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*For Plaintiff.*

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NOTICE OF APPEAL.

Essex County Circuit Court

PEOPLES NATIONAL BANK AND  
TRUST CO. OF BELLEVILLE,  
N. J., a corporation,

*Plaintiff,*

*vs.*

CHARLES S. GINSBURG and MAR-  
TIN SIMON,

*Defendants.*

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*Action  
at Law.*

*Notice of  
Appeal.*

To Nathan H. Berger, Esq., attorney of plaintiff-  
respondent, 776 Broad St., Newark, N. J.

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SIR:

PLEASE TAKE NOTICE, That the defendants in  
the above-entitled cause hereby appeal from the  
judgment entered in the above court on the 18th  
day of November, nineteen hundred and thirty,  
in favor of the above-named plaintiff and against  
the above-named defendants, and from every part  
thereof, to the New Jersey Court of Errors and  
Appeals in the last resort in all causes.

30

Dated, December , 1930.

Yours, etc.,

GEO. H. ROSENSTEIN,  
Attorney of Defendant, Charles S. Ginsburg.

LIONEL P. KRISTELLER,  
Attorney of Defendant, Martin Simon.

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*Notice of Appeal.*

Service of the within Notice of Appeal is hereby acknowledged this 5th day of December, 1930.

NATHAN H. BERGER,  
Attorney of Plaintiff.

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GROUNDS OF APPEAL.

New Jersey Court of Errors and Appeals

PEOPLES NATIONAL BANK AND TRUST CO. OF BELLEVILLE, N. J., a corporation, <i>Plaintiff-Respondent,</i>  <i>vs.</i> CHARLES S. GINSBURG and MAR- TIN SIMON, <i>Defendants-Appellants.</i>	}	<i>Action  at Law.</i>  <i>Grounds of  Appeal.</i>	10
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To Nathan H. Berger, Esq., attorney for plain-  
tiff-respondent: 20

PLEASE TAKE NOTICE that the defendants write  
down the following grounds of appeal, to wit:

1. Because there is no evidence to sustain the  
verdict of the jury in favor of the plaintiff and  
against the defendants.

2. Because the facts are undisputed and the  
verdict should have been in favor of the defend-  
ants-appellants instead of the plaintiff-respond-  
ent. 30

3. Because the trial court permitted the fol-  
lowing question to be asked by the respondent  
and answered over objection of the appellants:

“Q Well, why didn't you sell all of the  
2,000 shares on that day?”

4. Because the trial court permitted the fol-  
lowing question to be asked by the respondent  
and answered over objection of the appellants: 40

*Grounds of Appeal.*

“Q Was there a time, in August of 1929, when the sale of the stock would have resulted in a sum of money which, with the certificate of deposit, would have liquidated your line, your debt to the bank, or to within a few hundred dollars?”

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5. Because the trial court permitted the following question to be asked by the respondents and answered over objection of the appellants:

“Q At any time. Have you ever tendered him that money at any time, the amount of money that you owe the bank?”

6. Because the trial court refused to permit the following question to be asked by the appellants of respondent's witness:

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“Q Why don't you apply it to the indebtedness?”

7. Because the trial court refused to admit in evidence any testimony as to the value of the Lincoln Interstate Holding Company stock on September 12, 1929.

30

8. Because the trial court erred in the ruling that the value of the Lincoln Interstate Holding Company stock as of the date of the commencement of the suit should be the value which should control in this case and in fixing the latter date for the determination of such value.

9. Because the trial court refused to direct a verdict in favor of the defendants-appellants for the difference between the value of the stock in question on September 12, 1929, which was \$5,906.25, and the amount due upon the note in the sum of \$3,103.49, or a balance due defendants-appellants from plaintiff-respondent of \$3,221.19.

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*Grounds of Appeal.*

10. Because the trial court refused to direct a verdict in favor of the defendants-appellants for \$219.76.

11. Because the trial court charged the jury as follows, and to which charge defendants-appellants duly excepted:

“It stood as security for the \$3,000 note as well as for the \$7,200 note; and the proceeds of that sale would not be sufficient to wipe out the entire indebtedness of these defendants to the bank; and therefore the bank was not obliged to dispose of that stock simply because the defendants requested them to do so, as they would have been if those shares had stood as security only for the \$7,200 note.”

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12. Because the trial court charged the jury as follows, and to which charge defendants-appellants duly excepted:

“The mere fact, since the collateral would not pay the entire debt of these defendants, that they demanded the sale of this stock, if they did, would not entitle them to your verdict in this case.”

20

13. Because the trial court charged the jury as follows, and to which charge defendants-appellants duly excepted:

“Now we come to the main question in this case. As I have told you, the plaintiff was not bound to sell this stock simply because it was demanded by the defendants, unless the price for which the stock would have been sold would pay their entire indebtedness, or unless they made up the dif-

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*Grounds of Appeal.*

ference, which they admit they could not do at that time.”

LIONEL P. KRISTELLER,  
Attorney for Defendant-Appellant,  
Martin Simon.

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GEORGE H. ROSENSTEIN,  
Attorney for Defendant-Appellant,  
Charles S. Ginsburg.

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## COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

ESSEX COUNTY.

PEOPLES NATIONAL BANK & TRUST  
Co., a New Jersey corpora-  
tion,

*Plaintiff,*

*vs.*

CHARLES S. GINSBURG and MAR-  
TIN SIMON,

*Defendants.*

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*Action  
at Law.*

*Complaint.*

Plaintiff, Peoples National Bank & Trust Co. of Belleville, New Jersey, a corporation, organized and existing under the National Banking Laws of the United States of America, says:

20

1. On January 6, 1930, the defendants, Charles Ginsburg and Martin Simon, made their promissory note to their own order, for the sum of \$2,950.00, payable in one month at the Peoples National Bank and Trust Company, a copy of which is as follows:

30

\$2,950.00.

January 6th, 1930.

One month after date we promise to pay to the order of ourselves Two Thousand Nine Hundred Fifty & no/100 Dollars.

Payable at Peoples National Bank & Trust Co.

Value Received with interest.

No. 35370. Due Feb. 6.

Charles S. Ginsburg.  
Martin Simon.

40

*Complaint.*

## Endorsements:

Charles S. Ginsburg.

Martin Simon.

2. Thereafter and on the same day, the defendants, Charles S. Ginsburg and Martin Simon, 10 endorsed said note to the plaintiff herein for value.

3. On the date said note became due, it was presented at the Peoples National Bank & Trust Co. of Belleville, where it was payable, but was not paid, and thereupon said note was protested for non-payment.

4. Notice of the non-payment of said note was duly given to all said endorsers.

20 Plaintiff demands judgment against the defendants, Charles S. Ginsburg and Martin Simon, for the sum of \$2,950.00 with interest thereon from January 6, 1930 and costs of suit.

NATHAN H. BERGER.

Attorney of Plaintiff.

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**ANSWER AND COUNTER-CLAIM OF  
DEFENDANT CHARLES S. GINSBURG.**

ESSEX COUNTY CIRCUIT COURT.

PEOPLES NATIONAL BANK & TRUST  
Co., a New Jersey corpora-  
tion,

*Plaintiff,*

*vs.*

CHARLES S. GINSBURG and MAR-  
TIN SIMON,

*Defendants.*

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*Action  
at Law.*

*Answer and  
Counter-  
claim.*

The defendant Charles S. Ginsburg of the City  
of Newark, County of Essex and State of New  
Jersey, by way of Answer to the Complaint here-  
tofore filed in this action, says that:

20

1. He admits the allegations contained in par-  
agraph 1.

2. He admits the allegations contained in  
paragraph 2 relating to the endorsing of said  
note, but denies that the said note was endorsed  
for value and alleges said endorsement was made  
at the request and for the accommodation of the  
plaintiff.

30

3. He admits the said note was not paid, but  
denies that there is any sum due on said note.  
He further denies each and every other allegation  
in paragraph 3.

4. He denies each and every allegation con-  
tained in paragraph 4.

40

*Answer and Counter-claim of Charles S. Ginsburg.*

By way of counter-claim, this defendant says:

10 1. That on or about the 10th day of July, 1929, the defendant executed and delivered to the plaintiff his promissory note in the sum of \$7,250.00, secured by the deposit by the defendant as pledgor with the plaintiff, as pledgee, 2,000 shares of the common capital stock of the Lincoln Interstate Holding Co. of Newark, New Jersey, and further secured by a deposit by the defendant as pledgor with the plaintiff as pledgee of a certificate of deposit in the sum of \$1,500.00.

20 2. That thereafter, and on or about the 2nd day of August, 1929, at the express instance and request of the defendant, the plaintiff sold for the account of the defendant, 500 shares of the said 2,000 shares of the common capital stock of the Lincoln Interstate Holding Co. of Newark, New Jersey, at the price of \$4 $\frac{1}{8}$  per share, making a total of \$2,062.50, and applied the proceeds of said sale in reduction of the indebtedness of the defendant arising on said note.

30 3. That thereafter, the plaintiff credited on account of the amount due on said note the amount of the certificate of deposit heretofore mentioned against the indebtedness on said note, reducing the indebtedness on said note to the sum of \$6,637.50.

40 4. That thereafter and on or about the 12th day of September, 1929, the defendant directed the plaintiff to deliver 500 shares of the common capital stock of the Lincoln Interstate Holding Co. of Newark, New Jersey, to a customer, whom he had procured, at the then market price of \$3 $\frac{15}{16}$  per share, making a total of \$1,968.75, and to credit the proceeds received on account of the indebtedness of the defendant to the plain-

*Answer and Counter-claim of Charles S. Ginsburg.*

tiff, but notwithstanding its duty in that behalf, the plaintiff failed and unlawfully and negligently refused to make delivery of said stock, and apply the proceeds upon the defendant's debt.

5. On or about the said date, the defendant had made arrangements for the sale of the balance of the collateral security, to wit, 1,000 shares of the common capital stock of the Lincoln Interstate Holding Co. of Newark, New Jersey at and for the same price hereinabove mentioned, to wit, \$3 15/16 per share, making a total of \$3,937.50. 10

6. That thereafter and at the present time, the value of the 1,500 shares of the aforesaid common capital stock of the Lincoln Interstate Holding Co. of Newark, New Jersey, pledged with the plaintiff as aforesaid, depreciated in value, and is now worth \$2,436.00 or less. 20

7. That as a result of the plaintiff's carelessness, negligence and refusal to carry out the specific directions of the defendant to sell the 1,500 shares of the said stock as aforesaid, and crediting the proceeds of \$5,906.25 on account of the defendant's indebtedness, the defendant has been greatly damaged, in that he has sustained a loss in the depreciation of his security pledged with the plaintiff. 30

WHEREFORE, the defendant demands judgment affirmative on his counter-claim in the sum of \$10,000.00, together with his lawful costs.

CHARLES S. GINSBURG,  
Attorney *Pro Se.*

**ANSWER AND COUNTER-CLAIM OF  
DEFENDANT MARTIN SIMON.**

ESSEX COUNTY CIRCUIT COURT.

10	PEOPLES NATIONAL BANK & TRUST Co., a New Jersey corpora- tion, <div style="text-align: right; margin-right: 20px;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		
	CHARLES S. GINSBURG and MAR- TIN SIMON, <div style="text-align: right; margin-right: 20px;"><i>Defendants.</i></div>	}	<i>Answer and Counter- claim.</i>

20       The defendant, Martin Simon, of the City of  
Newark, County of Essex and State of New Jer-  
sey, by way of answer to the complaint hereto-  
fore filed in this action, says that:

Note: This answer and counter-claim of the  
defendant Martin Simon is in all respects similar  
to, and a verbatim copy of, that filed by defend-  
ant Charles S. Ginsburg, (S. C., pp. 9-11) and,  
for that reason, is not printed in full.

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**ANSWER TO COUNTER-CLAIM OF  
DEFENDANT CHARLES S. GINSBURG.**

ESSEX COUNTY CIRCUIT COURT.

PEOPLES NATIONAL BANK AND TRUST Co. OF BELLEVILLE, a New Jersey corporation,  vs.  CHARLES S. GINSBURG and MAR- TIN SIMON,  	}	Action at Law.  Answer to Counter- claim of Defendant Charles S. Ginsburg.	10
Plaintiff,       Defendants.			

Plaintiff, Peoples National Bank and Trust Company of Belleville, a corporation, answering the counter-claim of the defendant Charles S. Ginsburg, says: 20

1. It admits the allegations of paragraph 1, except the statement that the note referred to therein was dated July 10, 1929, and alleges that said note was dated June 10, 1929, and excepting also that it denies the allegation that it received a certificate of deposit of \$1,500.00, but alleges that said certificate of deposit was in the sum of \$1,463.20. 30

2. It admits the allegations of paragraphs 2 and 3 of the complaint.

3. It denies the allegations of paragraphs 4, 5, 6 and 7 of the complaint, except as such denial is modified in the separate defenses hereinafter set forth.

*Answer to Counter-claim of Charles S. Ginsburg.*

## FIRST SEPARATE DEFENSE.

1. On April 14, 1928, the plaintiff loaned to Charles S. Ginsburg and Martin Simon (herein referred to as the defendants) \$16,400.00 on their collateral promissory note, on the security of two thousand shares of Lincoln Inter-State Holding Company stock, which the defendants assigned to the plaintiff.

2. This loan was reduced periodically and on June 10, 1929, there was due on said loan a balance of \$7,200.00 for which the defendants gave plaintiff their collateral promissory note in said sum (a copy whereof is annexed hereto and made part hereof).

3. On or about August 12, 1929, the plaintiff demanded payment of said note of \$7,200.00 and plaintiff and defendants agreed that 500 shares of said stock should be sold and the proceeds of said sale should be applied in reduction of said note of \$7,200.00. Accordingly 500 shares of said stock were sold for \$2,062.00 and this amount was applied in reduction of said note. The defendants promised to pay the balance due on said note without undue delay.

4. Some time during the month of September, 1929, the defendants requested plaintiff to consent to the sale of another 500 shares of said stock, and the plaintiff refused to consent to such sale, because the defendants had failed to fulfill their undertaking to the plaintiff to pay the balance due on said note in full.

5. On November 4, 1929, plaintiff applied the certificate of deposit of \$1,463.20 in reduction of said note. On January 25, 1930, said note was further reduced by \$14.00, and on April 2, 1930,

*Answer to Counter-claim of Charles S. Ginsburg.*

by \$5.96, leaving an unpaid balance of \$3,654.84, which amount is still due and unpaid.

## SECOND SEPARATE DEFENSE.

1. By the terms of the collateral note given by the defendants to the plaintiff, dated June 10, 1929 (a copy whereof is hereby annexed), the defendants assigned, transferred and set over all of said shares of Lincoln Inter-State Holding Co. and gave to the President and Cashier of the plaintiff, or either of them, full power and authority to deal with said shares as they, or either of them may see fit. During the month of September, 1929, when the defendants requested the plaintiff to consent to the sale of said 500 shares of stock, the president and cashier of the plaintiff did not see fit to sell said 500 shares of stock, and the defendants were advised accordingly. By virtue of the express agreement between the plaintiff and the defendant, above referred to, the plaintiff rightfully refused to consent to the sale of said 500 shares of stock.

## THIRD SEPARATE DEFENSE.

It was optional with the plaintiff to sell said stock, or not, and it was under no legal obligation to consent to the sale of said 500 shares of stock.

## FOURTH SEPARATE DEFENSE.

The plaintiff did not act in bad faith, and was not negligent in its refusal to consent to the sale of said 500 shares of stock, and is therefore not liable in damages to the defendants for its re-

*Answer to Counter-claim of Charles S. Ginsburg.*

fusal to consent to the sale of said 500 shares of stock.

FIFTH SEPARATE DEFENSE.

10 There was no contract varying the powers and duties of the parties hereto, except the contract contained in the collateral note above referred to, and the defendants could not make it the duty of the plaintiff to consent to the sale of said 500 shares of stock.

SIXTH SEPARATE DEFENSE.

20 At the time of the request of the defendants that the plaintiff consent to the sale of said 500 shares of stock, said collateral note had become due and the plaintiff was under no obligation to agree to a sale of part of its collateral security, given with said note, and no liability attached to plaintiff by reason of its refusal to consent to the sale of said 500 shares of stock.

OBJECTION IN POINT OF LAW.

30 The plaintiff reserves the right to object, and hereby does object, to the counter-claim of this defendant, on the ground that said counter-claim does not set forth a legal cause of action, and reserves the right to move to strike out said counter-claim at any time, at or before the trial of this cause.

NATHAN H. BERGER,  
Attorney of Plaintiff.

*Answer to Counter-claim of Charles S. Ginsburg.*

“Exhibit Attached to Answer to Counter-claim”

\$3660.80

~~\$7200.00~~

Belleville, N. J., June 10, 1929

On Demand month after date, for Value received we promise to pay to

10

THE PEOPLES NATIONAL BANK AND TRUST  
COMPANY OF BELLEVILLE

or order, at their banking house Seventy-two hundred DOLLARS with interest at the rate of . . . . per cent, per annum, from the date hereof; I herewith deposit with them as collateral security for payment of this or any other liability or liabilities of . . . . . to them, now incurred or due, or that may be hereafter contracted, the following property, viz.:

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~~2000 sh Lincoln Interstate  
both bal 1500.00~~

168 shares Niagara share Corp. (Md) cert.  
#7 N Y Co 1848  
T NYC 1974

I, (we) hereby assign, transfer and set over all of said property to the PEOPLES NATIONAL BANK AND TRUST COMPANY OF BELLEVILLE, giving the President and the Cashier of said bank, or either of them, and their successors in office, full power and authority to deal with said property as they or either of them may see fit, and to the same extent as I (we) would deal with said property and to dispose of same as I (we) would dispose of said property if these presents were not made.

30

I hereby empower the PEOPLES NATIONAL BANK AND TRUST COMPANY OF BELLEVILLE, N. J., to call for additional security, should the said collateral decline in value, and on failure to respond to such call, or on the non-

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*Answer to Counter-claim of Charles S. Ginsburg.*

performance of this promise or on the non-payment of the liabilities above mentioned, the said Bank, its President or Cashier, is hereby given full power and authority to sell and assign and deliver the whole or any part of the above mentioned securities, or any substitute therefor, or  
 10 any addition thereto at any Brokers' Board, or at any public or private sale at the option of the said PEOPLES NATIONAL BANK AND TRUST COMPANY, or its President or Cashier, or their assigns at any time or times hereafter without advertisement or notice—such advertisement or notice being hereby expressly waived; and upon such sale the said PEOPLES NATIONAL BANK AND TRUST COMPANY, the  
 20 holder hereof, may purchase the whole or any part of such securities—discharged from any right of redemption; and after deducting all legal or other costs and expenses for collection, sale and delivery, may apply the residue of the proceeds of such sale or sales to pay any, either or all of said liabilities as the said PEOPLES NATIONAL BANK AND TRUST COMPANY shall deem proper, returning the over-plus to the undersigned. And the undersigned agrees to be  
 30 and remain liable to the holder hereof for any deficiency, and hereby authorize and empower the said Bank, at its option, at any time, to appropriate and apply to the payment and extinguishment of any of the above named obligations or liabilities, whether now existing or hereafter contracted, any and all moneys now or hereafter in the hands of the said Bank, on deposit or otherwise, to the credit of or belonging to the undersigned.

32314

Charles S. Ginsburg  
Martin Simon

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*Answer to Counter-claim of Martin Simon.*

“Endorsed”

\$2062.—	Paid Aug. 12, 1929	B
1463.20	Paid Nov. 4, 1929	B
14.00	Paid Jan. 25, 1930	B
5.96	Paid Apr. 2, 1930	B

10

**ANSWER TO COUNTER-CLAIM OF  
DEFENDANT MARTIN SIMON.**

ESSEX COUNTY CIRCUIT COURT.

PEOPLES NATIONAL BANK AND TRUST CO. OF BELLEVILLE, a New Jersey corporation, <i>Plaintiff,</i>  <i>vs.</i>  CHARLES S. GINSBURG and MAR- TIN SIMON, <i>Defendants.</i>	}	<i>Action at Law.</i>  <i>Answer to Counter- claim of Defendant Martin Simon.</i>	20
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Plaintiff, Peoples National Bank and Trust Company of Belleville, a corporation, answering the counter-claim of the defendant Martin Simon, says: 30

Note: This answer to counter-claim (and the exhibit thereunto annexed) is in all respects similar to, and a verbatim copy of, that filed by plaintiff in answer to the counter-claim of defendant Charles S. Ginsburg, (S. C., pp. 13-19) and for that reason, is not printed in full.

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**NOTICE OF MOTION AND AFFIDAVIT.**

ESSEX COUNTY CIRCUIT COURT.

10	PEOPLES NATIONAL BANK & TRUST Co., a New Jersey corpora- tion,  <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		
	CHARLES S. GINSBURG and MAR- TIN SIMON,  <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Notice of Motion.</i>

To Charles S. Ginsburg, attorney *pro se.*

20 SIR:

30 TAKE NOTICE that on April 25, 1930, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, I will move, in behalf of plaintiff, for an Order striking out the answer and counter-claim of the defendant, Charles S. Ginsburg, on the ground that this answer and counter-claim are filed in an action brought to recover a debt or liquidated demand arising upon an express contract, and will move for judgment final in favor of the plaintiff and against the defendant Charles S. Ginsburg.

I will base my motion on the affidavit, of which a true copy is annexed hereto and served herewith upon you.

Very truly yours,

NATHAN H. BERGER,  
Attorney of Plaintiff.

*Affidavit of Russell K. Rose.*

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

RUSSELL K. ROSE, being duly sworn on his oath according to law, deposes and says:

1. I am vice-president of the Peoples National Bank and Trust Company of Belleville, N. J. (herein referred to as the Bank), and am familiar with the facts herein set forth, and have been authorized by the Bank to make this affidavit in its behalf. 10

2. On April 4, 1928, the Bank loaned to Charles S. Ginsburg and Martin Simon (herein referred to as the defendants) \$16,500, on their collateral promissory note (a copy of which is annexed hereto and made a part hereof) on the security of two thousand shares of Lincoln Interstate Holding Company stock, which the defendants assigned to the Bank. 20

3. This loan was reduced from time to time by periodical payments. On June 10, 1929, the said loan was further reduced by \$3,000, which the Bank loaned to the defendants on their Unsecured promissory note, referred to in paragraph 9 herein. This left an unpaid balance on the collateral loan of \$7,200 and was renewed by a collateral note of the same form as above referred to. These two thousand shares of stock aforesaid were still held by the Bank as collateral security for the renewal note of \$7,200. 30

4. On or about August 12, 1929, the Bank and the defendants agreed to the sale of five hundred shares of Lincoln Interstate Holding Company stock out of the said two thousand shares held by said Bank, for which was realized the sum of 40

*Affidavit of Russell K. Rose.*

\$2,062, and said amount was credited as a payment on account of said collateral note.

5. On November 4, 1929, the defendants further reduced said collateral loan by the sum of \$1,463.20.

10 6. On January 25, 1930, said defendants further reduced said collateral loan by the sum of \$14.00.

7. On April 2, 1930, the said defendants further reduced said collateral loan by the sum of \$5.96, leaving an unpaid balance on account of said loan of \$3,654.84, besides accrued interest thereon.

20 8. It is true that sometime in September, 1929, the defendants requested the plaintiff to agree to the sale of five hundred shares of said Lincoln Interstate Holding Company stock, and that said Bank refused to agree to the sale of said stock at the price of \$3 15/16 per share, or for the total sum of \$1,968.75, unless said defendants paid all of their indebtedness to the Bank, which said defendants refused to do. The defendants, at no time, offered to sell all of said shares of stock held as security, and at no time  
30 offered to pay all of their indebtedness to said Bank.

9. On June 10, 1929, said Bank loaned to said defendants \$3,000 on their promissory note, payable one month after date, and applied the proceeds of said loan towards reducing the collateral loan of \$10,200.

40 10. The loan of \$3,000, referred to in paragraph 5 above, was reduced to \$2,950.00, and was renewed for said amount by the promissory note of the defendants, dated January 6, 1930,

*Affidavit of Russell K. Rose.*

payable February 6, 1930, with interest. On February 6, 1930, said note was presented for payment, was dishonored for non-payment, and was duly protested. All of said sum of \$2,950.00 and interest thereon from January 6, 1930, is due, together with a protest fee of \$2.36, no part thereof having been paid.

