennsylvania (S. C. p. 111).

The complaint alleges that the appellee delivered to the Franklin Trust Company his demand note for \$18,000; that the management of the affairs and business of the said Franklin Trust Company were placed in charge of the Secretary of Banking of the Commonwealth of Pennsylvania, who is now in possession of the note; that demand for the payment of said note had been made, but that the same had not been paid and that there was due and owing to the plaintiff the sum of \$16,941.20.

Appellee filed an answer (S. C. p. 6) admitting all of the complaint, excepting those allegations that the note had not been paid, and that there was any sum whatsoever due and owing to the appellant.

Appellee also filed a counterclaim (S. C. pp. 6, 7) alleging that on or before December 26, 1930, the date upon which the demand note forming the basis of the complaint had been given, securities aggregating the value of \$50,000, were deposited with the Franklin Trust Company as collateral for the loan of \$18,000; that on or about February 1st, 1931, appellee demanded of the Franklin Trust Company, that the said Trust Company dispose of the securities which had been deposited as collateral, which securities at that time had a market value of \$30,000; that the said Franklin Trust Company neglected and refused to sell the said shares of stock and that the appellee was damaged to the extent of \$25,000 by said negligence.

Appellant then moved to strike the answer and counterclaim filed by the appellee on the ground that said answer and counterclaim were sham and frivolous. No other grounds for striking the answer and counterclaim were mentioned in the notice (S. C. p. 117).

The Circuit Court Judge who sat as a Supreme Court Commissioner having heard the argument on this motion took the matter under advisement and before an Order was entered, appellee, on February 26, 1934, filed a reply to the answer and counterclaim (S. C. p. 9). Subsequently on March 5, 1934, an order was entered denying the motion to strike the answer and counterclaim (S. C. p. 126).

The issue was then tried before the Court and jury and a verdict was entered in favor of the defendant on the counterclaim in the sum of \$12,983.00.

The testimony given at the trial showed that commencing about February 1, 1931, appellee had continuously requested, ordered and demanded that the Franklin Trust Company sell the securities held as collateral for his loan of \$18,000, retaining an amount out of the proceeds sufficient to liquidate the demand loan and remit the remainder to himself (S. C. p. 37, ll. 30-35; p. 38, ll. 1-5). The bulk of the collateral deposited was stock of the City Stores Corporation, and a great deal of this stock was held by the Bank as collateral for the loans of other customers. In order to protect the market in this case, one, Duphinee, a Vice President of the Franklin Trust Company, advised the appellee not to sell the stock and when appellee persisted in his demands that the stock be sold, Duphinee flatly refused to obey the demands of the appellee. Finally the

appellant, through its Vice President, Duphinee, agreed to sell the collateral securities in small lots, but this promise was disregarded and never kept (S. C. p. 50, ll. 33-37; p. 51, ll. 1-11).

On May 11, 1931, appellee wrote a letter formally demanding the sale of his securities (S. C. pp. 49-50). On this date the value of the pledged securities was \$30,000 (S. C. p. 51, ll. 16-20).

The appellee left this vicinity on a trip South, and upon his return found that the Bank had been closed, and that the Secretary of Banking of the Commonwealth of Pennsylvania had taken possession of the assets of the Franklin Trust Company.

On June 29, 1932 and at various times thereafter, and up to and including July, 1933, the Liquidator of the Franklin Trust Company sold the collateral deposited by the appellee, but for the sixteen months intervening between February, 1931, when the appellee made his first demand that his collateral be sold, until June 29, 1932, in spite of a rapidly falling market, none of the collateral was disposed of.

The only evidence produced at the trial indicating the position of the Secretary of Banking of the Commonwealth of Pennsylvania was the testimony given by the witness Crispin (S. C. p. 12). Crispin testified that he was at present employed by the Department of Banking to help in the liquidation of the Franklin Trust Company, and that the Secretary of Banking of the Commonwealth of Pennsylvania took possession of the assets on October 5, 1931.

