

New Jersey Court of Errors and Appeals.

WILLIAM H. BROWN, Plaintiff, Plaintiff in Error, vs. JOHN HONISS, et al, Defendants, Defendants in Error.	} In Error to Essex Circuit Court.	16
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BRIEF OF JOSEPH COULT FOR DEFENDANTS IN ERROR.

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William H. Brown, the plaintiff in this action, on July 9, 1901, obtained from the defendant, John Honiss, an option for the purchase of a piece of property situate in the City of Newark, bounded by Mount Prospect Avenue, Sylvan Avenue, Summer Avenue and Second River, for the sum of twelve thousand five hundred dollars, as shown in Exhibit P. 2 and 3 of the printed case.

On October 17, 1901, the plaintiff notified the defendant that he wanted immediate conveyance of the property mentioned in the option. 30

The plaintiff brought action for damages for the failure of the defendant to convey the property.

The trial judge directed a verdict for the plaintiff for the sum of twenty-seven dollars and twenty-five cents, the amount of deposit paid by the plaintiff for the option, with interest.

"The plaintiff claims that the judge erred in giving this direction and brings the case to this court for review."

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Judge Swayze, following the case of *Gerbert v. Trustees*, held that as the defendants could not give a good title to the property by reason of the outstanding inchoate right of dower of Mrs. Honiss, they were liable only for the money paid, with interest.

In determining the case he said :

“It seems to me that I cannot assume that Mr. Hon-
 “iss would have been able to secure his wife’s release;
 “in fact, the law very carefully guards her against any
 10 “influence on the part of her husband, and it is for
 “that reason that the distinction is made in specific
 “performance cases between inchoate right of dower
 “and other incumbrances. Now, that being the sit-
 “uation, it seems to me the case is a case of failure
 “of title. It might be that if Mr. Brown had offered
 “to take the property subject to the right of dower,
 “that that would have altered the case; but he ten-
 “dered himself ready to take the title which I must as-
 “sume means the complete title in fee simple. I think
 20 “it was beyond the power of Mr. Honiss to make that
 “conveyance and although it is an incumbrance ap-
 “parently not of much value it still brings the case
 “within the doctrine of *Gerbert v. Trustees*, (30 Vr.
 “160.) I understand that *Gerbert v. Trustees* distinct-
 “ly says that even in case of fraud the only remedy is
 “by an action for deceit, and not by an action on the
 “contract.”

If plaintiff had tendered a draft of such conveyance
 as he was willing to receive (as he was bound to do),
 30 and it did not require Mrs. Honiss’s signature, Honiss
 might have been liable for refusal to execute it. No
 tender was made, and by the terms of the contract
 plaintiff had a right to a release of the dower right of
 Mrs. Honiss. No conveyance of a free and clear title
 could have been made without her release.

The tender of the price fixed in the option is shown
 on page 27 of the printed case in the testimony of the
 plaintiff, and it is there shown that there was no ten-
 der of a deed for Mr. Honiss to sign.

40 Tender must be made of the conveyance by the pur-

chaser before suit for breach of the contract. The purchaser must *prepare* and *tender* conveyance.

Sugden on Vendors, Vol. 1, p. 366.

Chitty on Contracts, 13 Ed. by Liby, p. 333.

Pool v. Hill, 6 M. & W. Ex., 833-8.

Stryker v. Vanderbilt, 3 Dutcher 68-72.

The principal question involved in this case is the amount of damages the plaintiff is entitled to by reason of the defendant's failure to convey.

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The rule of damages is laid down in *Gerbert v. Trustees*, 30 Vroom, p. 160, following the leading English case of *Bain v. Fothergill*, (1874), L. R. 7, H. L. 158, Law Journal, Vol. 43, Common Law 245.

Justice Van Syckle on page 180 says:

"In an action on contract for damages flowing from a breach of the covenant of warranty, the only damages recoverable would have been the consideration money paid and the interest thereon; and if the purchaser money was wholly unpaid, nominal damages only could have been recovered.

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"This rule has been so long recognized in our jurisprudence that it cannot now be subverted.

"That there is no substantial difference in the injury resulting where there is an ouster conveyance with warranty, and where there is a refusal of conveyance in pursuance of a contract to convey, where the vendor is unable to make title, which can reasonably support a rule for damages in the former case wholly different from that which prevails in the latter case, is too obvious to require discussion. * *

30

"The loss in both cases arises from the breach of the vendor's covenant on account of the defect in his title.

"There can, therefore, be no solid basis for diversity in the rule of damages applicable to the two conditions and the rule should be unified if there is no serious obstacle."

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The first case upon this subject is *Flureau v. Thornhill*, 2 W. Blackstone, 1078.

This was a case where a leasehold was auctioned to the plaintiff and a deposit paid by him. The party who sold at auction could not give a good title. In granting a new trial after a verdict for the plaintiff De Gray (*C. J.*) says:

10 "I think the verdict wrong in point of law. Upon
 "a contract for a purchase, if the title proves bad, and
 "the vendor is (without fraud) incapable of making a
 "good one, I do not think the purchaser can be entitled
 "to any damages for the fancied goodness of his bar-
 "gain which he supposes he has lost."

And Blackstone (*J.*) added:

20 "These contracts are merely upon condition, fre-
 "quently expressed, but always implied, that the ven-
 "dor has a good title. If he has not, the return of the
 "deposit with interest and costs, is all that can be ex-
 "pected."

30 After *Flureau v. Thornhill*, *Hopkins v. Grazebrook*,
 6 Barnewall & Cresswell, 31-34, held that where a per-
 son had contracted for the purchase of an estate, but
 had not obtained a conveyance, put up the estate for
 sale by auction and engaged to make a good title by a
 certain day, which he was unable to do, as his vendor
 never made a conveyance to him, a purchaser could re-
 cover not only the expenses which he had incurred,
 but also damages which he had sustained by not hav-
 ing the contract carried into effect.

In this case Bayley (*J.*) says:

40 "The case of *Flureau v. Thornhill* is very different
 "from this, for there the vendor had nothing but an
 "equitable title. Now where a vendor holds out an
 "estate as his own, the purchaser may presume he has
 "had a satisfactory title, and if he hold out as his own
 "that which is not so I think he may very fairly be
 "compelled to pay the loss which the purchaser sus-
 "tains by not having that for which he contracted."

This case was followed in—

Robinson v. Harman, 1 Ex. 850, 18 L. J. Ex. 202.

Engle v. Fitch, 37 Law Journal (N. S.) 145, 3 Law Rep. Q. B. Rep. 314.

In the case of *Sikes v. Wild, et als*, 1 B. & S. 587, Blackburn (J.) says (at foot of page 592) :

“My brother William expresses doubts, in which I
“fully sympathize, as to the soundness of the excep- 10
“tions in *Hopkins v. Grazebrook* in any point of view.
“I do not see how the existence of misconduct can al-
“ter the rule by which the damages for the breach of
“a contract are to be assessed. It may render the con-
“tract voidable on the ground of fraud, or give a cause
“of action for deceit, but surely it cannot alter the
“effect of the contract itself.”

These cases were all reviewed and *Flureau v. Thornhill* approved, and *Hopkins v. Grazebrook* overruled in the House of Lords in 1874 in the case of 20
Bain, et al, v. Fothergill, et al, 43 L. J. (N. S.) Com-
mon Law, 245. (See Beal's Cases on Damages, p.
503, 509-10-11 and 3 Sedgwick on Damages, 8th Ed.,
p 173).

The defendants in this case were in possession of a
mining royalty under a written agreement for a lease
of which they had taken an assignment from H. In
H's agreement for a lease with the owners it was stip-
ulated that he should not assign without their permis-
sion. The defendants contracted with the plaintiff to 30
sell their interest in the royalty and this action was
for the breach of that contract, in consequence of the
inability of the defendants to make title for want of
the owners' assent to the assignment to them. The
owners were willing to consent to the assignment to
the plaintiff if he would stipulate not to assign with-
out their permission. One of the defendants knew
that this consent was necessary, the other did not.
They held that the plaintiff could not recover in an
action for damages any damages for the loss of his 40

contract beyond his deposit with interest and costs.

Lord Chelmsford in delivering his opinion (page 266 L. J.) said:

Upon a review of all the decisions on this subject, "I think that the case of *Hopkins v. Grazebrook* ought "not any longer to be regarded as an authority. En-
"tertaining this opinion, I can have no doubt that the
"judgment of the Court of Exchequer in the present
"case is right, whether it falls within the rule as es-
10 "tablished by *Flurcau v. Thornhill*, or is to be con-
"sidered as involving circumstances which have been
"regarded as removing cases from the influences of
"that rule; because I think the rule as to the limits
"within which damages may be recovered upon the
"breach of a contract for the sale of real estate must
"be taken to be without exception. If a person en-
"ters into a contract for the sale of a real estate,
"knowing that he has no title to it, nor any means of
"acquiring it, the purchaser cannot recover damages
20 "beyond the expenses he has incurred by an action for
"the breach of the contract; he can only obtain other
"damages by an action for deceit."

The case of *Drake v. Baker*, 5 Vr., 358, was decided in the Supreme Court in 1871; three years before *Bain v. Fothergill*. It was decided on the strength of the English cases headed by *Hopkins v. Grazebrook*, which engrafted the exceptions on *Flurcau v. Thornhill*.

30 After *Hopkins v. Grazebrook* was overruled by the House of Lords, our Court of Errors and Appeals overruled *Drake v. Baker* in *Gerbert v. Trustees*.

The facts in *Drake v. Baker* were these: The defendant agreed in writing with the plaintiff for a certain consideration to sell and convey certain lands and real estate to the plaintiff and give him a "fee simple title free from incumbrances." The defendant's wife refused to sign the deed, thus preventing him from executing the contract.

40 The court here held that if a man entered into a contract knowing that his inability to complete de-

pended upon a contingency, he would be liable for substantial damages upon its breach.

The facts in *Drake v. Baker* directly apply to the case before the court. *Drake v. Baker* having been overruled by this court in the Gerbert case, it brings this case directly under the rule there laid down.

The rule in Virginia is the same as that established in this State by the case of *Gerbert v. Trustees*.

The authority of *Flureau v. Thornhill* was recognized and followed without the exception endeavored to be engrafted upon it by the subsequent English cases, which were overruled, however, subsequently by *Bain v. Fothergill*. 10

Stuart v. Pennis, 42 S. E., 667.

Thompson, Exrs. vs. Guthries, Adm., 33 Am. Dec., 225.

The rule appears to be the same in Pennsylvania.

McCafferty v. Griswold, 99 Penn. St. Rep., 270 (276).

McNair v. Compton, 35 Penn. St. Rep., 23. 20

In *Burk v. Serrill*, 80 Penn. St. Rep., 413 (418), the defect in the title was because of the outstanding inchoate right of dower of the wife of the vendor.

The court held that the wife's interest was protected by the statute, and that the husband was prohibited from using any influence to obtain a release of her dower.

The rule laid down in the above cases is an exception to the general rule of damages for breach of contract. But the reason for this rule is well stated in— 30

Mayne on Damages, 5th Ed. p. 201, as follows:

"No doubt this is an exception to the ordinary rule of the common law that where a person sustains loss by reason of a breach of contract he is *prima facie* entitled, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. But the reason is, that contracts for the purchase of real estate are of an ex- 40

10 "ceptional nature. In the case of a sale of a chattel,
 "the vendor must know, or at all events is taken to
 "know, what his right to the chattel is. But in re-
 "gard to real estate there must always be some de-
 "gree of uncertainty as to whether a good title can be
 "effectively made by the vendor; and, taking the pro-
 "perty with that knowledge, the purchaser is not en-
 "titled to recover any loss on the bargain he may have
 20 "made, if in effect it should turn out that the vendor
 "is incapable of completing his contract in conse-
 "quence of his defective title. All that he is entitled to
 "is the expense he may have been put to in investigat-
 "ing that matter. He has a right also to take the es-
 "tate and complete the purchase with that defective
 "title, if he thinks proper to do so. But he is held to
 "have bargained with the vendor upon the footing that
 "he (the vendee) shall not be entitled, under all cir-
 "cumstances, to have that contract completed, and
 30 "therefore he is put in a position under such a con-
 "tract to make a resale before the matter has been
 "fully investigated and before it is ascertained
 40 "whether or not the title of his vendor is a good one."

Whatever doubt may exist as to the rule in other
 jurisdictions there can be no doubt but that the case
 of *Gerbert v. Trustees* settled the rule in this State.

The argument in that case was that there was no
 substantial difference in injury resulting where there
 was an ouster after conveyance with warranty and
 where there was a refusal of conveyance in pursuance
 30 of a contract to convey, when the vendor was unable
 to make good title and that the rule for damages
 should be the same in both classes of cases and that
 where the action was in contract for the recovery of
 damages it made no difference whether the vendor was
 guilty of fraud or not; that the motive of the defend-
 ant was immaterial and that the vendee in order to
 recover substantial damages in a case of this char-
 acter must proceed in an action for deceit.

40 After elaborate argument, it was held that the rule
 as stated in the case of *Drake v. Baker*—that immuni-

ty to the vendor in such cases does not extend beyond his inability to perform his contract by reason of a defect in his title which was unknown to him at the time he entered into the contract and that he would be held responsible in substantial damages for willful default or from contingencies known to him and of which he consciously took risk—was wrong and should be overruled; and that following the case of *Bain v. Fothergill* there could be no recovery in that class of cases beyond the amount paid in an action on the contract. Judge Van Syckel, delivering the opinion of the court in that case, said:

“Under the long settled law of this State, if Snyder had conveyed in his lifetime to his lessee with a covenant of warranty and if thereafter the grantee had been evicted by the remaindermen in an action on contract for damages flowing from a breach of the covenant of warranty, the only damages recoverable would have been the consideration money paid and interest thereon, and if the purchase money was wholly unpaid nominal damages only could have been recovered.” (Referring to the cases of *Stewart v. Drake*; *Holmes v. Sinnickson*; *Morris v. Rowan*).

“This rule,” he says, “has been so long recognized in our jurisprudence that it cannot now be subverted.” “And,” he adds, “there is no substantial difference in the injury resulting where there is an ouster after conveyance with warranty and where there is a refusal of conveyance in pursuance of the covenant to convey when the vendor is unable to make title which can reasonably support a rule for damages in the former case wholly different from that which prevails in the latter case.” “This,” he says, “is too obvious to require discussion. The injury in both cases is the same—the loss of such profit as would have been incident to increased value. The loss in both cases arises from the breach of the vendor’s covenant on account of the defect in his title.”

“There can be,” he continues, “no solid basis for diversity in the rule of damages applicable to the two

"conditons and the rule should be unified if there is
 "no serious obstacle in the way."

After an examination of the English cases he proceeds to state what was held in the case of *Bain v. Fothergill* and what was determined by the court in the case under consideration. He says:

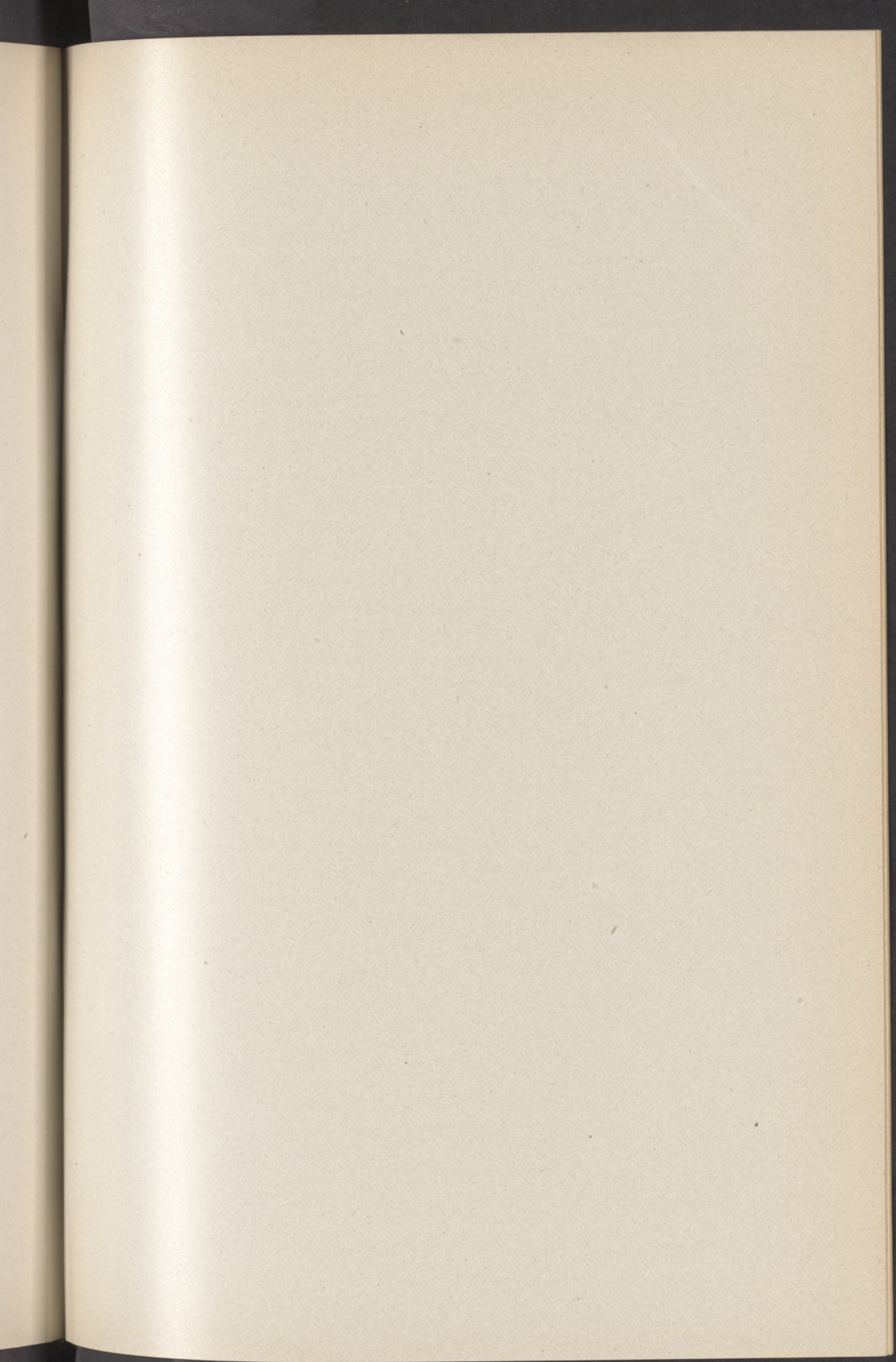
"The discussion in *Bain v. Fothergill* is most able
 "and interesting, and after a thorough review of all
 "the previous English cases the House of Lords ex-
 10 "pressed the opinion that *Flureau v. Thornhill* was
 "established law and that *Hopkins v. Grazebrook* was
 "no longer the rule; that *Flureau v. Thornhill* applied
 "to every case where the vendor failed to convey
 "through inability to make title; that the rule was the
 "same whether the vendor had been guilty of fraud or
 "not, for the motive of the defendant was immaterial
 "in measuring damages for breach of contract and
 "that therefore even if there had been fraud the ven-
 "dee could not have recovered substantial damages in
 20 "contract but must have proceeded in an action for
 "deceit."

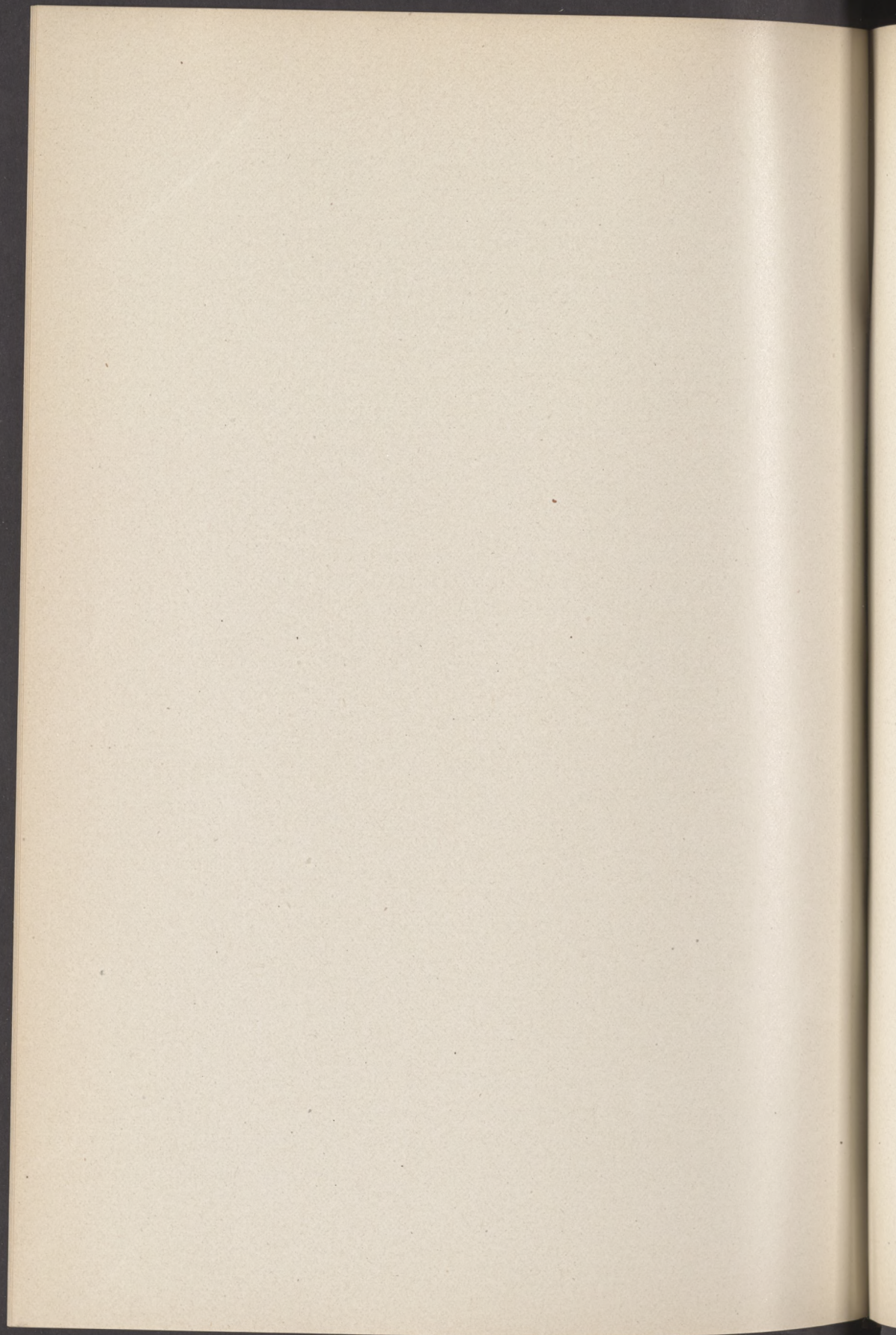
He concludes as follows:

"The cases upon which the doctrine approved in
 "*Drake v. Baker* was rested having been so complete-
 "ly overruled by the English courts, that case should,
 "in our judgment, be now disregarded and the law in
 "this State be made to harmonize in the two instances
 "where there is in all material respects similarity of
 "circumstances and no difference of substance upon
 30 "which to support a difference in the rule of damages;
 "where fraud or deceit enters into the transaction the
 "vendee should be left to his action for deceit to re-
 "cover for the loss he may thereby sustain."

Thus it will appear that the question in this State is closed by the final determination of our Court of Last Resort. It has become a rule of property affecting titles to land and should now stand undisturbed until changed by the legislature.

JOSEPH COULT.





New Jersey Court of Errors and Appeals.

CARLENE K. BROWN, EXRX. of WIL-
LIAM H. BROWN, DECEASED,
Plaintiff, Plaintiff in Error,
vs.
JOHN HONISS, *et al*,
Defendants, Defendants in Error.

*On Writ of
Error to
Essex Circuit
Court.*

10

BRIEF FOR PLAINTIFF IN ERROR.

July 9, 1901, William H. Brown, the plaintiff be-
low obtained from the defendants below, in con-
sideration of the payment of twenty-five dollars,
a written option to purchase a tract of land in
the City of Newark, in the option described, for
the sum of twelve thousand five hundred dollars,
the option to expire on the first day of Novem-
ber then next. (For copy of option see Exhibit P-2,
case page 124).

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September 4, 1901, the option was extended in writ-
ing from the first day of November to the first day of
December then next. (Exhibit P-3, case page 125.)

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In the early part of October, 1901, the plaintiff be-
low notified the defendants of his exercise of the op-
tion to purchase and finally on October seventeenth,
put his demand for a conveyance in accordance with
the terms of the option of July ninth, 1901, in writing,
accompanying the demand with a tender of the sum
of twelve thousand five hundred dollars, the price for
the conveyance named in the option. (Exhibit P-4,
case page 125).

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In September, 1901, the plaintiff below had sold the property to the City of Newark, for the sum of seventeen thousand five hundred dollars, the land to be used for an isolation hospital.

When the defendants below learned of the intended use of the property for an isolation hospital, they refused to convey the property, having first been indemnified by adjoining property owners against pecuniary loss by reason of refusal on their part to perform their contract with the plaintiff.

The plaintiff thereupon brought suit in the Essex Circuit, setting up his option and the exercise thereof, the request to convey, the tender of the purchase money, and the willful refusal of the defendants to convey, and claiming substantial damages. (Copy of narr., case, page 3; pleas, page 5; replication, page 6.)

At the trial it developed that one of the defendants, John Honiss, was a married man, and the court held that notwithstanding that the refusal to convey was not based on any claim of inability to secure the wife's signature to the deed, and notwithstanding that it was not shown that any effort had been made to procure her signature, or that she had refused to sign, the case was brought, by the existence of the inchoate right of dower, within *Gerbert v. Trustees*, 30 Vr., 160, and the jury was directed to return a verdict for nominal damages, namely, the sum paid for the option and interest. (Case, page 120.)

To this direction by the court, exception was taken and allowed, and this writ of error was sued out.

The only question before this court is the measure of damages applicable to the present case.

An examination of the record in this case will show that the existence of the inchoate right of dower of Mrs. Honiss had nothing whatsoever to do with the refusal to convey the property.

The defendant Honiss testified that as soon as he learned that the property was to be used for an isolation hospital, he directed Mr. Pennington, the attorney of himself and of Mrs. Ranney, the other defendant, not to give Brown a deed for a hospital. (Case page 68, line 30) ; that he first heard that the property was to be used for an isolation hospital from the papers and was dumbfounded to think that it was to be so used. (Case page 69, lines 12 to 17).

When asked if up to the time he learned the property was to be used for an isolation hospital he would have been perfectly willing to convey it, he replied "Yes, sir, Mr. Brown could buy it up to that time for a factory and he can buy it to-day for a factory for the same price." (Case, page 69, lines 18 to 22). 10

He was then asked:

"Q And the reason you did not make the deed was because you learned that the property was to go to the city for an isolation hospital? 20

A Yes, sir.

