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New Jersey Court of Errors and Appeals

EMILE LAMS, *Plaintiff-Appellant,* *vs.* HARWOOD EDWARD ODEREY FISH, *Defendant-Respondent.*	*Action at Law.* *On Appeal from Supreme Court.*

Brief of Appellant.

Abstract of the Case.

This action was instituted in the New Jersey Supreme Court by the plaintiff to recover damages for the fraud and deceit of defendant in making certain false representations to plaintiff in connection with the sale by defendant to plaintiff of stock in a Brazilian Diamond Mining Company known as Gem Dredging Company of South Dakota. The representations made by defendant to plaintiff were material and intended to be relied upon; they were false to the knowledge of defendant and plaintiff acted upon them to his damage by purchasing stock of said company.

After plaintiff's evidence was all in, the trial court directed a non-suit on the ground that the falsity of the representations made by defendant to plaintiff had not been shown and that no damage to plaintiff had been proved, and this appeal is prosecuted to review the judgment of non-suit so entered.

GROUNDS OF APPEAL.

1. Because the court ruled, at the end of plaintiff's case, that plaintiff be non-suited and that the evidence did not establish a cause of action for fraud and deceit by the plaintiff against the defendant.

2. Because the court ruled on all the evidence at the end of plaintiff's case that it failed to show damage suffered by plaintiff.

3. Because the following questions were overruled:

a. *By Mr. Heine.* Q Now, Mr. Lams, you have been trying to tell Mr. Codding, or inform Mr. Codding about this subscription on February 27th. Will you just explain to the jury the facts in regard to this seven hundred and fifty dollar subscription which Mr. Codding asked you about, and also the subscription on the 27th of February, when you paid the eighteen hundred dollars, just explain that? (Case, p. 80, l. 10; p. 81, l. 18.)

b. *By Mr. Heine.* Q When you went to Mr. Fish's office on the 27th of February, had you already subscribed to stock of the Gem Dredging Company? (Case, p. 81, l. 22.)

c. *By Mr. Heine.* Q Mr. Lams, on the 27th of February, how many shares of stock of this Gem Dredging Company did you subscribe for? (Case, p. 81, l. 26.)

d. *By Mr. Heine.* Q The amount of four hundred and fifty dollars which you paid prior to the 27th of February, did that amount apply to a subscription of five thousand shares of stock of this company? (Case, p. 81, l. 35.)

e. *By Mr. Heine.* Q What was that check in payment of? (Case, p. 83, l. 30.)

f. *By Mr. Heine.* Q Will you look at the minute book of the Brazilian Dredging Company of New York, if you have it? (Case, p. 101, l. 28.)

g. *By Mr. Heine.* Q Are you familiar with the concession of the Brazilian Dredging Company as it was in your first visit to Brazil in 1909? (Case, p. 129, l. 22.)

h. *By Mr. Heine.* Q Mr. Wilson, what experience have you, on your first trip to Brazil in 1909, to be able to tell from an examination of the property leased to Mr. Fish under plaintiff's Exhibit 1, whether on that property prior to February 27th, 1909, tests for values of diamonds and gold had been carried on or conducted? (Case, p. 129, l. 28; p. 130,)

i. *By Mr. Heine.* Q Please state what was said regarding the affairs of the Gem Dredging Company. (Case, p. 131, l. 2.)

j. *By Mr. Heine.* Q Was it possible for you in July, 1909, on this particular two miles of property referred to in plaintiff's Exhibit 1, to tell from your examination of it whether or not there had been tests to determine values of diamonds and gold on that property made on it prior to February 27th, 1909 (Case, p. 140, l. 30.)

k. *By Mr. Heine.* Q In the regular performance of your duties as first secretary you are accustomed to advise in regard to commercial and incorporation laws of Brazil? (Case, p. 86, l. 3.)

l. *By Mr. Heine.* Q Is there any reference which covers lease that was given by the Brazilian Dredging Company of South Dakota, plaintiff's Exhibit 1? A Yes, sir. Q What is the date of the meeting in which that reference appears? A May 17th, 1909. Q And what is the statement in the minutes? (Case, p. 125, l. 26; p. 126.)

m. *By Mr. Heine.* Q Will you state what experience you have had in engineering lines? (Case, p. 128, l. 9.)

4. Because the following questions were admitted over plaintiff's objection.

a. *By Mr. Codding.* Q How could you have been induced, on the 27th day of February, 1909, to take stock in a company, by the representations of Mr. Fish made on that day, to take stock in a company when as a matter of fact you had taken stock already, at least paid for certain stock previously to that time and previous to the incorporation of this company? (Case, p. 47, l. 27.)

b. *By Mr. Codding.* Q Therefore, as I understand it, on the ninth day of February you paid twenty per cent. on the twenty-two hundred and fifty dollars, which is four hundred and fifty dollars, and after the 27th you paid the balance of eighteen hundred dollars to make up the twenty-two hundred and fifty dollars? (Case, p. 60, l. 4.)

c. *By Mr. Codding.* Q Was there ever any lease made by the Brazilian Dredging Company, to your knowledge, previous to the one that you testified to on the book? A The records speak of none.

The Court. That is not the question.

(Question repeated by stenographer.)

By Mr. Buchanan. Objected to, unless the question states to whom the lease was made.

By Mr. Codding. To the defendant in this case, by the Brazilian Dredging Company.

