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New Jersey Court of Errors and Appeals

JOHN EISELE and NATHANIEL KING, partners trading as Eisele & King,
Plaintiffs-Respondents,

vs.

ELIAS RAPHAEL,
Defendant Appellant.

APPELLANT'S BRIEF.

Statement of Facts.

Briefly, the facts in this case are as follows:

This is an appeal from a summary judgment for the plaintiffs entered in the Supreme Court in the Hunterdon Circuit.

The action was commenced in the usual manner, by a summons and complaint (p. 8, Case). Within the time limited by law an answer and counterclaim were filed (p. 19, Case). No reply was filed by the plaintiffs.

On the 23rd of April a reply was due. Four days thereafter, on the 27th day of April, 1916, plaintiffs filed a notice of motion to strike out the answer and counterclaim, and for summary judg-

ment for plaintiffs (p. 22, Case). This notice was directed to the answer and counterclaim in general, but did not specifically refer to the 3rd and 4th separate defenses in the answer. In support of the motion to strike out the answer, affidavits were read by the plaintiffs (p. 23, Case, to p. 43; also p. 47). And an affidavit in opposition thereto of the defendant was read (p. 44, Case).

Mr. Justice TRENCHARD, who heard the motion in the Supreme Court, refused to enter summary judgment, stating his reasons therefor briefly (p. 50, Case).

This opinion was rendered on the 23rd of May, 1916.

Nothing further was done until three months later, when plaintiffs made application to renew their motion to strike out the answer and counterclaim, and an order to that effect was granted by Mr. Justice TRENCHARD on the 22nd day of August, 1916 (p. 56, Case).

This second notice of motion is on page 58, Case. The affidavits of the plaintiffs in support thereof are found on pages 60 to 68. And the affidavits of the defendant in opposition are found on pages 69 to 75.

On October 5th, Mr. Justice TRENCHARD struck out the answer and counterclaim, and ordered summary judgment entered in favor of the plaintiffs (p. 80, Case). This order is based upon an opinion written by Mr. Justice TRENCHARD on October 2, 1916 (p. 77, Case).

This appeal is taken to review the proceedings of the Supreme Court.

POINT ONE.

The Supreme Court erred when it entered summary judgment on the pleadings in this case.

FIRST: The complaint was defective, in that it referred to the rules of the Stock Exchange and did not have annexed to it a copy of said rules. Neither was any copy of said rules ever read or furnished the Court at any time during the proceedings.

Paragraph 3 of the complaint (p. 9, Case) says:

> "Defendant * * * was informed by plaintiffs that his relation with them in the agency so created as aforesaid would be governed by the rules, customs and usages of the New York Stock Exchange * * *."

The next paragraph of the complaint alleges certain facts which prevail under the rules and customs of the Stock Exchange. In the answer (p. 19, Case) defendant denies paragraph 3, absolutely, and has no information about the facts contained in paragraph 4; so that it puts the burden upon the plaintiff to show, first, that the defendant dealt in accordance with the rules of the Stock Exchange and, second, what those rules are.

Hartshorne's Practice Act (1912), Rule 23, page 36:

> "ANNEXING COPIES OF DOCUMENTS.
>
> In pleading any document, a copy thereof may be annexed to the pleading, and referred to therein, with like effect as if it were recited at length."

The complaint having been defective in this respect, and on the motion for summary judgment the defendant having admitted all the allegations of the answer and counterclaim, the old rule of pleading prevails, viz.: the same as on a demurrer, which was, that a demurrer having opened up the entire record, the pleader that made the first error on the record will have judgment rendered against him. Here, the complaint being defective, there surely can be no summary judgment on this defective complaint without an amendment.

SECOND: The defendant having set up in his answer separate defenses, as well as a counterclaim, it was absolutely necessary for the plaintiffs to file a reply, otherwise they are in default (Sec. 14, Practice Act, 1912).

Hartshorne's Practice Act (1912), Section 14, page 20:

> "Judgment of non-suit or by default may be entered against plaintiff or defendant respectively for failure to plead according to the rules."

Assuming, for the sake of argument, that the service of the first motion to strike out the answer and counterclaim (p. 22, Case) operated as a suspension, and a so-called extension of the time to file a reply, clearly, after the disposition of the motion by Mr. Justice TRENCHARD (p. 50, Case), on the 23rd day of May, 1916, the duty rested upon the plaintiffs to file a reply, or if they chose not to do so, they are presumed to admit all the allegations of the answer (Rule 20, Practice Act, 1912).

Hartshorne's Practice Act (1912), Rule 20, page 35:

> "STATEMENTS NOT DENIED ARE ADMITTED.
>
> Every material allegation of fact in a pleading, which is not denied by the adverse party, is deemed to be admitted, unless the latter avers that he has no knowledge or information thereof sufficient to form a belief."

The record indisputably discloses that the plaintiffs neglected to take any action whatever for a period of three months, and it is respectfully urged that the Supreme Court had no jurisdiction to entertain the subsequent motion (p. 58, Case) for renewal of the original motion to strike out the answer and counterclaim. In fact, the plaintiffs at that time, in August, had no standing in court, and should have first obtained leave to file a reply, so as to put the matter in issue squarely on record, by the pleadings in the case, which the law required (Rule 20, p. 35, Hartshorne's Practice Act), before they could receive any recognition on a motion to strike out the defendant's pleadings.

This not having been done, it is respectfully urged that the Supreme Court had no jurisdiction to enter the summary judgment, and that the judgment so entered is a mere nullity, under the same principle that a pleading that is filed after the expiration of the time within which it should have been filed is treated as a mere nullity.

In the case reported in 2 *Halstead,* page 39, entitled *In Matter of Practice,* which seems to be the law to-day, Chief Justice KIRKPATRICK says, on page 39:

> "If pleadings are filed after the thirty days allowed after the Practice Act have expired

(although notice is given of the time of filing same), they may be treated as nullities."

THIRD: There is nothing in the plaintiffs' notice to strike out (p. 22, Case) to indicate what part of the answer and counterclaim is sham and what part is frivolous. The notice says:

> "On the ground that the matters set forth in said answer constitute a frivolous and sham defense, and the matter set forth in said counterclaim a frivolous and sham and mere pretended cause of action."

There is nothing in this notice by which defendant is informed of the grounds or reasons for the plaintiffs' motion. The 1912 Practice Act expressly requires that every notice to strike out shall contain the reasons; because of the fact that the notice of motion being in the nature of a demurrer, the legal reason must be indicated therein.

Hartshorne's Practice Act, page 37, Rule 28, provides:

> "OBJECTIONS TO PLEADINGS.
>
> Every motion addressed to a pleading must present every cause of objection then existing."

Hartshorne's Practice Act, page 37, Rule 29, provides:

> "MOTIONS.
>
> Every notice of any motion to a pleading shall specify the grounds thereof."

These two rules confirm the practice laid down in the Practice Act of 1903 (Mott's Practice Act, p. 96, Sec. 191), which was *not repealed* by the Act of 1912:

"NOTICE OF MOTION TO STRIKE OUT PLEADINGS.

> The notice of a motion to strike out any pleading or any part thereof shall contain a particular statement of the defects in or objections to such pleading on which the party giving the notice intends to rely and matters not specified in the notice shall not be considered upon the hearing."

The mere statement that a pleading is frivolous and sham means nothing. It can readily be conceived that a pleading such as a general denial might be frivolous, but it could not be both sham and frivolous, because sham has been defined as good in form but false (31 *Cyc.*, 623). Frivolous has been defined as insufficient, *i. e.*, bad in form (31 *Cyc.*, 621), so that when a pleading is attacked on the ground that it is both sham and frivolous, it must appear that it is bad both in form and in substance. A mere cursory examination of the answer and counterclaim negatives any such contention very promptly and it is therefore respectfully urged that the notice to strike out the answer and counterclaim was defective and improper and the judgment entered on such a notice would consequently be a nullity.

FOURTH: The first motion to strike out having been entirely disposed of by Mr. Justice TRENCHARD, a subsequent motion to strike out the answer and counterclaim should have contained a specific reason or reasons and been able to stand or fall on its own self and not rely upon any prior notice; because the first notice having been disposed of by a denial of the motion, it became a mere nullity and had no further standing among the pleadings.

The second notice, therefore (p. 58, Case), indicating no reasons whatever on its face for the relief

sought, and being further defective for the reason that it was served when plaintiffs were in default in pleading, and being founded upon an order of the Supreme Court which was improperly made, the plaintiffs being out of court at the time, would not properly bring the defendant before the Court the second time, and the defendant, not having properly been before the Court, any judgment or proceeding made against him under such circumstances are void and of no force and effect, and should be reversed.

POINT TWO.

The Supreme Court erred when it entered summary judgment on the affidavits read.

The affidavits showing disputed questions of fact and raising several issues of fact, the motion to strike out should have been denied and the disputed questions of fact left to a jury.

It must be observed in this case that the case was disposed of by the Supreme Court on affidavits *pro* and *con*. The Judge (Mr. Justice TRENCHARD) practically sat as a jury and decided disputed questions of fact, which were as follows:

FIRST: The affidavit of Bentley Pope (p. 33, Case) is the backbone of the plaintiffs' case, but the defendant denies the important statements in that affidavit, so that a jury question is left to determine which of the two affiants is correct in his statements.

Clearly, it is not the province of a judge to determine such matters. The case is entirely different from a situation where an answer filed is a general denial or admits the important parts of a com-

plaint and denies one or two unimportant elements of it, and there an affidavit is produced establishing the plaintiffs' case beyond any doubt. Of course, the Court in such case can do nothing but enter summary judgment. But in the case at bar the affidavits each set up a different set of facts which can only be determined by a jury.

SECOND: A very important element in this case is the question of notice. This is also denied by the defendant and leaves a disputed question of fact, which is purely within the province of a jury. Pope swears (p. 36, ll. 30-33):

> "and the defendant then told us that he would pay the balance due on the account in full, etc."

The defendant (p. 46, l. 20) denies any such promise and says that such conversation was had, if at all, with one of his sons.

Pope also swears (p. 37, l. 20):

> "I told the defendant at the beginning of his dealings that our business was carried on strictly in accordance with the rules, customs and usages of the New York Stock Exchange, and explained to him the course and method of dealing in securities and he understood it thoroughly."

The defendant denies this and swears (p. 44, l. 33, Case):

> "His acts in connection with the account were almost entirely guided by the information and advice of the said Bentley H. Pope, who told deponent that if he would deposit money with him he would buy and sell stocks and make more money for deponent, and de-

> ponent asked him if Four Hundred Dollars would be enough, and he said it would be plenty, which amount deponent deposited."

On page 45, line 35, defendant again swears:

> "Because I thought the said Pope was doing the right thing by me."

It is very clear from the contradictions by the above statements that there existed a serious disputed question of fact which should have been left for the determination of a jury upon direct and cross-examination.

Plaintiffs also rely upon the fact that no notice to sell out defendant's stock was necessary because of the statement contained at the bottom of Exhibits A and B, pp. 39 and 40, Case). But as against that, there is a statement of Pope that he tried to get notice to the defendant, the denial of that statement by the defendant is that (1) he never received notice; (2) that whatever statements he received he could not read very well, and (3) that the notices contained in the first statements were different from those contained in the later ones. Is it not very proper to assume that such issues raise a disputed question of fact which should be determined by a jury?

POINT THREE.

The Supreme Court erred when it entered summary judgment on the statements contained in some of plaintiffs' affidavits, which were founded upon hearsay information, and should therefore have been excluded.

The affidavit of Nathaniel King, one of the plaintiffs, is all founded on hearsay information, and at a trial his testimony would have all been excluded upon objection, because of this fact.

Pope swears all the transactions occurred in Trenton, so that King's information in Newark must necessarily be founded on hearsay (p. 33, l. 35, Case):

> "Said defendant's dealings with the plaintiff firm were all carried on through its said Trenton office, of which I am manager."

See also Pope's affidavit (p. 36, ll. 9 to 17, Case):

> "These demands included personal interviews at my office, telephone calls by me to the Raphael store at Lambertville, and two trips by me to Lambertville in the evening, on one of which I found the defendant, but he would not talk about the account, and on the second of which I could not find him, but directed his son Nathaniel, who had full knowledge of his account, to tell him of my demand for margin."

It clearly was not the purpose of the Practice Act to permit hearsay testimony to be offered in the form of an affidavit of Wilfred L. Goodell (p.

29, Case), which is also based on hearsay information, because he says (p. 30, l. 35):

> "The purchases and sales in said account were made on orders given by defendant at the Trenton office of plaintiffs, and by said Trenton office duly reported to the main office at Newark each day."

POINT FOUR.

The Supreme Court erred in entering summary judgment because it deprived the defendant of his constitutional right of trial by jury.

There is no question that under the common law, as well as under our present statutes, a judge has the power to strike out a sham or frivolous pleading. Thus not permitting a defendant to shelter himself under a false or frivolous pleading. But a distinction must be drawn between the case at bar and *Coykendall* v. *Robinson,* decided by the Court of Appeals, 39 *Law.*, p. 98. In that case the Court struck out as sham, or false, the plea of the general issue accompanied by the statutory affidavit, which was nothing more than a general denial. Of course, if such answer were filed in the case at bar, it should properly be stricken out, because the general issue presents no issue unless there is a meritorious denial. But in the case at bar the answer was not sham or false, because the defendant honestly denied specific important facts in the complaint.

And the question of veracity of the parties was left to be decided under the constitution by a jury and not by a court. The answer and counterclaim clearly was not frivolous or bad in form, that being

so self evident that it needs no argument. Justice VAN SYCKEL, in the case of *Coykendall* v. *Robinson, supra,* page 99, says:

> "It is limited in its exercise to frivolous pleas—that is, pleas manifestly immaterial or inapplicable to the case—and sham pleas, which are false pleas."

It is therefore respectfully urged that wherever any pleading fairly and honestly raises a debatable question of fact, the inherent power in a court to strike out such pleading ceases to have effect, and the constitutional right of trial by jury continues in force and operation.

In this case, not only was there a denial of issuable or material facts, but in addition thereto there was a counterclaim, entitling the defendant to be heard before judgment could go against him.

POINT FIVE.

The Supreme Court erred in entering summary judgment because the sale by respondents of appellant's stock was unlawful.

Under this point we will take up the different legal questions arising out of the sale of this stock.

FIRST: It was essential for the plaintiff to prove by the preponderance of evidence that the rules and regulations of the Stock Exchange were known or made known to the defendant. In no part of plaintiffs' affidavits do they show this fact. All that Bentley H. Pope says is (ll. 19 to 25, p. 37, Case):

> "I told the defendant at the beginning of his dealings that our business was carried on

> strictly in accordance with the rules, customs and usages of the New York Stock Exchange and explained to him the course and method of dealing in securities and he understood it thoroughly."

There is nothing in this statement to show that the rules and regulations were communicated to the defendant, especially the rules applicable to the question of notice.

Pope says (l. 24, p. 37, Case):

> "And explained to him the course and method of dealing in securities and he understood it thoroughly."

Taking this statement in its best light in favor of the plaintiffs, it is ambiguous. And the plaintiffs had every opportunity to present their facts in their best light. Any omission must therefore be taken against them.

SECOND: It was also essential for the plaintiffs' case to show that the defendant had legal notice of intention to sell him out. That notice is absolutely necessary has been held by Mr. Justice TRENCHARD and is unquestionably the law. There is no question that the plaintiffs attempted to notify the defendant, but it seems that in each attempt they fell short of the act (p. 36, ll. 11-26, Case):

> " * * * and two trips by me to Lambertville in the evening, on one of which I found the defendant, but he would not talk about the account, and on the second of which I could not find him, but directed his son Nathaniel, who had full knowledge of his account, to tell him of my demand for margin.

> Finally, on the afternoon of the day preceding the sale, he told me at my office that I could sell him out when I was not satisfied with his account. The sale of his securities the next day was made on the open Exchange at current prices, after telephonic notice of intention to sell given him that morning previous to the opening of the Exchange, and *I believe* the message was promptly reported to him."

Plaintiffs attempted to show legal notice by the notation at the foot of the certificates. But whether or not the defendant can be bound by such notice, it must first be shown that the notice was actually known or made known to him. This not having been shown, the notice cannot therefore bind the defendant.

THIRD: It is admitted that all the transactions here were conducted on a marginal basis, the defendant having transacted business with the plaintiffs amounting to $134,821. The only margin that was ever deposited was $400 (p. 44, l. 38):

> "And deponent asked him if $400 would be enough and he said it would be plenty, which amount deponent deposited."

Plaintiffs are estopped from relying upon the statements at the foot of the bought and sold slips, which dispenses with the question of notices and demand for additional margin.

On his own statements (Affidavit of Bentley Pope, p. 35, ll. 33 to 40, and also p. 36, ll. 1 to 9), he says:

> "Before the closing out of the account of defendant by the sale of the stocks plaintiffs

> were carrying for him on margin I *repeatedly* informed him of the insufficiency of his margin (arising from the declining condition of the market and shrinkage in current prices) and called on him to put up more margin or take up some of his stocks or sell them. These calls extended over several days previous to the selling out of the account on November 10, 1915. He invariably replied that I need not worry; that he had lots of money and would take care of his account."

It is quite apparent from the above testimony and from the statement of Pope, that the plaintiffs had threatened the defendant, not once, but several times, to close out his account; but it seems that because of the financial standing of the defendant Mr. Pope changed his mind each time (p. 37, ll. 31 to 40, Case):

> "He represented himself to me as a man of means and more than once when I told him he was carrying too many stocks he said he had 'lots of money' and would take care of them. I inquired concerning his credit of sources which I considered reliable and trustworthy, and as a result of my inquiries and his own statements, considered him worth the credit extended to him."