Q That was the cause of the refusal?

A Yes, sir."

(Case, page 69, lines 23 to 28).

Counsel for the defendants on the trial stated that he (meaning Honiss) put it on the ground that he refused the conveyance for a certain purpose:

"*Mr. Coult.* He puts on the ground that he refused it for a certain purpose. 30

The Court. He absolutely and unqualifiedly refused to make a conveyance.

Mr. Coult. Yes."

(Case, page 70, lines 20 to 24.)

An examination of the record will show that the purpose referred to was for an isolation hospital.

The plaintiff Brown testified that when he asked for a deed Honiss said that Mr. Tiffany, for whom he did a great deal of business, did not want him to 40

give a deed for the property for the purpose of an isolation hospital and he was in an embarrassing position; and that Honiss finally said that he could not give the deed on that account.

(It appears in the case that the occupation of Mr. Honiss at the time this option was executed, was the care of Mr. Tiffany's property, which adjoined the land described in the option, and had been formerly in the same parcel with it. Case page 63, line 30; 10 page 118, line 20.)

Brown further testified that he was told by Mr. Pennington, attorney of the defendant, that the defendants had been indemnified against all pecuniary loss and that they would not give the deed. (Case, 20 pages 23, 24, 25, 26 and 27.)

Samuel H. Pennington, Jr., to whom Honiss referred Brown as his counsel, and who had signed the option as attorney of the defendant, Mrs. Ranney, 20 when called in behalf of the defendants on direct examination, testified as follows:

“Q Something was said about your having spoken as attorney for Mr. Honiss to Mr. Brown about his refusal to execute a deed. Was any reason given?

A The reasons had been given previously. On the occasion when Mr. Hardin and Mr. Brown, together made a tender to me of the twelve thousand five hundred dollars, nothing was said about the reasons, I think, excepting I may have said 30 at that time, as I had said before, that we refused—that Mr. Honiss refused—to convey for the purpose of a hospital, an isolation hospital, but whether that, even, was said at that particular time, I could not say, but I had frequently expressed to Mr. Brown the reason why they refrained from making a conveyance.

Q Why Mr. Honiss refrained?

A Why both of them refrained. Mr. Honiss 40 on the occasion when the tender was made, made

his absolute refusal, but before that time the parties had refrained from making the conveyance, although they had not finally refused.

Q But you stated the reason?

A The reason was stated at the first interview with Mr. Brown in the newspapers after it became public that the property was sought for the purposes of an isolation hospital. I told Mr. Brown on that occasion that a few years before the parties who gave this option had sold the greater part of the tract which they owned, and of which the land now in question is a small residue—that they had sold the greater part of this tract to Mr. Tiffany; that Mr. Tiffany had paid his money; that he had spent large sums of money in building a factory and improving otherwise the property, and that the parties did not think it would be honorable for them to convey this property for the purpose of an isolation hospital and so injure the property which they had sold and received their money for; and further Mr. Brown urged upon me the duty and the honorable obligation of fulfilling this option. I told him that we considered our duty to Mr. Tiffany, under the circumstances of the case, as more cogent and more obligatory in morals and in honor, than it was to convey this property under the option to him.” (Case, pages 117 and 118.)

This record will be searched in vain for even a suggestion that refusal to convey this property in accordance with the option, was based on the inability of the defendants to make title. It neither appears that Mrs. Honiss was asked to sign a deed nor that she refused to sign a deed. No reason was ever given except that the property would not be conveyed for an isolation hospital. The defendant Honiss in his evidence does not mention his wife as associated with the transaction, except to testify on page 63 that he was a married man at the time he executed the contract, and

that his wife was still living. He makes no suggestion that she would not have joined in the deed if requested, but on the contrary expressly declares (case, page 69, line 20) that Mr. Brown, up to the time it was announced that the property was to be used for an isolation hospital, could buy it for a factory, and that he could buy it at the time the witness was testifying, for a factory, and that the cause of the refusal to make a deed, was the knowledge on the part of the
 10 defendants that the property was to go to the city for an isolation hospital.

The trial judge conceded that, but for the inchoate dower of Mrs. Honiss, there would have been in this case a willful refusal for which the plaintiff would have been entitled to recover substantial damages; the difference between the market value of the property as the jury might find it, and \$12,500 (case, page 120, lines 18, *et seq.*).

20 The case of *Gerbert v. Trustees*, 30 Vr., 160, was decided by this court at the June term, 1896, and overruled *Drake v. Baker*, 5 Vr., 358, decided in the Supreme Court in 1871.

In the argument of the present case no attempt will be made to question the unanimous conclusion of this court in *Gerbert v. Trustees*. It will be contended that the doctrine of that case is not controlling in the present case.

30 The case of *Gerbert v. Trustees* followed the leading English case of *Bain v. Fothergill*, 7 H. L. Cas., 158. *Bain v. Fothergill* recognized and followed *Flureau v. Thornhill*, 2 Bl. R., 1078, which had been greatly narrowed by later cases relied on by our Supreme Court in *Drake v. Baker*.

This court, speaking through Mr. Justice Van Syckle, declared *Flureau v. Thornhill* to be established law and that it applied to every case where the vendor
 40 failed to convey through inability to make title: that

the rule was the same whether the vendor had been guilty of fraud or not, for the motive of the defendant was immaterial in measuring damages for breach of contract, and that therefore even if there had been fraud, the vendee could not have recovered substantial damages in contract, but must have proceeded in an action for deceit.

Gerbert v. Trustees, 30 Vr., 160, 182.

Where fraud or deceit enters into the transaction the vendee should be left to his action for deceit to recover for the loss he may sustain thereby. 10

S. C., page 183.

It is plain that the fraud or deceit referred to by the court is fraud or deceit in the contract of sale.

The courts of this State have in many cases defined the limits of fraud or misrepresentation as foundation for an action for deceit.

In *Cowley v. Smyth*, 17 Vr., 380, 383, Mr. Justice Depue, for the Supreme Court, said: 20

“The action for deceit to recover damages for a false and fraudulent representation, differs in principle from the cases that have been referred to. In such an action a false representation without a fraudulent design is insufficient. There must be moral fraud in the misrepresentation to support the action.”

In *Crowell v. Jackson*, 24 Vr., 656, 657, the late Chancellor, speaking for this court, said: 30

“We are of opinion that in contemplation of law there can be no fraud without moral delinquency; in other words there is no actual fraud which is not also moral fraud. In purchase or sale if there be no designed misrepresentation by words or deeds and no active intentional concealment, and no intentional silence where there is a duty to speak an action for deceit will not lie.” 40

The option contract on which this suit is founded became, when the option was exercised, a contract of sale of the real estate described therein.

Brooks v. Wentz, (N. J.), 49 At. Rep., 147 (V. C. Stevens).

Under the tests above cited, it would seem that no action for deceit could be maintained. The contract is silent as to the existence of any dower right. The active negotiators were the plaintiff Brown and the defendant Honiss, and the option itself was drawn by Mr. Pennington, counsel of the defendants. All three were examined as witnesses and none of them refers to this dower right as ever having been mentioned while the contract was making. The option is signed by Honiss in person, and by Mrs. Ranney, by Mr. Pennington, as attorney. It was negotiated in the best of faith, and was fifty-seven days after its original date, extended for an additional month. That the signature of Mrs. Honiss was obtainable at any time may be inferred from her husband's declaration on the witness stand that Brown could have had the land at any time for a factory and could then have it for a factory. There is no fraud or misrepresentation in the inception of the contract, no fraud alleged by the plaintiff or denied by the defendants.

When the plaintiff asked for a deed the defendants did not say, "We cannot give you good title; Mrs. Honiss has an inchoate right of dower and she will not sign the deed;" nor did they say, "We cannot get Mrs. Honiss to sign the deed, but we will give you what title we have if you want it." The existence of Mrs. Honiss was not referred to. Neither Mr. Honiss or Mr. Pennington suggested that the woman was the reason for the refusal to convey.

No inability to make title was set up as an excuse for non-performance.

The reason given was frankly and firmly expressed. "We will not give you a deed for an isolation hospital.

We will give you a deed for a factory. We consider our duty to Mr. Tiffany under the circumstances of this case, as more cogent and more obligatory in morals and in honor than our duty to convey this property to you under your option. We have been indemnified against pecuniary loss. We will not give you a deed for a hospital."

It will be observed that the refusal is conditional—based on the use of the property—and therefore inconsistent with the theory of inability to make title.

10

It is true that good faith or bad faith in the inception of the contract will not under the rule laid down in *Gerbert v. Trustees* affect the measure of damages.

But *mala fides* can arise after the making of the contract, in a wilful breach thereof, and may operate to take the case entirely out of the reason for the rule which this court followed in that case and which allows only nominal damages.

20

Gerbert v. Trustees confessedly rests on the English case of *Bain v. Fothergill*, and doubtless intended to go no further than that authority. The language of the first paragraph of the syllabus of the *Gerbert* case as published in the Reports (30 Vr. 160) when separated from the context of the opinion seems to be a more general application of the doctrine of the case than this court intended.

As stated in the opinion in the *Gerbert* case, three questions were propounded to the judges in the House of Lords in *Bain v. Fothergill*, the second of which has no bearing on the present discussion and the third of which was peculiar to the facts of that particular case. The first question, on which hinges the general rule established by the case, was:

30

"First, whether upon a contract for the sale of real property, where the vendor, *without his default*, is unable to make a good title, the purchaser is by law entitled to recover damages for the loss of his bargain."

40

The answer was, he is not entitled.

The reporter's head note in *Flureau v. Thornhill* (2

Wm. Blackstone, 1078) is as follows:

"Contractor for a purchase of a real estate, to which the title proves (*without collusion*) defective, is entitled to no satisfaction for the loss of his bargain."

10 And DeGrey, *Ch. J.*, says:

"Upon a contract for a purchase, if the title proves bad, and the vendor is (*without fraud*) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost."

20 The reason of *Flureau v. Thornhill* has been variously explained by different judges and text writers, but is perhaps most satisfactorily interpreted by Lord Hatherly in *Bain v. Fothergill*.

30 "The reasons given for the judgment in *Flureau v. Thornhill* were certainly not altogether satisfactory, because the Lord Chief Justice is said upon that occasion to have stated simpliciter, without alleging any ground for the decision whatever, that upon a contract for a purchase, if the title proves bad and the vendor is (*without fraud*) incapable of making a good one, the purchaser is not entitled to any damages for the fancied goodness of the bargain, to which Mr. Justice Blackstone added, that 'These contracts are merely upon a condition frequently expressed, but always implied, that the vendor has a good title.'

40 This is scarcely a correct representation of the case, because if the vendor's contract with his vendee was on the condition that he had a good title, then in the event of the title failing, there would be no action for damages whatever, and

there would be no power in the vendee to do that which he is always entitled in equity to do, namely, to insist upon having the title good or bad, if he be so minded. If the title be defective and if it is so stated, the vendee is always allowed to have the benefit of the contract. Therefore the reason is not that the contract is made upon that condition, but the foundation of the rule has been already more clearly expressed by my noble and learned friend who has preceded me, in saying that having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estates, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether with all the complications of our law, a good title can be effectively made by his vendor, and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, *if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title.*" 10 20

The rule in *Flureau v. Thornhill* is admitted on all hands to be an exception to the general rule as to the measure of damages on breach of contract, and a very interesting discussion of the different views as to the reason for the exception will be found in *Sedgwick on Damages*, Vol. 1, 7th Ed. pages 419-427. 30

And Mr. Mayne, in his treatise on the Law of Damages, page 138, in discussing the case of *Flureau v. Thornhill*, thus refers to this subject:

"But the reason for the anomalous rule restricting the damages is that from the complicated nature of our law of real property no man can be certain that he has a perfect title to his estates, and therefore it is assumed to be part of every bargain for the sale of real property, that *if the vendor fails to make good title*, he shall not be 40

liable to reimburse the full measure of damages, which would be awarded in an ordinary case, but the bargain shall be off, and the purchaser take back his deposit with interest and the expenses, if any, of investigating the title."

10 "It (*Bain v. Fothergill*) establishes as law that wherever the vendor at the time of the performance has no title to the land *and on that ground refuses to perform*, he will be liable only for nominal damages."

Sedgwick on Damages, 7th Ed. Vol. 1, p. 418. Note.

"The rule in *Flureau v. Thornhill* only applies where the vendor fails to convey *because of inability to make title*. If he has a good title and *refuses to convey for any other reason*, he will be liable in substantial damages." *Sedgwick*, p. 428, Note.

20 "Of course the ordinary rule of common law applies where the *cause of failure arises from other source than want of title*. In such a case the plaintiff may recover for any special damage he has received, as for instance, loss in his trade by not getting settled in his house."

Mayne on Damages, 2nd Ed., p. 138.

30 It is contended that in the case now before this court the refusal to convey was not based on inability to make title, and that for that reason this case is not within *Flureau v. Thornhill* and *Bain v. Fothergill*, and is not governed by the decision of this court in *Gerbert v. Trustees*.

40 While the controversy among the English Judges was for a hundred years narrowing and modifying the doctrine of *Flureau v. Thornhill* finally to come back to a recognition of the case in its entirety, many cases held to be without the rule were, in the opinions read in *Bain v. Fothergill* criticised and overthrown. In addition to the very full discussions in the opinions,

the court is referred to the note in the 7th Ed. of *Sedgwick on Damages*, pages 408, *et seq.*

One case, however, *Engel v. Fitch*, L. R., 4 Q. B., 659, survived the discussion in *Bain v. Fothergill*, without being overruled. In this case the defendants who were mortgagees of the lease of a house, sold it by auction to the plaintiff, but the mortgagor who was in possession refused to give it up, and the defendants declined to fulfill the contract on account of the expense of obtaining possession; the plaintiff having in the meantime resold the premises to a third party at an advance, was allowed to recover damages for the loss of his bargain, it being held, that as the breach of contract arose *not from inability of the defendants to make good title*, but from their refusal to take the necessary steps to give the plaintiff possession pursuant to the contract, he could recover not only the deposit and the expense of investigating the title, *but also damages for loss of his bargain.*

Lord Hatherley, in *Bain v. Fothergill*, speaks of the case as follows:

"The vendor in that case was bound by his contract as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest and also by force of the interest of others whom he can compel to concur in the conveyance. In *Engel v. Fitch*, a man having sold his estate and having failed to do everything in his power to compel possession of the estate to be given up, and being in a condition in which if a bill had been filed in equity, he would have been compelled by the court to take proceedings in order to deliver up possession according to his contract with his vendee, he refused to take any such proceedings whatsoever, simply upon the ground of the expense which might entail upon him; there could be no doubt whatever in that case that he

was acting in gross violation of his contract which he had the power of performing. Whether or not the proper mode of correcting that abuse was by giving damages to the plaintiff in respect of the loss of his bargain, I will not stop to inquire. But it is quite clear that that case was exceedingly different from the case of *Flureau v. Thornhill*, where it turned out upon an investigation that the vendor had no legal title."

10

That the case is not regarded as overruled is shown by the fact that it was quoted on the argument, although not referred to in the opinion in *Rowe v. London School Board*, 36 Chy. Div., 619.

20

It is insisted that it appears from the evidence in the case now before the court that the defendants had the ability to perform their contract and *wilfully refused to do so*; that the only fair conclusion to be drawn from the statements of the defendant Honiss on the witness stand above alluded to is that his wife's signature was obtainable.

If this view be accepted the defendants could have made good title, and the refusal on other grounds takes the case out of the rule of *Gerbert v. Trustees*.

30

But in any event, if the default was due to a failure of title by reason of Mrs. Honiss' refusal to sign a deed, this fact should have been *affirmatively shown* by way of defence.

Attention is directed to the fact that it affirmatively appears in *Bain v. Fothergill*, that the defendants did all that was in their power to complete the contract, but failed to do so. As to this, *Pollock, B.*, says, 43 L. J. C. L., page 247:

40

"The defendants therefore acted with perfect *bonafides*, and the contract failed not because the defendants did not do what they could have done to make a good title, but because the defendant who personally negotiated the contract, over-

looked a fact which might, and in the event did prevent them from making a good title to the plaintiffs. Under the circumstances it seems to me that there existed in this case all the material facts which bring it within the decision in *Flureau v. Thornhill*, and none of those which have been held to create an exception to that rule."

Piggott, B., says, page 262:

"In the result, after every endeavor had been made to induce the lessors to give their consent to the assignment, their consent was finally refused, and the defendants were therefore unable to complete their contract with the plaintiffs. From these statements, I infer that the defendants acted *bona fide* in making the contract with the plaintiffs; that they had an equitable title to the mine at the time, and that they were prevented from carrying out the completion of the contract without any fraud or default (in the nature of misconduct) on their part, but in consequence solely of a defect in their title which they had not the power to cure."

Lord Chelmsford says, page 266:

"There is no reason to think that the respondents were not acting throughout under a *bona fide* belief that the lessors' consent might be obtained at any time upon application. They were prevented from performing their contract, not from any fraud or wilfull act on their part, but by an unexpected defect in their title which it was beyond their power to cure."

In *Drake v. Baker*, 5 Vr., 358, it appeared that the defendant's wife refused to sign the deed, thus preventing him from executing the contract. It was held in that case, as has been heretofore stated, that the defendant being aware at the time of entering into the contract that his ability to comply depended upon

the contingency of his wife's signature, the vendee was entitled to substantial damages to the extent of a full indemnity.

The case as an authority for this holding has been overruled by *Gerbert v. Trustees, supra*, but the case is now referred to to show that it affirmatively appeared that the cause for the non-performance of the contract was the refusal of the wife to sign the deed.

10 And in *Gerbert v. Trustees* the infirmity of title existed at the time the contract was made, and was the real reason for the inability to convey. There was in that case no wilfull refusal to convey because the vendor had changed his mind, or was influenced by circumstances arising after the contract was made.

It is suggested by the trial judge (case, page 119) that if Mr. Brown had offered to take the property subject to the right of dower, that would have altered the case, but that in tendering himself ready to take
20 the title, the court must assume that he meant the complete title in fee simple.

This suggestion recognizes the right of Mr. Brown to have taken the property in equity, subject to the encumbrance of the inchoate dower, but no opportunity was given Mr. Brown to make any proposition to that effect. He asked for a conveyance in accordance with the contract, and was told, not that the defendants were unable to make title by reason of Mrs. Honiss's refusal to sign a deed; not that they were ready to
30 convey subject to this inchoate dower if Mr. Brown so desired; but that they would not convey for an isolation hospital.

It appears from the evidence of Mr. Pennington, that they had arrived at this conclusion prior to the written notice of acceptance by Mr. Brown on October 17th, and that he, Pennington, had told Mr. Brown prior to that time that they refused to convey for the purpose of a hospital; that he had frequently expressed to Mr. Brown the reason why they refrained from
40 making a conveyance.

This refusal on the part of the defendants to perform the contract, would have excused Brown from giving written notice of his own desire to perform, and from the tender of the purchase price. Immediately upon receiving notice of the refusal of the vendors to carry out the contract on the ground that they would not convey for an isolation hospital, he could have brought suit on the contract for damages.

The position taken by the vendees amounted to a repudiation or renunciation of the contract on their part, and a breach ensued on which an action could have been immediately brought. 10

Clerk on Contracts (Hornbook Series) pages 644 to 652.

Addison on Contracts, (3d Am. Ed.) Sec. 360.

A vendee may, before demanding a deed, sustain an action for failure to convey, if the vendor shows that he does not intend to convey.

1 *Sugden on Vendors*, (8th Am. Ed.) p. 368, sec. 55, note (c) and cases cited. 20

Huffman v. Hummer, 3 C. E. G., 83, 91.

A vendor incapacitating himself to perform by conveying the land to another before time of performance fixed in his original contract of sale, or holding the land for a rise, or changing his mind, can be held in substantial damages. Such a breach is due to the act of the vendor and not to a defect in the title, is wilful, and is not within *Flureau v. Thornhill*. 30

Engel v. Fitch, *supra*.

In *Allen v. Atkinson*, 21 Mich., 351, Chief Justice Cooley, in a case where the defendant had resold the land and so was unable to convey to the plaintiff in accordance with his contract said:

"As Allen refused to perform when it was in his power to do so, and without legal excuse, there can be no question on the authorities, that the rule of damages adopted in the court below was 40

the correct one. *If the vendor wilfully refuses to perform his contract, he must place his vendee as near as money can do so, in the same position in which he would have been if he had obtained that for which he contracted.*"

In *Baldwin v. Munn*, 2 Wend., 399-404, Sutherland, J., after approving *Flureau v. Thornhill* said:

10 "If the vendor act in bad faith and *refuses to convey because the property has increased in value, and with a view of putting the enhanced value in his own pocket*, it becomes a case of fraud and the plaintiff would clearly be entitled to compel a specific performance in equity, or to recover by way of damages the difference between the contract price and the enhanced value when the conveyance should have been made."

20 In *Margraf v. Muir*, 57 N. Y., 155, the court (Earl c.) said:

"The general rule in this State in the case of executory contracts for the sale of land, is that in case of a breach by the vendor, the vendee can recover only nominal damages, unless he has paid part of the purchase money in which case he can also recover such purchase money and interest. * * *

30 But to this rule there are some exceptions based upon the ordinary conduct of the vendor, as if he is guilty of fraud, or can convey, *but will not, either from perverseness or to secure a better bargain*, or if he has covenanted to convey when he had no authority to contract to convey, or where it is in his power to remedy a defect in his title and he refuses or neglects to do so, or when he refuses to incur such reasonable expenses as would enable him to fulfill his contract, in all such cases the vendor is liable to the vendee for the loss of his bargain under rules analogous to those applied in the sale of personal property."

40

And in *Drake v. Baker*, 5 Vr., 358, referred to above, the late Chief Justice Beasley, page 362, speaks as follows:

"That a vendor, who having it in his power wilfully refuses to complete his contract can claim no exemption from the general rule has been established by several cases, and has never so far as is known, been pretended. *Engel v. Fitch*, L. R. 3 Q. B., 15, belongs to the class exemplifying this proposition. *Hopkins v. Lee*, 6 Wheaton, 109, has been frequently referred to as standing in opposition to the case of *Flureau v. Thornhill*, but I think there is no ground for this assumption, as it was a case of unwarrantable refusal of a vendor to complete his contract, and consequently the rule of damages applicable in cases of sale of personal property was in all respects opposite, and it is not to be supposed that the court could have intended to overrule a case of so much prominence as the one just mentioned, without even referring to it or suggesting a reason for its rejection. *Driggs v. Dwight*, 17 Wend. 71, belongs to this same line of authorities, the defendant having perversely refused to perform his contract when there was no obstacle in the way."

The fact that the Supreme Court, in *Drake v. Baker*, recognized the exception to *Flureau v. Thornhill* established by the English case of *Hopkins v. Grazebrook*, 6 B. & C., 31, since overruled by *Bain v. Fothergill*, in no way weakens the words of the Chief Justice as to willful refusal on the part of the vendor to complete his contract.

The text book and case authorities without exception, hold that where the failure to comply arises out of any other cause than inability to make title, substantial damages may be recovered for breach of the contract to convey.

That the refusal to convey in the case now before the court was willful and not based by the defendants on the existence of the inchoate dower right of Mrs. Honiss must be conceded.

Can the mere existence of this inchoate dower right lessen the consequences of the willful act of the defendants in refusing to convey, and relieve them from the usual consequences of such a willful disregard of their contract?

10

To emphasize the willful character of the refusal to convey in this case, it should not be overlooked that the defendants were indemnified against pecuniary loss by reason of such refusal. This practically puts the case on all fours with those cases where the vendor incapacitates himself to comply with his contract by conveying to a third party.

20

If not tantamount to a conveyance to a third party, a refusal to convey as a result of a contract of indemnification against pecuniary loss by the refusal, must bring the case within the usual rule that one who voluntarily after making a contract puts himself in a position where he is unable to fulfill it must answer in substantial damages to the other contracting party.

Synge v. Synge, 1 Q. B., 466.

30

Under the circumstances of this case, if Honiss had never been married, or had been a widower, there could have been no question about the right of the plaintiff to recover damages for the loss of his bargain. *The trial court so held.*

Nor can there be any doubt that if it had appeared in the case that Mrs. Honiss refused to join in the deed, and that the defendants were for that reason unable to make title, the rule in *Flureau v. Thornhill* and *Gerbert v. Trustees*, would have applied.

40

Having shown no request to Mrs. Honiss to join in the deed, and no refusal on her part to so join, the defendants have not demonstrated *any inability to make title*. It seems entirely contrary to usual rules to assume that the knowledge of Mrs. Honiss's attitude

toward the fulfillment of this contract should be in the plaintiff rather than in the defendants. To assume as the trial court did, that Mr. Honiss would have been unable to secure his wife's release, and that it was therefore beyond his power to make that conveyance, is to cast on the plaintiff the necessity for knowledge of the intentions of Mrs. Honiss, and to relieve the defendants from establishing the existence of that situation which brings them within the rule in *Flureau v. Thornhill* and excuses them from other than nominal damages. 10

To make the rule of Flureau v. Thornhill applicable, the failure to convey must be based on inability to make title. The inability to make title is not shown in this case, but is assumed from the mere existence of Mrs. Honiss.

To hold as the trial court did that there was no obligation upon Mr. Honiss to make any effort to secure his wife's signature to the deed, is to relieve the defendants from that effort to secure the performance of the contract which is incumbent on every contractor, and is inherent in the very idea of a contract. 20

As tersely expressed by Lord Hatherley, in *Bain v. Fothergill*, every vendor is bound by his contract to do all that he can to complete the conveyance.

A ruling that Mr. Honiss need make no effort to secure his wife's signature, while quite in harmony with the assumption above referred to, that Mr. Honiss would have been unable to secure his wife's release, and that it was therefore beyond his power to make the conveyance, is, it is insisted, entirely unmindful of the obligation of the vendor to make every effort to complete his contract. He is relieved from completing his contract, or at least liable only in nominal damages, if *having made every effort* he is unable to make title. 30

The Trial Court excused the defendants in this case from establishing a defence and relieved them of a burden which the law had imposed. 40

It is a matter of common knowledge that a wife ordinarily joins with her husband in a conveyance of her husband's realty. If a bill for specific performance had been filed to enforce a conveyance under this contract, and it had appeared, as it does appear in this case, that the refusal of the vendors to convey had been based on reasons in no way connected with the refusal of the wife to join in the conveyance, that such refusal of the wife had never been mentioned between
 10 the parties, and was first set up at the trial, the inference would be very strong that the refusal of the wife, then first alleged, was owing to the contrivance of the husband, and a case of bad faith would have been made out within *Young v. Paul*, 2 Stock., 401.

But it is to be noted in this case that even at the trial it was not pretended that the existence of this dower right was the reason of the refusal to convey; then as always before, the breach of the contract was
 20 openly acknowledged to be due to the knowledge the defendants had acquired as to the intended use of the property by the plaintiff.

