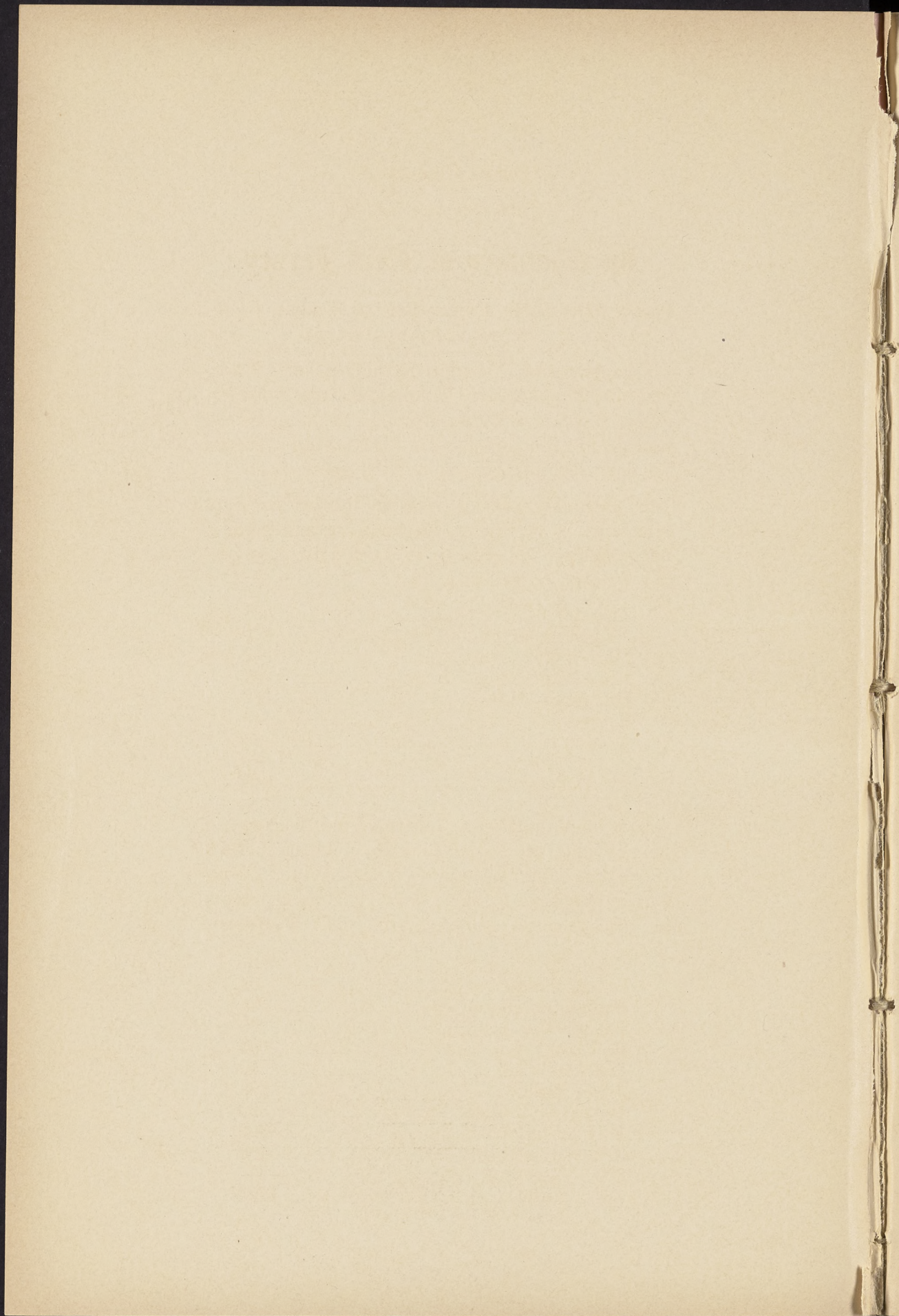


INDEX.

	PAGE
Bill of Complaint.....	1
Exhibit 1, Annexed to Bill of Com- plaint	9
Exhibit 2, Annexed to Bill of Com- plaint	11
Affidavit of Theodor Helbig and Max Franke	12, 38
Notice to Amend Bill of Complaint.....	19
Amendment to Bill of Complaint.....	20
Affidavit of Jacob A. Phillips.....	22
Exhibit 1, Annexed to Affidavit of Jacob A. Phillips.....	27
Exhibit 1-A, Annexed to Affidavit of Jacob A. Phillips.....	31
Exhibit 2, Annexed to Affidavit of Jacob A. Phillips.....	32
Affidavit of Max Mueller.....	34
Affidavit of Herman D. Moller.....	36
Affidavit of Albert Scherzer, Ernest Eich- ler, Max Roscher and Richard Boehm.....	42
Supplemental Affidavit of Jacob A. Phillips	45
Supplemental Affidavit of Herman Miller..	52
Supplemental Affidavit of Herman D. Moller and Max Mueller.....	54
Replying Affidavits of Complainants.....	56
Opinion of Vice-Chancellor.....	59
Notice	67, 75
Order and Injunction.....	68
Notice of Appeal.....	70
Petition of Appeal.....	71, 80
Answer to Petition of Appeal.....	73
Replication	74
Order	76
Notice of Appeal.....	79



Bill of Complaint.

(Filed October 9, 1929.)

In Chancery of New Jersey

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

Complainants, Theodor Helbig, Albert Scherzer, Max Franke, Emil Mueller, Hermann Miller, Ernst Eichler and Max Roscher, residing in the Towns of Bloomfield and Glen Ridge, Essex County, New Jersey, respectfully show that: 10

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

Theodor Helbig	128	
Albert Scherzer	124	
Max Franke	72	20
Emil Mueller	206	
Hermann Miller	172	
Ernest Eichler	48	
Max Roscher	80	
	<hr/>	
Total.....	840	

2. Complainants are informed and believe and charge the fact to be that in November, 1928, the balance of the capital stock of said corporation was held by the following named persons in the amounts set opposite their respective names: 30

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

Bill of Complaint.

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

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

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

Bill of Complaint.

each share of stock of the corporation with the option of paying \$200 in cash and issuing and delivering to each of the stockholders $3\frac{1}{2}$ shares of stock of the corporation purchasing the capital stock of the Brilliant Silk Hosiery Company, Inc., for each share of the capital stock of said company held by each of the stockholders thereof. 10

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

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

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

Complainants have been unable to secure a copy of said optional agreement. 30

7. In about November, 1928, pursuant to the terms of said option agreement, all of the stockholders of the Brilliant Silk Hosiery Company, Inc., delivered to said Jacob A. Phillips all of the capital stock of that company endorsed or with powers of attorney so that the same was negotiable, and we understand that the said Phillips delivered the same to the Bloomfield National Bank. At the time all of the officers and directors delivered their written resignations 40

Bill of Complaint.

as such to said Phillips in order that the said option agreement might be carried out and consummated.

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

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

30 10. On or about October 1, 1929, complainants (and we believe all the other stockholders) received a check drawn by Interstate Hosiery Mills, Inc., stated to be a dividend of 45¢ per share on the capital stock of that company. These checks were drawn to the order of the stockholders of the Brilliant Silk Hosiery Company, Inc., for the respective amounts of dividends to which each of them were entitled under the terms of the afore-

40

Bill of Complaint.

said option agreement. Accompanying said check was a printed statement, a copy of the face and reverse side of which is attached hereto and marked "Exhibit 2".