10

RUSSELL K. ROSE.

Subscribed and sworn to before me  
this 17th day of April, 1930.

JEAN NAPOLIELLO,  
A Notary Public of New Jersey.

Note: The collateral promissory note referred to in the following affidavit, and made part thereof, is in all respects similar to, and a verbatim copy of, that annexed to plaintiff's answers to the counter-claim (S. C., pp. 13-19).

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## NOTICE OF MOTION AND AFFIDAVIT.

## ESSEX COUNTY CIRCUIT COURT.

10	PEOPLES NATIONAL BANK & TRUST Co., a New Jersey corporation,  <div style="text-align: center;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> CHARLES S. GINSBURG and MAR- TIN SIMON,  <div style="text-align: center;"><i>Defendants.</i></div>	} <i>Action</i> } <i>at Law.</i>  } <i>Notice of</i> } <i>Motion.</i>
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To Martin Simon, attorney *pro se*.

20 Note: The notice of motion, the affidavit and the exhibit thereunto annexed to strike out the answer and counter-claim of defendant Martin Simon, is in all respects similar to, and a verbatim copy of that served upon defendant Charles S. Ginsburg (S. C., pp. 20-23), and for that reason, is not printed in full.

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**AFFIDAVIT OF CHARLES S. GINSBURG.**

**ESSEX COUNTY CIRCUIT COURT.**

PEOPLES NATIONAL BANK & TRUST Co., a New Jersey corpora- tion,  vs.  CHARLES S. GINSBURG and MAR- TIN SIMON,  }	Plaintiff,   Defendants.	} Action at Law. Affidavit.	10
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STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss. 20

CHARLES S. GINSBURG, of full age, being duly sworn according to law, on his oath deposes and says:

1. That he is one of the defendants in the above-entitled action.

2. That on or about the 10th day of July, 1929, he, together with the defendant, Martin Simon, executed and delivered to the plaintiff, his promissory note in the sum of \$7,200.00, secured by the deposit by them as pledgors, with the plaintiff as pledgee, 2,000 shares of the common capital stock of the Lincoln Interstate Holding Co. of Newark, New Jersey, and further secured by a deposit by them, as pledgors, with the plaintiff, as pledgee, of a certificate of deposit in the sum of \$1,500.00. 30

3. That on or about the 2nd day of August, 1929, at the request of deponent, the plaintiff sold for their account, 500 shares of the said 2,000 40

*Affidavit of Charles S. Ginsburg.*

shares of the common capital stock of the Lincoln Interstate Holding Co. of Newark, New Jersey, at the price of  $\$4\frac{1}{8}$  per share, making a total of \$2,062.50, and deponent instructed the plaintiff to apply the proceeds of said sale in reduction of the indebtedness of deponent and defendant,  
10 Martin Simon.

4. That he is informed and verily believes that the plaintiff credited on account of the amount due on said note, the amount of the certificate of deposit heretofore mentioned against the indebtedness of said note, reducing the indebtedness on said note to the sum of \$6,637.50.

5. That on or about the 12th day of September, 1929, deponent and Martin Simon called the  
20 Vice-President of the plaintiff corporation, one Russell K. Rose, both deponent and Mr. Simon being on extension telephone wires connected with Mr. Rose and at that time informed him that they had received an offer to purchase their common capital stock of Lincoln Interstate Holding Co. of Newark, New Jersey at the price of  
30  $\$3\frac{15}{16}$  per share and had actually sold 500 shares with the understanding that an additional 1,000 would be sold them at the same price on the same day, and in accordance with said sale, deponent instructed Mr. Rose to make delivery of said stock to the customer.

6. Mr. Rose refused to make delivery, stating that he felt that the price was insufficient.

7. Deponent then asked what would become of the loan if the value of the stock would depreciate further as it had already receded in price considerably and Mr. Rose's reply was that he would hold the stock for a better price and if it  
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*Affidavit of Charles S. Ginsburg.*

would recede, "it would be just too bad and we'll take that chance."

8. Deponent further states that if all of said 1,500 shares were sold on said date, pursuant to arrangements made with the customer, the amount realized on the sale would have been \$5,906.25. 10

9. Deponent is further informed and verily believes that the said stock had greatly depreciated in value and would now bring a price less than \$2,500.00.

CHARLES S. GINSBURG.

Subscribed and sworn to before me  
this 25th day of April, 1930.

JOSEPH W. HENRY,  
A Master in Chancery of New Jersey.

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**AFFIDAVIT OF MARTIN SIMON.**  
**ESSEX COUNTY CIRCUIT COURT.**

10	PEOPLES NATIONAL BANK & TRUST Co., a New Jersey corpora- tion, <div style="text-align: right; margin-right: 20px;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>Affidavit.</i>
	CHARLES S. GINSBURG and MAR- TIN SIMON, <div style="text-align: right; margin-right: 20px;"><i>Defendants.</i></div>		

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

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

1. That he is one of the defendants in the above-entitled matter.

30 2. That on or about the 10th day of July, 1929, he, together with the defendant, Charles S. Ginsburg, executed and delivered to the plaintiff, his promissory note in the sum of \$7,200.00, secured by the deposit by them as pledgors, with the plaintiff as pledgee, 2,000 shares of the common capital stock of the Lincoln Interstate Holding Co. of Newark, New Jersey, and further secured by a deposit by them, as pledgors, with the plaintiff, as pledgee, of a certificate of deposit in the sum of \$1,500.00.

40 3. That on or about the 2nd day of August, 1929, at the request of the deponent, the plaintiff sold for their account 500 shares of the said 2,000 shares of the common capital stock of the Lincoln

*Affidavit of Martin Simon.*

Interstate Holding Co. of Newark, New Jersey, at the price of  $\$4\frac{1}{8}$  per share, making a total of \$2,062.50, and deponent instructed the plaintiff to apply the proceeds of said sale in reduction of the indebtedness of deponent and defendant, Charles S. Ginsburg.

4. That he is informed and verily believes that the plaintiff credited on account of the amount due on said note the amount of the certificate of deposit heretofore mentioned against the indebtedness of said note, reducing the indebtedness on said note to the sum of \$6,637.50.

5. That on or about the 12th day of September, 1929, deponent and Charles S. Ginsburg called the Vice-President of the plaintiff corporation, one Russell K. Rose, both deponent and Mr. Ginsburg being on extension telephone wires connected with Mr. Rose, and at that time Mr. Ginsburg informed him that they had received an offer to purchase their common capital stock of the plaintiff corporation at the price of  $\$3\frac{15}{16}$  per share and had actually sold 500 shares with the understanding that an additional thousand would be sold them at the same price on the same day, and in accordance with said sale, defendant, Charles S. Ginsburg instructed Mr. Rose to make delivery of said stock to the said customer.

6. Mr. Rose refused to make delivery, stating that he felt that the price was insufficient.

7. Defendant, Charles S. Ginsburg, then asked what would become of the loan if the value of the stock would depreciate further, as it had already receded in price considerably, and Mr. Rose's reply was that he would hold the stock for a better price and if it should recede it would be "just too bad and we'll take that chance."

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*Affidavit of Martin Simon.*

8. Deponent further states that if all the said 1,500 shares were sold on the said date, pursuant to the arrangements made with the customer, the amount realized on the said sale would have been \$5,906.25.

10 9. Deponent is further informed and verily believes that the said stock has greatly depreciated in value and would now bring a price less than \$2,500.00.

(Sgd.) MARTIN SIMON.

Subscribed and sworn to before me  
this 25th day of April, 1930.

(Sgd.) JOSEPH W. HENRY,  
Master in Chancery of New Jersey.

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## ORDER DENYING MOTION TO STRIKE OUT.

## ESSEX COUNTY CIRCUIT COURT.

PEOPLES NATIONAL BANK & TRUST  
Co., a New Jersey corpora-  
tion,

*Plaintiff,*

*vs.*

CHARLES S. GINSBURG and MAR-  
TIN SIMON,

*Defendants.*

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*Action  
at Law.*

*Order.*

This matter having been opened to the Court  
by Nathan H. Berger, attorney for the plaintiff  
herein, upon a notice of motion theretofore served  
upon the defendants to strike out the answers  
and counter-claims filed by the above-named de-  
fendants, which said notice of motion was re-  
turnable on the 25th day of April, 1930, said  
motion being based upon the ground that the  
said answers and counter-claims were filed "in  
an action brought to recover a debt or liquidated  
demand arising from an express contract," and  
it appearing from the affidavit filed by the plain-  
tiff that prior to the maturity of the debt or  
demand aforesaid, the defendants requested the  
plaintiff to sell certain of the collateral held by  
it as security and a refusal thereof by plaintiff,  
and after hearing the argument of Nathan H.  
Berger, attorney for the plaintiff in support of  
said motion, and Lionel P. Kristeller, Esq., at-  
torney for the defendant, Martin Simon, and  
George H. Rosenstein, Esq., attorney for the  
defendant, Charles S. Ginsburg, appearing in

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*Order Denying Motion to Strike Out.*

opposition thereto, and it appearing to the satisfaction of the Court that factual issues had appeared herein, which said issues should be properly submitted to a jury, it is, on this 2nd day of May, 1930, on motion of Messrs. Lionel P. Kristeller and George H. Rosenstein, attorneys for the respective defendants herein,

10 ORDERED, that the motion heretofore made herein to strike out the answers and counter-claims filed by the respective defendants herein, be and the same hereby is in all respects denied.

NEWTON H. PORTER,  
Judge, Essex County Circuit Court.

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**ORDER TO SHOW CAUSE.**

ESSEX COUNTY CIRCUIT COURT.

PEOPLES NATIONAL BANK & TRUST  
Co., a New Jersey corpora-  
tion,

*Plaintiff,*

*vs.*

CHARLES S. GINSBURG and MAR-  
TIN SIMON,

*Defendants.*

10

*Action  
at Law.*

*Order.*

A verdict having been entered in the above-entitled cause in favor of the plaintiff and against the defendants on November 18, 1930, and application having been made within six days from that date by the above named defendants for a rule to show cause, why the verdict rendered by the jury in the above-entitled cause should not be set aside because the verdict of the jury was against the greater weight of the evidence, it is on this 24th day of November, nineteen hundred and thirty,

ORDERED, that the plaintiff, Peoples National Bank & Trust Co., show cause before the undersigned Circuit Court Judge, at the Court House, in the City of Newark, on the 4th day of December, next, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why the verdict heretofore rendered by the jury in the above-entitled cause as aforesaid, should not be set aside and a new trial granted because the said verdict was against the greater weight of the evidence, and it is further

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*Order to Show Cause.*

ORDERED, that all exceptions taken in the above entitled cause be expressly reserved, and it is further

10 ORDERED, that the issuance of an execution upon said judgment be and the same hereby is stayed until the argument of this motion and the entry of an order thereon.

NELSON Y. DUNGAN,  
Circuit Court Judge.

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**ORDER PERMITTING DEFENDANTS  
TO ABANDON RULE TO SHOW CAUSE.**

ESSEX COUNTY CIRCUIT COURT.

PEOPLES NATIONAL BANK & TRUST Co. of BELLEVILLE, N. J., a corporation, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div>		<i>Action</i>		10
<i>vs.</i>		<i>at Law.</i>		
CHARLES S. GINSBURG and MAR- TIN SIMON, <div style="text-align: right; padding-right: 20px;"><i>Defendants.</i></div>		<i>Order Per- mitting De- fendants to Abandon Rule to Show Cause.</i>		

A rule to show cause having been entered in the above-entitled cause directing the plaintiff to show cause before the undersigned Circuit Court Judge on December 4, 1930, why a verdict in the above cause in favor of the plaintiff and against the defendants should not be set aside and a new trial granted upon the ground that the said verdict was against the weight of the evidence and an application having been made by the said defendants for leave to withdraw the said rule to show cause without argument thereon and the undersigned Circuit Court Judge having granted said leave,

Now, THEREFORE, it is on this 4th day of December,

ORDERED, that the rule to show cause heretofore granted in this cause on November 24, 1930, be and the same is hereby withdrawn by leave of the Court, and the restraint therein contained vacated.

NELSON Y. DUNGAN,  
Circuit Court Judge. 40

**TESTIMONY.**

## ESSEX COUNTY CIRCUIT COURT.

Monday, November 17, 1930.

10	PEOPLES NATIONAL BANK & TRUST COMPANY OF BELLEVILLE, <i>Plaintiff,</i> <i>vs.</i> CHARLES S. GINSBURG and MAR- TIN SIMON, <i>Defendants.</i>	} <i>Action at Law.</i>
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20 Before Hon. Nelson Y. Dungan, *J.*, and a jury.

For plaintiff appears Nathan H. Berger.

For defendant Ginsburg appears George H. Rosen-  
stein.

For defendant Simon appears Lionel P. Kris-  
teller.

(A jury is called and sworn.)

Mr. Berger opens for plaintiff.

30 Mr. Rosenstein opens for defendant Ginsburg.

Mr. Kristeller opens for defendant Simon.

Mr. Berger: I think I ought to have an op-  
portunity to open to the jury as to the counter-  
claim.

The Court: You may.

Mr. Berger opens for plaintiff on defendants'  
counter-claim.

Mr. Berger: I offer this note.

Mr. Kristeller: No objection.

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*Martin Simon, for defendants, direct.*

(Document referred to is received in evidence and marked Exhibit P. 1.)

Mr. Berger: If your Honor please, I understand that it is admitted by counsel for the defendants that there is due on Exhibit P. 1, the note sued on, the sum of \$2,965.24, which includes interest to February 6, 1930; and interest from that date to this date is \$138.25. 10

The Court: Do you agree to that?

Mr. Kristeller: Yes, sir; that is satisfactory.

The Court: That makes, altogether, \$3,103.49, is that right?

Mr. Kristeller: Correct.

Mr. Berger: The plaintiff rests.

MARTIN SIMON, one of the defendants, sworn in behalf of defendants. 20

*Direct examination* by Mr. Kristeller.

Q Mr. Simon, you are a member of the Bar of the State of New Jersey? A I am.

Q And in April, 1928, did you make a loan, together with your former partner, Ginsburg, of the Peoples National Bank & Trust Company of Belleville? A Yes, sir. 30

Q How much was that loan? A \$16,500.

Q What was the purpose of the loan?

Mr. Berger: I object to that as immaterial.

The Court: I will sustain the objection.

Q Did you have a talk with anybody at the bank when you made the loan? A We spoke to Mr. Rose, the cashier of the bank. 40

*Martin Simon, for defendants, direct.*

Q And what was the nature of the loan? A The loan was a collateral loan for which we pledged, as securities, 2,000 shares Lincoln Interstate Holding Company stock, and a \$1,500 certificate of deposit of the same amount, in cash.

10 *By the Court.*

Q On what institution was the certificate of deposit? A The same bank.

Q That is the Peoples National Bank & Trust Company? A Yes, sir.

*By Mr. Kristeller.*

Q Now, did you have anything to do with the payments that were made on account? A Well, the payments were made by Mr. Ginsburg and  
20 myself, jointly.

Q Do you remember what payments were made? A Upon the maturity of the note, \$100 was reduced—if I may, I have the dates when the payments were made.

The Court: Is there any objection to his using that, Mr. Berger?

Mr. Berger: No, I have no objection.

30 The Witness: (Consulting document.) On May 2, 1928, there was \$100 paid on account; on June 2, 1928, there was \$400 paid on account; on July 12, 1928, there was \$500 paid on account, and on March 10, 1929, there was \$5,300 paid on account, leaving then a balance due of \$10,200.

Q That was at what date? A That was at March 10, 1929.

Q At that time had any of the collateral been sold? A No, sir.  
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*Martin Simon, for defendants, direct.*

Q Now, subsequent to March 10, 1929, what, if anything, took place between you and Mr. Rose? A On June 14th, of the same year, 1929, Mr. Rose called Mr. Ginsburg and myself to the bank, and told us that he would like to have the \$10,200 note divided into two notes: one for \$7,200, and one for \$3,000; the three-thousand dollar note to be a one-month non-collateral note, and the \$7,200 note to be a note payable on demand, and that he would apply all of the collateral on that note, stating that the purpose for doing it was that the Banking Examiners objected to the value of the securities being in excess of the amount of the \$10,200 note—and that was done. 10

Q Now, subsequent to that, on August 12th, did you have a conversation with Mr. Rose? A Yes. On August 12th we requested him to sell 500 shares. At that time I think the price was  $4\frac{1}{8}$ , and he did sell 500 shares, and he realized on them \$2,062, and that amount was applied on the \$7,200 note. 20

Q Did you sell that stock or did he sell it? A I don't remember actually whether he made the sale to the customer or whether we did, but we called him up and told him to sell it, and he agreed to sell it, and he did. 30

Q And that stock was delivered and credit was given on the note? A Yes, sir.

Q What happened after August 12, 1929? A On November 4th of 1929, the certificate of deposit was credited to our account, and, for some reason that we don't know yet, \$1,463 was applied instead of \$1,500.

Q Applied to what? A Applied to the \$7,200 note, further reducing that balance. 40

*Martin Simon, for defendants, direct.*

Q And how much was the note then? A The note then, roughly, would be about \$3,700, I should say offhand.

Q There were two subsequent small credits given on that note? A Yes, sir.

Q Will you just tell us what the amount was?  
10 A On January 25, 1930—if I might explain, that stock was subsequently transferred by the bank to—

Q (Interposing.) Well, I will ask you that later. A There was a dividend of \$14 applied on January 25, 1930; and on April 2, 1930, the plaintiff sold one-half share of stock, which it had, for \$5.96.

Q So that then how much was due, at the time of the credit of \$5.96, upon the collateral  
20 note? A \$3,654.84.

Q Now, you say there was a dividend of \$14?  
A Yes.

Q Will you tell us what happened to the Lincoln Interstate Holding Company stock during the time that it was up at the bank and held as collateral? A I am not quite sure of the dates, but I believe that sometime in October the Lincoln Interstate Holding Company was absorbed by the Niagara Shares Corporation of Delaware,  
30 and there was an exchange of stock effected, at which time the bank received—the bank turned in the stock for exchange and received, in exchange for the 1,500 shares of the Lincoln Interstate, 112½ shares of Niagara Shares Corporation of Delaware.

Q In other words, that stock was merely a substituted stock for the collateral that you had there at the bank? A Yes, sir.

The Court: Just give me those figures  
40 again.

*Martin Simon, for defendants, direct.*

The Witness: For the 1,500 shares, the bank received 112½ shares of Niagara Shares Corporation of Delaware. The one-half share—

The Court: That is the one that was sold for \$5.96?

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Q And that is the odd half share that was sold for \$5.96? A Yes, sir.

Q Now, that stock, in turn, was transferred?  
A That company was absorbed by the Niagara Shares Company of Maryland, and again an exchange of stock took place, and the bank received 168 shares for the 112 which it held.

Q So that after crediting, on this \$7,200 collateral note, the payments made on account, the sale of this one-half share, the dividend that was received from the collateral, and the certificate of deposit, and the sale of the 500 shares, how much was due on September 12, 1929, upon the collateral note? A On September 12th, \$3,673.84.

20

Q And these two small items of \$14 and \$5.96 were credited during the following couple of months? A Subsequently; yes, sir.

The Court: That came off of the \$3,673.84?

The Witness: Yes, sir. That figure is approximate, if your Honor please, the figure of \$3,673.

30

Q The date that I asked you was September 10, 1929; and on that date the Lincoln Interstate Holding Company stock was still in existence?

A Yes, sir.

Q Did you have any talk with Mr. Rose on or about that date with respect to the collateral of 1,500 shares of Lincoln Interstate Holding Com-

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*Martin Simon, for defendants, cross.*

pany? A Yes, sir. On that date we called Mr. Rose and told him we had sold 500 shares of the stock and that we could dispose of the additional thousand.

Q At what price? A At 3 15/16 per share.

Q And who was on the telephone when you  
10 were talking with him? A Mr. Rose himself.

Q And who was on your wire? A On our  
end of the wire—we had one of those trunk lines,  
with extensions, and there was both Mr. Gins-  
burg and myself; and Mr. Rose at that time re-  
fused to deliver the 500 and refused to permit  
us to sell the additional thousand, and we parried  
back and forth, asking him to sell it, that the  
market was declining and we would suffer a great  
loss, and he said, “Don’t you worry about that.  
20 We will take care about that and worry about  
that ourselves.”

Q Had he sold the 1,500 shares of the Lincoln  
Interstate at 3 15/16, how much would he have  
received for the stock? A \$5,906 and some odd  
cents, I think it is 25 cents.

The Court: That is for the 1,500?

The Witness: Yes, sir.

Mr. Kristeller: 500 had already been sold.

30 The Court: Yes.

Q You say you sold the 500 shares and Mr.  
Rose refused to deliver? A Yes.

Q To whom did you sell them? A To a firm  
of Weinstein, Schiffman & Company, brokers in  
Newark.

*Cross examination by Mr. Berger.*

40 Q You say you are a lawyer, Mr. Simon? A  
Yes, sir.

*Martin Simon, for defendants, cross.*

Q How long have you practiced law? A Four and one-half years.

Q And during that time have you been engaged in the financing business as a side issue?

A I did some investing.

Q Second mortgage business? A No, sir.

10

Q And financing business generally? A No, sir.

Q You did some investing? A Yes, sir.

Q Have you played the market, more or less? A Occasionally.

Q You are quite familiar with the ups and downs of stocks? A I don't know that anybody is.

Q Well, your personal experience taught you something about it? A I don't know that we had so much.

20

Q Well, you did not think it was a great big transaction to negotiate a loan of \$16,500, did you?

Mr. Rosenstein: That is objected to.

The Court: I will sustain the objection.

Q You went up, in April, 1928, to the Peoples Bank, with your partner, Mr. Ginsburg, and negotiated this loan of \$16,500? A Yes, sir.

30

Q And you say that eventually you reduced it by payments which brought it down to \$10,200? A Yes, sir.

Q And that was the condition of that line in June, 1929? A Yes, sir.

Q Did the bank ask for these reductions or were they made purely voluntarily on your part?

Mr. Kristeller: That is objected to as immaterial.

40

*Martin Simon, for defendants, cross.*

The Court: I will sustain the objection.

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

Exception noted as ground of appeal.

10 Q How did you get to the bank on June 10, 1929? Were you sent for or did you go up there of your own volition? A We were sent for.

The Court: I thought that was June 14th?

Mr. Berger: No, sir; it is June 10, 1929.

The Witness: It was June 14th.

Mr. Berger: Well, the note, the \$7,200 note is dated June 10th.

The Court: Mr. Simon says it was June 14th.

20

Q Are you sure of the date being June 14th?  
A Yes, sir.

Q And did you go up there with Mr. Ginsburg? A Yes, sir.

Q And you say that Mr. Rose told you that he wanted to divide this loan into two notes because the examiner wanted it that way? A Yes, sir.

30 Q And he told you that the \$3,000 note would be made for thirty days? A Yes, sir.

Q And the \$7,200 note to be made how, on what basis? A On demand.

Q Up to that time, the note, the \$10,200 note was on a time basis—I mean by that there was a date fixed when it becomes due, isn't that true? A I think that is correct.

40 Q So that there was a complete change made this date as to the entire loan, was there not? The \$7,200 note was made payable on demand,

*Martin Simon, for defendants, cross.*

and the \$3,000 note was made payable thirty days after date? That is right, isn't it? A Yes, sir.

Q And did you understand that, when a note is made payable at the end of thirty days, that at the end of that time demand can be made for the payment of it? A Well, that is what it means.

10

Q It meant that to you? A It meant that if I promised to pay it in thirty days, why I should pay it in thirty days or renew it, just as our custom had been in the past.

Q It meant that you would either pay it or renew it in thirty days? A Just as our custom had been for a year and a half or two years. If a note had been due we would reduce it or pay it, as the case may be.

Q Up to this date your note was made payable on a specific date, was it not? A Yes, sir.

20

Q On this date \$7,200 was made payable on demand? A Yes, sir.

Q And \$3,000 at the end of thirty days? A Yes, sir.

Q Do you say that was in line with the custom that you had for a year and a half? A I believed that you had reference to the \$3,000 note.