No evidence was given to show the legal status of the bank when it was taken over by the Secretary of Banking, or indeed was there any evi-

dence given, or even an allegation in the complaint, that the Secretary of Banking was acting by virtue of any statutory authority.

The plaintiff in commencing the suit did not clarify the status by the description of itself. Plaintiff started suit as "Franklin Trust Company, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession."

In the absence of any evidence to clarify this description, it is necessary for us to assume that the Franklin Trust Company retained its status as a legal entity, and that the Secretary of Banking of the Commonwealth of Pennsylvania had taken over the management and liquidation of the bank without affecting the rights, duties or obligations of the Franklin Trust Company or the means by which a Trust Company could enforce its rights or by which obligations against it could be enforced.

LAW.

POINT ONE.

A pledgee of stock is obliged to sell the pledged stock and liquidate his claim when requested to do so by the debtor, providing the amount realized from the sale of stock will satisfy the indebtedness of the debtor.

The basis of appellee's counterclaim in this suit is the damage he suffered resulting from the failure of the Franklin Trust Company to sell the securities pledged as collateral for his indebtedness to the said bank at a time when the amount which would have been realized from the sale of said stock would have been more than

sufficient to repay the bank the entire amount it had loaned to appellee.

There is no dispute in the testimony over the fact that the appellee requested the Vice President of the Franklin Trust Company to sell the stock pledged as collateral at a time when over \$30,000.00 would have been realized from such sale (S. C. p. 51, ll. 17-19); that the debt of appellee to the bank at that time was \$18,000.00; and that there was a ready market on the New York Stock Exchange and other recognized security exchanges for said securities (S. C. p. 67, ll. 15-32).

One Duphinee, a Vice-President of the Franklin Trust Company, and the officer with whom appellee was accustomed to transact his business, when requested to sell his stock urged the appellee not to do so, as putting such a large block of stock on the market at one time was very likely to depress the market price of the stock and the bank would suffer greatly since it held a substantial block of these securities pledged as collateral for other loans (S. C. p. 45, ll. 11-16).

In spite of these spurious reasons advanced by Duphinee as to why he should not sell his stock at the time, Goerke, the appellee, was adamant and continued to insist that they be sold, but finally, in response to the entreaties and urgings of the bank's officers, he consented that his securities be put on the market in small blocks, but he demanded that the sale commence immediately. Nevertheless during the many months intervening between the occurrence of these conversations and the exchange of letters between Goerke and the bank and the closing of the bank, not a single share of the deposited collateral was sold, with the result that when said collateral was sold it

brought but \$4,000, whereas it was worth \$30,000 at the time Goerke requested its sale. There can be no question but that the failure of the bank to sell this stock was due to a desire on its part to bolster up the market price of these securities at the expense of the appellee. There was no possible way in which the bank could be harmed in its relations with Goerke if it had sold the stock. The bank had possession of the securities; there was a ready market on many recognized security exchanges, including the preeminent New York Exchange. It would have been a simple matter for the bank to transmit the securities to a broker of its own choosing for sale, receive the proceeds thereof, reimburse itself for the amount of the loan the collateral was securing, and remit the balance, which would have been considerably over \$12,000, to Goerke. Instead appellant chose to disregard appellee's demands, and to the prejudice of Goerke's interest it tried to protect itself in regards to loans made to other customers who had pledged the same collateral as had Goerke. It would be a grave miscarriage of justice if the bank were to be allowed to substitute its own judgment for that of its customers in deciding whether or not the customer's collateral should be disposed of when the proceeds of said collateral would be sufficient to pay the bank the full extent of the customer's obligation. If the bank assumes the responsibility of disregarding a pledgor's express instructions it is only just that it assumes the responsibility for its negligence and bad faith.