11. Neither the shares of stock of the Interstate Hosiery Mills, Inc., to which the various stockholders of the Brilliant Silk Hosiery Company, Inc., were entitled as above stated, were delivered to them, nor did they receive the equivalent in money as agreed, and said Jacob A. Phillips, although inquiries had been made of him, has not made any satisfactory response as to when complainants and other stockholders will receive either the money due or the stock due from Interstate Hosiery Mills, Inc. 10

12. Said Bloomfield National Bank consolidated with the Bloomfield Trust Company and is now known as the Bloomfield Bank & Trust Company. Said Bloomfield Bank & Trust Company has stated that said Jacob A. Phillips delivered to said Bloomfield National Bank the shares of stock of complainants and other stockholders of Brilliant Silk Hosiery Company, Inc., and that the same were forwarded to a bank in New York, and that said Bloomfield Bank & Trust Company has received and holds in its possession a number of certificates of stock of Interstate Hosiery Mills, Inc., drawn in favor of the various persons and believed to be said stockholders of Brilliant Silk Hosiery Company, Inc., for various amounts, but has refused to furnish complainants with a list of the certificates of said stock in its possession, and has stated that inasmuch as its transactions with reference to said stock were with said Jacob A. Phillips, that it will not deliver any of said shares of stock of Interstate Hosiery Mills, Inc., 20 30 40

Bill of Complaint.

to complainants and other stockholders, although said certificates are drawn in their favor, and that it would deliver all of said shares of stock of said Interstate Hosiery Mills, Inc., to said Phillips or make such other disposition of the same as said Phillips may direct.

10

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

20

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

30

15. Complainants are apprehensive that the aforesaid stock certificates belonging to them and their associated stockholders now in the pos-

40

Bill of Complaint.

session of the Bloomfield Bank & Trust Company, may be returned to Interstate Hosiery Mills, Inc., in New York City, or to said Jacob A. Phillips, or otherwise removed from the jurisdiction of this Court.

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

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

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

2. That this Court may ascertain and determine the respective interests of complainants and other stockholders above named of Brilliant Silk

10

20

30

40

Bill of Complaint.

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

20 3. That said Bloomfield Bank & Trust Company set forth and discover the certificates of shares of stock of Interstate Hosiery Mills, Inc., now in its possession or at any time received or held by it, the number of shares of each certificate and the names of the persons in whose favor said certificates are drawn and the trust agreement or escrow agreement, if any, under which said certificates were received and held by it.

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

Bill of Complaint.

Brilliant Silk Hosiery Company, Inc. and particularly such provisions thereof as refer to the aforesaid sale and transfer of said stock to Interstate Hosiery Mills, Inc.

5. That a decree may be made restraining and prohibiting said defendants, Jacob A. Phillips and Bloomfield Bank & Trust Company, from selling, assigning, disposing of, hypothecating or delivering any certificates of stock of Interstate Hosiery Mills, Inc. to any person whatsoever until the further order of this Court, and that the respective officers, agents, attorneys and representatives be likewise restrained. 10

6. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises. 20

CARLYLE GARRISON,
Solicitor of Complainants.

ALFRED B. VANHOUTEN,
Of Counsel.

Exhibit "1".

INTERSTATE HOSIERY MILLS, INC. 30

232 Madison Avenue, New York, N. Y.

Finery
Coral Band July 1, 1929.
Hosiery

The enclosed check represents initial dividend of \$.45 (45 cents) per share, payable to-day, on stock registered in your name at the close of business June 15, 1929. 40

Exhibit 1, Annexed to Bill of Complaint.

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

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

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

INTERSTATE HOSIERY MILLS, INC.

20

See change of address blank on reverse side.

REVERSE SIDE:

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

30 Finery
Coral Band
Hosiery

Please change my address on your books as follows:

From

To

Dated

(Sign Here)

Sign Name exactly as it appears on stock certificate.

40

Exhibit 2, Annexed to Bill of Complaint.

Exhibit "2".

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

Finery 10
Coral Band
Hosiery October 1, 1929

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

The name and address which we use in mailing communications to you are intended to be in exact accordance with:— 20

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

If you receive communications with an incorrect name or address your prompt advice will be much appreciated. 30

INTERSTATE HOSIERY MILLS, INC.

See change of address blank on reverse side.

Exhibit 2, Annexed to Bill of Complaint.

REVERSE SIDE :—

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

10 Finery
Coral Band
Hosiery

Please change my address on your books as follows:

From

To

Dated (Sign Here)

Sign name exactly as it appears
on stock certificate.

20

Affidavit of Theodor Helbig and Max Franke.

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

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

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

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

40 3. In about July, 1923, the defendant, Jacob A. Phillips, became President and General Man-

Affidavit of Theodor Helbig and Max Franke.

ager of the Company and in full control of all of its affairs, including operation and business management and we, together with the other complainants, had full confidence in his integrity and honesty and trusted him implicitly, particularly with reference to all of the matters referred to in the bill of complaint and hereinafter set forth in this affidavit. 10

4. For some time prior to August, 1928, said Jacob A. Phillips carried on negotiations for the sale of all of the capital stock of the said Brilliant Silk Hosiery Company, Inc. Said Phillips conducted all of the negotiations in New York and none of the stockholders were in direct contact with the purchasers in New York, and from time to time the said Phillips reported to the stockholders of the company the result of the negotiations. The result of these negotiations was that on or about August 15, 1928, a proposition was submitted to the Board of Directors of the Brilliant Silk Hosiery Company, Inc., for an option to sell all of the capital stock of the corporation. Under the terms of this option the purchaser secured the right to buy all of the capital stock of the corporation on or before January 15, 1929, upon payment to the respective stockholders of the sum of \$300 cash for each share of stock of the corporation with the option of paying \$200 in cash and issuing and delivering to each of the stockholders $3\frac{1}{3}$ shares of stock of the corporation purchasing the capital stock of the Brilliant Silk Hosiery Company, Inc., for each share of the capital stock of said company held by each of the stockholders thereof. 20 30

There was paid on account of this option agreement to the Brilliant Silk Hosiery Company, Inc., the sum of \$5,000 in about August, 1928. 40

Affidavit of Theodor Helbig and Max Franke.

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

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

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

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

<i>Name of Stockholder</i>	<i>Number of Shares</i>
Theodor Helbig	128
Albert Scherzer	124
Max Franke	72
Emil Mueller	206
40 Hermann Miller	172

Affidavit of Theodor Helbig and Max Franke.

<i>Name of Stockholder</i>	<i>Number of Shares</i>	
Ernst Eichler	48	
Max Roscher	80	
Linus Thiefelder	72	
Bruno Thiefelder	104	
Albert Meixner	96	
Richard Bohm	104	10
Mr. Hook	40	
John Moller	288	
Hermann Miller	320	
Max Mueller	300	
Jacob A. Phillips.....	400	

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

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

Affidavit of Theodor Helbig and Max Franke.

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

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

30 12. On October 8, 1929, Mr. Ellis, an officer of the Bloomfield National Bank (now known as the Bloomfield Bank & Trust Company) stated to us that Jacob A. Phillips had delivered to the Bloomfield National Bank the shares of stock in question of the Brilliant Silk Hosiery Company, Inc., and that the same had been forwarded to a bank in New York, and that the Bloomfield Bank & Trust Company had received and held in its possession a number of the certificates of stock of the

40

Affidavit of Theodor Helbig and Max Franke.

Interstate Hosiery Mills, Inc., all drawn in favor of the stockholders of Brilliant Silk Hosiery Company, Inc., for various amounts, but refused to give us a list of the shares of stock in the possession of his bank. Said Ellis further stated that inasmuch as his transactions had been wholly with said Jacob A. Phillips, and the stock of the Brilliant Silk Hosiery Company, Inc., had been delivered to his bank by said Phillips, that the Bloomfield Bank & Trust Company would not deliver any of the shares of stock of the Interstate Hosiery Mills, Inc., to us even though the certificates were drawn in our favor, and further that the Bloomfield Bank & Trust Company would deliver said shares of stock of the Interstate Hosiery Mills, Inc., to said Phillips or make such other disposition of the same as the said Phillips directed his bank to make.

13. We understand that Interstate Hosiery Mills, Inc., was organized under the Laws of the State of New York, and that its principal business office is No. 232 Madison avenue, New York City. Its shares of stock are quoted in the curb market quotations. We understand that this company was organized at or shortly after the time the aforesaid option agreement was made, and that the quoted price per share on the curb market has varied from a high of about \$32¼ to a low of about \$14. Under the option agreement we were to receive 3⅓ shares of stock of that company for each one share we held of the stock of the Brilliant Silk Hosiery Company, Inc., on the basis of a \$30 valuation of each share of stock of the Interstate Hosiery Mills, Inc.