Mr. Buchanan. Objected to as not being material to the question in issue.

The Court. Question allowed.

Mr. Buchanan. The question is whether there was any other lease made to the defendant, Harwood Fish. The issue in this case and what has been testified to in this case, relates to leases owned by the Gem Dredging Company at the 27th day of February.

The Court. Question allowed. (Case, p. 111, ll. 1-20.)

d. *By Mr. Codding.* Q Who received any money that was paid for that lease? (Case, p. 113, l. 18.)

e. *By Mr. Codding.* How then do you justify your statement that a company could not do business in the United States of Brazil unless it was registered there, or hold property, when you say not that your own company didn't do it? (Case, p. 113, l. 28.)

f. *By Mr. Codding.* Q What excuse had you for giving such a lease then? (Case, p. 114, l. 18.)

5. Because the court struck out the evidence regarding conversations prior to February 27th and offered as leading up to the representations made on February 27th. (Case, p. 41, l. 4; pp. 37-40.)

6. Because the court struck out the answers to the following questions:

a. *By Mr. Heine.* Q Do you remember who requested you to sign that paper as a witness? A Mr. Fish. (Case, p. 84, ll. 8-18.)

b. *By Mr. Heine.* Q Do you know the law of Brazil governing foreign corporations?

Mr. Codding. Objected to as incompetent, irrelevant and immaterial. A Yes. (Case, p. 86, l. 12.)

c. *By Mr. Heine.* Q Are you familiar with the law governing the foreign corporations in Brazil? A Yes. (Case, p. 87, l. 12.)

7. Because the court refused to allow plaintiff to offer evidence that all the stock of the Brazilian Dredging Company of New York was owned by Brazilian Dredging Company of South Dakota as a holding company. (Case, p. 102, l. 20.)

8. Because the court refused to allow plaintiff's witness Case, to testify to the whole of a conversation between defendant and witness Case, and limited the testimony of the witness to statements made to him by defendant, excluding the statements made by the witness to defendant to which defendant made answer

and thereby excluding some of defendant's answers. (Case, p. 102, l. 30, to p. 104, l. 36.)

9. Because the court, although defendant's counsel did not object, refused to allow witness Case to answer the following questions:

a. *By Mr. Heine.* Q Will you state then what was done in regard to this question of the leases of the Brazilian Dredging Company? Explain that. A I came home and reported to the Board of Directors as to the conditions as I found them in Brazil—

The Court. He has already testified to that. Do not cumber up the record with repetitions.

Mr. Codding. We have no objection.

The Court. But I have. (Case, p. 119, l. 18.)

Brief of the Argument.

On the evening of February 27th, 1909, defendant who was the chief promoter of the Gem Dredging Co. (Case, p. 8, l. 8, and p. 31, l. 25), had an interview with plaintiff at the office of the Roselle Park Building and Loan Association in regard to the purchase by plaintiff of shares of stock of Gem Dredging Company. The plaintiff is a German, a native of Alsace and a veteran of the Franco-Prussian war (Case, p. 35, l. 1), and defendant's representations are best evidenced by plaintiff's own broken English at (Case, p. 41).

> "Did you have a conversation with the defendant, Mr. Fish, on the 27th of February in the year 1909?
>
> A Yes, sir.
>
> Q Will you state just what that conversation was?
>
> A Well, that day Mr. Fish sent for me and we had a conversation for quite a while. Mr. Fish told me there is a mine in Brazil, and the name of Jack, and the name of the company is Gem Dredg-

ing Company. So naturally, I admit we had conversations before. Well, Mr. Fish made me believe that day—

Q What did he say?

A All right. Mr. Fish said it was tested by experts, expert engineer and expert man, proved to be gold, diamonds, and the sand will pay all expenses. Naturally enough I believed Mr. Fish all what he said.

Q What else, if anything, did he say in regard to that company in that conversation on the 27th of February?

A All he said, the company owns a lease.

Q What did he say they owned a lease on?

A On the Jack.

Q This Jequitinhonhe River?

A Yes, we will call it that way. I call it Jack so everybody understands me.

Q What company did he say owned this lease?

A The Gem Dredging Company."

(Case, p. 43.)

"What did Mr. Fish say to you, just his language, over there on the evening of the 27th of February, about this company?

A Well, that day that is all—The Brazilian Dredging Company owns the lease. He represented that what a good luck I got if I will put my money from the Roselle Park Building Loan in it, as I never see another chance like that.

Q You said what company was it?

A The Gem Dredging Company. Naturally, if I—

Q Did he say anything to you that time regarding these tests that you have spoken about being made on this particular property covered by the lease?

A Well, he said—

The Court. Answer yes or no.

A Yes, sir.

Q What did he say?

A Well, he said it was proved by expert engineer, and expert man, and there is gold, diamonds, and the sand, and the sand will pay for all expenses.

Q Did you believe what Mr. Fish told you at that time?

A Of course."

On page 52, l. 3, on cross-examination:

"Q You paid your money after being satisfied?

A No, that is what I want to get to. On the 27th day, when I paid the whole amount, then Mr. Fish convinced me then. Other way he didn't convince me. He told me just what I said before."

These representations to plaintiff, boiled down, are:

1. That on February 27th, the Gem Dredging Company, a corporation of South Dakota, owned a lease of certain diamond mining lands on the Jequitinhonha River in Brazil.