In the instant case Goerke wanted his stock sold. His better judgment told him that February, 1931, was the propitious time to dispose of that stock, but the bank, despite the fact that it

could have gotten out from the Goerke loan entirely whole at that time by selling the stock, refused to follow his instructions. The mere statement of the facts of this case is sufficient to establish on whom the loss resulting from the failure to sell said stock should fall.

This case is made all the stronger by the fact that the bank did not act in good faith. It did not advise Goerke to hold his stock in a capacity of a disinterested financial advisor; it urged and entreated, and even begged Goerke to hold his stock because its sale would be detrimental to the bank, and when Goerke made the concession of permitting the bank to put his stock on the market in small blocks at a time, the bank still refused and neglected to sell despite the promises of Duphinee, its Vice President, that it would dispose of the stock.

At the trial of the cause no evidence concerning the law of Pennsylvania was put in evidence. Therefore, the Court must assume that the law of Pennsylvania is the same as the law of New Jersey in this respect, and decide the case on that ground. *Freedman v. Kaufman, et al.*, 10 N. J. Misc. 252.

The law of a foreign state must be treated by this Court as a question of fact and put in evidence as such. It cannot accept the expounding of foreign law by counsel at this time.

The cases of *Bardsley v. First National Bank and Trust Company of Montclair*, 111 N. J. Law 512; and *New York Fire Insurance Company v. Tooker*, 4 N. J. Law Journal 334, which are heavily relied on by counsel for the appellant in his brief were not at all in point. The closest these cases come to the case at bar is their holding that a pedgee of stock need not exercise dili-

gence in protecting the value thereof, and need not sell the same at his own discretion. These cases do not relieve a pledgee of the duty to sell the stock when requested to do so by the pledgor.

Naturally, somebody must exercise diligence in protecting the value of the stock. If such a duty does not rest upon the pledgee, it must of necessity rest upon the pledgor, and when he, in the exercise of this diligence, orders the pledgee to sell and satisfy the whole debt out of the proceeds, the pledgee who has been relieved of all discretion in the matter must sell. He should not be permitted to traffic with the pledgor's interest especially when, as in this case, the refusal to sell is made in bad faith, and is made not to protect the pledgor, but is made to protect the pledgee in transactions entirely independent of any in which the pledgor is involved.

The case in New Jersey coming closest to the instant case is *Peoples' National Bank and Trust Company of Belleville v. Ginsburg*, 108 N. J. Law 415, a case decided by the Court of Errors and Appeals of this State. In that case a pledgor did not sell collateral when requested to do so by the pledgee, and was relieved of liability for the loss suffered by the pledgor by reason of his failure to sell when requested *only because the proceeds of the sale of said stock would not have satisfied the entire obligation to the pledgor, and there was no tender made of the deficiency*. However, the attitude of the Court towards a situation such as the one presented by the case now at bar is illustrated by the following quotation from the Peoples' National Bank case:

“Normally, the pledgee of stock is entitled to hold it as security for the payment of the debt so long as that debt remains unsatisfied,

and, in order to entitle the pledgor to require a sale thereof by the pledgee, where the price produced by such sale would not satisfy the debt for which the stock was pledged, the pledgor, as a condition precedent, must pay to the pledgee such an amount of money as will, together with the price for which the stock is to be sold, satisfy the debt which the pledge was given to secure."

The unmistakable inference to be drawn from this case is that where the amount realized by the sale of the collateral would be sufficient to pay the entire debt it secured, the pledgor must dispose of the collateral when requested to do so by the pledgee.

In *Culver v. Wilkinson*, 12 Sup. Ct. 832, the Supreme Court of the United States, speaking through Mr. Justice Blatchford, held that in the absence of a request from a debtor, a creditor would not have to dispose of his collateral pledged, but when requested to do so, the creditor must dispose of the collateral.