14. Brilliant Silk Hosiery Company, Inc., has fully performed all of its obligations under the terms of said option agreement and extension. The stockholders of that company have not re-

Affidavit of Theodor Helbig and Max Franke.

ceived the entire amount of money or its stock equivalent in accordance with the terms of said option agreement, and the said stock certificates of the Interstate Hosiery Mills, Inc., which belong to the stockholders of the Brilliant Silk Hosiery Company, Inc., are now in the possession of and held by said Bloomfield Bank & Trust Company under instructions from said Jacob A. Phillips not to deliver them to us, and the other stockholders of the Brilliant Silk Hosiery Company, Inc.

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

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

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

THEODOR HELBIG,
MAX FRANKE.

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

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

A true copy.
CARLYLE GARRISON,
Solicitor of Complainants.

Notice.

IN CHANCERY OF NEW JERSEY.

Between

THEODOR HELBIG, *et als.*,
Complainants,

and

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

On Bill, &c.
Notice.

10

To M. Casewell Heine, Esq., Solicitor of Defendants, Jacob A. Phillips and Bloomfield Bank and Trust Co.

20

SIRS:

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

30

Dated October 24, 1929.

Respectfully yours,

CARLYLE GARRISON,
Solicitor of Complainant.

40

Amendment.

IN CHANCERY OF NEW JERSEY.

Between

10

THEODOR HELBIG, *et als.*,
Complainants,*and*JACOB A. PHILLIPS, *et al.*,
Defendants.On Bill, &c.
Amendment.*To the Clerk in Chancery:*

20

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

"SECOND CAUSE OF ACTION.

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

30

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

40

Amendment.

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

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

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

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

CARLYLE GARRISON,
Solicitor of Complainant.

Affidavit of Jacob A. Phillips.

IN CHANCERY OF NEW JERSEY.

10	Between <div style="text-align: center;"> THEODOR HELBIG, <i>et als.</i>, Complainants, <i>and</i> JACOB A. PHILLIPS, <i>et al.</i>, Defendants. </div>	On Bill, &c. Affidavit.
----	--	----------------------------

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

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

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

30 That I am informed by my counsel, M. Casewell Heine, of Newark, New Jersey, the said Brilliant Silk Hosiery Company was organized as a close corporation with about sixteen stockholders in 1921, and it purchased land, erected a plant and started in the manufacture of silk hosiery at Bloomfield, New Jersey. No stock was ever offered for sale outside the group who organized the corporation and there was in the files of the corporation an agreement signed by

40 all of the original stockholders providing that no one should dispose of his holdings of stock of

Affidavit of Jacob A. Phillips.

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

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

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

It was also understood and agreed between all of the stockholders during these negotiations that all of the stock of everybody should be sold or none should be sold. I was the active one in the negotiations but every stage of the same was reported to the stockholders, many of whom worked daily in the plant, and the progress of negotiations was at all times known to everybody who wished to know anything about it. A good deal of time was consumed in making the attorneys for said Ullman who was working on the consolidation of the various companies, understand that the sale was of the stock of the stock- 30 40

Affidavit of Jacob A. Phillips.

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

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

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

Affidavit of Jacob A. Phillips.

On February 15, 1929, the option was exercised by Ullman through his assignees and the new company being the reorganization of the various silk hosiery companies involved, paid the cash as called for by the option to the American Exchange Irving Trust Company, at New York, which cash was in due course transmitted to the Bloomfield National Bank and by it distributed to the respective stockholders. 10

At the same time, on February 15, 1929, there was deposited with the American Exchange Irving Trust Company, stock of the new company known as the Interstate Hosiery Mills, Inc., a corporation of Delaware, in the proportions called for by the option agreement, and this stock was held pursuant to the terms of the option agreement, in escrow subject to purchase as provided in the opinion until August 15, 1929. 20

On the date last named, a claim was made by the Interstate Hosiery Mills and their representatives against the stockholders of the former Brilliant Silk Hosiery Company, which resulted in the detention of the stock by the American Exchange Irving Trust Company of some of the stock of the new company and the turning over of other shares of said stock of the new company to it or its representatives. That upon demand made through our attorneys, in order to test the validity of the detention of this stock, the American Exchange Irving Trust Company finally released and delivered to the Bloomfield National Bank all of the stock of the stockholders of the old Brilliant Silk Hosiery Company except the stock of Jacob A. Phillips, the deponent, which it had turned over to the Interstate Hosiery Mills, Inc., or its representatives. 30

At the present time, the stock of all stockholders except my stock, is in the Bloomfield 40

Affidavit of Jacob A. Phillips.

National Bank, and my stock as far as can be ascertained has been returned to the Interstate Hosiery Mills, Inc., or its representatives, and legal proceedings are now underway to compel the return of this stock and its delivery to me.

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

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

40 Just what the amount of these charges will be in view of the legal action which has been made necessary in order to secure the delivery of my stock as well as that of the others, it is im-

Affidavit of Jacob A. Phillips.

possible now to state and I have considered it fair that the stock of all of the parties should be held by the Bloomfield Bank until such time as all of the stock, delivery of which was called for under the option, of all of the stockholders should be delivered and when the deal is thereby finally concluded and the expense determined, that the latter should be pro-rated, and in the meantime that the stock of the parties should be held as security as otherwise I would have no protection against non-payment for any reason on the part of any stockholder of his proportionate share. 10

JACOB A. PHILLIPS.

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

MARIE SULLIVAN,
Notary Public of New Jersey.

Exhibit 1.

November 21, 1928.

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

Dear Sirs:

The undersigned hand you herewith certificates of stock representing 2,880 shares of the capital stock of the Brilliant Silk Hosiery Co., a New Jersey corporation duly endorsed in blank for delivery, to be held in escrow and delivered by you in accordance with the following instructions: 40

*Exhibit 1, Annexed to Affidavit of
Jacob A. Phillips.*

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

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

*Exhibit 1, Annexed to Affidavit of
Jacob A. Phillips.*

under, the cash so received by you for the account of the undersigned to be immediately paid out to each of the said undersigned.

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

You shall not be bound or in any way affected by any notice of the modification or abrogation of this agreement unless signified to you in writing signed by all of the parties hereto, nor in the case of a modification unless the same shall be satisfactory to you. You shall not be liable or responsible for any matter or thing connected with this agreement or the deposited stock or the proceeds thereof, except the holding and delivery or payment thereof as herein provided.

10

20

30

40

*Exhibit 1, Annexed to Affidavit of
Jacob A. Phillips.*

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

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

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

	<i>Names</i>	<i>Addresses</i>
30	Jacob A. Phillips Max Mueller Herman D. Moller Theodor Helbig Emil A. Mueller Bruno Thierfelder Linus Thierfelder Ernest Eichler Willy Hug Albert Miehsner Max Frunke	
40	Herman Miller Max Roscher Richard Boehm Estate of John Moller	

*Exhibit 1-A, Annexed to Affidavit of
Jacob A. Phillips.*

Exhibit "1-A".

Jan. 18, 1929.

American Exchange Irving Trust Co. 10
60 Broadway,
New York City.
Trust Department.

Dear Sirs:

Please be advised that the letter addressed to you by the undersigned under date of November 19, 1928, depositing with you 2880 shares of the capital stock of the Brilliant Silk Hosiery Company of New Jersey, owned by the undersigned, to be delivered to Albert L. Ullman or his nominees upon the terms and conditions therein set forth is modified so as to extend the time for the complainance by Mr. Ullman or his nominees with the terms and conditions of said escrow letter, to and including the 15th day of February, 1929. 20

This extension of time granted to Mr. Ullman is in consideration of Mr. Ullman or his nominees paying for said stock on or before the 15th day of February, 1929, the sum of \$15,000. in cash in addition to and in excess of the price provided for in the escrow letter referred to, which addition \$15,000. when received shall be distributed pro rata among the undersigned stockholders.* 30

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

40

*Exhibit 1-A, Annexed to Affidavit of
Jacob A. Phillips.*

terms of said escrow except as herein specifically provided.

Very truly yours,

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

Exhibit 2.