30

Q I am talking about two notes now, and I ask you whether that was in line with your custom for a year and a half. A I wouldn't say it was in line with the custom. So far as the demand note was concerned, that was due on demand, and we would reduce it when we could, or pay it off, or let it stand, just as the bank chose or we chose. So far as the \$3,000 note, that would have to be met at the time stated in that note.

40

*Martin Simon, for defendants, cross.*

Q Then your understanding was that the \$3,000 note had to be met at the time stated in the note? A Yes, sir.

Q That would be in July of 1929? A If that is the date, yes.

10 Q Well, then, when July, 1929, came along, did you meet the note as you understood it should be met? A We did; we renewed the note at that time.

Q That is, you consider meeting it by renewing it? A Well, I suppose we would consider that, yes.

Q You would? As a matter of fact, instead of paying \$3,000, you only paid \$50, isn't that right? A Yes, sir.

Q And you considered that meeting the note?

20

Mr. Rosenstein: I object, upon the ground that the note speaks for itself, and there isn't any question—the witness had testified that he did pay \$50 on account, and the bank accepted it, and the \$3,000 note is not now the subject of inquiry, but \$2,950.

The Court: It seem to me that is so, Mr. Berger. It seems to be a matter of agreement between the bank and him.

30 Mr. Berger: The witness testified a minute ago—

The Court: I understand what you mean.

Mr. Berger: Is that overruled?

The Court: I will sustain the objection.

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

Exception noted as ground of appeal.

40 Q Well, now, when you paid \$50, there was a renewal for another thirty days? A Yes, sir.

*Martin Simon, for defendants, cross.*

Q Did you understand that you would pay the note of \$2,950 at the end of thirty days or not?

Mr. Rosenstein: That is objected to. That has already been testified to.

The Court: It seems to me that it is a legal question that you are asking this witness—whatever he understood; that was a legal situation. In the absence of any agreement—and no agreement has been testified to—that would be a legal situation. Of course, they would be obliged to pay it at the end of that time, whatever his understanding may have been. 10

Mr. Berger: On the direct examination of this witness, he testified to a series of conversations that he had with Mr. Rose at the bank on these various dates when this renewal came up, and I am examining as to what took place on these occasions—I am cross examining as to that, and I think that it is not at all directed to the amount due on the final note given in January. I am rather dealing with what transpired on each of these occasions. 20

The Court: There was one renewal of this note? 30

The Witness: I believe there were several. On one occasion there was a reduction of \$50 made, and on other occasions the note was just renewed for the full amount. Whether it was \$3,000 at the time it was renewed or \$2,950, I am not certain.

The Court: Just repeat the question.

(Question read.)

The Court: I will sustain the objection. 40

*Martin Simon, for defendants, cross.*

Q You testified a moment ago, Mr. Simon, that the time that you were to pay off this liability, this loan, was to depend on your convenience—that is, you would pay it as and when you could pay it? A No, sir.

10 Q Well, what was determined at the time when you would be able to pay this note?

Mr. Rosenstein: I object to that. The note speaks for itself.

The Court: I will sustain the objection.

Mr. Berger: There is one note made payable on demand.

20 The Court: That was an answer to your question, the one upon which you now predicate the question. The answer was to one of your own questions; it was not an answer to anything brought out on the direct examination.

Q Mr. Simon, isn't it true that on July 11th, or the middle of July, 1929, when you came to see Mr. Rose about a further renewal of the \$3,000 note, he told you that by August 12th you would have to pay the entire indebtedness to the bank? A I recall no such statement.

30 Q Would you say that he did not make such a statement to you? A I don't recall any such statement made.

Q That is not my question. I asked you whether you say positively that he did not make such a statement? A And what was the statement again?

Q That when August 12th arrived you would have to pay the entire indebtedness to the bank? A No, sir.

40 Q Well, then, what brought you around to the bank on August 12th?

*Martin Simon, for defendants, cross.*

Mr. Rosenstein: That is objected to upon the ground that the witness has already testified to that. He has testified that he was there pursuant to making a call in August, and I think we are going over the same ground again.

The Court: That was on direct examination. Counsel may cover, upon cross examination, the very ground that has been covered upon direct examination. The objection will be overruled.

10

A We requested the bank—I don't think that we called at the bank on August 12th, but rather think it was a telephone call—we requested the bank at that time to sell 500 shares of the stock, because we felt that the market was declining, and the bank did sell that 500 shares.

20

Q Then this was done at your suggestion only and not at the request of the bank? A Yes, sir.

Q What became of the note that you were to renew on that date? Do you recall it? A The renewal of notes—we simply sent them a note by mail. I believe—I think that may have been arranged by the telephone, or whether it was arranged by myself or Mr. Ginsburg, I am not certain.

30

Q You did not find it necessary to go down to the bank? A Oh, no; we did not.

*By the Court.*

Q I thought you said that was September 12th when you called on the phone? A There was 500 shares sold in August, and we requested an additional sale in September.

Q But this 500 shares, which you say you requested in August, were sold? A Yes, sir; that is the \$2,062 item.

40

*Martin Simon, for defendants, cross.*

*By Mr. Berger.*

Q Then the sale of the 500 shares in August was not for the protection of the bank but for your protection? A It was for our joint protection, I presume.

10 Q You say that the reason you were selling the 500 shares was because you thought the market was declining? A Yes, sir.

Q Well, why didn't you sell all of the 2,000 shares on that day?

Mr. Rosenstein: That is objected to. The fact is that these men requested the bank to sell 500, and the bank sold the 500, and he cannot call for the operation of the witness' mind as to why.

20 The Court: I am not sure that he cannot. You are charging the bank with negligence.

Mr. Rosenstein: Not on that date. On that date we requested the bank to sell 500, and they did. The negligence was on September 12th, when they refused to sell.

The Court: The question may be answered.

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

Exception noted as ground of appeal.

The Court: Negligence in the entire transaction is involved here.

(Argument.)

Mr. Kristeller: Has your Honor overruled the objection?

The Court: I have, yes.

40 Mr. Kristeller: I ask an exception to your Honor's ruling.

*Martin Simon, for defendants, cross.*

The Court: An exception on behalf of both defendants will be noted. Repeat the question.

Q (Read.) A We thought it advisable to dispose of the 500 at that time, to see how the market would react, in order not to sell the whole thing in case the market might go up or— 10

The Court: You mean react on your sale?

The Witness: No, sir; not on our sale. We thought we would see what would happen to the market, whether it would go up or down.

Q On August 12, 1929, you owed the bank a total of \$10,200, before you sold the 500 shares and applied the proceeds to that loan? A I think so; yes. 20

Q And as against that, aside from the stock, you say that the bank held a certificate of deposit? A Yes, sir.

The Court: Of \$1,500?

The Witness: Yes, sir.

Q Now, even if the \$1,500 were applied on the \$10,200, you would still owe the bank \$8,700, would you not? A If those are the figures; yes. 30

Q Now, isn't it true that in August, on the basis on which you sold the 500 shares, you could have realized for the 2,000 shares enough money to have paid the bank in full, or nearly in full?

Mr. Rosenstein: That is objected to.

The Court: I will sustain the objection. It is a mere matter of figures and argument. 40

*Martin Simon, for defendants, cross.*

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

Exception noted as ground of appeal.

10 Q Was there a time, in August of 1929, when the sale of the stock would have resulted in a sum of money which, with the certificate of deposit, would have liquidated your line, your debt to the bank, or to within a few hundred dollars?

Mr. Kristeller: That is objected to.

The Court: The question may be answered.

Counsel for defendant Simon prays an exception to this ruling of the Court.

20 Exception noted as ground of appeal.

A I don't recall exactly what happened during that period, so far as the value of the stock was concerned.

Q Well, let me help you. On August 12th you say you sold 500 shares, for which you realized \$2,062. That is correct, is it not? A Yes, sir.

Q That was for 500 shares? A Yes.

30 Q For 2,000 shares you would have realized four times that amount, wouldn't you? A Yes, sir.

Q It would have brought it up to well above \$8,000? A About \$8,400.

Q And on that date you owed the bank \$8,700, did you not? A Yes, sir.

Q So you could then have liquidated your debt to the bank within \$300.

Mr. Kristeller: I object to that.

40 The Court: I will sustain the objection to that question. It is precisely the question

*Martin Simon, for defendants, cross.*

upon which I ruled sometime ago, because your question is predicated upon the same price. Your other question, the one immediately preceding this one, was designed to show a difference in the market price, based upon a difference in the market price.

10

Q Did the market fluctuate upwards or downwards after August 12, 1929? A It was quite unsteady all along during that period.

Q And you say that the sale of the 500 shares was based entirely on your judgment, and not in any way upon the suggestion or the request of the bank?

Mr. Rosenstein: That is objected to. The ground is that it calls for the operation of the witness' mind, and for a conclusion.

20

The Court: The question may be answered.

A Not entirely. 500 shares were sold. I don't recall specifically whether it was a conversation I had with Mr. Rose or Mr. Ginsburg had with Mr. Rose, but, in discussing it, they both felt it was advisable to sell not more than 500 at the time, and that was done.

Q Did Mr. Rose, on August 12, 1929, advise you and Mr. Ginsburg that this loan was called and had to be paid? A I don't remember any such conversation.

30

Q Did he advise you of that fact at any time prior to September 12, 1929? A Well, we got the usual notice prior to the maturity date each time, that on such-and-such a date "your loan is due."

Q Didn't Mr. Rose talk to you about it and tell you so? A No.

40

*Martin Simon, for defendants, cross.*

Q Well, then, what happened in September, 1929? A In September—this was a period just prior to the absorption of this company by the Niagara Company, and the price was moving down and up in sympathy with the feeling of the public as to this merger. The stock was very  
10 unsteady at that time, and on September 12th the price dropped. It had been dropping right along, and we felt that we had better get out and sell it, because otherwise, if it went down too much, we would have a terrific loss, and therefore we called up the bank and told Mr. Rose we had sold 500 shares, and that we could sell the remaining thousand, we could sell them immediately, and he told us he would not deliver the 500 nor the remaining thousand.

20 Q Didn't he tell you that he would let you have your stock if you paid the bank what you owed them? A Yes.

Q Well, you did not offer to pay the bank what you owed them? A Well, I told him then that we could not give it to him right away, but we had to make delivery of the stock right away.

Q If you were selling 500 shares at  $3 \frac{15}{16}$ , it would realize how much? A About nineteen hundred and some-odd dollars, I think.

30 Q And if you sold all of the stock that you had at that time, you would have realized something like \$5,000 for it, wouldn't you? A Almost six.

The Court: \$5,926.25. He gave us that on his direct examination.

Q And how much did you then owe the bank?  
A About \$6,604.

40 Q Did you offer to pay them the difference?  
A We told Mr. Rose at that time, "We can't

*Martin Simon, for defendants, cross.*

give you the money today, but we have got to make delivery of the stock today. We will pay you the difference—”

Q Did you offer him the money? A Since then?

Q At any time. Have you ever tendered him that money at any time, the amount of money that you owe the bank? 10

Mr. Rosenstein: I object to that, if the Court please, both as to form and on the ground that it is incompetent.

The Court: The question may be answered.

Counsel for defendant Ginsburg prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 20

A We would have no opportunity. We had to either make delivery of the stock immediately, because the brokers insisted on having it that same day, because the market was unsteady—it was a question of either selling them immediately and paying the money the same day, or the next day, or considering the whole transaction off; and subsequently we had to do that, because of what Mr. Rose said. 30

Q Well, you had sold 500 shares, is that right?

A Yes, sir.

Q And you say that you think you had an outlet for the sale of a thousand shares? A No, we had a bid for the same, for the additional thousand, for the same broker, and we told Mr. Rose that.

Q You did not ask the bank, before you made any sale of any of this stock, whether the bank was satisfied with the sale of the stock, did you? 40

*Martin Simon, for defendants, cross.*

A The bank knew that we were going to sell it. We had made arrangements several days before that if we got a good price or could sell, we should go ahead and do it.

Q With whom did you make any such arrangement? A With Mr. Rose.

10 Q Who? A Both Mr. Ginsburg and myself.

Q When? A Between the August 12th date and that date we were on the lookout for a buyer for the best price we could get.

Q When was it that you called up Mr. Rose about the sale of the 500 shares, in September?

A On September 12th.

Q And you called up on your telephone? A Yes, sir.

20 Q And you say it was an extension telephone in your office? A Yes, sir.

Q And Mr. Ginsburg was on the other extension? A On the extension; yes, sir.

Q Listening in? A Yes, sir.

Q Mr. Ginsburg is also a lawyer? A Yes, sir.

30 Q And what was the occasion of Mr. Ginsburg listening in in this conversation? A We were both in that way able to speak to Mr. Rose; the extension joined both of us; then we could both speak and both listen at the same time to Mr. Rose.

Q Now, you said a moment ago that sometime before September 12th you had an understanding with Mr. Rose that you were to go on and sell this stock? A Yes.

Q And in pursuance of that understanding you say you actually sold the stock? A Yes.

40 Q And yet you say it was necessary for you and Mr. Ginsburg to get on an extension telephone to talk about the sale so that you could

*Martin Simon, for defendants, cross.*

both talk to him at the same time? A He held the stock and we had to call him to deliver it.

Q Why was it necessary, when you had made arrangements to sell the stock, and it was merely a question of asking him to deliver? Why was it necessary for you and Mr. Ginsburg to get on the extension telephones to talk to Mr. Rose at the same time? A On that morning I had sold the stock to the broker, and I had sold but 500 shares, and the broker had agreed to take the additional thousand at the same price, but I did not want to commit myself without first speaking to Mr. Rose and with my partner; and the purpose of us all getting together was to discuss the feasibility of selling either 500 or the entire fifteen, and that is why we were doing it together. 10

Q In other words, you still wanted Mr. Rose's opinion as to the advisability of selling? A Not his opinion. On that morning we both had previously discussed the feasibility of selling either the 500 or fifteen, and we both decided we had better get out of the whole thing and sell the whole 1500. We called Mr. Rose to tell him that we had sold the 500, and we wanted to sell the additional thousand, because the market was falling. 20

Q Well, then, it was you and Mr. Ginsburg who had decided to sell and get out? A Yes, sir. 30

Q Not Mr. Rose? A No, sir.

Q And then when you called Mr. Rose, you called him with a definite decision to sell all of the stock and get out? A To deliver the stock that we had sold, and to permit us to sell the additional thousand.

Q Didn't you tell us a moment ago that you had an understanding with Mr. Rose previously 40

*Martin Simon, for defendants, cross.*

to sell out the stock? A We had this understanding: that if he could get a good price he would sell the stock, if he could; and if he could not, he would not.

10 Q When did you make that understanding with Mr. Rose? A The definite time I cannot say, but it was sometime between August 12th and September 12th.

Q And that understanding was reached between yourself, Mr. Ginsburg and Mr. Rose? A Yes, sir.

Q You acceded to it and agreed upon it, did you not? A Yes, sir.

20 Q And accordingly, with this agreement between you and Mr. Rose, when you called him up and asked him to deliver the stock he refused to do so, in his judgment? A Yes, sir.

Q Finding it not a satisfactory sale, is that right? A Well, he said he did not think that was enough money, and he was not going to deliver it.

30 Q Was that your agreement with him, that he was not to sell if he found the price was inadequate? A No, sir. The stock was ours. If he could get a buyer for it he was to call us and let us know that he could sell it at a certain price, and find out whether we wanted him to, and on that morning we got a price, and the market had broke considerably on that morning, and we felt we had better sell it in order to limit the loss, and we did.

Q Mr. Rose told you, did he not, that whenever you will pay the bank the loan you owe him you can have your stock? A No.

40 Q He did not tell you that? A No, sir; he did not tell us that, when we sold the 500 before or at any time.

*Martin Simon, for defendants, cross.*

Q Did you at any time make a demand for the stock after this day in September?

Mr. Kristeller: I object to that as immaterial.

The Court: I will sustain the objection.

Q Isn't it true that after September 12th you requested further extensions of time of the bank to carry the loan along for you? 10

Mr. Kristeller: I object to that as immaterial. The notes speak for themselves.

The Court: The question may be answered.

A I don't think that we did. We did renew the \$3,000 note. The \$7,200 note, a demand was made for payment, and we told him we could not pay it at the time and we would have to sell the securities, and the securities had just dropped materially, to about one-third of the price that we could have gotten before. 20

Q You, in fact, signed renewal notes from time to time? A On the \$3,000 note; yes, sir.

Q And you made repeated requests on the bank to hold this \$7,200 note for the balance?

A We did not.

Q You at no time asked that? A No, sir. 30

Q Did you ever communicate with Mr. Rose, or any official of the bank, after September 12th?

A I did not.

Q You never made any payment of any kind on account of this indebtedness, did you? A We sent him a dividend check for \$14, to which I have previously testified; that is all.

Q But that was not your check, that was a check of the— A (Interposing.) Niagara Shares Corporation of Delaware. 40

*Martin Simon, for defendants, cross.*

Q Neither you or Mr. Ginsburg paid any money whatever to the bank since the \$50 payment in July, 1929? A No, sir.

Q And the amount of this indebtedness on the collateral note that you have testified to is still due the bank, is it not? A Yes, sir.

10 Q That is to say, \$3,654.84? A Yes, sir.

Q Is due on account of the collateral note? A Yes, sir.

Q And you still owe the \$2,950 amount? A Yes, sir.

Q You have paid nothing on account of either of them? A Not since the payments related.

20 Mr. Kristeller: Will you let me have the notice of motion and the original affidavit of Mr. Rose? I was served, in April of 1930, with an affidavit and notice of motion to strike the answer, to which was annexed a copy of the collateral note, and I desire to offer in evidence the original papers on file, and I find no copy of the original note annexed to it. I am entitled to offer this in evidence—their own affidavit—but annexed to it is no note, and on the copy served on us there was this note.

30 The Court: The note in suit?

Mr. Kristeller: No, the collateral note which is referred to in the affidavit.

The Court: Is there any objection to putting in the copy which has upon it the collateral note, Mr. Berger—I mean, putting in both together?

40 Mr. Kristeller: You refer to it in the affidavit and say “that they gave a note, a copy of which is annexed hereto and made a part hereof.”

*Martin Simon, for defendants, cross.*

Mr. Berger: You have a copy on the—

Mr. Kristeller: On the copy that was served.

The Court: Suppose you put the two in together.

Mr. Kristeller: I offer in evidence, then, the original affidavit of Mr. Rose, Russell K. Rose, sworn to April 17, 1930, which refers to a promissory collateral note made by the defendants on April 4, 1928, "as is herein referred to," but is not annexed to the original, and I offer the copy served on me. 10

The Court: You say that is the affidavit of Mr. Rose?

Mr. Kristeller: Yes, sir; it is filed here.

Mr. Berger: May I offer the original note itself, the very note in question? That will be a lot better than copies. 20

The Court: Yes, you can do that.

(Document referred to is received in evidence and marked Exhibit P. 2.)

Mr. Kristeller: I will withdraw my offer.

Mr. Berger: Would your Honor like some facts regarding this note on the record?

The Court: Yes. 30

Mr. Berger: This note is dated June 10, 1929. It is made payable on demand, in the sum of \$7,200, signed by Charles Ginsburg and Martin Simon; and it speaks of 2,000 shares of Lincoln Interstate and Collateral balance \$1,500, and then over that is marked 168 shares Niagara Share Corporation of Maryland, certificate No. TNYCO 1848, TNYC 1974. On the back of it, your Honor, are endorsed the following credits—it might be saving some time to do this: 40

*Martin Simon, for defendants, cross.*

\$2,062, paid August 12, 1929;

\$1,463.20, paid November 4, 1929—

The Court: I suppose it is admitted that that is the certificate of deposit?

10

Mr. Berger: Yes, less the reduction of interest on the demand note.

\$14, paid January 25, 1930—

The Court: And that is the dividend check?

Mr. Berger: Yes.

\$5.96, paid April 2, 1930.

The Court: And that was the sale of one-half share of stock?

20

Mr. Berger: Yes, that is the sale of one-half a share. I think the witness is in error as to the number of shares; there were 168 shares.

The Court: Yes, this was the Delaware corporation—

The Witness: There were two changes that took place prior to that.

The Court: I understand that. Niagara shares of Delaware, 112 shares—

The Witness: Yes, sir.

30

The Court: And 168 shares of the Maryland Company?

The Witness: Yes, sir.

The Court: That is the Niagara Shares Corporation?

The Witness: Of Maryland; yes, sir.

*By the Court.*

Q There were 2,000 shares of the Lincoln Company? A Yes, sir.

40

*Irving Weinstein, for defendants, direct.*

Q Lincoln Interstate Holding Company? A Yes, sir.

Q 112½ shares of the— A (Interposing.) Niagara Shares Corporation of Delaware.

Q And 168 shares of the— A (Interposing.) Niagara Shares Corporation.

Q Of Maryland? A Yes, sir.

10

*Re-direct examination by Mr. Rosenstein.*

Q On cross examination you testified that on August 12, 1929, when the 500 shares of stock were sold by the bank, at your request, the question asked you was, had you sold or had the bank sold all of the stock, that sufficient would have been realized to pay off the entire indebtedness. That is correct, is it not? A That was asked me; yes, sir.

20

Q Under the terms of the collateral note which you executed to the bank, the bank reserved an absolute right to sell the entire stock, without notice to you, did it not? A Yes, sir.

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IRVING WEINSTEIN, sworn in behalf of defendants.

30

*Direct examination by Mr. Kristeller.*

Q Mr. Weinstein, in September of 1929, what was your business? A Stock broker.

Q And with whom were you connected? A Weinstein, Schiffman & Company, a corporation.

Q And where is their office? A In the Federal Trust Building, Newark.

Q Did you have any talk, on or about September 12, 1929, with Mr. Simon, of Simon & Ginsburg, at that time? A I did; yes, sir.

40

*Irving Weinstein, for defendants, direct.*

Q Will you tell us whether or not you bought from him 500 shares of Lincoln Interstate Holding Company on September 12th? A Yes, we did.

Q How much per share? A 3 15/16.

10 Q Had you been trading in that stock? A Yes, sir.

Q Regularly? A Yes.

Q Was that the best price obtainable on that day? A Yes, that was, at that time, at the time he called. That is \$6.25 per 100 shares less than \$4 a share.

Q Did you offer to buy an additional thousand shares from Mr. Simon? A Well, Mr. Simon at the time—

20 The Court: One minute. Answer the question.

The Witness: Not at that moment; no.

Q No, but on the same day? A The same day; later on, yes.

Q At what price? A The same price.

Q And did you subsequently get delivery of either the 500 shares or the thousand shares, or 1,500 total? A No, we did not.

30 Cross examination waived by Mr. Berger.

Mr. Kristeller: If your Honor please, I have the other broker here, and I think that would be merely cumulative evidence. As long as there was no cross examination, I won't call him.

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*Charles S. Ginsburg, for defendants, direct.*

CHARLES S. GINSBURG, one of the defendants, sworn in behalf of defendants.

*Direct examination by Mr. Rosenstein.*

Q Mr. Ginsburg, you are a member of the Bar? A I am, sir. 10

Q Formerly a partner of your co-defendant, Mr. Martin Simon? A Yes, sir.

Q Will you please state to the Court and jury the circumstances of the loan made by the defendants from the plaintiff bank? A Yes. In April of 1928, Mr. Simon and myself borrowed from the plaintiff bank \$16,500, and we deposited with the plaintiff bank 2,000 shares of the capital stock of Lincoln Interstate Holding Company.

Q Did you deposit anything else at the time? A Yes. We deposited a \$1,500 certificate of deposit. 20

Q Will you state the total amount paid on account of the \$16,500 loan, from the inception of the loan? A To March 10, 1929—

The Court: Will that be questioned, the testimony of Mr. Simon on that point?

Mr. Rosenstein: That is the reason I summarized it, if your Honor please. 30

The Court: I am just asking Mr. Berger.

Mr. Berger: I might say, your Honor, this is all admitted in the answer; in the answer to the counter-claim it is admitted that these payments were made.

The Court: Then we won't waste any time on that.

Mr. Berger: \$5,484 is due on the collateral note of \$7,200, after crediting the various amounts. 40

*Charles S. Ginsburg, for defendants, direct.*

The Court: This relates only to the credits, and they are admitted.

Mr. Rosenstein: If that is admitted and stipulated, then I can go from that point right on.