In *Amick v. Empire Trust Company*, 296 S. W. 298, and 53 A. L. R. 1070, the Missouri Supreme Court said:

"Neither can it be questioned that the general rule, as laid down by this court, is to the effect that the failure of the pledgee to comply with clear and positive directions of the pledgor, or principal debtor, to take prompt action to collect or sell the collateral and apply the proceeds upon the principal debt, constitutes such negligence on the part of the pledgee, or creditor of the principal debtor, as renders the pledgee liable to the pledgor in damages for any loss occasioned to the pledgor by such negligence on the part of the pledgee."

It is respectfully submitted that this case enunciates the only rule consistent with the expeditious conduct of financial transactions. The Franklin Trust Company did not become the owner of this stock. It was simply the pledgee thereof, and had no discretion as to the disposal thereof as the proceeds of the sale of the stock would more than satisfy the debt due it from appellee. Despite this obligation it acted in *male fides* in refusing to sell when ordered to do so by Goerke. The Vice President of the bank finally promised the appellee that the stock would be disposed of in small lots. By this promise the appellee was lulled into believing that his wishes would be respected, the stock would be sold, and his debt liquidated. But, again the bank, determined to protect itself in other transactions at all costs, sacrificed the interests of Goerke.

By any standards of business morals, by any rules of logic, and by the authority of the law of the State of New Jersey as enunciated by this Court in the case of *People's National Bank of Belleville v. Ginsberg, supra*, the Franklin Trust Company became liable to Edmund Goerke for any and all loss suffered by him as a result of its failure to obey the orders to dispose of the stock, and satisfy his claim in full especially when it ultimately promised to do so.

POINT TWO.

The matters set forth in the counterclaim constitute a proper setoff or counterclaim.

This action was begun by appellant as a suit on a promissory note to secure which note collateral had been deposited with the appellant (S. C. pp. 1-5). As a setoff and counterclaim there-

to, the appellee alleged that the appellant had failed to dispose of the collateral pledged to secure the payment of this note when ordered to do so by appellee, and thereby caused great loss to the appellee (S. C. pp. 6-8). Section 12 of the Practice Act of 1912 (Ch. 231 P. L. 1912) allows a defendant to counterclaim or setoff any cause of action, and authorizes the Court to strike such setoff or counterclaim *if it cannot be conveniently disposed of in the pending action.*

If the instant case does not furnish a set of facts where a counterclaim is in order, it is difficult to conceive what the legislature had in mind when it authorized a counterclaim to be tried if it could be conveniently disposed of in the same trial.

Appellee's counterclaim arises from the same transaction as does appellant's cause of action. Indeed it would be impossible to present the evidence supporting the appellee's counterclaim without first presenting the evidence required to prove the appellant's cause of action. The execution of the note, the deposit of the collateral security, and the failure to pay the debt, all of which had to be proved as part of the appellant's case, must of necessity be involved in any action which the appellee might bring on the subject matter constituting his counterclaim. Not only is it convenient to try these cases together, but it should be mandatory on the appellee to bring his counterclaim in this action instead of independently, as to commence an independent action on the counterclaim should involve presenting the same evidence twice, and thereby waste the time of the courts.

Counsel for the appellant has relied upon *Elizabeth Trust Company v. Central Lumber*

Company, 112 N. J. Law 522, to support his contention that those matters alleged in the counterclaim do not constitute a proper subject of the counterclaim in this suit. A close reading of Justice Perskie's opinion in this case will lead to the conclusion that the only holding that can be deduced from the Elizabeth Trust Company case, *supra*, is that the facts of that particular case did not present the proper subject for a counterclaim. Two separate and distinct transactions were involved, one between the plaintiff and the defendant, and one between the defendant and a third party, who, it was alleged, was in turn connected with the plaintiff in some manner.

On that complicated set of facts the Court refused to allow a counterclaim to be filed. The convenience with which the various actions may be tried together is the sole test laid down in the Elizabeth Trust Company case. In the case at bar no third party is involved. The counterclaim involves a transaction between plaintiff and defendant with no outside persons entering into the matter at all, and the facts of the counterclaim arise directly from those facts upon which the appellant bases his cause of action. Using the convenience test laid down by the Court of Errors and Appeals in the Elizabeth Trust Company case, *supra*, there can be no doubt but that the trial court did not abuse its discretion in refusing to strike the counterclaim.