Assuming that all the statements of Pope's affidavit are absolutely correct, the defendant having heard the threats three or four times and nothing having been done thereafter, he having explained to Mr. Pope his financial standing, is it not fair and reasonable to conclude that because of these facts, that it was mutually understood between Pope (plaintiffs' agent, see par. 1, Pope's Affidavit, p. 33, Case) and defendant that they would not

sell out defendant's stock? At any rate, the acts of Pope were sufficient in law to constitute a waiver on the plaintiffs' part to exercise their option under this notice at the foot of the bought and sold slips. Once it being established that there is a waiver of this right, which is a very extraordinary privilege and remedy and resting entirely in the plaintiffs' own discretion, before any sale by them could be valid and legal and lawful, as such waiver is the legal prerequisites of demand for additional margin and sufficient notice of time and place of payment must be shown before the account could be sold out. Otherwise the unlawful selling by the broker constitutes conversion.

The broker's waiver of his customer's default in complying with a demand for additional margin will prevent him from being entitled to close the transaction until a new demand is made.

> *McGinnis* v. *Smythe,* 101 *N. Y.,* 646.
> *Rogers* v. *Wiley,* 14 *N. Y. Supp.,* 622; affirmed 131 *N. Y.,* 527.
> *Morgan* v. *Jaudon,* 40 *How. Pr.,* 366.

> "Under the contract, arising by operation of law out of the relation between the parties, a sale of the stock by the brokers without notice of the time and place of sale, constituted a conversion, in the absence of an agreement dispensing with such notice or providing for otherwise disposing of the pledged property."

FOURTH: Mr. Justice TRENCHARD says (p. 78, ll. 11 to 31, Case) that he is inclined to follow the ruling of Mr. Justice BERGEN respecting the companion cases of the same title. It must be observed that in the companion cases separate answers were filed and separate affidavits were prepared and read

by Mr. Justice BERGEN, as the cases disposed of by Mr. Justice BERGEN were separate and distinct from the case at bar. For the convenience of the Court, the complete opinion of Mr. Justice BERGEN is printed at the end of this brief, on page , as an exhibit. The affidavits presented before Mr. Justice BERGEN were also entirely different from those at bar. Before Mr. Justice BERGEN it seems that the questions raised were (quoting Justice BERGEN):

> "As I understand, the affidavits of the defendants and the argument of their counsel in opposition to this motion of that claim is that the stock never was in fact delivered to their broker, and that the sale was made without notice to them or an opportunity to take up the stock. The affidavits of the plaintiffs clearly established the facts that the stock was purchased and the certificates delivered to them, subject to the order of the defendants" (p. , Brief, Opinion of Justice BERGEN, *supra*).

Neither does it appear in Justice BERGEN'S opinion that more than one kind of notification slip was used, which is the fact in the case at bar. Mr. Justice BERGEN also says (p. , Opinion, *supra*):

> "The answering affidavits of the defendants do not deny that they ordered the purchase of the stock, etc." (p. , l. Brief).

It was therefore clearly error on the part of the Supreme Court to use as a precedent for the case at bar the opinion of Mr. Justice BERGEN.

POINT SIX.

The Supreme Court erred when it entered summary judgment because the purchase and sale of stock on behalf of the defendant was made by the plaintiffs without defendant's authority.

In the answer (Case, p. 20, fourth separate defense) defendant denies plaintiffs' authority to carry out certain transactions. This denial is verified by defendant's affidavit (Case, p. 45, ll. 27-35):

> "Deponent further says that the items in the said account—September twenty-fifth, Twenty-five Shares of Crucible Steel; September twenty-sixth, Fifty Shares of Crucible Steel, and October twenty-seventh, Fifty Shares of Midvale—were not ordered by me, and when the notice for the last item came I was away from home, and I did not object when I found out, because I thought the said Pope was doing the right thing by me."

And Case, page 46, lines 16-19:

> "Deponent further saith that the other subsequent sales made as appears by said account for deponent, were made without any order and without any knowledge and consent."

Here again is raised an issue on a very material allegation of fact, the truth of which could be gained only by having both parties before a jury, guided by proper instructions of the Court. *Crawford* v. *Winterbottom,* p. 498, last paragraph, 96 *Atl. Rep.:*

> "We think the ruling of the trial court in striking out the plaintiffs' complaint and entering judgment for the defendants was error. The allegations made in the complaint, if proved to be true, would make a jury question, and it would then be for the jury at the trial, under proper instructions by the court, to determine whether there was a waiver by, or an estoppel of, the defendants."

It may be urged as against this contention that the defendant or his previous counsel, Mr. Hayhurst, having possession of the notification slips, might constitute a waiver or acquiescence to accept the stock not ordered. But concerning this point, it must be borne in mind that that fact comes before the Court on affidavits by the respective attorneys, and furthermore, Mr. Hayhurst, who had possession of these slips, was the attorney of all the parties in this as well as the other suits, against the sons of the present defendant, and that it does not appear from whom Mr. Hayhurst received the respective slips, the father, defendant in the case at bar, or his sons, defendants in the other cases.

POINT SEVEN.

The Supreme Court erred when it entered summary judgment because the Supreme Court decided the answer was sham and frivolous without differentiating between those parts that were sham and those parts that were frivolous.

When plaintiffs moved to strike out the answer (Case, p. 22) because it was sham and frivolous,

they asked the answer to be stricken out for two reasons, each one contradicting the other. If the answer is sham, it is good in form although false; if frivolous, it is bad in form because not responsive. The answer could perhaps be stricken out if it is clearly shown that it is defective for either reason, but it cannot be both good and bad in form at the same time. Therefore, plaintiff cannot say it is both sham and frivolous. But if parts of the answer and counterclaim were sham and parts of it were frivolous, the plaintiffs should have pointed them out clearly, so that defendant would have due notice of the issues raised. (Rule 29, Hartshorne's Practice Act, p. 29; also note under Rule 29.)

POINT EIGHT.

The judgment of the Supreme Court should be reversed with costs.

Respectfully submitted,

LEVITAN & LEVITAN,
Attorneys for Appellant.

ABRAHAM LEVITAN,
of Counsel.

Opinion of Justice Bergen.

NEW JERSEY SUPREME COURT.

JOHN EISELE and NATHANIEL KING, partners trading as Eisele & King, v. NATHANIEL RAPHAEL and HARRY E. RAPHAEL, partners trading as Raphael Bros.	On motion to enter judgment.

Edgar W. Hunt, for motion.

Walter F. Hayhurst and Harry L. Stout, *contra.*

Mem. by BERGEN, *J.:*

The above stated action, and two others of like character by the same plaintiffs against Nathaniel Raphael and Harry Raphael respectively, were brought to recover an alleged balance due to the plaintiffs on stock purchases made by the plaintiffs for the respective defendants, the firm and the two partners as individuals, having separate accounts with the plaintiffs. The plaintiff moves to strike out the answers filed in each of the causes by the defendants, as well as counterclaims filed by the defendants for moneys deposited with the plaintiffs to be applied for the purchase of shares of stock. If the plaintiff is entitled to judgment notwithstanding the plea, the counterclaim would fail because the plaintiff has given the defendants respectively credit for all sums deposited on account of the purchase. While the plaintiffs, and each of the defendants, have filed affidavits in each

case for and against the motion for judgment, they are practically the same and may be considered and disposed of as one case.

The affidavits presented by the plaintiffs show that upon the order of the defendants they bought certain shares of stock, the defendants having deposited a sum of money as part payment, referred to in these proceedings as "margin"; that plaintiff advanced, in each case, the difference between the cost of the stock and the margin; that the stock purchased was in each case delivered to the plaintiff for the defendant, and each purchase and sale duly reported to the defendants; that the market price of the stock depreciated and the plaintiff demanded that the defendants take and pay for the stock, or make a larger deposit; that on Nov. 9, 1915, the plaintiff demanded that the defendants deposit with them the sum of $7,000 as an additional margin to be apportioned between the three accounts, and gave notice that if this sum was not paid before the opening of the Stock Exchange the following morning, that the stock would be sold; that the defendants did not make the deposit and the stock was sold and the defendant credited with the proceeds in each case, leaving a balance due the plaintiffs for which this suit is brought. The answering affidavits of the defendants do not deny that they ordered the purchase of the stock, and this they could hardly do, because they were furnished with a report of each purchase and sale on the day it was made, covering a period of some months. The contract was not a wager, because the affidavits of the defendants show that when they gave the first order they supposed that they would have to pay for the stock and ordered a limited amount, but increased the order when the plaintiff's agent assured them that they could buy a

larger number of shares on the deposit, and it is not pretended that there was any agreement, either express or implied, that the stocks bought and sold for the account of the defendants were not to be delivered in accordance with the rules and regulations of the New York Stock Exchange, which required a delivery of all stock bought or sold. As I understand the affidavits of the defendants, and the argument of their counsel in opposition to this motion, what they claim is that the stock never was in fact delivered to their broker and that the sale was made without notice to them or an opportunity to take up the stock. The affidavits of the plaintiff clearly established the fact that the stock was purchased and the certificates delivered to them subject to the order of the defendants. All the defendants say on this subject is that they have no knowledge as to whether any certificates of stock were secured for them, or sold for their account, but this does not meet the proofs offered by the plaintiffs, for they show that the stock was bought and sold for the account of the defendants, of which a report was made, and this defendants do not deny; that in one of the statements the purchaser was credited with a dividend on some of the stock, and in addition to this the purchases and sales were all made under the rule of the New York Stock Exchange which forbids any transaction which does not include the actual delivery of the stock purchased and sold, and to meet this there must be something beyond the mere statement of the defendant that he had no knowledge whether the certificates were secured or not.

As to the question of notice, the plaintiff's affidavits show that actual notice was given, but the defendants state in general terms that no notice was given, either that the margin was insufficient

or that the stock would be sold, but this is not borne out by the detailed statement, for Nathaniel in his affidavit says that they did ask him for more money and when he said that he had no more, he was asked to try and get it, to which he replied that he had lost enough, and then the plaintiff's agent said, " 'I will get fired if you do not get me some more money as I let this run too long,' and I replied to him, 'Why did you not sell me out when I had enough?' " But aside from this, the purchases of the particular stock which is now in question were reported to the defendants on a blank which contained this statement, "It is understood and agreed between you and ourselves that all stocks and securities carried in your account or deposited to secure the same * * * may be sold or bought at public or private sale or at the New York Stock Exchange, without notice or demand for margins, when such purchase or sale is deemed necessary by us for our protection."

Such notice was held in *Bibb* v. *Allen et al.,* 149 *U. S.,* 481, to constitute a sufficient memorandum in writing of a contract between the broker and purchaser to meet the requirements of the statute of frauds, and if in the present case the stocks had been sold at a profit the plaintiff would have been bound to account to the defendant. It seems to me if the defendants could prove all they set up in their affidavits, it would be no defense to the plaintiff's action.

The contract was not one of wager. The stock was bought on the order of the defendants, and the certificates were delivered to the plaintiff as agent and broker for the defendant; a demand for additional margins was made and not complied with, and under the memorandum of purchase the plaintiffs had a right to sell the stock without notice to the defendant. It was held by the plaintiff as

security for the money advanced, with a written agreement that the plaintiff could sell the stock without notice.

The correctness of the account is not questioned in the affidavits filed by the defendants.

I think the motion in each case should prevail.

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Notice of Appeal.

(Filed October 12, 1916.)

New Jersey Supreme Court

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King,
Plaintiffs,

vs.

ELIAS RAPHAEL,
Defendant.

To Edgar W. Hunt, Esq., Attorney for Plaintiffs:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

LEVITAN & LEVITAN,
Attorneys for Appellant.

(Endorsed)—Due and sufficient service of a copy of within notice of appeal acknowledged this 10th day of October, 1916. Edgar W. Hunt, Atty. for Plfs.

Order for Substitution of Attorneys.

(Filed October 17, 1916.)

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King,
Plaintiffs,

vs.

ELIAS RAPHAEL,
Defendant.

This matter being opened to the Court by Abraham Levitan, and it appearing by the annexed stipulation and consent that Levitan & Levitan are to be substituted as attorneys instead of Walter F. Hayhurst for the defendant,

It is, on this 10th day of October, nineteen hundred and sixteen, on motion of Abraham Levitan, of counsel, ORDERED that Levitan & Levitan be and the same are hereby substituted as attorneys for the defendant in place and instead of Walter F. Hayhurst.

THOMAS W. TRENCHARD,
Justice of the Supreme Court.

Consent to Substitution.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Stipulation.

It is hereby stipulated by and between Walter F. Hayhurst, attorney for the defendant in the above-entitled cause, and Abraham Levitan, counsel for the defendant in the above cause, that Levitan & Levitan be and the same are hereby substituted as attorneys for the defendant in the above-entitled cause in place and instead of Walter F. Hayhurst.

WALTER F. HAYHURST.
ABRAHAM LEVITAN.

Grounds for Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	On Appeal. Grounds for Appeal.

The appellant states the following grounds of appeal:

1. Because the Supreme Court refused to dismiss the complaint when motion was made therefor by the defendant.

2. Because the defendant was deprived of his constitutional right of trial by jury.

3. Because the Supreme Court struck out the defendant's counterclaim.

4. Because plaintiffs converted certain shares of stocks of the defendant.

5. Because the Supreme Court refused to enter judgment for the amount of defendant's counterclaim.

6. Because plaintiffs, having waived the provisions at the foot of the bought and sold slips, are estopped from enforcing the same against the defendant without proof of a new agreement.

7. Because the contracts between plaintiffs and defendant for the purchase and sale of the shares of stock were void under Section 6 of the Statute of Frauds.

8. Because the plaintiffs waived their right to close out defendant's account, by reason of his not receiving reasonable time to make good his margin.

9. Because there was sufficient margin on deposit with the plaintiffs by the defendant.

10. Because defendant received no reasonable notice of exhaustion of his margin.

11. Because plaintiffs waived their right to any additional margin from the defendant.

12. Because plaintiffs had an interest in some of the defendant's purchases of stock, having purchased same together with the defendant.

13. Because the purchase and sale of stock on behalf of the defendant was made by the plaintiffs, without defendant's authority.

14. Because plaintiffs did not communicate the rules of the Stock Exchange to the defendant and defendant had no means of ascertaining the same.

15. Because the Supreme Court decided that the defense was sham and frivolous when a disputed question of fact was presented therein.

16. Because the Supreme Court decided that the answer and counterclaim were frivolous when they both presented a defense.

17. Because the Supreme Court decided the answer and counterclaim were sham when it presented a disputed question of fact.

18. Because the Supreme Court decided the answer was sham and frivolous without differentiating between those parts that were sham and those parts that were frivolous.

19. Because the Supreme Court erred when it struck out all of the defenses of defendant's answer and counterclaim and entered summary judgment for the plaintiffs.

LEVITAN & LEVITAN,
Attorneys for Appellant.

(Endorsed)

Due and sufficient service acknowledged of a copy of within grounds of appeal.

Nov. 10, 1916.

EDGAR W. HUNT,
Attorney for Respondent.

I consent that the within grounds of appeal be filed as within time.

EDGAR W. HUNT.

Recognizance.

This was filed on October 28, 1916, in the sum of $3,870.62, in the usual form and approved by Hon. R. S. Kuhl, Supreme Court Commissioner.

Summons.

(Filed March 2, 1916.)

The State of New Jersey to Elias Raphael:

(SEAL) You are summoned to answer the annexed complaint of John Eisele and Nathaniel King, partners trading under the firm name and style of Eisele & King, in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this 28th day of February, nineteen hundred and sixteen.

WILLIAM C. GEBHARDT,
Clerk.

EDGAR W. HUNT,
Attorney.

Complaint.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law.

The plaintiffs, John Eisele and Nathaniel King, who both reside in the City of Newark, in the County of Essex and State of New Jersey, and are partners trading under the firm name and style of Eisele & King, say that:

(1) Plaintiffs are stockbrokers, having membership in the New York and Philadelphia stock exchanges and engaged in the business of acting as agents for third persons in the purchase and sale upon commission of stocks, bonds and other securities listed and dealt in upon said exchanges. Plaintiffs maintain offices in the cities of Newark, Paterson and Trenton, in said State of New Jersey.

(2) On September 7, 1915, plaintiffs, at the request of the defendant, and in consideration of his agreement to pay the usual rates of commission and subject to the conditions hereinafter stated, undertook to act as agent for the defendant in purchasing and selling on his order and for his ac-

count and at his risk, such securities dealt in on said exchanges as he might desire to purchase or sell.

(3) Defendant deposited a sum of money with plaintiffs to apply on account of any orders plaintiffs might execute for him in and about said agency, and was informed by plaintiffs that his relation with them in the agency so created as aforesaid would be governed by the rules, customs and usages of the New York Stock Exchange, in which defendant acquiesced.

(4) Under said rules, customs and usages of the stock exchange it became and was the duty of the plaintiffs to actually purchase all stocks ordered by the defendant to be purchased for his account and have the certificates therefor ready for delivery to the defendant upon demand and tender of the amount due; and it became and was the right of the plaintiffs to hold as security for any sums of money due them from the defendant any stocks belonging to the defendant and in their hands; and to sell such stocks if they did at any time deem it necessary to do so to protect themselves from loss; and to require the defendant at any time to take and pay for any stocks purchased by plaintiffs for him and on his order, or to make any deposit of money necessary to protect the plaintiffs against loss on the stocks purchased by them for the defendant; and in executing the orders of said defendant the plaintiffs constantly observed and followed all such lawful rules, customs and usages of said New York Stock Exchange as imposed upon them a duty toward the defendant, and expected that he the defendant would follow

the same in so far as they imposed upon him a duty to the plaintiffs.