2. That the lands covered by this lease owned by the Gem Dredging Company had been tested and proved by experts to be rich in diamond and gold values.

They were both false in fact, and were so known to be by defendant.

Representation No. 1. It appears in regard to the first representation—

(A) That the Gem Dredging Company, while its certificate of incorporation was filed in South Dakota on February 23rd, 1909, as admitted by the pleadings (p. 7, l. 35, and p. 31, ll. 20-24) did not hold its incorporators' meeting until March 8th, 1909, as appears from its minutes, Exhibit P. 10 (Case, p. 167).

At this meeting, March 8th, 1909, the company received by assignment from defendant Fish a lease of certain mining lands in Brazil which had been on the

23rd day of February given by the Brazilian Dredging Company of South Dakota to defendant. The Gem Company had no property on Feb. 27th, 1909. (Ex. P. 1) (Case, p. 151) (Ex. P. 10) (p. 167, par. 7, and P. 154, l. 29) (Case, p. 100, l. 31.)

It further appears from the language of the lease from the Brazilian Dredging Company to Fish that the written consent of the lessor, Brazilian Dredging Company, was necessary to its valid assignment (Case, p. 154, l. 30) and this consent was not given until April 16th, 1909 (Case, p. 96) so that said lease was not the legal property of the Gem Dredging Company until April 16th, 1909. Consequently the representation of ownership on Feb. 27th was false.

(B) Further, by reason of failure to comply with the laws of Brazil regarding foreign corporations, none of the parties to the leasing transaction had any title to a leasehold in Brazil on Feb. 27th, 1909.

On the 23rd of February, when Brazilian Dredging Company of South Dakota gave its lease to Fish, it was not registered in Brazil (Case, p. 112, l. 35; p. 114) and was not empowered to hold any property there and could not legally make any such lease or pass any interest to its said lessee Fish, as appears from the Laws of Brazil regarding foreign corporations (Ex. P. 5) (p. 166, l. 10; art. 85; p. 165, l. 25, art, 79). Fish's lessor had no power to make a lease and defendant therefore received nothing and passed nothing to the Gem Dredging Company even on March 8th and April 16th, 1909. So far as the evidence goes, the Gem Company never had a valid lease on Feb. 27th or at any other time of lands in Brazil.

AS TO DEFENDANT'S KNOWLEDGE.

Defendant Fish knew on February 27th that the Gem Dredging Company did not then own any lease as he represented to Lams *for the lease was then in his own name.* (Ex. P. 1, Case, p. 151.)

As an incorporator of the Gem Dredging Company he knew the incorporators' first meeting had not been held and that the company as yet owned neither lease nor other property. (Ex. P. 10, Case, p. 167.)

He also knew that registration in Brazil was a condition precedent to any valid leasehold title in that country and that neither his lessor nor his Gem Company was registered. (Case, p. 102, l. 30 to p. 104, l. 30; p. 112, l. 33.)

Representation No. 2. In regard to the second representation. The evidence shows that there were no reports by engineers on the particular property regarding which the representation was made (Case, p. 106, l. 30) and that no tests were known to have been made on that particular property (Case, pp. 135-136), and witness Hedden who was sent to Brazil by Fish in December, 1908 (Case, p. 132), gives evidence that he made no test of the particular property (Case, pp. 134, 135 and 136). Witness Wilson was not allowed to be qualified as an expert (Case, p. 128) or to testify on this question of testing of the property which will be considered later as a separate ground of appeal.

The property was practically virgin and its value a pure speculation.

AS TO DEFENDANT'S KNOWLEDGE.

Defendant knew this to be a fact. He had been negotiating and in close touch with the Brazilian Dredging Company people (Case, p. 119, l. 1; p. 71, l. 25) and knew as they did of the lack of tests and information regarding this specific property about which he was making representations.

Defendant also knew that Hedden, whom he sent down to Brazil in December, 1908, and who was not an engineer (Case, p. 136, l. 3), could not in the short time that he was in Brazil before February 27th,

1909, determine by actual tests the value of the property, especially under the court's ruling on mine testing (at p. 130, l. 1).

Plaintiff, relying on these false representations as he was intended to, paid $1,800.00 on February 27th for stock of the Gem Dredging Company (Case, p. 45, l. 5; p. 51, l. 9).

This stock, in a company not yet organized or possessed of any property was on February 27th, 1909, worthless and at the time of trial, Gem Dredging Company being insolvent, as admitted by the pleadings (Case, p. 32, l. 14), the stock was worthless, so that plaintiff was damaged in the sum of $1,800.00 with interest from February 27th, 1909.

At the close of the case the trial judge ordered a non-suit on the grounds that the representations made had not been shown to be false to the knowledge of defendant and that plaintiff was not damaged.

We submit that this was error for the following reasons.

Grounds of Appeal 1 and 2.

THE PROOF IN THE CASE AT BAR IS SUFFICIENT UNDER THE LAW LAID DOWN IN COWLEY *vs.* SMYTHE, 17 Vr., p. 388, AND WAS TRIED ON THE THEORY OF THAT CASE.

The Cowley case lays down that a representation of a matter of fact made by defendant which is false to defendant's knowledge, conclusively establishes fraudulent intent and entitles plaintiff to his proximate damage suffered by reason thereof.