30 Bloomfield Bank & Trust Company
Bloomfield, New Jersey

Feb. 21, 1929.

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

Dear Sir:

40 We, the undersigned, constitute the sixteen
present stockholders of the Brilliant Silk Hosiery
Company of Bloomfield, New Jersey. We under-

*Exhibit 2, Annexed to Affidavit of
Jacob A. Phillips.*

stand that in the reorganization of the company which you are directing, which is to consolidate the Brilliant Silk Hosiery Company as part of the International Silk Hosiery Company, Inc., there will be certain charges of a legal nature to clear the title of the property of the Brilliant Silk Hosiery Company and bank charges in connection with the escrow and such other incidental charges as may arise. 10

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

Albert Scherzer
Estate of John Moller, Paula E. Moller, Ex.
Richard Boehm
Max Roscher
Hermann Miller
Max Franke
Albert Meichsner 30
Willy Hug
Ernst Eichler
Louis Thierfelder
Bruno Thierfelder
Emil A. Mueller
Theodor Helbig
Max Mueller
Herman D. Moller

Affidavit of Max Mueller.

IN CHANCERY OF NEW JERSEY.

10	Between THEODOR HELBIG, <i>et als.</i> , Complainants, <i>and</i> JACOB A. PHILLIPS, <i>et al.</i> , Defendants.	On Bill, &c. Affidavit.
----	---	----------------------------

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

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

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

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

40

Affidavit of Max Mueller.

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

10

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

20

30

MAX MUELLER.

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

MARIE SULLIVAN,
 Notary Public of New Jersey.

40

Affidavit of Herman D. Moller.

IN CHANCERY OF NEW JERSEY.

10	Between THEODOR HELBIG, <i>et als.</i> , Complainants, <i>and</i> JACOB A. PHILLIPS, <i>et al.</i> , Defendants.	On Bill, &c. Affidavit.
----	---	----------------------------

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

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

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

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

40

Affidavit of Herman D. Moller.

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

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

HERMAN D. MOLLER.

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

MARIE SULLIVAN,
Notary Public of New Jersey.

10

20

30

40

**Affidavit of Theodor Helbig and
Max Franke.**

IN CHANCERY OF NEW JERSEY.

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

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

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

- 30 1. We are both familiar with the statements and contents of the affidavits of Jacob A. Phillips, Herman D. Moller and Max Mueller, all verified October 30, 1929, and with Exhibits Nos. 1, 1-A and 2.
- 30 2. The entire agreement and understanding of complainants with reference to the sale of their respective shares of stock of Brilliant Silk Hosiery Company referred to in said affidavits, is embodied in said Exhibits Nos. 1, 1-A and 2. There was no understanding or agreement with reference to the sale of said stock that was not embodied in said exhibits.
- 40 3. We did not agree at any time with said Phillips or anyone else that our shares of stock should

Affidavit of Theodor Helbig and Max Franke.

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

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

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

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

Affidavit of Theodor Helbig and Max Franke.

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

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

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

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

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

MAX FRANKE,
THEODOR HELBIG.

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

ALBERT BARBER,
A Notary Public of New Jersey.

Affidavit of Albert Scherzer and Others.

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

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

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

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

Affidavit of Albert Scherzer and Others.

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

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

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

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

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

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

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

Supplemental Affidavit of Jacob A. Phillips.

IN CHANCERY OF NEW JERSEY.

Between

THEODORE HELBIG, *et als.*,
Complainants,

and

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

On Bill, &c.
Supplemental
Affidavit by
Court's
Permission.

10

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

20

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

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

30

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

40

Supplemental Affidavit of Jacob A. Phillips.

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

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

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

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

Supplemental Affidavit of Jacob A. Phillips.

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

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

The situation then was that the option would not be exercised and my group of stockholders, including myself, would not receive the money and stock specified in the option unless I would sign this guarantee specifically represented to me to be only a matter of form and for the purpose of getting up a proper prospectus. Having seen and being familiar with the audit made by Haskins & Sells and the appraisal of the American Appraisal Company and knowing that the assets of the Brilliant Silk Hosiery Company were 100% as found and reported by these parties, I saw no harm in signing a guarantee that our as- 30 40

Supplemental Affidavit of Jacob A. Phillips.

sets were as represented and I did so sign in order to put the whole deal through and for the benefit of the entire group of stockholders who were selling their stock and as their representative. Without such action on my part the deal would not have been consummated and in so signing I acted for the entire group.

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

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

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

40 "(b) Deliver said one thousand eight hundred and eighty-six (1886) shares of said capital stock" (the stock due Mr. Phillips) "as directed in said notice upon the termination of said six (6) months' period."

Supplemental Affidavit of Jacob A. Phillips.

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

10

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

20

"We also showed Mr. Molloy" (one of Mr. Heine's associates) "the notice in writing dated August 14th, 1929, subscribed by Messrs. Ernst & Company, Messrs. Strupp & Company and by the Interstate Hosiery Mills, Inc., stating; '* * * we hereby notify you that breaches of conditions, representations, warranties, guarantees and agreements on the part of the said Jacob A. Phillips contained in his said contract letters dated February 15th, 1929, have occurred. We hereby notify you to deliver the said One Thousand Eight Hundred and Eighty-six (1886) shares of the capital stock of Interstate Hosiery Mills, Inc., formerly International Hosiery Mills, Inc., on August 15th, 1929, to Interstate Hosiery Mills, Inc., 232 Madison Avenue, New York City.'"

30

The contract letters of February 15, 1929, above referred to is the prospectus agreement

40

Supplemental Affidavit of Jacob A. Phillips.

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

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

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

30 This entire transaction has been one of an entire group of stockholders of which I was the active representative and it was never contemplated that the transaction should be considered closed and a final distribution of the stock made until everybody's stock was ready for delivery through the Bloomfield Bank in their respective proportions. If the other stockholders are permitted to receive their stock and I am forced to incur substantial expense in order to get my stock,
40 the result will be that while acting gratuitously as agent, I will be personally saddled with the

Supplemental Affidavit of Jacob A. Phillips.

expense of the transaction which was for the benefit of all and incurred in my capacity as agent for the completing of the original transaction.

It is true that the complainants have received \$200 per share in cash already and that they might have been at that time financially responsible but they are workmen and whether they have dissipated the money received in the stock market or elsewhere or whether they remain financially responsible or will be at the time when the amount of expense involved in securing my stock may be determined is problematical and if they are permitted to withdraw their stock without protecting me against the expense already incurred and about to be incurred, I will be deprived of my agent's lien on such stock now in the Bloomfield Bank and I may be deprived of the contribution of the proportionate shares due from the complainants. 10 20

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

JACOB A. PHILLIPS.

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

MARIE SULLIVAN,
Notary Public of New Jersey.

Supplemental Affidavit of Herman Miller.

IN CHANCERY OF NEW JERSEY.

10	<p>Between</p> <p style="text-align: center;">THEODORE HELBIG, <i>et als.</i>, Complainants,</p> <p style="text-align: center;"><i>and</i></p> <p>JACOB A. PHILLIPS and BLOOM- FIELD BANK & TRUST COMPANY, a corporation, Defendants.</p>	<p>On Bill, &c. Supplemental Affidavit by Court's Direction.</p>
----	---	--

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

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

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

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

40 I received my share of money from the Bloomfield Bank, \$200.00 for each of my shares, and when it came August, 1929, I was waiting for my

Supplemental Affidavit of Herman Miller.

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

10

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

20

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

30

HERMAN MILLER.

Subscribed and sworn to before }
me this 6th day of Novem- }
ber, A. D. 1929. }

MARIE SULLIVAN,
Notary Public of New Jersey.

40

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

IN CHANCERY OF NEW JERSEY.

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

20

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

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

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

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

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

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

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

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

HERMAN D. MOLLER,
MAX MUELLER.

Subscribed and sworn to before me this }
6th day of November, A. D. 1929. } 40

MARIE SULLIVAN,
Notary Public of New Jersey.

Replying Affidavits of Complainants.

IN CHANCERY OF NEW JERSEY.