Nor does the suggestion that if Mr. Brown had offered to take the property subject to the right of dower, the case might have been altered, seem to be within just lines under the circumstances of this case. This suggestion requires Mr. Brown to assume in advance that Mrs. Honiss would not join in the deed, an assumption contrary to ordinary experience and anticipating the necessity for a breach of the contract by the
 30 vendor. It was natural that Brown should assume that Honiss, before he signed the contract, had secured the assent of his wife, but apart from these considerations, Brown was given no opportunity to take the property subject to right of dower. He was never told before or subsequent to the signing of the contract of any difficulty about inchoate dower, or other objection to the title; he was flatly refused performance because the defendants had learned that the property
 40 was to be used for an isolation hospital. He was in

fact informed that the defendants had changed their minds, and that they would not perform. The defendants said to him that they had been indemnified against pecuniary loss, and would not convey; that they considered their duty to Mr. Tiffany as more cogent and obligatory in morals and in honor, than the contract obligation they had assumed.

The defendants having wilfully refused to convey for a reason not in any way connected with the title, or existing at the time the contract was made, should not be permitted to hide behind an assumed technical difficulty, first heard of at the trial, and which even at the trial they do not allege to be the reason for their breach of contract and do not claim to have made any effort to overcome. 10

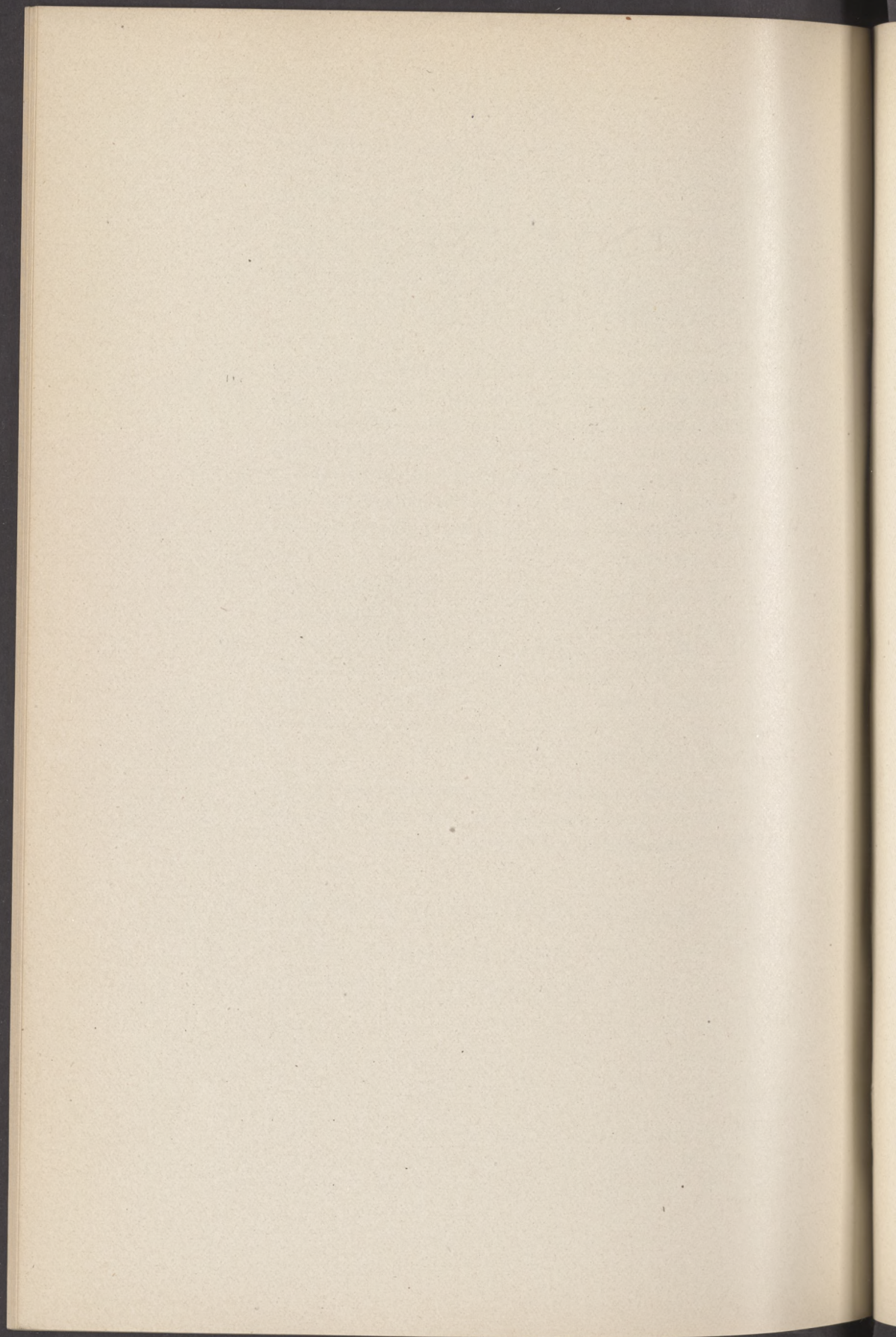
They have not brought themselves within the reason of the rule in Flureau v. Thornhill, as established by Bain v. Fothergill and followed in Gerbert v. Trustees. They have not shown the existence of conditions which in these cases were held to call for an application of the rule. They have established no inability to convey by reason of a defect of title. 20

The declaration is based on a willful refusal to convey. The evidence sustains the declaration and the plaintiff is entitled to substantial damages.

The judgment of the Essex Circuit should be reversed. 30

JOHN R. HARDIN.

Of Counsel for Plaintiff in Error.



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New Jersey Court of Errors and Appeals.

WILLIAM H. BROWN, <i>Plaintiff, Plaintiff in Error,</i> <i>vs.</i> JOHN HONISS, <i>et al.</i> , <i>Defendants, Defendants in Error.</i>	}	On Error to Essex Cir- cuit Court.
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WRIT OF ERROR.

NEW JERSEY, ss.

20

The State of New Jersey to our Circuit Court, at Newark, in and for the County of
(SEAL.) Essex, or such Justice of the Supreme Court of the State of New Jersey as shall hold such Circuit Court, GREETING:

For as much as in the record and proceedings and also in the giving of judgment in a certain plaint which was in our Circuit Court holden at Newark, in and for the said County of Essex, between William H. Brown, plaintiff, and John Honiss and Anna P. Ranney, defendants, in an action upon contract, manifest error hath intervened to the great damage of the said plaintiff, as it is said; we being willing that speedy justice should be done to the parties aforesaid in this behalf, do command you distinctly and openly, to send under your seal, the record and proceedings aforesaid, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the twenty-fifth day of April next, together with this writ, that the record and proceedings aforesaid

30

40

Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the sixth day of April, one thousand nine hundred and three.

10 PITNEY & HARDIN,
Attorneys.

Let proper return be made to the within writ.

FREDERIC ADAMS,
Circuit Court Judge.

STATE OF NEW JERSEY,
COUNTY OF ESSEX.

20 I, Arthur Horton, Clerk of the Circuit Court in and for the County of Essex, New Jersey, do hereby certify and return to the Court of Errors and Appeals in the last resort in all causes the record and proceedings, together with all things touching and concerning the same, as by the within writ to me directed, I am commanded.

Witness my hand and seal the thirteenth day of April,
A. D. 1903.

30 (SEAL.) ARTHUR HORTON,
Clerk.

ESSEX COUNTY, ss.

The State of New Jersey to the Sheriff
(SEAL.) of the County of Essex aforesaid, GREET-
ING:

40 You are hereby commanded to summon John Honiss and Anna P. Ranney, if in your county they may be found, so that they be and appear before our Circuit

Court to be holden at Newark, in and for the said County of Essex, on the tenth day of March next, to answer unto William H. Brown, in an action on contract wherein the plaintiff claims damages of ten thousand dollars, as is said; and have you then and there this writ.

Witness, William S. Gummere, Esquire, a Judge of our said Circuit Court at Newark aforesaid, the twenty-eighth day of February, in the year one thousand nine hundred and two.

WILLIAM O. KUEBLER,

10

JOHN R. HARDIN,

Clerk.

Attorney.

Pleas before the Judge of the Circuit Court holden at Newark, in and for the County of Essex, of the tenth day of March, A. D. 1902.

ARTHUR HORTON,

Clerk.

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ESSEX COUNTY, ss.

John Honiss and Anna P. Ranney, the defendants in this suit, were summoned to answer William H. Brown, the plaintiff therein, in an action upon contract, and thereupon the plaintiff by John R. Hardin, his attorney, complains, for that whereas the said defendants heretofore, to wit, on the ninth day of July, nineteen hundred and one, at Newark, in said county, did by agreement in writing signed by the said defendants represent themselves to be the owners of the premises therein described, and did thereby for the valuable consideration therein expressed, to wit, the sum of twenty-five dollars, by the said plaintiff to the said defendants paid, give and grant to the said plaintiff an option to purchase at any time on or before the first day of November then next, all that certain tract of land in the said City of Newark, in said agreement described bounded by Mount Prospect avenue, Sylvan avenue, Summer avenue and Second river, for the sum of twelve thousand dollars, and did thereby further agree upon the payment of said sum of twelve

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thousand dollars by said plaintiff to the said defendants on or before the said first day of November, then next, to execute and deliver all necessary deed or deeds of conveyance of said premises to the said plaintiff, or such party or parties as he should name, and the said plaintiff in fact says that thereafter, to wit, on the seventeenth day of October, nineteen hundred and one, he, the said plaintiff, tendered and offered to the said defendant the said sum of twelve thousand dollars, and then and there requested the said defendants to make a deed of conveyance to him, the said plaintiff, of the premises aforesaid mentioned, and described in the said agreement, in compliance with the terms thereof, yet the said defendants not regarding the said agreement and their said promise and undertaking, but contriving and fraudulently intending to injure and defraud the said plaintiff in this behalf, did not, nor would when so requested as aforesaid, or at any time before or since, make or procure to be made, to the said plaintiff a deed of conveyance of the premises aforesaid, but then and there, to wit, at Newark aforesaid, declared to the said plaintiff that they did not intend so to do, and wilfully neglected and refused so to do, contrary to the said agreement and the promise and undertaking of the said defendants, by reason whereof, he, the said plaintiff, has been deprived of all the benefits and advantages which would have arisen from the making of the said conveyance, and has expended large sums of money, to wit, the sum of five hundred dollars, in endeavoring to procure the said conveyance and the completion of the said agreement, and has been and is by means of the premises otherwise greatly injured and damnified, to wit, at Newark aforesaid, to the damage of the said plaintiff, ten thousand dollars.

And whereas, also, the said defendants afterwards, to wit, on the first day of February, nineteen hundred and two, at Newark aforesaid, were indebted to the plaintiff in ten thousand dollars, for goods sold and delivered by the plaintiff to the defendants at their request, and in the like sum for work done and materials furnished by the plaintiff for the defendants at their

request, and in the like sum for money lent by the plaintiff to the defendants at their request; and in the like sum for money paid the plaintiff for the use of the defendants at their request; and in the like sum for money received by the defendants for the use of the plaintiff, and in the like sum for interest for the forbearance by the plaintiff at the defendants' request of money due and owing from the defendants to the plaintiff; and in the like sum for money due from the defendants to the plaintiff on an account stated between them, and being so indebted the defendants in consideration thereof then and there promised the plaintiff to pay him the said several sums of money on request. Yet the defendants disregarded said several promises, and have not paid the said several sums of money, or any of them, or any part thereof, although often requested so to do by the plaintiff, but to do so have hitherto wholly refused and still do refuse to the damage of the plaintiff ten thousand dollars, and therefore the said plaintiff brings his suit, &c.

JOHN R. HARDIN,
Plaintiff's Attorney.

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And the said defendant, John Honiss, impleaded with one Anna P. Ranney, comes and defends the wrong and injury, when, &c., and says that he did undertake or promise in manner and form as in the said declaration alleged, and of this he puts himself upon the country.

And for a further plea in this behalf, the said defendant, John Honiss, impleaded, &c., by leave of the court for this purpose first had and obtained, according to the form of the statute in such case made and provided, as to the allegations in the first count of the said declaration says, that the plaintiff ought not to have or maintain the said action against him because he says that heretofore, to wit, on the ninth day of July, nineteen hundred and one, at Newark, in said county, the plaintiff in the negotiations which preceded the making by this defendant of the said option or agreement described in the said declaration,

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stated and represented to this defendant that in case of a sale of the said property in accordance with the terms of the said option or agreement, the said property would be used by the purchaser thereof for the purpose of erecting, constructing, and maintaining a factory thereon, and that this defendant believed the said statement and relied thereon, and relying thereon executed the said option or agreement in the belief of the truth thereof, but this defendant avers that in truth and in fact the plaintiff did
 10 not intend to purchase the said property for factory purposes, as aforesaid, nor did he intend to devote the same thereto, but that on the contrary thereof he intended to purchase the same for the purpose of an isolation hospital or pesthouse, for the Mayor and Common Council of the City of Newark, and this defendant avers that the said option or agreement was procured from him by the plaintiff by misrepresentation and fraud, and that the same is for that reason null and void, and this the defendant is ready to verify, wherefore he prays judgment whether
 20 the plaintiff ought to have or maintain the said action against him.

And this defendant for a further plea in this behalf, by like leave, as to the allegation in the said first count of the said declaration, says that the plaintiff ought not to have or maintain the said action against him, because he says that the plaintiff never offered to him the said sum of twelve thousand dollars or requested him to make a deed of conveyance to the plaintiff, and that the said option or agreement for this reason is null and void, and
 30 this the said defendant prays may be inquired of by the country, &c.

COULT & HOWELL,
Defendants' Attorneys.

And the said plaintiff as to the plea of the said defendant, John Honiss, by him first above pleaded and whereof he hath put himself upon the country, doth the like.

And the said plaintiff as to the said plea of the said
 40 defendant, John Honiss, by him secondly above pleaded,

saith, that the said plaintiff by reason of anything by the said defendant in that plea alleged, ought not to be barred from having or maintaining his aforesaid action thereof against the said defendant, because he saith that the said option or agreement in the said declaration mentioned, was obtained fairly and honestly by the said plaintiff and not by misrepresentation and fraud in manner and form as the said defendant hath in his said bill by him secondly above pleaded alleged, and this the said plaintiff prays may be inquired of by the country, &c.

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And the said plaintiff as to the said plea of the said defendant, John Honiss, by him thirdly above pleaded, and whereof he hath put himself upon the country, doth the like.

PITNEY & HARDIN,

Plaintiff's Attorneys.

Therefore let a jury thereupon come before the judge aforesaid, at Newark aforesaid, the second Tuesday of December next, who neither, &c., to recognize, &c., because, &c., and the same day is given to the parties here, &c.

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At which time before the judge aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the Sheriff hath not sent here the writ to him in this behalf directed nor hath he done anything thereupon.

And now on this day, that is to say, the ninth day of January, A. D. nineteen hundred and three, until which day the issue as aforesaid joined had been continued before the judge aforesaid, at Newark aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury of whom mention is before made, being summoned, also come who to speak the truth of the matter within contained being chosen, tried and sworn. upon their oath, say they find for the plaintiff and assess his damages against the defendant at the sum of twenty-seven dollars and twenty-five cents. And so they say all.

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Whereupon it is considered that the plaintiff do recover against the said defendant his damages in form

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aforesaid found, and also the sum of fifty-nine dollars and sixty-one cents as for his costs about his suit in this behalf expended by the court now here adjudged to him of increase with his assent, which damages, costs and charges in the whole amount to eighty-six dollars and eighty-six cents.

And the said defendant in mercy, &c.

Judgment signed July 9, 1903.

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WILLIAM S. GUMMERE,
Judge.

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Essex County Circuit Court.

Thursday, January 8, 1903.

WILLIAM H. BROWN,

vs.

JOHN HONISS, *et al.*,

} *On Contract.*

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BILL OF EXCEPTIONS.

Before Hon. FRANCIS J. SWAYZE, *J.*, and a jury.

For plaintiff appear Pitney & Hardin.

For defendants appear Coult, Howell & Ten Eyck.

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Mr. Hardin opens for plaintiff.

WILLIAM H. BROWN, plaintiff, sworn in his own behalf.

Direct examination by Mr. Hardin.

Q Mr. Brown, you are the plaintiff in this case?

A Yes, sir.

Q Where do you reside?

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A 78 Fourth avenue.

Q How old are you?

A Fifty-eight.

Q What is your business?

A Real estate.

Q Were you engaged in the real estate business in July, 1901?

A Yes, sir.

Q Do you know Mr. Honiss?

A I do; yes, sir.

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Q Did you have any dealings with him in the summer of 1901?

A I did; yes sir.

Q With reference to what?

A The purchase of property bounded by Sylvan avenue, Second river, Summer and Mt. Prospect avenues.

Q I show the witness a map (handed to witness). Is that a map of the property to which you have referred?

A That is the map that Mr. Honiss gave me.

10 Q You have seen that map before?

A Yes, sir.

Q When did you get it?

A At the time I received the option.

Q And from whom?

A From Mr. John Honiss.

Mr. Hardin. I offer the map in evidence.

(The map referred to is shown to the jury).

Marked Ex. P. 1.

20 Q I show the witness a typewritten paper, and ask him to tell me what that is?

A That is the option prepared by Mr. Pennington, the counsel for Mr. Honiss.

Q (*By Mr. Coult.*) What is that?

A That is the option that was prepared by Mr. Pennington, the counsel for Mr. Honiss.

Q Prepared?

A Yes, drawn by Mr. Pennington.

30 Q (*By Mr. Hardin.*) By whom is that signed?

A By John Honiss and Anna P. Ranney, per S. H. Pennington, who has her power-of-attorney.

Q In whose presence was it signed?

A In my presence.

Mr. Coult. One moment. He says he was her attorney.

Witness. It is signed there "attorney;" it says so here.

40 *The Court.* There will have to be further proof of that.

Q You saw both Mr. Honiss and Mr. Pennington sign that paper?

A Yes, sir.

(The witness is directed to stand aside for the present).

SAMUEL H. PENNINGTON, JR., sworn in behalf of plaintiff.

Direct examination by Mr. Hardin.

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Q Mr. Pennington, I show you the paper referred to by Mr. Brown as the option, dated July 9, 1901, and I direct your attention to the signature "Anna P. Ranney, per S. H. Pennington, Jr., attorney." Mr. Pennington, is that in your handwriting?

A That signature of Anna P. Ranney by myself as attorney is in my handwriting.

Q And that option was prepared by you?

A It was prepared in my office.

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Q Under your direction?

A Under my direction, with such suggestions as Mr. Brown had to make.

Q I notice that you signed "Anna P. Ranney per S. H. Pennington, Jr., attorney." What was your authority to so sign?

Mr. Coult. One moment. I do not understand that the agent can prove his own authority.

The Court. I do not know why not. You cannot introduce the statements of an agent to prove his authority, but it seems to me the calling of the agent ought to be the best way to prove the authority unless it is in writing.

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Mr. Coult. It cannot be by parol, as I understand it, for this purpose.

The Court. That may be a question to be raised hereafter; I will have to consider it. I will permit the question.

Exception by defendant's counsel.

(Question read).

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A I had authority to sign an option to sell the property for the price mentioned in that option.

Q For whom?

A From Mrs. Ranney.

Q Written or oral?

A I am not quite certain whether it was oral or written, but from the time that the paper is dated, I presume that it must have been by letter.

10 Q Have you that letter with you?

A I have not.

Q Will you look for it?

A I don't think that I have any such written letter; I don't usually preserve letters of that kind.

Q Give us your best recollection as to whether you had such a letter or not?

A Well, I have no distinct recollection of such a letter. It may have been given me verbally before Mrs. Ranney went away.

20 Q Where was Mrs. Ranney at the time that paper was signed?

A She was up in Northern New York State; but the authority was given some time previous, and whether it was before she left New York City, where she resided, or whether it was by letter, if she had left—

Q Where does Mrs. Ranney now reside?

A She resides in New York City.

Q (Paper shown to witness). I show the witness a typewritten paper and ask him to look at that and say whether he knows what it is?

30 A I do.

Q What is that?

A That was prepared in my office and I signed it, this paper, in the same way I signed the other.

Q Do you know Mr. Honiss's signature?

A Yes. Mr. Honiss was present when I signed.

Q And you signed at the same time?

A Yes, sir.

Q And that is his signature?

A His signature and my signature.

40 Q And that was an extension of the original option?

A That was an extension of the original option. I had no special authority to extend the option, but I presumed that, having a right to give the option, I could extend it.

Mr. Coult. I suppose that if the point we desire to reserve is not sufficiently clear on the record, we may make it so. What we object to is the proof of the agency for the purpose given.

The Court. Yes. I permit this proof.

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Exception by defendants' counsel.

Q Do you recall whether any request was made of you for a deed under that option—the original option?

A Yes.

Q By whom?

A Mr. Brown came to my office after it had become known that this property was intended to be bought for the purpose of an isolation hospital, and after some conversation, general conversation, about the subject, and some expression of regret that the property should be sold for that purpose and a general conversation—I can't give you the particulars of the conversation, but on that occasion, just before Mr. Brown left and after I had explained to him the reasons why the parties hesitated or were unwilling to give a deed under the circumstances, Mr. Brown just before leaving said to me, "I demand a deed." My reply to him was this: "Mr. Brown, if you regard this sale as a sale contemplated by the option, then I tender you back the \$25;" and Mr. Brown said, "I will not receive it." He then left.

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Q Did he see you again about the matter?

A He saw me several times about the matter, and the conversation was repeated—the substance of the conversation was repeated. There was a good deal of talk between us; I can't remember, among the various interviews that we had, just what was said on each particular occasion.

Q Do you recall a visit by Mr. Brown to your office on the 17th day of October, 1901, in company with myself and another gentleman?

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A I couldn't verify the date, but I remember such a call upon me at my office.

Q Do you recall that a paper was served upon you at that time?

A A paper was served on me at the time that you and Mr. Brown called on me at my office.

Q Have you that paper with you?

A I have not.

10 *Mr. Hardin.* That is a copy of it, Mr. Coult (handing paper to defendants' counsel).

Witness. I haven't been requested to bring such a paper. If I may be permitted to make one remark further about the conversation that occurred between Mr. Brown and myself—

Q (Paper handed to witness.)

A I remember that paper. That was served upon me by Mr. Hardin in the presence of Mr. Brown.

20 *Mr. Hardin.* It may be a little out of order, perhaps, but in order to make Mr. Pennington's evidence clear, I will read this paper. (Counsel reads the paper referred to, dated October 17, 1901, and signed "William H. Brown.")

Q Do you recall whether the sum of \$12,500 was tendered to you at that time in cash?

A The amount that you specify was counted out and was tendered to me in cash. May I finish the remark that
30 I was about to make when I was interrupted? I wanted to give the substance of a conversation I was asked about and which for the moment had escaped my memory.

The Court. I think, perhaps, I will let both counsel finish their examinations, and if Mr. Pennington thinks there is some explanation due to either side, we will see about it.

Q Was the request for a deed in this paper, so far as you know, ever complied with?

40 A I do not know of any deed having been given.

Q You never prepared one or had to do with the delivery of one?

A I never prepared one, and I had no authority, no power-of-attorney, to sign one. That was the remark I made to Mr. Brown which I was going to speak of a moment ago.

Cross examination by Mr. Coult.

Q Mr. Pennington, I understand you to say that, so far as you recollect and know, you had no written authority from Mrs. Ranney either to make the sale or to make an option for sale? 10

A I had no written authority to execute any deed.

Q Or contract of sale?

A I presume I had authority to make a contract of sale for the price mentioned, but it was indefinite in its terms excepting as to price.

Q Had you any written authority to make a sale for Mrs. Ramsey that you know of—any written authority? 20

A I can only state that unless the authority was given to me by a letter, I had no written authority. Whether I received a letter or whether such authority as I had was given verbally, I cannot say at this present time from recollection.

Q Was any deed or conveyance tendered to you at any time by Mr. Brown, or by any person representing him—any deed, any prepared conveyance, tendered to you for execution by Mr. Brown or by any person? 30

A None whatever.

Q Did you ever see any?

A I never saw any; I never prepared one and none was ever prepared, to my knowledge, and certainly none was ever presented to me for signatures to be obtained from either of those parties.

Q Had you any authority to execute any deed?

A I had not, and I told Mr. Brown so once, if not more than once.

Re-direct examination by Mr. Hardin.

Q Do you recall whether anything was said about a deed the day Mr. Brown and I were in your office together?

A Yes. I am not sure whether Mr. Hardin first spoke about it or whether I suggested that no deed had ever been tendered for execution, but Mr. Hardin's attention was called to that fact at that time.

10 Q Do you recall saying, in reply to that—

Mr. Coult. Well —

Mr. Hardin. I am going to ask a leading question, if that is what you are going to object to.

The Court. I will allow that. This seems to be the attorney in fact of one of the defendants.

Q Do you recall having said at that time that no question would be made about this tender on that account?

20 A I do not recollect that; I recollect saying that there was no question about a tender being made, a tender of the money, but nothing with regard to the requisite of the tender of a deed.

Q Do you recall whether anything was said at that time about the willingness of the parties to this option to deliver a deed?

Mr. Hardin. I shall connect Mr. Honiss with Mr. Pennington by other evidence.

The Court. I will permit that.

30 (Question read.)

A I said to Mr. Hardin and, of course, to Mr. Brown, who was present, that Mr. Honiss refused to convey the property.

Re-cross examination by Mr. Coult.

Q Did you say anything about Mrs. Ranney?

40 A I did not. Mrs. Ranney was absent during the whole of these conversations and negotiations, and I did not give any definite answer with regard to her.

WILLIAM H. BROWN, plaintiff, resumes the stand in his own behalf.

Direct examination by Mr. Hardin.

Mr. Hardin. Now, may it please the court, I will offer in evidence the option.

(Marked Ex. P. 2.)

Mr. Hardin. I offer the extension.

(Marked Ex. P. 3.)

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Mr. Coult. Of course, in admitting these papers in evidence, we don't admit the legal effect of them.

The Court. No. I conceive there may be a serious question raised there.

Plaintiff's counsel reads the paper referred to as the option, dated Newark, N. J., July 9, 1901, signed "John Honiss; Anna P. Ranney, per S. H. Pennington, Jr., attorney."

Also, the paper referred to as the extension, dated Newark, N. J., September 4, 1901, signed "John Honiss; Anna P. Ranney, per S. H. Pennington, Jr., attorney."

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Q Where was that paper signed, Mr. Brown—the original option?

A At Mr. Pennington's office.

Q Was Mr. Honiss there at the time?

A Yes, sir.

Q Did you pay the \$25 at that time?

A I did; yes, sir.

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Q To whom did you give it?

A To Mr. Pennington or to Mr. Honiss; I forget which; Mr. Pennington, I think.

Q They were both there?

A They were both there. I think I handed it to Mr. Pennington.