> "The simplest form in which the question of the sufficiency of proof arises is where the proof is that the representation was false to the defendant's knowledge. The *scienter* as well as

the falsehood being proved, proof of the fraudulent intent is regarded as conclusive. Evidence that the defendant intended no fraud will not be received, and the jury will be instructed to find for the plaintiff, though they should be of opinion that the defendant was not instigated by a corrupt motive of gain for himself, or by a malicious motive of injury to the plaintiff." *Cowley* vs. *Smythe,* 17 Vr., p. 388.

We shall consider the evidence under three heads.

One. The representations of fact.

Two. The falsity of these representations and defendant's knowledge of such falsity.

Three. Damage.

I

REPRESENTATIONS BY DEFENDANT TO PLAINTIFF.

As appears by the testimony set forth in the brief of the argument, there were at least two definite representations testified to by plaintiff as having been made to him on the evening of February 27th, 1909.

A. That at *that* time the Gem Dredging Company *owned* a lease of certain gold and diamond mining land in Brazil and

B. That this land had been tested and proved by experts to be of great value.

The evidence shows the plaintiff, an old man, a veteran of the Franco-Prussian War, a foreigner, who had laid by his savings in the Roselle Park Building and Loan Association, called over to the office of the building and loan by its secretary, Fish, this defendant, who was promoting this diamond mining project in Brazil. A check withdrawing plaintiff's money from the building and loan was already made out by

defendant, with an endorsement to the order of defendant or of the Gem Dredging Company (it does not appear which, as the defendant was unable to find the check, although subpœnaed to produce it on the trial). All that plaintiff had to do was to sign his name when defendant should have succeeded in persuading him to take his money out of the building and loan to buy stock in the "Gem."

Probably the defendant himself could not repeat all that he said at that interview on the evening of February 27th, 1909; the statements of the wonderful richness of this Brazilian property and of the title which Gem Dredging Company had secured to the richest portion of it, etc. And it is certain that plaintiff, with his limited ability to express himself in English, can never tell all that defendant said to him on that night. Out of the wealth of glittering statements which must have been used, the evidence brings out the two above mentioned, which plaintiff is able to remember and express and the very fact that he is able so to do, unshaken by cross examination, is evidence that these two points must have been hammered home by defendant in no uncertain fashion.

The representations of ownership and that the property was proved up and tested are representations of existing fact and existing condition just as much as the representation of cost in *Thompson* vs. *Koewing*, 50 Vr., p. 246, or that it was purchased, *McConnell* vs. *Wright* (1903), 1 Ch., 546.

Lehman-Charley vs. *Bartlett*, 135 App. Div., 675 (Aff. 95 N. E. Rep., 1125).

Under the rule of law requiring the construction most favorable to plaintiff to be placed upon the facts proven, there can be no serious question as to the proof of these representations.

That they were material is obvious and that they were made with the intent that plaintiff should rely

upon them and that he did so rely upon them to the extent of buying $1,800.00 worth of stock is fully proven. (Case, pp. 44, 51, 52, 58, 63.)

The action of plaintiff in paying a deposit of $450.00 upon a prior and tentative subscription of $750.00 of stock of the company to be formed later by Fish (Case, pp. 51, 52, 54, 55) which was brought out on cross examination we submit has nothing to do with the transaction of February 27th when plaintiff was induced by the representations of defendant to invest his $1,800.00.

And even if plaintiff had paid a deposit on a prior subscription of a small amount, if he was induced to make still further subscription by reason of misrepresentations made to him by defendant, defendant would still be liable.

Hubbard vs. *Weare,* 79 Iowa, 678.

Furthermore, when plaintiff invested on February 27th and paid his $1,800.00, he had never seen any company circulars (Case, pp. 57-65); he had never heard of any cablegram (Case, pp. 65-66); he had never met any officers of the Brazilian Dredging Company (Case, pp. 71-72) and all the circumstances go to corroborate his testimony that it was the representations made by Fish which induced him to pay his money.

We submit that if the question as to "who sold Lams" his stock had ever arisen, the evidence in this case would show that Fish was entitled to any commission which might be paid for the sale of that stock.

Plaintiff's general confidence in and reliance upon Fish and his supposed business sagacity may have and in all probability did influence plaintiff, but notwithstanding this the material representations regarding the ownership of the lease and the proved character of the property make defendant liable.

It is not necessary that the misrepresentation be the sole inducing cause of plaintiff's purchase.

Edgington vs. *FitzMaurice*, L. R. 28 Chan. Div., 459.

Derry vs. *Peak*, L. R. 14 App. Cas., 337.

Morgan vs. *Skiddy*, 62 N. Y., pg. 319.

Hindman vs. *Bank*, 112 Fed., 945.

In any event, plaintiff was entitled to have the jury pass upon the question as to whether these representations were one of the causes, if not the sole inducing cause, which led plaintiff to purchase his stock.

Tindle vs. *Birkett*, 171 N. Y., 526.

Further, counsel deem it their duty to call the court's attention to the entire cross examination of the plaintiff on the ground that defendant's counsel and the court adopted an unfair attitude toward plaintiff in interrupting him and in preventing him with his limited ability to express himself in English from finishing his sentences and fully completing his answers.

Plaintiff's counsel was also prevented from redirecting plaintiff in regard to these matters in which he had been abruptly shut off.

The effect of this is not so apparent in connection with the present subject of discussion as it is in connection with the numerous objections of counsel and the court's rulings which are relied upon as separate grounds of appeal.