10 The Court: We are wasting more time than if you were asking questions. Go ahead and ask the questions.

Q Mr. Ginsburg, will you please state whether or not you had any conversation with the plaintiff bank, on or about June 14, 1929, and the substance of it, if you did? A On June 14th we were called to the bank by Mr. Rose, the vice-president of the bank, and he requested that we sign for him two notes, one in the sum of \$7,200, which would be a collateral note, and another in  
20 the sum of \$3,000, which would be a non-collateral note. I asked him what the purpose of disturbing the original collateral note was, and he said that the bank examiners were expected at the bank, that the collateral security was not sufficiently well margined to allow the old note to stand as it was, and said if we would sign the \$7,200 collateral note and non-collateral note for \$3,000, only the \$7,200 collateral note would come  
30 to the attention of the bank examiners, who would at that time examine the collateral deposited with it. He also told us that, as far as we were concerned, we could consider both notes as if they had been the old, one note, in the sum of \$10,200.

Q Who was present at that conversation? A Mr. Simon, myself and Mr. Rose.

Q As the result of the request made to you by Mr. Rose, what did you do? A We signed the two notes.

40

*Charles S. Ginsburg, for defendants, direct.*

Q What was the date of the two notes that you signed for the bank? A The notes were antedated; in other words, on June 14th the notes were dated back by Mr. Rose until June 10th.

Q 1929? A 1929; yes.

Q Now, did you have any conversation with the plaintiff bank on August 12, 1929? A Yes. We understood that we could—

The Court: Not what you "understood." The question is what the transaction was.

The Witness: On August 12, 1929, 500 shares of stock were sold at a price of  $\$4\frac{1}{8}$  per share, making a total of  $\$2,062.50$ .

Q Will you state the conversation had between you and the bank preceding the sale? A We had requested that 500 shares of stock be sold, and Mr. Rose told us that he had a customer at  $\$4\frac{1}{8}$  per share, and we said to sell it at that price, and it was consequently sold.

Q And the sum of  $\$2,062$  realized? A Yes, and 50 cents.

Q And that was credited to your account? A Yes.

Q Will you not state what transpired, if anything, on September 12, 1929, as between yourself, Mr. Simon and the bank? A On September 12th I called Mr. Rose on the telephone to advise him that I had sold 500 shares of stock, that I could dispose of an additional thousand shares of stock at  $\$3\frac{15}{16}$  per share.

Q Do you say that conversation was over the telephone? A Yes, sir.

Q Who participated in the conversation? A I did most of the talking. Mr. Simon was on the telephone, but I did most of the talking with Mr. Rose.

*Charles S. Ginsburg, for defendants, cross.*

Q Did Mr. Simon join in the conversation? A I think once or twice.

Q So that Mr. Rose knew that you and Mr. Simon were on the telephone? A Yes.

Q He spoke to both? A Yes.

10 Q What did Mr. Rose say to you when you requested him to sell 1,500 shares of stock? A He refused to deliver the 500 that I told him we had already sold. He said he did not want us to sell the other thousand shares. He did not think that the price was sufficient that we had received for the stock. He said he felt that he could get a better price for it later on, and I tried to explain the fact that we were desirous of selling, we were anxious to sell, at that time.

20 Q The fact remains, however, that Mr. Rose refused to entertain the sale of either 500 or a thousand shares of stock which they held, or any part of it? A That is right.

Q And this was on September 12th? A Yes, sir.

*Cross examination by Mr. Berger.*

30 Q You say that on June 14th this plan was proposed to you about changing the note into two notes, but that you could consider them as one note? A Yes, sir.

Q Now, when was your note of \$10,200 due?

Mr. Rosenstein: I object. The note speaks for itself.

The Court: The question may be answered.

A I think the note was due on the 12th.

40 Q Wasn't it due on the 10th of June? A I don't think so. I think it was due on the 12th.

*Charles S. Ginsburg, for defendants, cross.*

Q And wasn't it dishonored by non-payment and kept as a past due note on the 14th? A I don't think so, no. I don't remember of any note of ours being dishonored.

Q Isn't it a fact that on the 14th of June that note was past due? A I don't remember what day the 12th fell on. No note was ever dishonored, if that is the answer to your question.

10

Q It was not paid, was it? A Not on the 12th, no; nor was it dishonored.

Q Well, isn't it a fact that the reason these notes were dated the 10th of June was because the original note fell due and was unmet on June 10, 1929? A I don't think so. I think it was due on the 12th.

*By the Court.*

20

Q The 12th was Wednesday. This, you say, was on the 14th? A Yes, sir.

Q And you think it was not overdue on the 14th? A If my recollection served me correctly, the note was due on the 12th.

Q You said this conversation was on the 14th. A Yes, your Honor.

*By Mr. Berger.*

Q Didn't it matter to you that these notes were dated back to the 10th? A I beg your pardon. I did not hear your question.

30

(Question read.)

Mr. Kristeller: I object to that as immaterial.

The Court: I will sustain the objection.

Q Mr. Rose did not tell you, on June 14th, that you would have to meet the \$3,000 note at the end of thirty days, did he?

40

*Charles S. Ginsburg, for defendants, cross.*

Mr. Kristeller: I object to that as immaterial.

The Court: I guess that is not quite the proper form.

Mr. Kristeller: I object to it as to form.

10 Mr. Berger: I will reframe it.

Mr. Rosenstein: I object to it.

The Court: The question is being withdrawn.

Q Did Mr. Rose tell you, on June 14, 1929, that at the end of thirty days you would have to pay \$3,000 to the Peoples Bank in reduction of this indebtedness to the bank?

20 Mr. Rosenstein: I object to that.

The Court: The objection will be overruled, because of the statement made by the witness that Mr. Rose then told him that it was to be considered the same as though the two notes were together, practically.

Mr. Rosenstein: I will withdraw the objection.

The Court: The question may be answered.

30 The Witness: I don't remember the question.

Q (Read.) A He did not.

Q But the fact that the \$7,200 note was made payable on demand—

Mr. Rosenstein: That I object to, if the Court please. The note speaks for itself.

40 Mr. Berger: Do you mind if I finish my question?

*Charles S. Ginsburg, for defendants, cross.*

Mr. Rosenstein: Pardon me.

The Court: I will have to hear the question.

Mr. Berger: I had not finished. I withdraw all that I said.

Q It is a fact, is it not, that one of these notes was made for \$7,200, on demand, and one of these notes was made for \$3,000, for thirty days, with your consent? A We signed both of those notes. We did not make them out; Mr. Rose did. 10

The Court: Is that in the question at all? You are an attorney. Why do you not answer these questions as they are asked? That is not the question at all. Repeat the question and strike out the answer. 20

Q (Read.) A Yes, sir.

Q Did you object to your agreement to pay \$3,000 at the end of thirty days? A There was no such conversation, that the \$3,000 would be paid at the end of thirty days.

Q In other words, when you saw the note made out for \$3,000, for thirty days, you signed it for that time? A Yes.

Q Nothing whatever was said about when it would be met? A No, sir. 30

Q But you, at the end of thirty days, cut it by \$50? A Yes, sir.

Q Why? A Because there was a request made that that be done.

Q That is the only reason? A Yes, sir.

Q And the fact is that—

The Court: That was at the end of the first thirty days, was it? 40

*Charles S. Ginsburg, for defendants, cross.*

The Witness: Yes, sir.

Q And the fact is that you had made no cut of any amount during a period of several months prior to that, that is, prior to July, 1929? A Yes. There was a payment made on account on  
10 August 12th; I mean there were several payments made, totaling \$6,300 before that time.

Q Well, now, it is a fact, is it not, that in March of 1929 was the last reduction prior to this one? A That is right.

Q And you made a reduction of \$50 because you were asked by the bank to reduce it by \$50, is that right? A No. We were asked by the bank to make a reduction, and we made a reduction of \$50 on that note.

20 *By the Court.*

Q What happened between July 14th, the end of the thirty days—that was Sunday, so that that note would be matured on July 15th, that first note— A (Interposing.) No, your Honor; it was dated the 10th and would mature on July 10th.

Q Yes, that is right. Now, from that time on, was that note renewed every thirty days? A  
30 Yes, sir.

Q On up to January 6th? A Yes, sir.

Q The date of the present note? A Yes, sir.

Q Without any payment upon it? A Yes, sir.

*By Mr. Berger.*

Q There was no renewal of the \$7,200 note during that time, was there? A No, sir.

Q Now, in August of 1929, were you at the  
40 bank? A Yes, sir.

*Charles S. Ginsburg, for defendants, cross.*

Q Well, what hapened on August 12, 1929?

A We sold 500 shares of the Lincoln Interstate stock.

Q And you did that without calling on the bank? A Without calling there in person, yes.

Q In person? A No, sir; I was not there in person. 10

Q Do you know whether Mr. Simon was there in person? A I don't think he was. It might be hard for me to answer that question.

Q What happened on this day? How did you come to make the sale? A We were desirous of selling the stock, and we so informed Mr. Rose, and we informed him that if he could get a customer to purchase the stock, if he would call us and let us know the price, we would advise him whether we would want it sold. If we could get a purchaser before that time, we would advise him to deliver the stock. 20

Q What stock? A Whatever part of that 2,000 shares we had sold.

Q And he was free to sell all of the 2,000 shares without your consent? A According to the terms of the note, he was; but according to our understanding he was to call us to tell us what price he obtained for the stock.

Q You say that the note was made payable on demand, don't you? A Which one are you referring to? 30

Q The \$7,200 note? A Yes, sir.

Q Was there ever that demand made by him prior to August 12, 1929? A No, sir.

Q Was it made on August 12th? A The note was not made on August 12th, but on June 10th.

Q The demand for payment, was it made on August 12th? A No, sir.

Q So that the bank at no time made any demand of any kind upon you? A No, sir. 40

*Charles S. Ginsburg, for defendants, cross.*

Q And what you offered to do was purely voluntary on your part? A No, that is not so, either. We had discussed the proposition of disposing of some of this stock. We had discussed that with Mr. Rose.

10 Q You brought the proposition to him, according to your testimony, isn't that so? A We brought what?

Q You brought this proposal to him that you would sell these 500 shares of stock? A We had, at sometime between July and August, spoken to Mr. Rose, either in person or on the telephone, with the idea in mind that we would dispose of some of the stock if we obtained a fair price for it; and on August 12th the entire transaction, so far as that was concerned, was consummated, and 500 shares were sold.

20 Q When did you talk to Mr. Rose, if ever, between August 12th and September 12, 1929? A I do not remember having spoken to him in between that time at all.

Q So that on September 12th you telephoned to him, telling him that you had sold 500 shares? A Yes.

Q And that you were about to sell a thousand more? A That is right.

30 Q Well, you did not ask him previous to that whether you should sell them at this price or not, did you? A No, sir; it was my stock.

Q You just went out and sold it and reported the sale? A Yes, I reported the sale and asked him to make delivery of it to the broker to whom I had sold it.

Q What did he say? A He said he would not do it.

40 Q Why not? A He said he felt that a better price could be obtained for it later, and I told him I did not feel like waiting any longer.

*Charles S. Ginsburg, for defendants, cross.*

Q Now, upon the sale of all of these 1,500 shares, that would have realized \$5,906.25, isn't that so? A Yes, sir.

Q And your indebtedness to the bank at that time was— A (Interposing.) \$6,604 and some change.

Q You owed all of the \$2,950, did you not? A That \$2,950 was all part of the \$6,604 that I speak of.

Q Did you offer to pay him all of this indebtedness at any time? A No.

Q Did you have any balance in the bank at that time? A At which time are you speaking of?

Q In September of 1929? A Yes. We had \$1,500.

The Court: In September?

The Witness: Yes, sir.

The Court: That had not yet been credited?

The Witness: That was credited in November.

Q Isn't it true that this was not a balance at all, but you had put it up as collateral when you first obtained the loan, according to your testimony? A It was supposed to have been considered a balance for the account.

Q It was supposed to have been considered a balance? A Yes, sir.

Q Aside from this certificate of deposit, did you have any money on deposit with the bank? A I don't remember whether we did or not. At one time, besides that certificate of deposit, we did; I don't remember the date.

*Charles S. Ginsburg, for defendants, cross.*

Q Isn't it a fact that you didn't have a dollar on deposit in this bank at any time? A I don't remember at that particular date.

Q Do you mean to say that you do not remember whether you had any deposit there at all? A That is what I said. I don't remember  
10 on that particular day whether there was a balance on deposit.

Q Well, now, after your telephone conversation with Mr. Rose, and his refusal to deliver the stock, did you go up to see him at the bank? A Not that day, no.

Q Did you ever go up to see him after September, 1929? A Yes, some months later; in March, I think.

Q Did you at that time offer to pay your loan? A No, sir; I did not.  
20

Q Did you ever offer to pay your loan? A No, sir; I did not.

Q Did you ever pay a cent on account of it? A From when?

Q Since September, 1929. A Yes, sir; I did.

Mr. Rosenstein: I object to that, for the reason that several loans that the witness has been questioned about—there was no specification made as to what loan and any  
30 payment was made, if at all, on account.

The Court: There were two notes. I think the very evident intention is to inquire about those two notes by this question. The objection will be overruled.

Q When? A On November 4th, \$1,500 was credited on account.

Q You are talking now about the certificate of deposit that you put up when you originally  
40

*Charles S. Ginsburg, for defendants, cross.*

obtained the loan? A Yes, sir; that was a payment made by us.

Q Did you pay it or did the bank apply it to protect itself? A The bank applied it, but it was our money; it was our payment.

Q You had gotten of the bank \$16,500? A Yes, sir. 10

Q Of the bank's money? A Yes, sir.

Q And this came out of the bank's money, didn't it? A Yes, sir, on that loan.

Q So that the \$1,500 was part of the bank's money, is that right?

Mr. Kristeller: I object to that as being the "bank's money."

The Court: I will sustain the objection.

*By Mr. Kristeller.* 20

Q What is the value of the stock that is up there as collateral today?

Mr. Berger: I object to that on the ground that this witness has not been qualified to answer that question.

The Court: I rather think the inquiry should be as of the date of this suit, should it not? 20

Mr. Kristeller: That would be about the same, as I understand it. Suit was brought February 28, 1930.

The Court: I suppose you mean the market price, if there be a market quotation?

Mr. Kristeller: There isn't—

The Court: Well, then, I do not believe he can testify then.

Mr. Kristeller: I was going to say, there isn't any in Newark. It is a Maryland stock, 20

*Charles S. Ginsburg, for defendants, re-direct.*

and I think he has a right to show that it has depreciated in value.

10 The Court: I do not think you can show actual value. If you mean market value, and there is a market quotation, I think that Mr. Berger will not object to putting in the market quotation.

Mr. Berger: I would not, if there is something that looks like tangible proof of some sort.

Mr. Kristeller: There isn't, in this State.

The Court: I will sustain the objection, because the witness is not qualified.

20 Q Do you know the actual value of this collateral as of February 28, 1930?

Mr. Berger: That is objected to.

The Court: The question may be answered yes or no. He would not be permitted to state what the actual value was, without saying that he knew it and how he knew it.

A I do.

30 Q And was it less than the value that you had pledged there?

Mr. Berger: I object.

The Court: I will sustain the objection.

*Re-direct examination by Mr. Rosenstein.*

40 Q Mr. Ginsburg, can you state whether or not, subsequent to September 12, 1929, the stock which you had up as collateral has depreciated in value? A Yes.

*Charles S. Ginsburg, for defendants, re-direct.*

The Court: I will call your attention to the fact that there has been no statement that it had depreciated in value. Your question was "Do you know," and he said "Yes," that he did know. You apparently are going on from that, without asking the question which you believe you have asked. 10

Q How do you know? A The stock depreciated in—

The Court: No. How do you know, is the question.

The Witness: From calls made to brokers, trying to dispose of it; from quotations that I have seen in the newspapers on this particular stock. 20

Q Can you state whether or not, between September 12, 1929, and the date that suit was commenced—

Q (Continuing.) February 28, 1930—whether or not the stock had at any time during that period been valued at 3 15/16?

Mr. Berger: I object to that.

The Court: I will sustain the objection. 30

Mr. Rosenstein: May I respectfully make this request, your Honor: I would like an opportunity to call back, for re-direct, the broker who testified, and who is qualified.

The Court: If he is here, you may call him.

Mr. Rostenstein: We will call him at once, if your Honor will permit us to put him on.

Mr. Berger: I will consent to it, your Honor. 40

*Russell K. Rose, for plaintiff, direct.*

The Court: The plaintiff consents to it. Was this a quoted stock, either on the New York Stock Exchange or the Curb?

Mr. Kristeller: On the Curb; I understand it is on the Curb.

10 The Court: I suggest, if you are sending for your broker, he be asked to bring with him the official Curb quotations as of that date.

Mr. Berger: I will agree to letting him go on at any time whenever he comes.

The Court: Then both defendants rest?

Mr. Kristeller: Yes.

Mr. Rosenstein: Yes, sir.

20

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RUSSELL K. ROSE, sworn in behalf of plaintiff.

*Direct examination by Mr. Berger.*

Q Mr. Rose, you are vice-president of the Peoples National Bank & Trust Company of Belleville? A I am.

30 Q And did you hold that office during the year of 1929? A I did.

Q On June 10, 1929, did the Peoples National Bank & Trust Company of Belleville hold a note made to it by the defendants in this case, Ginsburg and Simon? A They did.

Q And when did that note become due? Have you the record showing the due date of that note? A I have.

40 Q What is it? A On June 10th a note for \$10,200 was due. I called that note.

*Russell K. Rose, for plaintiff, direct.*

Q Yes. And on June 14, 1929, was it held as past due? A It was.

Q When it became due on June 10th, did you communicate in any way with the defendants?

A As to the day, I don't remember, but we had considerable telephone exchange calls.

Q And did they after that come in? A They came to the bank about the 13th, I think it was. 10

Q The 13th of June, you mean? A About the 13th of June.

Q 1929? A 1929.

Q Well, now, what conversation, if any, took place between you and these defendants on that day? A We had first—the Peoples Bank had a note of \$10,200, with a security which was declining—

The Court: You cannot wander around and state anything you want to state on the witness stand. You must answer the questions. The question now is what was the conversation. 20

The Witness: The conversation was that the collateral was declining; the bank must protect itself. We had gone along with these two young fellows and didn't care to sell them out—we had opportunities to do it—and we thought by giving them a little time they could extricate themselves from the position they were in. I asked them what they could do if we gave them a thirty days' renewal on the note. They thought in thirty days they could clean up part of this note which they owed us, their \$10,200 note. We took a renewal by giving them a demand loan of \$7,200, dated June 10th, although the previous obligation came due about the 30

40

*Russell K. Rose, for plaintiff, direct.*

13th of June. I asked them, if we should lend them \$3,000 on their unsecured note, in order to put their collateral note in a better banking condition, if they would be in shape to take care of it in thirty days.

10 Q To take care of what in thirty days? A To take care of the unsecured portion of this loan.

Q How would they take care of it—in what manner? A I made out two notes, one for \$7,200, predicated on this stock. I made the note “demand,” in order to enable me to handle the situation as I thought best at the time. If it was a time note it would not be under our control; we would have to wait until the maturity of that  
20 note.

Q And how did you make the other three thousand? A I took that as an unsecured note, straight note, dated for one month.

Q What was the understanding as to payment? A Ginsburg and Simon gave me to understand that at the end of thirty days, or the maturity of that note, they would be able to do something with it by way of reduction; possibly pay it off.

30 Q At the end of the thirty days, did they come back? A At the end of thirty days they came to the bank and told me they had no funds; that they couldn't reduce the note satisfactorily. The best I could get from them at the time was \$50.

Q Did they make any promise as to the payment of the balance of \$2,950 at the time? A Our conversation at the time was to the effect that if we granted them another thirty days' grace, they would be able to take care of the  
40 note.

*Russell K. Rose, for plaintiff, direct.*

Q Take care of it how? A Take care of it by way of reduction.

Q Did they state what amount they would pay at the end of thirty days? A They told me they would be able to make a very satisfactory reduction of it—satisfactory to the bank.

Q Well, then, that carried it over into when? A That would bring it due about the 12th of August.

Q Well, now, on the 12th of August, did they come back? A They called me previous to the 12th of August.

Q Yes? A They told me that they would like to dispose of some of the stock. I asked them how much they wanted to dispose of, and they said they would like to sell about 500 shares at that time. I said, "What are you going to do with the balance of the stock or notes that you owe us?" They said, "If you will permit us to dispose of this 500 shares at this time, we believe within a very few days we will be able to dispose of the balance of it, and clean our indebtedness up to the bank." I permitted them to sell—I don't recall now whether I sold it or they sold it.

Q Well, in any event, 500 shares were sold? A Five hundred shares were sold.

Q What was done with the proceeds of that sale? A The proceeds of the sale were applied on their demand loan.

Q Now, what became of the \$2,950 note? A The \$2,950 note came due about the 12th, if my memory serves me right.

Q Of August? A In August, yes, at that time; and it was several weeks, I believe, before they came to the bank to straighten it out.

*Russell K. Rose, for plaintiff, direct.*

Q Did they then pay this note? A They did not pay it, no.

Q Well, what was said about it? What did you say to them? A I said, "You must clean the situation up. We have gone along with you. We didn't like to see you take your losses, which  
10 have been terrific; neither do we want to take losses through you."

Q What did you do about the \$7,200 note in August? A I told them that we would have to consider the \$7,200 note called as a past due.

Q When did you tell them that? A I told them that on the first or the second renewal, which would be in August.

Q In August? A In August.

Q And what was said, if anything, about the  
20 payment of the \$2,950? A They said there was nothing they could do. I had it past due a week or two; and then, not caring to have the note as a past-due item, they would renew it for a like amount, \$2,950.

Q For how long? A For thirty days longer.

Q Did they make any statement as to what they would do when it became due thereafter? A They told me they would try and do better.

Q Well, did they ever come around to pay  
30 this note? A They did not.

Q In January of 1930, you renewed it for them for thirty days, did you not? A Renewed it for thirty days.

Q And what was the understanding then? A That they would pay the note when it came due.

Q Did they pay it? A They have not.

Q Is that the note you are now suing on? A That is the note we are now suing on.

Q Now, do you recall their calling you on the  
40 telephone sometime prior to September 12, 1929?

*Russell K. Rose, for plaintiff, direct.*

A About the early part of September, I believe it was Mr. Simon called me on the phone and asked me to deliver 500 shares of Lincoln Interstate stock. I asked him what price he was getting for it. He said around 3 and a fraction. I said, "What are you going to do with the balance of this stock?" He said, "We are going to try and dispose of the balance at that or a better figure." I said, "How do you intend to take up your note, the note which we are now considering as past due?" He says, "I don't know what we are going to do." He said, "We want to get out of the stock and some day we will pay you off." I says, "What do you intend us to do in the meantime?" and he says, "Carry the note," and I says, "I cannot permit you to do it. The board wouldn't sanction that action."

10

20

Q Now, did he at any time, either on that day or thereafter, tender you payment of the amount due the bank? A He did not.

Q What did you offer to do with the stock if he paid for the note? A I told him I would give him back the stock if he paid his notes off.

Q You offered to do that? A I did.

Q Did he offer to pay the notes? A He said he couldn't.

30

Q And did he at that time have any money on deposit with you outside of the certificate of deposit? A No.

Q Did Mr. Ginsburg have any money on deposit with you outside of the certificate of deposit? A No—a very negligible account from the beginning.

Q Isn't it a fact that the certificate of deposit represented a part of the money that the bank loaned them? A It represented part of the margin on the note; part of the collateral.

40

*Russell K. Rose, for plaintiff, direct.*

Q And did they ever pay this collateral note or the other note? A They did not.

Q Did you ever authorize them to make a sale of this stock? A I did not.

10 Q In behalf of the bank? A I should say not.

Q If you had made delivery of this stock on that day, and had received for it the sum of \$5,906.25, which is the amount which could have been realized at the price at which they offered to sell it, would the bank have taken a loss for the difference between that amount and the amount due it? A At what date was that?

Q In September, 1929? A Yes, we would take a loss; a considerable loss.

20 Q Does the bank now own this stock? A The bank still holds the stock.

Q What did the Lincoln Interstate Holding Company do with their company? Did they dispose of it in some way or another? A Yes. They merged with the Niagara Shares Corporation.

Q Of what? A Of Maryland, I believe was the first transaction; and then there was another transaction.