Q After you got this option did you make any effort to dispose of the property?

A Well, not before the 1st of September.

Q (By Mr. Coult.) What is that?

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A Not before the 1st of September. I made no effort, because I was looking, as I told Mr. Honiss, I was looking for—

Q I can't hear you.

A When I obtained this option I was looking at several sites of ground for a purpose, and I came across this. This was in June, way last June, or the June before.

Mr. Coult. What was that question?

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Mr. Hardin. I asked him if he made some efforts; I asked him a general question, if he made some efforts to dispose of the property.

Witness. I already had a possible purchaser in view for this property.

Mr. Coult. Had not the witness better confine himself to answering the questions directly? Because I cannot tell what to object to.

The Court. Yes. The only question is whether you made any efforts to sell before the 1st of September.

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Witness. I did not, because I had a prospective purchaser in view.

Q (*By Mr. Hardin.*) I can't hear you.

A I did not make any attempt to sell the property before the 1st of September, because I had a prospective purchaser in view for that and other property adjoining.

Q Well, did you make any efforts after the 1st of September to sell it?

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A Yes, sir. I would like to explain that in narrative form, to tell the story. It is perfectly simple, and entirely honest on my part, and it would save time and everything else.

The Court. No, Mr. Coult's rights must be protected. You may proceed in the regular way. Just answer the questions.

Q What did you do about the sale of this property after the 1st of September?

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A Well, about the second week in August, the first or second week in August, Dr. Herold came to me and asked me if I had an option—

Q Who is Dr. Herold?

A He is president of the Board of Health. He asked me if I had an option upon that property, and I told him yes, and he asked me if I would give him the option, or, rather, let him have it. I said, "Doctor, I can't do that"—

Objected to as conversation with a third person.

Objection sustained.

Witness. I only want to put the thing right; that it all. 10

The Court. The mere fact that he had a conversation with Dr. Herold is not objectionable; what was said at that conversation is not proper.

Mr. Coult. I move to strike out the conversation with Dr. Herold.

The Court. I will strike out anything said at that conversation so far as the witness has stated it.

Q Did you arrange to sell to Dr. Herold at that time? 20

A After the 1st of September; yes, sir.

Q Did you at that time in August that you refer to?

A In August I told him— No, I can't answer that question without explaining that I had agreed to give him the option if my prospective purchaser didn't want it.

Q Well, did you see the doctor again after the 1st of September?

A Yes, sir.

Q Did you make any arrangement with him about the purchase of the property? 30

A I did; he spoke to me about—

Objected to.

The Court. (After discussion.) You wish to show as the measure of damages the fact that you had an opportunity to sell?

Mr. Hardin. The fact that we had an opportunity to sell and could not sell is unquestionably competent, whether the measure of damages be the difference in profits or the market value. 40

Witness. I had sold it; it was bought by the City of Newark.

The Court. My impression is that you could not recover the profits on a re-sale. Do you seek to recover the profits on a re-sale?

Mr. Hardin. Yes, sir; I propose to argue that to the Court. I think the fact that we have lost the sale by a failure to deliver the deed is competent.

10 *The Court.* My impression is against you, but, still, I will allow this evidence, and I will reserve the question until later, Mr. Coult.

20 *Mr. Coult.* (After further discussion.) We understand the rule in regard to cases of this kind to be the rule laid down in the case of *Bain v. Fothergill*. This is an action on the contract. If they wanted to recover for deceit, they would have brought a different kind of action, or if they wanted specific performance, they would have brought a different action; but they have brought an action on the contract, and the rule is perfectly well settled, and is settled in the Gerbert case, as the rule was laid down in the House of Lords in the case of *Bain v. Fothergill*, and, as I understand that rule, it is, whether we had title or our title was defective, they could recover only the expenses incurred in the making of the contract, the earnest money paid and any expenses incurred by them in the attempt to carry out the contract.

30 *The Court.* Did not that case leave the door open as to a fraudulent refusal to convey?

Mr. Coult. But in that case the action would be for deceit.

The Court. Well, I will not limit the testimony. I will let in the testimony subject to your objection, and I will consider the matter further.

Defendants' counsel pray an exception.

(Question and answer read.)

Q Do not tell us what Dr. Herold said to you, but
40 just the fact whether you made any arrangement about the transfer of the property to him?

A Well, I agreed to sell him the property. That was in September.

Q Was the price agreed upon at that time?

A Yes, sir.

Q What was it?

Q (*By Mr. Coult, interrupting*). Was this verbal?

A Well, there was no price; I told him the price, \$17,500.

The Court. You may cross examine on that. That may be of very great importance. 10

Witness. I told him the price would be \$17,500, and he asked me to give him the option at that price, and I told him—this was after the 1st of September—and I gave it to him.

Q (*By Mr. Hardin.*) When did you next see Dr. Herold about the property?

A Well, it was in October; I think it was the first Friday in the month. 20

Q And where was it?

A My recollection is that it was the first Friday, because that was the meeting night of the Common Council. I was on the Grand Jury, and the Doctor came up and called me out.

Q You were a member of the Grand Jury at that time?

A Yes, sir. It was on a Friday afternoon, and he asked me whether I wouldn't take—

Objected to. 30

Witness. How can I explain myself, your honor? He came there to get a lower price.

The Court. You offer it now for the purpose of showing a contract to purchase?

Mr. Hardin. Yes, sir.

The Court. A verbal contract?

Mr. Hardin. No, I don't do that; I will prove the contract by the minutes of the Common Council.

The Court. You will have to do it that way. You 40

see, this involves the sale of lands. I do not see how that conversation would be admissible, Mr. Hardin.

Q Well, you had such a conversation?

A Yes, sir.

Objected to.

The Court. The fact that he had a conversation would be admissible.

Mr. Coult. He said "such a conversation."

10

The Court. It may be necessary to connect the minutes of the Common Council, which Mr. Hardin proposes to offer, with this transaction.

Witness. What I wanted to say was that he wanted to buy the property cheaper.

The Court. That is objected to, and I will overrule that.

Q Well, had you known up to this time what the purpose was for which the purchase of this property was desired by Dr. Herold?

20

Objected to.

The Court. I think that may be admissible, in view of the plea. It may be anticipating what might be rebuttal, but I won't control that.

Witness. Until that Friday afternoon, when he called on me at the Grand Jury room, I never had the slightest idea for whom he wanted the property; I thought he wanted it for himself. I had been dicker-

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ing with him for ten years, but never before for a city job.

Q What did you learn that afternoon as to who wanted the property?

A Well, I learned that the Common Council were going to buy it. That is the first I knew of that. Outside of Dr. Herold and City Clerk Connolly and Assistant City Counsel Boggs, there wasn't a man connected with it, directly or indirectly, up to this very minute that spoke to me about it—

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Objected to.

The Court. No, Mr. Brown; we have to go step by step here.

Mr. Coult. I move to strike out Mr. Brown's talk.

The Court. I will let it stand as it is.

Q Did you finally come to any arrangement with the city about the sale of this property?

A I believe by resolution of the Council they agreed to buy it; the resolution was passed buying it.

10

Q At what price?

A \$17,500. And was signed by the Mayor, the resolution was, and became a law.

Mr. Coult. Well, I move to strike that out.

The Court. I will strike it out. The resolution or the minutes must be produced.

Q Was the property conveyed to the city?

A It was not.

Q Why not?

20

A They refused to give me the deed.

Q Who refused to give you the deed?

A Mr. Pennington.

Q And anybody else?

A Mr. Honiss. Well, Mr. Pennington acted for Mr. Honiss and—

Objected to.

Q Did you ask for your deed?

A I did.

30

Q Whom did you ask?

A Mr. Pennington and Mr. Honiss.

Q What did Mr. Honiss tell you when you asked him for it?

A May I repeat the conversation?

The Court. Oh, yes; that is a conversation with the defendant.

Witness. Well, he told me—

Q When was it? Did you have one or more conversations with Mr. Honiss?

40

A I had perhaps three or four with Mr. Honiss and half a dozen with Mr. Pennington, and Mr. Honiss told me that he was in an embarrassing position; that Mr. Tiffany, for whom he did a great deal of business, did not want to give him the deed.

Q What is that?

A He said that this matter placed him in an embarrassing position.

Q Who said that?

10 A Mr. Honiss. Because Mr. Tiffany, for whom he did a great deal of work, didn't want him to let us have the property for that purpose.

Q What purpose?

A For the purpose of an isolation hospital.

Q Was this before or after the Common Council met and passed the resolution?

A After they had passed the resolution or agreed to buy it.

Q Did you see Mr. Honiss more than once?

20 A Yes, sir; a number of times.

Q On which occasion was it that he told you about Mr. Tiffany, as you have testified?

A I think it was on the first occasion; I think it was when I went up there to see him after I had been to Mr. Pennington.

Q Did he refuse you a deed on that occasion?

Objected to.

30 Q What did he say?

A He told me that he would have to consult with Mr. Pennington, his counsel, and they would consult together.

Q Did you see him again?

A Yes, sir.

Q And what did he say then?

A It was very much the same; he kept referring me to Mr. Pennington, and I went to Mr. Pennington. Have I a right to repeat the conversation with Mr. Pennington?

40 *Mr. Coult.* Only when Mr. Honiss was present.

The Court. He says he was referred to Mr. Pennington by Mr. Honiss.

Witness. He was his counsel.

Mr. Coult. He doesn't say it was for that purpose.

Witness. Certainly it was.

The Court. I think if Mr. Honiss referred him to Mr. Pennington, the conversation with Mr. Pennington must be admissible.

Mr. Coult. If he referred him to Mr. Pennington for an answer to a certain inquiry, yes. But the Court will recall that Mr. Pennington was himself attempting to represent Mrs. Ranney. This gentleman does not get to Mr. Pennington with such authority that Mr. Pennington could speak unreservedly and without any regard or reference to Mr. Honiss. 10

The Court. But Mr. Brown says that he referred him to Mr. Pennington as his counsel. It seems to me under those circumstances Mr. Pennington's statement will be admissible. 20

Defendants' counsel pray an exception.

Witness. When I went to Mr. Pennington he tendered me back the \$25 that I paid for the first option. I declined to take it, and told him that I wanted the deed, and asked him if he would give me the deed, and he said that he would neither refuse nor say that he would give it to me. This was the first time. I presume that I went six or eight different times during the month of October. 30

Q Did you see Mr. Honiss again?

A Yes, sir.

Q And what did he say?

A I think Mr. Honiss was a very honest man, and he felt very badly about it.

The Court. One minute.

Q What did he say?

A He kept saying that he couldn't do it on account 40

of Mr. Tiffany; that he did a great deal of business with Mr. Tiffany, and he didn't want the thing done; he had no objection himself.

Objected to.

The Court. Only answer Mr. Hardin's questions, Mr. Brown, and do not argue the case yourself.

10 Q Anything that Mr. Honiss said to you you may tell us; you may state anything that Mr. Honiss said to you about a deed for this property.

A I can't repeat everything. That was about the tenor of his remarks.

Q What did he say?

A That Mr. Tiffany didn't want him to give a deed; that he didn't care about the other people, but he did care about Mr. Tiffany.

Q And what did he finally tell you about the deed?

A Before the money had been tendered?

20 Q At any time, on the part of Mr. Honiss.

A Well, he told me that he couldn't give the deed on that account, on account of Mr. Tiffany. That seemed to be the only objection that he had to giving up the deed.

Q Now, did you ever try to pay for this property?

A Yes, sir.

Q In accordance with this option?

A Yes, sir.

Q Do you remember when that was?

A Well, it was about the middle of October, I think.

30 Q Where was that?

A At Mr. Pennington's office.

Q (Paper shown to witness.) Does that help you to recall the date?

A Yes, sir; I think that was the date; I know that was the date—October 17th.

Mr. Hardin. I offer that in evidence. It has been identified by Mr. Pennington and has not been marked.

40

Marked Ex. P. 4.

Q What was done on that occasion?

A Well, I tendered the money to Mr. Pennington, \$12,500, in legal tender. He took the money and counted it and said, "The money is all right, but I decline to accept it and give you the deed." Then I asked him if it was necessary for me to go to Woodside and tender this money to Mr. Honniss; I didn't want to carry that amount around with me. He said, "No, as his counsel I decline to accept it, and there will be no question about the tender." And he told me previously to that that they had bonded indemnity against all pecuniary loss. 10

Q Who told you that?

A Mr. Pennington.

Mr. Coult. That was not inquired about.

The Court. No, it was not responsive, but it was otherwise permissible, and I will not compel Mr. Hardin to put another question for that reason.

Q Did he tell you from whom the bond of indemnity was had? 20

A I don't know whether he did or whether Mr. Honiss did. One of them told me, I understood, that it was Mr. Snyder, Mr. Heller and Mr. Tiffany had given the bond.

Objected to as incompetent.

The Court. It is a statement made by the counsel of one of the parties defendant and the attorney in fact of the other as to the reason of the refusal to give a deed. 30

Mr. Coult. That is not the reason; he simply stated that as a fact.

The Court. I think it is admissible. However, I will look at this Gerbert case over night.

Mr. Coult. I want to take an exception to the admission of so much of the testimony as relates to the indemnity.

The Court. I will admit it.

Defendants' counsel pray an exception. 40

The Court. That exception may be considered as applying to all the testimony that has already been taken on that subject.

Q Did you see Mr. Honiss again after the interview with Mr. Pennington to which you have referred in which the tender was made?

A Yes, sir; I met him, I guess, on two or three occasions.

10 Q Has he said anything to you since that time about this transaction, about his refusal to give you a deed, or anything of that sort?

A Yes, he gave me a reason. He talked about the matter, but I prefer not to speak of it, because I don't know whether he said it to me in confidence or not. When he gets on the stand you can ask him the question. I wouldn't violate his confidence, although he didn't—

20 *Mr. Coult.* Now, that is all right. I guess we had better leave it out, since he is so particular about it.

Cross examination by Mr. Coult.

Q Mr. Brown, you are in the real estate business, you say?

A Yes, sir.

Q How long have you been engaged in that business?

A Twenty-five years or more, perhaps.

30 Q What?

A About twenty-five years or more.

Q Well, you have had other occupations in that time, haven't you?

A Yes.

Q Is that your steady business?

A Sir?

Q Are you steadily employed in that business?

A That is my business: real estate; yes, sir.

40 Q Early in the summer, you say, you obtained an option, on one or more properties, did you say?

A I obtained the option on this property from these people, and I wanted to get the options on the block this side, bounded by Sylvan avenue, the railroad, Mt. Prospect and Summer avenues, and—

Q One minute, now. About the same time did you procure an option or did you examine a site on Bloomfield avenue?

A No, sir.

Q Eh?

A No, sir.

10

Q And Sylvan avenue or in that vicinity?

A Well, I said that I tried to get the option together with this.

Q What?

A I tried to get the options together with the one that I had, on the other block, bounded by the railroad, Sylvan avenue, Mt. Prospect and Summer avenues. It is the block that adjoins the one that I had the option on.

Q Did you not also have an option upon a separate and distinct piece of property about that time?

20

A No, sir.

Q Did you attempt to get one?

A No, sir.

Q Eh?

A No, sir; not only as I say, only that one block, the one that I did have, and the one on the block between that and the railroad. You know the situation there, Mr. Coult.

Q Did they adjoin?

A Yes, sir; Sylvan avenue was between them, but it was not paved or anything of that sort.

30

Q When did you first see or speak with Dr. Herold about this lot?

A It was some time in August, the forepart of August.

Q Wasn't it earlier than that?

A No, sir.

Q Are you sure of that?

A I am positive of it.

Q Have you anything to fix your date?

40

A Well, I know it was three or four weeks; I had had this option on this property at least three or four weeks before I ever had any conversation with Dr. Herold about it.

Q I understood you to say that you obtained this option for some other purpose?

A I obtained it for another purpose; that is, I was looking for the option for another purpose.

Q What other purpose?

10

Objected to as immaterial.

The Court. I suppose Mr. Coult may contend that that is not so. I think he has the right to cross-examine on that subject.

Q Well, you say some other purpose; what other purpose?

A I was looking for a manufacturing site.

Q Was it for yourself or for some customer of yours?

20 A It was for a customer, a friend.

Q A friend of yours, eh?

A Yes, sir; a customer; he is a friend, a personal friend.

Q Who was that friend?

A I decline to answer that.

Objected to as immaterial.

The Court. Is that essential?

30 *Mr. Coult.* It may become material before we get through; it may not be now, but the court will allow me some little leeway in the cross examination.

The Court. Of course, I will, in cross examination.

Mr. Hardin. I think that is an abuse of the privilege of cross examination, to bring other customers of Mr. Brown into the matter. He has stated that he got it for a purpose and has stated what the purpose was.

40 Q I ask you who the person was, Mr. Brown?

A I am willing to tell the court confidentially, and he can inquire whether it is true or not, but I won't speak it out here unless I am compelled to by the court.

Q "I am not asking you to tell the court; I am asking you to tell the jury.

A I say that I have no right to explain the business of my clients, customers, here any more than you would have.

Q To whom did you first make application to purchase this lot? 10

A This plot I had the option on?

Q Yes.

A Mr. Honiss.

Q John Honiss?

A Yes, sir.

Q Where?

A At his house.

Q Where does he reside?

A Corner of Carteret street, and, I think, Lincoln avenue. 20

Q When was that?

A Some time in June.

Q How long before the option was obtained?

A Perhaps a couple of weeks.

Q Did you tell him for what purpose the property was to be used?

A I did not until it was agreed to give us the option, and then he said in an incidental way, as though it was none of his business, "What do you propose to do with this property?" 30

Q Did you tell him what purpose the property was to be used for?

A I am trying to tell you how it came about.

Q I want an answer to that question?

A I told him I was looking for a manufacturing site. He asked me in an incidental way, not that he cared or it didn't make any difference about the property.

Q He asked you for what purpose the property was to be used, and you told him it was to be used for a manufacturing site? 40

A I told him I was looking for a manufacturing site.

Q Did you say to him at that time or at some subsequent time that the person for whom you were purchasing was abroad?

A Yes, sir.

Q Eh?

A Yes, sir. Do you want to know what else I said to him about it?

Q Oh, I will ask you lots of questions about it.

10 A Well, I want to tell it.

Q But you needn't answer anything that you are not asked about. Did you have a manufacturer who wanted this property?

A I did; not that property particularly. I said that I was looking for a manufacturing site; the party was away; and I thought that this might suit; I had no agreement with him to buy.

Q Did you know, Mr. Brown, that plans were prepared for the erection of an isolation hospital?

20 A I did not; no, sir.

Q Did you ever see such plans?

A Never did in my life; no, sir.

Q Eh?

A Never in my life, unless they have been published in the paper; if they have been published in the paper, perhaps I have seen them, but I have never been shown the plans and have never heard of them.

Q You say some time in September, I think, you obtained an option or obtained a—

30 A An extension.

Q Why was that?

A Well, now, I will have to repeat some conversation if I answer that question; I can't answer that question without repeating—

Q Why did you obtain an extension?

Witness. Now, your honor, I am placed in an embarrassing position.

40 *The Court.* Mr. Coult will have to take the answer as it comes, I suppose.

A The only way I can tell that is by repeating a conversation I had with Dr. Herold, and you won't permit that.

Q (*By the Court.*) Was it in consequence of a conversation with Dr. Herold?

A Yes, sir; if he took the property—

Q (*By Mr. Coult.*) One moment. It was in consequence of some conversation you had with Dr. Herold?

A Yes, sir; about the 1st or 2d or 3d of September; I recall it was in September, a day or two before I received the second option. 10

Q Did you not before the extension of that option tell Mr. Honiss that you desired to have it extended because you had not heard from the person for whom you were purchasing, who was still in Europe?

A No, sir; what I said to Mr. Honiss was this—

Q One moment.

A I can repeat what I said to Mr. Honiss.

The Court. Mr. Coult has the right on cross examination to a responsive answer, and if there is something else to be brought out, Mr. Hardin will have to look out for it on re-direct, Mr. Brown. 20

Witness. Well, it is so near what Mr. Honiss has perhaps told him; I don't want to contradict Mr. Honiss.

Q Did you not tell Mr. Honiss that you desired an extension of the option because the person for whom you had purchased was in Europe and you couldn't tell whether he would be satisfied with it or not? 30

A No, sir.

Q Did you not tell Mr. Honiss that you desired for the same purpose, for the same customer, to have a more extended tract, and that you had been trying to buy the adjoining property?

A No, sir; nothing of that kind. I think I ought to be allowed to tell what I did say to him.

Mr. Coult. No.

The Court. Your opportunity may come to do that, but it is not now, Mr. Brown. 40

Q When was it, do you say, that the offer or the option or the resolution to purchase was passed by the City Council?

A I think it was the first Friday in the month; that is my recollection.

Q What month?

A October.

Q October?

A Yes, sir.

10 Q Up to that time there had been no refusal to convey?

A They hadn't been asked for a deed up to that time.

Q You had made no application for it?

A No, sir.

Q You had said nothing about the execution of your option?

A No, sir.

Q You had not spoken to Mr. Honiss about it?

20 A No, sir; I wasn't going to ask for a deed until I got the customer to buy it; that isn't customary.

Re-direct examination by Mr. Hardin.

Q Mr. Brown, when and where did the conversation to which you have referred, in which you told Mr. Honiss that you were looking for a manufacturing site, take place?

A I think it was in my office; I think Mr. Honiss came in, or else I met him on the street.

30 Q When was it with reference to the time when the option was executed?

A What do you mean, the first option?

Q Yes.

A Why, it was in Mr. Pennington's office, where that was executed. Where I saw him previous to that and was talking about it was at his house in Cartaret street.

Q Where did you talk to him about this property being wanted for a manufacturing site?

40 A Well, I am a little undecided about that. My recollection of it was that it was whilst Mr. Pennington was

in the back room dictating this first option. I may be mistaken about that.

Q Was it on the day the option was executed?

A Yes, sir. And I think Mr. Honiss asked me, "Mr. Brown, what are you going to do with this property?" I said, "I am looking for a manufacturing site." I think that was the time, but I am not positive about that; it might have been earlier than that.

Q Now, you got an extension of this option?

A Yes, sir. 10

Q Did you get that on the day of its date?

A The 4th of September.

Q Yes, that is the day of its date.

A Yes. Mr. Honiss either came in my office or I met him on the street, was going to find him, when I told him this: that the party, the manufacturer for whom I wanted this property, didn't want it, but that I had another party whom I thought would take it if I could have the time extended one month; he said all right. I asked him if he could get it extended, and he said he would see Mr. Pennington, and he went to Mr. Pennington, or went away, and came back shortly with the option signed. 20

Q That is, the extension?

A Yes, sir; and he certainly has misunderstood—

Mr. Coult. One moment.

Witness. But I wanted to set that right.

The Court. Don't argue the question.

Re-cross examination by Mr. Coult.

30

Q Now, Mr. Brown, when you first went to Mr. Honiss it was at his house?

A Yes, sir.

Q Did you not say to him there that your customer for this property wanted it for a factory site?

A I did not; there was nothing said about it the first time I went there, about what I wanted it for.

Q Did you not tell him before the option was made and given that the customer you desired it for wanted it for a factory site? 40

A I didn't say I had a customer for it; I said I was looking for a manufacturing site; and it was before the option was executed, but whether it was in Mr. Pennington's office or at his house I can't remember; that part I can't remember.

Q Did you at any time before you had this resolution passed by the City Council inform him that you wanted it for any different purpose?

10 A On the 3d or 4th of September—I think it was the 4th; the same day the extension was given—I said to him, "The manufacturer does not want this property, but I have another customer."

Q Did you tell him what you wanted it for?

A No, sir; he didn't ask me, and it didn't make any difference to him; he wanted to sell his property and I wanted to buy it.

Mr. Coult. I move to strike out that part of it.

20 *The Court.* Yes, it is argumentative; let it be stricken out.

Witness. There is one other thing I want to say that was said in the presence of Mr. Honiss.

Mr. Coult. No, not now.

The Court. No, let Mr. Hardin take care of you.

Further direct examination by Mr. Hardin.

Q What was the other thing that Mr. Honiss said?

30 Objected to.

Witness. It was with reference to the—

The Court. I think I will admit it.

A Well, the only thing was this: I was surprised when they only asked \$12,500 for the property, and I said to him, to Mr. Honiss—

Mr. Coult. One moment.

40 Q. (*By the Court.*) This is a conversation with Mr. Honiss?

A Yes, sir; I said to him, "Whoever gets that property from me will pay a great deal more money for it."

Mr. Coult. I move to strike that out.

The Court. This is a conversation with Mr. Honiss.

Mr. Coult. But he introduced it in his own testimony without any reference to what I said at all; I didn't cross examine him about Mr. Honiss's valuation of the property. That is an entirely voluntary statement. 10

The Court. I cannot see that it has very much to do with the case, but still, I cannot say that it may not have, and I will let it stand.

Defendants' counsel pray an exception.

JAMES F. CONNOLLY, sworn in behalf of plaintiff.

20

Direct examination by Mr. Hardin.

Q Mr. Connolly, you are the City Clerk of the City of Newark?

A Yes, sir.

Q And were you such clerk in the fall of 1901?

A Yes, sir.

Q Have you with you the minutes of the Common Council of the October meeting, 1901?

A Yes, sir.

30

Q Will you refer to them, please?

A Here they are. (Producing book.)

Q Give the book and page, please?

Mr. Coult. Here is a certified copy of the resolution and a certified copy of the rescission, both certified by Mr. Connolly. There is no need of keeping the book here.

Q What book and page do you find the minutes of that meeting on?

40

A Journal of the Council, May 7th to December 30th, 1901.

Q Do you find in that meeting any reports or resolutions referring to the purchase of the property on Sylvan avenue for an isolation hospital?

A I find some resolutions here. I haven't read them. Yes, here is one.

Q Will you read it, please?

A "Alderman Bacheller then offered the following resolution: Resolved, That the sum of \$17,500 be and the same is hereby appropriated to William H. Brown for the purpose of purchasing a plot of land situated between Sylvan avenue and Second River, bounded on the west by Mt. Prospect avenue and east by Summer avenue, that amount to be charged to the account known as Special Real Estate and Almshouse Account; provided, however, that the purchase money shall not be paid until a deed covering the property purchased shall have been delivered to the auditor, approved by the law department; the land to be used for isolation hospital purposes. Moved its adoption."

Q Was that resolution passed?

A It was, sir.

Q And it so appears by the minutes?

A Yes, sir. "The adoption of the resolution was then advocated by Alderman Sutphen."

Q (*By Mr. Coult.*) Well, it was passed?

A Yes, sir.

Q (*By Mr. Hardin.*) By what vote?

30 Objected to as immaterial.

Excluded.

Q Do you find anything else in the minutes of the meeting referring to this matter?

A Yes, there are other matters here.

Q No, I mean in reference to this matter?

A Yes, sir.

Q What else do you find there?

A This is in narrative; it goes on with the debate and
40 the remarks, I mean.