The matter is mentioned because a consideration of the entire cross examination is necessary to properly approach the specific objections which are taken up as separate grounds of appeal.

Examples of the attitude of defendant's counsel and the court toward plaintiff may be found on the following pages of the case.

Pg. 43, l. 18; 44, l. 18; 49, l. 20; 50, l. 15, where the court interrupts plaintiff and puts an answer in his mouth which he did not mean. Pg. 50, l. 25; pg. 52;

pg. 54, l. 18; pg. 60, where the court failed to give the plaintiff protection against a question assuming facts which were not in evidence. Page 77, l. 28; pgs. 80 to 84. Defendant's counsel, recognizing that plaintiff, in his excitement, was having difficulty with his English (Case, pg. 50, l. 25), said, that he "wanted to be perfectly fair about it," but while this doubtless indicated his intention at the moment, it did not long restrain the cross examiner's natural antagonism to the witness.

(2)

THESE REPRESENTATIONS WERE FALSE TO DEFENDANT'S KNOWLEDGE.

a. The representation that the Gem Dredging Company owned a lease on these diamond and gold lands in Brazil on Feb. 27th, 1909, is so obviously false that it seems unnecessary to add anything to what has been said in the brief of the argument.

The representations were made on February 27th.

The Gem Dredging Company'c certificate was filed in South Dakota on February 23rd, but the first meeting of the incorporators was not held until March 8th.

At that time the lease which appears to be the only one in question, was assigned to Gem Dredging Company by Fish, who was the previous owner. This assignment to the company was not, however, consented to in accordance with the terms of the lease by the lessor company until April 16th and not until that date did the Gem Dredging Company become the owner of said lease which, however, had no validity under Brazilian law.

The laws of Brazil governing foreign corporations, plaintiff's Ex. P. 5 provide, art. 47, "All foreign joint stock companies or their branches or agencies likewise, require authorization from government in order

to carry on business in the republic. Art. 79. Duly constituted joint stock companies cannot commence operations or legally perform any act until the following documents have been lodged in the archives, etc. Art. 85. No contracts may be entered into or operations effected on account of the company until it has been duly constituted in accordance, etc."

The evidence shows that the Brazilian Dredging Company of South Dakota which gave a lease on February 23rd, 1909, to defendant Fish was not registered (Case, pp. 112-114), nor of course was the Gem Dredging Company of South Dakota registered when plaintiff purchased his stock.

Consequently, it is obvious that neither Fish nor the company from which he received the lease, nor the company to which he eventually transferred it had any legal right or title to any lands in Brazil. Fish himself being the owner of the lease when he represented that it was owned by the company obviously knew that what he represented was not true.

There was also evidence in the case that Fish knew that registration in Brazil was a pre-requisite to any legal rights in that country. (Case, p. 102, l. 30, to p. 104, l. 30; p. 112, l. 33.)

b. In regard to the representation that the property referred to in the lease, plaintiff's Ex. 1, had been tested and proved by experts to be rich in diamond and gold values. The evidence shows that the Brazilian Dredging Company of South Dakota from which company Fish was endeavoring to secure his concession or lease, had no engineering or technical report on the particular property leased to Fish and in regard to which the representations were made, and that a thorough search for such reports had been made. (Case, p. 106, l. 30.) All reports appear to have been general regarding the district and none concerning this particular property.

Hedden, the special agent sent down to Brazil by

Fish in December, 1908, was not an engineer and he spent, according to his testimony on pages 134 and 135, one-half day canoeing about the river at the particular property and sticking an 18 foot pole down into the water and when said pole struck something hard he was assured by his native assistant that that was diamond-bearing formation, although he could not see the substance with which the pole came in contact beneath the water.

Furthermore, defendant or anyone else must be held to know that no proper examination of a mining property so as to brand it as proved or tested can be made in the time that Hedden was in Brazil and before the sale of the stock to plaintiff, and we submit it was for the jury to say whether or not defendant did not knowingly falsely represent that this particular property was tested and proved as to its diamond and gold values.

(3)

PLAINTIFF SUFFERED DAMAGE OF $1,800.00 WITH INTEREST FROM FEBRUARY 27TH.

The rule of damage applicable to the case at bar is laid down in this state in the case of *Crater* vs. *Binninger,* 4 Vr., 513, where the court says at page 516: "But where the sale itself is a product of fraud the vendee may either repudiate the contract or claim by way of damage the difference between the price paid by him and the real value of the property which he has acquired."

This rule has been approved in *Smith* vs. *Duffy,* 28 Vr., 679, and has been cited with approval in the United States Supreme Court, *Sigafus* vs. *Porter,* 179 U. S., 116, citing *Smith* vs. *Bolles,* 132 U. S., 125. "Upon the assumption that the property was not worth what the plaintiff agreed to pay for it, they were

entitled, if the evidence sustained the allegation of false and fraudulent representations upon which they were entitled to rely and upon which they in fact relied—to a verdict and judgment representing in damages the difference between the real value of the property *at the date of its sale* to plaintiff and the price paid for it with interest from that date and in addition such outlays as were legitimately attributable to the defendant's conduct, but not damages covering the expected fruits of an unrealized speculation."