10	Between THEODOR HELBIG, <i>et als.</i> , Complainants, <i>and</i> JACOB A. PHILLIPS, <i>et al.</i> , Defendants.	On Bill, etc. Replying Affidavits of Complainants.
----	---	---

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

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

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

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

40

Replying Affidavits of Complainants.

said Phillips or anyone else that it was necessary to sign any papers or documents in order to consummate the deal and secure our money and stock (except defendant's exhibits 1, 1A, and 2).

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

4. Complainants were not advised and had no information from any source until said affidavit of said Phillips was read to them today that Mr. Heine had instructed proceedings against the Irving Trust Company and in the Court of Chancery of New Jersey against Interstate Hosiery Mills, Inc. 20

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

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

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

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

Replying Affidavits of Complainants.

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

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

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

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

30

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

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

40

GERALDINE ZIEGENER,
A Notary Public of New Jersey.

Opinion of Vice-Chancellor.

IN CHANCERY OF NEW JERSEY.

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

Nov. 14, 1929. 20

CARLYLE GARRISON, Esq., Solicitor for the
Complainants.

HEINE & LAIRD, Esq'srs., Solicitors, M. CASE-
WELL HEINE, Esq., of Counsel for Defend-
ant Phillips.

OPINION.

SYLLABUS:

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

Opinion of Vice-Chancellor.

BENTLEY, V.-C.:

On motion for preliminary mandatory injunction.

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

Ullman, or those he represented, not being pre-
pared to take up the shares of stock so deposited
at the time fixed in this agreement, an extension
40 was granted for which a consideration of \$15,000

Opinion of Vice-Chancellor.

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

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

The complainants ask that a mandatory injunction issue forthwith to compel the Bloomfield Trust Company to deliver to them immediately, each his respective shares of the new corporation. This is resisted by the defendant Phillips, and he is joined by some of the former associates, because he says that his acts which have now led 40

Opinion of Vice-Chancellor.

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

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

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

My difficulty with Phillips' argument grows out of the fact that if he did occupy the position of an agent he clearly exceeded his authority when he entered into the warranty of the audit of the old company. Attached to Phillips' affidavit in the form of an exhibit is a copy of the deposit agreement of November 21, 1928, which has been re-
40

Opinion of Vice-Chancellor.

ferred to above. After fixing the terms upon which the depositories were to make delivery of the stock in escrow and the six months' option in favor of the new company, the instructions continue as follows:

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

10

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

20

Then further instructions were included for the distribution of the stock to be issued by the new company if it should not exercise its option. This instrument, it will be observed, amounts to a naked bailment upon the single condition that the bailees were to exchange the deposit for a certain sum in cash, or cash and shares of stock, without any discretion, and under an absolute agreement to either do so or to return the deposited shares and without any other alternative. In view of these facts, I do not see how it can be said that Phillips was endowed with any power to bind his fellow stockholders by the execution of the warranty. It was urged on his behalf upon the argument that his agency was made manifest by the unity of action and interest of all the stockholders of the old company. It seems to me that unity of purpose and equality of standing went no further than to attempt to provide an offer which, if accepted, would be proportionately beneficial to every one of the stockholders and did not extend

30

40

Opinion of Vice-Chancellor.

to any intention that a loss brought upon himself by any one of their number should be proportionately borne by all. Their purpose clearly was to use the advantage of collective bargaining for their mutual advantage, after accomplishing which it was "every man for himself". The argument was also made and admitted that originally the negotiations with Ullman contemplated a sale of all the assets of the old company, but that was abandoned in favor of the simpler process of a sale of all the capital stock and was adopted to avoid the very difficulty that Phillips has brought upon himself by his gratuitous warranty. It may be that he entered into it with the best intentions in the world. It may have seemed to him that otherwise this advantageous offer might be withdrawn; but even if he did there was no such emergency as justified him in assuming an authority which he did not possess. Mech. on Ag., sect. 718. The complainants and the other stockholders were available and they might at least have been consulted upon an unforeseen contingency which, if Phillips' claim is allowed, will result in their property and rights being withheld from them over the period of time necessary to complete a long litigation. *Gwilliam v. Twist*, 2 Q. B., 84. For this reason and because of the clear-cut intention and desire of the stockholders of the old company, I repeat that if there was an agency the agent exceeded his authority.

But it is said that the execution of the warranty by Phillips has been ratified, and in proof thereof there is exhibited with his affidavit another document under date of February 21, 1929, signed by all of the stockholders except Phillips, in which the latter is told that the signers' understanding is that in the negotiations of merger—

Opinion of Vice-Chancellor.

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

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

10

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

20

A preliminary injunction is a most drastic process and should never go except to prevent irreparable injury, and this is especially so in a mandatory injunction. But where the facts are not in dispute and the law is settled as it applies to a particular case, and such relief is necessary to prevent irreparable injury to the complainant, the writ should be allowed. *Hodge v. Giese*, 43 N. J. Eq. 342. That the Court may issue the writ in a proper case has been decided time and again, at least as early as *Bailey v. Schnitzius*, 45 N. J. Eq., 178, and as recently as *McCran v. Public Service Ry. Co.*, 95 N. J. Eq., 22, and *Rockaway Rolling Mill v. D. L. & W. R. R. Co.*, 138 Atl., 650. In the case at bar it is undis-

30

40

Opinion of Vice-Chancellor.

puted that the value of the stock held by the Bloomfield Trust Co. has declined to one-half the value at the time of issue. In these circumstances and the present condition of the stock market it seems to me that the complainants, who have not been shown incapable of being made to respond in damages, should not be compelled to await the outcome of a long litigation, at the end of which they may find that their property will have lost more, if not all, of its value.

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

20

30

40

Notice.

IN CHANCERY OF NEW JERSEY.

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

SIRS:

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

Respectfully,

CARLYLE GARRISON,
Solicitor of Complainants.

To

HEINE & LAIRD,
Solicitors of Defendants.

Order and Injunction.

IN CHANCERY OF NEW JERSEY.

10	<p>Between</p> <p style="text-align: center;">THEODOR HELBIG, <i>et als.</i>, Complainants,</p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">JACOB A. PHILLIPS, <i>et al.</i>, Defendants.</p>	<p>} On Bill, etc. Order and Injunction.</p>
----	--	--

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

30 considering the arguments of Carlyle Garrison, solicitor of complainants, and M. Casewell Heine, solicitor of defendants, and due cause appearing,

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

40 ORDERED that the defendant, Bloomfield Bank and Trust Company forthwith deliver to each of the complainants, Theodor Helbig, Albert Scherzer, Ernst Eichler, Emil A. Mueller, Max

Order and Injunction.

Roscher, Richard Boehm, Max Franke, Linus Thierfelder, Bruno Thierfelder, or Carlyle Garrison, their solicitor, all certificates of capital stock in its possession or under its control, of Interstate Hosiery Mills, Inc., a corporation, which said certificates of stock are drawn in favor of said complainants respectively. 10

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

E. R. WALKER,
C. 20

Respectfully advised,

JOHN BENTLEY,
V.-C.

30

40

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

<p style="text-align: center;">THEODORE HELBIG, <i>et als.</i>, Complainants-Appellees,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">JACOB A. PHILLIPS, <i>et al.</i>, Defendants-Appellants.</p>	}	<p>On Appeal from the Court of Chancery. Petition of Appeal.</p>	10
---	---	---	----

To the Honorable the Court of Errors and Appeals in the last resort in all causes: 20

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

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

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

Petition of Appeal.

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

20 Petitioners therefore pray:

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

HEINE & LAIRD,
Solicitors for Defendants-Appellants.

30 M. CASEWELL HEINE,
 Of Counsel.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

<div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: center; flex-grow: 1;"> <p style="margin: 0;">THEODOR HELBIG, <i>et als.</i>, Complainants-Appellees,</p> <p style="margin: 10px 0 0 40px;"><i>vs.</i></p> <p style="margin: 0;">JACOB A. PHILLIPS, <i>et al.</i>, Defendants-Appellants.</p> </div> <div style="font-size: 4em; line-height: 1; padding: 0 10px;">}</div> <div style="text-align: right; padding-right: 20px;"> <p style="margin: 0;">On Bill, etc.</p> <p style="margin: 0;">Answer to Petition of Appeal.</p> </div> </div>	10
--	----

The answer of the above named complainants-respondents to the petition of appeal of the above named defendants-appellants says that: 20

These respondents, not acknowledging all or any of the matters which in said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a decree and order was on the eighteenth day of November, 1929, made and entered in the Court of Chancery, in a cause for that purpose mentioned in said petition, as is therein stated; but for the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. 30

And these respondents are advised and believe that the said decree and order is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

CARLYLE GARRISON,
Solicitor of Complainants-Respondents.