Q I mean independent of the discussion, do you find anything else?

A Yes, sir. Shall I read?

The Court. If you have a resolution. We do not want debates or votes.

Mr. Coult. I think we have got everything we want.

Q Were you present at that meeting?

A I was.

10

Q Does it appear by the minutes of that meeting or from your recollection whether Dr. Herold was present there or not?

Objected to as immaterial.

The Court. How can that be at all material?

Mr. Hardin. This purchase was made at the request of the Board of Health, and I think I have a right to connect Dr. Herold and Mr. Brown and the Common Council together.

20

The Court. But Dr. Herold is not the Board of Health. I think I will exclude it, Mr. Hardin.

Mr. Hardin. I offer the minutes of the meeting, not only for the purpose of showing this resolution, but also showing the presence of the persons, aldermen and others, who were there, for the purpose of discussing the questions involved in the resolution.

Objected to.

The Court. I will exclude it for the purpose for which it is offered. I think the offer is entirely too broad. The resolution itself, I think, may be admissible, but you offer the minutes for the purpose of showing things that do not necessarily appear on the minutes; they are merely put there. I suppose the clerk thinks it is a good thing to do.

30

Mr. Hardin. Suppose it appears that an officer of another department of the city government was there and addressed the Council on this matter in his official capacity.

40

The Court. I cannot see how it would have any materiality.

Plaintiff's counsel pray an exception to this ruling of the court.

Exception allowed; let it be sealed and it is sealed accordingly.

FRANCIS J. SWAYZE, (L. S.)
Judge of the Circuit Court.

10

Mr. Hardin. And the minutes are admitted for the purpose of showing the resolution?

The Court. Mr. Coult wants to be heard on that. You offer the minutes for the purpose of showing the resolution that was adopted as Mr. Connolly read it.

Mr. Hardin. Yes, sir.

Mr. Coult. I might ask for what purpose it is offered, so that I do not mistake it.

20

The Court. You will have to assume that it is offered for any purpose for which it may be admissible.

30

Mr. Coult. I can see no purpose except as fixing the amount of the damages which might be recoverable in this case, on the theory that this was a subsequent sale of the property. I object to it, and I object to it on the ground that it is incompetent evidence for that purpose, in the first place; that that furnishes no rule of damages in cases of this kind and that this is a conditional sale anyway; it is to be purchased upon the delivery of a deed to the auditor, approved by the law department of the city, and it could not be used until the conditions were performed.

The Court. That is, that it does not amount to a purchase at all, but simply amounts to employing Mr. Brown as agent to make a purchase?

Mr. Coult. Yes, sir; it amounts to about that, if anything.

Mr. Hardin. That is not the way it reads.

40

Mr. Coult. Yes, it does. (Counsel reads from resolution referred to.)

The Court. Now, do you contend, Mr. Hardin, that under that resolution Mr. Brown would have had the right to have acquired this property for \$12,500 and turn it over to the city for \$17,500?

Mr. Hardin. I contend that that was a resolution to purchase for \$17,500, and I propose to show that the price had been fixed by the representatives of the city before that resolution was passed.

The Court. Well, I think this resolution is admissible, but my present impression is that it has not the force which you think it has. As it has been read, my impression is that it would have only the effect of employing Mr. Brown as agent for the city to buy for a price not exceeding \$17,500. I say that so that you may correct me if you think I am wrong. I will admit it, Mr. Coult. 10

Mr. Coult. Then upon the other ground, that it does not appear that the conditions prescribed here were ever conformed to, The reason I make this objection is that Mr. Honiss is a married man, and Mrs. Honiss was not a party to this contract, and her right of dower could not have been procured under that agreement; she could not have been compelled to make a release of her right of dower; and the city, therefore, could not have taken this property under this option anyway. 20

The Court. But I cannot assume that. That may be a part of your case. Mr. Hardin cannot put in his case all at once. I think it is admissible; the effect of it is another question. 30

Exception by defendants' counsel.

Copy of resolution marked Ex. P. 5.

Q Have you, in addition to the minutes, the original resolution with you?

A I have, sir.

Q Will you produce that?

A Yes, sir. (Producing paper.) That is the original article. The practice is for the Committee on Finance 40

to sign the resolution, present it to Council, and the Council acts on it, and it is presented to the President of the Council, the Clerk and the Mayor.

By Mr. Coult.

Q And this is the original resolution?

A Yes, sir.

Q In the ordinary form?

10 A Yes, sir.

By Mr. Hardin.

Q This original resolution that you produce is the one that comes from the Finance Committee with the signatures attached thereto?

A Yes, sir.

Q And, as I understand it, the Chairman of the Finance Committee presented it to the Council and the Council passed it?

20 A Yes, sir; that is the resolution that passed through Council.

Q Was that resolution subsequently approved by the Mayor?

Mr. Coult. Well, that appears on the face of it.

A Yes, sir.

Q Did you bring it to the attention of Mr. Brown?

30 A Yes, sir.

Q In what way?

A By—

Objected to.

The Court. How is that material?

Mr. Hardin. Mr. Brown must learn in some way that such a resolution was passed.

The Court. I think we will assume that he learned it. If it is necessary to make formal proof, I will

40

allow you to submit it.

Q Did Mr. Brown deliver a deed to the city for the property?

A That wouldn't come to me.

Objected to.

Mr. Hardin. He says it wouldn't come to him, anyhow.

Q Was there a subsequent resolution passed with reference to this same matter, rescinding the action taken by the Council? 10

A There was.

Q When was that passed?

A That was passed November the 7th. I have the original of that resolution here also.

Q On what page in the minutes do you find that? Is it the same book?

A The same book; yes, sir.

Q Will you read that, please?

A Yes, sir. "Whereas there was appropriated by the Common Council on September 12, 1901, \$17,500 for the purchase of lands in the Eighth ward, said lands to be used for isolation hospital purposes, and whereas the party from whom said lands were to be purchased does not hold the title to and is unable to give the city a deed to such property; therefore be it resolved that the resolution passed by the Common Council September 12, 1901, and approved by the Mayor September 13, 1901, appropriating \$17,500 to William H. Brown for the purchase of a plot of land situated between Sylvan avenue and Second river, bounded on the west by Mt. Prospect avenue and on the east by Summer avenue, the land to be used for isolation hospital purposes, be and the same is hereby rescinded. Resolution signed by the Finance Committee and by the President of the Council, the clerk of the Council, and approved by the Mayor." 20 30

Mr. Hardin. We can use the certified copy of that also. You will notice that the language of that resolution is inconsistent with the agency construction. 40

Mr. Coult. I object, of course, to the second resolution upon the same ground.

The Court. I will admit it.

Exception by defendants' counsel.

Certified copy of resolution marked Ex. P. 6.

Cross examination waived.

10 Adjourned until to-morrow, Friday, January 9, 1903, at 10 o'clock, A. M.

SECOND DAY.

Friday, January 9, 1903.

Met pursuant to adjournment.

Present, counsel as before stated.

20 HERMAN C. H. HEROLD, sworn in behalf of plaintiff.

Direct examination by Mr. Hardin.

Q Dr. Herold, where do you reside?

A 75 Congress street, Newark.

Q Are you acquainted with Mr. William H. Brown?

A Yes, sir.

Q Do you recall the fact that a resolution was passed by the Common Council of the City of Newark on or about October 17, 1901, for the purchase of the property on the Second river known as the Honiss property?

30

A Yes, sir.

Q Were you present at that meeting of the Common Council?

A Yes, sir.

Q In what capacity were you there?

A I was there as President of the Board of Health.

Q The Board of Health of the City of Newark?

A Of the City of Newark.

Q For what purpose?

40

Objected to.

The Court. How is that material, for what purpose he was there? He may have been there to advocate the adoption of the resolution or to oppose it. I do not see what difference that makes in this case.

Mr. Hardin. If the Court thinks the question is improper, I shall not press it.

The Court. I will exclude it.

Q Did you know before that meeting that that matter was coming up for action that night?

10

Objected to.

The Court. Well, it strikes me that in that exact form that is inadmissible. It seems to me the essential thing that you want to show is a contract between the city authorities and Mr. Brown, isn't it?

Mr. Hardin. Yes, sir.

The Court. I do not see how this tends to show it.

20

Mr. Hardin. I also want to show that that contract was made, I won't exactly say through the agency of this witness, but he was instrumental in bringing this property to the attention of the city authorities.

(After further discussion, the question is excluded.)

Q Do you recall the fact that the resolution of the council passed that night?

30

A Yes, sir.

Q Authorizing the purchase of this property for \$17,500?

Objected to.

The Court. Perhaps you had better not state the contents of the resolution. He may state that he recalls the passage of the resolution of October 17th.

Q Do you recall the price?

A Yes, sir.

40

The Court. Well, that, it seems to me, assumes something that does not yet appear. Perhaps your construction of this resolution is that it is substantially a contract—a memorandum of a contract?

Mr. Hardin. That is my construction, under the Statute of Frauds.

10 *The Court.* I can see how that construction is a possible one, but it does not seem to me that it is the proper construction. I think the proper construction of that resolution is that it is a mere appropriation resolution, appropriating a certain sum of money for a certain purpose, without saying whether that land has ever been bought or not. It does not say that \$17,500 be paid to William H. Brown for the purchase price of the property; it says that it be appropriated to William H. Brown for the purpose of purchasing. Now, the natural inference from that, in
20 my mind, is that it looked to future negotiations, and I think that is borne out by the latter part of the resolution, which provides that the purchase money, not stating how much, shall not be paid until a deed shall have been delivered, approved by the law department.

(After further discussion:)

30 *Mr. Hardin.* I now disclose to the court what has been the purpose of this offer and attempt to prove a sale to the city for \$17,500. It is my contention that it is evidence of market value, as well as evidence of an actual contract.

Q Had you had any conference with Mr. Brown with reference to the purchase of that property prior to the meeting of October 17th?

Objected to.

The Court. I cannot tell what it was. I will admit that.

A Yes, sir.

40 Q How long before this meeting?

A The last one was the afternoon of the passage of this resolution at night.

Q And where was that meeting?

A In the court house here, the prosecutor's room.

Q How long before that meeting had you had a conference with him about this property on another occasion?

A Three other occasions; the first one—

Mr. Coult. Never mind.

Q Yes, when was it? 10

A It was some time in the early part of August—the exact date I have no data of—at my office, at my request; the second one was at the post office building, and the third one was on the street in front of the post office building.

Q Did you secure from Mr. Brown on any of these occasions a price for this property?

Mr. Coult. One moment.

The Court. Do you propose to show by this witness that the terms of a contract were actually agreed upon? 20

Mr. Hardin. Yes, sir.

The Court. Now, suppose you show that, then of what importance is it? Because you have got no contract—that is, no memorandum—under the Statute of Frands, to back it up, unless you regard that as a memorandum.

Mr. Hardin. Is it not evidence to sustain that as a memorandum, and is it not fair that I should have it in that view? 30

The Court. I think not. I am so clear that this is not a memorandum of a contract that I should be unwilling to go into it. Of course, I want you to get my ruling in such shape that you can review it.

Mr. Coult. It can be put in any form that the counsel desires that is fair.

Mr. Hardin. I make the offer to prove by this witness that there was an agreement, prior to the passage of that resolution, between Mr. Brown and Dr. 40

Herold, by parol, to sell this property to the city from Mr. Brown for the sum of \$17,500.

The Court. I shall exclude that offer.

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

Exception allowed; let it be sealed, and it is sealed accordingly.

FRANCIS J. SWAYZE, (L. S.)
Judge of the Circuit Court.

10

Q When you conferred with Mr. Brown concerning this property, did you disclose to him the fact that you desired it for the city?

Mr. Coult. I object to that; I object to any conversations in relation to it.

The Court. Yes. I cannot see how that is material.

20

Mr. Hardin. I do not want the conversation; I only want the facts.

The Court. Aren't you practically asking for the conversation?

Mr. Hardin. Well, I am perfectly free to admit that it is in line with the testimony that the Court has already overruled.

The Court. Well, I will exclude it.

30

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

Exception allowed; let it be sealed, and it is sealed accordingly.

FRANCIS J. SWAYZE, (L. S.)
Judge of the Circuit Court.

Q When did you first make known to Mr. Brown that you desired this property for the city for an isolation hospital?

40

Objected to.

The Court. Well, perhaps that may be admissible in another aspect. There is a plea here charging fraud, and it may be permissible, it might possibly be on rebuttal, for Mr. Hardin to show that at the time of the option from Mr. Honiss Mr. Brown did not know the purpose for which it was to be used, and had no idea of buying it for an isolation hospital. I will allow that.

Mr. Coult. In that aspect alone?

The Court. Well, so far as I now see, in that aspect alone. I will not allow it for the purpose of showing the contract. I do not know what other question may arise. I will admit the question. 10

Defendants' counsel prays an exception.

(Question read.)

A The afternoon that I met him in the court house.

Q That was the day of the council meeting?

A Yes, sir.

Q In October? 20

A Yes, sir.

Cross examination waived.

THEODORE F. LEMASSENA, sworn in behalf of plaintiff.

Direct examination by Mr. Hardin.

Q Mr. Lemassena, where do you reside? 30

A No. 27½ Wakeman avenue.

Q What is your business?

A Real estate and insurance.

Q How long have you been engaged in that business?

A Thirty-five years.

Q In the City of Newark during all that time?

A Yes, sir.

Q Are you familiar with the property bounded by Mt. Prospect avenue, Sylvan avenue, Summer avenue and Second river, referred to in this suit? 40

A Yes, sir.

Q Shown on that map (Exhibit P. 1 shown to witness)?

A I know the property.

Q And you are familiar with the values of property in that neighborhood?

A Yes, sir.

Q Is there any substantial difference in value between that property at the present time and on October 17, 1901?

10 A I think it may be worth a little more to-day than it was then.

Q Will you tell us, please, what that property was worth in October, 1901?

A You mean in bulk or—?

Q Well, as a block.

A Yes, sir. I have estimated the property to have been worth at that \$17,975.

20 *Cross examination by Mr. Coult.*

Q How do you estimate it that way?

A I found eight lots—

Q Eight lots?

A —and a trifle over eight lots, I think, but I called it eight lots. I estimated it at eight lots on Mt. Prospect avenue, at \$28 per foot front, or \$700 per lot; on Summer avenue, seven lots, at \$25 per foot front, \$625 per lot; on Sylvan avenue, sixteen lots at \$16 per foot front, \$400 per lot; on Mill Creek—

30 Q How much was the Sylvan avenue per lot?

A \$16 per foot, \$400 per lot.

Q And Summer avenue?

A Summer avenue, at \$25 per foot, \$625 per lot.

Q (*By the Court*). Now, Mill creek, you say?

A Yes, sir; Mill creek, \$4 per foot, \$100 a lot.

Q (*By Mr. Coult.*) Mill creek, you say?

The Court. Second river.

40 A Second river.

Q (*By the Court.*) How many lots?

A There are sixteen there.

Q (*By Mr. Coult.*) Where are the last lots that you mentioned?

A Right here, sir, (indicating on map); this strip. These are all fenced off into lots, or rather, ruled off.

Q Yes, I see they are; that is, on this map they are?

A Yes, sir.

Q The last lots you speak of have no front except on the stream? 10

A That is all.

Q What is the character of the ground from Sylvan avenue down to the river.

A It is rather steep.

Q What is the difference in the grade between Sylvan avenue and the river?

A Well, I would have to guess at that. I should think, from recollection, it may possibly be in places maybe twenty feet, maybe twenty-five feet, and I think possibly at the lowest fifteen or eighteen feet. 20

Q You are only judging by your eye now?

A That is all.

Q Did you ever measure it?

A No, sir; I am not a surveyor.

Q How far is it from Sylvan avenue down to the river, how many feet?

A From Sylvan avenue?

Q Yes, from Sylvan avenue down to the river, what is the distance?

A The map there will give me that. 30

Q (*Map shown to witness.*) Well, about? That is all I want to get at, so as to get it on the record.

A Well, it is mapped out there.

Q Well, you can tell by the depth.

A Well, about five or six hundred feet, isn't it?

Q What is the depth of those lots?

A Those are a hundred feet deep.

Q And what is the other depth?

A I should think it would average about eighty feet.

Q Then it is one hundred and eighty feet? 40

A Yes, sir.

Q Then the lot falls off one hundred and eighty feet, according to your—

A Falls off? Well, no, I think—. Well, the bank is rather abrupt, I remember, and yet I can't tell what the incline is. You are trying to get the surface?

Q Yes, the difference in the grade.

A I should think in the surface through, I should
10 think it would make a difference of—

Q Well, twenty-five or thirty feet?

A Yes, possibly.

Q According to your recollection?

A Yes, sir.

Q Is Sylvan avenue paved?

A It is flagged, and I think the gutters are paved.

Q Are the streets paved?

A I am not positive about that.

Q Don't you know?

20 A I haven't been there to see that property recently, but I am familiar with the property; I know it is graded and I know it is flagged.

Q I asked you if it was paved?

A The roadbed itself?

Q Yes.

A I don't know whether it is or not.

Q You don't know whether it is or not?

A No, sir.

30 Q Then your acquaintance with it does not lead you to recognize now whether the road is paved or not?

A I know that land, if it had no pavement whatever, no road pavement—

Q Just answer my question, please; don't make any address; answer my question.

A No, I haven't seen it recently.

Q Do you know that the street is graded?

A Yes, sir.

Q Sure of that?

A Yes, sir.

40 Q When was it graded?

A Oh, my, I guess it has been graded for two or three years; I am not positive.

Q Sure of that, eh?

A Yes, sir.

Q Is it curbed?

A I think it is curbed.

Q Will you say that it is curbed?

A I am not willing to swear it is curbed; I think so, yes.

Q You will swear it is curbed? 10

A I think so; it is flagged, also.

Q And flagged?

A Yes, sir.

Q Now, how about Mt. Prospect avenue and Summer avenue, at the ends; are they paved?

A No, I think not.

Q There is no street crossing this property between Mt. Prospect avenue and Summer avenue, laid out, opened?

A No, sir. 20

Q You would put a value on this at lot prices?

A Put a value on it—yes; I was asked to look at that—

Q At lot prices?

A I was asked to find out what my value was—

Q You put it on at lot prices, not as a tract?

A No, at lot prices.

Re-direct examination by Mr. Hardin.

Q Mr. Lemassena, there is a trolley line on Mt. Prospect avenue? 30

A Yes, sir.

Q And a bridge to Belleville over Second river?

A Yes, sir.

Re-cross examination by Mr. Coult.

Q Where does the trolley stop?

A Well, it stops on the south side of the track of the Greenwood Lake road. 40

Q Where?

A On the south side of the track of the Greenwood Lake road.

Q How far is that away from this property?

A I think, it is my recollection, it is two blocks.

JAMES A. BERRY, sworn in behalf of plaintiff.

10 *Direct examination by Mr. Hardin.*

Q Mr. Berry, where do you reside?

A 239 Garside street, this city.

Q What is your business?

A Real estate.

Q Where is your office?

A 41 Clinton street.

Q How long have you been in the real estate business?

20 A Twelve years.

Q Have you recently visited the property in Newark bounded by Mt. Prospect avenue, Sylvan avenue, Summer avenue and Second river (map shown to witness)?

A Yes, sir.

Q Shown on that map, Exhibit P. 1?

A Yes, sir.

Q You are familiar with values in that part of the city?

30 A Yes, sir.

Q Can you give us the value of that property in October, 1901?

A Yes, sir; I think so. The Mt. Prospect avenue lots I valued at \$750 per lot; the Summer avenue lots, of which there are seven, I believe, at \$650 per lot; the Sylvan avenue lots, running through to the river, approximately at between 175 to pretty nearly 200 feet, I should say \$500 per lot.

Q What do you make the value of the tract?

40 A Approximately \$18,500, I think, substantially.

Cross examination by Mr. Coult.

Q You have been in the real estate business how long?

A Twelve years.

Q Where did you get your education?

A In real estate?

Q Yes.

A Well, I have been in the real estate and insurance business for twenty years.

Q Was it in Brown's office?

10

A No, sir.

Q Didn't you serve a clerkship in his office?

A I did not.

Q Ever been there?

A No, sir.

Q With him?

A No, sir.

Q Did you start for yourself alone without having any previous employment in a real estate office?

A No, sir.

20

Q Where did you get your—

A I had been for years in the office of Judge Conlon, real estate and insurance.

Q Judge Conlon?

A Yes, sir. Insurance and real estate he called it, I believe.

Q Do you know of any sales by lots up there at that point?

A Yes, sir.

Q Whose sales?

30

A I.

Q Where?

A On Mt. Prospect avenue.

Q Whereabouts?

A Just southerly from the land described here.

Q Southerly where?

A Just one block below.

Q On what block?

A Between Verona and, I think it is, Irving street.

Q Below Irving street?

40

A I say I think it is between Verona avenue and Irving street. Irving street is not called by that name, I think, westerly from the avenue.

Q On Mt. Prospect avenue, you say?

A Yes, sir.

Q Westerly from Irving street?

A No, sir; southerly from Verona avenue and between it and Irving street.

10 *Mr. Coult.* Have you a map showing that?

Witness. I have a map here.

The Court. I think Mr. Coult wants a city map.

Q Which side of the Erie railroad is that on?

A Is what on?

Q Towards Newark?

A Is what on?

Q The lot that you spoke about?

A Southerly from the railroad.

20 Q And how far south from the railroad?

A Well, the railroad is northerly from Verona and southerly from Sylvan, and this land to which I refer is southerly from Verona.

Q How far is it southerly from the railroad?

A Well, the exact number of feet, of course, I can't tell, but the city atlas would disclose that.

Q Well, what do you say?

A Well, it is—

Q How far is it south?

30 A Well, I should say that it is— You will understand I can't be exact; I know the territory pretty thoroughly; but I should say it is southerly from Verona avenue—

Q From the railroad, I said.

A Well, the railroad is northerly from Verona avenue; I have described this land as being southerly from Verona; the railroad is northerly from Verona.

Q How far is it southerly from the railroad?

40 A Say between five and six hundred feet, I should approximate it at.

Q Do you know of any sales of property at that time on or near the block shown there upon that map?

A There were no sales on that block.

Q Or on any adjoining block?

A Do you mean the block immediately adjoining on either side?

Q Yes.

A At that particular time? That is somewhat remote, over a year ago; I can't precisely recall that.

Q You knew the tract that was bought by Tiffany & Company? 10

A Westerly from the avenue?

Q Yes.

A Yes, sir.

Q Do you know when that sale was made?

A You mean to the Tiffany folks?

Q Yes.

A I don't know the exact date, but I do remember when the sale was made.

Q Do you know the price? 20

A No, sir.

Q Weren't you either working for or in the office of Mr. Brown or Schlesinger?

A Never at any time.

LOUIS SCHLESINGER, sworn in behalf of plaintiff.

Direct examination by Mr. Hardin.

30

Q Mr. Schlesinger, where do you reside?

A 46a James street.

Q What is your business?

A Real estate and insurance.

Q Where is your office?

A 749 Broad street.

Q Do you know William H. Brown, the plaintiff in this case?

A Yes, sir.

Q You were formerly in partnership with him? 40

A Yes, sir.

Q In the real estate business?

A Yes, sir.

Q When was that partnership dissolved?

A December 31, 1889.

Q (*By the Court.*) 1899?

A Oh, 1899.

10 Q Are you familiar with the property bounded by Mt. Prospect avenue, Sylvan avenue, Summer avenue and Second river, in this city, shown on Exhibit P. 1?

A Yes, sir.

Q Are you able to tell us what that property was worth in October, 1901?

A Yes, sir.

Q Tell us, please.

A About \$18,000.

20 *Cross examination by Mr. Coult.*

Q How do you get at it?

A Well, it consists of a plot of about—

Q Is it by the lot, the same as the others?

30 A Yes, I take the valuation by a lot. The plot contains about forty-five full city lots, each 25 by 100, about twelve thousand square feet—or one hundred and twenty thousand square feet. The valuation of the Mt. Prospect avenue lots are worth in the neighborhood of \$30 per front foot; the valuation on Sylvan avenue—I take it running from the line of Sylvan avenue to the end of this property fronting on Second river, at \$20 a foot or \$500 a lot, and the Summer avenue lots at about \$25 a front foot.

Q Do you know of any sales made at or about that time of property north of the railroad?

A May I have that map?

Q (*By Mr. Hardin.*) This map (handing paper to witness)?

A Yes, it is mine.

40 Q The city map?

A Yes, sir. Anything north of the railroad, you say, Mr. Coult?

Q (*By Mr. Coult*). Yes.

A At that time?

Q Or about that time.

A Nothing just about that time; no sir.

PLAINTIFF RESTS.

Mr. Coult opens for defendants.

10

JOHN HONISS, sworn in behalf of defendants.

Direct examination by Mr. Coult.

Q Mr. Honiss, you reside in the city of Newark?

A Yes, sir.

Q How long have you lived here?

A Thirty-one years last October.

20

Q Where is your place of residence?

A 226 Lincoln avenue.

Q You had an interest in a tract of land on Sylvan avenue?

A Yes, sir.

Q The one that has been mentioned here as included in the option given to Brown?

A Yes, sir.

Q How long had you owned that property?

A I think I bought it in 1872.

30

Q What do you say?

A 1872, I think.

Q What was your interest in it?

A A half interest, undivided interest.

Q An undivided half interest?

A Yes, sir.

Q Who owned the other undivided half interest?

A Mrs. T. P. Ranney.

Q Had you owned it together from the time it was first—

40

A Yes, sir.

Q —your first interest was in it?

A Yes, sir.

Q Was it held for sale all that time?

A Well, yes, we would sell it, of course, if we got our price for it?

Q Mr. Brown came to see you about it?

A Yes, sir.

10 Q Whereabouts did he first see you about it?

A He came to my house.

Q Where?

A 226 Lincoln avenue.

Q About what time was that, Mr. Honiss?

A Well, I really couldn't say exactly; it must be, I think, near noon.

Q Eh?

A I guess it was about near noon; I don't know what time of the day it was exactly.

20 Q Well I mean to say how long before the paper was signed? How long before the paper was signed was it that he first came to your house to see you about it?

A Well, I couldn't say; I should think a week or more.

Q A week or more?

A Yes.

Q And what was said, if anything, about the use?

30 A Well, he asked me if that property was for sale; I told him it was, and he wanted to know my price for it; I told him I couldn't tell him, as I didn't own only one undivided half, and then he asked me what the price was. I told him I couldn't tell him, of course, and then at that time I asked him what he wanted it for, and he told me he wanted it for factory use.

Q Before that had you owned a property near there?

A Yes, I sold Mr. Tiffany about twelve acres.

Q How far from this property?

A It joined right onto this property of mine.

Q On the west?

A Yes, on the west from Mt. Prospect avenue.

Q How large a tract was that?

40 A Well, that was about twelve acres.

Q About twelve acres?

A Yes, sir, that Mr. Tiffany bought; and then he built a large factory there for silver manufacture.