30 Q Wasn't it Delaware first and then Maryland? A Yes, I guess it was.

Q Have you the stock certificates that the bank finally received out of the changes? A I have.

Q Will you let me have them, please? A (Witness produces documents.)

40 Q When the changes in the stock were made, were they made in the name of the bank or in the name of these defendants? A They were merely transferred in the names of the defendants.

*Russell K. Rose, for plaintiff, cross.*

Q And these are the certificates that you received on the exchange of stock? A Those are the certificates (indicating).

Mr. Berger: I will offer them in evidence. The offer is made of Certificate No. TNYC 1974, for 100 shares of Niagara Share Corporation of Maryland, common stock, made in the name of Charles S. Ginsburg and Martin Simon, as tenants in common. It is dated January 16, 1930. 10

(Certificate referred to received in evidence and considered marked Exhibit P. 3.)

Mr. Berger: Then there is Certificate No. TNYCO 1848, for 68 shares of Niagara Share Corporation of Maryland, made in the name of Charles S. Ginsburg and Martin Simon, as tenants in common; that also is dated January 16, 1930. 20

(Certificate referred to received in evidence and considered marked Exhibit P. 4.)

Q For whose account is the bank holding these certificates of stock at the present time? A The account of Ginsburg and Simon. 30

*Cross examination by Mr. Rosenstein.*

Q Mr. Rose, you say that the bank is holding the stock for the account of Ginsburg and Simon at the present time? A That is correct.

Q Why don't you apply it to the indebtedness?

Mr. Berger: That is objected to, on the ground that it is argumentative, and it is not a proper question on cross examination. 40

*Russell K. Rose, for plaintiff, cross.*

10 The Court: Well, my notion is that the negligence charged must apply as of the date prior to the commencement of this suit, and that is February 28, 1930. Since that time it is unimportant why they have refused to sell; but if your question should be modified to relate to the time prior to February 28, 1930, I think it may be asked.

Mr. Rosenstein: May I say this, your Honor—that the question I am now asking on cross examination is based upon the last question asked on direct, which was: for whom is the bank holding holding the stock today. The plaintiff having fixed that date, my question on cross examination falls directly within the scope of that, I think.

20 The Court: I will sustain the objection.

Counsel for defendant Ginsburg prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30 Q Mr. Rose, you testified on your direct examination that the \$10,200 loan was split up in \$7,200 and \$3,000, and that the collateral was to apply to the \$7,200 note, and that the \$3,000 note was to be unsecured? A That is true.

Q You testified also that you did that to help these boys out, as you put it? A That is true.

40 Q Now, will you please tell us in what way splitting the loan up into two parts of \$7,200 and \$3,000, and applying the securities to the \$7,200 note, which is on demand, and applying no security to the \$3,000 note, which was due thirty days hence—just how you helped these boys out by doing that? A At the time, June 10th or June 12th—June 10th is when we made

*Russell K. Rose, for plaintiff, cross.*

the notes out—at that time we could dispose of all these securities with a very nominal loss to the bank. They had suffered terribly in the depression, and I wanted to go along with them so far as I could, without involving the bank; but to further protect myself and the bank, I took their demand loan for 7,200, instead of a time loan, which it had previously been, and I gave them thirty days on an unsecured portion of it; thirty days to work themselves out. 10

Q As a matter of fact, Mr. Rose, you were rather anxious to protect the bank, isn't that right? A Naturally.

*By the Court.*

Q I do not understand yet how that helped them. That was the question, and you have not told us? A Instead of having a 10,200 collateral loan coming due periodically, with no likelihood of getting the note paid at maturity, I thought it a better banking proposition to make their collateral a demand loan. 20

Q The question is how that helped them. Now you are putting it as a banking proposition? A It helped us to carry on with them instead of—

Q No, it is not a question as to how it helped you. You said you wanted to help them. How did it help them? A I helped them by not selling the collateral out, which I could have done. 30

Mr. Berger: That is what the witness said a moment ago, and it was lost in the discussion between counsel, the Court and the witness.

*Russell K. Rose, for plaintiff, cross.*

*By Mr. Rosenstein.*

10 Q But, Mr. Rose, my question is just how—  
please be as specific as you can—just how were  
these defendants helped by splitting up the loan  
as you did, and in the manner that I have out-  
lined to you in my first question? A Instead of  
selling their collateral out and cleaning up their  
entire line, I gave them a thirty days' renewal  
on part of it; on, namely, \$3,000.

Q But, Mr. Rose, the total line was \$10,200,  
wasn't it? A Yes.

Q Splitting it up did not vary the amount  
that was due the bank, did it?

The Court: Did not decrease it, you  
mean?

20 Mr. Rosenstein: It did not decrease it or  
change it.

A No, it did not decrease it; no.

Q And the collateral that they had up was to  
secure this entire loan, isn't that so? A Not  
after I had split their notes up; no.

Q Well, now, let us try not to quibble? A  
I made them a new loan under new conditions.

30 Q I do not want to confuse you, but I just  
want to get the facts. The fact is that the struc-  
ture of the loan was in no way affected, one way  
or the other, whether it was split in two parts  
or whether it remained as one balance of \$10,-  
200 due? A No.

Q Isn't that right? A True.

Q So that as far as these defendants were  
concerned, it did not matter to them one way or  
the other, isn't that right? Yes or no? A  
Yes.

40 Q It did or did not? A It did.

*Russell K. Rose, for plaintiff, cross.*

Q Well, now, how? A I gave them a smaller amount to worry about, to be paid in thirty days. In thirty days I expected them to pay \$3,000, and not worry about the whole 10,200 in thirty days, which I knew they could not meet.

Q But if your desire was to help them, why didn't you make the \$7,200 note, covered by collateral, payable thirty days hence and the \$3,000 as a demand note? A To give them a chance to raise \$3,000 instead of a larger amount. 10

Q But if they had paid anything on account, irrespective of whether they paid it on account of the unsecured note or the secured note, it would still leave the balance remaining, keeping in mind always that the total indebtedness was \$10,200, isn't that right? A I considered their demand note— 20

Q Please answer my question. (Question read.) A That is right.

Q So that, as a matter of fact, Mr. Rose, when you said that you did that to help these boys, you really had in mind that you were not helping them but you were helping the bank, isn't that so? A I think I helped the boys considerably.

Q Well, then, you are now compelling me to ask you again how you helped these boys? A By not disposing of the collateral when I had the opportunity. 30

Q Well, you said that you helped them by splitting up the loan into two parts, and that that is what helped them. You now say the help consisted of your not selling them out. Well, now, which is it? A Both.

*Russell K. Rose, for plaintiff, cross.*

*By the Court.*

Q As it has turned out, I suppose they would have been helped by your selling it? A It would have helped them considerably.

Q Both of you? A Yes, sir.

10 *By Mr. Rosenstein.*

Q Your testimony was that by doing that, their position was improved, is that right? A I won't say it was improved.

Q Well, that is what you testified on your direct examination—you thought that it would improve their position? A Prevent them from loss at the moment.

20 Q As a matter of fact, they owed you 10,200 before the notes were split up and they owed you 10,200 after the notes were split up? A That is right.

Q And it was merely a matter of bookkeeping isn't that right? A Not entirely.

Q Did the amounts vary in any way at all? A No.

30 Q As far as the figures were concerned, it made no difference, one way or the other, whether it was split up into two notes or whether it remained as one?

The Court: Everybody says that. Do not waste time over that. We all know that.

Q Mr. Rose, you have testified that in August the \$7,200 note was called by the bank. That is right, isn't it? A That is true.

Q Why didn't you sell the collateral on that day? A Couldn't sell it.

40 Q Why not? A It would not bring enough to pay the note off.

*Russell K. Rose, for plaintiff, cross.*

Q Did you try to sell it? A I had checked it around with different brokers and getting quotations from the various newspapers.

*By the Court.*

Q August 12th they had sold 500 shares, had they not? A Yes, 500 shares; and I had asked the note to be cleaned up. They were unable to clean the note up, so they asked my permission to let them dispose of 500 shares, which I did, and that was August 8th, and by August 12th we had the proceeds of the sale of the stock. 10

Q Well, if they had sold the balance of it at that price, you say that would not have cleaned it up? A I don't think it would in August; in June it would have.

Q I understood you to say a while ago that the loss would have been negligible? A In June it would have been negligible; in June. 20

Q I thought you meant August. A In June.

*By Mr. Rosenstein.*

Q On August 12, 1929, the bank sold 500 shares and realized \$2,062—that is correct, isn't it? A That is true.

Q If all of the stock had been sold at that time, would an amount sufficient to pay off the indebtedness have been realized? A No. 30

*By the Court.*

Q Mr. Rose, if this stock had been sold at 3 15/16 in September, when they requested permission to sell it, it would have more than taken care of the note for which it had been assigned as collateral, would it not? A No; not in September. 40

*Russell K. Rose, for plaintiff, cross.*

Q Well, you say three and a fraction; they say  $3 \frac{15}{16}$ . That would have been \$4,500, would it not, if it had been three? A Yes, \$4,500.

Q Now, at that time you had a \$1,500 certificate of deposit, did you not? A Practically so.

10 Q That would have made \$6,000, would it not? A Pardon me just a moment (consulting documents).

Q Well, there was \$10,200 due, was there not, on June 14th? A \$10,200 was due; yes.

Q Now, then, you made a collateral note for \$7,200? A \$7,200; right.

Q And you received on that \$2,062, did you not? A True.

20 Q You had a \$1,500 certificate of deposit, hadn't you? A True.

Q And \$4,500 for these 1,500 shares of stock would have made \$8,062, would it not? A That is right.

Q So that if you had permitted the sale at that time of that 1,500 shares, it would have more than paid the note for which it had been assigned as collateral, would it not? A It would have, yes.

30 Q It would have been \$800 over, less the interest, would it not? A It would have.

*By Mr. Rosenstein.*

Q Now, then, Mr. Rose, despite the fact that in August you called the \$7,200 note, and that that security was held by you at that time, sufficient to discharge the note, you did nothing by way of realizing on those securities, isn't that right? A That is true.

40 Q You testify that the board of directors would not sanction applying the collateral, be-

*Russell K. Rose, for plaintiff, cross.*

cause it would leave, as you put it, a deficit of about \$700, is that right? A That is right.

*By the Court.*

Q Was that the subject of action by the board of directors, Mr. Rose? A I wouldn't take upon myself to sell stock out with a loss to the bank. 10

Q I say, was it the subject of action by the board of directors? A It should be, yes.

Q Now, you are not answering my question at all. I mean to have an answer to that question. I do not mean to have it evaded? A Yes.

*By Mr. Rosenstein.*

Q You mean then that the board of directors refused to sanction a sale of the collateral, because it would leave a balance of \$700, but that they would sanction a refusal to apply the collateral and leave a balance of \$6,000? 20

Mr. Berger: I object to that.

The Court: I will sustain the objection. It is not a question of what they would do.

Q Have you personally taken the matter up with the board of directors? A I have. 30

Q Were you present when the transaction was considered by the board? A Your question was—pardon me—had I taken it up with the board of directors? Of course, this happened some time ago. I don't know whether I misunderstood the question or not.

Mr. Rosenstein: Will you repeat the last question? 40

*Russell K. Rose, for plaintiff, By the Court.*

Q (Last question read.) A This particular transaction was not taken up with the board until after we had gone through this procedure of I having taken an unsecured note of \$3,000 and a demand note of 7,200. At that time they didn't know about it.

10

*By the Court.*

Q That was something you did upon your own responsibility? A I did that on my own responsibility.

Q So when you answered my question as you did, you did not mean to state that what was done in the division of these notes was done with the sanction of the board of directors? A No. Our board meets once a week, and we have to take those things upon ourselves.

20

Q I suppose, however, when the board does meet, all these matters are taken up and receive their approval or disapproval, do they not? A That is true.

At 12:56 P. M. the Court takes a recess until 2 P. M.

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AFTER RECESS.

RUSSELL K. ROSE, recalled in behalf of plaintiff.

*By the Court.*

Q Have you here your record of these notes—the bank record? A Yes, sir.

Q By referring to those records, can you tell us the exact date when this \$3,000 note was

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*Russell K. Rose, for plaintiff, By the Court.*

given? I understood you to say that was June 10th. You know that, do you? A June 10th; I know that.

Q Can you give us the exact date of the first renewal of that note? A I would rather refer to the records on that.

Q Yes. Will you do that? Was that July 10, 1929? A (Consulting documents.) The note was dated June 10th. 10

Q June 10th? A June 10, 1929.

Q And it was for thirty days? A It was for thirty days.

Q Now, the next note. Tell us when that was. A That \$3,000 note was due July 10, 1929.

Q And when was it renewed? A And renewed on July 11th, a day later. 20

Q For thirty days? A Thirty days.

Q Now, your next one? A September 7th.

Q That was the next renewal, September 7th? A The next renewal. This \$2,950 note was discounted on July 11th, to mature, coming due, on August 12th.

Q It came due on Saturday, did it? A I presume it did.

Q I find the 11th was Sunday? A It was not renewed until September 7th. 30

Q For \$2,950? A \$2,950.

Q For thirty days? A Thirty days from August 12th.

Q That would make it due on September 11th? A September 12th this happens to be in the book.

Q That would be thirty-one days? A We go monthly. We go from month to month.

Q Well, was it one month after date? A One month after date. 40

*Russell K. Rose, for plaintiff, By the Court.*

Q Each time it was renewed for one month, was it? A One month each time.

Q One month from August 12th. Now, then, give us the next one. That would make that due on September 12th? A September 12th.

10 Q In other words, five days after it was given? A Five days after it was given.

Q Now, when was the next renewal? A At this time it was past due four days; it was not renewed on September 12th, but renewed on September 16th; four days past due.

Q For one month from what? A From September 12th.

Q Any more renewals? A Yes. It came due on October 14th.

20 Q That is Saturday. The due date was the 12th, and that was a Saturday? A That is right.

Q Due October 14th—all right. A Past due four days again.

Q Was that October 18th? A October 18th.

Q It was renewed then for one month? A It was renewed for one month.

30 Q From October 12th or 14th? A From October 14th to November 14th; and from November 14th it was past due to December 6th; renewed on December 6th.

Q For one month from November 14th? A It came due on November 14th; it was not renewed until December 6th.

Q And renewed December 6th to January 6th—and then that is this note? A That is this note.

Q That is the next renewal? A The next renewal.

40 Q And then renewed January 6th? A January 10th; four days late again.

*Russell K. Rose, for plaintiff, cross.*

Q From what date, from January 6th? A From January 6th.

Q Now, then, when do you say this conversation was, when they called you with reference to the sale of the 1,500 shares? You said early in September, but I am wondering now, since you have your records, if you can place it any more definitely than that? A They called me the early part of September, telling me they had sold 500 shares.

10

Q Now, can you give us the date of that? He fixes it as September 12th? A Well, that is practically right.

*Cross examination (continued) by Mr. Rosenstein.*

20

Q Mr. Rose, you recall the conversation that was had between yourself and Messrs. Simon and Ginsburg, that they talked about on direct examination, with respect to the sale in September of these 500 shares or thousand shares? A You mean the testimony given here today?

Q Yes. Perhaps I had better state the question in this fashion: Messrs. Ginsburg and Simon did have a conversation with you over the telephone in September, with respect to the sale of 500 shares? A Five hundred shares.

30

Q And the thousand shares? A Only 500 shares were mentioned.

Q You won't say that there was never any conversation with respect to the other thousand shares? A There never was any conversation about a thousand shares.

Q You are sure about that? A Quite sure; positive.

40

*Russell K. Rose, for plaintiff, cross.*

Q The fact, however, remains that you did refuse to sell any portion of the 1,500 shares which you held, is that right? A In September.

Q In September? A In September.

10 Q And that any request by the defendants, directed to the bank, or any direction directed to the bank, would have been refused by the bank in September? A Without payment of the note.

Q Without payment of the note? A Without payment of the note.

*Cross examination by Mr. Kristeller.*

Q Mr. Rose, when was this account opened?

A The early part of April, 1928.

20 Q You said on direct examination that the bank balance was always insufficient to carry this loan? A When the account was opened, there was a balance there of possibly three or four months. After that there were no balances, with the exception of two or three hundred dollars, other than the \$1,500 which was held in the collateral account to support the margin on the collateral loan.

30 Q When you say there were balances at the beginning of the account, what do you mean by that, a thousand dollars or more? A They deposited enough money in the account to take up this Lincoln Interstate stock, which was delivered to the bank. After the stock was cleared, the balance went down.

Q Well, you mean then that the defendants arranged with the bank for this loan in order to buy that stock, is that right? A No.

40 Q The stock was delivered to you, wasn't it? A There was sufficient balance that—do you want to know how much they deposited that day?

*Russell K. Rose, for plaintiff, cross.*

They deposited seven thousand-odd dollars in their account.

Q And that, together— A (Interposing.) With our renewal of \$16,500, put enough money in their account to pay for the stock, which came to us and was put up as collateral.

Q And you knew when you made the loan what the purpose of the loan was? 10

Mr. Berger: I object to that as immaterial.

The Court: The question may be answered.

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

Exception noted as ground of appeal.

The Court: I will permit that to show that the bank knew what the stock cost, and what the shrinkage was at the time these transactions took place. That is the reason I am allowing the question. 20

A We discounted the note with a reasonable amount of collateral at that time.

Q You are not answering my question, are you? I asked you whether you knew, when you made the loan of \$16,500, that that money or the proceeds of that loan was to be used, with their own money, to buy the Lincoln Interstate Holding Company stock. 30

Mr. Berger: May I repeat my objection? The question is not aimed at getting information as to the value of this stock at the time, but rather aims at showing that Mr. Rose knew that they were borrowing money for a specific purpose. That is the way the ques- 40

*Russell K. Rose, for plaintiff, cross.*

tion is framed, and I object to it on that ground, in line with your Honor's thought on the subject.

The Court: The objection will be overruled.

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

Exception noted as ground of appeal.

A At the time Ginsburg and Simon came to the bank to borrow this \$16,500, I didn't know, and don't know now, but what they had already owned the stock. I was disinterested whether they were just buying it or transferring a loan from another bank. They gave us sufficient margin.

20 Q Do you want to let us understand that you loaned \$16,500 of the bank's money on this collateral, without having the collateral there or being delivered to you? A The note was not discounted until the stock was presented.

Q And who presented the stock? A That I don't remember.

30 Q And you now say that there was enough in their account to pay the draft for this stock—isn't that what you said? A They opened the account with \$7,750; they brought to me a note for \$16,500; they paid for the stock \$22,750.

Q When they came to you with this note of \$16,500, did they bring the stock with that note?

A The stock was paid for the same date the note was discounted.

Q By your bank, wasn't it?

The Court: \$22,750, did you say?

40 The Witness: \$22,750 was charged to their account on April 5th, the same day that

*Russell K. Rose, for plaintiff, cross.*

we discounted the note for \$16,500—less the discount.

Q Wasn't that stock delivered to you, and didn't you pay for it out of the proceeds of this discount? A I don't recall that.

Q You won't say no, will you? A I don't remember. I can't; I don't remember. 10

Q I say, you won't say no?

The Court: He says he does not remember.

A I don't remember.

Q Will you say that you loaned these gentlemen \$16,500 on a note which said that there was collateral of 2,000 shares of Lincoln Interstate Holding Company pledged, when that was not there? 20

The Court: He has answered that. He said the proceeds were not applied until he received the stock.

*By the Court.*

Q The note was made prior to that time, I suppose? A The note was dated the 4th; the same day. 30

Q And the proceeds credited when? A The same day; I think the 4th.

Q And when did you get the stock? A Got the stock the same day, on the 4th.

The Court: That seems to explain it all.

*By Mr. Kristeller.*

Q April, 1928? A April, 1928. 40

*Russell K. Rose, for plaintiff, re-direct.*

Q You say it was dated the 4th? A According to my records here (indicating).

Q I will ask you if this is the note you are referring to (handing witness document). A (Examining.) Well, that is the note. It is dated April 2nd, but was not discounted until April 4th.

Mr. Kristeller: I ask that that be marked for identification.

(Document referred to marked Exhibit DS. 1 for identification.)

Q I show you a debit memorandum of your bank, and ask you whether this refreshes your recollection as to whether the bank paid for that stock and had it delivered at the time the note was given, or shortly thereafter (handing witness document). A (Examining.) On April 4th the draft, with stock attached for \$22,750, was presented to the bank for payment, against which we had a \$7,000 balance and a note made for \$16,500. We credited the note to the account and charged the draft up.

Q So that the note was not credited to the account until you had the stock there? A True.

30 *Re-direct examination by Mr. Berger.*

Q Mr. Rose, you were asked before whether you intended it as a benefit to the defendants when you split the loan into two notes, in June of 1929. I would like you to tell the Court and jury in what way the defendants were benefitted, besides the splitting of the note into two notes. Was there any advantage to that?

40 Mr. Rosenstein: I object to that.

*Russell K. Rose, for plaintiff, redirect.*

The Court: I will sustain the objection. Mr. Rose had ample opportunity. That question was asked of him in several ways upon cross examination, and I think that I should now sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court. 10

Exception noted as ground of appeal.

Q In September of 1929, upon the sale of the 1,500 shares, and upon the crediting of the certificate of deposit, would the bank have been paid in full or not? A They would not.

*By the Court.*

Q When you say "they would not," you mean, of course, that it would not have paid the \$10,200? A No. 20

Q But it would have more than paid in full the note for which it had been assigned as collateral, would it not? A It would, but our collateral note—

Q One minute. What is your answer to that? A It would.

Q Except for that provision in your note that it shall stand as security for any indebtedness of the makers of the note? A All indebtedness. 30

*By Mr. Berger.*

Q And do you rely upon that provision in the collateral note when you asked for payment of the entire line? A Certainly.

Mr. Kristeller: That is objected to.

The Court: The answer may remain.

Mr. Berger: We rest. 40

*Milton Zucker, for defendants, direct.*

MILTON ZUCKER, sworn in behalf of defendants.

*Direct examination by Mr. Kristeller.*

Q With whom are you connected, Mr. Zucker?

10 A Halle & Stieglitz.

Q Is that a Stock Exchange house? A Yes, sir.

Q Have you produced here the bound volume of the Journal of Commerce for March and April, 1930? A Yes, sir.

Q Is the Journal of Commerce a recognized periodical in Stock Exchange houses? A Yes, sir.

20 Q Will you turn to March 1st and tell us whether, on the Curb Market, there is a sale of Niagara Shares of Maryland? A (Consulting volume.) Yes, sir; there is.

Q And what is the price?

30 Mr. Berger: I object to that as immaterial, on the ground that the defendants in their counter-claim say that they requested the sale of 500 shares of Lincoln Interstate Holding Company stock, and that by reason of the failure of the plaintiff to make sale of it, they suffered this loss. They do not make the claim to a loss sustained on the sale of any stock of any other company.

The Court: Yes, but the undisputed proof in the case is that the Lincoln Company became the Niagara of Delaware, and afterwards the Niagara of Maryland; and the testimony is it was after this time, after September 12th.

40 Mr. Berger: But that is not yet in the question, what became of the market value

*Milton Zucker, for defendants, direct.*

of the stock of the Lincoln Interstate Holding Company.

The Court: I understood, after it was merged with these other companies, it had no value.

(Argument.)

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The Court: The objection will be overruled.

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

Exception noted as ground of appeal.

Q What does that show the sales to be?

The Court: Of what, now?

Mr. Kristeller: Of Niagara Shares of Maryland, in the paper of March 1st.

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A \$15- $\frac{3}{8}$ .

Q And what is that the record of, of the sales of what day? A Of February 28th.

Q 1930? A 1930.

Q Have you the record of the sales of the Curb Market Friday? A Yes, sir.

Q And is there any Niagara Shares Corporation sold on that report?

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Mr. Berger: I object to that as immaterial.

The Court: I do not see the materiality of that.

Mr. Kristeller: May I make the point that the defendants' case is predicated upon the Empire Trust case that you have before you, and the point that we make is this: that our damage is not the difference between

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*Motion for Direction of a Verdict for Plaintiff.*

the price on September 12, 1929, and the date of this suit, as it would be if the parties were reversed. We maintain that our damage arose the moment there was a request to sell and a refusal to sell.

(Argument.)

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The Court: I will still adhere to my first notion—that the value as of the date of the suit should be the value which should control, in order to fix the date; and an exception to that ruling may be noted.