(5) On various dates between September 7, 1915, and November 10, 1915, plaintiffs, as the agents of said defendant, purchased of third parties, and sold to third parties, on the order of said defendant and for his account and at his risk, certain shares of stock, as set forth in the schedule annexed hereto.

(6) On or about November 1, 1915, certain of the stocks purchased by the plaintiffs for the defendant as aforesaid, and then held by the plaintiffs as security for the sums paid and advanced by them on account of the defendant, had so declined in value as to render the deposit of the defendant with the plaintiffs insufficient to secure the plaintiffs against the reasonable possibility of loss by further declines in market values; whereupon plaintiffs demanded of defendant that he take and pay for the stocks so as aforesaid purchased for him, or increase his deposit with plaintiffs, in default of which plaintiffs would sell his stocks to save themselves from loss. Defendant promised to increase his deposit to a satisfactory amount by a certain day, and at his request and in consideration of said promise plaintiffs agreed to continue to carry his account until said day. On said day defendant failed to keep his promise and plaintiffs renewed their aforesaid demands and defendant made new promises to secure new extensions of time, which promises were always broken although the requested extensions of time had been given.

(7) On November 8, 1915, the value of said stocks had so decreased that the same was not suffi-

cient, with the deposit of defendant, to cover the sum due from defendant to plaintiffs, and plaintiffs notified defendant that his stocks would be sold at the opening of the exchange on the next day unless he, before that time, took and paid for the said stocks or increased his deposit in an amount sufficient to protect plaintiffs against loss. Defendant requested an extension of one more day, which plaintiffs granted in consideration of his promise to increase his deposit during said day's extension.

(8) Defendant failed to keep his said promise and on November 9, 1915, plaintiffs again notified him that his stocks would be sold at the opening of the exchange on the next day unless he before that time took and paid for the said stocks or increased his deposit in an amount sufficient to protect plaintiffs against loss. Defendant in reply told plaintiffs to sell his said stocks.

(9) At the opening of the exchange on November 10, 1915, plaintiffs in order to save themselves from further loss offered all of the stocks belonging to defendant for sale on the exchange, and sold them on the exchange for the highest and best price bid for the same, and credited the proceeds to the account of the defendant.

(10) The amount realized from the sale of said stocks, when added to the deposit of the defendant, was not sufficient to reimburse the plaintiffs for the sums expended by them in the purchase of stocks for the defendant, and the sums due them from him for commissions, stamp tax on shares sold, and interest on the moneys advanced by the plaintiffs for his use in the purchase of stocks, and

on the closing of said account there remained due from the defendant to the plaintiffs a balance of $1,870.33, and said sum, nor any part thereof, has not been paid, although the same has been duly demanded.

(11) Annexed hereto and hereby made a part hereof is a schedule showing in detail the account between plaintiffs and defendant setting forth particularly:

(a) The dates of all purchases and sales.

(b) The names and amounts of the several stocks purchased and sold and the prices paid or received for the same.

(c) The sums of interest charged the defendant for advances made on his account by plaintiffs.

(d) The sums of money paid or deposited by defendant with plaintiffs on said account.

(e) The balance due plaintiffs on said account.

In said schedule a commission of 1/8 of 1% of the par value of the shares is added to the sum paid for all stocks purchased, and a commission at the same rate is deducted from the selling price of all stocks sold, and there is also deducted from the selling price of all stocks sold the sum of four cents for each $100.00 of par value of the shares, the same being the sum expended by the plaintiffs for United States Internal Revenue Stamps and New York State Transfer Tax Stamps required by law to be attached to the transfers of said shares. Said charges for commissions and stamp taxes are made in accordance with the rules of said New York Stock Exchange governing such transactions.

(12) Plaintiffs demand of the defendant as damages the sum of $1,870.33 with interest thereon from November 11, 1915, and also their costs of suit in this action.

EDGAR W. HUNT,
Attorney for Plaintiffs.

SCHEDULE.

MR. ELIAS RAPHAEL,

In account with

EISELE & KING.

Dr. (To purchases and interest.)

Date 1915	No. of Shares	Name of Company	Purchase Price	Amount
Sept. 7	50	Pittsburg Coal Co.	32⅛	1612.50
17	50	Penna. Railroad Co.	109	2728.13
29	50	Distiller's Securities Corporation	32½	1631.25
	50	Maxwell Motors Co.	52¾	2643.75
	50	Distiller's Securities Corporation	33	1656.25
30		Interest		4.48
Oct. 4	100	Nevada Consolidated Copper Co.	15	1512.50
	100	Philadelphia Rapid Transit Certificates	12¾	1287.50
5	50	U. S. Steel Corporation	80	4006.25
6	50	U. S. Steel Corporation	79	3956.25
11	50	Virginia-Carolina Chemical Co.	42⅜	2125.00
13	50	U. S. Steel Corporation	82¾	4143.75
14	25	American Locomotive Co.	69	1728.13

	11	50	Penna. Received		
		25	Republic Iron & Steel Co.	53½	1340.63
	18	25	Union Pacific Railway Co.	134⅞	3375.00
	20	100	Colorado Fuel & Iron Co.	58	5812.50
	21	100	Corn Products Refining Co.	18⅛	1825.00
	20		Cash		100.00
	22	100	Nevada Consolidated Copper Co.	15⅛	1525.00
	25	100	Philadelphia Electric Co.	27¼	2737.50
		50	Colorado Fuel & Iron Co.	59	2956.25
		50	Colorado Fuel & Iron Co.	60⅛	3012.50
		25	Crucible Steel Co.	94	2353.13
	26	50	American Hide & Leather Co.	14	706.25
		100	Miami Copper Co.	34	3412.50
		50	Crucible Steel Co.	92½	4631.25
	27	100	Colorado Fuel & Iron Co.	59	5912.50
		50	Central Leather Co.	58	2906.25
		50	Midvale	94¼	4718.75
		25	Crucible Steel Co.	89⅛	2231.25
	19	9/27/15 50	Erie Railroad Co. 2nd Preferred	40¾	2043.75
	28	100	U. S. Rubber Co.	56	5612.50
		100	American Woolen Co.	54	5412.50
	29	100	Colorado Fuel & Iron Co.	57½	5762.50
		100	Miami Copper Co.	34½	3462.50
			Interest		66.09
	Nov. 1	50	N. Y. New Haven & Hartford Railway Co.	83⅛	4162.50
		50	Crucible Steel Co.	85½	4281.25
		50	Reading Co.	83⅝	4187.50
	3	100	American Woolen Co.	54	5412.50
	4	100	American Woolen Co.	53	5312.50
		50	Crucible Steel Co.	75	3756.25
	8	100	American Locomotive Co.	66¾	6687.50
			Interest		69.43
					134821.27

MR. ELIAS RAPHAEL,
In account with
EISELE & KING.

Cr. (By sales, cash and dividends.)

Date 1915	No. of Shares	Name of Company	Sale Price	Amount
Sept. 8		Cash		400.00
21	50	Pittsburg Coal Co.	34	1691.75
		Cash for 50 Penna.		2728.13
23	50	Penna. Railroad delivered		
27	50	Penna. Railroad	113⅛	2824.00
29	50	Distiller's Securities Corporation	32⅛	1598.00
Oct. 4	50	Distiller's Securities Corporation	33¾	1679.25
5	50	Maxwell Motors Co.	55	2741.75
8	50	Erie Railroad Co. 2nd Preferred	43¼	2154.25
11	100	U. S. Steel Corporation	81¼	8108.50
13	100	Nevada Consolidated Copper Co.	15¾	1562.30
14	25	Republic Iron & Steel Co.	54¾	1364.62
18	50	Virginia-Carolina Chemical Co.	43⅝	2173.00
19	50	U. S. Steel Corporation	84⅜	4210.50
20	25	American Locomotive Co.	71	1770.87
22	100	Colorado Fuel & Iron Co.	59¼	5908.50
26	100	Corn Products Refining Co.	19¼	1908.50
	100	Colorado Fuel & Iron Co.	61	6083.50
29	100	American Woolen Co.	55	5483.50
				54390.92
Nov. 1	25	Union Pacific Railway Co.	137	3420.87
	50	Central Leather Co.	59½	2966.75
3	100	Nevada Consolidated Copper Co.	15¾	1562.30
	200	Miami Copper Co.	35	6974.60
5	50	Reading Co.	85	4242.75
8	50	Crucible Steel Co.	76	3791.75
	100	U. S. Rubber Co.	57¼	5708.50
	100	American Locomotive Co.	66¼	6608.50
10	100	Philadelphia Electric Co.	27⅛	2699.50
	50	American Hide & Leather Co.	11	541.75

11	50	Crucible Steel Co.	75⅜	3760.50
	100	Crucible Steel Co.	74	7383.50
	100	American Woolen Co.	46½	4633.50
	100	Colorado Fuel & Iron Co.	49	4883.50
	100	American Woolen Co.	47⅜	4721.00
	100	Colorado Fuel & Iron Co.	50	4983.50
	50	Midvale	78½	3917.75
	50	N. Y., New Haven & Hartford Railway Co.	78⅞	3935.50
5	100	Philadelphia Rapid Transit Certificate		1624.00
15		Div. 200 Miami Copper Co.		200.00
		Balance (Due Brokers)		1870.33
				134821.27
		Balance Due Plaintiffs		$1870.33

To the within named Defendant:

Take notice that if the within summons and complaint be served upon you personally and you intend to make defense, then you must file an affidavit of merits within ten days of such service and must file an answer within twenty days of such service; and that in default thereof, judgment will be entered against you.

EDGAR W. HUNT,
Attorney of Plaintiffs.

(Endorsed)

Served the within summons and complaint on the defendant Elias Raphael, personally, at his residence on North Main St. Lambertville, New Jersey, this 29th day of February A. D. 1916, by showing him the original and giving him a true copy of the same and informing him of the contents thereof.

Feb. 29, 1916.

JOHN W. SHARP,
by Sheriff.

CYRENAS SLACK,
Special Deputy.

Affidavit of Merits.

Filed March 9, 1916.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law.

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

ELIAS RAPHAEL, being duly sworn, on his oath says that he is the defendant in the above stated cause.

And that he believes that he has a just and legal defense to said action on the merits of the case.

ELIAS RAPHAEL.

Sworn to and subscribed to before me
this 7th day of March, 1916.

Order.

Filed April 3, 1916.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King,
Plaintiffs,

vs.

ELIAS RAPHAEL,
Defendant.

Action at Law.

This matter being opened to the Court by Levitan & Levitan, of counsel with the defendant, and upon good cause shown, it is on this 23rd day of March, 1916, ORDERED that the defendant have ten days' time within which to file an answer.

JAMES F. MINTURN,
Justice of the New Jersey Supreme Court.

Answer and Counterclaim.

Filed April 7, 1916.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law.

FIRST SEPARATE DEFENSE.

The defendant, Elias Raphael, residing in the City of Lambertville, County of Hunterdon and State of New Jersey, says:

1. He admits paragraph 1, except that he has no knowledge as to whether the plaintiffs are members of the New York and Philadelphia Stock Exchanges.
2. He denies paragraph 2.
3. He denies paragraph 3.
4. As to the statements in the 4th paragraph, defendant has not any knowledge or information thereof sufficient to form a belief.
5. He denies paragraph 5.
6. He denies paragraph 6.
7. He denies paragraph 7.
8. He denies paragraph 8.

9. As to the statements in the 9th paragraph, defendant has not any knowledge or information to form a belief.

10. He denies paragraph 10.

11. As to the statements of the 11th paragraph, defendant has not any knowledge or information thereof sufficient to form a belief as to the correctness of same.

Second Separate Defense.

Defendant avers that the complaint does not contain facts sufficient to constitute a cause of action.

Third Separate Defense.

On or about the 1st day of November, 1915, defendant had on deposit with the plaintiffs certain shares of stock, with the plaintiffs as brokers, and the plaintiffs, on or about that day, sold and disposed of said shares of stock without sufficient notice thereof to the defendant.

Fourth Separate Defense.

On or about the 1st day of November, 1915, defendant's margin had been exhausted, and the plaintiffs continued to buy and sell stocks for the defendant without authority of the defendant, and without any demand for additional margin.

By Way of Counterclaim.

This defendant says:

1. On the 8th day of September, 1915, defendant, Elias Raphael, deposited with the plaintiffs the sum of Three thousand one hundred and twenty-eight and 13/100 dollars ($3,128.13), which was to be applied for the purchase of certain shares of stock.

2. That plaintiffs purchased certain shares of stock for defendant and held them until about the 10th day of November, 1915, when the plaintiffs converted said shares of stock to their own use, and refused to deliver same to the defendant, Elias Raphael, or to refund the money deposited, upon defendant's demand.

3. Defendant, Elias Raphael, counterclaims Five thousand ($5,000) dollars damages.

WALTER F. HAYHURST,
Attorney of Defendant.

(Endorsed)

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King,

Plaintiffs,

vs.

ELIAS RAPHAEL,

Defendant.

Action at Law.

ANSWER.

WALTER F. HAYHURST,
Attorney of Defendant.

Consent to file within Answer this April 7th, 1916.

EDGAR W. HUNT,
Attorney of Plaintiffs.

Notice of Motion to Strike Out Answer and Enter Summary Judgment.

Filed April 27, 1916.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law.

To Walter F. Hayhurst, Esquire,
Attorney for Defendant.

Take notice, that on Thursday, the twenty-seventh day of April, instant (1916), at the hour of ten o'clock in the forenoon or as soon thereafter as the matter can be heard, at the State House in Trenton, New Jersey, before the Honorable Thomas W. Trenchard, Justice of the Supreme Court, I shall move to strike out the answer filed by the defendant in the above-entitled action, and every part thereof, including the defendant's counterclaim, and to enter final judgment in said action, on the ground that the matters set forth in said answer constitute a frivolous and sham defense, and the matters set forth in said counterclaim a frivolous and sham and mere pretended cause of action. Annexed hereto are copies of affidavits which will be read in support of said motion.

At the same time and place I shall further move to strike out that part of said answer which is headed "Second Separate Defense" on the ground that it does not set forth any facts, reasons or grounds of objection upon which it is based.

Dated April 21, 1916.

EDGAR W. HUNT,
Attorney of Plaintiffs.

Affidavit of Nathaniel King.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law.

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

NATHANIEL KING, of full age, being by me duly sworn according to law, on his oath deposes and says:

(1) I reside in Newark, New Jersey, and am a member of the New York Stock Exchange and

have been such member since 1905. I am a general partner in the firm of Eisele & King, stock brokers, the plaintiffs in the above-entitled action. Said firm was established in 1905 and has carried on business as stock brokers continuously ever since. Its principal office is located in the Mutual Benefit Building in Newark and it has branch offices at Paterson and Trenton.

(2) Elias Raphael, the defendant in said action, is indebted to said firm in the sum of One thousand eight hundred seventy and 33/100 dollars, with interest from November 11, 1915, on the account a copy of which is annexed to the complaint in said action.

(3) Said indebtedness is based upon the following considerations and no others:

(a) Commissions due plaintiffs for purchasing and selling stocks for defendant and on his order and for his account at the rate of twelve and a half cents for each share of stock purchased or sold.

(b) Advances of money made by plaintiffs in the purchase of stocks for defendant and on his order and for his account.

(c) Interest on such advances, at a rate not exceeding six per cent. per annum, from the time of the advance down to the time of repayment of the same, but not later in any case than November 10, 1915.

(d) Stamp taxes on the sale and transfer of stocks of the defendant sold by plaintiffs on his order and for his account.

(4) The schedule annexed to the complaint in this action correctly sets forth all of the items en-

tering into the account between plaintiffs and said defendant, showing the dates of all transactions, the stocks purchased or sold, the prices paid or realized for the same and the interest charged. The date shown in each instance is the day of settlement for and delivery or receipt of the shares dealt in, which is the next business day following the day of the transaction on the exchange (Friday and Saturday, however, being counted as one day under the rules and customs of the Exchange). In the price paid for all shares purchased as shown on said account there is calculated the sum of twelve and one-half cents per share for commissions due plaintiffs, and from the price received for all shares sold as shown on said account there is deducted the sum of twelve and one-half cents per share for such commissions, and the further sum of two cents per share for United States Internal Revenue Stamps and two cents per share for New York State Transfer Tax stamps purchased and affixed to the instruments of transfer by plaintiffs.

Said charges for commissions and stamp taxes are made in accordance with the rules of the New York Stock Exchange governing such transactions; and the method above described of showing them in the account by an addition on the one side and a deduction on the other is the universal custom of stock brokers and members of said stock exchange in keeping and stating their accounts with their principals.

(5) Most of the dealings of defendant through plaintiffs' firm were what are known as marginal dealings. "Marginal dealings" are dealings partly upon credit, and that is all the term means. In marginal dealings it is the general custom and

usage of stock brokers to purchase stocks on the order of their clients, upon deposit by the client with them of a small percentage of the purchase price, variable in amount according to the price and character of the stocks dealt in, and commonly called a margin; whereupon the broker pays the balance of the purchase price and receives the certificates for the stock bought and holds the same as pledgee of the buyer and as collateral security for the balance due from him, with the right of sale at the broker's option in case the margin shall not be maintained at a point sufficient to protect the broker from loss on his advances of purchase money and commissions and other lawful charges, and the right of hypothecation as collateral for moneys borrowed by the broker. Such was the course followed in the marginal dealings of the defendant through plaintiffs as his brokers.