Q Just there, I will ask you how long before this was it that that sale occurred?

A Well, I couldn't tell you exactly; it must be three or four years probably.

Mr. Coult. I don't know whether that is too remote or not. I propose to ask him what that tract was sold for. That is about the only sale that has been made on that site of any large size. 10

Mr. Hardin. How long before was it?

The Court. He said it must be three or four years back.

Mr. Hardin. I object to it.

After further discussion, the objection is sustained.

Q Following that up, what was subsequently done and said about the option? 20

A Well, I told him then he would have to go to Mr. Tiffany's and Mr. Pennington's office, and made an arrangement to meet him there.

Q Did you meet him there?

A Yes, sir.

Q Before the execution of the option at that place was anything said further about the use?

Objected to as leading.

The Court. Of course, Mr. Coult may inquire as to the conversation. 30

Mr. Coult. Unless you direct it to some particular point it may take some time.

Q What was said there, if anything?

A In the office?

Q Yes; as to the purpose for which—

Objected to as leading.

Mr. Hardin. I am entitled to the conversation.

The Court. Perhaps you may be entitled to the 40

whole conversation on your own examination. I don't think it is leading. I will allow the question.

Q What was said there at that time?

A Mr. Pennington drew up the agreement for this option.

Q I know Mr. Pennington drew it up. Before that was anything said about the purpose by Mr. Brown?

10 A Why, he said of course—not in the office, he didn't say so; he said it in my house—that it was for factory purposes.

Q That was at your house, then, was it?

A Yes, sir; at my house, at the time when he first came to see me to buy the property.

Q Did you learn anything different from him up to the time of the execution of the option?

20 A No, I don't remember that I did, until he came to see me again, and he said that he wanted to renew the option before the other one expired, and I understood him to say that the man was in Europe and he wouldn't be back in time, and he wanted to get an option on it longer; so we went to Mr. Pennington's office again and had another option drawn up, I think it was the 1st of December, 1901.

Q Did you at any time learn from him subsequently that he proposed to put it to any other use?

A No, no, he never said anything what he wanted it for, only for a factory; that is what I supposed.

30 Q Now, Mr. Honiss, if you had been told that it was to be used for a—

Objected to.

The Court. Wait until the question is asked. The witness will not answer until I have ruled upon it.

Q If you had been told that it was to be used for an isolation hospital would you have given the option?

A Oh, no.

40

Objected to.

Witness. I would not.

Mr. Hardin. It is objected to on the ground that it calls for the opinion of the witness now on what he would have done under other conditions six or eight or ten months ago.

After further discussion, the objection is withdrawn.

The Court. I will let the answer stand.

(Question and answer read).

10

Q Why would you not have given it?

Objected to.

The Court. That is going further.

(Question withdrawn).

Q You are a married man?

A Yes, sir.

Q And were at the time that you executed this option?

20

A Yes, sir.

Q And your wife was living with you at the house at that time?

A Yes, sir.

Q And your wife is still living?

A Yes, sir.

Q What was your personal occupation at the time this contract was sought?

A What was my occupation?

Q Yes.

30

A I had charge of Mr. Tiffany's property up there.

Cross examination by Mr. Hardin.

Q Mr. Honiss, how old are you?

A I believe I was seventy-eight years old yesterday.

Q How old is Mrs. Honiss?

A Well, she is five years younger, I believe.

Q Seventy-three?

A Yes.

40

Q This tract of land that you sold to Mr. Tiffany, the twelve acres, at the time you sold it was woodland, was it not?

A I can't understand you; I am a little deaf.

Q This tract of land that you sold Mr. Tiffany, the twelve acres, at the time you sold it to him was woodland, was it not?

A Yes, sir.

Q A tract of land in its natural state, covered with
10 trees and woods?

A Yes, sir.

Q And it has since been greatly improved?

A Yes, sir; improved since.

Q A very handsome factory on it?

A Very fine factory.

Q Handsome grounds?

A Yes, sir.

Q And workmen's houses of modern construction?

A Yes, sir.

Q The entire tract developed and improved?
20

A Yes, sir.

Q That is right across the street, is it not, from this tract that Mr. Brown had the option on?

A Yes, sir; across Mt. Prospect avenue; Mt. Prospect avenue divides Mr. Tiffany's property and mine and Mrs. T. P. Ranney's.

Q You and Mrs. Ranney had owned this property a great while?

A Yes, sir.

Q Mrs. Ranney's husband in his lifetime originally
30 owned the property with you?

A Yes, sir.

Q And it came to her from him?

A Yes, sir.

Q Do you recall when he died?

A No, I couldn't say.

Q Several years ago?

A Yes, sir; quite a good many years.

Q And ever since his death—was it ten years?

40 A More than that, I think.

Q Was it fifteen years?

A I presume it was; I couldn't tell you.

Q So that you and Mrs. Ranney had owned this property together for at least fifteen years?

A Yes, sir.

Q Had you received any income from the property during that time?

A No, sir.

Q Paying taxes on it all the time?

A Paying taxes, yes, sir.

10

Q It was free and clear, was it?

A Yes, sir.

Q I show the witness a letter and ask him whether it is in his handwriting (shown to witness)?

A Yes, sir; I acknowledge that.

Q And is that in your handwriting also (another paper)?

A Yes, sir.

Q The first letter is dated June 29, 1901?

A Yes, sir.

20

Q And addressed to Mr. Brown?

A Yes, sir.

Plaintiff's counsel reads the letter referred to, dated June 29, 1901, addressed to plaintiff and signed by the defendant Honiss.

Q You wrote that to Mr. Brown after his first call at your house, I take it?

A I guess I did.

Q So that his first interview with you was prior to June 29, 1901?

30

A Yes, sir; I think so.

Plaintiff's counsel reads letter dated July 6, 1901, addressed to plaintiff and signed by the defendant Honiss.

Q That letter was written, I suppose, after you had consulted Mrs. Ranney?

A Well, I guess probably I got a price from Mr. Pennington, very likely.

40

Q You had gotten a price, anyhow, so that you were able to fix a price on the property?

A Yes, I think so, but I think the price was made in Mr. Pennington's office; I think he and I—

Q After consultation, you fixed the price?

A Yes, sir; because I couldn't do it alone, of course.

Q You knew what price you were going to ask for the property at the time this letter of July 6th was written, did you?

10 A Well, I think probably I had seen Mr. Pennington, probably.

Q Well, did Mr. Brown call on you in response to this letter of July 6th?

A Well, I really couldn't tell you now, it is so long ago.

Q Well, what is your recollection about it?

A Well, I don't remember; he might, of course.

Q As I understand you, there was nothing said about the manufacturing site at any interview between Mr.
20 Brown and yourself except the first one?

A No, only the first time, no.

Q You read this option before it was signed?

A Yes, sir.

Q What business have you been in, Mr. Honiss, during your life?

A Well, I have been taking charge of Tiffany's property and my own.

Q You have had a good deal of experience in dealing with property, haven't you?

30 A Well, quite some; yes, sir.

Q How many years?

A Well, I guess thirty years.

Q And have owned a great deal of property yourself?

A Yes, sir.

Q And bought and sold property?

A Yes, sir.

Q Were there any restrictions on this property that you gave Mr. Brown the option on of any kind?

40 A No, no restrictions, only he told me it was to be for a factory, that is all.

Q There were no restrictions on your title, I mean?

A No, not on my title.

Mr. Coult. That is a conclusion of law.

The Court. I will assume that the title was good unless there is proof to the contrary, barring, of course, the inchoate dower.

Q After this option was given, in July, 1901, you saw nothing more of Mr. Brown until September, when he came back after the extension? 10

A Did I see him?

Q Yes.

A Well, I don't know as I remember about seeing him.

Q Have you known Mr. Brown for some time?

A Yes, sir; I knew him; not very much acquainted with him, of course.

Q You had a casual acquaintance with him for some time? 20

A Yes, sir.

Q And I take it that during the interval between the date of this interview and the date of the option you might have met him casually, but you didn't meet him in connection with this property?

A Yes, I met him once or twice since.

Q In connection with the property?

A Not to say anything about the property.

Q Now, after the extension was given, when did you next see Mr. Brown? 30

A I can't understand you.

Q After the extension was given—it is dated the 4th of September—when did you next see Mr. Brown?

A Well, I couldn't say when I saw him.

Q Well, was it before or after you heard that the property was to be bought by the city?

A I couldn't say.

Q Never mind a casual meeting, now. I mean when you talked with him about the deed for this property, or about the transaction growing out of this option; was it 40

before or after you had learned that the city wanted the property?

A No, I never had any conversation after that.

Q Until after that?

A No, not after that; no, sir.

Q You never talked with Mr. Brown about this property after you had heard that the city was to take it?

A No, I don't remember that I did.

10 Q Did Mr. Brown ever ask you for a deed for this property?

A No, sir; never asked me for a deed.

Q He never spoke to you about a deed?

A I don't remember that he did. I 'most forgot about it, it is so long ago.

Q I want you to be very sure about that.

A Well, I am pretty sure. I think he done the business in the office with Mr. Pennington.

Q Didn't he speak to you about it, and didn't you refer him to Mr. Pennington?

20 A He might have done it, of course; I couldn't say.

Q Well, I want you to say whether he did or not?

A Well, I am not positive that he did.

Q Will you say that he did not?

A Well, no, I won't say he didn't nor he did, either one; I couldn't tell exactly.

Q He might have spoken to you, and if he did speak to you, you referred him to Mr. Pennington; is that it?

A Well, I presume I did; I don't know.

30 Q You told Mr. Pennington not to give him a deed, didn't you?

A Oh, yes, of course I did; not for a hospital.

Q Then you told Mr. Pennington not to give him a deed after you knew the city was to take the property?

A Yes.

Q How soon after?

A Well, I couldn't tell you how soon.

Q Now Mr. Honiss—

40 A I never took no notice or anything; of course, I didn't suppose this thing was coming up, and I didn't pay much attention to it, of course.

Q Don't you remember that Mr. Brown asked you for a deed for this property and that you referred him to Mr. Pennington?

A Out of Mr. Pennington's office?

Q Well, I don't know where it was.

A Well, I left it with Mr. Pennington.

Q Yes, but didn't you refer Mr. Brown to Mr. Pennington?

A Well, I couldn't tell you, honestly; I couldn't say.

Q Well, you might have done so? 10

A I might have done so and might not; I couldn't say.

Q Where did you first hear that this property was to be used for an isolation hospital?

A I saw it in a paper.

Q That was the first you knew it, was it?

A Yes, sir; and I was dumbfounded to think that it was to be used for a hospital.

Q And up to that time you would have been perfectly willing to convey it?

A Yes, sir; Mr. Brown could buy it up to that time for a factory, and he can buy it to-day for a factory for the same price. 20

Q And the reason you did not make the deed was because you learned that the property was to go to the city for an isolation hospital?

A Yes, sir.

Q That was the cause of the refusal?

A Yes, sir.

Q Did you ever tell Mr. Brown that you were unwilling to convey this property on Mr. Tiffany's account? 30

A No, sir.

Q Did you ever talk to him about that?

A No, sir.

Q Never mentioned that fact to him?

A No, sir; nothing said about it.

Q You have been indemnified in this case, have you not?

Objected to.

The Court. How is that material?

Mr. Hardin. It goes to the question of *mala fides*, and I propose to show by the date of it that the refusal was not made until the indemnity was given.

After discussion :

10 *Mr. Hardin.* My purpose in offering it was to show that this deed was not definitely refused until after the indemnity was given, and to show a wilful refusal of it. I make that offer. Does the Court exclude it?

The Court. Yes, I exclude it.

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

Exception allowed ; let it be sealed, and it is sealed accordingly.

FRANCIS J. SWAYZE, (L. S.)
Judge of the Circuit Court.

20 *Mr. Coult.* He puts on the ground that he refused it for a certain purpose.

The Court. He absolutely and unqualifiedly refused to make a conveyance.

Mr. Coult. Yes.

Re-direct examination by Mr. Coult.

Q Mr. Honiss, Mr. Hardin asked you if you had paid taxes on the property?

30 A Yes, sir.

Q During all this time?

A Yes, sir.

Q Do you recollect at what rate it was taxed?

Objected to as immaterial.

Excluded.

WILSON C. ELY, sworn in behalf of defendants.

Direct examination by Mr. Coult.

Q Mr. Ely, what is your occupation or profession?

A Architect.

Q Where is your office?

A 800 Broad street.

Q What is the firm?

A John H. & Wilson C. Ely.

10

Q John H. is your brother?

A My father.

Q Your father, I mean?

A Yes, sir.

Q Were you in business with your father last year?

A I was.

Q Did you prepare or were plans prepared in your office for an isolation hospital?

A There were.

Q Have you these plans here?

20

A I have.

Q Just produce them, will you.

Mr. Hardin. How are the plans material?

The Court. I cannot see how they are material.

Mr. Coult. I will open it now. These plans were prepared for this property, and I propose to show that they were prepared for this property early in the summer.

The Court. Do you propose to connect that with Mr. Brown? 30

Mr. Coult. I expect to.

The Court. If you propose to connect it with Mr. Brown, that is another question. Unless it is connected with him, unless you can show that he had knowledge of it early in the summer, it does not seem to me it would be admissible.

Mr. Coult. I don't say that I can, but I think I can. These plans were prepared and this ground examined, and they are fitted to the ground, and I want 40

to show when they were prepared and at whose direction they were prepared.

The Court. Well, I think, Mr. Hardin, that if it turns out that they are not connected in any way with Mr. Brown, the matter can be controlled in such a way that no harm will be done by admitting them, but unless it is shown that Mr. Brown had knowledge of this matter, then I think this evidence is clearly inadmissible. I will receive it with the understanding that Mr. Coult is going to connect it.

Q You may produce the plans.

A (Witness does as directed).

Q Have you got the foundation plans there?

A Yes, sir (produced).

Mr. Hardin. I think, if the court please, I will object at this time, and suggest that Mr. Coult had better show that the plans were made for this property before he shows the plans.

Mr. Coult. I will show that by this man.

Q Before you made these plans, or before these plans were prepared, did you examine the ground upon which these buildings were to be erected?

A Before these final drawings were made we looked at the property.

Q Did you look at more than one piece of property?

A My father, I believe, examined two pieces of property, as per instructions of Dr. Herold.

30 Q Eh?

A My father examined two pieces of property.

Q By instruction?

A By instruction, yes.

Q From whom?

A From Dr. Herold, I believe.

Q Representing whom?

A The Board of Health.

Q Well, where were those pieces of property?

40 A The one of them, of course, was the piece of property in question; the other one, I can't say just where it

was; it was somewhere back of this property, or on the hill, I think. I am not sure just where that property was.

Q Did you go to see this property yourself, personally—this property?

A I have seen this property personally.

Q Didn't you to go there before the plans were drawn to examine the property?

A I did.

Q Now, just show the plans. Were the plans adapted to this property? 10

A The scheme was formulated before this property was decided upon; the plans were changed to conform to this property.

Q The plans were changed to conform to this property when?

A As near as we can find out from the records in our office, it was some time in August.

Q When did you go to see the property before that?

A It would be impossible for me to give that date, Mr. Coult. 20

Q Why?

A I presume it was before we started the revision of these plans for this property, which was some time in August, the first of August.

Q Some time before that; when before that?

A Well, it must have been immediately before that.

Q Well, in what month?

A Well, I couldn't give the date positively, Mr. Coult.

Q What is the trouble with your giving me the date? 30

A Because I couldn't tell you; we have no record of the fact, when we examined this property.

Q You went there yourself, did you?

A Yes, sir.

Q Well, when did you go?

A I remember distinctly it was in the summer time; I should say it was in July, but I couldn't give you the date, because we don't make a record of those things.

Q How do you know that you commenced on these plans subsequently, about the 1st of August? 40

A Because of letters from material men, and so forth, and stubs in our check book, which show that we had an extra force working on these plans at that time.

Q These are the plans?

A These are the plans.

Q Now, just exhibit the ground plan.

A (Exhibiting a plan.) This is the first story plan of the building.

10 Q Where is the building shown on the ground?

The Court. You want the elevation, do you not?

Mr. Coult. Yes, that is what we want to get at.

A (Indicating.) That is the front elevation of the property.

Q Now, give us the side elevation.

A (Indicating). There is the side elevation of the property.

20 Q Now, how was that adapted to the ground?

A This was the front of the property; this would be the river end down here, where the property runs down (indicating).

Q And it was made to correspond with the grade of that lot?

A The plans were made to correspond with that grade.

Q Do you know when you got the order from Dr. Herold, or from the Board of Health to make those plans?

30 A We have no record of the date when we got the order from the Board of Health. We know that the committee was appointed by the Board of Health to procure plans, and that my father was instructed by that committee to formulate a scheme for an isolation hospital.

Q And then you visited the ground and prepared the plans and adapted them to the ground?

A We adapted our scheme, which we had submitted to the board, to this property.

40 Q When was that scheme prepared before it was adapted?

A You mean the original scheme for the isolation hospital?

Q Yes.

A Oh, it was prepared, I suppose, eight months before this property came up; that is, a scheme for an isolation hospital, but not for this particular plot; that is, we were required by the Board of Health of this committee to adapt our scheme for an isolation hospital to this property, and our purpose in visiting the site was to ascertain whether our scheme could be fitted to this site. 10

Q It took a long time to prepare that set of plans, didn't it?

A Yes, sir, they are a very complete set of drawings.

Q And a very elaborate building, is it?

A Yes, sir; it is.

Q Constructed on the theory of keeping all the patients isolated?

A Yes, sir.

Q And disinfecting everybody that goes in? 20

A Yes, sir.

Q And comes out. You can tell exactly when you got the order for the readapting of the plans for this land, can't you?

A It is impossible for us to do that, Mr. Coult; we have no record of that in our office, and we were merely told—my father was instructed to go there to examine the property and ascertain whether our scheme for an isolation hospital would go on that site.

Q But you know it was before the 1st of August? 30

A It was some time about the 1st of August.

Q Well, do you know whether it was before the 1st of August?

A I don't know it positively, no, Mr. Coult, any more than we started the work to revise these drawings about the 1st of August; so it must have been immediately before that time, some time in July.

Q Do you know when the board passed its resolution authorizing these plans to be prepared?

A I think it was in the spring some time; I don't 40

know the exact date; I believe in June, something of the sort.

Mr. Hardin. Perhaps I misunderstand the witness, but I understand the first plans that were first adopted by the committee were not adapted to any particular site.

Mr. Coult. I am talking about the readapting of these plans.

10 Q Were there any plans drawn before you drew these; that is, put on paper?

A Yes, sir; there were.

Q Not this set, though?

A Not this set of drawings.

Q I am speaking of when this set was prepared.

A This is not the original set of drawings.

Q But this is the adaption of your previous drawings to this place?

A It is.

20 Q Now, so that there may be no mistake about it, I ask you when you got the order to adapt this plan to this site?

A Well, I can't give the positive date, Mr. Coult.

Q As you said before, you commenced to do it about the 1st of August?

30 A Yes, we commenced work. Our stubs in our check book show that we had an extra force of men; an extra amount was paid for salaries at that time, for drawing these plans, and therefore we put that down as about the date the plans were commenced. We have no positive data that those plans were commenced at that date, though, any more than that.

Cross examination waived.

MATTHEW T. GAY, sworn in behalf of defendants.

Direct examination by Mr. Coult.

Q Mr. Gay, you were a member of the Board of Health last year?

A Yes, sir.

Q And are still?

A Yes, sir.

Q Were you a member of a special committee that was appointed for the purpose of securing a site for erecting an isolation hospital? 10

A I was.

Q Who was chairman of the committee?

A The president of the board.

Q Dr. Herold?

A Dr. Herold.

Q Of whom did the committee consist?

A Dr. Herold, Dr. Disbrow, Dr. Becker and myself.

Q Do you know when you first became a member of that committee? 20

A Some time in June, 1901, the early part of June.

Q Was that committee authorized to select a site and procure plans for a hospital?

A They were.

Q I mean an isolation hospital?

A Isolation hospital; yes, sir.

Q Were they so authorized by vote of the board?

A They were, I believe.

Mr. Hardin. There is a minute to that effect, isn't there, Mr. Coult? 30

Mr. Coult. Yes, I believe so. I would like to have the minute, and I will have it produced right here. (Counsel calls upon a Mr. Chandler to produce the book referred to, and a book is accordingly produced). There is no objection, I suppose, to the introduction of this record?

Mr. Hardin. Not at all.

Mr. Coult. On the 4th of June, 1901, in the minutes of the proceedings of the Board of Health en- 40

10 titled "Regular Meeting of the Board of Health for sanitary affairs, June 4, 1901, in executive session" appears this statement: "The health officer stated that a letter which he had written in response to the motion instructing him to write and request an appropriation of \$100,000 from the finance committee of the Common Council for the purpose of purchasing land and erecting thereon a contagious disease hospital, was not sent by him, as he had been advised that it would be irregular to do so. The president gave a very full statement of the matter, which he said should be left to a special committee to go before the Finance Committee of the Common Council. Moved and seconded that the committee on contagious disease hospital be given enlarged powers, so that they can get an option on property and have power to select a site and have plans prepared for a contagious disease hospital, and that Commissioner Gay be added to the committee. Carried." Also the second

20 resolution: "Moved and seconded that the motion instructing the secretary to write to the Finance Committee of the council, and request an appropriation for the purpose of erecting a contagious disease hospital be reconsidered." That was in conformity with the first part of the resolution.

Q Immediately after you were added to the committee did you take part with it in its proceedings and deliberations?

30 A I did.

Q Do you know whether an effort was made to ascertain whether sites could be procured for that hospital?

A An effort was made to procure a site.

Q Were any pieces of ground looked at with a view of location?

A A great many.

Q Among others, was the ground here mentioned looked at?

A It was.

40 Q When was that, Mr. Gay?

A I think this ground was looked at probably within about two weeks after our appointment.

Q Did you go and look at it?

A I did.

Q Who went with you?

A The entire committee went with me.

Q What other site did you look at?

A We looked at a great many other sites, but there was one site in particular that we all agreed upon in preference to this site.

10

Q This one you all agreed upon?

A No, in preference to this site.

Q In preference to this site?

A Yes, sir.

Q Where was that?

A That was located on Roseville avenue, where the golf links are—a plot of about fourteen acres.

Q Was any site agreed upon subsequently?

A We agreed upon the Roseville avenue site as the first choice of the committee, and on the site in question as the second choice of the committee.

20

Q Do you know whether an architect was employed to draw up plans?

A I know we instructed the chairman of the committee to employ an architect.

Q Eh?

A We instructed the chairman of the committee to engage an architect.

Q Do you know whether it was done?

A I do.

30

Q Who was selected?

A J. C. & W. H. Ely, I believe.

Q You knew that the plans were prepared, then, for one of the sites, don't you?

A I know that the plans were presented to the committee for the site which was decided upon—this site.

Q When was that decided upon?

A Well, I can't tell exactly; it was some time in July, I think.

Q Where was that decision reached?

40

A The decision was reached in the office of Dr. Herold.

Q At that time the ground had not been procured?

A It had not been procured.

Q How did you propose to procure it?

A We were to select the site; I believe the Common Council was to make the final—

Q What?

10 A The Common Council were to procure the ground and we were to select the site and obtain plans for the same.

Q And you were to leave the Common Council to select the site or to agree to it?

A Not to select the site; to agree to it.

Q Who was to arrange for the purchase of it temporarily, provisionally?

A I think the committee was.

Q Well, who on behalf of the committee?

20 A Well, we all had a voice in it.

Q Did you see the owner of the tract?

A We did not.

Q How did you approach him?

A We did not—at least, we instructed the president of the committee—the chairman of the committee—to see the owner.

Q Well, how?

A Beg pardon?

Q You instructed the chairman of your committee to do what?

30 A To try and obtain a better price than that which was named and secure an option on this ground.

Q "A better price than that which was named." What price was named?

A The price named to the committee was \$17,500.

Q When was that named?

A Well, when we examined the properties, from time to time, it was stated about what such and such a piece of property would cost.

Q Stated by whom?

40 A Whichever one of the committee presented the

property. The property was presented by different members of the committee.

Q Well, when did you first arrive at \$17,500 as a price?

A We did not arrive at it as a price; we were told that was the price that was asked for the property.

Q Told by whom?

A Told by whichever member of the committee was aware of it. In this case Dr. Herold, I think, stated the price of that piece of property. 10

Q How did he say he got the price?

A I don't know that he said how he got the price of that particular piece of property.

Q Well, did you make any effort to find out what the owner of the property desired to be paid for it?

A No effort beyond that.

Q Eh?

A No other effort.

Q Well, now, did you understand, as a member of that committee, when you determined upon the location, 20 upon this site, that the owner wanted \$17,500 for it?

Objected to.

The Court. You are asking now for the witness's understanding.

Q Well, were you told so?

Mr. Hardin. This witness is not under cross examination, either.

The Court. I did not observe that it was a cross examination. 30

Mr. Hardin. I haven't any objection, except to the conclusions of the witness.

A In fact, in no case, or hardly any case, was the owner of the property mentioned, and we were simply out to find a site for a hospital, and the price which was attached to the various pieces of ground was mentioned as we looked them over. The question of ownership didn't enter into it. 40

Q How did you get at the price?

A Simply from the fact that we had on our list certain pieces of property with the prices attached.

Q Did you find out who had ascertained these prices?

The Court. Well, hasn't he testified that in each case it was the member of the board who brought the property to the attention of the board who named the price, and in this particular case it was Dr. Herold who named the price? I so understood him.

Witness. That is my statement; yes, sir.

Q When was that, Mr. Gay?

A I don't understand the question.

Q Eh?

A When was it in regard to this piece of property?

Q Yes, Was it before you had the plans prepared?

A Oh, yes.

Q Long before. Did you know whether the doctor used any other person or any agent?

A I don't know, except the statement of the doctor that he had been endeavoring in every way possible to obtain sites and prices of any eligible place.

Q Did he tell you from whom?

A One person he told us was Mr. Breidenbach.

Q Anybody else?

A I don't remember, but—

Q Did he tell about Mr. Brown?

A Mr. Brown's name was never mentioned to me or any of the committee that I knew of; I never heard of Mr. Brown having any connection with the transaction.

Q You didn't know about that, eh?

A I never heard of it.

Q When did you first hear Mr. Brown's name mentioned in connection with it?

A I never heard Mr. Brown's name mentioned in connection with it until after the matter became public.

Q Who drew your attention to this property first?

A I think Dr. Herold called attention to it first. I wish to say, though, that it was not the first time that we went out looking for property that we looked at this.

Q No, but I mean this particular property.

A Dr. Herold.

Q You saw subsequently that Mr. Brown had offered this property to the city?

A It was after that; yes, sir; subsequent to that.

Q Did you get any explanation of that from Dr. Herold?

A None whatever.

Q Did you ask for any?

A I heard about the option when it became public. 10

Q Did you have any explanation of how the option had been taken by Mr. Brown?

A Yes, I heard that.