Mr. Kristeller: I guess the record is straight that I have offered the value as of yesterday?

The Court: Yes.

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Mr. Kristeller: Does your Honor want to ask the witness any question?

*By the Court.*

Q You say that was \$15- $\frac{3}{8}$ . That would be \$15.37 $\frac{1}{2}$ , would it not? A Yes, sir.

The Court: Well, now, does that close the case?

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Mr. Kristeller: That closes the case.

Mr. Berger: I move, if your Honor please, for the direction of a verdict in favor of the plaintiff against the defendants, both on the plaintiff's claim on the note sued on, which amount I understand has been admitted—

The Court: No question about that.

Mr. Berger: No question about that—and also in favor of the plaintiff and against the defendants on the counter-claim. I base it on two grounds. My first one is that the

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*Motion for Direction of a Verdict for Defendant.*

cause of action asserted by the defendants on the counter-claim has been prematurely brought and cannot be sustained at this time; and for that reason I move for a dismissal of the counter-claim, and for the striking out of the testimony given in support of the counter-claim.

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The second point is that the defendants, having been indebted to the plaintiff in a sum of money which would not have been fully paid upon the sale of the security pledged with the plaintiff as collateral for the loan due the plaintiff by the defendants, could not, as a matter of right, demand, on September 12, 1929, the sale of all of the security without liquidating the entire indebtedness due from them to the plaintiff; and in view of the fact that the testimony is clear and uncontradicted that the defendants, on September 12, 1929, when they requested the delivery of all the collateral, for an amount which would not have liquidated the entire indebtedness to the plaintiff, and they did not offer to pay and they did not pay to the plaintiff the entire indebtedness, there can be no liability in favor of the defendants and against the plaintiff for the refusal of the plaintiff to make delivery of the collateral under these circumstances.

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The Court: The motion for direction of a verdict on the counter-claim will be denied, and an exception to that ruling may be noted.

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

Exception noted as ground of appeal.

Mr. Kristeller: I make a motion now, on behalf of the defendant Simon, for the di-

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*Motion for Direction of a Verdict for Defendant.*

10 rection of a verdict, for the difference between the value of the stock on September 12th, \$5,906.25, and the amount due upon the note, as admitted here, of \$3,103.49, or a balance due this defendant from the plaintiff of \$3,221.19; and I make that motion under the doctrine of *Amick v. Empire Trust Company*.

The Court: The motion will be denied.

Counsel for defendant Simon prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: You make the same motion on behalf of the other defendant (addressing Mr. Rosenstein)?

20 Mr. Rosenstein: Yes, sir; I do.

The Court: And for the same reasons, I suppose. The motion will be denied.

Counsel for defendant Ginsburg prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30 Mr. Kristeller: I make a motion for a verdict in favor of the defendant for \$219.76, in view of the fact that my friend on the other side says that there are no facts which are in dispute. I quite agree with him. There is the demand and refusal to sell, and the only question, I think, is the question of damages, and these are liquidated, the amount that we owe the bank being admitted, and the value of the stock having been testified to and remaining uncontradicted.

The Court: The motion will be denied, and an exception to that ruling may be noted.

*Court's Remarks Re Direction of Verdict.*

Counsel for defendant Simon prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Counsel for defendant Ginsburg prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

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(Mr. Berger sums up for plaintiff.)

(Mr. Kristeller sums up for defendant Simon.)

(Mr. Rosenstein sums up for defendant Ginsburg.)

At 4:05 P. M., the Court takes a recess until tomorrow, Tuesday, November 18, 1930, at 10 A. M.

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 SECOND DAY.

Tuesday, November 18, 1930.

Continued pursuant to adjournment.

Present, counsel as before stated.

The Court: In thinking over this case this morning—I am now speaking to the attorneys—it seems to me, in fairness, I ought to withdraw something I said yesterday in denying the motion for direction of a verdict made on behalf of the plaintiff, on the subject of negligence, in which it might have been understood, in speaking of the things which the jury might take into consideration on the subject of negligence, that with respect to the transfer of the shares of stock from the Lincoln Interstate Holding Company to

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*Court's Remarks Re Direction of Verdict.*

the Niagara Shares Corporation of Delaware, and by that company to the Niagara Shares Corporation of Maryland, the merger took place before September 12th. I want to say that if I had such thought in my mind at that time, that is not borne out by the testimony.

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These mergers, whatever they were, took place after that time, and I think we have not the date when the shares of stock of the Niagara Shares Corporation of Delaware were substituted for the shares of stock of the Lincoln Interstate Holding Company—I think we have not that date in the evidence—but we have the date in the evidence when the shares of the Niagara Shares Corporation of Maryland were substituted for those of the Niagara of Delaware, and that is January 16, 1930; so I thought, in fairness, before beginning the charge, I ought to make this explanation so the jury will understand it.

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**CHARGE TO JURY.**

The Court charges the jury as follows:

DUNGAN, J.:

Gentlemen, this is a suit upon a promissory note; just an ordinary, plain promissory note, in these words: "January 6, 1930. One month after date we promise to pay to the order of Ourselves, \$2,950. Payable at the Peoples National Bank & Trust Company. Value received with interest," and signed "Charles S. Ginsburg" and "Martin Simon," and endorsed "Charles S. Ginsburg" and "Martin Simon." 10

Admittedly, this note has not been paid; admittedly it was given by the defendants to the plaintiff company, and discounted by the plaintiff company for the credit of the defendants; that nothing has been paid upon it; that at its maturity, which was February 6, 1930, the note being drawn "with interest," there was due upon it \$2,965 principal and interest. The note not being paid at that time, it was protested for non-payment, and it is admitted that the interest from February 6, 1930, to yesterday, November 17, 1930, at six per cent., amounted to \$138.25, making due upon the note \$3,103.49. I do not know whether some of you want to take a memorandum of those figures or not. If you do, I do not think there will be any objection to your doing so. It is indicated by the attorneys that there is no objection, so you may take that figure down, \$3,103.49. That is the amount of principal and interest which was due yesterday upon this note. There being no dispute about the giving of the note and the amount due, that should be the amount of your verdict in this case, if you de- 20 30 40

*Court's Charge to Jury.*

cide that the defense which has been interposed has not been made out in this case.

10 However, the defendants contest the payment of this note and say that they ought not at this time to be required to pay it, notwithstanding their admission of the facts already related, because they claim that the security which was  
20 given for another note, and which had previously been given for this same debt, under circumstances which I shall relate, was negligently handled by the plaintiff in this case—the Peoples National Bank & Trust Company—to the detriment and loss of these defendants under these circumstances— It appears that in April, 1928— if I make any incorrect statement as to these dates or amounts, I am quite willing that either  
30 of the attorneys should call my attention to it— these defendants purchased 2,000 shares of the stock of the Lincoln Interstate Holding Company for \$22,750, which would be at \$11- $\frac{3}{8}$  per share. They had at that time upwards of \$7,000 on deposit with the Peoples National Bank & Trust Company, and they borrowed \$16,500 upon a collateral note, and assigned these 2,000 shares of the Lincoln Interstate Holding Company as collateral security to that note. Thereupon a draft  
40 for the \$22,750 was accepted by the plaintiff bank, which paid for this stock, and they took the stock and placed it as collateral for this \$16,500 note. Between that date, April, 1928, and June, 1929—the dates are not important—this note had been reduced to \$10,200. At that time—June 13th or 14th—Mr. Rose, the vice-president of the plaintiff company, thinks it was the 13th, and the defendants think it was the 14th—there was a meeting at the bank—by whom it was called is unimportant—in which it was agreed that the

*Court's Charge to Jury.*

\$10,200 note should be split up into two notes, one of \$7,200 and one of \$3,000, that all of the securities should be placed against the \$7,200 note, that is, specifically placed against that note in the collateral note itself, and that that should be made a demand note; and that the balance of the \$10,200 should be represented by a time note, payable in one month, for \$3,000. 10

At first there appeared to be some little difference about the reason for this splitting up of the note, but upon an analysis of the testimony there does not seem to be such a great difference. Mr. Simon says that Mr. Rose stated that the purpose of this was that the Banking Examiner might object to the note being in excess of the value of the collateral, and the collateral at that time—the Lincoln Interstate stock—was not worth \$10,200. Mr. Ginsburg practically corroborates that; he says that Mr. Rose said that the Bank Examiners were expected, and the note was not sufficiently well margined to let it stand as it was. Mr. Rose himself says that the conversation was that the collateral was declining and the bank must protect itself; so, apparently, from Mr. Rose's own testimony, that matter must have been discussed, although he denies that the reason for it was precisely as stated by the defendants in this case. However, whatever the reasons were, that was what happened and was consented to by all the parties. 20 30

Later, about August 12th, the defendants sold 500 shares of this Lincoln Interstate stock for \$4- $\frac{1}{8}$  a share, which amounted to \$2,062.50, and the proceeds of the sale of those shares were credited upon this \$7,200 note, which left due upon it \$5,137.50; and subsequently there was credited upon it an additional security which had 40

*Court's Charge to Jury.*

been given in the note, namely, a certificate of deposit in the amount of \$1,500. The plaintiff bank does not seem to have credited the whole \$1,500, but \$1,463—the reason for the reduction of \$37 does not appear in this case—which would leave due upon that note \$3,674.50; and later there was credited upon it a \$14 dividend, and the sale of one-half share of stock of the Niagara Shares Corporation of Delaware, \$5.96, making \$19.96; leaving due upon the \$7,200 note the sum of \$3,654.54. That note is still held by the plaintiff in this case. Nothing has been paid upon it since the application of the last two items I have mentioned to you.

It appears that in September—the defendants think about September 12th, Mr. Rose says in the early part of September, he does not deny the date; in fact, when his attention is called to the date fixed by the defendants in their testimony, he says that is substantially correct—the defendants, according to their testimony, had sold 500 additional shares of that stock at \$3-15/16 a share, and on the same day they received an offer of the same price for the remaining 1,000 shares. You will remember that after the 500 shares were sold and the proceeds credited, the plaintiff continued to hold the remaining 1,500 shares of that stock against this note. The defendants say that when they told Mr. Rose that they had sold this stock, and requested him to deliver the 500 shares and to approve the sale of 1,000 shares, he declined to deliver the 500 shares and to approve the sale of 1,000 shares, giving as a reason that he thought it was worth more than that, and that he thought he could get more for it. The value of that stock at that price would have been \$5,906.25, or \$2,251.71 more than

*Court's Charge to Jury.*

was necessary to pay the balance due on the \$7,200 note, which was \$3,654.54. That, of course, does not take into account interest; I am talking now about the principal only of that note.

Now, if that \$7,200 note had been the only note to be taken into consideration, you can see that the bank would have been overpaid, and, under those circumstances, if that had been the only thing to take into consideration, the bank would have been obliged to act upon the order of these defendants, sell that stock at the price they indicated, apply the proceeds upon the \$7,200 note, and turn the balance over to the defendants. But that was not all. This collateral note for \$7,200 contained this provision: "I herewith deposit with them"—that is the bank—"as collateral security for the payment of this or any other liability or liabilities to them, now incurred or due or that may be hereafter contracted, the following property"—and then we have the 2,000 shares of the Lincoln Interstate Holding Company, or 1,500 shares remaining; so that the wiping out of the \$7,200 note was not all that was required of that security. It stood as security for the \$3,000 note as well as for the \$7,200 note; and the proceeds of that sale would not be sufficient to wipe out the entire indebtedness of these defendants to the bank; and therefore the bank was not obliged to dispose of that stock simply because the defendants requested them to do so, as they would have been if those shares had stood as security only for the \$7,200 note.

It appears that some time after September 12th there was a merger of the Lincoln Interstate Holding Company with the Niagara Shares Corporation of Delaware, and 121½ shares of the

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*Court's Charge to Jury.*

latter company were substituted for the 1,500 shares of the Lincoln Interstate Holding Company—the one-half share was sold, as I have already called to your attention, and the proceeds credited upon the \$7,200 note—and later, under certificates of stock dated January 16, 1930, the  
10 Niagara Shares Corporation of Delaware was merged with the Niagara Shares Corporation of Maryland, and 168 shares of that company issued in the place of the 121 shares, and these shares successively were placed as collateral security for this \$7,200 note. The 1,500 shares of the Lincoln Interstate Holding Company were replaced by 121½ shares of the Niagara Shares Corporation of Delaware, and the 121 shares remaining after the one-half share was sold, were  
20 replaced by 168 shares of the Niagara Shares Corporation of Maryland; these taking, in turn, the place of the original collateral.

The mere fact, since the collateral would not pay the entire debt of these defendants, that they demanded the sale of this stock, if they did, would not entitle them to your verdict in this case. The fact that they did demand the sale of all this stock is disputed. Mr. Rose admits that they demanded the transfer of 500 shares of  
30 the stock, which he refused to transfer because he did not think it was enough, and because it would not pay the indebtedness, but he denies that they said anything to him about the 1,000 shares of stock which would remain after the sale of the 500 shares. Of course, if they did not, their statement that they did demand it should not be taken into consideration in this case in determining the question which I shall presently call to your attention, and which is the question

*Court's Charge to Jury.*

to be decided by you in this case, namely, the negligence of the plaintiff company.

At the time this suit was brought, the stock which had been substituted for the 1,500 shares of the Lincoln Interstate Holding Company was worth \$15- $\frac{3}{8}$  a share, making the 168 shares worth \$2,583, while the 1,500 shares at \$3- $\frac{15}{16}$  a share, as I have already indicated to you, would have been worth \$5,906.25, or a difference of \$3,323.25; so that at the time this suit was brought, if you credit this evidence, the difference in the value of the stock at those two times would be, as I have said, \$3,323.25.

Now we come to the main question in this case. As I have told you, the plaintiff was not bound to sell this stock simply because it was demanded by the defendants, unless the price for which the stock would have been sold would pay their entire indebtedness, or unless they made up the difference, which they admit they could not do at that time. So the question is whether or not the plaintiff handled this stock with ordinary care; that is, did it handle this stock with such care as reasonably careful and prudent business men would handle it. What I mean by that is this: that a reasonably careful business man, particularly a bank, having collateral, is obliged to exercise reasonable care in the handling of that stock, and would it be the exercise of reasonable care for a business man to continue to hold stock on a declining market, when there was an opportunity to sell it, until that stock went down to the vanishing point. Now, this stock, it appears, never went down exactly to the vanishing point, but it went down from three-fourths of \$22,750 in April, 1928, to \$2,583 on February 28, 1930, that is, the stock which was substituted for the

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*Court's Charge to Jury.*

original collateral. The mere fact that the stock went down does not say that this plaintiff was negligent. You cannot find negligence from the mere fact that it went down, if you decide that what it did, in continuing to hold that stock and refusing to sell it in September, 1929, was what  
10 a reasonably careful and prudent business man would have done under the same or similar circumstances and conditions.

The plaintiff knew, as I have already indicated, what this stock was purchased for in April, 1928, namely, the whole bulk of the stock—\$22,750 for the 2,000 shares. They knew, because Mr. Rose himself says that in this conversation of June 13th the stock was declining; he says so; the conversation was that the stock was  
20 declining, and the bank must protect itself. The bank knew, through Mr. Rose, in August, that the market price had declined to  $\$4\frac{1}{8}$  a share as compared with  $\$11\frac{3}{8}$  a share the year before, and he knew that the defendants had an offer of  $\$3\frac{15}{16}$  a share for that stock; he knew it by what the defendants said to them, and the defendants' testimony is corroborated by the testimony of the broker through whom this deal was  
30 handled, that the price of that stock had declined to that point.

Now, did they act the part of reasonably careful and prudent business men in declining to sell that stock at the request of the defendants at that time? If they did, then the defendants must fail in their counter-claim, because the burden of proving that the plaintiff was negligent in its handling of this stock is upon the defendants; but if the greater weight of the evidence fails to show that the handling of this stock, under the  
40 circumstances proven in this case, was want of

*Court's Charge to Jury.*

due care on the part of this plaintiff—in other words, was not a negligent handling of that stock—then the plaintiff is entitled to your verdict for the full amount of this note, with interest, which amounts to \$3,103.49. On the other hand, if the preponderance of the evidence, that is, the greater weight of the evidence in this case, shows that, under the circumstances of this case, with the knowledge which the plaintiff had through Mr. Rose, its vice-president, the plaintiff failed to handle this stock as reasonably careful and prudent business men would have handled it under the same or similar circumstances and conditions, that was a negligent handling of this stock, and the defendants are entitled to counterclaim in this case for whatever their loss was up to the time of the bringing of this suit.

If you believe, from the testimony in this case, that the difference between the price at which the defendants could have sold that stock, on September 12th, and the value of that stock when this suit was brought, is \$3,323.25, that is the figure which you may take into consideration. However, you are not bound by those figures; but if you decide that to be the difference, there is due upon the plaintiff's note now \$3,103.49, and the difference in favor of the defendants, if you adopt those figures, should be \$219.76; but, as I say, you are not obliged to adopt those figures.

If you decide that there was no negligence, then the plaintiff is entitled to your verdict for the full amount. If you decide there was negligence, then what the defendants are entitled to recover as an offset against this note, the amount due upon this note, is the difference between the value of the stock on September 12, 1929, and its value on February 28, 1930—whatever that would be—

*Court's Charge to Jury.*

and if that difference exceeds the amount which the defendants owe upon this note to the plaintiff, your verdict should be in favor of the defendants for that difference. If there be a difference in favor of the plaintiff, then your verdict should be for the plaintiff for that difference. Interest  
10 may be calculated on whatever sum you find due from either plaintiff or defendants, from the 28th day of February, 1930, at six per cent.

I have here several requests to charge, which were not handed to me until about seven or eight minutes before the charge began, and I was obliged to give that time to two other attorneys and have not even read them over; but I will read them over and treat with those about which I  
20 have no doubt—the rule being that requests to charge should be handed to the Court prior to the arguments of the case, so that during the arguments the Court may have an opportunity to look them over.

The first request to charge, on behalf of the plaintiff, is “The jury is the sole judge of the facts and is not bound in any way to accept any figures relating to the claim of the defendants for damages against the plaintiff, mentioned by  
30 the Court in ruling on motions of counsel for either plaintiff or defendants.” I charge you that.

The second:

“There is no evidence in this case fixing the amount of damages which the defendants claim in this case, and if the jury should find in favor of the defendants and against the plaintiff on the counter-claim of each defendant, they must find and assess nominal dam-  
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*Court's Charge to Jury.*

ages of six cents in favor of said defendants on said counter-claims."

I decline to charge.

The third:

"The evidence adduced by the defendants as to the price at which the shares of stock of Niagara Share Corporation of Maryland sold on the market on March 1, 1930, is not a proper basis for determining the damages claimed by the defendants in their counter-claims." 10

I decline to charge.

The fourth:

"Unless the jury should find evidence in this case, other than the evidence as to the price at which the stock of Niagara Share Corporation of Maryland sold on the market on March 1, 1930, establishing the loss sustained by the defendants, the verdict of the jury on the counter-claims of the defendants must be in favor of the plaintiff." 20

I decline to charge.

The fifth:

"The damages claimed by the defendants on their counter-claims must be established by said defendants by evidence as to any loss sustained by the defendants on September 12, 1929, the day when the defendants claim they sold 500 shares of their collateral security put up with the plaintiff, and could have sold the balance of 1,000 shares, and that the plaintiff refused to make delivery of said shares to defendants' purchaser of said shares." 30

I decline to charge.

*Court's Charge to Jury.*

The sixth:

10        “The defendants must establish their claims for damages under their counter-claims by the greater weight of the evidence, the burden of proving said counter-claims resting on the defendants. If the jury should find that the defendants have not proved their counter-claims by the greater weight of the evidence, their verdict must be in favor of the plaintiff and against the defendants on said counter-claim.”

I have charged.

The seventh:

20        “The defendants must prove by the greater weight of the evidence that the plaintiff was negligent in refusing to consent to the sale of the 1,500 shares of Lincoln Interstate Holding Company on September 12, 1929. If the jury should find that the defendants have not proved by the greater weight of the evidence that the plaintiff was negligent, their verdict on the counter-claims must be in favor of the plaintiff and against the defendants.”

I have charged substantially.

30        The eighth:

40        “The plaintiff, through its officers, was entitled to exercise its judgment in determining whether it should consent to a sale of the 1,500 shares of Lincoln Interstate Holding Company on September 12, 1929, and if it reasonably exercised such judgment and, therefore, refused to consent to the sale of said shares or any part thereof on September 12, 1929, it is not liable in damages to the defendants on their counter-claims.”

*Court's Charge to Jury.*

I think I substantially have said that to the jury, and I reiterate it and charge that request.

The ninth:

“If the jury should find that on September 12, 1929, both notes held by the plaintiff, given to it by the defendants were past due, they must find that the plaintiff was entitled on September 12, 1929, to hold said 1,500 shares of Lincoln Interstate Holding Company as collateral security for the entire indebtedness due from the defendants to the plaintiff as evidenced by said two notes.” 10

I decline to charge, except as I have charged. I think I have practically covered that.

The tenth:

“If the jury should find that on September 12, 1929, both notes of the defendants held by plaintiff were past due, they must find in favor of the plaintiff on the counter-claim, if the jury also finds that upon the sale of said 1,500 shares of Lincoln Interstate Holding Company and upon crediting the Certificate of Deposit given by defendants to plaintiff, the entire indebtedness due from the the defendants to the plaintiff would not have been fully paid.” 20 30

I decline to charge, except as I have charged. I think I have covered that.

The eleventh:

“If the jury should find that upon the sale of said 1,500 shares of stock and after crediting the proceeds of the sale of said stock, and after crediting the Certificate of Deposit the entire indebtedness due from the defendants to the plaintiff on September 12, 1929, 40

*Defendants' Exceptions to Charge.*

would not have been fully paid, they must find that the plaintiff was justified in refusing to consent to the sale of said shares."

I decline to charge.

The twelfth:

10 "The collateral note, Exhibit P. 2, provides that the plaintiff is given full power and authority to sell and assign and deliver the whole or any part of said 1,500 shares of said stock at the option of the plaintiff. If the plaintiff in the exercise of its option on September 12, 1929, refused to sell and deliver all or any part of said 1,500 shares of said stock, it acted within its rights given it by the terms of said note, and if the jury should find that the plaintiff did exercise  
20 its said option on September 12, 1929, its verdict on the counter-claims of the defendants must be in favor of the plaintiff."

I decline to charge, except as I have charged.

Exceptions may be noted to the refusal of the Court to charge any of these requests specifically as requested.

(The jury retires at 10:58 A. M.)

30 Mr. Kristeller: I desire to take an exception to that part of your Honor's charge in which you charged the jury that if the sale of the 1,500 shares of the Lincoln Interstate stock would have paid the amount due to the bank, the bank would have been obligated to carry out the instructions of the defendants.

I desire to take an exception to that part of your Honor's charge in which you charged that  
40 if the sale of the stock would not have disposed of the entire obligation to the bank, and the bank

*Defendants' Exceptions to Charge.*

would not thereby have been paid in full the obligations of the defendants, both secured and unsecured, the bank was not obligated to carry out the instructions of the defendants, as it would have been if payment had been made in full.

I desire to take an exception to that part of your charge in which you said, "The mere fact, since the collateral could not pay the entire debt, that the defendants demanded the sale of the collateral, would not entitle the defendants to a verdict at your hands." 10

And an exception to that part of your Honor's charge, if you will, in which you said, "As I told you, the plaintiffs were not bound to sell this stock simply on demand of the defendants, unless it would, on sale, pay the entire indebtedness of the defendants or the defendants made up the difference." 20

Mr. Rosenstein: I desire the same exceptions.

The Court: Have you any exceptions, beyond the requests, Mr. Berger?

Mr. Berger: No, your Honor.

"Exhibits." 30

P. 1. Note: Copy is printed as part of the "complaint" (S. C., p. 7).

P. 2. Note: Copy is attached to "Answer to counter-claim" (S. C., p. 17).

**JUDGMENT.**

ESSEX COUNTY CIRCUIT COURT.

10	PEOPLES NATIONAL BANK AND TRUST Co., of Belleville, N. J., a corporation, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>On Verdict by Jury.</i>
	CHARLES S. GINSBURG and MAR- TIN SIMON, <div style="text-align: right; padding-right: 20px;"><i>Defendants.</i></div>		

Nathan H. Berger, attorney of plaintiff.