All of the purchases and sales of stocks shown in said schedule annexed to said complaint are actual, *bona fide* purchases and sales, accompanied by receipt or delivery of the certificates representing the shares, and settlement for the price of the same, and made upon the order of the defendant given through the Trenton office of plaintiffs' firm, and for defendant's account. Every purchase or sale was executed on the floor of the New York or Philadelphia Stock Exchanges and in accordance with its rules, customs and usages. In the case of every purchase of stocks as shown in said schedule, the plaintiffs caused the stock to be purchased promptly, reported the transaction to the defendant, made settlement for the stock purchased with the broker acting for the seller, required and received delivery of certificates for the stock to plaintiffs or their duly authorized agents, on the

day of the purchase or the next business day following, and at all times thereafter and until the subsequent sale of the stock for the account of defendant, or delivery of it to him on his order, had such certificates in their hands or under their control ready for delivery to the defendant on his paying or tendering the sum due thereon, meantime holding the certificates as pledgees to secure the payment of such sums. In two instances the defendant called for delivery of stocks purchased by him and they were delivered, as follows: fifty shares P. R. R. Co., Sept. 23, 1915, delivered to defendant; 100 shares Philadelphia Rapid Transit Co., November 5, 1915, delivered to a firm of stock brokers in Philadelphia on the order of defendant. In all other cases the stocks purchased on the order of the defendant were subsequently sold on the Exchange on his order and for his account, and the certificates representing the shares were delivered by plaintiffs to the broker acting for the purchaser, and the net price realized on the sale credited to the defendant's account.

(6) There was no contract, agreement, or understanding, express or implied, between plaintiffs and defendant, releasing, discharging or in any manner modifying the legal obligations of defendant as purchaser or seller of the shares dealt in by him through plaintiffs as his brokers, or the legal right of plaintiffs arising out of their employment as brokers and agents for the defendant in executing his orders. The relationship between the plaintiffs and the defendant was solely and strictly that of broker and client, and was subject to the rules and customs of the New York Stock Exchange and defendant was so notified by a printed notice ap-

pended to the several statements sent him by plaintiffs showing the various transactions on his account as they were executed. Plaintiffs do not engage and never have engaged in fictitious dealings, or dealings in differences, or fluctuations in quotations, but carry on and have always carried on a strictly legitimate brokerage business, in accordance with the rules of the New York Stock Exchange, by which rules all such illegitimate transactions as are above described are strictly forbidden under penalty of suspension from membership.

(7) The closing out of the account of the defendant on November 10, 1915, by the sale of the stocks then being carried by the plaintiffs for him was occasioned by the refusal of the defendant to comply with the demand of plaintiffs that he take and pay for his stocks or deposit sufficient margin to protect his account, his margin having been impaired to such an extent that it was no longer sufficient to protect plaintiffs from loss, and the rules, customs and usages of the Exchange and the contract between plaintiffs and defendant, permitting the sale of stocks carried on margin when necessary for the broker's protection, and the amount sued for in this action is the balance remaining due to plaintiffs after crediting said defendant with the amount realized from the sale of his stocks in the closing out of his account.

(8) I verily believe that there is no defense to this action.

NATHANIEL KING.

Sworn to and subscribed before me,
this 20th day of April, A. D. 1916.

WILLIAM G. LEONARD,
Notary Public for New Jersey.

(Seal)

Affidavit of Wilford M. Goodell.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law.

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

WILFORD M. GOODELL, of full age, being by me duly sworn according to law, on his oath deposes and says:

(1) I live in East Orange, New Jersey, and am employed by the firm of Eisele & King, plaintiffs in the above-entitled action, as cashier and head bookkeeper, and have been so employed for over ten years. I have charge of their books of account and of making settlements with others brokers for securities bought and sold by them for persons employing them as brokers.

(2) I have personal knowledge concerning the account of said plaintiffs against said defendant, Elias Raphael, the entries in plaintiffs' books of account relating to said account having been made by me or by assistants, under my personal supervision. The account of plaintiffs against defendant as annexed to the complaint in the above-entitled

action is a true copy, from the books of original entry of said plaintiffs, of their account against said defendant.

(3) The entries in plaintiffs' books showing the transactions in said defendant's account, were made at or about the time of the respective transactions and set forth truly and correctly all purchases and sales of stocks made by the plaintiffs on the order of the defendant and for his account.

(4) To my personal knowledge each lot of stock which appears in said account as having been purchased by the plaintiffs on the order of the defendant was in fact actually purchased by the plaintiffs and paid and settled for by them with the broker representing the seller, and said plaintiffs, at all times during the carrying of said account with the defendant, had in their possession or under their control certificates for the shares of stock purchased for the defendant and on his order, ready for delivery upon payment or tender by the defendant of the balance due thereon. In every case of a sale of stocks by the plaintiffs on the order of the defendant the certificates for the same were delivered by the plaintiffs or their agent to the broker representing the purchaser in accordance with the terms of sale, upon the business day next following the making of the sale, and the purchase price received and credited to defendant's account. The purchases and sales in said account were made on orders given by defendant at the Trenton office of plaintiffs and by said Trenton office duly reported to the main office at Newark each day.

(5) The sum sued for on said account is the balance due to plaintiffs from defendant for advances

made by plaintiffs in the purchase of stocks for the defendant on his order; interest on such balances at not exceeding the legal rate of six per cent.; commissions at the rate of twelve and a half cents per share on the stocks purchased and sold; and stamp taxes on shares sold for the defendant at the rate of two cents per share for the New York Stock Transfer Tax and two cents per share for the Federal Sales or Transfer Tax. Said commissions are charged at the standard rate fixed by the rules of the New York Stock Exchange and said stamp taxes are charged at the rate imposed by law, and under the rules of said exchange said stamp taxes are required to be paid by the seller. The commissions and stamp taxes (at the rate aforesaid) are shown in said account in the manner following, namely: In case of a purchase the commission is added in and appears in the gross sum shown as paid for the stock; in case of a sale the commissions and stamp taxes are deducted and the amount shown as received for the stock is the gross sales price less such deduction. The actual price paid or received per share (without such addition or deduction) is shown in another column in the account. I have had experience in the keeping of brokers' accounts for many years and know that this is the general custom and usage of all New York Exchange brokers.

(6) I personally supervise the sending of monthly statements to the persons dealing through said plaintiffs' firm. To my personal knowledge there was mailed to said defendant on or about the first business day of each month during the time he was doing business through the plaintiffs, a statement showing all of his purchases and sales during the

previous month and showing the amount of interest charged against him by plaintiffs and the balance standing to his account, and the shares of stock then being carried on margin by the plaintiffs for him. Said statements were mailed in sealed envelopes addressed to the defendant at Lambertville, New Jersey, with postage thereon prepaid, and there was printed on the envelopes a card directing their return to plaintiffs if undelivered. None of the statements ever came back to plaintiffs and no complaint was ever made or exception taken by defendant to any item appearing in said statements.

(7) I verily believe that there is no defense to this action.

WILFORD M. GOODELL.

Sworn to and subscribed before me,
this 20th day of April, A. D. 1916.

WILLIAM G. LEONARD,
Notary Public for New Jersey.
(Seal)

Affidavit of Bentley H. Pope.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law.

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

BENTLEY H. POPE, of full age, being by me duly sworn according to law, on his oath deposes and says:

(1) I live in Trenton, New Jersey, and am manager of the Trenton office of Eisele & King, stock brokers, the plaintiffs in the above-entitled action, and have been such manager for over one year. I have had ten years' experience in the stock brokerage business. I know Elias Raphael, the defendant in this action, and have known him since August or early in September of 1915.

(2) Said defendant's dealings with the plaintiff firm were all carried on through its said Trenton office of which I am manager. I keep in said Trenton office a record of all orders for the purchase and sale of stocks, given by persons dealing through

said office, and upon receiving telegraphic advice of the execution of any order, the price per share at which the purchase or sale was made is set down in this record.

(3) I have examined the schedule annexed to the complaint in this action and compared the same with the said record, and find that the said schedule correctly sets forth all of the purchases and sales made by the plaintiffs for the account of the defendant, and the prices paid or received for the stock in each instance.

(4) Every purchase or sale of securities appearing in said account was made on the order of the defendant given through said Trenton office, and by said Trenton office transmitted by telegraph for execution on the floor of the New York or Philadelphia Stock Exchange and reported back by telegraph to said Trenton office for the information of its manager and the customer promptly after execution of the order. Every such order was taken by me in good faith and in the belief that defendant intended an actual *bona fide* purchase or sale, and such purchases and sales were duly made in accordance with the orders given by the defendant.

(5) Every purchase or sale of securities for the account of the defendant was reported to him on a printed form, properly filled up to correctly state the essential facts, on the day the purchase or sale was made. Blank copies of such forms are annexed hereto and marked respectively Exhibits A and B. There is also annexed hereto a sales form of an earlier type, marked Exhibit C. And in a very few instances (not exceeding five or six) that

form, or a like form for purchases, was used in reporting to defendant. The defendant was personally present at the Trenton office of the plaintiffs on most of the days that any transactions were executed on his account. His sons Nathaniel and Herman Raphael were also frequently there. When the defendant or his sons were present at the close of the market, these written reports were handed to him or them personally; when none of them was present, the reports were mailed by me on the day of the transactions they covered to the defendant at Lambertville, New Jersey, in a sealed envelope with first-class postage prepaid and bearing a printed card directing their return to me if undelivered. None ever was returned undelivered and I believe and charge that defendant received such a report for every transaction shown in his account. During the pendency of the account I saw the defendant frequently; in fact he was at my office habitually nearly every day while his account was running. Since the closing out of his account I have seen him several times in reference to payment of the balance he owes the plaintiffs. He has never, on any occasion, informed me that he had failed to receive the report for any of his transactions, and he has never repudiated, or objected to, or in any manner complained of or taken exception to any item shown on any of these reports.

(6) Before the closing out of the account of defendant by the sale of the stocks plaintiffs were carrying for him on margin I repeatedly informed him of the insufficiency of his margin (arising from the declining condition of the market and shrinkage in current prices) and called on him to put up more margin or to take up some of his stocks or sell them.

These calls extended over several days previous to the selling out of the account on November 10, 1915. He invariably replied that I need not worry; that he had lots of money and would take care of his account. These demands included personal interviews at my office, telephone calls by me to the Raphael store at Lambertville, and two trips by me to Lambertville in the evening, on one of which I found the defendant, but he would not talk about the account and on the second of which I could not find him, but directed his son Nathaniel, who had full knowledge of his account, to tell him of my demand for margin. Finally, on the afternoon of the day preceding the sale he told me at my office that I could sell him out when I was not satisfied with his account. The sale of his securities the next day was made on the open Exchange, at current prices, after telephonic notice of intention to sell given him that morning previous to the opening of the Exchange, and I believe the message was promptly reported to him. The stocks were all sold in the forenoon. Had they been carried until afternoon they would have brought several hundred dollars less, as the market declined further after these sales.

(7) On Saturday, November 13, 1915, I went to Lambertville in company with Mr. Lentz, manager of the Newark office of Eisele & King, and the defendant then told us that he would pay the balance due on the account in full, but that owing to his income being very small he would have to do it in small periodical payments, and mentioned the sum of fifty dollars per month as a payment he could possibly make.

(8) There was never any contract, agreement or understanding, express or implied, between the defendant and me as manager for the plaintiffs or as an individual, that defendant should not be required to carry out the purchases and sales which he engaged in through plaintiffs as brokers, or that there should be a settlement of differences merely between them, or dealings in fluctuations of quotations and not actual, *bona fide* dealings in securities; or that the transactions should be anything other than straight, legitimate purchases and sales. I am not authorized to make any such contract on behalf of the plaintiffs and never have made any such contract or agreement, or had any such understanding, express or implied, with any customer, either on my own behalf or that of the firm. I told the defendant at the beginning of his dealings that our business was carried on strictly in accordance with the rules, customs and usages of the New York Stock Exchange and explained to him the course and method of dealing in securities and he understood it thoroughly. Twice in the course of his dealings he took up the certificates for stocks he had bought, once fifty shares of Pennsylvania Railroad Co., certificate for which was delivered to him, and again one hundred shares of Philadelphia Rapid Transit Co., certificate for which was delivered to a Philadelphia broker on his order. He represented himself to me as a man of means and more than once when I told him he was carrying too many stocks he said he had "lots of money" and would take care of them. I inquired concerning his credit of sources which I considered reliable and trustworthy, and as a result of my inquiries and his own statements, considered him worth the credit extended to him. Every transaction appear-

ing in his account is a *bona fide* purchase or sale on his order and for his account and risk; the closing out sales having been made with his entire acquiescence and for the protection of the account against further loss.

(9) I verily believe there is no defense to this action.

BENTLEY H. POPE.

Sworn to and subscribed before me,
this 20th day of April, 1916.

CHAS. B. KENNEDY,
Atty. at Law,
N. J.

Exhibit A.

MEMBERS OF
Philadelphia Stock Exchange
New York Stock Exchange

Trenton Office
First National Bank Bld'g
'Phone 247

EISELE & KING
Mutual Benefit Building
Broad and Clinton Streets

Newark, N. J.,.....

M.....

We have this day BOUGHT for your account and risk:

SHARES, Etc.	DESCRIPTION	BROKER	TIME	PRICE	Commission	TAX	AMOUNT

IT IS UNDERSTOOD AND AGREED between you and ourselves that all stocks and securities carried in your account or deposited to secure the same, now or in the future, may be carried in our general loans and may be pledged or loaned by us either separately or in common with other stocks or securities, and either for the sum due thereon, or for a greater sum, all without notice to you, and may be sold or bought at public or private sale or at the New York Stock Exchange without notice or demand for margins when such sale or purchase is deemed necessary by us for our protection, and we may settle contracts in accordance with the rules and customs of the New York Stock Exchange, and that all regular statements of account current as rendered you from time to time are acknowledged by you to be correct unless written notice is given us within fifteen days after receipt of any exception thereto.

Respectfully Yours,

EISELE & KING
Per.....

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40 30 20 10

Exhibit B.

MEMBERS OF
Philadelphia Stock Exchange
New York Stock Exchange

Trenton Office
First National Bank Bld'g
'Phone 247

EISELE & KING
Mutual Benefit Building
Broad and Clinton Streets

Newark, N. J.,.....

M.....

We have this day SOLD for your account and risk:

SHARES, Etc.	DESCRIPTION	BROKER	TIME	PRICE	Commission	TAX	AMOUNT

40

IT IS UNDERSTOOD AND AGREED between you and ourselves that all stocks and securities carried in your account or deposited to secure the same, now or in the future, may be carried in our general loans and may be pledged or loaned by us either separately or in common with other stocks or securities, and either for the sum due thereon, or for a greater sum, all without notice to you, and may be sold or bought at public or private sale or at the New York Stock Exchange without notice or demand for margins when such sale or purchase is deemed necessary by us for our protection, and we may settle contracts in accordance with the rules and customs of the New York Stock Exchange, and that all regular statements of account current as rendered you from time to time are acknowledged by you to be correct unless written notice is given us within fifteen days after receipt of any exception thereto.

Respectfully Yours,

EISELE & KING
Per.....

Exhibit C.

EISELE & KING
Mutual Benefit Building
Broad and Clinton Streets

Newark, N. J.,.....

M.....

We have this day SOLD for your account and risk:

Quantity	Description	Price	Name

It is agreed between broker and customer:

1. That all transactions are subject to the rules and customs of the New York Stock Exchange and its Clearing House.
2. That all securities from time to time carried in customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the cutsomer.

Respectfully Yours,

EISELE & KING
Per.....

Affidavit of Carl W. Lentz.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law.

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

CARL W. LENTZ, of full age, being by me duly sworn according to law, on his oath deposes and says:

(1) I live in Orange, New Jersey, and I am employed by the firm of Eisele & King, plaintiffs in the above-entitled action, as Manager of their Newark Office.

(2) On November 13, 1915, I went to Lambertville, New Jersey, in company with Bentley H. Pope, Manager of the Trenton Office of Eisele & King, and there Mr. Pope and I had an interview with Elias Raphael, the defendant in said action, in reference to payment of the balance due from him to the plaintiffs on the account on which this action is founded.

(3) In said interview said defendant admitted that the balance sued for, being the sum of $1,-

870.33, was justly due and owing from him to the plaintiffs. He did not dispute the account nor make any claim that it was subject to any defense whatever. In reference to paying same, his only excuse for non-payment was that he was not able to pay, and he did express his willingness to pay the account, provided some terms could be agreed upon, but the sum which he named as the largest monthly payment that he could make was so ridiculously small that we could not entertain such a proposal. I don't remember the exact sum which he offered to pay monthly, but it was very small.

Sworn to and subscribed before me,
this day of April, A. D. 1916.

Affidavit on Motion to Strike Out Answer to Affidavit of Defendant.

Filed May 23, 1916.

NEW JERSEY SUPREME COURT,

COUNTY OF HUNTERDON.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law

STATE OF NEW JERSEY, SS.:

ELIAS RAPHAEL, being duly sworn according to law, on his oath saith he is a native of Russian Poland; understands the English language, but does not read and write fluently. He never read the notice in fine type at the bottom of the notices attached to the affidavit of Bentley H. Pope, nor had his attention called to the contents thereof until after the account referred to in this action had been closed. His acts in connection with the account were almost entirely guided by the information and advice of the said Bentley H. Pope, who told deponent that if he would deposit money with him he would buy and sell stocks and make more money for deponent, and deponent asked him if Four Hundred Dollars would be enough, and he said it would be plenty, which amount deponent deposited.

