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SUMMONS.

THE STATE OF NEW JERSEY TO HARRY  
KUEMMERLE AND KUEMMERLE CORPORA-  
(Seal) TION, a corporation of the State of Penn- 10  
sylvania, jointly, and in the alternative.

You are summoned to answer the annexed com-  
plaint of Frank J. Bloom Company, a corporation  
of the State of New Jersey in an action at law in  
the Atlantic County Circuit Court. And take no-  
tice that unless you file your answer to the said  
complaint with the clerk of the Atlantic County Cir-  
cuit Court at Mays Landing, New Jersey, within  
twenty days after service upon you of this writ and  
the annexed complaint plaintiff may proceed in the 20  
suit and judgment may be entered against you.

Witness, HON. THEODORE W. SCHIMPF, Judge of  
the Atlantic County Circuit Court at Mays Landing,  
this first day of July, 1926.

WM. A. BLAIR,  
*Clerk.*

LEE F. WASHINGTON,  
*Attorney.*

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

10 FRANK J. BLOOM COMPANY,  
a corporation, etc.,  
*Plaintiff,*

v.

HARRY KUEMMERLE and  
KUEMMERLE CORPORATION,  
a corporation, etc.,  
jointly and in the alter-  
native,  
*Defendant.*

Action at Law.  
Complaint.

20

The plaintiff, Frank J. Bloom Company, a corporation of the State of New Jersey, having its principal office and place of business in the City of Atlantic City, in the County of Atlantic and State of New Jersey, says that:

30 1. At all times herein stated, plaintiff has been and is a corporation of the State of New Jersey, engaged in the real estate business and in the business of placing mortgages, in and about the City of Atlantic City aforesaid, and duly registered and licensed to transact such business under the laws of said state.

2. On or about December 20, 1925, the defendant, Harry Kuemmerle, and the defendant, Kuemmerle

Corporation, or one of them, employed plaintiff to obtain for said defendants, or one of them, the sum of \$50,000.00 to be used to take an assignment of a mortgage then held against property of said defendants, or one of them under an agreement that said defendants, or one of them, would forthwith pay to plaintiff, for plaintiff's services in obtaining said funds to take over said mortgage a commission of \$1600.

10 3. Thereafter, under said contract, plaintiff obtained for said defendants, or one of them, said sum of \$50,000.00, said funds being so obtained on or about January 23, 1926.

4. Said defendants and each of them were notified that said funds were held awaiting execution by said defendants, or one of them, of necessary papers in said matter and said funds were so held awaiting instructions of said defendants, and each of them, until on or about February 10, 1926, when the depositor of said funds withdrew same because of failure of defendants, and each of them to execute necessary papers and go through with settlement. 20

5. Plaintiff complied with all the terms of its said contract, but defendants and each of them, notwithstanding, failed to accept the funds obtained and to perform acts to be performed by said defendants, and each of them under said contract, and said defendants also failed and refused to pay plaintiff the sum of \$1600 or any part thereof, although said defendants and each of them have been indebted to plaintiff in said sum of \$1600 for said services, since February 10, 1926, together with lawful interest thereon from said date, and remain so indebted. 30

6. As a result of the failure of defendants, and each of them, to comply with said contract and to accept said funds, the depositor of said funds lost interest on \$50,000.00 from January 23, 1926, to February 10, 1926, amounting to \$150 and plaintiff was required to make said adjustment of interest with the depositor of said funds, so that the failure of defendants, and each of them to accept said funds caused plaintiff the additional loss of \$150 together with interest thereon from February 10, 1926.

10

Plaintiff accordingly demands judgment against said defendants, and each of them for the following sums, besides costs of suit to wit:

Commission .....	\$1600.00
Interest on said \$1600 from February 10, 1926 .....	
Interest on \$50,000.00.....	150.00
Interest on said \$150 from February 10, 1926 .....	

20

LEE F. WASHINGTON,  
*Attorney for Plaintiff.*

30

AFFIDAVIT OF SERVICE.

ATLANTIC CIRCUIT COURT.

FRANK J. BLOOM Co., a  
corp.,

v.

HARRY KUEMMERLE and  
KUEMMERLE CORP., a  
corp., etc., jointly and in  
the alternative.

Action at Law.  
Affidavit of Service.

10

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

20

CHARLES WALTERS, special deputy sheriff of the County of Atlantic, being duly sworn according to law, on his oath saith that on the seventh day of July, nineteen hundred and twenty-six, he served on the defendant, Harry Kuemmerle and on Kuemmerle corporation by delivering to Harry Kuemmerle, president, personally a full true and correct copy of the annexed complaint in the above stated cause, with the summons to which complaint is annexed and that there was endorsed on the said complaint a notice that if the defendant intends to make a defense to the said action he shall within ten days after the date of personal service of said copy of the complaint file with the clerk of the above mentioned Court an affidavit of merits and unless in

30

case such affidavit shall be so filed, the said defendant shall file an answer to the said action, within twenty days after the date of service of said copy of the complaint, judgment by default would be entered against him.

CHARLES WALTERS,  
*Special Deputy Sheriff.*

10 Sworn and subscribed to before me this 8th day of July, A. D. 1926.

*Notary Public of N. J.*

*To the within named defendants:*

20 In case the within summons and complaint are served upon you personally then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of the service hereof upon you and that unless you file such affidavit, judgment by default will be entered against you at the end of said ten days; and that in case you file said affidavit, unless you file an answer within twenty days from the date of service hereof upon you, judgment by default will in such case be entered against you at the end of said twenty days.

LEE F. WASHINGTON,  
*Attorney.*

I hereby deputize and appoint Charles Walters to serve the within writ.

Witness my hand and seal this 7th day of July, 1926.

HOWARD R. CLOUD, (L. S.)  
*Sheriff of Atlantic Co.*

Duly served within summons and complaint July 7th, 1926, personally on Harry Kuemmerle at the Frederick Apts. Commerce and North Carolina Avenues, Atlantic City, Atlantic County, New Jersey; on Kuemmerle Corporation by delivering a copy personally to Harry Kuemmerle, president of said corporation, at the Frederick Apts. Commerce and North Carolina Avenues, Atlantic City, Atlantic County, New Jersey. 10

HOWARD R. CLOUD,  
*Sheriff.*

By CHARLES WALTERS, 20  
*Special Deputy Sheriff.*

Sheriff's fees 10.09.

Received July 3, 1926. Sheriff.

Filed July 12, 1926, at 9 A. M.

WILLIAM A. BLAIR,  
*Clerk.*

ANSWER.

ATLANTIC COUNTY CIRCUIT COURT.

FRANK J. BLOOM COMPANY,  
a corp., &c. }  
10 Plaintiff, )  
v. )  
HARRY KUEMMERLE and )  
KUEMMERLE CORPORATION, a corp., &c. )  
Defendants. )

Action at Law.  
Answer.

Harry Kuemmerle of Atlantic City, New Jersey,  
and Kuemmerle Corporation, a corporation of the  
20 State of New Jersey, severally answering the com-  
plaint say:

1. Paragraph 1 is admitted.
2. They deny paragraph 2.
3. They deny paragraph 3.
4. They deny paragraph 4.
5. They deny paragraph 5.
- 30 6. They deny paragraph 6.

COLE & COLE,  
*Attorneys of Defendants.*

Filed July 16, 1926, at 9 A. M.  
WILLIAM A. BLAIR,  
*Clerk.*

RULE FOR JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

FRANK J. BLOOM COMPANY,  
a corporation, etc., }  
10 Plaintiff, )  
v. )  
HARRY KUEMMERLE and )  
KUEMMERLE CORPORATION, a corporation, etc., )  
jointly and in the alter- )  
native, )  
Defendants. )

Action at Law.  
Rule for Judgment.

This cause being regularly upon the list for trial,  
at the October Term, 1926, of this Court and being  
called and the parties appearing with their respec-  
tive counsel, and the cause being moved by the  
plaintiff, and the jury being empanelled and sworn  
and it being stipulated in Court that the defendant,  
Kuemmerle Corporation, is a corporation not of  
the State of Pennsylvania, but of the State of New  
Jersey, and it being ordered that the summons and  
any pleadings in said matter be amended accord- 30  
ingly, and it being further stipulated in open Court  
that the claim of plaintiff, if any, was against the  
said defendant, Kuemmerle Corporation, a corpora-  
tion of the State of New Jersey, alone, and the evi-  
dence offered by all parties being submitted, and

all parties by their respective counsel being heard and the Court having charged the jury, and the jury having retired to consider of their verdict come into court and say they find in favor of the plaintiff, Frank J. Bloom Company, a corporation of New Jersey, and against the defendant, Kuemmerle Corporation, a corporation of the State of New Jersey, for the sum of \$1,836.72:

10 It is therefore, on this ninth day of December, 1926, ordered that judgment final be entered in favor of said Frank J. Bloom Company, a corporation of the State of New Jersey, the plaintiff, and against the said Kuemmerle Corporation, a corporation of the State of New Jersey, defendant for the sum of \$1,836.72 and for costs of suit to be taxed.

W. F. Sooy,  
C. C. J.

Rule actually entered this day of December, 1926.

20 On motion of  
LEE F. WASHINGTON,  
Attorney for Plaintiff.

Filed and entered Dec. 10, 1926, at 9 A. M.  
WILLIAM A. BLAIR,  
Clerk.

JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.  
October Term, 1926.

18315  
FRANK J. BLOOM COMPANY,  
a corporation, etc.,  
Plaintiff,

v.

HARRY KUEMMERLE and  
KUEMMERLE CORPORATION, a corporation, etc.,  
jointly and in the alternative,  
Defendant.

Action at Law.  
On Verdict.  
Lee F. Washington,  
Atty.

10

20

Judgment entered Dec. 10, 1926, at 9 A. M.

Damages \$1836.72  
Costs 69.85

Total \$1906.57

This action was tried before Judge W. F. Sooy, with a jury in the presence of counsel for the respective parties on December 9th, A. D. 1926. 30

The cause having been heard and submitted to the jury they returned their verdict in favor of the plaintiff and against one of the defendants, Kuemmerle Corporation, a corporation of New Jersey.

Whereupon it is ordered that the plaintiff, Frank

J. Bloom Company, a corporation of the State of New Jersey, recover of the defendant, Kuemmerle Corporation, a corporation of the State of New Jersey, the sum of one thousand eight hundred thirty-six dollars and seventy-two cents damages and sixty-nine dollars and eighty-five cents costs of suit.

WM. A. BLAIR,  
Clerk.

County Circuit Judgment Book No. 14, page 545.

10

NOTICE AND GROUNDS OF APPEAL.

ATLANTIC COUNTY CIRCUIT COURT.

20	FRANK J. BLOOM COMPANY, a corp., &c.	}	Plaintiff,
	v.		
	HARRY KUEMMERLE and KUEMMERLE CORPORATION, a corp., &c.	}	Defendants.)

Action at Law.  
Notice and Grounds  
of Appeal.

30 To the Within Named Plaintiff:

Notice that the defendants appeal to the Supreme Court from the judgment on the verdict of the jury, on the following grounds:

1. The Court erroneously admitted in evidence over objection the testimony of Mr. Moore concern-

ing his conversation with Bloom, which conversation could not bind the defendant.

2. The Court erroneously admitted in evidence Exhibits P8, P9 and P10, three letters having no relevancy and materially to the issue.

3. The Court erroneously admitted in evidence Exhibits P11 which is not relevant or material to the issue.

4. The Court erroneously admitted in evidence Exhibit P12 which is not relevant or material to the issue.

5. The Court erroneously admitted in evidence testimony of plaintiff as to his talk with Kuemmerle, Jr., he having no authority to bind the corporation.

6. The Court erroneously permitted the jury to find damages against the defendant upon the theory of a breach of the contract; at most defendant being liable only for what he agreed to pay with interest.

7. The Court erroneously permitted the jury to find a verdict in favor of the plaintiff, notwithstanding the failure of the defendant to execute papers on the ground that this would permit the jury to find for the plaintiff, despite the fact that at the time the request was made for execution of the papers the president of the corporation was ill and could not execute, and that it was during this period that plaintiff's principal voided the contract.

COLE & COLE,  
Attorney of Defendants.

10

20

30

Service acknowledged this 2nd day of February, 1927.

LEE F. WASHINGTON,  
Attorney of Plaintiff.

Filed February 5, 1927, at 9 A. M.

WILLIAM A. BLAIR,  
Clerk.

STATE OF NEW JERSEY.  
COUNTY OF ATLANTIC.

I, WILLIAM A. BLAIR, clerk of the County of Atlantic, and also clerk of the Circuit, etc., courts, holden therein, said court being a court of record, having a common seal, do hereby certify, that the foregoing is a true copy of a certain notice and grounds of appeal, Frank J. Bloom Company, plaintiff v. Harry Kuemmerle and Kuemmerle Corporation, defendant, as the same is filed in my said office.

In Testimony Whereof, I have hereunto set my hand and affixed my official (Seal) seal at May's Landing, N. J., this 7th day of February, A. D. 1927.

WM. A. BLAIR,  
Clerk.

By  
Deputy Clerk.

TESTIMONY.

ATLANTIC COUNTY CIRCUIT COURT.

FRANK J. BLOOM Co.,  
Plaintiff,

v.

HARRY KUEMMERLE and  
KUEMMERLE CORPORATION, a corporation, &c.,  
Defendants.

Action at Law.

APPEARANCES:

LEE F. WASHINGTON, Esq., for plaintiff.  
COLE & COLE, for defendants.

(The above entitled case was tried December 7, 1926, before Hon. William Frank Sooy, Judge, and a jury.)

(Mr. Washington opened the plaintiff's case to the jury.) 30

(Mr. Cole opened the defendant's case to the jury.)

Mr. Washington: May it please your Honor, before we proceed, I note in checking over our pleadings that we have started suit here against Kuemmerle Corporation, a corporation of the State of Pennsylvania, and I note that while Judge Cole has filed an answer and entered a general appearance, the answer which is filed is an answer of Kuemmerle Corporation, a corporation of New Jersey. All I want to do is to find out which company it is and amend either the complaint or the answer, as the case may be.

Mr. Cole: I understand it is New Jersey.

Mr. Washington: Well, there is no objection, I assume to amending the complaint so that it will read "a corporation of the State of New Jersey."

Now, Judge, if I may ask a question: is there any question that whatever Mr. Kuemmerle did he had authority to do, to bind the corporation?

Mr. Cole: If there is a cause of action it is against the corporation. There is no doubt about that.

FRANK J. BLOOM, called as a witness on behalf of the plaintiff, was sworn and examined and testified as follows:

Direct examination.

By Mr. Washington:

Q. Mr. Bloom, what is your connection with Frank J. Bloom Company?

A. I happen to be the president of the company.

Q. Is Frank J. Bloom Company the company referred to in that real estate license?

A. It is.

Mr. Washington: I offer it in evidence.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff P1.)

Q. Mr. Bloom, did you in behalf of your company have any dealings with Mr. Kuemmerle either in his own behalf or in behalf of the Kuemmerle Corporation?

A. I did.

Q. Touching obtaining certain funds for Mr. Kuemmerle or for the corporation?

A. Yes.

Q. And about when did you have the first corporation or notice touching that transaction?

A. I would approximate that the latter part of December, sometime. I have considerable correspondence that I would have to refer to to confirm the exact time.

Q. I ask you if that is the correspondence you refer to? (Papers handed to and examined by the witness.)

A. It is. There are some more there, too.

Q. This?

A. Yes.

Q. What correspondence do you have in your hands and whose correspondence?

A. I have correspondence between—

Q. No, not "between." Is it correspondence that went from your place?

A. Oh, yes.

Q. Copies of your own correspondence?

A. Copies of letters sent out from my office pertaining to the matter.

Q. The originals of those letters were all signed by you personally?

A. Signed by me.

Q. And checked up at the time?

A. Checked up at the time.

Q. Now, referring to those papers, can you tell us about when it was that you first had any knowledge or dealing touching this transaction?

A. Well, the way I entered the matter was this way:—

Q. Never mind how you entered. Just tell us about when it was.

A. Oh, about the fifteenth day of December.

Q. Now, who first took the matter up with you?

A. Who first took the matter up with me? Mr. Harry Kuemmerle.

Q. The defendant?

A. Yes, sir.

Q. Where did he take it up with you?

A. On the steps of the Atlantic City National Bank.

Q. What did he say to you?

A. He said did I have any money where there were no extra charges, and I said yes.

Q. What else did he say to you?

A. He said: "Well, I have a loan over there. I want you to step over to the office and let me go over it with you. I want to get fifty thousand dollars." I asked him where it was. He said, over at the corner, the Alkazar or Frederick—it has been known by several names. Then we talked the matter over and I went out for it and in the course of I should say probably a week or ten days I handled a commitment on the loan—

Mr. Cole: I object to that.

The Court: Strike the latter out—"In the course of a week or ten days," etc.

Q. Did Mr. Kuemmerle discuss with you the rate of commission?

A. He did.

Q. That he or the company would be willing to pay for the loan? 10

A. Yes.

Q. How much?

A. \$1600.

Q. It was a flat figure of \$1600?

A. Oh, no; it was three per cent plus \$100.

Q. Well, what did Mr. Kuemmerle tell you the situation was with respect to that mortgage?

A. Well, simply said he wanted to get it quickly and sign the mortgage; that is all.

Q. Did he tell you why he wanted to get it quickly? 20

A. No; we didn't go into details as to why.

Q. Did he later go into details as to why?

A. Yes, he later went into details.

Q. What did he tell you?

A. He said that the Equitable Trust Company was anxious to have the matter cleaned up and I should get on the job, and I carried it out as quickly as I could.

Q. Did he tell you who held the mortgage at that time? 30

A. Yes.

Q. Whom did he tell you held it?

A. The Equitable Trust Company.

Q. Did he say anything about whether the mortgage was due or was not due?

A. No; the only correspondence we had—

Mr. Cole: Ask him what was said.