Q Eh?

A I did.

Q From Dr. Herold?

A From Dr. Herold.

Q What did he say about it?

Mr. Hardin. Is this competent? 20

The Court. I don't see how it is competent at present, Mr. Coult.

Mr. Hardin. If the court thinks it is even remotely so, I will withdraw the objection to it.

The Court. You will have to connect it with Mr. Brown.

Mr. Coult. I think the court will give me a little latitude in this class of cases.

The Court. Does that mean that you think you can connect it with Mr. Brown or you merely hope to? 30

Mr. Coult. Well, I can see the way through.

The Court. Well, I think I will hold that evidence until you connect it in some way with Mr. Brown. It is conversation with a third party.

Q Did Dr. Herold mention the name of Mr. Brown to you subsequently as the agent employed?

A He did.

Q When was that, Mr. Gay? 40

A As I say, Dr. Herold never mentioned Mr. Brown's name until the matter became public.

Q Then you had a talk with him about it?

A Yes, sir.

Q Well, now, state what was said, what you said and what he said.

Mr. Hardin. Well, Dr. Herold is here.

(After discussion, the question is withdrawn).

10 Q Did you have a conversation with Dr. Herold after you learned that Brown held the option?

A I had a good many conversations.

Q Did you know when you went to look at this ground that it could be purchased?

A We did in regard to all the property we went to look at; we knew it could be purchased.

Q You knew it could be purchased?

A Yes, sir.

Q How did you know it?

20 A I knew it from the fact that the chairman of the committee, or whichever member called our attention to this property, stated it could be purchased.

Q And how in regard to this particular piece did you know it?

A By Dr. Herold stating that this property could be purchased.

Q And the price?

A And the price.

Q Did you know whether there was an option given?

30 A At the time the property was offered?

Q Yes, or subsequently. Did you know at the time that you were locating the hospital there that it was held under an option?

A We did not.

Q Did you know that subsequently?

A Not at the time we decided upon it.

Q Well, subsequently did you learn it?

A About the time it became public.

Q Not until the time it became public?

40 A Not until the time it became public.

Q About what time was that?

A Well, I should think it must have been in the latter part of August or the early part of September; I can't place the date of it.

Q That was long after you had had plans prepared for this ground?

A No, it must have been about the time we had plans prepared, because then it became public when we had plans prepared.

Q Well, you had given the order long before that for the plans, you said some time in July? 10

A Yes, he was given orders before the plans were made public, I think.

Q Well, you understood when you had given orders for the plans that you could use the property, that you had some—

A We understood when we looked at it that we could use the property.

Q On the payment of \$17,500?

A It was stated that that was the price asked; whether we could get it for less or not, we didn't know. 20

Cross examination by Mr. Hardin.

Q Mr. Gay, Mr. Coult asked you whether you were subsequently told, if I recall the question, that Dr. Herold had employed Mr. Brown as agent for the purchase of this property. Did you understand that question when it was asked?

A That we had employed? 30

Q Yes.

A No, sir; I didn't understand that question.

Q (By Mr. Coult.) What do you say?

A That we had employed Mr. Brown as agent?

The Court. I don't think that was the question.

Mr. Hardin. That was the question.

Witness. I didn't understand that question.

Mr. Hardin. I didn't think the witness understood it.

The Court. I didn't understand him to so testify, 40

but you may have the stenographer look back, if you desire.

Q (By Mr. Hardin.) Did you mean to say that you were ever told from any source that Mr. Brown was employed by the Board of Health as agent to purchase this property?

A No, sir; never, never, no. I don't think Mr. Coult asked me that.

10 Q Mr. Gay, it is true, is it not, that the Board of Health had been working on the matter for more than a year prior to the time we have named on the building and location of an isolation hospital?

A That is true; yes, sir.

Q And do you recollect the fact that an act was passed by the legislature at the session of 1900 under which you were working to secure an appropriation from the council?

A Yes, sir.

20 Q And this committee that you mentioned and a former committee of your board had been working under that law?

A Yes.

Q For more than a year prior to that time?

A Yes, sir.

Re-direct examination by Mr. Coult.

Q There came a time when you learned that Mr. Brown had something to do with this thing, didn't you?

30 A There did.

Q You say that was not until it became public?

A No, sir.

Q Then did you talk with other members of the committee about that and with Dr. Herold?

A Certainly.

Q I believe the court interrupted me when I was asking what was said.

Objected to.

40 *The Court.* I think I must exclude that for the present, what Dr. Herold said.

HERBERT BOGGS, sworn in behalf of defendants.

Direct examination by Mr. Coult.

Q Mr. Boggs, you are a counselor-at-law?

A Yes, sir.

Q And were in the employ of the city as City Attorney?

A Yes, sir.

Q In 1901?

A Yes, sir.

10

Q And for some time before that?

A From April, 1900; I forget the exact date.

Q Had you charge of the examination of titles when property was purchased by the city?

A Yes, sir; I examined the titles and approved them, and then, of course, they were finally approved by the City Counsel as well.

Q Was your attention called as City Attorney to the fact that there was an effort made to purchase this particular property for an isolation hospital?

20

A I think I first heard of it after the passage of the resolution by the Common Council to purchase the property, whenever that date was.

Q And that resolution directs that you should pass upon the title?

A The law department, I presume.

Q The law department. Did you know that there was an outstanding right of dower in that property?

Objected to as immaterial.

30

The Court. His knowledge of it, I think, is quite immaterial. It is proved that there was an inchoate right of dower.

Mr. Coult. I propose to go a step further, and show that he objected to the title on that ground.

The Court. Well, you may show that he objected to the title. I will allow that.

Q Was anything said about that by you, about the title to that property?

40

A. Only to Mr. Brown. I never examined the title; that is, I never had a search submitted to me or examined any search on the property. No search was made by the city that I know of.

Q What did you tell him about it?

Mr. Hardin. I object to conversations with Mr. Brown.

10 *The Court.* Mr. Brown is the plaintiff in the suit. After discussion:

The Court. The conclusion I have reached upon the question is that the inchoate right of dower is a very material matter, and under the circumstances, as thus far developed, it brings this case clearly within *Gerbert v. Trustees*. I cannot see, however, how any conversation or statements of Mr. Boggs with Mr. Brown can have any bearing upon it.

20 *Mr. Coult.* I will ask him, then, in another way, and I don't know that the question is competent, but I think it is.

Q I will ask him whether he would pass that title without the—

The Court. I held in your favor that the resolution did not constitute a contract. It seems to me quite unnecessary to show non-compliance with the conditions.

(Question withdrawn).

30

WILLIAM S. DISBROW, sworn in behalf of defendants.

Direct examination by Mr. Coult.

Q Doctor, you are also a member of the Board of Health?

A Yes, sir.

Q And were on this special committee?

40 A Yes, sir.

Q And you went and looked at this particular piece of property?

A Yes, sir.

Q When did you first look at it, Doctor?

A I don't know, Mr. Coult. It was the only meeting or only visit that I attended while on that committee, and I regret very much attending that one. We went to visit this property, or three properties, at Belleville and on the Second river and Roseville, and we were all of the opinion that this was the piece of property that we thought would be the second choice; the first choice was Roseville, and, really, that is about all I do know about it. 10

Q Did you learn at that time that these properties could be purchased?

A I was told so, yes.

Q And the prices named?

A No, I don't remember any price at all, Mr. Coult; in fact, I thought that laid with the Common Council entirely; I didn't think we had anything to do with the price. 20

Q Did you learn how or in what way they could be purchased?

A No, sir; I did not.

Q You were with the party that went up there with Mr. Gay?

A Yes, sir.

Q How did you know that it could be purchased?

A Well, only by inference; I supposed that these properties could be purchased if they were selected.

Q Eh? 30

A I supposed they could be purchased only by inference; I knew nothing about it; and from the fact that they were presented as available sites, I supposed they could be, but I knew nothing about the prices, and we necessarily had to keep it very quiet, and I left it very much to the other members; I knew nothing about property; I told them I knew nothing more about the price of lots than I knew about legal matters, probably. I must confess that I was not much of a member of that committee.

Q You didn't know much and didn't learn much? 40

A No, sir.

Q And didn't attend much?

A No, sir. And when the papers came out about it, that is where I got all my information. I never knew anything about Mr. Brown in connection with it, or any of the rest of it.

Cross examination waived.

10

HERMAN C. H. HEROLD, recalled in behalf of defendants.

Direct examination by Mr. Coult.

Q Dr. Herold, do you recollect the visit of the committee to this site up at Sylvan avenue?

A Yes, sir.

Q In July?

A I couldn't tell you the date; it must have been in
20 July.

Q The time that Mr. Gay speaks about?

A Yes, sir.

Q Did you tell at that time the price of that property?

A No, sir.

Q Mr. Gay says you did?

A No, sir; that was after that.

Q Did you know the price at that time?

A No, sir; I didn't know who owned it or who held
an option or anything else.

30 Q How did you decide on that site at that time?

A We didn't decide at that time; that was decided later at a meeting at the post office, held in my office.

Q You decided before you had the plans arranged for, didn't you?

A Beg pardon.

Q Before you had the plans prepared you made a decision as to the lot?

A Yes, I think we did.

Q Then, before the plans were prepared you knew the
40 price?

A Well, we knew the price; yes, sir; or knew the prices—

Q What was the price, Doctor?

A \$17,500.

Q And that was before the plans were prepared?

A That was before the plans were prepared.

Q From whom did you get that?

A From Mr. Brown.

Q Who saw Brown?

10

A I did.

Q Any other member of the committee?

A No, sir.

Q You alone?

A Yes, sir.

Q Did you ever tell any member of the committee that Brown was acting as agent for the committee?

A No, sir.

Q Or for the city?

A No, sir.

20

Q Did you have a talk with Commissioner Gay after the publication of that fact?

A That he was agent?

Q Yes. Did you have a talk with him about Brown's—

A About the option that Brown had; yes, sir.

Q After that?

A After the publication of the facts.

Q Did you not in that conversation tell him that Brown was acting as agent for the city?

30

A No, sir; at no time.

Q How did you come to look at this property?

A Well, in the manner that we looked at all other property.

Q What directed your attention to this property?

A Nothing in particular, only driving by it; that was all; I drove by there one Sunday afternoon in looking up another piece of property.

Q How did you know it was for sale?

A I didn't know that it was for sale.

40

Q Then, did you decide on it before you knew it was for sale?

A No, sir.

Q Then who did you talk with about seeing about whether it was for sale?

A Who did I talk to?

Q How did you subsequently—

A Well, I found out after I had seen the property and after the members had seen the property the first time; I
10 found out that the property was held—an option on that property was held by Mr. Brown.

Q How did you find that out?

A I ascertained that fact through the gentleman that I employed to look after the prices of these properties that I was looking at.

Q Who was that man?

A Mr. Breidenbach, in my office, the revenue office. That was done so as not to have me connected with it.

Q I understood you to say that when you went to look
20 at it you knew you could get it?

A No, sir.

Q You didn't say so a little while ago?

A No, sir.

Q Didn't you tell the committee when you went up there that you could get it?

A Not on our first visit there; that was done in the office later. We were looking at other sites the day we went out and saw this particular piece of property.

Q I understood Mr. Gay to say (I want to see
30 whether he is correct about it) that there were two sites particularly considered available?

A Yes, sir; that was at the end.

Q And this was the second choice?

A Yes, sir.

Q And that they finally went and looked at this, and you informed them that it could be purchased; is that true?

A No, not then; that was said in my office, that that could be procured.

40 Q Subsequently in your office?

A Yes, sir.

Q And you didn't know when the committee was up there that you could get it?

A No, sir; not when we were there; we didn't know that the sites could be procured, any of them.

Cross examination by Mr. Hardin.

Q When did you first see Brown about this property, Doctor? 10

A The early part of August.

Q Did you get a price from him at that time?

A Well, he showed me his option with the exception of the price on the option, and he told me that he had an option for someone else, but he was afraid the party would not use it because he couldn't get the other piece of property lying between that and the railroad; and he then gave me the privilege of the second option, but didn't tell me that I could get it then.

Q When did you learn definitely that you could have the property? 20

A I think that was the second visit that I had from Mr. Brown at the revenue office. That was some time in the latter end—I have no particular knowledge about the time, but it was either early in September or the latter end of August; I can't say exactly. And he came to the office and asked me then whether I would like to have the continuance of that—whether I was going to have anything to do with that piece of property, and I told him I couldn't say; it wasn't settled then, and he said— 30

Mr. Coult. You cannot tell what he said, Doctor.

The Court. No, that ought to be excluded.

Q Did you either at the first meeting, in August or in September or at any other time, authorize or employ Mr. Brown as agent—

A No, sir; at no time.

Q —for the Board of Health or yourself for the acquisition of this property?

A No, sir. 40

Q You were treating with him as a seller of property?
 Objected to.

The Court. Well, I think that is inadmissible. Of course, as I said, Mr. Coult, the inquiry is not as to any fraud between Mr. Brown and the city. The allegation of fraud, if it is to be sustained, of course, it must be predicated upon knowledge of Mr. Brown prior to the date of the option.

10

Re-direct examination by Mr. Coult.

Q Now, Doctor, if you didn't know that you could get this property and if you didn't know that Brown held an option on it, why did you direct the architects to prepare plans with reference to that ground?

A I can explain that, if you wish.

Q Yes, I would like it.

20

A We were at that time hurried to get plans ready for an isolation hospital; smallpox was on us, and it was necessary to make preparations for it; and just as soon as Mr. Brown gave me the information, the first visit he made to me, that the chances were that the man for whom he held the option wouldn't take it because he couldn't get the other property, I had the privilege of that option after he had seen that person; and I asked Mr. John Ely, who interviewed me frequently at the office with relation to the construction of the plans, I asked him to hurry on with the plans.

30

Mr. Coult. Never mind the conversation with Mr. Ely.

The Court. What was the question?

Q I understood you to say that you didn't learn about Brown's option until the latter part of August or the first part of September, then I asked you how it came, if you didn't know that there was an option on the property, even, in the hands of Brown, that the Board of Health had plans prepared suitable for this ground early in August if not in July.

40

A I explained that, Mr. Coult.

Q Well, I didn't follow your explanation.

A At the first meeting I had with Mr. Brown he told me that the chances were that the party wouldn't take that property.

Q When was that? You don't give dates.

A The first week in August, early in August; as nearly as I can tell you, the first visit I had from Mr. Brown was early in August.

Q Then you knew he had an option then? 10

A Certainly, that is the only time I knew he had it, the only time I knew anything about it.

Q Weren't these plans ordered in July?

A No, sir; those plans were not ordered prior to my interview with Mr. Brown.

Q (*By the Court.*) That is, you mean the final drawings?

A The final— Well, I never knew about the final drawings, the plans for this particular piece of property; I never, in fact, ordered it. Mr. Ely was the architect, and he had had frequent consultations with me, almost every few days. 20

Q (*By Mr. Coult.*) Did the board take any action as to employing Mr. Ely, too?

A Yes, sir.

Q When was that?

A Early, when that committee was formed; it was formed in May, and there had been a committee existent for a year prior to that.

30

MATTHEW T. GAY, recalled in behalf of defendants.

Direct examination by Mr. Coult.

Mr. Coult. I propose to ask this witness now, having called the Doctor's attention to it, whether Dr. Herold gave him any information about the employment of Mr. Brown subsequently.

Mr. Hardin. You already asked him, and he ex- 40

plicitly stated that he never had any such information.

Mr. Coult. I mean subsequently, when it came out.

Mr. Hardin. Is this for the purpose of contradicting Dr. Herold?

Mr. Coult. Well, possibly.

The Court. Do you think I can allow you to do that?

10

Mr. Coult. I think so, under the circumstances of this case.

After further discussion, the question was excluded.

HARRISON VAN DUYNE, sworn in behalf of defendants.

20 *Direct examination by Mr. Coult.*

Q Mr. Van Duyne, what is your occupation?

A Surveying and dealing in real estate.

Q How long have you been engaged in the sale and disposition of real estate in the city?

A Thirty-odd years.

Q You live in Summer avenue?

A I do.

Q And you are acquainted with real estate in Woodside?

30

A I am.

Q Do you know the location and situation of this property that was owned by Mr. Honiss?

A I do.

Q Describe that property to the jury, Mr. Van Duyne; tell them what you know about it.

A The property extends from Mt. Prospect avenue to Summer avenue and from Sylvan avenue to the Second river; it is a very irregular shaped piece of ground so far as its topography is concerned; the difference in elevation, 40 perhaps, from the lower part to the upper part is thirty-

four or thirty-five feet. Mt. Prospect avenue and Summer avenue are each graded and curbed; Mt. Prospect avenue is flagged; I don't think Summer avenue is. Sylvan avenue, while it is opened, is in its natural state of rough, irregular ground, not improved at all. The property further, after you cross the railroad and get to Verona avenue, from there to the Second river the property drops down very rapidly, and also the grades of the streets, both of Summer avenue and Mt. Prospect avenue, run down quite rapidly, so that the property is of a different character when you go north of the railroad entirely from what it is south of the railroad, running on down through Woodside, and is a poorer class of property. 10

Q Do you know whether there is a trunk sewer running through that property in the rear?

A Along the—

Q River.

A Along the river, the outlet sewer of the Montclair and—

Q The Orange outlet? 20

A The Orange outlet sewer runs just skirting the property along the Second river.

Q What was the value of that property, in your opinion, in October, 1901?

A Why, the price—between \$10,000 and \$12,000, in my judgment, is the outside possible value of that property at that time.

Q Have you watched the changing value of real estate in that locality by reason of the improvements made in the vicinity? 30

A I have, and have had charge of most of the improvements that were made there.

Q You had charge of them?

A I had charge of all the Tiffany changes and the general improvements in Woodside.

Q When you speak of the value, do you take into account any additional value it might have by reason of the improvements made by Tiffany there?

A I do, taking into consideration its actual value at that time, and judging partly from the sales with which 40

I was familiar around there of all the properties that were bought by Tiffany.

Q Did you assist in making purchases there?

A I was consulted with reference to the purchases there, but I don't remember whether I actually as an agent sold part of it or not.

Q Had there been any sales of lots in that vicinity within any recent period that you know about?

10 A Why, more desirable lots on Mt. Prospect avenue south of the railroad.

Q Would they afford any criterion for value here?

A Only as comparing the two properties and knowing that these were worth less.

Q What is the relative difference in value between the properties, say, as far down on Mt. Prospect avenue as Sylvan avenue and lots on this property?

The Court. You mean between lots south of Sylvan avenue and this property?

20 *Mr. Coult.* Yes.

The Court. South of the railroad?

Mr. Coult. That is south of the railroad, and Sylvan avenue is one or two blocks down—I mean Verona avenue.

A South of Verona avenue?

Q Yes.

A There are lots—to my knowledge, there have been lots sold from \$500 to \$600, and there are others still that
30 can be bought for about those prices.

Q Now, those as compared with lots on this tract; are there any on this tract as valuable or desirable?

A No, not in my judgment.

Q What would be the difference in value?

A Well, the lots as lots on this tract are peculiarly hard lots to sell. Of course, if the property—if somebody wanted a tract of that size, for instance, for manufacturing purposes, if they could get a switch there, then it would be valuable as a manufacturing site; but it doesn't
40 adjoin the railroad; there is the street and other property

in between; and in that way it differs from the whole Tiffany tract. They ran from Mt. Prospect avenue around to the railroad, and had all the benefit of railroad facilities.

Q Is there a sewer basin located near there?

A You mean the large receptacle that the sewage goes in?

Q Yes.

A That is east of Summer avenue.

Q East of Summer avenue?

A Yes, sir; on the other side of Summer avenue from this property. 10

Cross-examination by Mr. Hardin.

Q Do you recall any specific sales in the neighborhood of this property?

A On Mt. Prospect avenue?

Q Yes.

A Yes. 20

Q How close by?

A Well, both on the corner of Verona avenue, and different lots a little further south, between that and Grafton avenue.

Q Verona avenue being the first street south of the railroad?

A Yes.

Q How recently?

A Well, I think it is between two and three years.

Q About in October, 1901? 30

A Well, I wouldn't say the month, but I recall surveying a piece of property that had just been bought, and while I haven't looked, I am satisfied it isn't over two or three years ago.

Q I show you the city map used by one of the other witnesses (shown to witness). You know this; this is a sheet from the city atlas in general use in the city here?

A I recognize it as a sheet from the city atlas.

Q I call your attention to the fact that along the block 841, which is this Honiss tract, that the Orange 40

sewer runs the greater part of the distance off the tract?

A I supposed it was entirely off the tract.

Mr. Coult. No, it is not; it is on both ends, I think.

Witness. I didn't know; my attention hasn't been called to that. I knew that it skirted, as near as possible, the foot of the bluff.

10 Q You think that is about correctly indicated, the line of the Orange sewer?

A So far as these maps are concerned, this sketching might not be true. I don't think, for instance, between the line of the Orange sewer and the bluff, there was a stretch of pondage land of that kind. Of course, that is an impression, too. I have been along there and surveyed there.

20 Q And in giving your figures, the difference of thirty-five feet between the Sylvan avenue grade and the grade in the rear, you have gone from the street level down to the bottom of the bluff, haven't you?

A Not quite to the bottom of the bluff.

Q Down to the bank of Second river?

A Pretty close to it.

Q And that bluff is quite acute in the rear; it is not a gradual slope?

A It is not a gradual slope from the stream to Sylvan avenue.

Q It is a sharp bank?

30 A It runs up quite sharp, and has an exceedingly irregular surface.

Q How high is that bank?

A Perhaps twenty feet of the bank; it runs up 40 or 50.

Q Twenty feet in 40 or 50 feet?

A Yes, sir; and then it humps and hollows.

Q But it could be easily graded to a general level, couldn't it?

40 A It could be graded, not to a level, but it could be graded to a slope, of course.

Q Is there a stone wall along that property, along the river?

A Well, unless in some sections along this sewer; a sort of a riprap wall was put up as a support; I don't recall. I didn't this time go down there; there was snow on the ground, and I didn't just go down to look to see if there was a stone wall there.

Q How recently have you been there?

A I have been there within a couple of weeks and I have been there dozens of times every year. 10

Q You are not prepared to say that there isn't a stone wall along the rear of this property sustaining this bank?

A I am not prepared to say.

Q And practically lifting the rear of the lot above the altitude you have referred to?

A No, if there is a wall there I don't believe it changes my figures over five feet at the most.

Q You do not think this block amounts to very much considered from the standpoint of lots?

A I recognize it as it is. The lots are undesirable and the street is not improved that the lots mainly front upon. 20

Q You are valuing this, then, without reference to lot frontage, so to speak?

A I am taking the fact, the number of feet of lot frontage and the size of the block into consideration.

Q If you had this property divided into lots and valued it by lots, would your conclusion be any different?

A It would not, because I look at it and consider it with the possibility of lots that it would make. 30

Q You sometimes value a tract comprising blocks, as in this case, on other principles than as a whole, do you not?

A Yes, although I generally state the difference between a possible sale of a single lot and the sale of a plot, and have frequently stated that as between twenty-five and thirty-three per cent; that is, the value of a whole lot as a tract compared with a possible sale of a lot, and so continuing, a lot and a lot, and getting the money out of it. 40

Q (*By the Court*). The difference between whole-sale and retail?

A Yes, sir. In undeveloped property of this kind it is very moderate to say that the difference is between twenty-five and thirty-three per cent.

Q (*By Mr. Hardin*). So that if this property were sold in lots and not as a whole, your price would be increased twenty-five to thirty-three per cent.?

10 A I believe in selling it off in lots, I don't think you could realize in the next five years \$12,500 out of this property.

Q I notice that this map Exhibit P. 1 was made by you? (Map shown to witness). It seems to me that is your sign manual?

A Yes, sir; in 1893.

Q I notice on that survey that you divided this property up into lots?

A Undoubtedly. We divide any city property into lots when we make a survey of it.

20 Q (*By Mr. Coult*). It looks very well on paper, too, doesn't it?

A It looks much smoother on paper than it does on the ground.

Q (*By Mr. Hardin*). How many lots does your survey show there?

A Thirty-one fronting on the street and two rear plots.

30 *Re-direct examination by Mr. Coult.*

Q You must have made this map for somebody, didn't you?

A Yes, sir.

Q You made it for John Honiss?

A Yes, sir. I had forgotton.

Q What did Mr. Honiss want of a map?

A He undoubtedly wanted a map to show—

Q The possibility of sale?

40 A Yes, sir; the relation of his property to the city streets.

Q It is all there yet?

A Yes, sir.

Q When did you make this map?

A In 1893.

Q There are no buildings on it and no lots sold?

A There are no buildings on it, no.

Re-cross examination by Mr. Hardin.

Q You were somewhat concerned in the agitation against the isolation hospital, weren't you? 10

A I happened to be out of town while most of that agitation was going on.

Q You don't answer the question.

A I was out of town, but I don't doubt if I was in town I would have been opposed, as I have been opposed, to placing a permanent isolation hospital anywhere. I believe in a temporary structure that can be disposed of when the contagion is over.

Q Did you make any speeches on this subject at any of the meetings? 20

A I don't believe I did; I happened to be out of town.

Q Well, did you?

A I don't recall, really, now.

Q You expressed yourself quite freely on the subject, though?

A I haven't any doubt I did.

Q Were you interviewed in the newspapers at all that you recall? ,

A I don't recall it; but I had undoubtedly the same views then that I have now in reference to it. 30

Q You are glad it didn't go there?

A Yes, sir; I am glad it didn't; I think it would have been a misfortune.

At one o'clock, P. M., the court took a recess of one hour.

AFTER RECESS.

CHARLES GEIS, sworn in behalf of defendants.

Direct examination by Mr. Coult.

Q Mr. Geis, you reside in Newark?

A Yes, sir.

10 Q Whereabouts?

A I reside at 48 Irving street, sir.

Q That is in the Woodside district?

A Yes, sir.

Q How long have you resided there?

A I have resided in that immediate neighborhood for over seventeen years.

Q What is your occupation?

20 A My occupation is a salesman, primarily, selling shoes, but I also keep my spare time busy in handling and selling and occasionally—handling and selling real estate and occasionally erecting a house, although that is not my business; I don't call it my business.

Q How long have you been in the branch of selling and buying real estate?

A Ever since I have lived here, sir.

Q And quite extensively?

A Well, I can't say. Well, I don't follow it, you understand, as a business, but I am constantly buying and selling, as my means allow me.

30 Q Did you in that way become acquainted with the values of real estate in that vicinity?

A Yes, sir.

Q Do you own property in the same vicinity?

A I do, within about a half a block.

Q Of the property that is in question here?

A Yes, sir.

Q You know that property?

A Yes, sir.

Q Owned by Mr. Honiss and Mrs. Ranney?

40 A Yes, sir.

Q What, in your opinion—

Mr. Hardin. I object to the qualification of this expert.

The Court. Do you desire to cross examine him?

Mr. Hardin. Yes, sir.

Cross examination by Mr. Hardin.