The second transaction deponent had he bought Fifty Shares of Pennsylvania Railroad for investment, and when the certificate came the said Pope told deponent that I should leave the certificate with him and he would make more than five per cent. for me.

On or about October fourth deponent ordered One Hundred Shares of Philadelphia Rapid Transit and told the said Pope I wanted a certificate. He told me I could not have it unless I paid the full cost, although I had then with him, as I believe, more than Four Thousand Dollars, and the certificate was never delivered to me.

On or about October twenty-ninth deponent ordered One Hundred Shares of the Miami Copper, and asked for a certificate for it, and deponent believed and still does believe that he had money and securities in the hands of the said Pope for the plaintiffs of ample value to pay for the same, but I was told I could not have the certificate unless I paid for it in full; that I should keep my other moneys to make more money.

Deponent further says that the items in the said account—September twenty-fifth, Twenty-five Shares of Crucible Steel; September twenty-sixth, Fifty Shares of Crucible Steel, and October twenty-seventh, Fifty Shares of Midvale—were not ordered by me, and when the notice for the last item came I was away from home, and I did not object when I found out, because I thought the said Pope was doing the right thing by me.

On or about November eighth the said Pope told deponent that he thought I was carrying too much stock, and I told him to sell One Hundred Shares of Philadelphia Electric, and he said that would be satisfactory. And I told him at the same time

to sell Fifty Shares American Hide & Leather, but I do not remember, and I do remember that after these sales were ordered the said Pope said to me American Locomotive is a good buy, and that he would buy One Hundred Shares with me, and the same was bought. The same day it had dropped in price, and the said Pope told deponent that he did not want it; thereupon deponent told Pope to sell it, and I left the office and never had anything more to do with the plaintiffs or the said Pope as their agent.

Deponent further saith that the other subsequent sales made as appears by said account for deponent were made without my order and without my knowledge and consent.

And deponent further saith that he never agreed or promised to make good or to pay the balance as it appears by said account or any part of it, and that on or about November thirteenth, on Saturday afternoon, when the said Pope and a person whom deponent supposes to be Mr. Lentz, who has made an affidavit in this case, were in Lambertville, the conversation was with deponent's sons, and had relation to their account or accounts, and to the best of the recollection and belief of deponent my account was not mentioned, except that I asked the said Pope, "What did you sold me out for?" And deponent did not at that time or at any other time admit that he owed the plaintiffs One Thousand Eight Hundred and Seventy and 30/100 Dollars, or any other sum, and did not promise to pay Fifty Dollars monthly or any other sum at any other time.

ELIAS RAPHAEL.

Sworn and subscribed before me
this first day of May, 1916.

WM. LYMAN, J. P.

Replying Affidavit of Bentley H. Pope.

Filed May 23, 1916.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law

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

BENTLEY H. POPE, being by me duly sworn according to law, on his oath deposes and says:

(1) I am the manager of the Trenton office of the plaintiffs in the above-entitled action and have previously made an affidavit herein.

(2) I have read the affidavit of Elias Raphael in answer to the affidavits annexed to plaintiffs' motion for summary judgment. In reply to that paragraph thereof which states that certain shares of Crucible Steel and Midvale Stock were not ordered by said Elias Raphael, I desire, in fairness to this court, to make the following statement:

(3) The defendant and three of his sons were customers of the plaintiffs during the fall of 1915. Each of them had an account, and two of the sons,

who were partners in business, had also a partnership account. The unit for stock transactions on the New York Exchange is 100 shares, and orders for 100 shares or multiples thereof can usually be executed more quickly and at better prices than orders for less than 100 shares, which are called "fractional lots." It was the general custom and habit of the defendant and his sons, when they each desired to buy a certain kind of stock, but did not want to buy as much as 100 shares each, for one of them to order 100 shares, which, when bought, was by the mutual assent and direction of all of them charged to the accounts of two or more of them in such divisions or parcels as they might direct. In such cases each of them whose account was charged was on the day of the purchase notified in the usual manner of the purchase for his account of the number of shares which they had jointly directed should be charged to his account. These purchases for division among their accounts were always preceded by conference and consultation among said defendant and his sons or those of them whose accounts were to be affected, and neither the defendant nor any of his said sons ever objected to any item of such character appearing in his account. As to the several transactions of this character mentioned by the defendant in his affidavit, he is mistaken in saying that certain of them occurred on September 25 and September 26. There were no such transactions on those dates. There were transactions such as he describes on October 23 and October 25 and October 26, which appear in the schedule annexed to the complaint under dates of October 25, 26 and 27.

(4) On October 23 there was purchased 100 shares of Crucible Steel, which, by direction of the defendant and his sons, was apportioned as follows: 50 shares to account of Raphael Brothers, 25 shares to account of Herman Raphael, 25 shares to account of defendant. There was purchased on October 25 100 shares of Crucible Steel, which, by the order of defendant and his son Nathaniel, was divided equally between their accounts, 50 shares to each. There was purchased on October 26 100 shares of Midvale Steel, which, by order of the defendant and his son Nathaniel, was divided between their accounts, 50 shares to each. I remember particularly in the case of the Midvale a conversation between defendant and his son Nathaniel in my office and in my presence which preceded the purchase, they having before them and reading and discussing a pamphlet issued by some brokerage house which advised the purchase of that stock. I remember distinctly that in this instance the order was given by Nathaniel Raphael in the presence of his father, and when the purchase of the stock was reported back to my office said Nathaniel Raphael, still in the presence and hearing of his father, the defendant, and after consultation with him, directed that fifty shares should be charged to the account of each of them. Defendant made no objection.

Sworn to and subscribed before me,
this day of May, A. D. 1916.

Opinion.

Filed

(Copy)

SUPREME COURT OF NEW JERSEY

May 23, 1916

Edgar W. Hunt, Esq.,
Lambertville, N. J.
Walter F. Hayhurst, Esq.,
Lambertville, N. J.

Gentlemen:

In re *Eisele* vs. *Raphael.*

No doubt plaintiffs affidavits would, in the absence of counter affidavit, entitle them to summary judgment.

The question is does defendant's affidavit raise any question of essential fact which, under our system, must be submitted to a jury for determination?

I feel constrained to conclude that it does raise some such question.

The defendant denies any subsequent promise to pay the balance; so judgment cannot go upon that theory.

We pass then to the purchases and sales themselves.

It may well be that the purchases are conclusively shown to have been either ordered by defendant or ratified by him.

Now looking at the sales we see that the complaint avers that on November 9th the plaintiffs notified defendant that his stocks would be sold at the opening of the exchange the next day unless he took and paid for them or increased his deposit

(amount required not being stated) and that defendant told plaintiffs to sell.

Plaintiffs affidavits respecting demand for additional deposit, is very indefinite as to time and amount; and I incline to think hardly sufficient as a basis for summary judgment. The affidavit further states that defendant told plaintiff on the afternoon of the day preceding the sale, to sell him out when not satisfied with his account, and that the sale was made "after telephonic notice of intention to sell given him that morning previous to the opening of the exchange, and I believe the message was promptly reported to him."

Now the defendant denies that the sale was made by his order and consent; and so judgment cannot go upon that ground.

Turning now to the notice, it is perceived that the affidavit seems to be on information and belief only, and that is of course insufficient for present purposes.

Whether the defendant in his affidavit intended to deny notice is uncertain;—he says he had no knowledge. But the fact that his affidavit is ambiguous does not help the plaintiffs. The burden of showing want of any essential question to be submitted to the jury is on them.

No doubt, in the absence of agreement to the contrary, demand and reasonable notice of sale were essential.

Whether the parties are to be deemed to have dispensed with them by reason of the printed agreement upon some (not all) of the purchase slips, was at most a question for the jury. The proof is uncertain as to which contained such agreement. It is also uncertain as to whether those that contained it reached the defendant, or remained with

other members of the family (not shown to have represented the defendant) to whom some were given.

The foregoing reasons are sufficient to show that summary judgment must be denied. I have not looked further.

I have filed the affidavits of both sides and the notice of motion with the clerk. I send to Mr. Hunt his office copies which he left with me.

Yours truly,

THOMAS W. TRENCHARD.

Affidavit Supporting Rule to Reopen.

Filed August 27, 1916.

NEW JERSEY SUPREME COURT.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law Affidavit.

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

EDGAR W. HUNT, being by me duly sworn according to law, on his oath deposes and says:

(1) I am the attorney of the plaintiffs in the above-entitled action.

(2) In May last a motion on behalf of said plaintiffs to strike out the answer and counterclaim in said action and enter summary judgment was denied by Mr. Justice Trenchard, of the Supreme Court, on grounds set forth in a letter addressed by him to the attorneys for both parties, the same being, in brief, that a jury question was raised by defendant's affidavit in opposition to the motion as to whether defendant was entitled to have and

did in fact have notice of the sale of certain stocks then being carried by plaintiffs for him on margin.

(3) Said defendant, when he took said affidavit, had in his possession (or that of his attorney of record) purchase notifications from the plaintiffs in relation to said stocks, which set forth plainly that plaintiffs should have the right to sell said stocks without notice when deemed necessary by them for the protection of the account. A copy of the form of such notice is annexed hereto and marked Exhibit A.

(4) This deponent, not supposing that the fact of actual notice would be denied, did not set forth in the affidavits read in support of said motion the facts stated in the preceding paragraph hereof. Plaintiffs are able and ready to prove said facts in support of a renewal of said motion if leave to renew the same shall be given.

EDGAR W. HUNT.

Sworn to and subscribed before me this
sixteenth day of August, A. D. 1916.

L. H. SERGEANT,
Master in Chancery
of New Jersey.

Exhibit A.

(Affidavit of Edgar W. Hunt.)

MEMBERS OF
Philadelphia Stock Exchange
New York Stock Exchange

Trenton Office
First National Bank Bld'g
'Phone 247

EISELE & KING
Mutual Benefit Building
Broad and Clinton Streets

Newark, N. J.,.....

M.....

We have this day BOUGHT for your account and risk:

SHARES, Etc.	DESCRIPTION	BROKER	TIME	PRICE	Commission	TAX	AMOUNT

IT IS UNDERSTOOD AND AGREED between you and ourselves that all stocks and securities carried in your account or deposited to secure the same, now or in the future, may be carried in our general loans and may be pledged or loaned by us either separately or in common with other stocks or securities, and either for the sum due thereon, or for a greater sum, all without notice to you, and may be sold or bought at public or private sale or at the New York Stock Exchange without notice or demand for margins when such sale or purchase is deemed necessary by us for our protection, and we may settle contracts in accordance with the rules and customs of the New York Stock Exchange, and that all regular statements of account current as rendered you from time to time are acknowledged by you to be correct unless written notice is given us within fifteen days after receipt of any exception thereto.

Respectfully Yours,

EISELE & KING

Per.....

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Order Permitting Renewal of Motion to Strike Out, etc.

(Copy)

Filed August 22, 1916.

NEW JERSEY SUPREME COURT.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law

Application in this behalf being made by Edgar W. Hunt, attorney for the plaintiffs in the above-entitled action, and his affidavit being read,

It is, on this eighteenth day of August, A. D. 1916, on motion of the said Edgar W. Hunt, ORDERED, that said plaintiffs have leave to renew their motion heretofore made to strike out the answer and counterclaim in said action and to enter summary judgment therein, and to that end to submit additional affidavits bearing upon the question of the right of plaintiffs to sell defendant's stocks without previous demand or notice of sale, to which affidavits defendant shall have the right to reply.

AND IT IS FURTHER ORDERED, that said motion shall be heard before the Honorable Thomas W. Trenchard, one of the Justices of the Supreme Court, at the State House, in Trenton, on the seventh day of September next to ensue, at the hour of ten o'clock in the forenoon, or as soon thereafter

as the matter can be heard, and that the plaintiffs shall serve a copy of this rule and of their additional affidavits on the defendant or his attorney of record at least four full days previous to the argument of said motion, and said defendant shall serve a copy of his replying affidavits on the plaintiffs or their attorney at least one full day previous to said argument.

Let this rule be entered,

THOMAS W. TRENCHARD,
Justice of the Supreme Court.

Entered August 22nd, 1916,
on motion of

EDGAR W. HUNT,
Attorney for Plaintiffs.

Notice of Motion and Notice to Produce.

Filed October 2, 1916.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King,
Plaintiffs,

VS.

ELIAS RAPHAEL,
Defendant.

Action at Law

To Walter F. Hayhurst, Esquire, Attorney for Defendant:

PLEASE TAKE NOTICE that on the seventh day of September next (1916), at the hour of ten o'clock in the forenoon, or as soon thereafter as the matter can be heard, before the Honorable Thomas W. Trenchard, Justice of the Supreme Court, at the State House, in Trenton, I shall renew the motion to strike out in the above-entitled action, as permitted by a rule entered in the Supreme Court on August 22, 1916, and a copy of which was duly served upon you. Annexed hereto are copies of the affidavits which will be read on the part of the plaintiffs.

Please take notice that you are required to produce upon the argument of said matter at the time and place aforesaid all reports or notification slips in the possession of the defendant for the purchase and sale of stocks bought and sold by

the plaintiffs for the account of the defendant, and all monthly statements of account rendered by the plaintiffs to the defendant, and also a certain complete statement of account showing the names of brokers for the opposite party to the various transactions heretofore rendered by the plaintiffs to the defendant.

Dated, August 31, 1916.

Yours respectfully,

EDGAR W. HUNT,
Attorney for Plaintiffs.

Supplementary Affidavit on Renewal of Motion to Strike Out.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law

STATE OF NEW JERSEY, }
COUNTY OF HUNTERDON, } SS.:

BENTLEY H. POPE, of full age, being duly sworn according to law, on his oath deposes and says:

(1) I am manager of the Trenton office of the plaintiffs in the above-entitled action, and this affidavit is supplemental and additional to affidavits formerly made by me in this action.

(2) At the close of the New York Stock Exchange on November 9, 1915, plaintiffs' firm was carrying for said defendant on margin 650 shares of stock previously purchased by plaintiffs on the order of defendant and for his account, the amounts, names, dates of purchase and purchase prices thereof being as follows:

25 shares Crucible Steel Co., bought Oct. 25, 1915, @ $92½ per share. (Being the balance remaining of 50 shares bought that date, 25 of which

were sold subsequently, but previous to said November 9.)

100 shares Colorado Fuel & Iron Co., bought Oct. 26, 1915, @ $59 per share.

50 shares Midvale Steel Co., bought Oct. 26, 1915, @ $94¼ per share.

25 shares Crucible Steel Co., bought Oct. 26, 1915, @ $89⅛ per share.

100 shares Colorado Fuel & Iron Co., bought Oct. 28, 1915, @ $57½ per share.

50 shares N. Y., N. H. & Hartford Rwy. Co., bought Oct. 29, 1915, @ $83⅛ per share.

50 shares Crucible Steel Co., bought Oct. 29, 1915, @ $85½ per share.

100 shares American Woolen Co., bought Nov. 1, 1915, @ $54 per share.

100 shares American Woolen Co., bought Nov. 3, 1915, @ $53 per share.

50 shares Crucible Steel Co., bought Nov. 3, 1915, @ $75 per share.

(Total, 650 shares.)

Said purchases of 100 American Woolen Co. and 50 Crucible Steel Co. on Nov. 3 were the last purchases made by plaintiffs for said defendant, except 100 shares of American Locomotive Co., bought on Nov. 5, at $66¾ per share and sold on November 6 at $66¼ per share. Said defendant had been notified by me of the purchase of each of the lots of stock above named on the day of the respective purchases by a printed notification form, having the blanks filled in, to show the stocks bought and the respective purchase prices of the same, and containing an agreement giving plaintiffs the right to sell said stocks without notice or demand for margins when deemed necessary by them for their protection, a copy of which notification

form is annexed hereto, and marked Exhibit A, and made a part hereof. I am informed and believe, and charge, that such notifications are now in the possession of defendant's attorney. The stocks set forth in the above list constitute all of the stocks that were sold by the plaintiffs in the closing-out of the defendant's account, as set forth herein and in an affidavit heretofore taken by me in this action.

(3) The quoted values of said stocks at the close of the New York Stock Exchange on November 9, 1915, were as follows:

Crucible Steel Co., $73½ per share.
American Woolen Co., $47 per share.
Colorado Fuel & Iron Co., $49½ per share.
Midvale Steel Co., $78¼ per share.
N. Y., N. H. & Hartford Rwy. Co., $79½ per share.

The said stocks above mentioned, being carried by the plaintiffs for the defendant at the close of the stock exchange on November 9, 1915, and amounting in all to 650 shares, were then worth approximately $5,575.00 less than the money expended by plaintiffs in purchasing them for the defendant. Defendant had a deposit of money with plaintiffs sufficient to cover a part but not all of this deficiency. The market values of nearly all listed stocks, including those named above, had been declining for several days previously, and appeared likely to continue to decline. The protection of the plaintiffs from the possibility of further losses arising from further declines in market prices required that they should not carry said stocks any longer, but must sell the same unless defendant paid for them and took them up or gave plaintiffs an additional deposit of margin.