Q. Give us full details, as fully as you can, of all that was said between you and Mr. Kuemmerle at the time he first took that transaction up. Carry it right on through in your own way.

A. Well, Mr. Kuemmerle asked me to secure the loan, as I mentioned aforesaid, and the matter was taken up by me. I placed the loan to be placed—to be placed—yes, —by assignment. Then after I had placed the loan I found out that Mr. Kuemmerle had typhoid. See? And that Mr. Charlie Myers, I believe, of one of the beach front hotels, was in Florida at the time.

Q. What was his connection with the matter?

A. He was the original, I believe mortgagee, of the property, and I believe the Equitable Trust Company took it by assignment from Mr. Myers.

20 Mr. Cole: I object to it. These are not facts.

The Court: He is just guessing.

Q. Tell us the substance if you cannot give us the exact words of the conversations between you and Mr. Kuemmerle. What did Mr. Kuemmerle say to you and what did you say to him from the beginning?

A. After Mr. Kuemmerle asked me to get the money I secured the money and opened up connection with—

30 Q. Tell us what Mr. Kuemmerle said to you and what you said to Mr. Kuemmerle.

A. Mr. Kuemmerle told me to go ahead with the matter and close it up. That is all he said.

Q. Did you do so?

A. Yes; I did so as far as I could.

Q. Did you actually procure fifty thousand dollars to be used to take an assignment of that mortgage?

A. I secured fifty thousand dollars and had it deposited in a title company in Atlantic City here, ready for settlement.

Q. When was it deposited with the title company?

A. About January 23rd.

Q. What year?

A. 1926.

Q. How long were the funds held there?

A. The funds were held there for approximately three weeks. 10

Q. Do you know the date on which they were withdrawn?

A. Well, that would make it—let me see—that would make it somewhere in the neighborhood of the twenty-third—around the fifteenth, twelfth to fifteenth of February; somewhere between those dates.

Q. Do you know the exact date on which they were withdrawn?

A. February 10th. 20

Mr. Cole: Tenth?

The Witness: Tenth, yes.

Q. When the funds were deposited did you notify Mr. Kuemmerle that they were on deposit?

A. Yes.

Q. What did he say?

A. Mr. Kuemmerle told me to get in touch with Charles Moore who was the solicitor for the Equitable Trust Company who held the mortgage, in order to close the matter. 30

Q. Did you do so?

A. I did.

Q. What did Mr. Moore do?

A. Mr. Moore, inasmuch as it was an assignment of mortgage—at Mr. Kuemmerle's request, as I understood it, prepared an extension agreement covering the mortgage for a total period of five years on the property.

Q. Was that extension agreement subsequently delivered to you?

A. That extension agreement was delivered to me, 10 was executed by my principals up in Philadelphia and returned to me in Atlantic City and returned personally by me to Mr. Kuemmerle to have him execute the papers, or have the corporation execute the papers.

Q. When did you personally return it to Mr. Kuemmerle after it had been executed by your clients?

A. I would say about somewhere around the 20 twentieth to twenty-second—I mean about the twenty-third or twenty-fourth of January.

Q. What, if anything, did you tell Mr. Kuemmerle when you gave him those papers?

A. I told Mr. Kuemmerle at that time—Mr. Kuemmerle every time I seen him he pretended to be awful—well, he was awful busy, and he couldn't give me any time. I gave him those papers and at that time, which I am quite sure was on a Friday, I said: "Now, Mr. Kuemmerle, you ought to close this matter up at once. My man is getting impatient. 30 We want to have the matter disposed of." "Well," he said, "I am not going to" he said: "I am not going to go out of my way to take care of it. Wait until I get to Philadelphia." He said he had to go to Philadelphia to have somebody execute the extension agreement and he said he couldn't settle himself at that time until the

papers, I believe, were executed by the secretary—I believe—of the company, and we had to wait upon the return of those papers from Philadelphia, and in the meantime when I gave the papers to Mr. Kuemmerle, Mr. Kuemmerle took them with him preparatory to sending them down quickly, then in the meantime—that is a day or two later—Mr. Kuemmerle was taken ill.

Q. Well, did you ever see the papers after that?

A. No.

Q. Were they ever returned to you by anybody? 10

A. No.

Q. Were the funds held till those papers that Mr. Kuemmerle had—were the funds on deposit in the title company in Atlantic City?

A. No, not yet.

Q. They were not then there?

A. Not yet.

Q. When were the funds sent there?

A. The funds were sent there—the funds were 20 sent there in anticipation of the prompt return of the—

Mr. Cole: No, no. When?

Q. When were they sent there?

A. I presume about January 23rd. That is on a Sunday.

Q. Well, they were not sent there on a Sunday, were they? 30

A. No. I say there were sent there on a Saturday so they would reach there on Monday; but they were addressed to Mr. Clark S. Barrett, I believe, of the South Jersey Title Company.

Q. Now, how soon were the funds sent there after you gave the other papers to Mr. Kuemmerle?

A. Oh, immediately, practically; just a matter of a day or two in between.

Q. Did you notify Mr. Kuemmerle that the funds were there?

A. I notified Mr. Kuemmerle's son. In the meantime Mr. Kuemmerle had been taken ill.

Q. In the meantime Mr. Kuemmerle had been taken ill?

A. Yes.

10 Q. And you did notify the son?

A. Yes.

Q. How did you do so, by letter?

A. Personally called over to the office, 2 North—South North Carolina Avenue.

Q. After your first conversation with Mr. Kuemmerle did you write any letters to him?

A. To Mr. Kuemmerle?

Q. Yes, or the Kuemmerle corporation?

A. Several letters; yes.

20

Mr. Washington: I call for the originals if you have them. If you have got them I have carbons.

Mr. Cole: Which letters do you want?

Mr. Washington: First, January 12, 1926; February 26th. I assume there is no objection to offering these three produced by the defense.

30 Mr. Cole: No.

Mr. Washington: I offer in evidence letters dated January 12, 1926, Frank J. Bloom Co. to Mr. Kuemmerle, produced by the defense.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff P2.)

Mr. Washington: Another letter dated February 26th, Frank J. Bloom Co. to Mr. Harry Kuemmerle.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff P3.)

Mr. Washington: A third letter, dated April 23rd, 1926, Frank J. Bloom Company to Mr. Harry Kuemmerle.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff P4.)

10

Q. Now, Mr. Bloom, I ask you whether in addition to that there was any other letter in between sent to Mr. Kuemmerle or Mr. Kuemmerle, Jr. touching that matter?

A. Between what dates—oh, none that I know of, no.

Q. Well, how many were sent altogether, three or four?

A. I don't know. Whatever you have there, Mr. Washington. I had so much correspondence about loans that I can't—

Q. I hand you again your carbons. You testified to how many letters? Three or four?

A. I would say four.

Q. To whom were the four letters written?

A. Well, there were three letters addressed to Harry Kuemmerle, Senior, and one addressed to Harry Kuemmerle, Junior; rather, that was the intention of that, because Mr. Kummerle was ill at the time and I addressed the letter to Mr. Kuemmerle, Junior.

30

Q. Is that the carbon of the letter that you addressed to Mr. Kuemmerle, Jr.?

A. It is.

Mr. Cole: I object to that. First, it is not to either of the defendants, and, secondly, I do not see what it has to do with the issue.

Mr. Washington: At the present stage of the game I haven't offered it yet.

Mr. Cole: Why do you say "game?"

10

Mr. Washington: At the present stage of the proceedings.

Q. Mr. Bloom, when did you next see Mr. Kuemmerle, Senior, after his illness?

A. Oh, I should judge several weeks after his illness.

Q. Was that before you wrote him the letter of April 22?

20

A. Why, yes—oh! Let me see that letter. I don't know. (Paper handed to and examined by the witness.) Oh, yes, that was before this April 22nd. Yes, that was before that time.

Q. What conversation did you have with him after his return before you wrote that letter?

A. Why, he stopped me on the street and I said to him: "How did you make out?" "Well," he said, "I think Dick has it."

30

Mr. Cole: A little louder.

A. (Continuing.) I asked him how he made out. "Well," he said, "I think Dick has got it." "Well," I said, "Tough luck." like that. That is all there was to it and we forgot the matter.

Q. Now, Mr. Bloom, when the matter was first

placed in your hands was there any conversation or understanding between you that if someone else got the money first you were to get no commission?

Mr. Cole: I object to that as leading. We ought to have the contract.

Mr. Washington: We will concede it is a little anticipatory, but it is following the opening of counsel, with the exception that there was such an un- 10  
derstanding. It may possibly be rebuttal.

The Court: You have asked the witness what the conversations were and he has detailed those that he has testified about. Now you are directing his attention to something else.

Mr. Washington: I withdraw the question.

Q. Mr. Bloom, I would like you to go back over 20  
the transaction and see if there are any other conversations that you had with Mr. Kuemmerle touching this matter that you haven't previously testified to, and, if so, what they were.

A. Well, when I saw Mr. Kuemmerle about the loan—rather, Mr. Kuemmerle saw me and later I saw him, he mentioned to me that he would pay so much money for it, and I said: "Well,"—I said: "What about it?" He said: "You go ahead." I came back to him several days later. I said, addressing 30  
him as Harry, I said, "Harry, I have your mortgage for you. Everything is all set, but I want you to sign this contract because I won't know where I am." "Well," he said, "I would rather not sign any papers to tell the truth." He said, "I don't want to sign any papers." He said: "But is all right.

You go ahead. I will take your money.” He emphasized the words “I will take your money,”—“and I want it.” That is all that I remember.

Q. That was before you actually went ahead?

A. That was before I actually went ahead.

Mr. Washington: Cross-examine.

Cross-examination.

10

By Mr. Cole:

Q. How long was it after the talk at the bank that

you produced the contract for Mr. Kuemmerle to sign?

A. I can only approximate these things. I will say—I would say that Mr. Kuemmerle spoke to me about it around, say, about the middle of the month. Then we started going into detail—I mean getting  
20 to a deal toward the latter part of the month and had a commitment the latter part of the month, I think. Mr. Washington, may I have that correspondence?

(Correspondence handed to the witness by Mr. Washington.) Here is a letter addressed December 15th wherein the mortgage was—the mortgage was placed by December 15th and I must have spoken earlier than that according to my correspondence.

30 Q. Well, how long do you think it was before you produced the agreement for him to sign, that the conversation took place?

A. Do you mean of the original held at the bank?

Q. Yes.

A. Well, I offered that contract so frequently—I offered the contract shortly after he—no. At the same time the mortgage was placed I offered the

contract. Then I offered it again. I offered it several times, on every day I was about.

Q. Still you don't answer my question. I want to know your best judgment, how long it was after you had the talk with Mr. Kuemmerle at the bank, that you produced the written contract for him to sign. When did you first produce it?

A. Well, when I first produced it was shortly before I placed the mortgage.

Q. Can't you—

10

A. I will answer twelve or fourteen, to tell you—to be perfectly honest, Judge, I placed so many mortgages it is an impossibility to keep up with the dates.

Q. Then do you say you can't answer it?

A. I would rather say that, yes; I would rather say that.

Q. All right. You have not any idea how long it was before?

A. No; I haven't any idea. I cannot answer it. 20

Q. Now I show you a writing dated the 15th of December and ask you whether that is the contract you asked Mr. Kuemmerle to sign? (Paper shown to and examined by the witness.)

A. Yes; that is the contract.

Q. And is that the one he refused to sign?

A. As originally worded it is.

Q. Is that the one he refused to sign?

A. No, it is not.

Q. Where is the one he refused to sign? 30

A. Why, these corrections were in here. He would not sign that one with these corrections. Yes, it is.

Q. Well, he never signed any, did he?

A. Never signed any.

Q. Who wrote the corrections on there?

A. The corrections on there were written by me at his request.

Q. And who wrote them?

A. By me.

Q. When did you write those corrections?

A. Probably about the same day or a day or two later.

Q. December 15th?

A. I don't know.

Q. Well, that is the date of the letter.

A. Well, I think, but I won't answer that. I don't  
10 know.

Q. Isn't that correctly dated?

A. It may not be because I presumed those contracts so many times for Mr. Kuemmerle's signature.

Q. You say you presented these contracts so many times. What do you mean by "These contracts?"

A. I went to Mr. Kuemmerle's office four or five or six times. He said "You don't need no contract. My word is good."

Q. Did you ever present any contract other than  
20 the one you hold in your hand? If you did, let's see it. Produce it.

A. Well, when I say "Contracts" I mean now signatures on the same contract.

Q. Well, that is different. Do you say now the paper you hold in your hand is the only contract you ever produced for him to sign?

A. Yes.

Q. Now, was that drawn on the day it bears date,  
30 December 15th?

A. It was drawn on the day it bears date, yes.

Q. How soon after that did you ask him to sign  
it?

A. Very likely the same day, and several days after that and before that.

Q. Well, when did you write the corrections?

A. The corrections? I couldn't tell you.

Mr. Cole: Mark that for identification.

(The paper referred to is marked as an exhibit for identification D1.)

Q. Didn't you say in answer to Mr. Washington that you were at his office with this contract at or about the same time or day that you had this talk at the bank?

A. Oh, no; after that.

Q. How long a time do you think it was between? 10

A. Oh, days. I would not answer that question, either.

Q. Now, didn't you say that you first saw him about December fifteenth?

A. I first said that, yes; but referring to my correspondence—I was going by my correspondence and whatever this correspondence says here is so; but insofar as the calls are concerned and things like that, I can't tell it. I mean it honestly. I would  
20 rather—

Q. All right. I haven't any quarrel with you. ?

A. I would rather not have a verdict than have anything like that. I wouldn't want to tell a lie and, therefore, I can't answer. I don't know.

Q. Do you want to change your testimony?

A. I would rather change my testimony.

Q. That you didn't see him first on December  
15th?

A. Yes. I would rather say I don't remember, or  
30 I can't answer.

Q. You also testified that when you saw him on December 15th at the bank you told him you had the money, do you remember, at that time?

A. Well, then, I must have seen him earlier then.

Q. Now, Mr. Bloom—

A. Yes; I had the money on December 15th.

Q. At that time?

A. I had the money on December 15th.

Q. Now, didn't you say in answer to Mr. Washington that you had the money on the day he spoke to you at the bank?

A. Oh, no; I didn't say that.

Q. You did not say that?

A. No.

10 Q. You didn't have it at that time?

A. I was asked to get it then. How could I have it?

Q. Didn't you sometimes have money to loan when people asked you about it?

A. Not without my principal's approval.

Q. Then you didn't have this fifty thousand dollars on the day that he spoke to you at the bank?

A. No, sir.

Q. Now, you say this money was deposited when?

20 A. The money was deposited direct from the principal to the South Jersey Title Company. I can't give you the exact dates. I can only approximate them from my correspondence.

Q. Who was the one who was lending this money?

A. The one who had loaned the money?

Q. Yes.

A. Why, Penrose Fleisher of Philadelphia.

Q. When did you get an agreement from him that he would take an assignment of this mortgage?

30 A. When did I get an agreement from him?

Q. Yes.

A. I have—as a matter of fact, I have some correspondence in my office where he agrees to take it.

Q. Won't you please answer my questions? When was that you had the agreement?

A. Well, I would say sometime around December

—it must have been on the day that the loan was approved, December 15th, whenever it was.

Q. Well, if it was December 15th, why was it so long over a month getting to the title company, two months—no, over a month?

A. Now, just a moment. I will answer your question. On December fifteenth Mr. Kuemmerle instructed me to close the loan.

Q. That is not what I am asking you.

A. I am going to let you know—

10 Q. Why was there so long a delay between January fifteenth and December 23rd to have that money deposited?

A. In the first place Mr. Kuemmerle gave me the title policy. That was all mixed up. By that I mean to say it had not been executed; it had not been properly assigned by the original mortgagee; had to take down to Florida, be executed by Mr. Myers and be brought back again. In the meantime we had to start the title company working, and in addition to that I believe Mr. Moore, who represented the Equitable Trust Company, had considerable work to do in the matter, as well as to prepare extension agreements and things of that sort, and I was dealing with attorneys and I had to wait on their pleasure to have things ready for me. 20

Q. Now, show me any writing from Mr. Fleisher bearing the date when he had agreed to take this assignment?

A. Well, on December 15th Mr. Kuemmerle accepted an offer— 30

Q. I am asking you to produce any writing you have from Mr. Fleisher in which he agreed to take the assignment of the fifty thousand dollar mortgage.

A. I can have it over here in one minute.

Q. Well, I would like to see it because I think it is important. Have you any idea when that date was?

A. It was about the sixteenth or seventeenth of December.

Q. You think it was about the sixteenth or seventeenth of December?

10 A. I think it was around the sixteenth because I wrote a letter on the fifteenth to Mr. Fleisher saying that Mr. Kuemmerle had authorized me to proceed and I received a letter within a day or two of that date of acceptance. I have it in the office.

Q. If you did not have an agreement with Mr. Fleisher before the fifteenth or sixteenth of December, how could you say in this letter of December fifteenth to Mr. Kuemmerle: "I am pleased to advise that Mr. Penrose Fleisher of Philadelphia has agreed to take an assignment of the first mortgage in the amount of fifty thousand dollars?"

20 A. That was done over long distance 'phone.

Q. What?

A. That was done over long distance 'phone and the letter followed.

Q. Whom did you talk to over the long distance telephone?

A. Mr. Fleisher.

Q. On what date?

A. It must have been the fourteenth or fifteenth of December.

30 Q. Didn't Mr. Kuemmerle ask you at the time he talked to you at the bank whether you then had that money, and didn't you tell him you had?

A. Oh, no. I would never say that. I said I could get it. I said "I will get it for you, Harry," like that, and went out and got it for him within a week or ten days, or whatever the time was.

Q. You first testified that you delivered an extension agreement to Mr. Kuemmerle and you afterwards corrected that by saying you delivered to the son. Now, which was it?