Also in the case of *West Homestead Borough* vs. *Erbeck,* 239 Pa. State at page 199, citing *High* vs. *Berret,* 148 Pa. State, page 261, "Such damages should equal the loss which the deceit, which the jury have found was practiced upon him inflicted." "The loss in the transaction before us (the sale of stock) is the difference between *the real value of the stock at the time of the sale* and the fictitious value at which the buyer was induced to purchase." That is, the price paid for it.

Cook on Corporations (6th Ed.) Sec. 586.
Am. & Eng. Crim. Cas., vol. 8, p. 1060.

Applying this rule to the facts in the case at bar, the plaintiff paid $1,800.00. He received for this shares of stock of the Gem Dredging Company on February 27th, 1909, and we submit that the evidence shows that these shares were of no value whatsoever at that time.

As pointed out above, the company's certificate had been filed in South Dakota on February 23rd, 1909.

Its meeting of incorporators was not held until March 8th and at that time the first attempt to furnish it with an asset was made by the incomplete assignment by Fish to the company of his lease which was not legally perfected until April 16th, and then it was of no validity in Brazil. The company had nothing but a naked franchise or right to exercise its functions. Therefore at the time plaintiff received his stock the

company had nothing with which or upon which to exercise its corporate functions.

Plaintiff received a mere valueless chance that the corporation would some day receive assets without any certainty or assurance that it would. There was no contract shown between Fish and the incorporators. No declaration of trust by him that he would turn over the lease which he had from the Brazilian Dredging Company, and it appears from the evidence that even if he had, the same was valueless.

Assuming that the evidence did show, although it does not, that the Gem Dredging Company did, after the 27th of February acquire a valid lease of the lands in Brazil, it would not change the situation as a misrepresentation that certain property had already been purchased by a corporation is not cured by the fact that the corporation did acquire such property thereafter.

McConnell vs. *Wright* (1903) 1 Ch., 546.

Furthermore, conceding the doctrine of some cases that the difference between the value of the stock *at the time of the trial* and the amount paid by plaintiff is the measure of damage, it is admitted in the pleadings (page 32, l. 15), that the Gem Dredging Company at the time of the institution of this suit was insolvent. Consequently, its stock is worthless.

GROUND OF APPEAL No. 3 A (p. 80, l. 10, and p. 81, l. 18).

The court erroneously overruled the following question addressed to plaintiff on re-direct examination:

> "Q Now, Mr. Lams, you have been trying to tell Mr. Codding or inform Mr. Codding of this subscription on February 27th. Will you just explain to the jury the facts in regard to this $750.00 subscription which Mr. Codding asked you about, and also the subscription on the 27th of February when you paid the $1,800.00?

I object. There is no testimony as to any $750.00 subscription."

Defendant's counsel was in error in this statement. There was no testimony on direct examination about this $750.00 subscription as it had been stricken out by the court on page 41, line 11, but defendant's counsel on pages 48, 49, 54, 60, 61 and 62 on his cross examination had developed considerable evidence about a $750.00 subscription.

This matter therefore having been brought out first on cross examination, plaintiff's counsel was entitled to re-direct in regard to same and the court's ruling deprived him of this opportunity to the prejudice of his case.

GROUNDS OF APPEAL 3 B; 3 C; and 3 D (p. 81, l. 22; p. 81, l. 26; p. 81, l. 35).

The court erroneously overruled the following three questions to plaintiff:

"B. When you went to Mr. Fish's office on the 27th of February had you already subscribed to stock of the Gem Dredging Company?

C. Q Mr. Lams, on the 27th of February how many shares of stock of this Gem Dredging Company did you subscribe for?

D. Q The amount of $450.00 which you paid prior to the 27th of February, did that amount apply to a subscription of 5,000 shares of stock of this company?"

The court erroneously overruled all of these questions for the reason set forth above. They all referred to the new matter brought out first on the cross examination regarding some previous subscription to the stock of the company and were intended to give plaintiff an opportunity to explain this new matter and we submit were proper re-direct examination and the plaintiff's case was prejudiced by their exclusion.

GROUND OF APPEAL 3 E (p. 83, l. 30).

The court erroneously overruled the question to plaintiff, "What was the check in payment of?"

There was no direct examination regarding a check, merely a statement at page 45 that $1,800.00 was paid. The question how this payment was made by a building and loan check etc. was first brought out by defendant's counsel (pp. 77 and 78) and on page 73 defendant's counsel made statements to the witness which indicated that the date when this money was paid and the means of payment were seriously questioned and the cross examination therefore developed that the matter of the check of this $1,800.00 and its date would be very important.

The plaintiff was therefore entitled to go into the matter of this check on re-direct examination and his case was prejudiced by the ruling of the court in preventing his so doing.

GROUND OF APPEAL 3 G (p. 129, l. 22).

The court erroneously overruled plaintiff's question to plaintiff's witness Wilson, an engineer "Are you familiar with the concession of the Brazilian Dredging Company as it was on your first visit to Brazil in 1909?"

We submit that this question was relevant to bring out testimony from this witness as to the condition in the summer of 1909 of the property in regard to which defendant had made representations in February, 1909, which would tend to prove the truth or falsity of the representation that the property in question was on February 27th, 1909, tested and proved.

The principle laid down by Mr. Wigmore, sec. 437, p. 514 *et seq.* of his work on Evidence, supports the competency and materiality of this testimony.

> "This general principle that a prior or subsequent existence is evidential of a later or earlier one has been repeatedly laid down and has even been spoken of as a presumption."