(4) Said defendant did not pay for or take up said stocks, or any of them, or deposit any additional margin, and the said 650 shares of stocks above mentioned were sold by the plaintiffs for the account of the defendant shortly after the opening of the New York Stock Exchange at ten o'clock in the forenoon of the next day, viz., November 10, 1915, on the floor of the exchange, at the current prices then prevailing and by the usual and customary method of sale, being the same method followed in all the previous dealings in defendant's account. The order for sale was given by me as plaintiffs' agent and manager. The sale of said stocks was reported to the defendant by me by telephone as soon as made, the telephone call being made to No. 174 Lambertville, which is the number assigned in the telephone book to Raphael Brothers Department Store and to the residence of Elias Raphael, and the message given to whoever answered the telephone, and on the same day said telephonic notice of sale was confirmed by a notification slip sent by me by mail to said defendant at Lambertville, New Jersey, such slip being the same in form as Exhibit A attached hereto, with the substitution of the word sold for the word bought in the sentence immediately following the blank for the name of the addressee. The Defendant's account was credited with the net amount received from the sale of said stocks, as appears by the above-mentioned schedule annexed to the complaint in this action and hereby made part hereof.

BENTLEY H. POPE.

Sworn to and subscribed before me,
this 31st day of August, A. D. 1916.

HORACE G. PRALL,
Attorney-at-Law,
Supreme Court of N. J.

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Exhibit A.

(Affidavit of Bentley H. Pope.)

MEMBERS OF
Philadelphia Stock Exchange
New York Stock Exchange

Trenton Office
First National Bank Bld'g
'Phone 247

EISELE & KING
Mutual Benefit Building
Broad and Clinton Streets

Newark, N. J.,.....

M.....

We have this day BOUGHT for your account and risk:

SHARES, Etc.	DESCRIPTION	BROKER	TIME	PRICE	Commission	TAX	AMOUNT

IT IS UNDERSTOOD AND AGREED between you and ourselves that all stocks and securities carried in your account or deposited to secure the same, now or in the future, may be carried in our general loans and may be pledged or loaned by us either separately or in common with other stocks or securities, and either for the sum due thereon, or for a greater sum, all without notice to you, and may be sold or bought at public or private sale or at the New York Stock Exchange without notice or demand for margins when such sale or purchase is deemed necessary by us for our protection, and we may settle contracts in accordance with the rules and customs of the New York Stock Exchange, and that all regular statements of account current as rendered you from time to time are acknowledged by you to be correct unless written notice is given us within fifteen days after receipt of any exception thereto.

Respectfully Yours,
EISELE & KING
Per.....

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Supplementary Affidavit on Renewal of Motion to Strike Out.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law

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

EDGAR W. HUNT, of full age, being duly sworn according to law, on his oath deposes and says:

(1) I am the attorney of the plaintiffs in the above-entitled action. In April or May, 1916, and again on Aug. 28, 1916, I called at the office of Walter F. Hayhurst, Esquire, attorney for the defendant, and asked leave to examine and was permitted to examine the reports or daily notification slips of purchases and sales made by the plaintiffs in this action for the defendant, and being in the possession of defendant's said attorney.

(2) Said Walter F. Hayhurst showed me certain papers which he said were such reports or notifications. I found that said papers embraced reports of sale of every lot of stock which appears in the schedule annexed to the complaint in this cause to

have been sold by the plaintiffs for the account of the defendant, and no other reports of sales. I found that said papers embraced reports of purchase for every lot of stock which appears in said schedule annexed to said complaint as having been purchased by the plaintiffs for the account of the defendant, except two lots, as follows: Oct. 11, 1915, 25 shares Republic Iron & Steel Co. @ $52½; Sept. 27, 1915, 50 shares Erie Rwy. Co. 2d preferred @ $40¾, and did not include any other reports of purchases.

(3) Said attorney also produced before me a complete statement of account rendered by the plaintiffs to the defendant, and I found that the two lots of stock mentioned in the preceding paragraph, and for which no purchase notification forms were shown me, appeared as purchased in said statement under dates of October 11, 1915, and September 27, 1915, respectively, the item of September 27 being placed out of its chronological order in said statement and appearing between entries bearing date October 27 and October 28. I found by reference to said daily sales reports or notification slips and said statement of account that each of said two lots of stock was, subsequent to its purchase, sold for the account of the defendant, and his account credited with the price received from the sale thereof, and that the sales in question must have been of these two particular lots of stock, or otherwise the account would necessarily show the defendant short these two lots of stock, which it does not.

(4) I found that all of said reports of purchases were in the form annexed hereto and marked Ex-

hibit A, and contained all of the printed matter appearing on said exhibit, except three reports, as follows:

(The dates are those shown on said statement of account.)

Sept. 7, 1915, 50 Pittsburg Coal Co.
Oct. 18, 1915, 25 Union Pacific R. R. Co.
Oct. 20, 1915, 100 Colorado Fuel & Iron Co.,

which said three reports were on another form, a copy of which, marked Exhibit C, is annexed to the affidavits filed on the first hearing of this motion. And I found by said statement of account that said three lots of stock were sold previous to the closing out of the account, being sold on the following dates, respectively, viz. (as shown by said statement), September 21, November 1, October 22, 1915. I found that all of the sales reports were on forms identical with Exhibit A, save for the substitution of the word "sold" for the word "bought," except 3, being the reports of the first three sales appearing in the account as shown by said schedule, and all made in September, 1915.

(5) I have read the affidavit of Bentley H. Pope annexed hereto and know the contents thereof. I found in the possession of said defendant's said attorney on both occasions when I inspected said purchases and sales reports reports of the purchase of all of the 650 shares of stock which are shown in the affidavit of said Pope as having been sold on November 10, 1915, on the closing-out of the defendant's account. All of said reports were in the form and contained the printed matter shown by Exhibit A annexed to the affidavit of said Bentley H. Pope. Two of them were undated, but it is ap-

parent from examination of all the reports and of the statement of account above mentioned that these two undated reports are for, (1) the purchase of 50 shares of Crucible Steel Co. shown in said statement under date of October 26, 1915 (25 of which were sold afterward, but previous to the closing-out of the account on November 10, 1915), and (2) the purchase of 100 shares Colorado Fuel & Iron Co. appearing in said statement under date of Oct. 27, 1915. On the occasion of my inspection of these reports, on Aug. 28, 1916, defendant's said attorney had all of the reports arranged in chronological order and these undated ones came in their proper place in such order. By comparison of all of the reports and said statement of account it is apparent that these undated purchase reports could not refer to any other stocks than those appearing in the said statement of account under date of Oct. 26, 1915, and Oct. 27, 1915, as above set forth.

EDGAR W. HUNT.

Sworn to and subscribed before me,
this 31st day of August, A. D. 1916.

HORACE G. PRALL,
Attorney-at-Law,
Supreme Court of N. J.

(Attached hereto and marked Exhibit A is a bought slip similar to Exhibit A to affidavit of Pope, printed at page .)

Supplementary Affidavit for Defendant on Renewal of Motion for Summary Judgment.

Filed October 2, 1916.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law.

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

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

(1) I did not know, and my attention was not called to the fact, until after this action was commenced, that the fine print at the bottom of the notices received by me, and a copy of which is referred to in the affidavit of Bentley H. Pope as "Exhibit A," contained the clause that stocks might be "sold or bought at public or private sale at the New York Stock Exchange without notice or demand for margin when such sale or purchase is deemed necessary by us for our protection."

(2) I never had any previous experience in dealing in stocks, and my actions were entirely gov-

erned by advice and instruction of Bentley H. Pope, and I never signed any of the slips authorizing purchase and sale of stock which I saw other customers sign and hand to the telegraph operator for every transaction.

(3) I did not buy or order to be bought, verbally or otherwise, 25 shares of Crucible Steel on October 26, 1915, @ $89.50 per share, and I did not buy nor order to be bought, verbally or otherwise, 50 shares of Midvale Steel on October 26, 1915, @ $94.25 per share, and I did not purchase or order to be purchased, verbally or otherwise, 50 shares of Crucible Steel on October 29, 1915, @ $85.50, which Shares are said to have been sold for me and for my account on November 10, 1915.

(4) The items referred to in the last paragraph are part of a transaction referred to by me in an affidavit heretofore filed in this cause made May 1, 1916, in which affidavit I state that these transactions took place on September 25, 26 & 27. The name of the month was an error, no such transactions having taken place in September, and appearing by the account to have taken place October 25, 26 & 27, but by the notices in my possession appear to have really taken place October 23, 25 & 26.

(5) I was not present at the office of Bentley H. Pope on October 23, 1915. This was Saturday, and I am a Jew, and was never present in Pope's office on that day of the week.

(6) I have heard read the affidavit made by Bentley H. Pope and filed in this cause May 3, 1916, and the statements made in paragraph 4 of

that affidavit are untrue. I was not present in his office on October 23, 1915; 100 Shares of Crucible Steel were not bought by direction of myself and my son at that time, and no such purchase was apportioned amongst myself and my sons; 100 Shares of Crucible Steel were not purchased by myself and my son Nathaniel on October 25, and were not, to my knowledge or with my consent, divided equally between our accounts; 100 Shares of Midvale Steel were not purchased by order of myself and my son Nathaniel on October 26, and no such order was given by Nathanial in my presence. And I here repeat a statement made in my affidavit heretofore filed in this cause that when notice of these transactions was received by me I protested to Bentley H. Pope that such purchases were not made by my order, and his reply to me was, "It is too late now. The stocks are bought, but I will see that you are protected."

(7) I did not order that purchase of 25 Shares of Republic Iron & Steel on October 11, nor any other shares of that stock. I did not receive any notice of such purchase, and did not at any time order the sale of that stock, and did not know that it had been sold for my account until I received notice that it had been sold.

(8) I did not order the purchase of 50 Shares of Erie Second on September 27th, as appears to be charged to me on my account of October 19th, and I never received any notice of the purchase of the same, and no record of the purchase of the same appears in the statement received by me dated October 1st, 1915, purporting to be my account with Eisele & King, which I received on their printed

form and now in possession of my counsel, Walter F. Hayhurst.

(9) I did not receive on November 8th, or at any other time, notice that more deposit from me was required for margin, or that my account with Eisele & King was not entirely satisfactory, except as stated in my affidavit of May 1, 1916, which I here repeat: On or about November 8th Pope told me that he thought I was carrying too much stock. I told him to sell 100 Shares of Philadelphia Electric, and he said that would be satisfactory; at the same time he was ordered to sell 50 Shares of American Hide & Leather. After this transaction had been completed he told me American Locomotive was a good buy, and that I should buy 100 Shares for account jointly with him; the same day the price declined slightly, and when I asked Pope about it he refused to recognize his agreement and charged the whole number to me, and I immediately ordered the stock sold, and left the office, and never had anything to do with the plaintiffs or the said Pope as their agent.

(10) I did not receive any notice on November 9th, or at any other time, that if I did not deposit additional margin the 650 Shares of stock mentioned in the affidavit of Bentley H. Pope, filed in this cause, or any other stocks, would be sold on November 10, 1915, or at any other time.

(11) I admit that my telephone call number is 174-Lambertville, which is the same number assigned to Raphael Bros. Department Store; but my residence is not in any way connected with the Department Store, and the telephone is an exten-

sion from the store, and I did not receive on November 10th notice that stocks had been sold for my account, and had no such notice until I received the notice on printed form dated November 10, 1915.

(Sig.) ELIAS RAPHAEL.

Sworn and subscribed before me,
this 14th day of September, 1916.

WM. LYMAN,
Justice of the Peace.

Affidavit of Walter F. Hayhurst.

STATE OF NEW JERSEY, }
HUNTERDON COUNTY, } SS.:

WALTER F. HAYHURST, being duly affirmed according to law, on his solemn affirmation saith:

(1) I am the attorney for Elias Raphael, the defendant in the above-stated action. Some time after November 11, 1915, and I think it was about the first of December, Edgar W. Hunt, attorney for the plaintiffs in this action, requested me to come to his office to talk over the account which is the subject of this action. I complied with his request, and was there introduced to Bentley H. Pope.

(2) Mr. Hunt there showed me what purported to be a copy of the account against the defendant and four other accounts against his sons, and Mr. Pope at that time and in the presence of Mr. Hunt

assured me that the accounts were correct and the transactions had been in every way transacted strictly in accordance with the rules of the New York Stock Exchange, and at that time handed me a slip of paper evidently cut from a larger piece or notice and upon which were printed the following words:

> "We have this day sold for your account and risk, upon the following terms and conditions assented to by you, viz.
>
> 1. That all transactions are subject to the rules and customs of the New York Stock Exchange and its Clearing-House.
>
> 2. That all securities from time to time carried in the customer's account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities either for the sum due thereon or for a greater sum, all without further notice to the customer";

and he assured me that every transaction had been accompanied by a notice containing these words, except in some cases the word bought had been substituted for sold.

(3) I have in my possession the notice of purchase and sales reported to have been made by the plaintiff for account of the defendant, and there is printed at the bottom of the notice of the first purchase and at the bottom of the notice of the first sale words corresponding with the words on the printed slip of paper given to me by Bentley H. Pope.

(4) I have in my possession a statement upon a blank form dated October 1, 1915, purporting to be a statement of the account of Elias Raphael with Eisele & King, and in that account there does not appear any item of shares of Erie Railway Second Preferred stock or any other stock of the Erie Railway Co.

(5) I have also in my possession a copy of an account dated November 1, 1915, and purporting to be the account of Elias Raphael with Eisele & King, by which it appears that the said Elias Raphael is charged on October 19 with a purchase of 50 Shares of Erie Second as of 9/27/15. The account from which this copy was made was loaned me by Edgar W. Hunt, the attorney for the plaintiffs, and was returned by me to him at his request, and he subsequently furnished me with another statement of the account as of the same date, and upon a printed form, in which it appears that Elias Raphael is charged with 50 Shares of Erie Second upon September 27, which item, however, appears after another item of October 29. In both of these accounts it appears that Elias Raphael is credited with the sale of 50 Shares of Erie Second on October 8.

(Sig.) WALTER F. HAYHURST.

Affirmed and subscribed before me,
this 14th day of September, 1916.

WM. LYMAN,
Justice of the Peace.
(Seal)

Notice to Suppress Affidavit.

NEW JERSEY SUPREME COURT.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, and ELIAS RAPHAEL, Defendant.	Action at Law.

To Walter F. Hayhurst, Esquire, Attorney for Defendant:

PLEASE TAKE NOTICE that on the argument of the renewed motion to strike out in the above-entitled action I shall move the suppression of the affidavit of the defendant on the ground that the matter contained in it is irrelevant, incompetent and immaterial and outside the scope of the rule of Court permitting the taking of additional affidavits to be read on said motion and not responsive to the affidavits taken by the plaintiffs to be read on said motion.

Dated, September 18, 1916.

Yours respectfully,

EDGAR W. HUNT,
Attorney for Plaintiffs.

Opinion.

SUPREME COURT OF NEW JERSEY.

Filed .

October 2, 1916.

Edgar W. Hunt, Esq.,
Lambertville, N. J.
Walter F. Hayhurst, Esq.,
Lambertville, N. J.
Frederick W. Gnichtel, Esq.,
Trenton, N. J.

Gentlemen:

In re *Eisele* vs. *Raphael.*

Apart from the American Locomotive stock transaction (recovery on account of which is waived by the plaintiffs), I think that the purchases (so far as the defendant may be heard to object) are conclusively shown to have been either ordered by the defendant or ratified by him.

The Republic Iron & Steel and Erie 2nd purchases, which defendant says he did not order and did not know of until after sale, resulted in gain rather than loss to the plaintiffs (defendant).

With respect to the sales, the situation is different from that presented on the original motion. Then the plaintiff's affidavits were mainly directed to showing notice, which was essential in the absence of agreement to the contrary. I then found that neither notice nor waiver was conclusively shown, pointing out that proof respecting actual notice was merely on information and belief, and that respecting waiver the affidavit did not show that all of the stocks sold were when bought accompanied by purchase slips (which reached the defendant) containing the essential waiver. This

proof has now been supplied. The affidavits show conclusively that all of the stocks sold were purchased upon notice to defendant containing an agreement for sale without notice or demand for margins when deemed necessary for the protection of plaintiffs.

Therefore, the only question remaining is this: does such proof entitle the plaintiffs to judgment? Mr. Justice Bergen said respecting the companion cases of the same title that "the purchases of the particular stock, which is now in question, were reported to the defendants on a blank which contained this statement, 'it is understood and agreed between you and ourselves that all stocks and securities carried in your account or deposited to secure the same * * * may be sold or bought at public or private sale or at the New York Stock Exchange, without notice or demand for margins, when such purchase or sale is deemed necessary by us for our protection'," and he held that the plaintiffs were, therefore, entitled to judgment.

Notwithstanding the somewhat persuasive argument to the effect that the use of different notices between these parties in prior transactions raises a jury question as to binding force of the notices in question, I am inclined to think that I should follow the ruling of Mr. Justice Bergen.

The result is that the plaintiffs may have judgment for their claim, eliminating the American Locomotive transaction, which has been waived.

I am sending to the Clerk's office the original affidavits; the papers of the plaintiffs to Mr. Hunt; the papers of the defendant to Judge Gnitchtel.

Yours truly,

THOMAS W. TRENCHARD.

Notice of Motion to Perfect Record.

Filed October 5, 1916.

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law

To Edgar W. Hunt, Esquire, Attorney for Plaintiffs:

TAKE NOTICE that on Thursday, the fifth day of October (1916), at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the State House, in Trenton, New Jersey, before the Honorable Thomas W. Trenchard, Justice of the Supreme Court, I shall make application to settle the form of order for summary judgment in this case.

At the same time and place I shall make application for leave to file affidavits or copies of the same used in the hearing of motion for summary judgment on the part of the plaintiffs.

Dated, September 3, 1916.

WALTER F. HAYHURST,
Attorney for Defendant.

Rule for Summary Judgment.

Filed October 5, 1916.