Q How much property do you own in the neighborhood? 10

A I don't know how much, but I have owned—

Q Well, how many pieces?

A To-day?

Q Yes.

A I now own three pieces and am directly interested in a number of others.

Q Where are they located?

A One is located where I live, another one at Forest Hill, and a third one, not exactly adjoining this property, but just across. 20

Q How long have you owned the property where you live?

A I have lived in that house since 1890, although I owned it previous, before the house was built.

Q How long have you owned the Forest Hill property that you refer to?

A I think about five years.

Q How long have you owned the third property?

A Since 1898, sir. 30

Q And you have no acquaintance with real estate values except from your personal dealings?

A Well, I don't know as I can say that, because I have watched very carefully the transactions in our neighborhood.

Q That is, you watch the newspaper reports of them?

A Yes, sir; and also—

Q And also what gossip you hear?

A And I am also conversant with men who deal in real estate. Since I have been there, probably not less 40

than twenty-five pieces of property have passed through my hands in that neighborhood.

Q The last piece of property that you acquired there you bought in 1898?

Mr. Coult. He didn't say that; he spoke as to the three he mentioned.

A I have acquired in 1901 property on Summer avenue.

10 Q Whereabouts on Summer avenue?

A Just below Irving street.

Q Do you own it?

A I sold it; the title passed this week. I also have passed title to a piece of property on Verona avenue.

Q Belonging to yourself?

A Yes, sir.

Q When was that?

A This year. I have passed title to a piece of property in Lincoln avenue and one or two in Winthrop street.

20 Q But you do not acquire any acquaintance with real estate values in your neighborhood in connection with the business of real estate agent?

A I don't claim to be a real estate agent.

Q Your knowledge is acquired from your own dealings and from your neighbors and friends?

A My own dealings and what I know has been going on.

Q Not what you learn in the management of real estate transactions for other people?

30 A No, not what I know of other people's; chiefly my own.

The Court. I think the witness has sufficient experience to qualify him.

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

Exception allowed; let it be sealed and it is sealed accordingly.

FRANCIS J. SWAYZE, (L. S.)
Judge of the Circuit Court.

Re-direct examination by Mr. Coult.

Q What, in your judgment, is this piece of land worth, or was it worth in October, 1901?

A I don't know the exact size of it. If you can give me the exact size, perhaps I can form a better opinion of it.

Q I will give you a diagram of it. Here is Sylvan avenue, Summer avenue and Mt. Prospect avenue and the river (indicating on Exhibit P. 1).

A I see according to this map it is measured out so as to represent, I believe, about thirty-one, possibly thirty-two lots. 10

Q A little louder, Mr. Geis.

A I say it is laid out to represent thirty-one or possibly thirty-two lots with the interior. I should say that in the present condition of the property—it hasn't changed at all, except the sewer, in the past two or three years; I should place the values to-day the same as they were in 1901; in fact, values haven't materially changed there. Sylvan avenue itself—I have been over it within a week; it reminds me more of a country road; while it is legally opened, it has never been graded; and it is probably a rough piece of property; it slopes down towards the rear, so that I should judge the rear part of it couldn't be utilized without considerable of expenditure, if the whole thing was utilized, probably a stone wall or something of that nature. It it could be reached from the railroad by a switch, which I presume it cannot, on account of the objection to crossing an opened avenue, it could be utilized for a manufacturing site, which, in my judgment, it is adapted for. In the absence of getting to it by rail or water, I should say it could be laid out as proposed here, although I didn't know before I came here that a map of this property had ever been made into building lots. I should say those building lots, if the sidewalks were put down, the grading done and curbing, would bring from \$300 to \$400 apiece, if there was a market for them. At present there is no market there, gentlemen; you couldn't sell them at but a very small price; property is not moving and hasn't moved in that neighborhood for many years. 20 30 40

There has been, to my knowledge, but one or two sales made on Sylvan avenue, in that neighborhood, within two or three years, and I don't know as I would call that one sale a criterion, because the property was loaded up with city charges and had to be sold.

Q How much is the property worth without any regard to the uses—any use that it could be put to—sold together, one sale?

10 A Well, my own impression is it would be difficult to find a customer to give more than six or seven thousand dollars for it.

Q What would be its market value as between a purchaser willing to buy, and an owner willing to sell?

A I should place that as a fair value.

Q Do you know anything about that sewer running along there?

A At the front or the rear?

Q In the rear?

20 A I know there is a sewer used jointly by the Orange, Montclair and Bloomfield people; it is the outlet.

Q Does that run through the property?

30 A Well, I think, if this property is mapped to run to to the river, I think it runs on the edge; there is a low stone wall there which I think protects the sewer; I think that is the object of putting that little bit of wall there, to protect it against the encroachments of the river. The ground is very, very low there; I should judge at the rear below Sylvan avenue, I should judge it was not less than 25 feet deep down to the lowest part of this property. It is very irregular and very uneven.

Q Is there near there a basin where this sewer opens out?

A The basin, sir, is on the next block beyond, between what would be—well, Lincoln avenue is not opened through there; it is about midway between Washington avenue and Summer avenue.

Q It is on the next block below?

A Yes, sir.

40 Q Does that affect, in your judgment, at all the price of the property there?

A I don't think it would affect this particular property, that is, as far as that basin is concerned.

Re-cross examination by Mr. Hardin.

Q Do you recall the proposal some year and a half ago to locate the isolation hospital on this tract?

A I recall it after it was made public; before that I knew nothing of it, sir.

Q You first heard of it from the papers? 10

A Yes, sir.

Q Did you join in the agitation against it at that time?

A No, sir.

Q Took no part in it?

A No part whatever.

HENRY RUSSELL, sworn in behalf of defendants. 20

Direct examination by Mr. Coult.

Q Mr. Russell, do you live in Newark?

A In Belleville.

Q In Belleville?

A Yes, sir.

Q What part of Belleville?

A On Washington avenue.

Q How far is that from this property that is in question here? 30

A A mile.

Q What is your business?

A Real estate broker.

Q How long have you been in that business?

A Nine years.

Q Are you acquainted with the value of property in the Woodside district of the city?

A Yes, sir.

Q Deal in it?

A Yes, sir. 40

Q Do you know this property?

A I do.

Q You can look at it there; there is a map showing it. (Shown to witness). You have examined the property and heard the description given of it by the witnesses?

A Yes, sir.

Q Take the last witness and Mr. Van Duyne; did they correctly describe the character of the property?

A Yes, sir, what I could hear.

10

Q Well, you may state what kind of property it is.

A Well, the property runs off quite precipitously from Sylvan avenue down to Second river; there is a descent there of probably at least twenty-five feet, I should think, possibly more, and it is rough ground; Sylvan avenue it not laid out.

Q Just state, looking at the map, about what the depth of that property is in feet from the line on Sylvan avenue on down to the river.

20

A I should judge about 200 feet; at some points it is a little wider; it narrows in.

Q About 200 feet on an average?

A Yes, sir.

Q Go on with your description.

30

A Well, I was about to say that Sylvan avenue is nothing more than a country road; it is not exactly impassable, but you want to be pretty careful how you drive through there. There is no improvement that I know of, excepting the sewer is through there, and on Mr. Prospect avenue it is curbed and flagged, but it is not curbed and flagged on Summer avenue.

Q Now, sir, what, in your opinion, was that property worth between a purchaser willing to buy and a seller willing to sell; what was the fair market value of that property in October, 1901?

A Take it in bulk, I should say \$5,000.

Q Well, could it be disposed of otherwise than in bulk, in your opinion?

A Yes, sir.

Q How long would it take?

40

A That is a conundrum I couldn't answer.

Q Well, is there any sale for lots up there that would give a market within any reasonable time?

A Well, it could be sold only for a very poor class of houses. It is better fitted for a factory site than for any other purpose.

Q Would it bring as much for a factory site as for any other purpose?

A I think if it was laid out into lots, I think it would bring something more than it would in bulk.

Q How much more? 10

A Well, can I refer to figures?

Q Yes.

A I made up a little memorandum of what I thought it was worth. (Referring to paper.) They could cut it up into eight lots on Mt. Prospect avenue, eight on Summer avenue and twelve on Sylvan avenue; that would make thirty-four lots. I should say the lots on Mt. Prospect avenue would be worth \$300; those on Summer avenue \$300; those on Sylvan avenue \$200, amounting to \$7,200; but there would have to be some grading done before they would bring that price. 20

Q There would have to be some improvements made?

A Yes, sir.

Q Before they could be sold?

A Yes, sir.

Q And wouldn't it take a considerable time in any state of the market to sell those lots at that price?

A Well, I think so. Business is very treacherous; a man might sell to-day and then not for a year. 30

Cross examination by Mr. Hardin.

Q What was your business before you were a real estate dealer?

A I was a manager in a factory in Philadelphia for two years.

Q (By Mr. Coult.) Is there any demand, to your knowledge, for residence property there?

A On that spot?

Q Yes. 40

A No, sir.

Q (*By Mr. Hardin.*) What was your business before you were a real estate agent?

A Two years I was a manager of a factory in Philadelphia; prior to that I was in business for myself in New York for twenty-five years.

Q At what time did you come to Belleville?

A Nine years ago.

Q And you immediately embarked in the real estate
10 business there?

A Yes, sir; my office is in Newark.

Q Where is your office?

A 99 Belleville avenue, at the junction with Bloomfield avenue. When I first came to Newark I was on the corner of Washington avenue and Verona.

Q (*By Mr. Coult.*) Your office?

A My office was there, yes, but living in Belleville.

Q (*By Mr. Hardin.*) Have you handled a good
many properties during the last nine years?

20 A Quite a number, sir.

Q Have you handled any property in the immediate vicinity of this tract?

A Yes, sir.

Q How recently?

A Well, I should say about three years, as near as I can remember.

Q Where was that?

A On Sylvan avenue, between Summer and Wash-
ington.

30 Q The next block to this?

A Yes, sir; the next block east.

Q Have you handled any other tract near this one in that time?

A I don't at the present moment recall anything very near to it. I have sold all around there.

Q This tract on Sylvan avenue, the next block, was that a large property?

A No, sir.

Q What was it, a lot 25 by 100?

40 A 50 by, I think, 165.

Q Was there a house on it?

A No, sir.

Q A vacant lot?

A Yes, sir.

Q That is the only real estate transaction you have had in the immediate neighborhood since you have been there?

A I don't recall anything else at present.

Q How far away was your next transaction?

A What do you mean by how far away?

10

Q From this locality. You say you haven't sold any in the immediate locality. I don't want to leave the jury with the impression that you haven't sold any property in the Eighth Ward at all.

A Well, in Forest Hill, on Ridge street.

Q How many properties did you handle during the year 1901?

A I couldn't tell you, sir.

Q How many properties did you sell in that year?

A I couldn't say. I keep no record of it in my head; I put it on a book, and that is the end of it.

20

Q Well, twenty?

A I don't know.

Q Fifteen?

A I don't know.

Q Ten?

A I don't know.

Q Five.

A I don't know.

30

Re-direct examination by Mr. Coult.

Q Was it more than that?

A More than what?

Q More than five?

A Yes, sir.

Q And more than ten?

A In how long a time?

Q One year, I think he stated.

A Well, I wouldn't want to say from memory.

40

- Q Well, that has been your business?
 A For nine years; yes, sir.
 Q And you have been engaged in nothing else?
 A No, sir.

JAMES KEATING, sworn in behalf of defendants.

Direct examination by Mr. Coult.

10

Q Mr. Keating, where do you reside?

A On Clifton avenue, Forest Hill.

Q How far from this property?

A About four or five hundred yards.

Q How long have you lived there?

A I have lived there about five months.

Q Where were you before that?

A On Parker street, near Bloomfield avenue.

Q How long have you lived in that vicinity?

20 A I have had property in that vicinity for this last four years.

Q How long?

A Four years.

Q Four years?

A Yes, sir.

Q What has been your occupation for the last four years?

A I have been a builder and real estate seller for fifteen years.

30 Q Buying and selling?

A Buying and selling; that is, buying vacant land, not houses.

Q And building on it and selling?

A And building and selling; yes, sir.

Q Did you become acquainted with the value of land in that vicinity?

A Yes, sir.

Mr. Hardin. Now, if I understand this witness, he says he has been in this business two years.

40

Mr. Coult. Four years.

Witness. I have had property in that vicinity four years, but I have been in this business for fifteen years.

Q Do you know the value of that tract of land on Sylvan avenue?

A I don't know the value of it, but I know—

Mr. Hardin. If you don't know the value, don't tell it.

10

Q Look at that map and see (map shown to witness). Are you familiar with that property; do you know where the property is?

A Yes, sir.

Q And do you know what its market value is?

Mr. Hardin. He has just told us that he didn't know.

Mr. Coult. No, he hasn't said that.

Witness. No, sir.

20

Q What, in your opinion, is it?

A In my opinion, the lots are worth about a hundred and a quarter; that would be a fair price for it.

Q What is your opinion based upon?

A I based it upon property that I bought in that neighborhood.

Q Whereabouts?

A On Clifton avenue.

Q Where is that with reference to this property?

A That is southeast—southwest of it.

30

Q So far as you know, has there been any sale of lots in this immediate vicinity; I mean to say, on that block or near there?

A I saw them advertised for \$200 on that block.

Cross examination waived.

40

ROBERT KUEBLER, sworn in behalf of defendants.

Direct examination by Mr. Coult.

Q Mr. Kuebler, where do you reside?

A Forest Hill, Newark.

Q What is your occupation?

A Real estate dealer and builder.

Q How long have you been in that business?

10 A In the neighborhood of twelve or fourteen years.

Q Are you familiar with the value of real estate in the vicinity of this property?

A Yes, sir.

Q Do you know this property?

A Yes, sir.

Q Just look at the map and identify it (shown to witness).

A Yes, sir.

20 Q What, in your opinion, was that worth in October, 1901?

A Well, that piece of land as it lays there now, in my opinion, is a piece of property that should be valued by the acre. It is in a pretty rough state; it is irregular, and I don't know as I would want to give a value per lot.

Q Well?

A I should judge that property was worth from \$2,000 to \$2,500 an acre.

Q How many acres are there in it, do you suppose?

A Well, I don't know.

30

The Court. There was testimony that there was about 120,000 square feet.

Mr. Ten Eyck. About three acres.

The Court. There was testimony this morning as to the superficial area.

Witness. From the number of lots, I should judge there was very near, more or less, around three acres.

40 Q Is there or has there been any sale in that vicinity for lots within the last four or five years?

A You mean adjoining that—

Q In that particular locality where that property is;
by lot sale.

A No, sir; not that I am aware of.

Cross examination by Mr. Hardin.

Q Is your valuation \$6,000?

A I put the valuation from \$2000 to \$2,500 per acre.

Q Well, you know about the size of the tract. About 10
\$6,000, would that be? What is your valuation of the
tract?

A As it lies there now?

Q Yes.

A I should say from six to seven thousand dollars.

Q Where is your office?

A 752 DeGraw avenue.

Q That is up in Forest Hill?

A Yes, sir.

20

SAMUEL H. PENNINGTON, JR., recalled in behalf
of defendants.

Direct examination by Mr. Coult.

Q Mr. Pennington, did you have any authority what-
ever, either verbal or written, to accept any tender of a
deed on the part of Mrs. Ranney?

A I did not.

Q Did you ever express any refusal or acceptance of 30
any tender on her part?

A I did not.

Q Something was said about your having spoken as
attorney for Mr. Honiss to Mr. Brown about his refusal
to execute a deed. Was any reason given?

A The reasons had been given previously. On the
occasion when Mr. Hardin and Mr. Brown together made
the tender to me of the \$12,500, nothing was said about
the reasons, I think, excepting I may have said at that
time, as I had said before, that we refused—that Mr. 40

Honiss refused to convey for the purpose of a hospital, an isolation hospital; but whether that, even, was said at that particular time, I couldn't say; but I had frequently expressed to Mr. Brown the reason why they refrained from making a conveyance.

Q Why Mr. Honiss refrained?

10 A Why both of them refrained. Mr. Honiss on the occasion when the tender was made made his absolute refusal, but before that time the parties had refrained from making the conveyance, although they hadn't finally refused.

Q But you stated the reason?

20 A The reason was stated at the first interview with Mr. Brown in the newspapers, after it became public that the property was sought for for the purposes of an isolation hospital. I told Mr. Brown on that occasion that a few years before the parties who gave this option had sold the greater part of the tract which they owned, and of which the land now in question is a small residue—that they had sold the greater part of this tract to Mr. Tiffany; that Mr. Tiffany had paid his money; that he had spent large sums of money in building a factory and in improving otherwise the property, and that the parties did not think it would be honorable for them to convey this property for the purpose of an isolation hospital, and so injure the property which they had sold and received their money for. And, further, Mr. Brown urged upon me the duty and the honorable obligation of fulfilling this option. I told him that we considered our duty to Mr. Tiffany, 30 under the circumstances of the case, as more cogent and more obligatory in morals and in honor than it was to convey this property under the option to him.

Q When you spoke you spoke without any authority other than your own on the part of Mrs. Ranney?

A I spoke in the presence of Mr. Honiss and from what I knew would be Mrs. Ranney's sentiment.

Cross examination waived.

Defendants rest.

40

Plaintiff rests.

The Court. You had my notion this morning, Mr. Hardin, with reference to the effect of this inchoate right of dower. I would be glad to hear you on that.

After discussion :

The Court. I have given the question the best consideration I could over night, and it is entirely novel as far as I know. I found no case that approaches this particular defect in title. Of course, I may be in error in the conclusions to which I have come. 10

It seems to me that I cannot assume that Mr. Honiss would have been able to secure his wife's release; in fact, the law very carefully guards her against any influence on the part of her husband, and it is for that reason that the distinction is made in specific performance cases between inchoate rights of dower and other incumbrances. Now, that being the situation, it seems to me the case is a case of failure of title. It might be that if Mr. Brown had offered to take the property subject to the right of dower, that that would have altered the case; but he tendered himself ready to take the title which I must assume means the complete title in fee simple. I think that it was beyond the power of Mr. Honiss to make that conveyance, and although it is an incumbrance apparently not of much value, it still brings the case within the doctrine of *Gerbert v. Trustees*. 20

Mr. Hardin. I understand that under *Gerbert v. Trustees* good faith must exist.

The Court. I do not understand so. I understand that *Gerbert v. Trustees* distinctly says that even in case of fraud the only remedy is by an action for deceit, and not by an action on the contract 30

After further discussion :

The Court. I may be in error, but I am strong in my own opinion that this is directly within the ruling in *Gerbert v. Trustees*. If that is so, is there any question to go to the jury?

Mr. Coult. None whatever. 40

The Court. What do you say? In that event the measure of damages, whether you treat the contract as rescinded or whether you treat it as subsisting, is twenty-five dollars.

Mr. Coult. That was tendered.

The Court. There is no plea of tender. There is no proof of any expenses on Mr. Brown's part. The result would be a verdict for \$25 with interest. I will put that in any shape you wish.

10 *Mr. Hardin.* I want an exception which will enable me to review it.

The Court. Unless you call my attention to something else—I don't want it to be taken away from the jury on any other point that is not brought to my attention.

Mr. Hardin. That is my understanding: If your honor rules that the existence of this dower right justified the refusal under the evidence—

20 *The Court.* That is the only ground on which I think my ruling can be justified. I think that if it was not for the right of dower, there was a wilful refusal in this case, for which you would be entitled to recover substantial damages, the difference between the market value of the property, as the jury might find it, and the \$12,500. I think the plaintiff in that case has a right to damages for the loss of his bargain and is not limited to nominal damages, as in *Gerbert v. Trustees*; but in this case I hold that the title which the defendants could have conveyed was a defective title subject to the inchoate right of dower of Mrs. Honiss, and that that being so, the damages for the
30 breach of the contract to convey must be limited to the money that was deposited for the option, twenty-five dollars, there being no proof in the case of expenses. I hold further that there was no obligation upon Mr. Honiss to make any effort to secure his wife's signature to the deed. That meets the point that you wish to raise?

Mr. Hardin. Yes, sir.

40 *The Court.* The result is that I direct a verdict for twenty-five dollars with interest from July 9, 1901, until the present date, which is just a year and a half, making \$2.25, and that would be \$27.25.

(To plaintiff's counsel): Now, you had better make such request as you desire in order to raise the question fairly.

Mr. Hardin. I will except to the direction of a verdict, and your honor will allow me that exception?

The Court. Take your exception to my direction of a verdict for that amount. I will treat it as though you had requested me to submit it to the jury as to how much the damages of the plaintiff were, and as if you had requested me to direct them to find the damages as the difference 10
between the market value of the property in October, 1901, and the \$12,500. I decline to grant that request.

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

Exception allowed; let it be sealed and it is sealed accordingly.

FRANCIS J. SWAYZE, (L. S.)
Judge of the Circuit Court. 20

The Court. (To the jury): Gentlemen, in the view I take of this case, there is no disputed question of fact left for you to decide. The law I am responsible for, and if I am wrong I can be corrected hereafter. I direct that you find a verdict in favor of the plaintiff and against the defendants in the sum of twenty-seven dollars and twenty-five cents.

(The jury returns a verdict accordingly.) 30

The Court. If upon reviewing the case you find that the exceptions do not fairly raise the question, I will put them in whatever way will raise it.

Death of plaintiff, William H. Brown, suggested on the record, and qualification of Carlene K. Brown, as executrix of his last will and testament.

New Jersey Court of Errors and Appeals.

10

 WILLIAM H. BROWN,

Plaintiff, Plaintiff in Error,
vs.
JOHN HONISS, *et al.*,

Defendants, Defendants in Error.

 } *On Error to
Essex Circuit
Court.*

ASSIGNMENT OF ERRORS.

20

Afterwards, that is to say, on the eighteenth day of August, nineteen hundred and three, before the Court of Errors and Appeals in the last resort in all causes, comes the said Carlene K. Brown, executrix of the last will and testament of the said William H. Brown, deceased, by Pitney & Hardin, her attorneys, and says that in the record and proceedings aforesaid and also in giving the judgment aforesaid and also in the matters contained and recited in the said bill of exceptions there is

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manifest error in this, to wit:

1. That by the records and proceedings aforesaid it appears that at the trial of said cause, after the plaintiff and defendants had rested, the said judge of the Circuit Court declined to grant the request of the said plaintiff to submit to the jury the question as to how much the damages of the said plaintiff were, and to direct the said jury to find the damages to be the difference between the market value of the property in October, nineteen hundred and one and the sum of twelve thousand five hundred dollars.

40

2. There is also error in this, to wit, for that the said judge before whom, etc., and upon the aforesaid trial of the said issue so joined between the parties as aforesaid, directed a verdict in favor of the plaintiff and against the defendant for the sum of twenty-seven dollars and twenty-five cents.

3. There is also error in this, to wit, for that the said judge before whom, etc., and upon the aforesaid trial of the said issue so joined between the parties as aforesaid, excluded the offer of the said plaintiff to prove that prior to the passage by the Mayor and Common Council of the City of Newark of the resolution (Exhibit P. 5) there was an agreement by parol between the said plaintiff, William H. Brown, and Dr. Herold, president of the Board of Health of the City of Newark, for the said plaintiff to sell to the said City of Newark, the property described in Exhibit P. 2 for the sum of twelve thousand five hundred dollars. 10

Therefore, the said plaintiff in error prays that judgment aforesaid, by reason of the aforesaid errors and other errors appearing in the record of the proceedings aforesaid, may be reversed, annulled and for nothing holden, and that she may be restored to all things lost by occasion of the said judgment. 20

PITNEY & HARDIN,
Attorneys of Plaintiff in Error.

(Common joinder in error filed.)

EXHIBIT P. 2.

THIS IS TO CERTIFY that John Honiss and Anna P. Ranney, owners of the premises hereinafter described, in consideration of the payment of twenty-five dollars, do hereby give and grant to William H. Brown, of 78 Fourth avenue, Newark, N. J., agent, the option to purchase the certain tract of land in said City of Newark, bounded by Mt. Prospect avenue, Sylvan avenue, Summer avenue and
10 Second River, for the sum of twelve thousand five hundred dollars, said option to expire on the first day of November next. Any other person applying to purchase said premises during the continuance of said option shall be referred to said William H. Brown, who agrees on his part to use his best endeavors to effectuate a sale thereof. And the said parties first above named agree on their part to execute all necessary deed or deeds of conveyance upon a sale negotiated in pursuance of the premises unto said William H. Brown or such party or parties as he
20 shall name.

Dated Newark, N. J., July 9th, 1901.

JOHN HONISS,
ANNA P. RANNEY,
Per S. H. Pennington, her Att'y.

EXHIBIT P. 3.

This is to certify that the option to purchase land on Sylvan avenue given to William H. Brown by John Honiss and Anna P. Ranney is extended from the first day of November next to the first day of December next, said option having been given by writing dated Newark, N. J., July 9th, 1901.

Dated Newark, N. J., Sept. 4th, 1901.

JOHN HONISS,
ANNA P. RANNEY,
per S. H. PENNINGTON, her Att'y.

10

EXHIBIT P. 4.

John Honiss and Anna P. Ranney, and S. H. Pennington,
her Att'y.

You are hereby notified that I demand immediate conveyance to me of the tract of land in the City of Newark, County of Essex and State of New Jersey, bounded by Mt. Prospect avenue, Sylvan avenue, Summer avenue and Second River in accordance with the terms of the option given me under date of July 9th, 1901, and I herewith tender you the sum of twelve thousand, five hundred dollars, the price for such conveyance named in said option.

20

Dated October 17, 1901.

WILLIAM H. BROWN.

30

EXHIBIT P. 5.

Resolved, That the sum of seventeen thousand five hundred dollars (\$17,500.00) be and the same is hereby appropriated to William H. Brown, for the purpose of purchasing a plot of land situated between Sylvan avenue and Second river bounded on the west by Mt. Prospect avenue and east by Summer avenue, that amount to be charged to

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the account known as "Special Real Estate and Alms House." Provided, however, that the purchase money shall not be paid until a deed conveying the property purchased shall have been delivered to the auditor, approved by the Law department.

The land to be used for Isolation Hospital purposes.

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J. H. BACHELLER,
JOHN H. SINNOT,
J. B. WOOD,
JOS. S. SUTPHEN,
J. H. DONNELLY,
JOHN BUHL.

Committee on Finance.

Adopted Sep. 12, 1901.

Presented to the Mayor Sep. 12, 1901, for approval.

JAS. F. CONNELLY, *President of Common Council.*
City Clerk.

20

Approved Sept. 13th, 1901.

JAMES M. SEYMOUR,
Mayor.

I HEREBY CERTIFY that the foregoing is a true copy of a resolution passed by Common Council, Sept. 12, 1901, and approved by the Mayor, Sept. 13, 1901.

30

IN TESTIMONY WHEREOF, I have hereunto set my hand, and affixed the seal of the City of Newark, this 27th day of March, A. D., 1902.

JAS. F. CONNELLY,
City Clerk.

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