A. I delivered that I am quite sure to Mr. Harry Kuemmerle, Senior, at his own office—yes, Mr. Kuemmerle, Sr. I didn't say anything about Junior. I didn't say anything about Junior. I delivered that to Mr. Kuemmerle, Sr., prior to his leaving Atlantic City. 10

Q. Whom do you now say you delivered these agreements to?

A. I rather think it was Mr. Kuemmerle, Senior.

Q. It is your recollection you delivered them to Mr. Kuemmerle, Sr.?

A. I think so.

Q. And from whom did you receive them?

A. From Mr. Moore.

Q. When did you deliver them?

A. I couldn't say. 20

Q. I show you what purports to be an original and a copy of an extension agreement and ask you whether they are the papers to which you have referred?

A. There is a Pennsylvania affidavit there. It must be that.

Mr. Cole: Mark the two papers for identification.

(The papers referred to are marked as exhibits 30 for identification for the defendant D2 and D3.)

Q. Now, when was it that Mr. Kuemmerle told you that Dick had the loan or the money?

A. Oh, I would say approximately—which is all I can answer—well, it would be some time upon his

return, between the time he returned after his illness, and April 22nd.

Q. And to whom did he refer?

A. Sir?

Q. To whom did he refer when he said Dick had it?

A. Oh, he referred to his brother.

Q. And what is his business?

A. He is in the real estate business.

10 Q. Same business you are in?

A. Yes.

Q. Now, when did you first learn that Mr. Kuemmerle was sick abed?

A. I first learned that Mr. Kuemmerle was sick in bed about two or three days after the papers were delivered to the office for execution.

Q. And by the papers you mean the extension agreement?

A. Extension agreements.

20 Q. And you know how long he was sick and unable to attend to business?

A. Why, approximately three weeks; something like that.

Q. Wasn't it longer than that?

A. I don't know.

Q. Well, now, in the meanwhile did you write Mr. Fleisher, who was to lend this money, and tell him that Mr. Kuemmerle was sick and could not attend to business?

30 A. Yes.

Q. Have you a copy of the letter you wrote him?

A. I don't know. I ought to have.

Q. Do you hand me now a copy of the letter you wrote Mr. Fleisher?

A. Yes; that is a copy of the letter.

Q. The original was mailed to him?

A. Yes.

(The paper referred to is marked as an exhibit for identification for the defendant D4.)

Q. Did Mr. Kuemmerle's illness interfere with the consummation of this transaction on his part?

A. Well—

Q. Now, did it? Say "yes" or "no," please. Then you can explain.

Q. It did not interfere with it at all?

A. No.

Q. Had nothing to do with it?

A. No.

Q. Why did you say in your letter of April 23 to Mr. Kuemmerle: "Dear Harry: You will remember the fact that the mortgage of fifty thousand dollars which I placed and had the funds waiting for several weeks for you was not settled, which was due to the fact of your illness and the impossibility of my client to hold the money for a longer period than two weeks without any prospect of early settlement." 20

A. Yes.

Q. Was that true?

A. That was not true under the circumstances.

Q. What you said was not true?

A. Was not true; was not true.

Q. Well, have you a habit of—

A. Well—

Q. Wait a minute, wait a moment. Have you a habit of writing letters and making statements that 30 are not true?

A. Under circumstances—

Q. I ask you is it?

A. Yes, yes.

Q. You have that habit?

A. Yes; I have that habit.

Q. Is that part of the real estate business?

A. Not necessarily.

Q. Did you get a reply by Mr. Fleisher to your letter?

A. Not that I remember.

Mr. Washington: I have just been handed by Mr. Bloom's clerk some papers which I assume are the papers Judge Cole asks for. (Handing the same to  
10 the witness.)

Q. Which one was I asking about?

A. About the letter of acceptance.

Q. By Mr. Fleisher?

A. Yes.

Mr. Cole: I offer for identification the letter of December 19th, 1925, from Penrose Fleisher to Mr. Bloom. (The paper referred to is marked as an  
20 exhibit for identification for the defendant D5.)

Q. I note that in Mr. Fleisher's letter he states as a condition of taking this loan—

Mr. Washington: I ask if counsel wants to refer to that letter he offer the letter in evidence. I am perfectly willing that should be done.

Mr. Cole: I offer it in evidence.

30 (The paper offered, heretofore marked as an exhibit for the defendant for identification D5, is received in evidence.)

Q. I note in the letter of Mr. Fleisher to you that he states as a condition of making this loan that the

interest on the mortgage shall be paid quarterly. Did you notice that when you got the letter?

A. Yes, sir.

Q. Did you communicate that to Mr. Kuemmerle?

A. I probably did.

Q. No. Did you communicate that to Mr. Kuemmerle?

A. Undoubtedly.

Q. Undoubtedly? Yes or no.

A. Undoubtedly I did.

10

Q. How did you do it?

A. Personally, very likely.

Q. What did he say?

A. Why, my recollection of the matter was that the interest—that the matter was disposed of.

Q. How?

A. In other words, it was supposed to be paid semi-annually. I believe that was the result.

Q. How could you do that?

A. Why, with further conferences.

20

Q. Wait a minute. Did you have any additional instructions from Mr. Fleisher to change this condition? If so, let's see the correspondence of it.

A. May I see that extension agreement?

Q. Yes. (Handing the extension agreement referred to to the witness.)

Mr. Washington: May I ask if they have been offered in evidence, the extension agreements?

30

The Court: They have been marked for identification.

Mr. Washington: I ask that they be offered in evidence also at this time.

Mr. Cole: The witness is under cross-examination.

The Court: Yes, he is, and he is simply referring to them to refresh his recollection in order to answer the question?

Mr. Cole: I suppose so.

10 The Witness: Whatever these agreements were, they were the final contract agreed upon.

Q. Well, who executed that extension agreement?

A. This agreement was executed by Mr. Fleisher and prepared on Mr. Kuemmerle's instructions to Mr. Moore. Whatever that contract says is the truth.

Q. Why, this extension agreement is with Eleanor F. Riesman and Margaret F. Sloss. Who are they?

20 A. They are relatives of Mr. Fleisher's.

Q. Relatives of whom?

A. Mr. Fleisher's.

Q. Wasn't your arrangement with Mr. Fleisher?

A. Yes, sir.

Q. He was the one who was to lend the money?

A. Yes. All my arrangements were with Mr. Fleisher.

30 Q. Now, when you found out that Mr. Kuemmerle was sick, as you admit you did, and, therefore, he couldn't close this transaction, did you notify Mr. Fleisher or these people you now say were to lend this money? If so, produce your correspondence.

A. I believe I already have a letter here, haven't I?

Q. I haven't seen any.

The Court: You were looking for one?

The Witness: I can probably only show you my own correspondence relative to that.

Q. Well, let me have a copy of any letter you sent to Mr. Fleisher—pardon me. There is a letter in evidence you wrote to Mr. Fleisher, January 27th, calling his attention to Mr. Kuemmerle's serious illness. Now, did you get a reply from him?

A. Is that addressed to Philadelphia or the Am- 10  
bassador Hotel?

Q. St. James Annex, Philadelphia.

A. St. James Annex, Philadelphia.

Q. Now, did you get an answer to that letter?

A. I must have gotten an answer of some sort.

Q. Will you produce that?

A. I mean over the telephone, not personally.

Q. What did he say?

A. I don't have—all our correspondence is not 20  
letters. As a matter of fact I did most of my busi-  
ness over the long distance telephone or over the—

Q. What did he say?

A. Why, he agreed to wait a while.

Q. How long did he agree to wait?

A. Why, he waited one week and he waited two  
weeks and I believe he waited three weeks.

Q. How long did he agree to wait?

A. Well, he, he, he,—he agreed to wait a week.

Q. He agreed to wait a week?

A. Yes. 30

Q. Is that all he agreed to?

A. Then on my persistence—

Q. Did he agree to that?

A. No. Finally I requested him to extend it be-  
cause I was anxious not only to take care of the  
contract, but have it completed for Mr. Kuemmerle.

Q. How long?

A. I effected one extension and I effected another extension, and at the end of the third extension after the fifty thousand had been lying in the title company for three weeks with Mr. Kuemmerle quite ill and an uncertain settlement in sight, the money was withdrawn.

Q. Then Mr. Fleisher, whoever it was that was to lend this money, withdrew the money when they  
10 knew that Mr. Kuemmerle and when you knew Mr. Kuemmerle was sick abed and couldn't close this transaction; is that so?

A. That is so, yes.

Mr. Cole: That is all.

Mr. Washington: That is all.

(Witness excused.)

20

HARRY KUEMMERLE, called at a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Washington:

30

Q. Mr. Kuemmerle, you are one of the defendants in this case, are you not?

A. I am.

Q. Were you taken ill during the early part of this year?

A. Twenty-fifth of January.

Q. January 25?

A. January 25.

Q. Were you taken ill quite suddenly?

A. Yes, sir, within an hour.

Q. Up to that time you had been transacting business?

A. Oh, yes.

Q. Where were you when you were taken ill?

A. In Philadelphia.

Q. In what city?

A. In Philadelphia.

Q. In Philadelphia?

A. Sunday night.

Q. January 25th was a Sunday?

A. I think it was. It was Sunday night.

Q. I thought you said it was Sunday night?

A. It was.

Q. Now, were you confined to your bed then?

A. I was.

Q. From that date until what date?

A. I think I was in bed about six or seven weeks  
and I didn't get out until the middle of March.

Q. You don't recall the exact date when you got out?

A. No, about the middle of March. The first date I got out I came to Atlantic City. That was about the fifteenth of March.

Q. During that whole period, from January 25, 1926, until the middle of March, were you in the physical condition to transact any business at all? 30

A. No, sir. I had typhoid fever.

Q. You were very ill?

A. Very ill.

Q. What other officers did this company have during the period of your illness? Who were they?

A. My son is secretary. I am the president and treasurer.

- Q. Who is the vice president?  
 A. We have no vice president.  
 Q. You had no vice president?  
 A. No vice president.  
 Q. So that there were no officers of the company during that period except yourself and your son?  
 A. That is all.  
 Q. Your son is Harry Kuemmerle, Junior?  
 A. Yes, sir.
- 10 Q. During the period of your illness did your son show you any letters that he had received from Frank J. Bloom Company touching this mortgage in question?  
 A. I was not allowed to have any business transactions. I was very, very sick, and the doctor would not allow any business transactions at all.  
 Q. Now, when was it that the doctor first permitted you to be bothered with any business transactions?  
 20 A. As soon as I got well I started to put in an extension telephone and they cut it out, because I didn't know I had typhoid fever.  
 Q. About when was it you started to do that?  
 A. About four or five weeks after I was taken sick. I was feeling pretty good and I thought I would be out the next day.  
 Q. That was sometime the end of February, wasn't it?  
 A. Oh, yes.
- 30 Q. Now, did you about the time that you had that extension telephone put in also have any conversations with your son as to this transaction?  
 A. Yes.  
 Q. What conversation did you have with him?  
 A. I don't know. I don't just remember what it was any more because I had a fever of a hundred and five—

- Q. You have no recollection of this transaction from January 25, 1926, up to what date then?  
 A. I really don't know.  
 Q. Have you any recollection of it?  
 A. I had several talks with him about it, just in a casual way.  
 Q. Several talks with whom?  
 A. With my son, in a casual way. He came up one day from Atlantic City.  
 Q. Did he bring with him any letter from the Bloom Company?  
 10 A. No.  
 Q. Did he ever at any time submit to you any letter that he had received from the Bloom Company touching it?  
 A. He mailed on—he mailed on a Saturday night before I was taken sick two extension agreements which came to Philadelphia and were never opened by me until after I was well. That is these two extension agreements here.  
 20 Q. They were actually received at your place but you didn't open—weren't able to open the envelope until after you were well?  
 A. Wasn't opened until afterwards. I have the envelope right over there.  
 Q. I show you carbon dated February 26, 1926, purporting to be from Frank J. Bloom Company to your son, and ask if he showed you that letter during your illness?  
 A. Well, at that time I was pretty well, February 26—I think he did at that time—he didn't bring it up, no. I believe I saw this letter when I got back to the office about the middle of March, two weeks later than that.  
 30 Q. About two weeks later than its date?  
 A. Yes.

Mr. Washington: Any objection to offer this in evidence?

Mr. Cole: Yes. I do not see what it has to do with sustaining your proposition here nor how it is relevant.

Mr. Washington: I will let your Honor see the letter.

10

Mr. Cole: That is after this money was withdrawn?

Mr. Washington: That is right.

Mr. Cole: The transaction was closed?

The Court: This is after the money was withdrawn?

20

Mr. Cole: Yes, the money was withdrawn on February tenth. He is attempting to make evidence for himself.

The Court: I won't admit that.

Mr. Washington: Your Honor will allow me an exception.

The Court: Yes.

30

Mr. Washington: Mark it for identification.

(The paper referred to is marked as an exhibit for identification for the plaintiff P5.)

Q. Mr. Kuemmerle, did your son during your illness report to you any of the steps that were being

taken by him in the matter of the mortgage in question?

A. I don't think he did. He might have mentioned something.

Q. You don't think he did?

A. I don't remember.

Q. When was the first time that he mentioned them to you?

A. When I came back to my office about the middle of March.

Q. It was not until about the middle of March?

10

A. I am not sure. I don't know what you are referring to. What is it you are—

Q. You mean to say that from January 25, 1926, until March 15, 1926, you did not discuss any of the facts contained or attending this fifty thousand dollar mortgage with you son?

A. Oh, I might have. I just don't remember.

Q. You don't know whether you did or not?

A. I might have.

20

Q. Well, did you?

A. I might have asked him was there anything new or something like that, something of that kind that I ask every day.

Q. You did ask every day?

A. No, that I do ask every day now.

Q. You have no recollection of whether you did or whether you didn't discuss—

A. From the 25th of January until about the end of February I was practically out of my mind. So I couldn't have discussed business very well with anybody.

30

Q. During that period?

A. Yes. If you will—

Q. Now, from March 15th on you did?

A. Yes, I attended to business.

Q. Now, Mr. Kuemmerle, when did you first talk to Mr. Bloom—that is Mr. Frank J. Bloom—touching the fifty thousand dollar mortgage?

A. Somewhere around the twelfth or thirteenth of December. I met him as I was coming out of the Atlantic City National Bank.

Q. What day of the week was it?

A. I don't know. I said: "Frank, have you got a fifty thousand dollar fund handy?" He said: "What for?" I said: "A mortgage on the Frederick Building." He said: "I haven't got it on hand now but I can get it." I said: "That is not the point. I need it quickly," and I said: "There is others working on this same mortgage." I said: "William F. Shaw is working on it; Carlton J. Adams and John Stafford, and," I said, "Your brother Dick, Richard P. Bloom and Company are working on it. Now," I said, "here is the condition, Frank: I am a real estate broker myself and I don't want to get into any wrangle over this. I only want to pay one commission. The man who gets this money for me—" I said, "It is a mortgage anybody could place. It is a fifty thousand dollar mortgage on a three hundred thousand dollar building and," I said, "The man I take the money from at the settlement is the man who is going to get the commission." I said: "Under those conditions, Frank, if you want to work on it, all right." He said: "I will get that money for you." I said: "Now, don't let us have any misunderstanding on that point."

Q. Now, when did you next discuss the transaction with him?

A. On December fifteenth he came to my office with a letter, a letter stating that he had placed it with Penrose Fleisher and agreeing to pay him \$1600 commission. I said—

Q. What date did he come in?

A. December 15th.

Q. On December 15th?

A. I guess it was.

Q. Who was the letter from?

A. It is a contract he drew up himself,

Q. Have you got it?

A. Yes.

Q. The paper here?

A. Yes. I told him I would not sign any contract. 10

Q. Is that the paper that he brought to you?

A. That is the paper. There is a copy over there, carbon copy.

Q. As it was brought to you first had these ink notations been made?

A. They weren't on there when he first brought it.

Q. So that as it was brought to you it was brought with everything there excepting these notations?

A. Yes. 20

Mr. Washington: I offer that in evidence.

(The paper offered, heretofore marked for identification D1 is received in evidence and marked as an exhibit for the plaintiff P6.)

Q. How did it come that these ink notations were made on the paper?

A. When he brought that in to me I jumped up 30 from my chair and I said: "Now, Frank, you know what I told you over at the bank. I told you that others are working on this." I said: "Take it away. I will not sign anything." We had quite an argument. We had quite an argument there for about five or ten minutes and he finally took this thing out

and made those notations. He said: "Now, look here. I will call my stenographer over." I said: "Frank, I am not going to sign any contracts with you." I said: "If you will get Mr. Fleisher to write a letter to the Kuemmerle Corporation stating that he will take back such mortgage, that present mortgage and extend it for five years, "I said, "I will call off the other brokers that are working on it." He said he would do that and he went out of the

10 office.

Q. Did you ever get an agreement or letter to that effect from Fleisher?

A. No, sir. He never produced it.

Q. Did the company ever get any letters at all from Fleisher?

A. No, sir. He never produced any letters at all.

Q. Did you retain Mr. Charles F. Moore in this matter?

A. Mr. Charles F. Moore represented the Equitable Trust Company.

20 Q. Did you refer Mr. Bloom to him in the matter?

A. I told Mr. Bloom if he had the money and if he would get a letter from me—from Mr. Fleisher that he had this money, I said we would call off the others and go ahead with the transaction. He said: "I got it." "Well," I said, "if you got it, all right, you are the man. If you produce it, if you are the one who produces it at the settlement I will pay the commission to you."

30 Q. Did somebody else thereafter produce the money?

A. Yes.

Q. Who? On what date?

A. I think at the same time. His brother had received telegrams from the Equitable Life Assurance Society of New York stating that they would

take this mortgage.