NEW JERSEY SUPREME COURT.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law

The plaintiffs in the above-entitled action having given notice of a motion to strike out the answer and enter summary judgment, and the same coming on to be heard before the Honorable Thomas W. Trenchard, one of the Justices of the Supreme Court, in the presence of Edgar W. Hunt, attorney for the plaintiffs, and Walter F. Hayhurst and Frederick W. Gnichtel, attorneys for the defendant, and the said plaintiffs by their said attorney offering to waive and relinquish such part of their demand as arises out of a transaction involving the purchase and sale of 100 shares of stock of the American Locomotive Company appearing in the schedule annexed to the complaint under date of November 8, 1915;

And it appearing by the affidavits filed in the action that with such part of said demand eliminated the defense made by the defendant's answer is sham and frivolous, and that the counterclaim incorporated in said answer sets up a frivolous, sham and mere pretended cause of action; and the

defendant, after due notice, having failed to show such facts as entitle him to defend the plaintiffs' action (after the elimination of a part of their demand as aforesaid) or to prosecute said counterclaim against the plaintiffs,

IT IS, on this 5th day of October, A. D. 1916, ORDERED, that the said defense and said counterclaim be stricken out, and that final judgment be entered for the plaintiffs against the defendant for the sum of $1,887.23 (being the amount of the balance due the plaintiffs as shown by a schedule hereto annexed), and also $38.08 for plaintiffs' costs of action to be taxed.

Let this rule be entered,

THOMAS W. TRENCHARD,
Justice of the Supreme Court.

On motion of

EDGAR W. HUNT,
Attorney for Plaintiffs.

The following is the schedule referred to in the foregoing rule:

Amount of plaintiffs' demand (accruing Nov. 11, 1915), as shown by schedule annexed to complaint,		$1870.33
Amount of said demand waived by plaintiffs calculated as follows:		
Gross cost (including commissions) of 100 shares American Locomotive Company appearing in said schedule annexed to said complaint as purchased Nov. 8, 1915,	$6687.50	
Int. on $6687.50 for 1 day at 5% (rate actually charged),	.92	
Total cost and carrying charges,	$6688.42	
Net amount realized from sale of said stock, after deducting commissions and all charges, as appears in said schedule under date of Nov. 8, 1915,	6608.50	
Amount waived, being the whole loss to defendant in said transaction and the whole demand arising therefrom,	79.92	79.92
Net amount due plaintiffs Nov. 11, 1915,		$1790.41
Interest on $1790.41 from Nov. 11, 1915, to October 5, 1916, @ 6%,		96.82
Amount due plaintiffs,		$1887.23

Add plaintiffs' costs to be taxed.

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Admission.

NEW JERSEY SUPREME COURT.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of Eisele & King, Plaintiffs, vs. ELIAS RAPHAEL, Defendant.	Action at Law

The defendant admits the receipt and possession of the daily notification slips of purchases and sales, and of the complete statement of account rendered by the plaintiffs, referred to in the affidavit of Edgar W. Hunt filed in this action and read on the second motion for summary judgment; and admits that said papers are as described in said affidavit, and were produced before Mr. Justice Trenchard on the argument of said motion in compliance with a notice to produce given by plaintiffs. This admission is made in lieu of printing said papers in the state of the case on the appeal taken in this action.

LEVITAN & LEVITAN,
Attorneys for Defendant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN EISELE and NATHANIEL KING, partners trading under the firm name and style of EISELE & KING,

Plaintiffs-Respondents,

vs.

ELIAS RAPHAEL,

Defendant-Appellant.

BRIEF FOR RESPONDENTS.

STATEMENT.

The judgment from which this appeal was taken was rendered in an action brought by a firm of stockbrokers to recover moneys expended and commissions earned by them in executing the orders of the defendant for the purchase and sale of stocks. The appellant was the defendant below. The following is an abridgment of the proceedings and proofs in the Supreme Court.

The complaint (State of the Case, p. 8), sets out that the plaintiffs (respondents) are members of the New York and Philadelphia Stock Exchanges, that as such, and at the request of the defendant (appellant), they undertook to act for him in the execution of such orders as he might give for the purchase

and sale of stocks for his account, subject to the rules, customs and usages of the New York Stock Exchange. That they did so act, and at defendant's request and upon his promise to secure or reimburse them extended to him in the purchase of stocks a credit in excess of the value of the money and securities which he had on deposit with them. That upon defendant's failure to keep his promises, plaintiffs, after notice, closed out his account by the sale of the securities then being carried for him on margin. Appended to the complaint is a schedule showing in detail all transactions in the account.

The answer (State of the Case, p. 19), admits that plaintiffs are stockbrokers, engaged in the business of acting as agents for third persons in the purchase and sale upon commission of listed securities, but as to every other allegation of the complaint, it either makes a flat denial or avers lack of knowledge. It then proceeds to set up separate defenses entirely inconsistent with such ~~details~~ denials, amounting practically to (1) a charge of the sale of defendant's stocks without notice; (2) a charge of unauthorized dealings. By counter-claim it then demands damages for an alleged conversion.

After the filing of the answer plaintiffs moved before Mr. Justice Trenchard to strike out it and the counter-claim as frivolous and sham and enter summary judgment. Their affidavits in support of this motion are as follows:

(1) *By Nathaniel King, one of the plaintiffs.* (State of the Case, p. 23.) This verified the account as set forth in the schedule annexed to the complaint; it asserts the basis of the indebtedness sued for to be (a) commissions, (b) advances of money in making purchases, (c) interest on advances, (d) stamp

taxes paid for defendant on sales and transfers of stock; it shows the character of defendant's transactions (most, but not all, of which were "marginal"), and that in the marginal transactions there were actual, *bona fide* deliveries and payments between plaintiffs, acting as defendant's brokers, and the broker representing the opposite party to each transaction; it negatives the existence of any bargain of any character modifying the legal obligations of the plaintiffs and defendant, and avers the entire absence of fictitious or gambling or illegitimate dealings of any character in the account; it asserts that the closing out sales were due to defendant's refusal to take up and pay for his stocks or deposit additional margin and were necessary to protect plaintiffs from further loss, and were authorized by the general custom and usage of the business, and that the sum sued for is the balance remaining due after crediting the defendant with the proceeds of the sales, and that deponent believes no defense exists.

(2) *By Wilford M. Goodell, plaintiffs' bookkeeper.* (State of the Case, p. 29.) This verifies the account as shown by the schedule annexed to the complaint; proves by personal knowledge (deponent having charge of such work for plaintiffs), the actual receipt, or actual delivery, as between plaintiffs and the brokers representing the other party, of all stocks purchased or sold in the account, and payment for the stocks purchased and receipt of the price for the stocks sold; also the possession or control by plaintiffs of certificates for all stocks at any time being carried on margin for the defendant, ready for delivery upon payment or tender and demand by him; it specifies the details concerning the charges for commissions, interest and stamp taxes and

shows their regularity and correctness; it proves the sending of *monthly* statements of account to defendant; and avers the belief that there is no defense.

(3) *By Bentley H. Pope, manager of plaintiffs' Trenton office.* (State of the Case, p. 33.) This verifies the schedule by comparison with records kept by deponent at plaintiffs' Trenton office, where defendant's orders for purchases and sales were given; it proves the giving of the orders by defendant and their transmission in good faith to New York for execution; it proves that each transaction was reported in writing to the defendant on the day of its occurrence, and that defendant never repudiated, objected or took exception to any report; it shows, by exhibits (A, B and C), the forms of various reports. ("C" was used only a few times—it will be hereafter referred to.) It asserts frequent demands for margin, promises by defendant to pay, requests by him for additional time, and finally a consent from him to sell whenever deponent "was not satisfied with his account," and a sale the next morning after an attempted telephonic notification which deponent believed promptly reached defendant; it shows a subsequent acknowledgment of the indebtedness and a verbal promise to pay in small installments. It negatives the existence of any bargain of any character modifying the legal rights of the parties or depriving the transactions of their legitimate character as actual *bona fide* purchases and sales, and relates two actual deliveries of certificates, one to defendant, one to an agent of his on his order. It shows representations by defendant and other facts reasonably warranting the credit accommodation that was extended. It avers deponent's belief that no defense exists.

(4) *By Carl W. Lentz, manager of plaintiffs' Newark office.* (State of the Case, p. 42.) This corroborates Mr. Pope on the point of defendant's acknowledgment of the indebtedness and promise to pay.

In opposition to the case thus presented the defendant filed an affidavit (State of the Case, p. 44), which when stripped of its irrelevancies sets out, (1) that he had never read any of the printed matter on his daily reports of purchases and sales ("bought and sold slips"), evidencing certain contract rights of the broker in dealing with his principal; (2) that in two instances he had asked for certificates for certain shares bought by him, believing his margin sufficient to allow the shares to be delivered to him and charged against his account, and that plaintiffs had refused to deliver the certificates unless he paid for them; (3) that three certain lots of stock appearing in the account as purchased had not been ordered by him, but after notice of the purchases he had ratified them by acquiescence; (4) that plaintiffs had called on him to reduce his commitments and he had complied by ordering the sale of certain stocks; (5) that the last purchase transaction in the account, 100 shares American Locomotive Company bought Nov. 5 (and sold the next day), was not a purchase by defendant alone, but by him and plaintiffs' agent jointly; (6) that the closing out sales were made "without my (defendant's) order and without my knowledge and consent"; (7) that he never acknowledged the indebtedness nor promised to pay it.

(*It is important to observe that the three lots of stock above mentioned the purchase of which defendant says he did not order, but ratified after notice, are the same stocks referred to in paragraphs* 3, 4, 5 *and* 6 *of defendant's subsequent affidavit made on*

the renewal of the motion (State of the Case, p. 69), defendant correcting an error as to date and fixing the time in October instead of September.) Also that the schedule shows that the stocks for which plaintiffs are said to have refused to deliver certificates were subsequently sold (previous to the closing out sales), and the proceeds credited to defendant's account and brought him a profit of about $360.00).

To this defensive affidavit Bentley H. Pope makes a reply affidavit (State of the Case, p. 47), explaining a practice of the defendant and his sons, by which for their own convenience they sometimes purchased stocks in the usual exchange unit of 100 shares and after the purchase had plaintiffs apportion the shares fractionally among their several accounts.

On the foregoing record the first motion was argued, and Mr. Justice Trenchard refused to order summary judgment, saying that the defendant's denial of acknowledgment of the debt, and denial that the closing out sales were made by his order and consent, precluded judgment going on either of those grounds; and holding that a jury question existed as to whether defendant was entitled to have notice of the final closing out sales. (See opinion, State of the Case, p. 50.)

Thereafter the plaintiffs procured a rule (State of the Case, p. 56), permitting the renewal of the motion and the submission of "*additional affidavits bearing upon the question of the right of plaintiffs to sell defendant's stocks without previous demand or notice of sale, to which affidavits defendant shall have the right to reply.*"

Under this rule plaintiffs brought on the argument again, reading two new affidavits (State of the

Case, pp. 60, 65), showing in exact detail the various stocks involved in the closing out sales; the insufficiency of the defendant's margin plus the then market value of the stocks to equal the sum due from the defendant to the plaintiffs; the fact that each of the several lots of stock involved had been purchased under an express agreement between the parties, evidenced by the terms of the written notifications of the several purchases, that they might be sold "without notice or demand for margins when deemed necessary by us (plaintiffs) for our protection"; and the fact that such written notifications were then and had been at the time of the previous argument, in the possession of defendant's (then) attorney of record.

(Circumstances compelled the proof of this last feature by the affidavit of plaintiffs' attorney. To mitigate this the notice of argument (State of the Case, p. 58), called upon defendant's attorney to produce upon the argument all of the various written papers in his possession, which alone formed the subject-matter of the attorney's affidavit. By an admission by defendant's present attorney of record, appearing on p. 83 of the state of the case, it appears that these papers were produced, and that the truth of the statements contained in the affidavit of plaintiffs' attorney concerning them is admitted.)

In resistance to the renewed motion affidavits were made by the defendant and his attorney of record (State of the Case, pp. 69, 73). Plaintiffs gave timely notice (State of the Case, p. 76) of a motion to suppress defendant's affidavit as irrelevant, incompetent and immaterial and outside the scope of the rule permitting the taking of additional affidavits, and not responsive to plaintiffs' affidavits. The motion to suppress was made at the opening of the argument and denied by Mr. Justice Trenchard.

Dealt with by its separate paragraphs, the material portions of defendant's affidavit may be summarized as follows:

1. A reiteration of the statement of the earlier affidavit that defendant had not read the contract embodied in the bought and sold slips (Exs. A and B), until after the suit was brought.

2. An averment that defendant lacked experience, took advice from plaintiffs' agent and gave no written orders for the transactions in his account.

3, 4, 5 and 6. An averment (with details of circumstances and denials intended to be corroborative or supporting), that defendant did not order the purchase of certain named stocks appearing in the schedule as sold on the closing out of the account.

(N. B. *It is important to observe that these stocks are the same ones as to which defendant in his first affidavit denied that he ordered the purchases, but admitted that he ratified them after they had been reported to him.*)

The last sentence of paragraph 6 (p. 71, line 16), purports to be a reiteration of a statement contained in defendant's former affidavit, which statement is, however, entirely non-existent.

7 and 8. Deny that defendant ordered the purchase or was notified of the purchase of two named lots of stock.

9. Makes a conditional denial that more margin was demanded; reiterates matter from defendant's

first affidavit, including the charge that the purchase on November 5 and sale on November 6 of 100 shares American Locomotive Company was a joint transaction engaged in by defendant and plaintiffs' agent, Mr. Pope, as coadventurers, and that it resulted in a slight loss which was charged to defendant's individual account.

10. Denies that he received previous notice that his account would be sold out on November 10 unless he deposited additional margin.

11. Denies that he received telephonic notice of the closing out sales on the day they were made, but admits receiving the sales slip of that date sent him by mail.

The affidavit of Walter F. Hayhurst, attorney for the defendant, points out that the purchase slip for the defendant's first purchase and the sales slip for his first sale were of the form illustrated by Exhibit C annexed to the first affidavit of Mr. Pope (State of the Case, p. 41). It does not assert that this is true of any others of the purchase and sales slips. It points out that a certain purchase of Erie Railway 2d Preferred Stock made by the defendant Sept. 27, 1915, does not appear in the monthly statement rendered by plaintiffs to defendant October 1st following, but does appear (its true date being indicated), in the next monthly statement, November 1, 1915.

Upon the argument following the reading of these new affidavits plaintiffs' counsel (without admitting the truth of defendant's assertion), voluntarily waived such part of the demand as arose by reason of the transaction in American Locomotive men-

tioned in paragraph 9 of defendant's affidavit, and Mr. Justice Trenchard thereafter granted the motion (see opinion, State of the Case, p. 77), holding that the purchases were conclusively shown to have been ordered by the defendant or ratified by him, and that plaintiffs were entitled to sell, without notice to the defendant, all of the stocks that were sold on the closing out of the account, such right arising from the notice printed upon the sales slip used in reporting to the defendant the purchase of each of these lots of stock. The schedule annexed to the rule for judgment (State of the Case, p. 82) shows the method of calculating the sum waived, which amounts to $79.92.

The following observations will assist to an understanding of the case:

The date of any given transaction as shown by the purchase or sales notification slip (Exhs. A and B, pp. 39, 40), differs from its date as shown in the schedule annexed to the complaint, the date in the schedule being usually one day, but sometimes two or more days, later. The reason for this appears from paragraph 4 (p. 24) of the affidavit of Mr. King, and paragraph 5 (p. 34) of the affidavit of Mr. Pope, when read together. The notification slip is made out and delivered or mailed to the customer on the day of the transaction on the floor of the exchange; the entry in the brokers' books is made as of the date of the day of settlement for and delivery of the stock, *which is the business day next following the transaction on the floor* (Friday and Saturday, however, being counted for such purpose as one day). The schedule shows the dates as they appear in the brokers' books. To illustrate: (1) The first purchase shown in the schedule appears under date

of September 7, 1915. This date fell on Tuesday and the preceding day was Labor Day, a legal holiday. The purchase slip for this transaction would therefore bear date September 3 or September 4 according to whether the purchase on the exchange was made on the Friday or the Saturday of the preceding week. (2) The closing out sales appear in the schedule as having been made on November 11, 1915. This date fell on Thursday, and the sales slip bears date the preceding day, November 10, which was the date of the actual sales on the floor. *It is perhaps important to note that the last purchase,* 100 *shares American Locomotive, which appears in the schedule under date of November* 8, 1915 (*Monday*), *was actually made on the floor the preceding Friday, November* 5, *as appears by the purchase slip.*

The gross cost of each lot as charged on the debit side of the account is arrived at by adding to the actual purchase price (product of the price per share multiplied by the number of shares), a commission at the rate of $12.50 per 100 shares. The net selling price of each lot sold as credited on the other side of the account is arrived at by deducting from the actual selling price a commission at the same rate and deducting also the Federal Stamp Taxes at the rate of $2.00 per 100 shares and New York State Stamp Taxes at the same rate. This practice is explained and its regularity attested by the affidavit of Mr. Goodell (p. 31, line 8, *et seq.*).

On November 15 (see p. 16, line 14), the appellant is credited with Miami Copper Co. dividend $200. This pertains to the 200 shares which when sold November 3 (p. 15, line 36), were sold "ex-dividend," *i. e.*, dividend reserved to seller; and the dividend when paid consequently came to respondents as the seller's agent.

The several entries on both sides in the early part of the account (pp. 13, 14, 15), dealing with 50 shares Penna. R. R. Co. indicate the purchase, the receipt of a certificate, the delivery of it to appellant, his re-delivery to respondents to be used in lieu of cash as margin, and the subsequent sale on appellant's order and at a profit.