20 Judgment entered November 18, 1930.

Damages .....	\$3,103.49
Costs .....	<b>115.02</b>

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\$3,218.51

30 This action was tried before Judge Nelson Y. Dungan with a jury at the Essex County Circuit Court on November 18, 1930. The cause having been heard and submitted to the jury they returned their verdict as follows:

They find in favor of the plaintiff, Peoples National Bank and Trust Company of Belleville, a New Jersey corporation, and against the defendants, Charles S. Ginsburg and Martin Simon, for the sum of three thousand one hundred three dollars and forty-nine cents (\$3,103.49) damages and one hundred fifteen dollars and two cents costs, whereupon it is adjudged that the plaintiff recover of the defendants the sum of three thousand one hundred three dollars and forty-nine

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*Judgment.*

cents (\$3,103.49) damages, and costs which are taxed at one hundred fifteen dollars and two cents, making in the whole the sum of three thousand two hundred eighteen dollars and fifty-one cents.

Judgment signed and entered November 18, 1930. 10

WILLIAM S. GUMMERE,  
C. J.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

PEOPLES NATIONAL BANK AND  
TRUST CO. OF BELLEVILLE,  
N. J., a corporation,

*Plaintiff-Respondent,*

*vs.*

CHARLES S. GINSBURG and MAR-  
TIN SIMON,

*Defendants-Appellants.*

*Action  
at Law.*

*On Appeal  
from Essex  
County  
Circuit  
Court.*

### BRIEF OF APPELLANTS.

#### Statement.

(Italics ours unless otherwise noted.)

This is an appeal from a judgment entered in the Essex County Circuit Court on November 18th, 1930, upon a verdict of a jury in favor of the respondent and against the appellants, in the sum of \$3,218.51 damages and costs. The case was tried before Hon. NELSON Y. DUNGAN and a jury on November 17 and 18, 1930.

#### Facts.

On April 4, 1928, respondent loaned appellants the sum of \$16,500.00 cash upon a collateral promissory note. The form and terms of the note (except the figures) are set out on page 17 of the State of Case. The loan was made to appellants to assist them in the purchase of 2,000 shares of Lincoln Interstate Holding Company stock at \$11.37½ per share, totalling \$22,750.00 (testimony of Rose, respondent's Vice-President, S. C. 102). An account was opened by appellants in respondent's bank with an initial cash

deposit of \$7,750.00. The account was also credited with the proceeds of the aforesaid \$16,500.00 note, making a total of \$24,250.00.

The 2,000 shares of Lincoln Interstate Holding Company stock purchased as aforesaid by appellants, was delivered to respondent bank with draft attached, which draft was paid by the bank (S. C. 104).

The situation, therefore, was as follows: Respondent held appellant's collateral note for \$16,500.00. The collateral for said loan was the 2,000 shares of Lincoln Interstate Holding Company stock, costing \$22,750.00 plus a certificate of deposit in the sum of \$1,500.00, making the total collateral \$24,250.00. Until on or about June 10, 1929, periodical payments were made by appellants on account of the loan, so that, on that day, there was due from appellants, to respondent bank, the sum of \$10,200.00. Throughout, respondent bank held the same collateral (S. C. 21).

On or about June 10, 1929, respondent, through its Vice-President, Russell K. Rose, requested appellants to split the obligation in two parts so that respondent should hold appellant's collateral note for \$7,200.00 secured by the same collateral as before and an unsecured note for \$3,000.00 (S. C. 81-82). Appellants complied with this request. It is undisputed that this situation existed on June 10, 1929. While there was some question as to the reason for the aforesaid splitting of the loan, *all parties agree that the change was made, resulting in the execution of the two notes hereinabove referred to.*

On or about August 12, 1929, appellants sold 500 of the shares of the stock held by respondent as collateral, and directed the bank to deliver the same. The bank complied and the sum of

\$2,062.00 was realized; and said sum was credited on appellants' collateral debt. In September, 1929, the appellants sold 500 shares more of said stock at \$3 15/16 per share, totalling \$1,968.75, and had a firm offer from the same purchaser for the balance of 1,000 shares then remaining, at the same price, totalling \$3,937.50. The total which the bank would have thus received is \$5,906.25. The latter sum, plus the certificate of deposit of \$1,500.00, would have placed in respondent's hands a total of \$7,406.25. The entire indebtedness due from appellants to respondent at that time (on both notes) was \$8,138.00, so that, had appellants' instructions to sell been complied with, their total indebtedness would have been but approximately \$700.00. The following analysis will better clarify the course of dealings between the parties:

April 4, 1928 (collateral note).....	\$16,500.00
Paid on account (4-4-28 to 6-10-28)....	6,300.00

Balance due June 10, 1928.....	\$10,200.00
June 10, 1928, loan of \$10,200.00 split as follows:	
By collateral note.....	\$7,200.00
By unsecured note.....	3,000.00
	<u>          \$10,200.00</u>

August 12, 1928, collateral note	
of .....	\$7,200.00
Reduced by proceeds of sale of	
500 shares for.....	2,062.00

Balance due on collateral note after said	
sale .....	\$ 5,138.00
Due on unsecured note, \$3,000.....	3,000.00
	<u>          \$ 8,138.00</u>

September 12, 1928, credit on proposed sale of 1500 shares at \$3 15/16 .....	\$5,906.25
Credit due for certificate of deposit .....	1,500.00
Credit cash on unsecured note.	50.00

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Total credits due appellants Septem- ber 12, 1928.....	\$ 7,456.25
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Net balance (without interest) which would have been due from appellants to respondent had former's instructions to sell been complied with.....\$ 681.75

The Lincoln Interstate Holding Company was absorbed by the Niagara Shares Corporation of Delaware, and the 1,500 shares of Lincoln Interstate Holding Company stock was subsequently converted into 168 shares of Niagara Shares Corporation of Maryland. The value of the collateral declined from day to day so that at the time suit was instituted, the value of Niagara Shares Corporation of Maryland, was \$15<sup>3</sup>/<sub>8</sub> per share, or a total of \$3,383.25. The latter sum was the total value of the collateral exclusive of the \$1,500.00 certificate of deposit, *whereas, on the day when demand was made to sell, the value of said stock was \$5,906.25, exclusive of the \$1,500.00 certificate of deposit aforesaid.*

On February 28, 1930, respondent instituted the present suit to recover the balance of \$2,950.00 due upon appellants' \$3,000.00 unsecured note, upon which \$50.00 had been paid on account. Appellants gave respondent their note for this sum due one month after January 6, 1930. Appellants' answers admit the making and endorsement of the note, but deny that there is anything due the respondent thereon.

A counter-claim was filed by appellants alleging that on September 12, 1929, they demanded that respondent sell the collateral, the value of which at that time, was \$5,906.25, and apply the proceeds towards their debt. That respondent refused to comply with said demand, as a result of which, the collateral, valued at \$5,906.25 on the date when demand to sell was made, had depreciated to \$2,436.00 or less.

These were the issues raised by the pleadings. The suit was tried and a verdict rendered for the respondent and against the appellants, and this appeal is taken from the judgment entered on this verdict.

The argument in this brief will be divided into two parts. First, we will discuss (a) the refusal of the Court to direct a verdict in favor of the appellants; (b) the exceptions taken to the Court's charge, and (c), the legal argument that there was no evidence to sustain the verdict. These points are the legal questions primarily involved in this appeal and are covered by grounds of appeal 1, 2, 9, 10, 11, 12 and 13.

While appellants contend that the three points in the first part of this brief, dispose of the question herein on the merits, they have no desire to be deemed as having waived those grounds of appeal dealing with the introduction and rejection of evidence covered by grounds of appeal 3, 4, 5, 6, 7 and 8. The later grounds of appeal will be discussed in the second part.

## POINT I.

This case presents no disputed questions of fact. The value of the collateral on the date appellants demanded sale thereof was fixed, determined and uncontradicted. Respondent's admission of demand and refusal to sell rendered mere mathematical computation the amount for which a verdict should have been directed in favor of appellants.

(a) At the conclusion of the taking of the testimony, counsel for the appellants moved for a directed verdict in favor of the appellants for the difference between the value of the stock on September 12, 1929 (which was the date of demand and refusal to sell) amounting to \$5,906.25 and the amount due upon the note, to wit, \$3,103.49, or a balance or difference due appellants from respondent of \$3,221.19 (S. C. 109, 110). This motion was based upon the doctrine enunciated in the case of *Amick v. The Empire Trust Company*, 53 A. L. R. 1064, 296 S. W. 798. The latter case deals precisely with the question involved in the case under review, and holds that the failure of a pledgee to comply with clear and positive directions to sell collateral and apply the proceeds to the principal debt constitutes such negligence on the part of the pledgee rendering him liable to the pledgor for any and all damages occasioned by such negligence. *It should be borne in mind that there is no dispute either as to the facts or the figures; the only question being whether the value of the stock should be taken as of the date of demand and refusal to sell, which was September 12, 1929, or the date when suit was commenced, to wit, February 28, 1930. THE APPELLANTS CONTEND THAT THE VALUE OF THE STOCK AS OF THE DATE WHEN DEMAND AND REFUSAL TO SELL WAS MADE,*

SHOULD CONTROL. THE LEARNED COURT BELOW HELD THAT THE DATE WHEN SUIT WAS COMMENCED SHOULD CONTROL. IN THIS, WE SUBMIT, THE LEARNED COURT BELOW HAS ERRED. AFTER THE DENIAL OF THE FOREGOING MOTION, A SECOND MOTION WAS MADE BY THE APPELLANTS FOR A VERDICT IN FAVOR OF THE DEFENDANTS FOR \$219.76, IN VIEW OF THE ADMISSION BY COUNSEL FOR THE RESPONDENT THAT THERE WERE NO FACTS IN DISPUTE AND IN VIEW OF THE ADMISSION OF A DEMAND AND REFUSAL TO SELL, THUS LEAVING ONLY THE QUESTION OF DAMAGES. ALTHOUGH THE AMOUNT OF THE DAMAGES WAS LIQUIDATED, AND THE INDEBTEDNESS DUE THE BANK WAS ADMITTED, AS WELL AS THE VALUE OF THE STOCK ESTABLISHED BY UNCONTRADICTED TESTIMONY, THIS MOTION WAS ALSO DENIED BY THE LEARNED COURT BELOW, NOTWITHSTANDING THE COURT'S PRIOR RULING AS TO DATE UPON WHICH THE DAMAGES WERE TO BE CALCULATED (S. C. 109-110).

(b) The second proposition raised under this point is the position taken by the learned Court below in charging the jury that the collateral in question

“stood as security for the \$3,000.00 note as well as for the \$7,200.00 note; and the proceeds of that sale would not be sufficient to wipe out the entire indebtedness of these defendants to the bank; and therefore the bank was not obliged to dispose of that stock simply because the defendants requested them to do so, as they would have been if those shares had stood as security only for the \$7,200.00 note.”

APPELLANTS MAKE REFERENCE TO THAT PORTION OF THE TESTIMONY (S. C. 81, 82), WHEREIN RUSSELL K. ROSE, VICE-PRESIDENT OF THE RESPONDENT BANK ADMITTED MAKING A REQUEST OF APPELLANTS

THAT THEY SO SPLIT THE OBLIGATION, THAT THE \$3,000.00 NOTE SHOULD REMAIN UNSECURED, WHILE THE COLLATERAL SHOULD BE APPLIED SOLELY AND EXCLUSIVELY TO SECURE THE \$7,200.00 NOTE.

*It is respectfully submitted that the learned Court below was clearly in error in charging the jury that the respondent was under no obligation to heed the demand to sell unless the amount realized would wipe out the entire indebtedness.*

It is further submitted that the learned Court below erred in limiting the jury in its consideration of the question of damages claimed by appellants in charging the jury as follows:

“The mere fact, since the collateral would not pay the entire debt of these defendants, that they demanded the sale of this stock, if they did, would not entitle them to your verdict in this case.”

It is respectfully submitted that this latter instruction was prejudicial to the appellants in that it excluded a proper consideration by the jury of the demand to sell in fixing in the mind of the jury the proposition that the collateral would not pay the entire indebtedness due respondent from appellants. *The point made by appellants is, that irrespective of whether or not the entire indebtedness would be discharged upon the sale, the respondent had no right to arbitrarily refuse to comply with the demand to sell.*

It is further respectfully submitted that the learned Court below erred in its charge as follows:

“Now we come to the main question in this case. As I have told you, the plaintiff was not bound to sell this stock simply because it was demanded by the defendants, unless the price for which the stock would have been sold would pay their entire in-

debtedness, or unless they made up the difference, which they admit they could not do at that time."

Appellants take the position, under the doctrine of the *Amick* case, *supra*, and the other cases hereinafter cited, that the question of whether or not the entire indebtedness would be discharged upon a sale of the collateral, has no bearing on the demand by a pledgor to a pledgee to sell the collateral. By the plain terms of the charge aforesaid, the consideration of the question of respondent's negligence was entirely removed from the jury by the limitation imposed upon it, that there was no obligation on the part of the respondent to sell upon demand unless the appellants paid the entire indebtedness. *It is respectfully submitted that (1) the aforesaid instruction and (2) the fixing of the date when suit was commenced, to wit, February 28, 1930, instead of September 12, 1929, when demand and refusal to sell took place as determining the value of the collateral, constitute the fundamental and basic errors made by the learned Court below justifying a reversal.*

(c) The third proposition raised under this point is that there was no evidence to sustain the verdict. The facts are practically undisputed. It is admitted that on September 12, 1929, respondent held as collateral 1,500 shares of the Lincoln Interstate Holding Company stock which appellants pledged with it. Appellants testified that on September 12, 1929, they had sold 500 shares of this stock at \$3 15/16 per share totalling \$1,968.75 and directed the bank to deliver them to the purchaser; and thereafter, and on the same day, obtained a purchaser for, and directed the sale of the remaining 1,000 shares at the same price totalling \$3,937.50. The total

amount which would have been realized upon the sale of the aforesaid 1,500 shares is \$5,906.25. It is undisputed that the respondent refused to comply with the direction to deliver the 500 shares. Some question was raised as to appellants' direction to respondent to sell the remaining 1,000 shares. That a demand and refusal to sell occurred on September 12, 1929, is undisputed. *In view of the doctrine urged by appellants, that a pledgee's failure to comply with clear and positive directions to promptly sell collateral and apply the proceeds towards the reduction of the principal debt constitutes negligence rendering the pledgee liable for any loss occasioned; and it having been established that such loss was occasioned to the appellants by the conduct of the respondent, there was, therefore, no evidence to sustain the verdict.*

In dealing with the question of the introduction and rejection of evidence covered by grounds 6, 7 and 8, appellants contend that the Trial Court erred in the rulings made therein. Ground of appeal 6 deals with the refusal by the learned Court below to allow the question by appellants to respondent's witness, Rose.

“Why don't you apply it to the indebtedness?” (S. C. 88).

This question, asked on cross examination, fell directly within the scope of the direct examination theretofore conducted by respondent's counsel; and was a proper question with important bearing on the inquiry. In addition thereto, the learned Court below in passing on the objection, erred in ruling (S. C. 88) that the negligence charged must apply as of the date prior to the commencement of the suit, that is, February 28, 1930.

Ground 7 deals with error made by the learned Court below in its adherence to the proposition that the value of the collateral as of the date of the suit should be the value which should control in order to fix the date (S. C. 108).

Ground 8 in which it is urged that the learned Court below erred in ruling that the value of the Lincoln Interstate Holding Company stock as of the date of the commencement of the suit, should be the value which should control, is substantially covered by the argument heretofore made.

## POINT II.

**A pledgee's refusal to comply with positive direction of pledgor to take prompt action to sell collateral and apply the proceeds to the principal debt constitutes negligence rendering him liable in damages to pledgor.**

A careful examination of the decisions in this State discloses no case in which the facts are similar to those in the case at bar. Several cases are found in other jurisdictions, particularly in Missouri, which we submit, are directly in point.

The case of *Amick v. The Empire Trust Co.*, 53 A. L. R. 1064 (296 S. W. 798 Mo.) reviews exhaustively the various authorities and text writers on "Pledges," "Collateral Securities" and "Bailments," quoting with approval from the following standard authors: "Jones on Collateral Securities & Pledges" (3rd Ed. Sec. 1, Sec. 702, p. 830); "Van Zile on Law of Bailments" (2d Ed. Sec. 292, p. 275); and "Schouler on Law of Bailments" (3rd Ed. Sec. 208, p. 214). All of the foregoing text writers are quoted with approval and relied upon by the Court in the *Amick* case, *supra*. All authorities agree on fundamental rule of law that a pledgee is

under a duty to the pledgor to exercise ordinary diligence in respect to the care and protection of the pledge; and renders himself liable for negligence resulting in any loss to the property in his custody and control. Also, that the failure of a pledgee to comply with clear and positive directions of the pledgor to promptly sell collateral, and apply the proceeds towards the reduction of the principal debt, constitutes such negligence on the part of the pledgee, as to render the latter liable to the pledgor in damages for any loss occasioned by such negligence.

The foregoing proposition is supported by highest authority, both in standard treatises on the law of bailments and under the decisions of various jurisdictions in the United States and England.

The *Amick* case, *supra*, is, in the opinion of counsel for appellants, dispositive of the law in the case under review.

The case of *National Exchange Bank v. Kilpatric*, 102 S. W. 499, Mo. is peculiarly applicable to the instant case. Incidentally, it is referred to and cited with approval in the *Amick* case, *supra*. In *National Exchange Bank v. Kilpatric*, *supra*, the question determined by the Court was, that: where corporate stock was pledged as collateral for the payment of a note, and the pledgee failed to sell the stock for its par value, although requested so to do by the maker, and the stock became worthless, the amount of the loss should be credited on the note.

Defendant in the aforesaid case set up in his answer among other things:

“Defendants further say that while plaintiff held the Oregon County Bank stock as aforesaid as collateral security for the pay-

ment of said note, *they had several offers to sell said stock at par value of \$5,100; and thereupon requested said plaintiff to sell said stock or permit defendants to sell said stock and apply the proceeds of the sale thereof towards the payment of said note, which plaintiff refused to do; that said stock has now become worthless, and by reason of plaintiff's refusal to sell or permit same to be sold, these defendants have been damaged in the sum of \$5,100 for which they ask judgment against plaintiff with costs of suit."*

And the Court said,

*"While it may be said that plaintiff in this cause had absolute dominion over the bank stock as collateral as long as the note of defendants remained unpaid, yet it by no means follows that the defendants who are the real owners of the collateral are absolutely deprived of all interest in it, and it was the plain duty of the plaintiff in this cause, who could only be legally interested in the collateral to the extent of applying the proceeds to the payment of the note \* \* \* and failure of the plaintiff to sell the stock after requested to do so amounts to such negligence as to warrant the Court in crediting the amount of the loss upon the note where the collateral has become worthless."*

It is to be borne in mind that in this case the cardinal and outstanding factor is that *a demand was made upon the pledgee to sell and the demand was refused.* The following authorities settle beyond peradventure the liability of a pledgee under the circumstances of the *National Exchange Bank v. Kilpatric* case, *supra*, and of the case at bar.

*Richardson v. The Ins. Co. of Val. of Va.*,  
27 Grat. 749;

*Henry Wood's Sons Co. v. Schaefer*, 173  
Mass. 443, 53 N. E. 881;

*Adoue & Lovit v. Hutches*, 75 S. W. 41, 31  
Civ. Appl. 559 (Tex.);  
*Anderson v. Carothers*, 52 Pac. 229, 18  
Wash. 520;  
*Hibernia Bank & Trust Co. v. Turner*, 127  
South. 291.

### CONCLUSION.

There being no disputed question of fact in the instant case; nor any questions as to the value of the collateral on the day appellants demanded the sale thereof; and respondent having failed to comply with the positive direction of the appellants to deliver the collateral upon the sale made by them and apply the proceeds to their debt due respondent, the Court below erred in refusing to direct a verdict in favor of the appellants when moved therefor at the conclusion of the trial; and such error requires a reversal of the judgment in this case.

May 1931 Term.

Respectfully submitted,

LIONEL P. KRISTELLER,  
Attorney of Appellant, Martin Simon.

GEORGE H. ROSENSTEIN,  
Attorney of Appellant, Charles S. Ginsburg.

### ADDENDUM.

The amounts for which motions for a directed verdict were made (S. C. 109-110), and referred to on pages 6-7 of appellant's brief are as follows:

MOTION NO. 1 FOR A DIRECTED VERDICT	
WAS FOR .....	\$3,221.19
Damages claimed for failure to sell	
on September 12, 1929, .....	\$5,906.25
Interest from that date to date of	
trial, .....	418.43
	\$6,324.68
Stipulated amount due on note in	
suit with interest, (S. C. 37) ....	3,103.49
	\$3,221.19

The amount claimed in respect to Motion No. 1 is for damages computed as of September 12, 1929, when demand and refusal to sell occurred.

MOTION NO. 2 FOR A DIRECTED VERDICT	
FOR .....	\$219.76
Value of collateral on September 12,	
1929, .....	\$5,906.25
Value of collateral as testified on	
date suit was commenced, .....	2,583.00
Loss claimed by appellants for	
failure to sell on demand Sep-	
tember 12, 1929, .....	\$3,323.25
Stipulated amount due on note in	
suit with interest (S. C. 37), ....	3,103.49
	\$219.76

The amount claimed in respect to Motion No. 2 is for damages computed as of February 28, 1930, the date when suit was commenced.

Taking either basis of computation, one of the other of these motions should have been granted.

The first part of the report is devoted to a general description of the country, its climate, soil, and natural resources. It is followed by a detailed account of the various industries and occupations of the people, and a list of the principal towns and villages. The report concludes with a summary of the progress of the colony during the year, and a list of the names of the principal officers and members of the government.

The second part of the report contains a list of the names of the principal officers and members of the government, and a list of the names of the principal towns and villages. It also contains a list of the names of the principal officers and members of the government, and a list of the names of the principal towns and villages.

## New Jersey Court of Errors and Appeals

PEOPLES NATIONAL BANK AND  
TRUST Co. OF BELLEVILLE,  
N. J., a corporation,  
*Plaintiff-Respondent,*

*vs.*

CHARLES S. GINSBURG and MAR-  
TIN SIMON,  
*Defendants-Appellants.*

*Action  
at Law.*

*On Appeal  
from Essex  
County Cir-  
cuit Court.*

### BRIEF OF PLAINTIFF-RESPONDENT.

#### Facts.

This is an appeal from a judgment entered in the Essex County Circuit Court in favor of the respondent against the appellants, in a suit on a promissory note for \$2,950.00 made by the appellants to the respondent, which note the appellants failed to pay.

On June 10, 1929, the respondent held a note of the appellants for \$10,200.00 secured collaterally by 2,000 shares of Lincoln Interstate Holding Company. On June 13th or 14th, 1929, the appellants, in renewal of said \$10,200.00 note, delivered to the respondent, their demand note for \$7,200.00 (State of Case, pages 17 and 18), and a note for \$3,000.00 payable one month after date.

Upon the maturity of the \$3,000.00 note, the appellants renewed it by a new note for \$2,950.00 paying \$50.00 in cash, which new note of \$2,950.00 they renewed from time to time, the last renewal having been made on January 6, 1930, for a

period of one month. The last renewal note is the basis of this suit.

The appellants reduced the \$7,200.00 note with the proceeds of the sale of 500 shares of said collateral stock, and by applying the proceeds of a certificate of deposit of \$1,500.00, leaving an unpaid balance due thereon of \$3,654.54, besides interest. There was due at the time of the trial \$3,103.49 on the note sued on, making a total on both notes of \$6,758.63, besides accrued interest. The respondent held the remaining 1,500 shares as collateral security to cover this entire indebtedness, pursuant to the terms of the \$7,200.00 note, which provides that said shares were to be collateral security for the payment of said note, or any other liability or liabilities to them, now incurred or due, or that may be hereafter contracted.

As to what transpired between the appellants and respondents on June 13th or 14th, 1929, when the original note of \$10,200.00 was split into two notes, the evidence was as follows. Martin Simon testified (State of Case, page 39, fols. 3-18):

“On June 14th, of the same year, 1929, Mr. Rose called Mr. Ginsburg and myself to the bank, and told us that he would like to have the \$10,200.00 note divided into two notes: one for \$7,200.00, and one for \$3,000.00; the three-thousand dollar note to be a one-month non-collateral note, and the \$7,200.00 note to be a note payable on demand, and that he would apply all of the collateral on that note, stating that the purpose for doing it was that the Banking Examiners objected to the value of the securities being in excess of the amount of the \$10,200.00 note—and that was done.”