GROUNDS OF APPEAL, 3 H. and 3 M. (Case, p. 129, l. 28 and p. 130) and (Case, p. 128, l. 9).

The court erroneously overruled the following two questions to plaintiff's witness, Wilson.

"Q You are an engineer by profession?

A Yes, sir.

Q State what experience you have had in engineering lines?"

This question and the question at line 28, page 129, were asked for the purpose of qualifying this witness as a mining engineer.

The objection of defendant's counsel was that there was no previous evidence to show what relevancy an engineer's testimony might have (Case, p. 128, l. 11).

One of the alleged and proved representations made to plaintiff was that the property represented to be leased by the Gem Dredging Company *was tested and proved as to its diamond and gold values.*

This tested and proved condition of the property was in issue and the best evidence which could be produced in regard to this was necessarily that of a mining engineer particularly one who was familiar with this Brazilian property as this witness was (Case, p. 129, l. 9).

"Q Are you familiar with the concession of the Brazilian Dredging Company in Brazil?

A Yes, sir."

Counsel for defendant's objection sustained by the court deprived plaintiff of the opportunity of qualifying this witness and consequently of the witness's testimony as an expert in regard to this representation that the property was tested and the falsity thereof. Plaintiff was therefore deprived of testimony vitally effecting his case.

GROUND OF APPEAL, 3 J. (Case, p. 140, l. 30).

The court erroneously overruled question to plaintiff's witness, Wilson:

"Q Was it possible for you in July, 1909, on this particular two miles of property referred to in plaintiff's Exhibit 1 to tell from your examination of it whether or not there had been tests to determine values of diamonds and gold on that property made on it prior to February 27th, 1909"?

The ruling on this question really involves the same point treated under grounds of appeal, 3 H. and 3 M. where plaintiff was prevented from qualifying witness, Wilson, as an expert. Having prevented his qualification, although he was concededly an engineer with Brazilian mining experience, the court now rules out the question which we submit was entirely proper to be put to an engineer under the issue in this case regarding the tested condition of the property.

Further, witness Wilson's testimony on page 140 we submit shows ample experience to qualify him to answer this question which is relevant under the principle referred to under Ground of Appeal, 3 G., namely—that subsequent existence is evidential of an earlier condition. In other words, that examination of this property by Wilson, an expert, in July, 1909, would be properly evidential of its tested or proved condition in the preceding February.

It is submitted that mining operations of sufficient magnitude to prove up this two miles of property as of value and which were undertaken after January, 1909, would have been visible to the eye of an ordinary observer as well as to an expert in July, 1909, a period of seven months. And there was only one small test working in the property before January, 1909, as witness, Hedden, testifies (p. 136).

Wigmore on Evidence, section 437.

GROUND OF APPEAL, 4 B. (p. 60, l. 4).

The court erroneously admitted over plaintiff's objection.

"Q Therefore, as I understand it, on the 9th day of February, you paid 20% of the $2,250.00 which is $450.00 and after the 27th you paid the balance of $1,800.00 to make up the $2,250.00"?

The question was objected to as containing facts not in evidence. There was no evidence up to this point in the case of any agreement by plaintiff to pay 20% on account of any subscription to stock of the Gem Dredging Company or of any subscription in the amount of $2,250.00 to stock of that company. There was no evidence that any payment was made after the 27th of February. In fact, the testimony was that $1,800.00 was paid on the 27th. There was no evidence in the case that the $1,800.00 represented any *"balance"* of any subscription. The court's allowance of this question and forcing the witness to answer was prejudicial to plaintiff and contrary to authority:

"A question which assumes the existence of a fact not shown by any evidence, or which erroneously assumes a statement to have been made by the witness is properly excluded."

Hines Appeal, 68 Conn., 551 (37 Atl., 384).
Drake vs. *State*, 24 Vr., 23.
Fengar vs. *Brown*, 57 Conn., 60 (17 Atl., 321).
Thompson on Trials, section 369.

GROUND OF APPEAL, 4 C. (p. 111, ll. 1-20).

The court erroneously admitted over objection the question:

"Q Was there ever any lease made by the Brazilian Dredging Company to your knowledge previous to the one that you testified to on the book"?

This was amended to read "Any lease to defendant in this case."

The issue in this case related to leases owned by Gem Dredging Company on February 27th and it is submitted that as to that issue the above question

whether any other leases had been made by the Brazilian Dredging Company to defendant is immaterial.

GROUNDS OF APPEAL, 4 D and 4 F. (Case, p. 113, l. 18) and (Case, p. 114, l. 18).

The court erroneously admitted, over objection:

"Q Who received any money that was paid for that lease?

Q What excuse had you for giving such a lease then"?

These had reference to a lease between Brazilian Dredging Company of New York and defendant, Fish, personally and we submit are immaterial and irrelevant for the reasons mentioned in the preceding Ground of Appeal.

GROUND OF APPEAL, 5 (Case p. 41, l. 4 and pp. 37-40).

The allegation of the complaint to which this proof was addressed was that on or about February 27th the plaintiff was solicited to buy stock in the Gem Dredging Company which was incorporated February 23rd.

The plaintiff (pp. 35-37) testified to certain preliminary conversations with the defendant leading up to and *culminating in* the conversation of February 27th. These the court struck out. It is submitted this was error.