THE QUESTIONS PRESENTED.

Counsel for the respondents has not yet been served with the appellant's brief, and can therefore look only to the printed book for information as to the questions to be argued on this appeal.

The only meritorious question presented by the record is whether, under the circumstances of this case, the respondents had the right to sell on November 10, 1915, the stocks which they were then carrying on margin for the appellant. *No real question is raised respecting any transactions other than the sales made November* 10.

Some other questions may seem at first glance to be raised by the affidavits filed by the appellant in the court below, but they possess only an apparent and not a real merit, as will be pointed out here before presenting the respondent's argument on the real question.

Thus, the first affidavit (p. 45, line 10) sets up a refusal by the respondents to deliver certificates for certain shares which appellant had bought. Analysis of the account will demonstrate that delivery of these shares, without appellant paying for them, would have left insufficient margin to protect the other stocks then being carried. Furthermore, the show-

ing of the schedule is uncontradicted that both lots were subsequently sold (previous to the closing out sales and therefore admittedly by appellant's order), at a profit, in the case of the Philadelphia Rapid Transit, over $300, in the case of the Miami, over $20.00.

The second affidavit (paragraphs 7 and 8, p. 71), denies that the purchase of 25 shares of Republic Iron and Steel on October 11 and the purchase of 50 shares of Erie 2d Preferred on September 27 were ordered by the appellant. These are the only purchases for which respondents' attorney, when he examined the papers in the hands of appellant's attorney (State of the Case, p. 66, line 2), failed to find purchase notification slips. As appears plainly by the schedule (p. 15-16), each lot was sold at a profit to the appellant. The Republic cost, including commissions $1340.63; interest while it was carried (3 days @ 5%), amounted to 55¢; its net sales price (Oct. 14) after deducting commissions and stamp taxes, was $1364.62; the transaction therefore netted the appellant a clear gain of $23.44. The Erie Second cost, including commissions, $2043.75; interest (11 days @ 5%) amounted to $3.08, net sales price (Oct. 14) after deducting commissions and stamp taxes $2154.25; clear gain to appellant $107.42.

This same affidavit, in paragraphs 3, 4, 5 and 6 denies that certain other stocks were ordered by the appellant. But these paragraphs lose all force in view of the admitted fact that the stocks to which they relate are the same stocks as to which appellant, in his first affidavit (p. 45, line 27), admitted that he ratified the purchases after notice thereof. (Paragraph 6 relates to the 100 share lots of which the smaller lots mentioned in paragraphs 3 and 4 were parts, and the balance of which went to the accounts

of appellant's sons, as explained in the affidavit of Mr. Pope at p. 47 of the State of the Case.)

The question presented by appellant's allegations respecting a joint adventure with Mr. Pope in American Locomotive (if any question exists after respondent's waiver), will be met in answering the grounds of appeal.

ARGUMENT.

I.

OF THE CASE FROM THE POINT OF VIEW OF THE RESPONDENTS:

The meritorious question, whether, under the circumstances of the case, the respondents had the right to sell, on November 10, 1915, the stocks which they were then carrying on margin for the appellant, is to be answered in the affirmative if the facts as disclosed by the record establish either of the following propositions:

1. *That respondents gave appellant reasonable notice of intention to sell unless he took and paid for the stocks or deposited additional margin.*

2. *That the contract between the parties gave the respondents the right to sell without notice or demand for margins.*

Respondents maintain that both propositions are established.

As to the first proposition, Mr. Justice Trenchard, in denying the first motion for judgment, held that

it was not established. (See State of the Case, p. 51, line 20.) The respondents respectfully submit that it is established. Paragraph 6 of the affidavit of Mr. Pope (p. 35) states the facts in respect of the demand and notice. The appellant's affidavit (p. 46, line 16), says in reply, "the other subsequent sales made as appears by said account for deponent were made without my order and without my knowledge and consent."

Respondents submit that this language *does not deny notice.* Notice precedes sale by the broker on his own initiative and as of his right; it differs materially in meaning from the ideas expressed by the words, *order, knowledge* or *consent,* as applied to the acts of the customer. Certainly if a criminal prosecution were instituted and notice were proven by two witnesses, the appellant could not be convicted on this affidavit for having falsely sworn that notice was not given him.

As to the second proposition, the affidavit of Mr. Pope, at p. 60 of the State of the Case, shows in detail the various lots of stock sold on November 10, with the date of purchase and purchase price of each, and the quoted values of each at the close of the market on November 9; their market value, as appears by this affidavit, then being $5575.00 less than the sum the respondents had laid out in executing the appellant's orders for their purchase, and the appellant's margin being insufficient to cover this deficiency. The affidavit further shows that the appellant had been notified of the purchase of each of these lots of stock on a purchase notification slip (Exhibit A, p. 64), containing the following notice: "IT IS UNDERSTOOD AND AGREED between you and ourselves that all stocks and securities carried in your

account or deposited to secure the same, now or in the future, * * * * may be sold or bought at public or private sale or at the New York Stock Exchange without notice or demand for margins when such sale or purchase is deemed necessary by us for our protection." * * * * The affidavit of respondents' attorney (State of the Case, p. 65), sets forth that he had seen such purchase slips in the hands of appellant's attorney, both before and subsequent to the making of the previous motion for judgment; the notice of the second motion (State of the Case, p. 58, line 36), required their production, and the admission by appellant's attorney (State of the Case, p. 83), admits their receipt and possession and production before the Court below, and admits them to be as described by the affidavit of plaintiffs' attorney.

These facts speak for themselves. Parties *sui juris* are at liberty to make any lawful contract or waive any rights that without waiver would belong to them. The appellant is *sui juris,* and a contract for the waiver of the right of demand and notice is a lawful contract. The facts above stated clearly constitute a waiver of any right to previous demand and notice that the law might otherwise vest in the appellant.

No weight is to be attached to the argument of the appellant in the court below, adverted to by Mr. Justice Trenchard in the second opinion (State of the Case, p. 78, line 26), to the effect that the previous use of a different form of notice raised a jury question as to the binding force of the notices in question. The different form was used in only six transactions (State of the Case, p. 66, line 38, *et seq.*), three purchases and three sales, none of which is disputed. The latest of these purchases was made October 20. Defendant states in the first paragraph of each of

his affidavits (pp. 44-69), that he never read either form of notice until after suit had been brought, so he could not have been misled. The affidavit of Mr. Pope (p. 34, line 38), explains that this different notice was of an "earlier type." Respondents formerly used it and a few of the old forms continued to be used after the adoption of the new one.

It is respectfully submitted that each purchase is a separate transaction and that the rights of the parties are in each case to be determined by the form of the contract governing the particular transaction.

Furthermore, both contracts are in effect about the same so far as the point in question is concerned. The new form gives the right of sale without notice in express words; the old one (see Exhibit C, p. 41), provides that "all transactions are subject to the rules and customs of the New York Stock Exchange." Mr. King, a member of the Exchange (State of the Case, p. 25, paragraph 5 and p. 28, line 25), explains the rights of brokers in marginal dealings under the usages of the Exchange and they seem to be broad enough to include sale without notice when necessary to protect against loss.

Again, the appellant is estopped from now contending that any of the purchases and sales were unauthorized. It is not denied that the filing of his answer in this suit constitutes the first objection expressed by him to any of the transactions as reported to him at the time they were executed, and it is admitted that he received purchase and sales notifications for his transactions daily (except only for the purchase of 25 Republic and 50 Erie 2d. mentioned in paragraph 7 and 8 of his affidavit on p. 71 of the State of the Case, both of which were subsequently sold at a profit). The statement of Mr. Goodell (p. 31, par. 6, line 33), that on or about the first of each month there was mailed to him a com-

plete statement showing all the transactions in his account during the preceding month and the then condition of the account, is not denied; nor is it alleged that such statements were not received; in fact the appellant's attorney (p. 75, line 1) admits the possession of some of them. These facts invoke the rule of *Clews vs. Jamieson,* 182 U. S. 461, 21 Sup. Ct. 845, holding that the failure of a principal to repudiate a sale of stock made by his broker on a stock exchange, immediately after it is reported to him, operates as a ratification and precludes him from subsequently contending that the terms of the sale were unauthorized. Of course the principle would apply as well to a purchase as to a sale. Probably the terms of the purchase and sales slips (Exhs. A & B, pp. 39-40, begin third line from bottom of notice printed at foot), would allow appellant 15 days in which to express objection to a monthly statement, though not so to daily purchase and sales slips. Appellant made no objection to either kind. The statement in his second affidavit (State of the Case, p. 71 line 16), purporting to repeat a statement from the first affidavit to the effect that he had objected to certain purchase slips, is found to be incorrect when tested by reference to the first affidavit (p. 45, line 33), for that says, upon this point, "When I found out I did not object."

No question was raised on the record in the court below and none is raised by the grounds of appeal, respecting the legality of the transactions, and respondents' proofs upon that point stand without contradiction. The case of *Kendall & Whitlock vs. Fries,* 71 N. J. Law, 401, is conclusive in favor of respondents on the record in this case if any such question should arise. See also *Thompson vs. Wil-*

liamson, 67 N. J. Eq. 212; *Cameron vs. Preu,* 81 N. J. Law, 335; *Irwin vs. Williar,* 110 U. S. 499, 4 Supreme Court Reporter, 160.

II.

UPON THE DEFENSES SUGGESTED BY APPELLANT'S GROUNDS OF APPEAL (State of the Case, p. 4).

These will be answered as briefly as possible.

1. The record does not show that defendant made any motion to dismiss.

2. The right of trial by jury exists only in favor of the litigant who, under such rules for pleading as may be adopted by the state, raises a meritorious question of fact to be submitted to a jury. The striking out of sham defenses is an ancient, well-established practice. It existed at common law, "from time immemorial." *Anon.,* 7 N. J. Law, 160. And is inherent in the court. *Cemetery Co. vs. Railway Co.,* 74 N. J. L. 100. The provisions of the practice act of 1912 (P. L. p. 377: sec. 15, on p. 380, rule 26 on p. 389, rules 57-58 on p. 394), for striking out answers and entering summary judgment are only a modern adaptation of the old practice. The provisions of the practice act of 1874, as amended by P. L. 1882, p. 111, and the provisions of the practice act of 1903 (P. L. p. 537, sec. 111), for striking out frivolous pleas or demurrers or sham pleas, which permitted the Judge before whom the motion was made to direct the taking of testimony to be read on the hearing of the motion, were the same in practical effect, for upon the defective pleading being stricken

out the plaintiff might ordinarily have judgment as upon default for lack of plea, the filing of a further pleading not being permitted as a matter of course. *State Mutual Asso. vs. Williams,* 78 N. J. L. 720, illustrates the practice. And this practice obtained much earlier than either of the statutes above cited. See *Allen vs. Wheeler,* 21 N. J. Law, 93 (1847), *Coxe vs. Higbee,* 11 N. J. Law, 395 (1830).

It was held by the Court of Errors and Appeals in *Coykendall vs. Robinson,* 39 N. J. L. 98, that the striking out of a sham plea under the provisions of sec. 133 of the practice act of 1874 did not violate the constitutional right of trial by jury. The ground of the decision is that such right does not exist where the defendant presents no true issue of fact to be so tried. He can not present such an issue by a pleading which is sham, *i. e.* false.

Authorizing judgment by default in case defendant does not within a reasonable limited time file a sufficient affidavit of defense is not an unreasonable restriction upon the right of trial by jury. *Lawrance vs. Borm,* 86 Pa. 225; *Dortic vs. Lockwood,* 61 Ga. 293. The provision of the practice act of 1912 goes no further *in principle* than the provisions of the earlier acts requiring an affidavit of merits to be filed. A defendant who is willing to file a general affidavit of merits but is unable to sustain its truth when counter-affidavits from the plaintiff setting up the actual facts of the case are served upon him, is not entitled to delay justice by compelling the plaintiff to await the next term of the Circuit Court before he can have judgment. The restrictions imposed upon the right to have a jury trial by the District Court act (C. S. 1999, sec. 149,) are constitutional. *Humphrey vs. Eakely,* 72 N. J. L. 424, aff'd 74 Ib. 599; *Haythorn vs. Van Keuren,* 79 N. J. L. 101.

The 7th amendment to the Federal constitution,

securing the right to trial by jury, has no application to proceedings in state courts. *Edwards vs. Elliott,* 21 Wall. 532. Nor has the 14th amendment, securing the privileges and immunities of citizens and due process of law. *Walker vs. Sauvinet,* 2 Otto, 90.

3. The counter-claim was as properly the subject of a motion to strike out as was the rest of the answer of which it formed a part, P. L. 1912, p. 389, rule 26. The notices (State of the Case, pp. 22, 58), expressly include it. Mr. Justice Bergen, dealing with this phase in three companion cases brought by same plaintiffs against the sons of appellant (judgment for plaintiffs, not appealed from; memorandum filed but not published), says: "If the plaintiff is entitled to judgment notwithstanding the plea, the counter-claim would fail, because the plaintiff has given the defendants respectively credit for all sums deposited on account of the purchase."

4. There is absolutely no evidence in support of this charge of conversion by respondents of appellant's shares.

5. The record does not show that appellant made any motion for judgment on his counter-claim.

6. There is no word of evidence to the alleged waiver.

7. This point shows a misapprehension of the nature of the relations of the parties. *There were no "contracts between plaintiffs and defendant for the purchase and sale of shares of stock."* The contract between them was that plaintiffs should act as brokers (*i. e.* agents), in executing any orders which de-

fendant might give for the purchase and sale of stocks on the exchange and extend him credit in carrying his account, in return for which defendant was to pay commissions and to repay, with interest, any advances plaintiffs might make for him. (Affidavit of Mr. King, State of the Case, p. 24, line 20; of Mr. Goodell, p. 30, line 39; of Mr. Pope, p. 37, line 20.) Defendant never bought anything from or sold anything to plaintiffs (King, p. 26, line 30; Goodell, p. 30, line 15).

The statute of frauds imposes no restrictions upon the creation of an agency of such a character, nor does it require the instructions to the agent to be in writing.

The value of the purchase and sales slips printed as exhibits in the record is not so much that they serve as a memorandum to satisfy the requirements of the statute of frauds, but that they serve to report to the appellant daily the steps taken by the respondents in the execution of the agency he had committed to them. The printed notice at the foot is evidential of the conditions created by the contract of agency for the protection of the agent in these transactions, the character of which requires great outlays of money by the agent on the principal's account.

Furthermore, the statute of frauds is no defense against an *executed contract*. *Bibb. vs. Allen,* 149 U. S. 481, 13 Sup. Ct. Rep. 950 (at p. 955); *Huntley vs. Huntley,* 114 U. S. 394, 5 Sup. Ct. Rep. 884; *Brown vs. Trust Co.,* 117 N. Y. 273, 22 N. E. 952. And when respondents and the brokers for the opposite party exchanged money for securities, or *vice versa,* as was done in every instance, the contract of sale made on the floor became fully consummated and executed.

8. There is no evidence in the record of any such waiver as is alleged.

9. No evidence in the record in support of this ground of appeal.

10. The evidence afforded by the record contradicts the appellant upon this point. Mr. Pope (p. 35, line 33), asserts, and the appellant (p. 45, line 36, p. 72, line 10), seems to admit, notice of the insufficiency of the margin.

11. No evidence in support of this point.

12. No evidence in support of this point. If it refers to appellant's allegation concerning a joint adventure with Mr. Pope in American Locomotive, the harm, if any, is cured, by respondents' waiving such part of the claim as arose out of this transaction (see State of the Case, p. 82, line 23). *It is to be remembered that this was the last purchase in the account, and the allegation, which refers to this single transaction alone, therefore casts no taint of suspicion upon the earlier dealings.*

13. The evidence, including that of the appellant, is that all of the purchases were either ordered by appellant or ratified by him (see his affidavits, p. 45, line 26, p. 70, line 10, *et seq.*). The appellant makes no contention that any of the sales were unauthorized, save those in the closing out of the account on November 10, which are dealt with under the first heading of respondents' argument.

14. The uncontradicted evidence is that appellant was advised concerning the rules of the stock exchange (affidavit of Mr. Pope, State of the Case, p.

37, line 20). Furthermore, the point if supported by the facts, would amount to nothing in law. Where a principal sends an order to a broker engaged in an established market or trade for a deal in that trade, he confers authority upon the broker to deal according to any well-established usage in such market or trade, *Furber vs. Dane,* 203 Mass. 108, 89 N. E. 227; especially if the principal knows the usage; *Bibb. vs. Allen,* 149 U. S. 481, 13 Sup. Ct. 950. And even if the principal does not know the usage, *Taylor vs. Stray,* 2 C. B. (N. S.) 195, 140 Eng. Reprint, 380; *Baylee vs. Wilkins,* 7 C. B. 886, 137 Eng. Reprint, 351 (dealing with the rules of the London Stock Exchange).

15. Is too general and indefinite to permit a specific answer.

16 and 17. A defense or a disputed question of fact set up by an answer and counter-claim is of no value when attacked by a motion to strike out unless supported by affidavit or other proof. Rules of Supreme Court, p. 28, rule 80. (P. L. 1912, p. 394, rules 57, 58.)

18. Is itself "sham and frivolous." It may be presumed, since the Court makes no differentiation, that all parts of the pleading were open to both objections. See *Kelly vs. Faitonte Iron Co.,* 94 Atl. 802 (Court of Errors and Appeals, 1915).

19. Is merely general and is answered by the answer to the specific grounds of appeal.

Respectfully submitted,
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