Charles S. Ginsburg also, on behalf of the appellants, testified as follows (State of Case, page 66, fols. 15-35):

“On June 14th we were called to the bank by Mr. Rose, the vice-president of the bank, and he requested that we sign for him two notes, one in the sum of \$7,200.00, which would be a collateral note, and another in the sum of \$3,000.00, which would be a non-collateral note. I asked him what the purpose of disturbing the original collateral note was, and he said that the bank examiners were expected at the bank, that the collateral security was not sufficiently well margined to allow the old note to stand as it was, and said if we would sign the \$7,200.00 collateral note and non-collateral note for \$3,000.00, only the \$7,200.00 collateral note would come to the attention of the bank examiners, who would at that time examine the collateral deposited with it. He also told us that, as far as we were concerned, we could consider both notes as if they had been the old, one note, in the sum of \$10,200.00.”

As a result of the conversations and negotiations which transpired between the appellants and respondents on June 13th or 14th, 1929, a note was made by appellants, dated June 10, 1929 containing the agreement of the parties. The said note is set now in full on pages 17 and 18 in the State of Case. The note provides in part as follows:

“I herewith deposit with them as collateral security for payment of this or any other liability or liabilities of \* \* \* to them, now incurred or due, or that may be hereafter contracted, the following property, viz. \* \* \*”

The appellants filed a counter-claim against respondents, predicating the counter-claim on the circumstances given in the following testimony of witnesses. Martin Simon testified that the col-

lateral stock held by respondent to secure the liabilities of appellants was very unsteady, and that on September 12, 1929, the price dropped (State of Case, page 54, fols. 11-26):

“It had been dropping right along, and we felt that we had better get out and sell it, because otherwise, if it went down too much, we would have a terrific loss, and therefore we called up the bank and told Mr. Rose we had sold 500 shares, and that we could sell the remaining thousand, we could sell them immediately, and he told us he would not deliver the 500, nor the remaining thousand.

Q Didn't he tell you that he would let you have your stock if you paid the bank what you owed them? A Yes.

Q Well, you did not offer to pay the bank what you owed them? A Well, I told him then that we could not give it to him right away, but we had to make delivery of the stock right away.”

Charles S. Ginsburg testified as follows (State of Case, page 74, fols. 25-40):

“Q So that on September 12th you telephoned to him, telling him that you had sold 500 shares? A Yes.

Q Well, you did not ask him previous to that whether you should sell them at this price or not, did you? A No, sir; it was my stock.

Q You just went out and sold it and reported the sale? A Yes, I reported the sale and asked him to make delivery of it to the broker to whom I had sold it.

Q What did he say? A He said he would not do it.

Q Why not? A He said he felt that a better price could be obtained for it later, and I told him I did not feel like waiting any longer.”

Russell K. Rose, in behalf of the respondent, testified as follows (State of Case, page 85):

“A. About the early part of September, I believe it was, Mr. Simon called me on the

phone and asked me to deliver 500 shares of Lincoln Interstate stock. I asked him what price he was getting for it. He said around 3 and a fraction. I said, 'What are you going to do with the balance of this stock?' He said, 'We are going to try and dispose of the balance at that or a better figure.' I said, 'How do you intend to take up your note, the note which we are now considering as past due?' He says, 'I don't know what we are going to do.' He said, 'We want to get out of the stock and some day we will pay you off.' I says, 'What do you intend us to do in the meantime?' and he says, 'Carry the note,' and I says, 'I cannot permit you to do it. The board wouldn't sanction that action.'

"Q. Now, did he at any time, either on that day or thereafter, tender you payment of the amount due the Bank? A. He did not. Q. What did you offer to do with the stock if he paid for the note? A. I told him I would give him back the stock if he paid his notes off."

There were, therefore, among others, the following questions of fact to be decided by the jury:

1. DID THE APPELLANTS REQUEST THE RESPONDENT IN SEPTEMBER, 1929, TO SELL 500 SHARES OF COLLATERAL STOCK, OR ALL OF THE 1,500 SHARES?
2. DID THE RESPONDENT EXERCISE REASONABLE CARE, UNDER ALL THE CIRCUMSTANCES OF THIS CASE AS DISCLOSED BY THE EVIDENCE, IN HANDLING THE COLLATERAL STOCK?

The appellants' brief makes two points:

1. That there were no disputed questions of fact to go to the jury; that there was no dispute as to the value of the collateral, and as to the refusal of the respondent to surrender the collateral stock to the appellants.

2. That the refusal of the respondent to comply with the appellants' direction to sell the collateral, and apply the proceeds on account of the debt, constituted negligence, rendering the respondent liable in damages to the appellants.

## ARGUMENT.

### POINT ONE.

**This case presented disputed questions of fact for the jury's determination.**

Even if we assume, as the appellants contend, that the facts in the case were uncontroverted, nevertheless, these facts presented an issue that was properly left to the jury. It was for the jury to decide after a consideration of all of the facts in the case, whether the respondent was guilty of negligence. Our Court of Errors and Appeals in the case of *Nolan v. Bridgeton and Melleville Traction Co.*, 74 N. J. L. 559, laid down the principle that:

“Where fair minded men might honestly differ as to the conclusion to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury.”

In *Kappertz v. The Jerseyman* (121 Atl. 718; 98 N. J. L. 836) our Court of Errors and Appeals said:

“As to whether he was acting with reasonable care or not was a question upon which the minds of fair-minded men might differ, and as was said by Mr. Justice Trenchard in the case of *Nolan v. Bridgeton and Melleville Traction Co.*, 74 N. J. L. 559, 65 Atl. 992:

‘Where fair-minded men might honestly differ as to the conclusion to be drawn from facts, whether controverted or un-

controverted, the question at issue should go to the jury.'”

In the case of *Holmes v. First National Bank of Wrightstown*, 147 Atl. Rep. 441; 105 N. J. L. 621, our Court of Errors and Appeals held that where a bank failed to insure bonds of a customer left with it for safekeeping, it was a question for the jury to determine, under all the circumstances of the case, whether the bank failed to use that degree of care which a prudent business man would exercise in regard to his own property of a similar kind, under similar circumstances.

One of the questions for the jury to determine was whether or not the respondent was guilty of negligence in dealing with the security of appellants.

In the case of *Alvina v. Public Service Ry. Co.*, 117 Atl. Rep. 709; 97 N. J. L. 526; our Court of Errors and Appeals held that there is always a presumption against negligence, and in favor of innocence, and in the case of *Sutton v. Bell*, 77 Atl. Rep. 42; 79 N. J. L. 42; the same court held that when the existence of negligence depends upon the conclusion to be reached from a variety of circumstances, considered in their relation to and their reaction upon each other, the jury, and not the Court, is normally the tribunal to draw such conclusions.

See also *Bowell v. Public Service*, 71 Atl. Rep. 119; 77 N. J. L. 231.

Russell K. Rose, for the respondent, testified (as quoted above) that in September, 1929, the appellants had a conversation with him with respect to the sale of the 500 shares; that only 500 shares were mentioned, that there never was any conversation about 1,000 shares. The appel-

lants testified that in September, 1929, they informed Russell K. Rose, that they had sold 500 shares, and that they would sell the remaining 1,000 shares immediately, and that Rose said he would not deliver the 500 shares or the remaining 1,000, unless they would pay the bank what they owed it; that appellants told Rose that they could not pay the bank right away, but that they had to make delivery of the stock immediately. THIS PRESENTED A CLEAR-CUT ISSUE OF FACT FOR THE JURY.

In the case of *Klucanik v. Shaihofsky*, 142 Atl. 420; 6 N. J. Misc. Rep. 652, the court held that the facts and inferences therefrom are for the jury on conflicting evidence.

In this connection also, counsel for the appellants incorrectly assumed that there was no issue of fact for the jury, and are equally incorrect in their statement that counsel for the respondent admitted that there were no facts in dispute.

Counsel for appellants at the trial of the action did not question the fact that pursuant to the agreement of the appellants and respondent, as to the application of the collateral stock, it constituted security for the payment of \$7,200.00 or any other liability or liabilities of the appellants to respondent, then incurred or due, or that may be thereafter contracted. Appellants' counsel cannot now urge that the trial court erred in charging the jury that the collateral in question stood as security for the \$2,950.00 note, as well as the \$7,200.00 note.

Appellants' counsel took exception to that part of the charge "that if the sale of the stock would not have disposed of the entire obligation to the bank, and the bank would not thereby have been

paid in full, the obligations of the defendants, both secured and unsecured, the bank was not obligated to carry out the instructions of the defendants, as it would have been if payment had been made in full." (State of Case, page 126, fols. 37-40, and page 127, fols. 1-10.)

This Court held in the case of *Holt v. United Life Insurance and Trust Co.*, 72 Atl. 201, 76 N. J. L. 585, that the exception must show the principal ground of objection; that the proper function of an exception is to direct the mind of the trial judge to a single and precise point in which it is alleged that he erred in law.

See also the cases of *Gasmon v. Brady Brass Co.*, 81 A. 727; 82 N. J. L. 411; *Goldfarb v. Phillipsburg Transit Co.*, 137 A. 593; 103 N. J. L. 690; *Benz v. Central R. R. of N. J.*, 82 N. J. L. 197; 82 A. 431; *Bennett v. Pillion*, 144 A. 601; 105 N. J. L. 359.

The objection quoted above, did not direct the mind of the trial judge to the precise point in which it is alleged that he erred, inasmuch as said exception to charge is so ambiguous as to leave great uncertainty as to exactly what the error complained of consisted.

There is no merit in the exception taken to the Court's charge, assuming that said exception states the objection to the trial court's charge with sufficient clarity. The agreement of the appellants and respondent with regard to the application of the collateral security was embodied in the note (State of Case, page 17) which provides that said collateral security was given to the respondent for payment of this or any other liability or liabilities. The terms of the note are clear. The courts of this state have held

that whatever the contracting parties reduced to writing, must be considered as embodying their understanding at that time. *Suffern v. Butler*, 27 N. J. E. 410; *Duweese v. Manhattan Insurance Co.*, 35 N. J. L. 366.

Other jurisdictions have repeatedly held that the intention of the parties where the terms are clear, are to be gathered from the language of the instrument itself. In the case of *Harrington v. Law*, 90 Atl. Rep (RI), 660, the Court held "that the intention of the parties to a contract, free from all ambiguity, must be gathered from the instrument itself." See also *McLean v. Windham Light and Lumber Co.*, 81 Atl. (Vermont) 613 (85 Vt. 167).

Other jurisdictions have repeatedly held that the intention of the parties where the terms are clear, are to be gathered from the language of the instrument itself. In the case of *Harrington v. Law*, 90 Atl. Rep. (R. I.) 660, the court held "that the intention of the parties to a contract, free from all ambiguity, must be gathered from the instrument itself." See also *McLean v. Windham Light and Lumber Co.*, 81 Atl. (Vermont) 613.

The facts in this case as stated above, show that on September 13th or 14th, 1929, the appellants and the respondent negotiated for a division of the \$10,200.00 loan into two notes, and that as a result of these negotiations, the note dated June 10, 1929, was made. Under the law of this state and other jurisdictions, all preliminary negotiations are merged in the last contract executed by the parties. Therefore, the contract of bailment as contained in the \$7,200.00 note must be construed as containing the intentions of the parties.

In the case of *Alexander v. Capital Paint Co.*, 111 Atl. 140, 136 Md. 658, the court held that the prior negotiations and all agreements concerning the same subject matter, were merged in the written agreement.

In the case of *Curtis-Warner Corporation v. Thirkettle*, 134 Atl. 299, 99 N. J. E. 806, decree affirmed 137 Atl. 408, 101 N. J. E. 279, the court held that an executed contract merged all prior negotiations and agreements, where the last contract covers the whole subject embraced in the prior one.

#### POINT TWO.

The pledgee's refusal to surrender the collateral stock to appellants did not constitute negligence, rendering it liable in damages to appellants.

The trial court very properly left this question to the jury. In his charge, the trial judge stated to the jury:

“Now, did they act the part of reasonably careful and prudent business men in declining to sell that stock at the request of the defendants at that time? If they did, then the defendants must fail in their counterclaim, because the burden of proving that the plaintiff was negligent in its handling of this stock is upon the defendants; but if the greater weight of the evidence fails to show that the handling of this stock, under the circumstances proven in this case, was want of due care on the part of this plaintiff—in other words, was not a negligent handling of that stock—then the plaintiff is entitled to your verdict for the full amount of this note, with interest, which amounts to \$3,103.49. On the other hand, if the preponderance of the evidence, that is, the

greater weight of the evidence in this case, shows that, under the circumstances of this case, with the knowledge which the plaintiff had through Mr. Rose, its vice-president, the plaintiff failed to handle this stock as reasonably careful and prudent business men would have handled it under the same or similar circumstances and conditions, that was a negligent handling of this stock, and the defendants are entitled to counter-claim in this case for whatever their loss was up to the time of the bringing of this suit." (State of Case, page 120, fols. 30-40; page 121, fols. 1-20.)

The respondent agrees that it is a fundamental rule of law, that a pledgee is under a duty to the pledgor, to exercise ordinary diligence in respect to the care and protection of the pledge, and renders himself liable for negligence resulting in any loss to the property in his custody and control. Counsel for the respondent challenges the correctness of the proposition asserted by the appellants, that the failure of a pledgee to comply with clear and positive directions of the pledgor to promptly sell collateral, and apply the proceeds towards the reduction of the principal debt, constitutes such negligence on the part of the pledgee, as to render the latter liable to the pledgor in damages, for any loss occasioned by such negligence, but urges that the correct proposition of law is, that, in the case of a pledge, in the absence of an express contract, making it the duty of the pledgee to sell the property pledged, within a specified time, the duty of the pledgee is to exercise ordinary care, and he is liable only for neglect of such care. The pledgor cannot make it the duty of the pledgee to sell merely by requesting him or directing him so to do, after the contract of pledging has been made. The pledgee may exer-

cise his own judgment as to the sale of the property pledged, and is liable only for negligence.

The pledgor having the right of redemption, must redeem and sell the pledged property himself, if he wished to avoid losing the depreciation. The contract of the pledge may make it the duty of the pledgee to sell within a specified time, and his failure to do so is then such a breach of duty as will render him answerable to the pledgor. In the absence of such a contract, however, the pledgor cannot make it the duty of the pledgee to sell merely by requesting or directing him to do so. The pledgee may exercise his own judgment as to the sale of the stock and is liable only for negligence. *Minneapolis and N. Elevator Co. v. Betcher*, 44 N. W., page 5; 21 R. C. L. 689. *Peoples Bank of Waldo v. Mendenhall*, 243 S. W. 805 (the Supreme Court of Arkansas).

In the case of *Montgomery Bank and Trust Company v. Kelly*, 815-612 (Alabama), the Court held that in the absence of a special agreement, a pledgee is invested with a discretion with respect to a sale of the subject of the pledge, and is not bound to sell collateral in order to avoid liability for its depreciation occurring after the maturity of the debt, to secure which the property is pledged.

In 49 *Corpus Juris* 997, Section 247, the proposition is laid down that, although the pledgee, for the pledgor's default, is entitled to sell the collateral, in the absence of a special agreement, he may sell or not at his option, and is under no legal obligation to make a sale, and is not liable for a depreciation in value of the property

after the failure to sell; but is liable only for damages resulting from bad faith or negligence.

Where there is no contract varying the powers and duties of the parties, as a general rule the pledgor cannot make it the duty of the pledgee to sell by directing or requesting him to do so.

See also *Atlantic National Bank v. Moore*, 29 Arizona, 346—241 Pacific, 601; *Adoue and Tobit v. Hutches*, 75 S. W. 41 (Texas).

In the case of *Cooper v. Simpson* (Minnesota), 42 N. W. 601, a note with a chattel mortgage on a horse and four wheat tickets were given to secure an indebtedness. The pledgee, instead of selling the wheat tickets, held the same until the charges for storage made these tickets valueless. The Court held in that case that while the parties may, by contract, make it the duty of the pledgor to sell the property pledged within a specified time, that in the absence of a contract, the pledgee is obliged to exercise ordinary care and is liable only for neglect of such care; that the pledgor cannot make it the duty of the pledgee to sell merely by directing or requesting him to do so.

In the case of *First National Bank, et al. v. Waddell* (Arkansas), 85 S. W. 417, involving the pledge of cotton as collateral security for a debt, it is held that it was not negligence *per se* for the bank to hold the cotton from one season to another especially upon a dull and fluctuating market, and errors of judgment only on the part of the bank officials did not create liability for loss occasioned by depreciation in prices.

In the case of *City Bank of York v. Rieker*, (Pa.) 104 Atl. Rep. 804, the plaintiff sued on two promissory notes. The plaintiff held as collat-

eral security thereto certain stocks and two mortgages. The defendant counter-claimed on the ground that the defendant had given plaintiff's cashier notice to foreclose the mortgages, that no foreclosure had taken place, that the real estate encumbered by the mortgages, depreciated in value more than plaintiff's claim, and that the defendant asked that the verdict should be in his favor for the amount of his loss. The evidence showed that the mortgages had become valueless. The jury rendered a verdict for the defendant, and an appeal was taken from this verdict by the plaintiff bank.

On appeal, the Supreme Court of Pennsylvania held that while the plaintiff was bound to act in good faith, without supine negligence, a refusal to act according to the defendant's judgment or fears, is not negligence of any kind. If bound to act whenever defendant required it, its bargain for a particular security might, without its consent, be broken as soon as made; its judgment would go for naught, and it might lose some or all of its claim, but could never receive more than its debt. Such a contention is too one-sided to receive judicial sanction unless unavoidable. To allow one of the parties to the contract to thus change it without the consent of the other, either express or implied, would come perilously near violating the obligation of the contract, if it did not overstep the constitutional line of inhibition.

If, upon the facts appearing in this record, the defendant desired the collateral mortgages to be foreclosed, it was his right to pay his indebtedness and take an assignment of the mortgages, or to make some other satisfactory arrangement with the plaintiff whereby his de-

sires could be accomplished. He had no other right.

It is respectfully urged that the case at bar presents an almost identical situation. The bank held stock of the appellants. The appellants, according to their testimony, wanted the stock sold without paying the bank in full. It would be strange doctrine, indeed, to deprive the officers of the bank of the right to exercise any judgment as to the advisability of selling said stock, and to charge the bank with negligence *per se*, because of its refusal to comply with the request of the appellants to sell said stock, when appellants admit their inability to pay to the bank the principal indebtedness in full.

Counsel for appellants rely on the case of *Amick v. The Empire Trust Co.*, 53 A. L. R. 1064 (296 S. W. 798) and on the case of *National Exchange Bank v. Kilpatric*, 102 S. W. 499, in support of their contentions. The *Amick* case involved a suit against a bank for damages claimed by the plaintiff because the bank failed to enforce the collection of a collateral note and chattel mortgage, given to the bank to secure a loan to one Bass until the collateral note became worthless. The judgment in the case was in favor of the defendant bank, and the plaintiff appealed. The appellate court enunciates the rule in Missouri to be that the failure of a pledgee to comply with pledgor's directions to sell collateral and apply the proceeds to the debt for which the collateral was pledged, constituted negligence on the part of the pledgee.

But the Court proceeds to point out that the law is also that "in an action against the pledgee for failure to enforce collateral, it is not enough to show that it has not been collected; but it

must appear that the pledgee has been negligent, and that loss has resulted to the pledgor from such negligence. Upon an action by the pledgor against the pledgee for failure to exercise due diligence in the enforcement of collateral, or where the pledgor sets up such lack of diligence as a defense to a suit on the principal obligation, the creditor must account for the collaterals, as in the case of their loss, but having done so, the mere fact that they have not been collected is not even *prima facie* evidence of negligence, and the burden is on the pledgor to prove negligence and damage," giving as authority for this proposition 31 Cyc. 835. The Court then quotes from Van Zile's treatise on the Law of Bailments (2nd Edition) No. 292, p. 275, in part as follows: "The burden of proof in such cases is upon the pledgor, as it is he that alleges the negligence, and it is also incumbent upon him to show the damage occasioned by reason of such negligence." The Court concludes that in actions by the pledgor to recover damages by reason of alleged negligence on the part of the pledgee, in failing to enforce or collect the collateral, the burden is upon the pledgor to prove the negligence of the pledgee, and, also, resulting loss or damage to the pledgor. The Appellate Court finds that the plaintiff failed for want of evidence, and that the trial court did not err in giving judgment for the defendant.

The Appellate Court then deals with the question as to whether the plaintiff was obliged to tender the amount due the defendant, as a condition precedent to maintaining an action for the refusal of the defendant to permit plaintiff to redeem the collateral. In support of the proposition that such a condition precedent exists, the Court cites numerous authorities, including the

case of *Nevius v. Moore*, 221 Mo. 330; 120 S. W. 43, 52, in which case the Court said:

“The law is well settled that the obligation and duties of a pledgee and pledgor are mutual and reciprocal. While the pledgor must be ready and willing and offer to pay the indebtedness, before demanding a return of the collateral, the pledgee also when he demands payment of the original indebtedness must be ready to return and deliver to the pledgor the collateral left with him as security, citing *Richardson v. Ashby*, 132 Mo. 238—33 S. W. 806; *Hagen v. Bank*, 182 Mo. 319 (81 S. W. 172).

The case of *National Exchange Bank v. Kilpatrick, supra*, deals with a situation in which the collateral, if sold, as requested by the defendant, would have realized a sum sufficient to pay the obligation of the defendant to the plaintiff in full. It therefore has no application to the case at bar.

In the case of *Irving v. Mutual Trust Co.*, 90 Atl. Rep. 274; 82 N. J. E. 629, our Court of Errors and Appeals held that in order to entitle one to redeem collateral pledged to secure a debt for which he is liable as surety, he must pay or tender the entire debt due by his principal to the creditor holding the collateral. It is reasonable to argue that the same rule should apply in a case where the debtor demands the return of the collateral by the creditor, so that the debtor may sell the same.

The appellants urge as a ground of appeal that the verdict of the jury is against the weight of evidence. The law is well settled, by the courts of this state, that the question whether the verdict is sustainable upon the evidence, will not be reviewed by the appellate court.

In the case of *McCue v. Paulison*, 130 Atl. 367, 3 N. J. Misc. Rep. 992, the court held that an assignment of error that verdict was contrary to evidence, and against weight of evidence are properly considered on rule to show cause, but cannot be considered on appeal.

In the case of *Mangone v. Paterson*, 139 Atl. 17; 104 N. J. L. 132, our Court of Errors and Appeals definitely laid down the rule that a claim by the appellants that the verdict was against the weight of evidence is not proper ground of appeal.

The appellants also urge as a ground of appeal that the learned Court below refused to allow the following question by appellants to respondent's witness Rose:

“Why don't you apply it to the indebtedness?” (State of Case, page 87-88).

Respondent contends, as did the trial court, that the negligence charged must apply to a date prior to the commencement of the suit, and why the respondent refused to apply the collateral since that date is immaterial.

In any event, the overruling of this question was not an injury to the substantial rights of the appellants. Our Court of Errors and Appeals has held that no judgment will be reversed on the ground of misdirection, or the improper admission or exclusion of evidence, unless after examination of the whole case it shall appear that the error injuriously affected the substantial rights of a party.

*Kargman v. Carlo*, 90 A. 292; 85 N. J. L. 632;

*Klie v. Hollstein*, 120 A. 16; 98 N. J. L. 473.

The appellants do not consider the other grounds of appeal in their brief, and the respondent considers them abandoned.

**CONCLUSION.**

It is, therefore, urged in behalf of the respondent that the judgment of the Essex County Circuit Court appealed from, should be affirmed.

Respectfully submitted,

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Attorney for Respondent.

May Term, 1931.

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The appellants do not consider the other grounds of appeal in their brief, and the respondent considers them abandoned.

#### CONCLUSION.

It is, therefore, urged in behalf of the respondent that the judgment of the Essex County Circuit Court appealed from, should be affirmed.

Respectfully submitted,

NATHAN H. BERGER,  
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May Term, 1931.