The case of *Yeskel v. Gross*, 105 N. J. Law 308, relied upon by counsel for the appellant, is not in point as that case involves the point of whether the filing of a setoff under certain conditions is mandatory, and whether the failure to file such setoff will bar a subsequent action. The case at bar involves the point of whether a

counterclaim is permissive under the conditions presented by this peculiar case.

Two recent cases, *Newman, Receiver v. Viemeyer Brothers*, 12 N. J. Misc. 477; and *Newman, Receiver v. Hatfield Wire and Cable Company*, 113 N. J. Law, 484, illustrates to what lengths the court will extend the provisions of the Practice Act allowing setoffs and counterclaims. In both these cases the receiver of a defunct insurance company was suing for premiums which had accrued before the insurance company went into receivership. To these claims of the receiver the defendants were permitted to set off losses sustained by them because of the failure of the insurance company to provide the protection supposedly afforded by other policies which the defendants had purchased from the insurance company. In these cases there were mutual dealings, but the subject of the setoff arose from a transaction entirely different from the one sued upon by the plaintiff. The plaintiff proved the issuance of one policy and premiums due thereon, and defendants, to prove their setoff, had to prove the issuance of totally different policies and subsequent loss; yet the Court permitted these causes of action to be tried together. Such a wide latitude of interpretation of Section 12 of the Practice Act is not necessary to sustain the counterclaim in the present case. Unlike the two Newman cases, *supra*, we have but one transaction here, one series of events pertaining to but one loan. In considering this point it is respectfully urged that this Court does not confuse the collectibility of the judgment obtained on the counterclaim with the right of the appellee to enter such counterclaim. The cause of action arose prior to the time the bank was closed and the Secretary of Banking of the Commonwealth

of Pennsylvania took possession of the assets. Whether or not the appellee can collect the amount of this judgment out of assets of the appellant bank found in the State of New Jersey is now the subject of another appeal pending before this Court. The only matter now *sub judice* is did a valid claim exist, and was judgment correctly entered.

POINT THREE.

The appellant is barred at this time from urging that the Supreme Court should have stricken the counterclaim upon his motion.

After notice and argument on this question, the Circuit Court Judge, sitting as Supreme Court Commissioner, took the matter under advisement, but before an order was entered on appellant's motion to strike appellee's counterclaim, appellee filed a reply to the counterclaim thereby losing any right he may have had to urge this point upon appellee. Appellant's reply was filed on February 26, 1925 (S. C. p. 9), whereas the order denying the motion to strike the counterclaim was not signed until March 4, 1934 (S. C. p. 125, l. 29). By filing the reply before the entry of the order on the motion to strike the counterclaim, appellant in law permitted the counterclaim to stand, and is considered to have agreed to go to trial thereon without reserving his rights to urge the striking of the counterclaim. *Apfelbaum v. Pierce*, 2 N. J. Misc., 1150; *Great American Indemnity Company v. Gronowicz*, 6 N. J. Misc. 821.

POINT FOUR.

The Supreme Court did not err in refusing to charge plaintiff's third request to charge.

The third request to charge submitted by the appellant was as follows: "In the event of verdict in favor of the defendant, such verdict would have to be directed against the Franklin Trust Company of Philadelphia, and not against the Secretary of Banking of the Commonwealth of Pennsylvania for the reason that there is no evidence of any mutual dealings between the Secretary of Banking of the Commonwealth of Pennsylvania and the defendant" (S. C. p. 90, ll. 12-20).