Q. When did you make settlement with Mr. Richard Bloom's client?

A. I think June 6th.

Q. June 6th, 1926?

A. Yes, sir.

Q. When was their money deposited with the local title company?

A. That money was not deposited until June 6th.

Q. Wasn't it obtained until about that time, was 10 it?

A. Oh, yes; it was obtained long before that.

Q. When was it obtained?

A. When I made—as soon as I got well I met Mr. Bloom on the corner of North Carolina—

Q. Which Mr. Bloom?

A. This Mr. Bloom, Ralph—or Frank.

Q. Mr. Frank Bloom?

A. Yes; met him on North Carolina the first day I was down here, North Carolina and Atlantic, and 20 I spoke to him. I said to him: "Frank, how does this case stand?" He said, "Fleisher pulled away his money and I got somebody else." "Well, now," I said, "listen. Dick Bloom has been in the office every day showing telegrams from the Equitable Life Assurance Society," and I said, "I ain't going to wait any longer for you, but I will wait a few days." He said: "There is only one hitch with this other client. They may not take an assignment of an old mortgage." "Well," I said, "I will wait a few 30 days;" and he finally met me and told me, he said; "It is all off. I am through." So I went in to Dick Bloom. I told Dick: "Dick, I will take that money." and he telegraphed on to New York and I believe it was forty-eight hours afterward when the word came back to have the thing ready and the money would be forwarded when we were ready.

Q. Well, now, Mr. Richard Bloom's client didn't have the money for you until after March 15th; did they?

A. Oh, yes; they had that money at the same time that he said that he had it.

Q. When did they advise you—when did Mr. Richard Bloom's office advise you that they had the funds to take over this mortgage?

A. I think it was before I got sick, the first time.

10 You see, the—

Q. Do you know when it was?

A. He went ahead. I explained the same thing to Dick Bloom. I said: "You know, I can use this money, but I am not going to pay you a lot of commission. I don't want to get in any tangle or any mixup. Now," I said "You know I can use this money and I only want to pay one commission," and he went ahead and the Equitable Life Assurance Society told him that they would take that mortgage.

20 That was long—that was before I got sick.

Q. Were you advised—

A. By him.

Q. Wait a minute. Were you advised before you went away by Mr. Richard Bloom that he had the funds?

A. Yes, sir; that he could get it.

Q. He didn't tell you that he had them. When were the funds actually deposited and produced by his client?

30 A. At the settlement.

Q. Not until June, were they?

A. At the settlement in June.

Q. And not until that time, were they?

A. Well, they telegraphed that they were ready at any time we were ready.

Q. They were not actually produced until June; were they?

A. They were not produced until we called for them, June sixth.

Q. And the funds produced by Mr. Bloom's client were produced before that; before you went away?

A. I don't know whether they were ever—the only thing I ever knew was through the correspondence that it had been deposited. He had no right to deposit that money.

Q. Wait a minute. We will argue that later. You went to one of the title companies in this matter, 10 didn't you, and ordered a search?

A. I think when—

Q. Now, please answer the question.

A. Yes. I don't believe I went to a title company. I called him on the 'phone.

Mr. Cole: He is your witness.

Mr. Washington: I have a right to have him answer the questions. 20

Q. What title company did you call?

A. The one that had the policy, the South Jersey. That policy was with a mortgage.

Q. The existing mortgage?

A. Yes.

Q. When did you call them?

A. Oh, I think it was way along before I got sick. I wanted to know whether—I wanted to know whether that same policy could be transferred to 30 other—to other people.

Q. Where was that policy?

A. Where was that policy?

Q. Yes, sir.

A. At that time I didn't know.

Q. Did you make any inquiry to find out where it was?

A. Yes.

Q. Did you then find out where it was?

A. Yes.

Q. Where was it?

A. Well, I called on Mr. Moore who represented the Equitable Trust Company and he said: "I don't have the policy. I don't even have the fire insurance. The Equitable Trust Company didn't get anything with this mortgage from Myers." "Well,"

10 I said, "that is funny."

Q. Was Myers the mortgagee?

A. The mortgage was originally made by Charles Myers.

Q. The title policy went to him too?

A. He had it before I owned the building.

Q. How long ago was that?

A. What?

Q. How long a time had he held the mortgage—Myers?

20 A. He had the mortgage for five years and sold it shortly before it became due.

Q. To the Equitable?

A. He traded it off, yes, for some stocks and bonds and stuff.

Q. Now, where was Myers at the time that you inquired for this policy?

A. I went to his secretary, Miss Davis, in the Hotel Breakers. I didn't know that the Equitable Trust Company didn't have it, and I went to her and

30 I said: "Miss Davis, where is this policy? Did you turn it over to the Equitable when you gave them the mortgage?" She said: "I don't know, Mr. Kuemmerle, I will find out." I said, "Well, where is Mr. Myers?" She said: "He is in Florida. I will write to him today."

Q. Now, how long a time was it that elapsed before you located the policy?

A. I don't know. I didn't locate the policy; that is, I didn't get the policy. When I told Mr. Moore and asked him to let me see the policy and he didn't have it, and they were not in the papers, he was surprised. So I imagine he got busy and looked up the policy. I told him Miss Davis had written to Myers to see if Myers gave him the policy. It was not my transaction. The transaction was between Myers and the Equitable Trust Company.

Q. You wanted that policy, didn't you? 10

A. After I found out the Equitable Trust Company didn't have the policy and didn't have the fire insurance with their mortgage, of course then I told him that they better look that up.

Q. Well, you were certainly anxious, weren't you, that that existing policy should be assigned to the new persons that were to take the mortgage?

Mr. Cole: Now, may it please your Honor— 20

Q. (Continuing) rather than to have an entirely new policy issued to them.

Mr. Cole: I object to it as not relevant and immaterial.

The Court: I cannot see its relevancy nor its competency.

Mr. Washington: The witness has just answered 30 that he didn't have any particular concern at all about that policy.

The Witness: That is true.

Mr. Washington: Isn't it proper for us to show that the witness did have?

The Court: He is your witness. I will overrule it.

Mr. Washington: Allow me an exception.

Q. Mr. Kuemmerle, did you thereafter discuss the question of that title policy with anyone?

Mr. Cole: That is objected to on the ground that 10 it is not relevant nor material.

The Court: Objection sustained.

Mr. Washington: I ask an exception.

Q. Mr. Kuemmerle, did you ever at any time get word from Mr. Bloom that his client had the funds ready for you for use in taking over this mortgage or that the funds were on deposit?

20 A. No. He told me—on December 5 he came in with that letter stating that Penrose Fleisher would take the mortgage. I said: "Frank, the C. J. Adams and Company have placed one hundred thousand dollars on that building with five different clients and I haven't got it yet. Now," I said, "if you will get me a letter from Penrose Fleisher will take that mortgage just as it stands, with everything connected with it, I will call everybody off and then I will sign that agreement." He said: "When I say a 30 thing I mean it." I said: "So did C. J. Adams and Company." That is the reason the delay has been so long."

Q. Now, had there been a lot of delay at the time of that letter, the date of which is December 15th, 1925?

A. That mortgage up to this time the Equitable

Trust Company had called that mortgage a year before, and three or four other brokers—

Q. So prior to December 15th, 1925, you had been trying for months to have it replaced, hadn't you?

A. Not this mortgage; no, sir. One hundred thousand—I made application for \$125,000 mortgage. The first one was with Shapiro and he promised that he could easily get it, and he delayed three or four weeks or a month or more; and C. J. Adams told me they could get \$125,000 first mortgage on the building, and they had it for months and months. 10 He had it placed with four or five different people that would take it. Finally he called me and told me a Baltimore concern would take \$100,000 if I would accept it.

Q. Who told you that?

A. C. J. Adams. Just at this time this man has come in—

Mr. Bourgeois: I do not see the relevancy. 20

Mr. Washington: Well, the last has no relevancy. Strike it out.

The Court: It will be stricken.

Mr. Washington: Cross-examine.

Cross-examination.

By Mr. Bourgeois: 30

Q. Envelope postmarked Atlantic City, January 25, 3 P. M. addressed to Mr. Harry Kuemmerle, City Line and Lime Kiln Pike, Mt. Airy Post Office, Philadelphia,—I ask you to look at that and ask you whether you received that envelope?

- A. I received it.  
 Q. You received it?  
 A. Yes, sir.  
 Q. Was there anything inside of it?  
 A. Two extension agreements.  
 Q. Two extension agreements that have been marked for identification?  
 A. These two extension agreements; yes, sir.  
 Q. And where were you when it reached you?  
 10 A. I was sick in bed.  
 Q. When did you open it?  
 A. Oh, I guess six weeks or more after this.  
 Q. Were these two extension agreements ever delivered to you by Mr. Bloom?  
 A. Never.

Mr. Bourgeois: I offer the agreements and the envelope. (The agreements offered are marked as exhibits for the defendant D2 and D3 in evidence.  
 20 The envelope offered is marked as an exhibit for the defense D4 in evidence.)

- Q. Did you pay Richard Bloom a commission?  
 A. I paid Richard Bloom three per cent.  
 Q. Were you in your office in Atlantic City between the date you left in January, which you say was the twenty-fourth—  
 A. It was Friday. I left Friday.  
 Q. —until you came back in March?  
 30 A. I was never in my office at any time.  
 Q. How long were you actually confined to your room?  
 A. To between the fifth and seventh of March.  
 Q. And was that the first day you left your room after your illness?  
 A. Yes. I came downstairs.

- Q. You said you had typhoid fever?  
 A. Typhoid fever.  
 Q. Who was your attending physician?  
 A. Dr. Alfred Stanley, 18 or 19 Spruce Street.  
 Q. Now, when did you first know that this fund which Mr. Bloom says he procured for you had been withdrawn from the title company?  
 A. I didn't know it was withdrawn until after I got back to Atlantic City.  
 Q. Were you ever shown the letter from Mr. 10  
 Fleisher to Mr. Bloom in which he placed a condition that this interest was to be paid every three months?  
 A. No, sir.  
 Q. Had you ever read the extension agreement before you came to Atlantic City?  
 A. You mean in March?  
 Q. In March?  
 A. No, sir.  
 Q. Now, is this sheet or letter a carbon copy of the 20  
 agreement Mr. Bloom asked you to sign?  
 A. Yes, sir.  
 Q. Did he have that with him when he presented the original?  
 A. Yes, sir; two together. I was to keep one and he was to keep one.

Mr. Bourgeois: I offer that in evidence.

(The paper offered is marked in evidence as an 30  
 exhibit for the defendant D7.)

- Q. When you told him that you would not sign that agreement what did he say?  
 A. He said: "I will change it. I will change it," and he went outside and made these notations on

there. I said: "Now, Frank, listen. I don't care what you put on there. I will sign no contract. That is our understanding." And we had quite a heated argument.

Q. Did he leave those with you?

A. He went out so excited that he left them there, yes.

Q. And have you had them ever since?

A. They have been in my desk ever since. I said:  
10 "If you don't like those conditions let the thing alone." I said: "Just what I want to avoid I see is going to happen."

Mr. Bourgeois: That is all.

(Witness excused.)

20 FRANK J. BLOOM, recalled.

Re-examination.

By Mr. Washington:

Q. Mr. Bloom, you just heard the testimony of Mr. Kuemmerle with respect to the statement, as I recall, that he distinctly stated to you that if someone else procured this money ahead of your clients  
30 or ahead of you, that you were to receive no commission on the deal. I ask you if any such conversation ever occurred?

A. We never had any such conversation.

Q. Did Mr. Kuemmerle ever say to you that a number of other parties were working on the deal and that if someone else closed ahead of you you were to receive no commission?

A. At that time, no.

Q. Did he ever at any time mention the question of other parties working on the deal?

A. Previous to that time, yes.

Q. Previous to what time, can you mention?

A. Well, when he told me at the bank, he said:  
"Now, the first fellow gets it gets the commission."

Mr. Bourgeois: When was that?

The Witness: When I was talking to him at the  
bank about getting the mortgage. 10

Mr. Bourgeois: That was the initial step, wasn't it, the initial proceeding when you first met him?

The Witness: That was when I first met him, yes.

Mr. Bourgeois: He told you that?

20

The Witness: Told me at that time, yes.

Q. What did he tell you then?

A. He told me he wanted the money and I asked him for a contract then at that time. I said "So it will protect me, Harry." "Well," he said, "Frank, I don't want to get tied up in anything. He said: "I don't know just how things might go," and he said, "You go get the money." Wel, I went and got the money very quickly. 30

Mr. Cole: Now, that is the answer.

Q. Did you thereafter have any conversation with Mr. Kuemmerle touching the fact that other parties were working on the deal?

A. After the loan was placed, no. I asked for a contract and he said: "I won't give you a contract." I said: "Well, that puts me in a very funny position. There is one thing I never do,—place a mortgage without a contract." He said: "You go right ahead. I will call them all off. It is your loan. I want the money and need it."

Q. Well, did you tell him then that you had the funds?

10 A. Absolutely.

Q. And thereafter you did have the funds sent here?

A. I had the funds sent here later on.

Mr. Cole: That is all going over the case again.

Mr. Washington: That is all.

Cross-examination.

20

By Mr. Cole:

Q. Then you did know at the very threshold of this matter that the placing of this loan was in the hands of others besides yourself?

A. When it was placed, yes, in the first place.

Q. And when you told him that you had it and he then said: "All right. I will call them all off?"

A. Yes; he said that.

30 Q. You knew it at that time?

A. Sir?

Q. You knew it at that time?

A. No. We had a gentleman's agreement. I asked him for a contract. He said: "No, Frank.. The deal is yours. You place the mortgage. I want the money. I am anxious to satisfy Mr. Moore. He

has been calling me up and we have got to get this thing cleaned up."

Q. Didn't you just say a moment ago that he said to you: "I will call them all off?"

A. Yes.

Q. What did you mean by that—what did he mean by that?

A. He meant to call off all the other brokers.

Q. You knew he had other brokers on this matter?

A. Oh, yes. I admitted that, up to the acceptance 10 of the loan.

Mr. Cole: That is all.

Re-direct examination.

By Mr. Washington:

Q. Now, did you ever up to the time the proposal of December fifteenth, 1925, was submitted to Mr. 20 Kuemmerle have any talk at all about a letter from Fleisher to the Kuemmerle Company?

A. Yes. I told Mr. Kuemmerle the mortgage was placed and I told him I had a letter and wanted to get a contract. I said: "I want to know where I stand. The mortgage is placed."

Q. What did he say to that?

A. Well, he said, "That is not a letter to me. That is a letter to you. That does not satisfy me." 30 "Well," I said, "a commitment to me is as good as a commitment to you."

Q. What did he say to that?

A. Well, he—he still insisted on the letter from Mr. Fleisher and he did not give me a contract, although he did say: "It is all right. You just forget the matter," he said, he said: "You forget the other brokers and go ahead."

Q. And the funds were thereafter—

Mr. Cole: That appears—thereafter were in the South Jersey Title Company and withdrawn February 10th. Why do we need to prove that three or four times? We admit it.

Mr. Washington: That is all.

10 (Witness excused.)

CLARK BARRETT, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination.

20 By Mr. Washington:

Q. Mr. Barrett, where do you reside?

A. Ventnor City, New Jersey.

Q. Were you ever at any time connected with any of the title companies in Atlantic City?

A. I was.

Q. With which company?

A. I was the secretary of the South Jersey Title and Finance Company.

30 Q. Were you their secretary during any part of the period from December first, 1925, on?

A. I was until the fifteenth day of March, 1926.

Q. And until March fifteenth, 1926?

Mr. Cole: We admit all that.

Mr. Washington: I would sooner examine.

Q. Did Mr. Kuemmerle ever call to see you about the matter of fifty thousand dollars mortgage covering the Alkazar Apartments?

A. Not to my recollection.

Q. Did he ever 'phone you?

A. I don't recall.

Q. Do you know whether any funds were ever deposited by Mr. Bloom or by any party touching that fifty thousand dollar mortgage?

A. There was. 10

Q. Do you know when?

A. They were received by the title company on the morning of January 23, 1926.

Q. How long were they held there?

A. They were held there until the tenth day of February, 1926, when they were returned to Mr. Fleisher.

Q. Do you know how it happened that they were returned to Mr. Fleisher?

A. Mr. Fleisher came to the office on the morning of February tenth in company with Mr. Bloom and said that he wished to withdraw his money. 20

Q. Did he say why he wanted to withdraw it?

A. I don't recall that he did.

Q. Did your company prepare any papers in connection with an assignment of that mortgage?

A. We made a search.

Q. Under whose orders?

A. Under the orders of Moore and Butler.

Q. Do you recall about when that search was ordered? 30

A. I have the original order here.

Q. Refer to that please, and let us have the date of it.

A. It was ordered on the fifteenth day of January, 1926, and signed by Moore and Butler, attorneys, etc.

Q. January 15, 1926?

A. Yes, sir.

Q. Do you know whom Moore and Butler represented in the matter?

A. Well, the papers that they produced were for the Equitable Trust Company.

Q. Did Mr. Kuemmerle call at the office to see you in connection with that mortgage?

A. I never remember Mr. Kuemmerle coming to  
10 the office.

Q. You don't remember his ever coming to see you?

A. Not in connection with this matter.

Mr. Cole: That is three times he said that.

Q. Did Mr. Moore come to see you at any time in connection with this matter?

A. He did.

20 Q. When?

A. On two or three occasions, possibly more.

Q. Did you notify anybody when the funds were withdrawn?

A. I have no correspondence here showing such notice.

Q. Do you have any recollection?

A. No.

Q. Did you notify anybody when the funds were received?

30 A. I don't recall that I did.

Q. Aside from making the search, did your company prepare any papers in the matter?

A. The only thing that we prepared was an approximate state of the amount of money that would be required to settle the transaction. That was prepared by Mr. Charles F. Moore and myself.

Q. When you prepared it what did you do with it?

A. I have the original memorandum that I had at that time here.

Q. When did you prepare that?

A. I think that was prepared on the 22nd day of January.

Q. Do you recall what you did with it?

A. I have it here.

Q. Aside from preparing it and keeping it in your  
10 files you did nothing with it?

A. No.

Q. That was on January 23?

A. Yes.

Q. Were there any negotiations with you touching an assignment of an outstanding policy the fifty thousand dollar mortgage?