ALFRED B. VAN HOUTEN,
Of Counsel with Complainants-Respondents. 40

Replication.NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	<p style="text-align: center;">THEODOR HELBIG, <i>et als.</i>, Complainants-Appellees,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">JACOB A. PHILLIPS, <i>et al.</i>, Defendants-Appellants.</p>	} On Bill, &c. Replication.
----	--	--------------------------------

20 The defendants-appellants join issue on the answer of the complainants-respondents.

HEINE & LAIRD,
Solicitors of Defendants-Appellants.

30

40

Notice.

IN CHANCERY OF NEW JERSEY.

Between <div style="text-align: center;"> THEODOR HELBIG, <i>et als.</i>, Complainants, <i>vs.</i> JACOB A. PHILLIPS, <i>et al.</i>, Defendants. </div>	}	On Bill, etc. Notice.	10
--	---	------------------------------	----

Sirs:

Please take notice that I shall move the argu- 20
 ment of all pending and undisposed motions and
 matters before Hon. John O. Bigelow, Vice Chan-
 cellor, at the Chancery Chambers, Paterson, N. J.,
 on Monday, June 2, 1930, at 10 o'clock A. M., day-
 light saving time, or as soon thereafter as the
 Court can attend to the same, and at said time and
 place I shall also apply for an order to show cause
 why the corporate defendant, Bloomfield Bank &
 Trust Company, and its officers should not be ad-
 judged guilty of contempt by reason of its and 30
 their refusal and failure to deliver the certificates
 of stock in question, in compliance with the order
 and injunction made in the above cause and dated
 November 18, 1929, and for such other and further
 relief in the premises as to the Court shall then
 seem proper and just.

Respectfully yours,

CARLYLE GARRISON,
 Solicitor of Complainants. 40

To

HEINE & LAIRD,
 Solicitors of Defendants.

Notice.

Due, legal and timely service of the within notice is hereby admitted this 23rd day of May, 1930.

10

Solicitors of Defendants, Jacob A. Phillips and Bloomfield Bank & Trust Company.

Order.

IN CHANCERY OF NEW JERSEY.

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

30 Due notice of this application having been given by Carlyle Garrison, solicitor of complainants, and the hearing having been adjourned from time to time to this day, and the Court having heard and considered the argument of Carlyle Garrison, solicitor as aforesaid, on behalf of complainants, and Heine & Laird, Esquires, appearing for defendants, and due cause appearing,

IT IS, on this 10th day of June, 1930, on motion of Carlyle Garrison, solicitor as aforesaid,

40 ORDERED that the defendants, Jacob A. Phillips and Bloomfield Bank & Trust Company, file an

Order.

answer to the amended bill of complaint in the above cause on or before the expiration of fifteen days after the day of the date of this order (certified by Carlyle Garrison, solicitor of complainants, to be a true copy) upon Heine & Laird, solicitors of record of said defendants, and serve a copy thereof within the same period upon said solicitor of complainants. 10

ORDERED that the motion of the defendants to strike the bill be and the same hereby is denied.

ORDERED that defendant, Bloomfield Bank & Trust Company, and defendant, Jacob A. Phillips, or one of them, enter into a bond to the complainants in the sum of \$10,000, with sufficient surety, conditioned that it and he will well and truly abide by and perform such order and decree as may be made by this Court in the above cause, and shall pay to each of the complainants such sum of money as it or he may be directed to pay under the order of this Court, if the decree of this Court shall be affirmed, but not otherwise; such bond to be approved as to sufficiency of surety and form by John A. Bernhard, a special Master of this Court, and to be filed with the Clerk of this Court within ten days from the date hereof; and in default of entering into and filing said bond by said defendant, Jacob A. Phillips, or said Bloomfield Bank & Trust Company within fifteen days from the date hereof, said Bloomfield Bank & Trust Company deliver to the complainants respectively or Carlyle Garrison, their solicitor, all certificates of capital stock in its possession or under its control of Interstate Hosiery Mills, Inc., a corporation, pursuant to terms of order and injunction in the above cause dated November 18, 1929, notwithstanding the appeal taken therefrom by said 20
30
40

Order.

defendants or one of them to the Court of Errors and Appeals.

10 ORDERED that a copy of this order, certified as aforesaid by solicitor of complainants to be a true copy, be served upon the defendants or their said solicitors of record within two days from the date hereof.

Respectfully advised,

E. R. WALKER,
C.

J. O. BIGELOW,
V. C.

20 I hereby certify that the within is a true copy of the original order to file in the within cause.

CARLYLE GARRISON,
Solicitor of Complainants.

30

40

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between

THEODOR HELBIG, *et als.*,
Complainants,

and

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

On Bill, &c.
Notice of Appeal.

10

The defendants, Jacob A. Phillips and Bloomfield Bank & Trust Company, hereby appeal from the order made and dated in the above entitled cause on June 10th, 1930, and from the whole and every part thereof to the Court of Errors and Appeals in the Last Resort in All Causes.

20

HEINE & LAIRD,
Solicitors for Defendants.

I conceive there is a good cause for appeal in this case.

M. CASEWELL HEINE,
Of Counsel.

30

Dated: June 25th, 1930.

Service of the within is hereby acknowledged this 26 day of June, 1930.

CARLYLE GARRISON,
Solr. for Compls.

40

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	<p style="text-align: center;">THEODOR HELBIG, <i>et als.</i>, Complainants-Appellees,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">JACOB A. PHILLIPS, <i>et al.</i>, Defendants-Appellants.</p>	<p style="font-size: 3em; line-height: 1;">}</p> <p>On Appeal from the Court of Chancery.</p> <p>Petition of Appeal.</p>
----	--	--

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

20 The petition of Jacob A. Phillips and Bloomfield Bank & Trust Company, appellants in the above entitled cause, respectfully shows:

30 1. Petitioners find themselves aggrieved by a final order made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date June 10th, 1930, in a certain cause in said Court of Chancery wherein Theodor Helbig, *et als.*, were complainants and Jacob A. Phillips and Bloomfield Bank & Trust Company were defendants, in this respect, to wit: that said order is a mandatory order directing the defendants or one of them to enter into bond to complainants in the sum of Ten Thousand Dollars with surety conditioned upon the performance by defendants of such order or decree as may be made by said Court of Chancery in said above mentioned cause, and further conditioned upon the payment to complainants of such sums as may be directed to be paid,

40

Petition of Appeal.

if any, by defendants to complainants, if the decree of said Court of Chancery be affirmed and directing the approval and filing of said bond within the time limited by said order, and in default of the entering into said bond that the defendant, Bloomfield Bank & Trust Company deliver to complainants or their solicitor all certificates of stock of the Interstate Hosiery Mills, Inc., in the possession of said Bloomfield Bank & Trust Company or under its control in accordance with the terms of an order of said Court of Chancery dated November 18th, 1929, and notwithstanding the appeal taken from the last named order to the Court of Errors and Appeals. 10

2. And your petitioners appeal from so much of said order of June 10th, 1930, as directs the defendants to enter into said bond to complainants or in lieu thereof to deliver certificates of stock of Interstate Hosiery Mills, Inc., to complainants or their solicitor pursuant to the order of November 18, 1929, notwithstanding the appeal from said last named order to the Court of Errors and Appeals on the ground that the Chancellor was without jurisdiction to make said order pending the appeal to the Court of Errors and Appeals from the order of November 18, 1929, and on the further ground that said order would be destructive of the *status quo* and of the subject matter of the litigation involved in the order of November 18, 1929, pending the appeal therefrom and on the ground that said order of June 10, 1930, would irreparably damage the defendants and particularly defendant Phillips in disregard of his legal and equitable rights as agent and individually, and on the ground that said order erroneously disregards the situation existing between the parties 20 30 40

Petition of Appeal.

and the maintenance of the same unchanged pending the appeal from the order of November 18, 1929, and on the ground that no facts and circumstances were made to appear which warranted the Court in making its said order pending the appeal by defendants to the Court of Errors and Appeals from the order of November 18, 1929.