The body of the complaint of the appellant commences as follows: "The plaintiff, Franklin Trust Company, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession, shows that:" (S. C. p. 1, ll. 26-28). The only other reference in the complaint to the Secretary of Banking is as follows: "On or about October 5, 1935, the management of the affairs of business of the said Franklin Trust Company was duly placed in the charge of the Secretary of Banking of the Commonwealth of Pennsylvania, and he is now in charge thereof, having possession of the note herein mentioned, a copy of which is annexed hereto and made part hereof" (S. C. p. 1, l. 33).

At the trial of this cause Luther A. Harr, Secretary of Banking of the Commonwealth of Pennsylvania, was substituted as plaintiff in the place and stead of William D. Gordon (S. C. p. 111), but in this order no further description of the capacity, duties or office of the Secretary of Banking of the State of Pennsylvania was set forth. The argument of the counsel for the

appellant on this point appears to be based entirely on the premise that the status of the Secretary of Banking as stated in this case is entirely analogous to that of a receiver, and hence no counterclaim could be filed against him. The pleadings do not disclose, and no evidence was offered as to what position the Secretary occupies in this case. He is merely designated as being in possession of the bank. No order of a proper court or official of the Commonwealth of Pennsylvania is offered to prove his appointment. No evidence was submitted as to what his rights, duties and liabilities are. He was merely described as being in possession.

A receiver is appointed by a Court with well defined rights, duties and liabilities. He is an arm of the Court, and is not "in possession" which seems to be the only description of the Secretary of Banking in this case.

So far as the record of this case discloses, although the Franklin Trust Company is closed and is not now a going concern, there has been no change in its legal status. It is entirely proper for a bank to close its doors and call in an outsider to take possession of its assets and liquidate them in an orderly fashion, but the mere closing of the doors and the employment of an outsider to liquidate a bank does not relieve it from liability for any of its acts committed before or after closing. As far as the record discloses, all the Franklin Trust Company did was to suspend business operations and call in the Secretary of Banking of the Commonwealth of Pennsylvania to liquidate it. There was not presented to this Court any order of the Pennsylvania Court appointing the Secretary of Banking in any capacity whatsoever to take

over this bank or defining his duties, nor was any order of any administrative or executive breach of the Commonwealth of Pennsylvania presented to the Court showing the connection of the Secretary of Banking with the Franklin Trust Company, his rights, duties and obligations therein or the statutory authority by which he is now in possession of the bank. It is, therefore, incumbent upon this Court to consider the Secretary of Banking and Insurance of the Commonwealth of Pennsylvania as an agent of the Franklin Trust Company voluntarily called in to liquidate its assets. In such liquidation it is necessary for the liquidator to honor all the liabilities incurred by the organization he is liquidating. Were this not the case it would be a simple matter for any going concern which had large outstanding claims to liquidate itself, and with impunity disregard the claims of creditors. This state of affairs could not be tolerated, and in the absence of any evidence to the contrary this Court must consider the Secretary of Banking of the Commonwealth of Pennsylvania as a mere liquidator of a bank called in voluntarily and with no official capacity conferred by either a court, a statute, or administrative order.

POINT FIVE.

The Supreme Court was not in error in admitting the testimony of the witness, Maurice J. Ferris.

At the trial the appellee called as his witness Maurice J. Ferris, a statistician of many years' experience in the employ of Eisele, King & Nugent, members of the New York Stock Exchange. The witness, Ferris, was called for the purpose of proving that there was a ready market for

the stock that appellee ordered the appellant to sell in February to May, 1931, and to corroborate testimony given by the witness Goerke as to the value of the stock at that time.

As it is not humanly possible for one individual to carry the quotations of all the securities traded on the various exchanges in this country unless he has a special interest in a particular security, Ferris used the Commercial and Financial Chronical, a publication recognized and used by the Franklin Trust Company and the entire financial fraternity to refreshen his memory as to the points upon which he was testifying. Objection was made at the trial to the use of these volumes, which objection the trial court properly overruled.