A. Mr. Washington, that was such an ordinary occurrence in the course of the title company's business that I don't recall any particular transactions  
20 in this case; because it was a matter that was happening two or three times every day.

Q. Do you know where that title policy was that was outstanding?

A. No.

Q. Do you know when your work of checking up the title was completed?

A. Well, we were prepared to settle on the 22nd.

Q. On January 22?

A. The date that we made the computation of  
30 amounts, yes.

Q. Do you know whether Moore and Butler were then advised that you were ready?

A. Mr. Moore was with me.

Q. When you made the computation?

A. Yes.

Q. Did Mr. Bloom get in touch with you at all about the matter?

A. Why, I think he was in and out regarding the matter.

Q. Do you recall how many times?

A. I couldn't say.

Mr. Washington: Cross-examine.

10 Cross-examination.

By Mr. Cole:

Q. Do you recall really that he was ever there at all about this?

A. Yes; I recall distinctly one occasion when he was there?

Q. When was that?

A. When the money was returned.

20 Q. That was when he and Mr. Fleisher came together?

A. Yes.

Q. Do you recall any other occasion when he was there?

A. No, I don't.

Q. That is the only one that you really recall?

A. That is the one I recall positively.

Q. What did Mr. Bloom say when Mr. Fleisher said he wanted to have the money withdrawn?

A. I don't recall, Judge.

30 Q. What did Mr. Fleisher say?

A. Mr. Fleisher came there. It was a stormy morning. He said he decided he would take his money and have me draw a check for fifty thousand dollars. I drew it and handed it to Mr. Fleisher.

Q. Did either of them assign any reason for it?

A. If they did I don't recall it.

Q. Just said they wanted their money back and you gave it to them and that was all?

A. Yes.

Mr. Cole: That is all.

(Witness excused.)

(Recess to 1.30 P. M.)

10

AFTER RECESS.

CHARLES H. MOORE, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination.

20

By Mr. Washington:

Q. Mr. Moore, where do you reside?

A. Atlantic City, New Jersey.

Q. What is your occupation?

A. Attorney-at-law.

Q. What is your connection, if any, with the Equitable Trust Company of Atlantic City?

A. Solicitor and attorney.

Q. I show you papers marked D2 for identification and D3 for identification, and ask you who prepared those papers?

30

A. I did.

Q. Can you tell us when you prepared those?

A. About the middle of January of this year.

Q. At whose request did you prepare them?

A. At the request of Mr. Harry Kuemmerle, the defendant here.

Mr. Washington: These have only been offered for identification. I would like to offer Exhibit D2 and D3 in evidence.

(The papers offered are received in evidence heretofore marked as exhibits for the defendant for identification D2 and D3 and now marked as exhibits for the plaintiff P6 and P7 in evidence.)

Q. When did Mr. Kuemmerle first get in touch with you in connection with the matters referred to in those papers?

A. Well, do you mean after the preparation of those particular papers?

Q. No, sir. When did he first discuss with you the matter of that mortgage, the fifty thousand dollar mortgage?

A. In December, 1925.

Q. Do you recall about what part of the month it was?

A. Shortly after the first of December. I don't remember the exact date.

Q. What did he say to you at that time?

Mr. Cole: I am wondering how this is relevant.

The Court: If it applies to this particular loan it would be relevant.

Mr. Cole: It does, your Honor; wholly in connection with this particular loan.

The Court: Then I will admit it.

Mr. Cole: I ask for an exception.

A. He told me that he had obtained this fifty thousand dollar mortgage loan through Frank Bloom and asked me to get in touch with Mr. Frank Bloom about it.

Q. You are sure that that was before January 1, 1926?

A. Yes, sir.

Q. Did you get in touch with Mr. Frank Bloom about it?

A. Yes.

Q. What dealings did you have with him touching the mortgage and its assignment?

A. You mean with Bloom or Kuemmerle?

Q. With Bloom first? Kuemmerle, I understood you to say, asked that you get in touch with Bloom?

A. Yes.

Q. He told you that he had gotten the loan through Bloom and asked that you get in touch with Bloom?

A. Well, he asked me to represent him, Kuemmerle did.

Q. Did he suggest that you get in touch with Bloom?

A. After he had asked me to represent him and I agreed to do it.

Q. Did you get in touch with Bloom?

A. Yes.

Q. What conversation did you have with Bloom?

Mr. Cole: I object to this as not binding upon the defendant.

The Court: I will admit it.

Mr. Cole: Exception.

A. Well, I told him that Mr. Kuemmerle had asked me to represent him in getting this settlement through, this mortgage that Mr. Bloom had obtained for him—the money; and that Mr. Kuemmerle was anxious to save the expense of a new title policy insuring the title to this mortgage loan, and that I was looking up the matter with an endeavor to ascertain and locate the policy; that the Equitable Trust Company didn't have it and that I thought—

10 Q. Did you discuss—

A. Wait a minute—and that I thought that I could get the policy and have it assigned to Mr. Bloom's client provided they would accept such an assignment and a search from the date of the old policy, and Mr. Bloom assured me that would be satisfactory to Fleisher or whoever it was he was representing, and then I proceeded to get the physical possession of the policy.

20 Q. Now, how did you obtain possession of the policy? Through whom?

A. Well, both Mr. Kuemmerle and myself worked on it. I obtained it directly from the Equitable Trust Company, but it was delivered to the Equitable Trust Company by Charles R. Myers.

Q. Do you know when it was delivered to the Equitable?

A. About December 24 of last year.

Q. When you received it did you take any further steps at the request of Mr. Kuemmerle?

30 A. Yes.

Q. What?

A. The examination of the policy disclosed that Mr. Charles Myers who had held this mortgage previously had not endorsed the assignment of the policy on the back of the same, and in order to have the title company make the transfer, Mr. Myers' signa-

ture had to be secured and he was in Florida, and I took steps to secure that signature.

Q. How long did it take you from that time until you finally received the policy back properly assigned?

A. Well, I mailed the policy to Mr. Myers on the 28th of December last and received it from him on January 12th last.

Q. When you received it properly assigned what did you do with it? 10

A. What did I do with the policy?

Q. Yes, sir.

A. Well, I had had the assignment made from Mr. Myers to the Equitable Trust Company. Then I had the Equitable Trust Company endorse the assignment in blank to go to Mr. Bloom's client.

Q. Now, were you in touch with Mr. Kuemmerle all along as the various steps were taken with respect to obtaining this policy?

A. Yes. 20

Q. Were you in touch with him all along with respect to the work that was being done in preparation of the papers in question, the two papers which have been offered, the two assignments?

A. They were not all the papers. There were a lot of others.

Q. What other papers were there?

A. Well, there was an assignment of mortgage of the Equitable Trust Company to Eleanor Riesman and Margaret S. Sloss, trustees. They were the trustees for this Penrose Fleisher; declaration no- 30  
offset from the Kuemmerle Corporation, owner of the premises, the extension of agreement you have referred to; a resolution of the board of directors of the Kuemmerle Corporation setting out the terms of this extension agreement that was to be executed by

the corporation; and there may have been some others I don't recall.

Q. Now, after you had prepared those different papers that you have referred to what did you do with them?

A. First as to the title policy—

Q. After you had had it assigned?

A. After the Equitable Trust Company had endorsed it I delivered that to Clark Barrett of the  
10 South Jersey Title Compnay.

Q. For what purpose?

A. In preparation for this settlement.

Q. Do you recall when you delivered it to him?

A. It was about the middle of January; may be a day or two after that.

Q. Now, take the other papers that you have referred to that you prepared. Please tell us what you did with them in order as they were prepared?

A. Well, on the sixteenth of January I sent Mr.  
20 Kuemmerle the declaration no off-set. On the same day I wrote Mr. Bloom a letter and I sent Mr. Bloom a copy of the letter I wrote to Mr. Bloom; and also I sent Mr Barrett a copy of the letter I had sent to Mr. Bloom.

Q. Do you have the carbons of those various letters?

A. Yes, sir.

Q. Will you produce them, please.

A. (Producing papers) There is the one to Mr.  
30 Barrett; here is the one to Mr. Kuemmerle; here is the one to Mr. Bloom.

Mr. Washington: I offer in evidence the carbons of three letters of January sixteenth, 1926—all bearing the same date.

Mr. Cole: We object to the offer, not because they are carbons, but because they are not material to the issue. They cannot bind this defendant.

The Court: I will admit them.

Mr. Cole: Exception.

(The papers offered are received in evidence and marked as exhibits for the plaintiff P8, P9 and P10.) 10

Q. Mr. Moore, did you deliver all of the papers that you have referred to as enclosures in the three letters that have been offered?

A. Well, I didn't—I delivered the declaration no off-set to Mr. Kuemmerle at that time; but I subsequently to those letters delivered to Mr. Kuemmerle a carbon copy of his agreement that you have referred to between—extension agreement as you call it. I delivered that to Mr. Kuemmerle in a letter on  
20 the 19th of January.

Q. On the nineteenth of January—

A. That was a carbon copy of that.

Q. You left a carbon but not the original?

A. Not the original.

Q. In the meantime what have you done as to the original?

A. There is a letter as to that. I say in that letter—

Q. Just a moment. 30

Mr. Washington: I offer this letter dated January 19th also.

Mr. Cole: Objected to for the same reason.

The Court: Same ruling.

Mr. Cole: Exception.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff P11.)

Q. Now, did the last letter refer to the delivery of the last paper that you prepared, or were there still some further?

A. Well, the only thing that I delivered to Mr. 10 Kuemmerle at that time was a carbon copy of these agreements. The originals—that I called the duplicate originals were not delivered until later.

Q. When were the duplicate originals delivered and to whom were they delivered by you?

A. After I sent that letter on the 19th instant to Mr. Kuemmerle, Mr. Frank Bloom called me on the 'phone. I think it was the next day. And he said that Mr. Kuemmerle had received this letter and they wanted the duplicate originals—

20 Mr. Cole: This testimony is objected as not properly binding Mr. Kuemmerle and I ask an exception to its admission.

Mr. Washington: Statement made to the attorney of Kuemmerle.

The Court: As I understand it now he is testifying—to what?

30 Mr. Cole: To what Mr. Bloom told him as to what Mr. Kuemmerle had received.

The Court: When you say "They" whom do you mean? Do you mean Kuemmerle wanted the duplicate originals?

The Witness: Yes.

The Court: I will admit it.

Mr. Cole: Allow me an exception.

Q. What did you do with the duplicate originals?

A. Well, I sent them as requested.

Q. To whom?

A. To Frank Bloom. 10

Q. Now, did you send them by a letter?

A. Yes.

Q. Have you a carbon of the letter?

A. Yes, sir.

Q. This is letter dated January 21, 1926?

A. Yes, sir; that is it.

The Court: And these were sent in pursuance of a request of Mr. Frank Bloom that you have just related? 20

The Witness: Well, it was the result of my letter of the 19th to Mr. Kuemmerle that they asked to have these delivered. You see, I said in my letter I would keep them, of the 19th. They said no, they wanted them so that Mr. Kuemmerle's corporation and the other people as well could execute them. You see, the settlement had been fixed for the 22nd and I had so notified them, and they said they wanted to get those executed in 30 advance of the settlement.

The Court: Is that letter offered?

Mr. Washington: Yes.

Mr. Cole: I object for the same reason.

The Court: Same ruling.

Mr. Cole: Exception.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff P12.)

Q. Now, Mr. Moore, who made the arrangement for a settlement as stated in the last letter at South Jersey Title Company with Mr. Barrett on Friday morning of this week, as the letter says, at 11.30 A. M., the letter being your letter of January 21st, 1926?

A. I did.

Q. How did it come that you arranged for that settlement?

A. Well, I had been in conference with Mr. Kuemmerle all along and with Mr. Bloom and Mr. Barrett for a month about it, trying to get the settlement aranged and finally arranged it with Mr. Barrett for that day. They said they would be all ready and I found I could be all ready with those matters and I so notified Mr. Kuemmerle and Mr. Bloom.

Q. Had you previously talked with Mr. Kuemmerle as to whether or not they would be ready to go through with this settlement before this date was selected?

A. Yes.

Q. Did you mention the particular date to him, or aren't you sure?

A. Not until I sent him that letter of I think the sixtennth.

Q. But he had told you to make arrangements for the settlement?

A. Yes, sir.

Q. Did you go to the title company at the time and place fixed for the settlement?

A. I did.

Q. Was Mr. Kuemmerle there?

A. No, sir.

Q. Anybody else there aside from yourself representing either Kuemmerle or the Kuemmerle corporation?

A. Well—

Q. Who else were there at that time?

A. There was Mr. Barrett of the title company and myself. I am not sure whether Mr. Kuemmerle's son was there or whether I talked with him over the 'phone. I am not certain that he was present. I don't think he was.

Q. Did the settlement go through on that date?

A. No, sir.

Q. Why not?

A. Well—

Mr. Cole: If he knows.

Q. Do you know, sir?

A. I think I know. In the first place, they didn't have the papers; that is, the agreements were not there signed, the duplicate originals that I had delivered were not there.

The Court: That is the extension agreements?

The Witness: That is the extension agreements. Whether they were all signed up at that time I couldn't say. I had never seen them since until this morning. Mr. Barrett and myself made up the figures. He was all ready. His title company work had been arranged with him; that he would take care of this for Mr. Fleisher.

Q. Were the funds there from Mr. Bloom's client? Did he have his funds there?

A. I cannot say.

Q. What was the date of this?

Mr. Cole: Twenty-first of January.

Q. Twenty-first of January?

10 A. No, it was the 22nd of January, Friday morning, the 22nd of January, 11.30. I couldn't say whether the money was there. I didn't see it.

Mr. Cole: Well, of course, the money was not there. The truth is it was not deposited until the 23rd. What is the use of wasting time about that?

The Witness: I don't know about that. I know I was ready. Had done everything I was requested to do; the work all ready.

20

Q. You say Kuemmerle did or did not appear at that time?

A. Mr. Kuemmerle, Senior, did not, and I didn't have any communication with him that day. But I think I talked with his son over the 'phone. I don't think his son was personally present. He may have come in before I left. I am not sure about that.

30 Q. Now, after that date did you advise either of the Kuemmerles or the corporation what had occurred? Did you report to them?

A. I did to Mr. Kuemmerle's son. I don't think I talked with Mr. Kuemmerle, Senior.

Q. When did you report?

A. Well, that very day. I told Mr. Kuemmerle, Junior—

Mr. Cole: I object to any conversation with the son. The defendant corporation or the defendant company cannot be bound by a conversation between Mr. Moore and the son.

Mr. Washington: The son is the secretary and treasurer of the company.

The Court: Secretary of the company, and Mr. Kuemmerle is president and treasurer. 10

Mr. Washington: He is an officer of the company and the father has admitted that he discussed some deals with him and that he reported to him.

The Court: I will permit it.

Mr. Cole: Exception.

Q. What did you tell him? 20

A. That the settlement was all ready; that we were just waiting for the extension agreement and the other papers I had sent to his father to be brought in, and there was an additional deposit I think required over and above the fifty thousand dollars, approximating, with interest and taxes and so on, about ten thousand dollars, as I recollect it.

Q. Who was to pay that money up?

A. Mr. Kuemmerle.

Q. Did he say anything about whether they were 30 ready with that money or whether they were not ready with it?

A. Said that he didn't know anything about it; he would have—he said he would have to confer with his father about it.

Q. Did he say anything about where those papers were, the extension papers that were to be executed?

A. I don't recall that he did, no.

Q. Did he ask you to give them to either him or his father?

A. Oh, I had given them to his father before. I didn't have them in my possession.

Q. You know that his father had them before that time?

A. I cannot say now—

10 Q. Don't let us get confused on the question whether they were originals or carbons.

A. I can not say whether he said he knew his father had them, no, I cannot say that.

Q. You had given to the father carbons; that is so, isn't it?

A. I had given Mr. Kuemmerle, Senior, a carbon copy of the original of this extension agreement, but the originals I delivered to Mr. Frank Bloom before the settlement.

20 Q. Exactly. You delivered them to Mr. Bloom in one of those letters that are in evidence?

A. Yes. I may have delivered them to him personally. He may have come in and got them. I don't know about that. I couldn't recall.

Q. What date did you say was fixed for the settlement, 22nd?

A. 22nd of January last.

Q. Now, when this settlement did not go through on the 22nd did you fix any new date for settlement?

30 A. I can't remember any other date being fixed; no, sir.

Q. Did you ever discuss with Mr. Kuemmerle or with the son or with Mr. Bloom further date for settlement?

A. Well, I am very certain I did with the son and with Mr. Bloom.

Q. When did you discuss them with the son?

A. Well, it was subsequent to the 22nd of January. I don't know the exact date.

Q. About how soon thereafter?

A. Well, certainly—that was on Friday. Certainly by the following week I was urging the young man to get the papers there and get the settlement.

Q. Now, what answer did he make to you?

A. Well, he said that his father was sick, very sick, and he was not able to sign anything.

Q. Did you discuss with him as to where the 10 papers were? Had he then received them?

A. I think he told me that they—that they were up at his father's house in Philadelphia; that is this extension agreement. I don't know where the other papers were.

Q. That is what I am referring to, the extension papers.

A. Yes, except what I had.

Q. How long was the matter held open without any further definite action? 20

A. Just a minute. (Witness refers to papers.) I asked Mr. Barrett to return the original bond and mortgage, the title policies that accompanied this mortgage, and the assignment, to me on the 22nd of February last.

Q. Why did you do that?

A. Sir?

Q. Why did you do that?

Mr. Cole: I object to it. It does not matter. The 30 transaction was closed on February 10th. The money was withdrawn.

Mr. Washington: I withdraw that.

The Witness: Well, I was being assured—

The Court: There is no question.

Mr. Cole: Well, if he wants to answer, let him answer.

Q. Go ahead, sir. Answer.

A. I was being assured all the time the settlement was going through.

Q. Who assured you?

10 A. Well, Mr. Bloom and young Kuemmerle here.

Q. They both seemed to think even then—

A. As soon as he got around. That was all that was necessary—for him to get out.

Q. Do you know whether the funds were finally withdrawn?

A. I don't know anything about that. I never had anything to do with the funds, no, sir.

20 Q. Did you ever have any talk with Mr. Kuemmerle during the time that Mr. Bloom was handling this matter about other agents working on it?