10

Your petitioners pray, therefore:

That said order of the said Chancellor may be in the matters above specified regarding the execution of the bond or the delivery of said stock, reversed, set aside and for nothing holden; and that your petitioners may have such other relief in the premises as to this Court may seem proper.

20

HEINE & LAIRD,
Solicitors for Defendants-Appellants.

I conceive there is a good cause of appeal in this matter.

M. CASEWELL HEINE,
Of Counsel.

30

40

~~6 OCT. T. 1930~~

2 OCT. T. 1931

No 6

New Jersey Court of Errors and Appeals

THEODOR HELBIG, *et als.*,
Complainants-Appellees,

vs.

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

On Bill, &c.

On Appeal from
the Court of
Chancery.

(Order of June
10, 1930.)

Statement.

This is an appeal from an order of the Chancellor advised by Vice Chancellor Bigelow, dated June 10, 1930 (State of Case, p. 76), whereby the defendants were directed to enter into bond in the sum of \$10,000 conditioned upon the performance of any decree, including the payment of money, which might be made in this cause, or failing the filing of said bond, to deliver to the complainants the stock of the Interstate Hosiery Mills, Inc., held by the defendant bank and delivery of which said stock was directed by the mandatory injunction of November 18, 1929 (State of Case, p. 68), notwithstanding the appeal taken from said mandatory injunction to the Court of Errors and Appeals which was still pending in that court.

Facts.

Complainants filed their bill on October 9, 1929 (State of Case, p. 1), and prayed for the following relief:

1. That defendants answer.
2. That the Court determine the interest of the stockholders in the stock of the Interstate Hosiery Mills, Inc., held by the defendant bank, and when this interest should be determined that it decree that the bank deliver said stock to complainants in accordance with the interest of each and that it further decree that the defendants had no interest in said stock held by the defendant bank.
3. That the bank make discovery of the certificates of stock held by it together with the names in which the stock was made out and the trust agreement under which it held the same.
4. That defendant Phillips make discovery of the escrow agreement, corporation minutes, etc.
5. That defendants be restrained from disposing of the certificates pending the suit.
6. For process against the defendants.
7. (By amendment) That an account be taken of any loss resulting to complainants from the detention of this stock by defendants and when this loss should be determined on an accounting, for a decree that defendants pay the same.

Answer was filed and the case is now at issue and set for trial.

On application supported by the bill and affidavits a preliminary mandatory injunction was made by Vice Chancellor Bentley, dated November 18, 1929, directing the delivery by defendants to complainants of the stock held by the defendant bank (State of Case, p. 68).

On November 18, 1929, an appeal was taken by the defendants to this Court from the said

mandatory injunction order of November 18, 1929, which appeal was pending undecided on June 10, 1930.

Subsequent to the taking of said appeal from the order of November 18, 1929, and while the same was being perfected and prosecuted with all diligence, the complainants applied to the Court without any new affidavits, pleadings or facts shown other than those upon which the original mandatory injunction had been made, and secured an order of June 10, 1930, directing that the defendants enter into a bond with complainants in the sum of \$10,000 conditioned upon the payment of any sum found due upon the trial of the issue and the compliance with any decree made upon said trial, or in case of default in entering into said bond that defendants deliver the said stock held by the defendant bank and the subject of the appeal from the mandatory order of November 18, 1929.

This appeal is taken from the making of said order of June 10, 1930, on the ground that the Court had no jurisdiction pending the appeal to make said order.

Grounds of Appeal.

The grounds of appeal set forth in the petition of appeal (State of Case, p. 80) are:

That (1) the Court of Chancery had no jurisdiction pending the appeal from the mandatory order of November 18, 1929, to make the order of June 10, 1930; and that (2) the Court had no jurisdiction to make said order of June 10, 1930, as no facts were presented to it upon which the same could rest.

Argument.

The contention of defendants-appellants is that pending the appeal from the mandatory injunction of November 18, 1929, directing the defendants to turn over the stock in question to the complainants, that the subject matter of the appeal, namely, the stock, was required to be preserved intact and that the appeal suspended the operation of the order directing delivery. The making of the subsequent order of June 10, 1930, pending the appeal attempted to interfere with the subject matter of the first appeal by directing defendants to file a bond or upon failure so to do, to deliver the stock. This is contended to be an attempted interference with the subject matter of the pending appeal.

If the application for the order of June 10, 1930, be considered as an independent application for a bond to safeguard the complainants for the payment of any amount which might be found due upon an accounting on the trial of the case, the application was not only premature but was without any facts upon which the exercise of the Court's jurisdiction could be based. Nothing new was presented which had not been before the Court in the first application. There was no proof presented that the defendants were irresponsible or that they would be unable to respond to the payment ordered of any amount found due upon an accounting, no proof of any irreparable damage which might be suffered by complainants, in fact absolutely nothing which would warrant the Court in imposing the condition of entering into the bond prior to the trial of the issue in the cause.

POINT I.

The Court below had no jurisdiction to make the order of June 10, 1930, pending the appeal in this Court from the mandatory injunction order of November 18, 1929.

The subject matter of the operation of a decree or order of the Court of Chancery pending an appeal therefrom in this Court has been dealt with in *Pennsylvania Railroad Company v. National Docks Railroad Company*, 54 N. J. E. 647. An exhaustive consideration of the scope of this National Dock Company decision was made by the present Chancellor when sitting as a Vice Chancellor in *Ashby v. Yetter*, 78 N. J. E. 173.

This Court's latest expression is found in *Roseburg v. American Hotel & Garden Co.*, where the Court speaks by the Chief Justice in 95 N. J. E. 640.

The Court says in the National Docks case at page 653:

“The entire purpose and object of the appeal is to preserve such rights and property from the ill effects of the decision that is challenged. Unless it produces such a result, the procedure is a mere form, and, in many cases, absolutely a useless form. The suitor in carrying his case up asks for protection against an erroneous decree; such protection is obviously refused to him if the decree can be enforced before its legality has been tested by the superior court. In fine, the very essence of the remedy by appeal is to prevent, for the time being, the appellant from this execution of the existing decree; and this being so, it is indisputable that when the statute grants the right of appeal, it grants such protection. A decree cannot be used detrimentally to the appellant, pending the appeal, for the plain reason that such a use will, for

every practical purpose, defeat the appellate procedure.”

And at page 655:

“It is likewise the opinion of this court that an appeal in all cases will have that effect given to it *which shall be necessary to preserve the subject* to which the appellate procedure relates, in such a condition as will enable this court to render an efficacious decree in the premises. That for this purpose an injunction decree will be suspended or continued, or a previous injunction revived, by the act of filing an appeal whenever such construction shall be necessary for the end just stated.”

The Chief Justice in the Roseburg case, at page 641, approves the doctrine of the National Dock case and says that the effect of filing an appeal “was to prevent the order from being so dealt with subsequently by the Court of Chancery as to destroy or impair the subject of the appeal”.

In the present instance the subject matter involved in the appeal from the mandatory injunction of November 18, 1929, is the block of stock claimed by the complainants and withheld by the Bank and Phillips on the ground that the same is not deliverable until the termination of a certain prior contract involving the sale of said stock by the stockholders and the payment of the expenses of Phillips, for which payment he has a lien upon the stock held by the Bank.

Obviously Phillips has the right to have this Court pass upon the conflicting claims to possession of this stock and, equally obviously, the mandatory injunction of the Court of Chancery to turn it over to complainants is suspended pending the appeal.

If the Court of Chancery should in any way directly or indirectly proceed so as to compel the

defendants to hand over this stock to complainants pending the appeal, complainants would be perfectly free to dispose of it, encumber it with a resulting probability of its being sold out and placed beyond their control and in the event of this Court reversing the mandatory injunction, the subject matter of the appeal would have been completely destroyed.