Ever since the case of *More-Jonas Glass Company v. West Jersey and Seashore Railroad Company*, 76 N. J. Law 708, it has been settled law in this State that a witness could refer to recognized trade lists and sheets to refreshen his memory as to quotations, volume of transactions, etc. It was said in the *More-Jonas* case, "they (referring to the lists) were promulgated by the authority of the manufacturers and universally recognized by the trade and enabled the witness to accurately testify as to market value." This is still the law in our State.

Appellant has cited cases of *Horst Company v. Peter Breidt City Brewery*, 94 N. J. Law 230; and *National Spun Silk Co. v. Peerless Silk Mills Corporation*, 96 L. 49. Neither of these cases are in point because in those cases the lists or quotations were put in evidence and given to the jury without being properly authenticated. In the case at bar the jury was not asked to consult

the books, but they were marked only for identification.

The witness, Ferris, an expert in his line, a statistician of long standing with a well known New York exchange house, testified that of his own knowledge as refreshed by the lists, the quotations were as he stated. In the Horst case and the National Spun Silk Co. case the jury had to rely on the lists without anything more. Here we have the word of an expert whose memory was merely refreshed by the lists. He vouched for their authenticity and it was his testimony that the jury was asked to believe, and not the naked quotations of the book.

Appellant also relied upon the case of *Crowley v. E. Holman Co.*, 3 N. J. Misc. 968. In that case it was held error to permit a witness to testify from a book known as the "Automobile Blue Book" when the only grounds advanced for the competency of this book was "that the said book from which he was reading was only generally used in the automobile trade."

The witness, Ferris, testified by refreshing his memory through the use of the Commercial and Financial Chronical. These volumes were not put into evidence, *but were marked for identification* so that the course of the witness' information could be inquired into. An examination of these books will show the exhaustive and complete organization and research which goes into them, and would show that the New York Stock Exchange furnishes official copies of their transactions to the publishers of the Commercial and Financial Chronical for their use. At the request of the appellant, the appellee waived the printing of these four large volumes in lieu of a stipulation which will be found on page 114

of the State of Case. Said stipulation reads as follows:

“In lieu of printing the four volumes of the Commercial Finance Chronical, offered in evidence and marked ‘Exhibit D1,’ it is stipulated as follows:

1. That said publication has been printed weekly since June 23, 1879.

2. That the four volumes so referred to are dated February 7, 1931, February 14, 1931, May 16, 1931 and May 23, 1931, respectively.

3. That the said publication records and reports weekly, the total sales of all stocks and bonds traded in on the New York Stock Exchange and the New York Curb Exchange, and the prices at which they were traded.”

Thus the vices which the Court found in the use of the “Automobile Blue Book” in the Crowley case is cured in the case at bar *since the appellant in this stipulation concedes that the publication records and reports weekly the total sales on the exchanges and the prices at which they were traded.*

The appellant should not be permitted to stipulate as to the authenticity of the Commercial and Financial Chronical and then be heard in this Court to say that the volumes were not sufficiently reliable so that a witness could use them to refreshen his memory.

The Franklin Trust Company itself and Bank Examiners in general used the Commercial and Financial Chronical for the same purpose as Mr. Ferris used it here (S. C. p. 20, ll. 10-18).

Even if this Court should hold that the testimony of the witness, Ferris, was inadmissible, the inclusion of such testimony was not reversible error for the reason that the error was not

prejudicial to the appellant. Ferris was called only to corroborate the testimony of the appellee Goerke (S. C. p. 51, ll. 16-18) as to the value of the collateral securities at a reasonable time after he ordered the appellant to sell. Therefore, even if Ferris' testimony be stricken entirely, the testimony of Goerke as to the damage he suffered, still stands unimpeached and uncontradicted.

CONCLUSION.

For the reasons stated above the Supreme Court did not err in this case, and it is respectfully submitted that the judgment of the Supreme Court should be affirmed in each and every detail.

Respectfully,

JOHN J. STAMLER,
Attorney for Defendant-Appellee.