Mr. Cole: I object.

Mr. Washington: I will withdraw that.

Cross-examination.

By Mr. Cole:

30 Q. Well, as late as February 22nd of this year you thought that this transaction was still alive; did you?

A. Yes; I was told so.

Q. By whom?

A. By that young man sitting there and Mr. Bloom.

Q. Mr. Bloom told you as late as February 22nd, 1926, that the matter of this mortgage loan was still an open proposition, did he?

A. Well, I cannot say that on the 22nd of February, that exact date.

Q. But you did say so, didn't you?

A. I did not. I said that I had been assured from time to time that the loan was going through.

Q. Well, now, that is important. Was that after February 10th? 10

The Court: February 10th?

Q. February 10th, when the money was withdrawn?

A. Yes.

Q. And Mr. Bloom told you that after February 10th, didn't he?

A. Yes. He said—

Q. Wait a moment. Don't argue with me, Mr. 20 Moore.

A. Well, I will tell you what he said.

Q. You be patient and anything I overlook Mr. Washington will ask you. But you didn't know even as late as February 27th this money had been withdrawn, did you?

A. I—

Q. Now, pardon me. Did you?

A. Yes. I did not know about the money being withdrawn. I am wrong about that. 30

Q. Then you want to change that testimony?

A. Yes.

Q. What do you want to say about it now?

A. Well, I recall since you have asked me that question that Mr. Bloom did tell me that Mr. Fleisher had taken the money out, but that he would

return the money and the settlement would go through whenever we were ready. Now, he told me that. I remember that very distinctly.

Q. How long have you been solicitor of the Equitable Trust Company?

A. Well, I did the work for Jim Hayes when he was in France. I think that commenced just as soon as Jim Hayes went to France, which was in 1917 and have been doing it ever since.

10 Q. You had this very mortgage in your hands, lodged with you at the Equitable Trust Company, to foreclose, didn't you?

A. Yes, sir.

Q. So then you represented the Equitable Trust Company to collect this money?

A. Yes, sir.

Q. And you had threatened in a number of letters to Mr. Kuemmerle if the money was not forthcoming you were going to foreclose?

20 A. I cannot say how many letters, but I had threatened.

Q. Well, some, anyhow?

A. Yes.

Q. Now, when you wrote that letter in which you said there would be a settlement, I think on the 21st day of January—

A. I never said the 21st.

Q. Sure about that?

A. Yes, absolutely certain.

30 Q. When you sent that letter on January 21st in which you said there was going to be a settlement did you know at that time that the money was not on deposit?

A. No, sir.

Q. Did you think it was?

A. Well, now, I don't recall anything about knowing whether it was on deposit or not.

Q. Did you know there could not be a settlement without the fifty thousand dollars was there?

A. I did.

Q. Then if you knew there could not be a settlement if the money was not there, why did you fix Friday for a settlement?

A. Well, I assumed the money would be there.

Q. Upon what did you base that assumption?

A. Why, upon the fact that Mr. Kuemmerle had told you that he had obtained the loan through Bloom and they had granted the loan. 10

Q. Then you thought the money would be there?

A. Yes.

Q. Did you ask Mr. Bloom about it?

A. No, but I notified him three or four days. On the sixteenth of January I notified all of them that the settlement would take place on the 22nd. That was nearly a week in advance. I assumed they would have the money there.

Q. What time in December was it that Mr. Bloom told you that he had this money? 20

A. Well, I received that information from Mr. Kuemmerle.

Q. What time in December?

A. Well, it was before Christmas.

Q. It was after the fifteenth, then, was it?

A. I would think so; yes sir.

Q. Now, the original and duplicate extension agreements that have been offered in evidence were sent by you or handed by you to Mr. Bloom? 30

A. Yes, sir.

Q. Is that correct?

A. Right.

Q. Now, you observed that they were not acknowledged I think until the 22nd of January, did you? At least, the certificate of the prothonotary is not until the 22nd.

A. I haven't looked at it in that respect. (Examining paper) 22nd day of January; yes, sir; 22nd of January.

Q. Now, that mortgage was finally paid off?

A. I think it was paid off, yes, last summer.

Q. Do you recall through whom?

A. You mean who brokered it?

Q. Yes.

A. Richard P. Bloom and Company.

10 Q. Do you know what company took it over?

A. Well, yes. It was the—I think it was the Equitable Life Assurance Society of New York City, as I recollect it.

Q. Did you actually file the bill to foreclose this mortgage?

A. No, sir.

(Witness excused.)

20

CLARK BARRETT, recalled.

Re-examination.

By Mr. Washington:

Q. Now, did you receive any direct communications from Fleisher with reference to making settle-  
30 ment in this matter?

A. I did.

Q. When did you receive instructions from him?

A. The first direct letter I received from him was under January 16th, 1926.

Q. Have you that letter here?

A. (Witness produces a letter consisting of two pages.)

Q. This is the original letter?

A. That is the original letter, yes.

Mr. Washington: I ask that it be marked for identification (The paper referred to is marked as an exhibit for the plaintiff for identification P13.)

Mr. Cole: I have no objection to offering it in evidence.

10

(P13 received in evidence.)

Q. A settlement did not take place on January 22?

A. It did not.

Q. Were the funds there at that time or not?

A. The funds were not there until the following morning.

Q. On January 22 was there any date selected for a new settlement? Was there any continuance? 20

A. No; because I had told Mr. Moore that I would personally handle the matter; when they got together I would handle it for them.

Q. You were all ready?

A. Yes.

Q. When the funds came in the next day was Mr. Moore notified?

A. Yes.

Q. Was any new date selected?

A. Not to my knowledge.

30

Mr. Washington: Cross-examine.

Mr. Cole: That is all.

(Witness excused.)

PLAINTIFF RESTS.

## DEFENDANT'S CASE.

HARRY KUEMMERLE, the defendant, called as a witness in his own behalf, being sworn, was examined and testified as follows:

Direct examination.

10 By Mr. Cole:

Q. You are the son of Mr. Kuemmerle, the defendant?

A. I am.

Q. I show you an envelope marked Exhibit D6 and ask you if you had anything to do with mailing that envelope?

20 A. Yes, sir. I mailed that to my father with two extension agreements.

Q. The two agreements that have been offered in evidence?

A. Yes, sir.

Q. From whom did you receive them?

A. Mr. Frank Bloom.

Q. And where did he hand them to you?

A. In the office, 2 North North Carolina Avenue.

Q. At that time was your father in Atlantic City?

A. No, sir; he was not. He had just left.

30 Q. Where was he?

A. He was on the train. I imagine it was about three o'clock on a Friday.

Q. How long had he been gone when Mr. Bloom brought those in?

A. I imagine about an hour or so.

Q. About how long was it after you mailed them before you saw them again, if you can remember?

A. I don't think I saw them until my father brought them back from Philadelphia.

Q. And about when was that?

A. I guess around the fifteenth of March.

Mr. Cole: Cross-examine.

Mr. Washington: No questions.

(Witness excused.)

10

Mr. Cole: There are one or two papers marked for identification.

Mr. Washington: I am willing they be marked in evidence. (D4 for identification received in evidence.)

DEFENDANT RESTS.

20

(Mr. Washington opened the plaintiff's case to the jury.)

(Mr. Cole summed up for the defendant.)

(Mr. Washington summed up for the plaintiff.)

30

## COURT'S CHARGE TO THE JURY.

Sooy, J.:

Ladies and gentlemen of the jury: The plaintiff, Frank Bloom, seeks to recover from the defendant certain commissions and damages which he alleges he received by reason of the failure of the defendant to carry out a contract, the commissions being based on a verbal agreement between Mr. Kuemmerle representing the Kuemmerle Corporation, and the plaintiff.

As I understand the agreement of counsel at the beginning of the suit, it was stipulated that Mr. Kuemmerle in all his transactions was acting for the Kuemmerle Corporation, and I assume, therefore, that if there is a verdict it should be against the Kuemmerle Corporation and not against Mr. Kuemmerle personally; that is, if you should find a verdict for the plaintiff it would be against the defendant Kuemmerle Corporation.

Mr. Bloom claims that the verbal agreement between Mr. Kuemmerle and himself was first started over at the Atlantic City National Bank, and that certain conversations which you will remember took place there, the sum and substance of them being that Mr. Kuemmerle wanted fifty thousand dollars and that Mr. Bloom said he thought he could get it for him. They both agree that at that time Mr. Kuemmerle said there was not any exclusive agency placed with Mr. Bloom, but that there were other real estate agents working on it and that the first man who actually got the money and made the settlement would get the commission.

According to the plaintiff's testimony, in other

words according to Mr. Bloom, he went out and worked under that agreement and subsequently obtained from a man, by the name of Penrose Fleisher an agreement from him that he would lend the money to the defendant corporation, the Kuemmerle Corporation; that he went to the Kuemmerle Corporation with that information and according to his story and his testimony Mr. Kuemmerle acting for the corporation told him that the loan was his and that he would call off the other real estate agents.

On the other hand, Mr. Kuemmerle denies that and he says that the agreement they first made was the agreement that they went through with up until the end and up until the termination of the relations between the parties.

The case is purely a question of fact and it has been ably presented by counsel on both sides, both in the production of their testimony and in their argument; so that you have the testimony before you and you must deal with it subject to only one or two propositions of law that I think of, and, of course, the first is that the burden of proving the allegations of the complaint is on the plaintiff; that it, he must satisfy you by the greater weight of evidence that he is entitled to recover these commissions under the agreement as he has testified to.

The second proposition of law as I see it is that if you find that the plaintiff is entitled to recover he would not only be entitled to recover the amount of the commission as agreed on together with interest from February 10, 1926, but he would be entitled to recover the damages he may have proved to you he sustained by reason of the non-performance of the agreement to pay those commissions on the part of the defendant.

He alleges that those damages that he sustained by reason of the non-performance of the agreement on the part of the defendant was the payment of \$150 which he was compelled to lay out for interest and some other expenses. You will remember what the testimony in that respect is.

10 There is one other proposition of law that I want to charge you, and that is that the plaintiff in this case cannot be charged with any failure that may have arisen if there was such a failure on the part of the Kuemmerle Corporation to execute any papers which may have been necessary for them to execute.

20 If you find that in accordance with the agreement Mr. Bloom did produce this money and that it was ready for the Kuemmerle Corporation and that it was produced under an agreement that they would pay, as testified to by the plaintiff, then your verdict would be in favor of the plaintiff and against the defendant for such sum as you find the plaintiff is entitled to for commissions, which it is undisputed amount to \$1600 together with interest from February 26, 1926, plus the damage I have spoken to you about.

If you find in favor of the defendant against the plaintiff, then your verdict will be for no cause of action.

(The jury retired.)

30 Mr. Cole: I except to the Court's permitting the jury to find the damages or anything in excess of the commission.

I except also to the Court's charging the jury that the plaintiff could recover notwithstanding the failure of the defendant corporation to execute the papers; because this would allow the jury to find

for the plaintiff in spite of the fact that the president of the corporation was ill and could not execute the agreement, and that it was while he was so sick that the plaintiff principal voided the contract by withdrawing the money.

---

EXHIBIT P2.

10

FRANK J. BLOOM CO.  
REALTOR  
22 S. Pennsylvania Avenue  
Atlantic City, N. J.  
Marine 1769

January 12, 1926.

Mr. Harry Kuemmerle,  
2 N. N. Carolina Ave.,  
City.

Dear Harry:

20

Mr. Charles Moore of the Equitable communicated with me this morning to inform me that the title policy had arrived from Florida, having been executed by Charlie Myers, and that he was ready for settlement.

This afternoon he called again and asked me when settlement could be made, and I informed him that forty-eight hours from the time notice was given, settlement could be made.

Under the circumstances, I am awaiting your instructions to order the funds forwarded.

30

Yours very truly,  
FRANK J. BLOOM CO.,  
Frank J. Bloom,  
President.

FJB H

## EXHIBIT P3.

FRANK J. BLOOM CO.  
REALTOR  
22 S. Pennsylvania Avenue  
Atlantic City, N. J.  
Marine 1769

January 21, 1926.

10 Mr. Harry Kuemmerle,  
2 N. N. Carolina Ave.,  
City.

Dear Harry:

I wish to inform you that I have this A. M. forwarded to Mr. Fleisher the two mortgage extension agreements to be executed by the assignees of the mortgage. On account of the fact that these were not delivered to me until today, it was naturally impossible to have forwarded them sooner for the signatures required; however, this is being done in this same mail, and Mr. Fleisher will inform me by 'phone in the next day or two what time settlement shall be made.

In any event he will forward these papers together with check, which shall bear interest from the date of the delivery at the South Jersey Title and Finance Company, which should be either Saturday or Monday, with a slight possibility of still being completed tomorrow Friday.

20 When the extension agreement returns, it will have to be executed by your Corporation, the proper officers, etc. and I presume your seals and secretary are handy for this purpose.

30 Let me also bring to your attention the fact that there will be accumulated interest due on the first mortgage, as well as the fact that all taxes must be

paid up until December 31, 1925, as well as other expenses such as commission, etc. I naturally conclude that you are cognizant of this fact, but merely as a good business practice am bringing these points to your attention.

Under the circumstances, it is naturally desirable that you and I keep in close touch with each other for the next few days, as it is desirable to avoid any delay in settlement after the check arrives.

Yours very truly,

\$1,836 72/100

FRANK J. BLOOM CO.,

Frank J. Bloom,  
President.

FJB H

## EXHIBIT P4.

FRANK J. BLOOM CO.  
Real Estate—MORTGAGES—Insurance 20  
22 S. Pennsylvania Avenue  
Atlantic City, N. J.  
Marine 1769

April 23, 1926.

Mr. Harry Kuemmerle,  
3 N. N. Carolina Ave.,  
City.

Dear Harry:

You will remember the fact that the mortgage of \$50,000. which I placed and had the fund waiting for several weeks for you was not settled, which was due to the fact of your illness and the impossibility of my client to hold the money for a longer period than two weeks without any prospect of early settlement.

I am obliged to inform you that I expect to be re-

compensated for the service in placing this mortgage as well as lost interest which I assumed to my client. I would like to talk the matter over with you and reach a settlement in the matter.

Yours very truly,  
FRANK J. BLOOM COMPANY,  
Frank J. Bloom,  
President.

FJB H

10

## EXHIBIT P5.

February 26, 1926.

Mr. Harry Kuemmerle, Jr.,  
#3 N. N. Carolina Ave.,  
City.

Dear Mr. Kuemmerle:

I spoke with Mr. Moore this afternoon relative to the mortgage, and he informed me that he was very sorry that he was obliged to proceed with the foreclosure; but that he could stop it at any time that we were in a position to clear up the matter.

This, I am afraid, may have a very unsatisfactory impression on a prospective assignee or purchaser of a new mortgage; but in any event, I am informing you that I was helpless to restrain him from so proceeding.

I did inform him, however, that we could handle the matter as soon as your Father was in a position to enter into final negotiations in the matter.

Yours very truly,  
FRANK J. BLOOM COMPANY,  
President.

FJB H

## EXHIBIT P6.

FRANK J. BLOOM CO.  
REALTOR  
22 S. Pennsylvania Avenue  
Atlantic City, N. J.  
Marine 1769

December 15, 1925. 10

Kuemmerle Corporation,  
1203 Commerce St.,  
City.

Attention Mr. Harry Kuemmerle, President

Dear Harry:

I am pleased to advise that Mr. Penrose Fleisher, of Philadelphia has agreed to take an Assignment of the first mortgage in the amount of \$50,000. on the Frederick Apartments owned by the Kuemmerle Corporation and situate Northwest corner Commerce and North Carolina Avenues, Atlantic City, N. J. 20

It being understood that Mr. Fleisher's Client is to take an Assignment of the present first mortgage, Assignment of the present title policy and Assignment of full fire insurance which shall be in no less amount than \$50,000.

It is further understood that should this mortgage extension be for a period of four years, that the commission, exclusive of any conveyancing expenses, recording, etc. shall be \$1600. Should a three-year extension be accepted a commission of \$1500 would be charged. Mr. Fleisher has been informed of the desire for early settlement, with the understanding that the money is expected within the next two weeks. 30

Trusting that this arrangement is entirely satisfactory to you, we are,

Yours very truly,  
FRANK J. BLOOM CO.,  
President.

FJB H

I hereby accept the above proposition on behalf of the Kuemmerle Corporation.

10

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EXHIBIT P8.

January 16, 1926.

Mr. Clark Barrett,  
South Jersey Title Co.,  
Atlantic City, N. J.

Dear Mr. Barrett:

20 Herewith is copy of a letter I am this day sending to Mr. Frank J. Bloom in the Kuemmerle mortgage matter, which is self-explanatory.

Very truly yours,

W—Enc.

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EXHIBIT P9.

30

January 16, 1926.

Mr. Harry Kuemmerle,  
North Carolina & Commerce Avs.,  
Atlantic City, N. J.

Dear Sir:

Herewith copy of a letter I am sending to Mr. Frank J. Bloom concerning the assignment of

the \$50,000 mortgage against the Alcazar Apartments from the Equitable Trust Company to Eleanor F. Riesman and Margaret F. Sloss, Trustees. Please note that the settlement is Friday, the 22nd inst. at the South Jersey Title Co., at 11.30 A. M.

Herewith is Declaration—No Offset for execution and acknowledgment on the part of the Kuemmerle Corporation. Please have this properly executed and acknowledged and return to me as quickly as possible.

Very truly yours,

CSM/W—Enclosures.

10

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EXHIBIT P10.

January 16, 1926.

Mr. Frank J. Bloom,  
22 S. Pennsylvania Ave.,  
Atlantic City, N. J.