This Court could not render an efficacious decree that the stock should not be delivered up by the defendants if delivery had been directly or indirectly procured pending the appeal by subsequent action of the Court of Chancery.

As was said in the National Docks case, a decree appealed from "cannot be used detrimentally to the appellant pending the appeal".

In the present instance upon the identical papers upon which the application was made for the mandatory injunction and pending the appeal therefrom, the Court of Chancery makes the order of June 10, 1930, directing that the defendants enter into a bond conditioned to pay the complainants whatever may be found due on an accounting, if any be required on the trial of the case, or in default of such bond deliver the stock, the subject matter of the appeal.

This is plainly detrimental to the appellants; it is an indirect attempt to impose a condition upon failure to comply with which the subject matter of the appeal is to be destroyed and the decision of this Court, if it reverse the mandatory injunction, rendered academic.

In other words, the Court of Chancery says you have appealed from our order to deliver this stock; now, on second thought and while the appeal is pending, you are required to deliver or to comply with an additional and burdensome condition of entering into a bond to secure the complainants prematurely for the payment of any.

thing found due on an accounting in the main case when the same shall be tried.

In the Roseburg case the bill was filed to obtain an injunction restraining the defendant Hotel Company from disturbing the complainant in his possession of a store which he had leased from the Hotel Company and upon proper application temporary injunction went against the defendant Hotel Company. Pending the appeal from the restraining order, defendant applied to the Court of Chancery to dissolve the injunction upon additional facts, which application the Vice Chancellor denied and appeal was taken from this denial.

This Court, in affirming the denial, however, did so, not upon the ground stated by the Vice Chancellor but upon the ground that it was an interference with the subject matter of the appeal from the original restraining order and in violation of the doctrine in the National Docks Railway Company.

We submit that in principle there is a close analogy between the Roseburg case and the case at bar.

In the Roseburg case defendant was ordered to refrain from interference with the tenant. In the case at bar the defendant was ordered to deliver up certain stock to complainants.

In the Roseburg case application was made while an appeal was pending to dissolve the injunction restraining interference, and this on additional facts. In the case at bar application was made pending appeal to compel delivery of the stock unless a bond was entered into to protect the complainants in any relief to which they might finally prove themselves entitled on the trial. In both instances this was an attempt to interfere with the subject matter of the appeal or to impose a burdensome condition—the use of the original decree detrimental to the defendants—while the appeal was pending.

It should be further noted that in the Roseburg case the application to Chancery pending the appeal was upon additional facts.

In the case at bar, the application to Chancery pending the appeal was upon no additional facts, so that there could be no warrant for the Court's imposing this condition of entering into a bond or else delivering the stock, the subject matter of the appeal.

A case such as *Morton v. Beach*, 56 N. J. E. 791, examined by the Chancellor in *Ashby v. Yetter*, page 178, is entirely beside the question. That case held that an account might be proceeded with pending an appeal to this Court.

In the case at bar there is no objection to the complainants trying their case and establishing their right to an accounting upon the trial, but in the meantime pending the appeal to this Court the stock must remain undisturbed in the possession of the defendant bank and the attempt to compel delivery pending an appeal by imposing the condition of giving a bond remains entirely unwarranted.

This is not within the rule of the cases considered by the Chancellor in the *Ashby* case, where an injunction has been refused and where it might be possible for an appeal to continue the injunction. The case at bar is a case where a mandatory injunction was granted and where the appeal must stay the action of the mandate in order to be any protection to the defendant.

It is submitted that there is no case reviewed by the Chancellor in *Ashby v. Yetter*, which affects the application of the doctrine of the National Docks case to the facts in the case at bar, which are parallel to the last named case.

In the *Ashby* case there was a decree adjudging a reconveyance of property, real and personal, from the defendant to the complainant and the Chancellor says at page 183:

“Of course the reconveyance of the property, real and personal, ordered, may not be made because after the hearing the avails of the litigation would be at once placed in the possession of the complainant and could be disposed of or consumed by him, and thus would that particular subject of the litigation be destroyed pending the appeal and leave nothing except an abstract question to be passed upon by the Court of last resort.”

Equally so in the case at bar, the indirect attempt of the Court of Chancery to compel defendants to deliver up the stock by imposing the condition of the giving of the bond, is an attempt to interfere with the subject matter of the litigation.

The defendants are entitled to resist if only on the score of inconvenience and expense, the giving of this bond or in the alternative delivering up the stock for the reason that they have the right to have this Court first pass upon the question of whether the stock shall be delivered up.

Furthermore, although defendants promptly appealed to this court from the order of June 10, 1930, their non-compliance with said order has been made the basis of an application to hold them in contempt.

sented to it which warranted the exercise of any jurisdiction and the application was premature.

Considering this order entirely apart from its effect on the subject matter of the litigation pending the appeal from the mandatory injunction and considering it as an original and independent application to secure the complainants for anything to which they might be decreed to be entitled upon an accounting in the cause, the Court action was improper.

First, the bill claimed delivery of the stock; the answer denied the right of complainants to deliver at this time. This issue has been joined, referred and a date set for trial. Until this issue is determined by trial the complainants may not assert that they are entitled to possession of the stock or are entitled to an account for any loss occasioned by its being held by the Bank. There is nothing in the bill of complaint or the supporting affidavits used on the motion for the mandatory injunction which show that the defendants are not responsible and that a decree for the payment of money on an account, if found against them, would not be collectible. There is no prayer in the bill for security, no allegations to support such a prayer. The application to the Court, therefore, is premature and the Court's order improper.

The Court simply directed a bond to be given as likely to protect the complainants in the event that they should win their suit, and the Court must apparently have been of the opinion that they were likely to win and that it would be convenient for the complainants to have some form of security which would be more effective and convenient than a proceeding by execution.

Second, the order for the bond is tied in with the direction to deliver the stock, the subject matter of the pending appeal, and for the reason pointed out in the preceding point is improper as an interference with the subject matter of the appeal.

Third, as an independent application for security, there are no facts before the Court showing irreparable injury to complainants, showing irresponsibility or inability to satisfy any decree which may be made in the cause on the part of defendants, no facts indicating the course of the stock upon the market, its intrinsic value, its mar-

ket value, and naturally no evidence could be before the Court as to what the market value or the actual value of the stock may be at the time the cause is tried.

In the absence of these and cognate facts, it is submitted that there was nothing before the Court on which it could exercise any jurisdiction to order even independently of the alternative of delivering the stock pending the appeal, that defendants enter into the bond of \$10,000.00.

POINT III.

It is respectfully submitted that the order of June 10, 1930, should be reversed with costs to the appellants.

HEINE & LAIRD,
Solicitors for Defendants-Appellants.

M. CASEWELL HEINE,
Of Counsel.

INDEX

	Page
Bill of Complaint	1
Answer of Hannah Hinshel	3
Answer and Counterclaim	11
Reply and Answer to Counterclaim	23
Final Decree	24
Opinion	26
Notice of Appeal	36
Petition of Appeal	37
Testimony	40

WITNESSES FOR PLAINTIFF

Hannah Hinshel:	
Direct	44
Cross	70
Re-direct	95
Re-cross	97
Gladys G. Vogel:	
Direct	100
William Hinshel:	
Direct	103
Cross	113
Re-direct	115
Re-cross	116
Frank Vogel:	
Direct	116

WITNESSES FOR DEFENDANT

Charles A. Frohn:	
Direct	119
Cross	123

and value, and naturally no evidence could be taken by the Court as to what the market value or the actual value of the stock may be at the time the same is sold.

In the absence of these and cognate facts, it is submitted that there was nothing before the Court which would, if could exercise any jurisdiction to order even independently of the alternative of delivering the stock pending the appeal that defendants enter into the bond of \$30,000.00.

POINT III.

It is respectfully submitted that the order of June 10, 1930, should be reversed with costs to the appellants.

HARR & LOUN,
Solicitors for Defendants-Appellants.

W. CARROLL HARR,
of Counsel.