20

Dear Mr. Bloom:

I have arranged with Mr. Clark Barrett of the South Jersey Title Company for settlement in the Kuemmerle \$50,000 mortgage matter for Friday, the 22nd inst., at 11.30 A. M.

There is not any fire insurance in the possession of the Equitable Trust Company accompanying this mortgage. The mortgage calls for fire insurance in the sum of \$50,000. If your client exacts fire insurance, it will have to be taken care of through arrangement with Mr. Kuemmerle.

30

I will prepare the following papers:  
Assignment of Mortgage from Equitable Trust Co. to Eleanor F. Riesman and Margaret F. Sloss, Trustees.

Declaration—no offset from the Kuemmerle Corporation, owner of the premises.

Extension agreement for five years between Kuemmerle Corporation and Eleanor F. Riesman and Margaret F. Sloss, Trustees.

10 I will also secure assignment of the title policy from the Equitable Trust Company. Mr. Barrett will have search prepared showing assignments and releases with respect to this mortgage, and also conveyances from the date of the mortgage. I will secure a tax search from the Tax Collector of Atlantic City. If you think of anything else that would be required for the settlement, please let me know.

Very truly yours,

CSM/W

---

EXHIBIT P11.

20

January 19, 1926.

Mr. Harry Kuemmerle,  
North Carolina & Commerce Avs.,  
Atlantic City, N. J.

Dear Mr. Kuemmerle:

30 Herewith is resolution which should be adopted by your Board or Directors for the purpose of authorizing the officers of the Kuemmerle Corporation to execute, acknowledge and deliver the Extension Agreement with Eleanor F. Riesman and Margaret F. Sloss, Trustees, in re \$50,000 mortgage on your property at North Carolina and Commerce Avenues, this city. Please have the resolution adopted by your Board of Directors, and then have Mr. Peart, your Secretary, certify to the enclosed original copy of the resolution, attaching the seal of the corporation and properly filling in the blank dates.

There is also enclosed a copy of the proposed Extension Agreement between the Kuemmerle Corporation and Eleanor F. Riesman and Margaret F. Sloss, Trustees, as to the extension of time of payment of this mortgage. The two original copies of this Extension Agreement are still in my possession, and I will keep them here until they are executed. Kindly return the enclosed copy to me after you have finished with same. One of the originals will be delivered to you after the execution. 10

Please bear in mind that the settlement in this matter is Friday of this week, at 11.30 A. M. at the South Jersey Title Company.

Very truly yours,

CSM/W\*Enclosures.

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EXHIBIT P12.

20

January 21, 1926.

Mr. Frank J. Bloom,  
22 S. Pennsylvania Avenue,  
Atlantic City, N. J.

Dear Mr. Bloom:

As requested, herewith proposed form of Extension Agreement in duplicate between Eleanor F. Riesman and Margaret F. Sloss, Trustees, and Kuemmerle Corporation, relative to \$50,000 mortgage covering the Frederick Apartments, this city. 30

Settlement is arranged at the South Jersey Title Company with Mr. Barrett on Friday morning of this week, at 11.30 A. M.

Your clients, Riesman, and Sloss, should sign both copies of the enclosed agreement, as they should be executed in duplicate originals, and their acknowl-

edgments to both copies should be taken. If the acknowledgments are taken before someone in Pennsylvania who is authorized to take acknowledgments to deeds in that State, there must also be attached to each copy of the enclosed acknowledgment a certificate of the Prothonotary of Philadelphia County that the officer before whom the acknowledgments were taken was authorized to take such acknowledgments, and that the Prothonotary knows the signature of  
10 the officer.

Very truly yours,

CSM/W—Enc.

EXHIBIT P13.

HOTEL ST. JAMES ANNEX  
1218 Walnut St.  
Walnut and Thirteenth Sts.

20

January 16, 1926.

Philadelphia,  
South Jersey Title Co.  
Atlantic City.

Gentlemen:

Relative to the Frederick Apartment's mortgage of \$50,000 purchased through Mr. Frank J. Bloom, I desire to say that a check will be mailed to you, on Thursday, next 21st March.

30 The mortgage is to be made in the names of Eleanor F. Riesman & Margaret F. Sloss, Trustees; and the Title is to be brought down to date—I would prefer if the interest was paid quarterly; if not, semi-annual will be acceptable—Checks to be mailed to the Trustees care of Penrose Fleisher, 1218 Walnut St. Philadelphia.

Yours truly,

Penrose Fleisher.

EXHIBIT D4.

January 27, 1926.

Penrose Fleisher, Esq.,  
The St. James Annex,  
Philadelphia, Pa.

Dear Mr. Fleisher:

Mr. Kuemmerle has been seriously ill since Sunday 10 of last week, although today an improvement is noted in his condition; and it is hoped that we will complete the settlement in the next day or two through his son in this City.

You are naturally interested in the progress of the settlement, and as your representative, I feel obliged to acquaint you with this delay on account of his illness.

I fully expect to complete the settlement within the next few days and when completed, will so advise 20 you.

Yours very truly,  
FRANK J. BLOOM CO.,  
President.

FJB H

30

## EXHIBIT D5.

HOTEL ST. JAMES ANNEX  
Walnut and Thirteenth Sts.  
PHILADELPHIA

Dec. 19/25.

Mr. Frank J. Bloom,  
Atlantic City.

10 My Dear Mr. Bloom:

Your favor of the 15 inst. relative to the Kuemmerle mortgage is satisfactory there is only one additional proposition I desire to make, & that is: that the interest on the mortgage be paid quarterly,—also advise me through which of the Title Co.'s the papers are being \* \* \* \* \* noon—today—& no doubt will be in their possession tomorrow morning—

20 Trusting their will be no further obstacles to settlement I am Yours very truly  
Penrose Fleisher

## EXHIBIT D7.

December 15, 1925.

30 Kuemmerle Corporation,  
1203 Commerce St.,  
City.

Attention Mr. Harry Kuemmerle, President

Dear Harry:

I am pleased to advise that Mr. Penrose Fleisher, of Philadelphia has agreed to take an Assignment of the first mortgage in the amount of \$50,000. on the

Frederick Apartments owned by the Kuemmerle Corporation and situate Northwest corner Commerce and North Carolina Avenues, Atlantic City, N. J.

It being understood that Mr. Fleisher's client is to take an Assignment of the present first mortgage, Assignment of the present title policy and Assignment of full fire insurance which shall be in no less amount than \$50,000.

It is further understood that should this mortgage extension be desired for three years, that the commission, exclusive of any conveyancing expenses, recording, etc. shall be three per cent; and that should the extension be desired for five years, that the commission shall be three and one-half per cent. Mr. Fleisher has been informed of the desire for early settlement, with the understanding that the money is expected within the next two weeks. Trusting that this arrangement is entirely satisfactory to you, we are,

Yours very truly,  
FRANK J. BLOOM CO.,  
President.

FJB H

I hereby accept the above proposition on behalf of the Kuemmerle Corporation.

OPINION.

(Filed October 27, 1927.)

NEW JERSEY SUPREME COURT.  
No. 21. MAY TERM, 1927.

10

FRANK J. BLOOM COMPANY,  
Plaintiff-Respondent,  
v.  
HARRY KUEMMERLE, et als.,  
Defendants-Appellants.

On Appeal.

20 (Argued May 4, 1927. Decided October 27th,  
1927.)

Before GUMMERE, Chief Justice, and JUSTICES  
BLACK and LLOYD.

30 For the Appellants: MESSRS. COLE AND COLE.  
For the Respondents: MR. LEE F. WASHINGTON.

PER CURIAM:

This suit was brought to recover the sum of \$1,600.00 commissions alleged to be due for procuring a loan in the sum of \$50,000.00 to be used to take an assignment of a mortgage, then held against

the property of the defendants, and a further sum of \$150.00 interest on the \$50,000.00 and interest on the sum of \$1,600.00.

The trial resulted in a verdict for the plaintiff for \$1,836.72. The defendant appealed and filed seven grounds of appeal, only two of which are argued in the appellants' brief, viz., the sixth and seventh. We find no error, except in the amount of damages. There is nothing in the case to show that the plaintiff was under any legal obligation to pay the lender the interest sued for. Nor is there anything to show that the defendants agreed to pay interest by way of damages for a breach of their agreement to accept the loan of \$50,000.00. But as we find the only question with respect to which the verdict is wrong is the amount of the verdict which is separable. The jury having settled the question of liability upon sufficient evidence, the judgment will be affirmed for \$1,600.00 under the case of Robinson v. Payne, 99 N. J. L. 141.

The judgment of the Atlantic County Circuit Court will be affirmed for \$1,600.00.

30

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.  
OCTOBER TERM, 1927.

10	FRANK J. BLOOM COMPANY, a corporation, etc., <i>Plaintiff-Respondent,</i> v. HARRY KUEMMERLE and KUEMMERLE CORPORATION, a corporation, etc., <i>Defendants-Appellants.</i>	}	On Appeal from Atlantic Circuit. Order on Affirmance of Judgment.
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20 This cause having been duly argued at the May Term, 1927, of this Court, by Clarence L. Cole, of counsel for the appellant, Kuemmerle Corporation, and Lee F. Washington, of counsel for the respondent, and the Court having considered the same, and finding no error in the record or proceedings in the Atlantic County Circuit Court as to a part of said judgment:

30 It is thereupon, on this sixteenth day of December, in the year of our Lord one thousand nine hundred and twenty-seven, ordered and adjudged that the judgment of the Atlantic County Circuit Court, removed by the appeal in this cause, be affirmed to the extent of \$1,600.00, and that the record be remitted to said Circuit Court to be proceeded with

in accordance with this judgment and the practice of said Court.

Entered Dec. 15, 1927.

On motion of  
LEE F. WASHINGTON,  
*Attorney for Respondent.*

NOTICE OF APPEAL AND GROUNDS. 10

(Filed December 20, 1927.)

NEW JERSEY SUPREME COURT.

FRANK J. BLOOM COMPANY, a corporation, etc., <i>Plaintiff-Respondent,</i> v. HARRY KUEMMERLE and KUEMMERLE CORPORATION, a corporation, etc., <i>Defendants-Appellants.</i>	}	On Appeal from Atlantic Circuit. Notice of Appeal and Grounds.	20
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To the within-named Respondent and Lee F. Washington, Esq., Attorney: 30

Notice that Kuemmerle Corporation, a corporation of the State of New Jersey, appeals from the whole of the judgment rendered by the New Jersey Supreme Court on appeal from the Atlantic County Circuit Court to the Court of Errors and Appeals, on the following grounds:

1. Because the Supreme Court affirmed the judgment when it should have reversed it.

2. Because there was no power in the Supreme Court to affirm the judgment on appeal for a sum different from that found by the jury when its finding was based, according to the judgment of the Supreme Court, upon an error of law admittedly committed by the trial Court.

10 COLE & COLE,  
*Attorneys of Defendants-Appellants.*

20

30

NEW JERSEY  
**Court of Errors and Appeals**

FRANK J. BLOOM COMPANY, a Corporation, etc.,  
*Plaintiff-Respondent,*  
*vs.*  
KUEMMERLE CORPORATION, a Corporation, etc.,  
*Defendant-Appellant.* } On Appeal From Supreme Court.

**RESPONDENTS' BRIEF  
STATEMENT.**

Respondent corporation sued to recover certain sums which it claimed to be due it for services in negotiating a mortgage loan of \$50,000. It claimed, in its complaint (Case, pages 2-4), to be entitled to \$1,600 for commissions, plus interest thereon from February 10, 1926 (Case, p. 3, par. 5), together with \$150.00 which it had made good to the depositor of such funds, plus interest thereon from February 10, 1926. (Case, p. 4, par. 6.)

The jury brought in a verdict in favor of respondent, and against appellant, Kuemmerle Corporation, for all sums claimed by respondent. Appellant then appealed to the Supreme Court, which affirmed the judgment of the Circuit Court, but only to the extent of \$1,600. Appellant has now appealed from said judgment of affirmance of the Supreme Court, which brings the matter of said Supreme Court judgment before this Court.

## ARGUMENT.

### I.

#### Grounds of Appeal Not Briefed.

Appellant, before the Supreme Court, originally assigned seven grounds of appeal (Case, pages 12-13). In its brief before said Court, however, it argued only the sixth and seventh of said grounds. We are therefore assuming that the first five of said grounds of appeal were abandoned, and we accordingly do not comment on such first five grounds.

*Manda v. U. S. Express Co.*, 85 N. J. L., 720.

*Wieson v. Automobile Ins. Co.*, 126 Atl., 652;  
2 N. J. Misc. R., 1129.

*Kelleher v. Borden's Milk Co.*, 128 Atl., 866;  
3 N. J. Misc. R., 522.

### II.

#### The Sixth Ground of Appeal.

The sixth ground of appeal (Case, p. 13), was as follows:

"6. The Court erroneously permitted the jury to find damages against the defendant upon the theory of a breach of contract; at most defendant being liable only for what he agreed to pay with interest."

Before the Supreme Court appellant briefed said exception under the following caption: "It was error to permit the jury to find a verdict for any sum in excess of the alleged commission of \$1,600 with interest." Said brief, on said point, concluded: "Manifestly, the verdict is in excess of the amount due respondent. The judgment thereon is without warrant and should be reversed."

Before the Supreme Court, the respondent contended that there should be no reversal but argued in its brief before said Court as follows:

"But even if appellant should be held to be now entitled to be heard as to its sixth objection (which we deny) and even if this Court should further feel that clear error was committed below with respect to such objection, the proper course to be here adopted would not be to now flatly reverse, but to reverse unless respondent within a stated time elect to enter a remittitur as to the \$150.00, plus interest, complained of, and permit respondent to elect to enter such remittitur or take a new trial. *Price v. Cerclieo*, 135 Atl., 660."

The Supreme Court, evidently assuming from the foregoing statement in respondent's brief that respondent preferred to have the judgment stand only as to the \$1,600, rather than have the expense of a new trial, flatly affirmed said judgment to the extent of \$1,600. Respondent thereupon entered an order affirming said judgment to the extent of \$1,600. Respondent is still content to abide by said judgment of affirmance, and has taken no appeal therefrom.

Appellant, in its new brief, before this Court, argues that the Supreme Court should have reversed the judgment of the Circuit Court and ordered a new trial, insisting that the Supreme Court had no power to take the course which it did. Respondent contends that the power of the Supreme Court to excise the erroneous portion of the judgment below and affirm for the balance has been clearly settled both by decisions of the Supreme Court and of this Court.

We will cite no cases touching appeals from District Courts, conceding that all such decisions are inapplicable, the power of the Supreme Court in District Court appeals being governed by different statutes, which explicitly confer power in such cases. *Hurley v. Leavitt*, 93 N. J. L., 299. We contend, however, that it is equally settled that the power also exists on appeals from the Circuit to the Supreme Court and on appeals from the Supreme Court to this Court.

In *Philbrick v. Mundy*, 93 N. J. L., 43, which came before the Supreme Court in 1919, the facts were as follows: An action had been brought before a Circuit Court to recover for damages to an automobile through an accident. The only ground of appeal argued was that "the court erred in charging the jury to allow interest on an unliquidated claim for damages." The Supreme Court expressly stated that the point was "well taken." Nevertheless, the Supreme Court concluded:

"The judgment is therefore wrong in respect to the inclusion of interest and is right in all other respects."

"If the plaintiff will waive the interest, the judgment will be affirmed, without costs on this appeal; otherwise, it will be reversed and a new trial awarded as to damages alone. Supreme Court Rules 132 and 147."

Please note that in the *Philbrick* case the matter came up on appeal from the Circuit Court to the Supreme Court, that there was a clear error on the part of the Circuit judge in charging the jury, that the error occurred as to certain items of interest, and that the Supreme Court gave the plaintiff the election of having the judgment affirmed, without costs or interest, or taking a reversal and a new trial. In the case now before this Court, plaintiff made such election in its brief before the Supreme Court, as above quoted.

In *Horst Co. v. City Brewery*, 94 N. J. L., 231, which came before this Court in 1920, the facts were as follows: The case came before this Court upon appeal. Plaintiff had brought an action in the Supreme Court for breach of contract. The case was tried before the court without a jury. A motion had been made below upon the pleadings and a considerable amount of testimony had been taken touching the entire case. One of the exceptions before this court was that the Supreme Court had improperly allowed interest. This court agreed that error had been committed in said respect, but said:

"The judgment will not, however, be reversed for this error. If the plaintiff will waive this item of interest, viz., \$1,951.65, the judgment will be affirmed without costs, on this appeal; otherwise it will be reversed, to the end that a new trial be awarded as to the damages alone. *Philbrick v. Mundy, supra*, approved and followed on this point; *Young v. Society, etc.*, 91 N. J. L., 310, distinguished."

In the *Horst* case, the matter came before this Court by appeal, considerable testimony had been taken below, it was here decided that error had been committed below, such error touched the allowance of interest, and yet this Court excised the erroneous items and itself gave the plaintiff the election of having the judgment affirmed, without costs or interest, otherwise reversed, to the end that a new trial be awarded as to the damage alone; and this Court expressly cited the *Philbrick* case as its authority for so doing.

Bear in mind that in the case now here the plaintiff-respondent made its election before the Supreme Court, as above quoted. It entered its order of affirmance for \$1,600 alone. It took no appeal, and it is content to abide by such judgment. It only asks such \$1,600, plus the interest thereon which it assumes is accruing from the date of such affirmance, and, in addition, it asks its costs on the present appeal to this Court, if the judgment of affirmance is affirmed.

Respondent (which is a corporation) appreciates the solicitude which the appellant (which is also a corporation) expresses in its brief, that the course of the Supreme Court may have worked injustice to respondent. Respondent feels, however, that appellant should only be heard as to error, if any, prejudicial to its own interest. *Harris, Pleading and Practice in New Jersey*, par. 652, and cases therein cited.

The spirit of our present Practice Act is stated by Professor Harris (par. 652, *supra*), as follows:

"One of the features which makes our present practice more progressive is that a misdirection by the trial judge, or the improper admission or exclusion of evidence or error as to the matter of pleading or procedure will not constitute a sufficient ground for reversing a judgment, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of the parties. The foregoing rule reflects the spirit of the modern law which gauges the importance of the rules of pleading and practice by the effect they have upon the adjudication of the substantial rights of parties, rather than by their variations from established technical requirements. Form is subordinated to substance in the law. Reversals of judgments on mere technicalities are not favored."

In the case now here, appellant complained that certain items were improperly allowed. The Supreme Court agreed with it, and struck them out. The error, if any, has been cured, and still appellant will be satisfied with nothing but a new trial and more litigation. Interest *reipublicae ut sit finis litium*.

### III.

#### The Seventh Ground of Appeal.

Like the sixth ground of appeal, the seventh also related to the charge to the jury. Both arose together as follows: The record shows the following (Case, p. 94):

"(The jury retired.)

"Mr. Cole—I except to the Court's permitting the jury to find the damages or anything in excess of the commission.

"I except also to the Court's charging the jury that the plaintiff could recover notwithstanding the failure of the defendant corporation to execute the papers; because this would allow the jury to find for the plaintiff in spite of the fact that the president of the corporation

was ill and could not execute the agreement, and that it was while he was so sick that the plaintiff principal voided the contract by withdrawing the money."

Note that the record shows that neither of these exceptions was taken until after the jury had retired. We contend that it was then too late.

The authorities are collected in 38 *Cyc.*, 1790, which summarizes them as follows: "The common-law rule, as generally stated, was that exceptions to instructions or refusal to instruct must be taken at the trial in order to be available. This rule has been generally construed to require exceptions to the giving or refusing of instructions to be taken at the time they are given or refused, and before the retirement of the jury."

True, we no longer have exceptions or writs of error in civil causes, but we must still object, and the reasons for the old rule still apply.

In the next place, we contend that said objections to the charge are bad because appellant was required to call the attention of the Trial Judge to some specific error in the charge in order that he might rectify the mistake. *Thibodeau v. Hamley*, 95 N. J. L., 180; *Schneider v. Winkler*, 74 N. J. L., 71; *Timlan v. Dillworth*, 75 N. J. L., 100; *Addis v. Rushmore*, 74 N. J. L., 649; *Kargman v. Carlo*, 85 N. J. L., 632.

We contend that these objections to the charge are also bad for two additional reasons: First, they do not point out the particular words to which defendant objects. In *Claxson v. Hart*, 4 N. J. Adv. R., 1743, it was held that any part of the charge not excepted to is not reviewable. Second, appellant also failed to make any request to charge, so that it cannot now complain because the Trial Judge may have omitted to charge as it wished. *Posner v. Shapiro*, 4 N. J. Adv. R., 508.

We also call attention to the following recent authorities touching the form of appellant's objections:

"Grounds of appeal and assignments of error must be specific (form 37 annexed to rules of the Supreme

Court, and to Practice Act 1912 (P. L., pp. 415, 416,)” *LeConey v. Koch*, 4 N. J. Adv. R., 950; *Edwards v. Parsells*, 137 Atl., 795.

In the event that the Court feels that our said objections are untenable and that appellant properly excepted, we nevertheless contend that no error was committed by the trial court that has not already been corrected by the Supreme Court.

The seventh ground of appeal was as follows (Case, p. 13):

“7. The Court erroneously permitted the jury to find a verdict in favor of the plaintiff, notwithstanding the failure of the defendant to execute papers on the ground that this would permit the jury to find for the plaintiff, despite the fact that at the time the request was made for execution of the papers the president of the corporation was ill and could not execute, and that it was during this period that plaintiff’s principal voided the contract.”

This objection is by no means clear to us, but we take it to mean that respondent should not have been permitted to recover because illness had prevented appellant from executing certain necessary papers and thus benefiting by respondent’s work. So stated, the weakness of the objection is evident.

Bear in mind that appellant offered no request to charge. If it wished an instruction given, it should have formulated it and stated it definitely and unequivocally. *Klie v. Hollstein*, 98 N. J. L., 473.

Furthermore, the argument of appellant is based upon two major assumptions, both of which are unsound, to wit:

First, that no one could act for the appellant corporation but defendant Kuemmerle.

Second, that respondent was not entitled to commissions because appellant never actually used the money which respondent obtained for it.

The appellant is a New Jersey corporation (Case, p. 16). As such, it had a board of directors (Corporation

Act, Section 12, as amended by P. L. 1921, p. 923), as well as a president, secretary and treasurer (Corp. Act, Sec. 13). It also had the power to appoint other officers and agents (Corp. Act, Sec. 14). It had power to appoint a vice-president to act in case of absence or disability of the president. Therefore, while Kuemmerle, by virtue of his position, was admitted to be authorized to act for appellant, so that notice to him was notice to it, it does not therefore follow that appellant could not act without him. On the contrary, it is quite clear that, under the statutes above quoted, it could have done so.

The second error, as stated, is the assumption that the failure of appellant to make use of the money obtained for it by respondent prevented respondent’s recovering its commissions’, even though it had done all that was to be done by it under its contract. This is clearly not so. Respondent’s duties were analogous to those of a broker employed to sell a property. It was entitled to its commissions when it had found a money-man ready, willing and able to advance the desired funds. *Dickinson v. Walters*, 100 N. J. L., 62; *Littman v. Slack*, 5 N. J. Adv. R., 139; *Richard v. Spagna*, 5 N. J. Mis. R., 33; affirmed in 5 N. J. Adv. R., 899; *Morris Realty Co. v. Popiel*, 5 N. J. Mis. R., 666; *Maxwell v. Staulcup*, 5 N. J. Adv. R., 1134.

The proof showed that even as early as January 12, 1926 (or a day or so thereafter), Kuemmerle had been advised by respondent “that forty-eight hours from the time notice was given, settlement could be made” (Case, p. 95). The funds were actually deposited with the title company in Atlantic City on January 23, 1926, and held there until February 10, 1926 (Case, p. 65). The proof was abundant that the attorney employed by Kuemmerle (Case, pp. 70-71), was in touch with the matter at all times and kept him fully informed (Case, p. 100, *Exhibit P-9*; same, p. 101, *Exhibit P-10*; same, p. 102, *Exhibit P-11*; same, p. 103 *Exhibit P-12*).

Certainly, appellant should not now complain that the funds were withdrawn. They were specially held, for its benefit, in the title company, in Atlantic City for seventeen days (Case, p. 65).

We respectfully contend that the judgment is a just one, and that it should be affirmed with costs on this appeal.

Respectfully,  
 LEE F. WASHINGTON,  
*Attorney for and of Counsel  
 with Respondent.*

87 FEB. 1. 1928

## New Jersey Court of Errors and Appeals

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FRANK J. BLOOM CO., a corp., &c.,  
*Plaintiff-Respondent,*  
 v.  
 KUEMMERLE CORPORATION, a corp., &c.,  
*Defendant-Appellant.*

---

ON APPEAL FROM SUPREME COURT.

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APPELLANT'S BRIEF.

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STATEMENT.

The action sounds in contract and was begun by respondent against Harry Kuemmerle and Kuemmerle Corporation in the Atlantic County Circuit Court. There was a verdict in favor of respondent against appellant, a corporation, and the judgment thereon was remolded in the Supreme Court and affirmed for an amount less than the judgment reviewed.

The amount claimed is stated in the complaint as follows:

“Plaintiff accordingly demands judgment against said defendants, and each of them for

the following sums, besides costs of suit, to wit:  
 Commission .....\$1,600.00  
 Interest on said \$1,600.00 from February 10, 1926 .....  
 Interest on \$50,000.00 ..... \$150.00  
 Interest on said \$150.00 from February 10, 1926 ..... ”

Trial errors were asserted as well as one against the charge of the Court respecting the item of interest on \$50,000. The Supreme Court decided that that allowance by the jury under the direction of the Court was improper and the opinion concludes:

“The judgment of the Atlantic County Circuit Court will be affirmed for \$1,600.”

The amount of the judgment was \$1,836.72.

*Robinson v. Payne*, 99 Law 141, is cited in support of the power of the Court to thus remold the judgment.

## ARGUMENT.

### I.

#### THE SUPREME COURT SHOULD HAVE REVERSED THE JUDGMENT AND ORDERED A NEW TRIAL.

The power of the Supreme Court to remold the judgment does not reside in either the Practice Act or rules of court cited in *Robinson v. Payne*. We find no case that we deem to be substantially analogous with the instant case. In *Robinson v. Payne*, at page 137 this Court says:

“By Rules 72 and 73 of the Practice Act of 1912 (now Rules 131 and 132 of the Supreme Court), the Legislature declared that: (72) ‘In case a new trial is granted it shall only be a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable;’ (73) ‘When a new trial is ordered because the damages are excessive or inadequate and for no other reason, the verdict shall be set aside only in respect to damages and shall stand good in all other respects.’”

In this case, this Court affirmed the judgment of the Supreme Court which determined that there was power to award a new trial for damages only and it affirmed the judgment founded upon a verdict awarding such a new trial. The case is clearly within the rule.

A number of cases are cited in *Robinson v. Payne* to which we shall briefly refer.

*Young v. Society*, 91 Law 310. There a new trial was awarded limited to damages only. The opinion concludes:

“The judgment is reversed to the end that a *venire de novo* be awarded. The question with respect to which the decision is found to be wrong is the measure of damages and since that question is here separable the new trial is limited thereto pursuant to Rule 131 made applicable to appeals by Rule 147.”

Just preceding the foregoing quotation this Court said:

“For the reasons before stated, however, we think the learned trial Judge should have

granted defendant's motion that a verdict be directed in favor of the plaintiff and against the defendant for \$193.42 with interest instead of \$427.45, the amount for which a verdict was directed."

Since the only error in this case was in the amount of damages directed to be found by the jury, why did not this Court mold the judgment and affirm it? The amount involved was liquidated as found by this Court. If the power resided in the Supreme Court in the instant case to remold the judgment, then it resides in this court, and we perceive no valid reason why in *Young v. Society*, a *venire de novo* should have been awarded.

*Spencer Heating Co. v. Abbott*, 91 Law 594, was a case where the judgment was reversed and a *venire de novo* awarded.

*Queen v. Jennings*, 93 Law 353, was on a rule to show cause where the verdict was set aside and a new trial awarded.

In *Giardini v. McAdoo*, 93 Law 138, there was a reversal and the award of a new trial. In this case this Court said, at page 149:

"The verdict rendered, upon which the judgment before us was entered, is, therefore, excessive; and were it not for Rule 73 annexed to the Practice Act (1912), now Rule 132 of those of the Supreme Court (1913), it would be necessary for us to reverse this judgment in toto and order a new trial after allowing proper amendments to be made; but, by that rule, it is provided that when a new trial is ordered because the damages are excessive or inadequate, the verdict shall be set aside only in respect to damages and shall stand good in other respects."

In *Gaffney v. Illingsworth*, 90 Law 490, a new trial was granted as to damages only.

The action of the Court in each of the cited cases was well within the cited rules.

But from what source did the Supreme Court in the instant case acquire the power to in effect reverse the judgment because of error in the trial court and still affirm for an amount which it thought was proper? Certainly the language in the cited rules cannot be successfully invoked to justify such power.

The Supreme Court has the power which it exercised in the instant case to control the judgment on appeals from the District Court, but this is by virtue of the District Court Act, Second Compiled Statutes, 2016, Section 213a, and P. L. 1915, page 549. The pertinent language is:

"And the said Supreme Court may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party as the case may be, and may make such order with respect to the dismissal and costs of the said appeal as such Court may think proper."

Rules 131 and 132 Supreme Court apply only in cases where a *venire de novo* is awarded and this is so stated in Rule 147, which reads:

"Rules 131 and 132 shall apply to appeals in which a *venire de novo* is directed."

As above quoted, this Court has already announced in *Giardini v. McAdoo* that it would be powerless to do other than reverse and order a new trial without qualification were it not for the cited rules. If, therefore, the cited rules apply only to

cases where a new trial is awarded, then by the declaration of this Court, the Supreme Court erred in affirming the judgment for an amount different from that which the jury found.

Suppose in this case the respondent had appealed and urged that the Supreme Court had awarded a sum less than it was entitled to have. Could it be doubted that this court would reverse the judgment? If the respondent was entitled to recover the commission then it was entitled to \$1,600 with interest from February 10, 1926, to the day of the rendition of the verdict and for the Supreme Court to arbitrarily say that it should accept \$1,600 was manifest error. Of course, it may be said that this appellant cannot be heard to object because it has not been harmed, but after all, the question is not one of harmful error but one of the presence of the power of the Supreme Court to do what it did. If the power is absent, then the judgment must be reversed.

## II.

### THERE SHOULD HAVE BEEN A REVERSAL BECAUSE OF ERROR IN THE COURT'S CHARGE.

The Court said:

"There is one other proposition of law that I want to charge you, and that is that the plaintiff in this case cannot be charged with any failure that may have arisen if there was such a failure on the part of the Kuemmerle Corporation to execute any papers which may have been necessary for them to execute. If you find that in accordance with the agreement Mr. Bloom did

produce this money and that it was ready for the Kuemmerle Corporation and that it was produced under an agreement that they would pay, as testified to by the plaintiff, then your verdict would be in favor of the plaintiff and against the defendant for such sum as you find the plaintiff is entitled to for commissions, which it is undisputed amount to \$1,600 together with interest from February 26, 1926, plus the damage I have spoken to you about."

The 7th assignment of error which is addressed to the quoted charge, reads:

"The Court erroneously permitted the jury to find a verdict in favor of the plaintiff, notwithstanding the failure of the defendant to execute papers, on the ground that this would permit the jury to find for the plaintiff, despite the fact that at the time the request was made for execution of the papers, the president of the corporation was ill and could not execute, and that it was during this period that plaintiff's principal voided the contract."

A clear understanding of the allegations in the complaint and the testimony is necessary to appreciate the point made against the charge. It developed during the trial by the introduction of Exhibit D4 that the respondent was the agent of the lender of the money for which commission was claimed by the respondent. The letter from the respondent to the lender reads:

"Dear Mr. Fleisher:

Mr. Kuemmerle has been seriously ill since Sunday of last week, although today an improvement is noted in his condition; and it

is hoped that we will complete the settlement in the next day or two through his son in this city.

You are naturally interested in the progress of the settlement, *and as your representative*, I feel obliged to acquaint you with this delay on account of his illness.

I fully expect to complete the settlement within the next few days and when completed, will so advise you."

The money was deposited with the title company January 23rd (page 21) and withdrawn February 10th. Harry Kuemmerle was president and treasurer of appellant, and his signature was necessary to certain papers in order to consummate the transaction. He was taken suddenly ill on January 25, 1926, and was confined to his bed with typhoid fever from that date until the middle of March, during which period he was wholly incapacitated from signing papers or doing any business (page 42-43). The lender withdrew the money on February 10, 1926 and at a time when it was impossible for the corporation to execute the necessary papers (page 42). From the time the money was deposited until it was withdrawn, the company was powerless to act, and this was known both to the respondent and the lender. In this posture the lender for whom respondent was agent withdrew the money without assigning any reason. Witness Barrett, of the title company, at page 69, is asked:

"Q. Just said they wanted their money back, and you gave it to them, that was all?

A. Yes."

Paragraph 2 of the complaint reads:

"2. On or about December 20, 1925, the de-

fendant, Harry Kuemmerle, and the defendant Kuemmerle Corporation, or one of them, employed plaintiff to obtain for said defendants, or one of them, the sum of \$50,000.00 to be used to take an assignment of a mortgage then held against property of said defendants, or one of them, under an agreement that said defendants, or one of them, would forthwith pay to plaintiff, for plaintiff's services in obtaining said funds to take over said mortgage a commission of \$1,600."

From the foregoing and the undisputed proof in the case it will be observed that the title company was called upon by the lender to investigate the title of the mortgaged premises and certain negotiations between the Equitable Trust Company, the holder of the mortgage, to be assigned, and the appellant, had to be consummated. The title company (see testimony of Barrett) was not prepared to act until January 22, 1926. The president of appellant was taken seriously ill on January 25th, and this fact, together with the fact of the inability of the corporation to conclude the transaction was communicated to the lender by the respondent on January 27th. While the corporation was powerless to act because of the illness of its president, the lender withdrew the money.

In this posture, was the trial Court correct in saying that respondent was entitled to recover notwithstanding the failure of the appellant to execute the necessary papers and notwithstanding its inability to do so for the reasons stated? Appellant received no value. Its failure to receive the money was due to the illness of its president and the early withdrawal of the money by the lender. Respon-

dent admitted it was the agent of the lender and that on January 27th the appellant could not execute the necessary papers and that the transaction had not yet been completed. Quoting from his letter:

"I fully expect to complete the settlement within the next few days and when completed will so advise you."

Our submission is that in the circumstances and by the undisputed essential facts it was a question for the jury to say whether respondent was entitled to recover in view of the fact that by its own admission the transaction had not been completed, that it was the agent of the lender, and that while appellant was unable to execute the papers the lender prematurely withdrew the loan.

The effect of the Court's charge was to withdraw from the consideration of the jury the question of reasonableness of time on the part of the appellant to execute the necessary papers after having been advised that the money was on deposit, it also left out of consideration the question of the premature withdrawal of the money, and the absence of right of the appellant to receive the money until it had executed certain papers which it could not do by reason of a matter beyond its control.

The further effect of the charge was to lay down the principle that the respondent was entitled to his commission when the lender agreed to lend and deposit the money notwithstanding he might immediately withdraw it without a justifiable reason. It must be that the appellant was entitled to a loan available to it when it acted with reasonable diligence to do the thing or things necessary to enable it to receive the loan. It cannot be that the jury did not have a right to consider whether there was any

legal default on the part of appellant. These questions were all withdrawn from the consideration of the jury, and we submit, illegally.

There was error and the judgment of the Supreme Court should be reversed with an award of a *venire de novo*.

Respectfully submitted,  
 COLE & COLE,  
*Attorneys of Appellant.*