The circumstances or declarations need not be contemporaneous with the main fact under consideration if so connected therewith as to illustrate its character, further its object or to form in conjunction with it one continuous transaction. *Reg.* vs. *Throop*, 2 Can. Cr. Cas., 22, 33 note.

A false statement made a considerable time before the representations alleged is admissible if it had some influence on plaintiff's conduct or was repeated at the time of the one in question. *Kost* vs. *Bender*, 25 Mich., 515, 20 Cyc. 105, note 35.

Evidence of previous transactions between the parties is admissible to show the relation of the parties or to show how defendant may have learned of the possibility of committing the fraud alleged. *James* vs. *Work*, 24 N. Y. Sup., 149, 20 Cyc. 111, note 93.

Specific acts of misconduct relevant to an issue of fraud may be given in evidence although not averred in the declaration. *McDonald* vs. *Smith*, 102 N. W. Rep., 668 (Mich. 1905).

GROUND OF APPEAL 6 A (Case, p. 84, ll. 8-18).

The court erred in striking out plaintiff's answer to the following question:

> "Q Do you remember who requested you to sign that paper as a witness?
>
> A Mr. Fish."

The signing by plaintiff as a witness of a contract between defendant Fish and one Mr. Lovell who was hired to go to Brazil was first brought out on cross examination. Plaintiff's counsel desired to have plaintiff on re-direct examination explain the circumstances attending such signing of that paper; who requested him to do so, etc.

It is submitted that this was proper re-direct examination tending to show that plaintiff's signature was secured at the request of defendant as a convenience and that plaintiff was thereby in no way connected with the active management or the affairs of the proposed company.

The court's ruling deprived plaintiff of this opportunity.

GROUND OF APPEAL 8 (Case, p. 102, l. 30 to p. 104, l. 36).

The plaintiff, after his witness Case had testified that he, Case, had a conversation with defendant in January, 1909, on the subject of registration of com-

panies in Brazil, attempted to have the witness state what the conversation was. The question being (p. 104, l. 15):

> "Q State, giving the date as near as you can what was said by the defendant to you and by you in answer to the defendant regarding this subject of registration of companies in Brazil."

The court, while allowing statements made by the defendant to the witness refused to allow the witness to testify to the answers given by the witness to defendant in this conversation.

We submit that this was clearly erroneous under well settled principles of law.

Wigmore on Evidence, sec. 2094 says:

> "The general principle then—which may be termed the principle of completeness—that the whole of a verbal utterance must be taken together is accepted in the law of evidence * * *. *Entirety of parts* is equally essential to the correct understanding of an utterance."

At section 2115 (p. 2864) numerous cases regarding conversations are cited, among which are.

Somerville Co. vs. *Doughty*, 2 Zab., p. 500.
Hartman Steel Co. vs. *Hoag*, 104 Ia., 269.
State vs. *Bean*, 77 Vt., 384 (60 Atl., 807).

In order to make the statements of defendant Fish intelligible what witness Case said to him was necessary.

Young vs. *Bennett*, 5 Ill., 43, 47.

GROUND OF APPEAL 9 (p. 119, l. 18).

The court erroneously without objection by defendant's counsel, refused to allow plaintiff to re-direct plaintiff's witness Case in explanation of matters first brought out on cross examination.

The cross examination had developed that Brazilian Dredging Company of South Dakota had made certain leases, among them the one to defendant of February 23rd, 1909, without being registered in Bra-

zil. Plaintiff was entitled to have the witness explain this on re-direct examination as new matter relevant to the question of the registration of these companies in Brazil and the falsity of the representations that the Gem Dredging Company at any time received a valid lease through Fish and the Brazilian Dredging Company of South Dakota.

No objection was made by defendant's counsel and the court of its own motion refused to allow the witness to answer.

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF NON-SUIT SHOULD BE REVERSED WITH COSTS.

M. CASEWELL HEINE,
MALCOLM G. BUCHANAN,
Of Counsel.

New Jersey Court of Errors and Appeals

EMILE LAMS, Plaintiff-Appellant, against HARWOOD EDWARD ODEREY FISH, Defendant-Respondent.	Action at Law. On Appeal from Supreme Court.

BRIEF FOR DEFENDANT-RESPONDENT.

Statement.

The plaintiff brought this action upon the ground of alleged fraudulent representations made by the defendant, by which the plaintiff was induced to buy stock in the Gem Dredging Company, which company was formed to carry on operations upon the Jequitinhona and Caethe Mirim Rivers in Brazil. A brief statement as to the relations and business of the various companies mentioned in the evidence will help the Court to more quickly grasp the situation.

The Jequitinhona and Caethe Mirim Rivers are streams flowing down from the diamond and gold mines in the Diamantina region of Brazil, and a concession from the Brazilian Government to conduct operations along these rivers to recover gold and diamonds, which were supposed to have been washed down in the course of ages from the dia-

mond and gold deposits above, was obtained by the Brazilian Dredging Company of South Dakota, of which company Jesse R. Grant (son of General U. S. Grant) was president.

This Brazilian Dredging Company exploited the proposition and sold to other companies and various individuals, its rights in certan portions of these rivers, and to the defendant in this case, who had become interested in the proposition, made a lease (Exhibit P1, p. 151), giving him the right to operate on a definite portion of these rivers. Certain other people, among them the plaintiff, became interested with the defendant in the venture, with the result that the Gem Dredging Company, a South Dakota Corporation, was formed, a number of persons, including plaintiff and defendant, taking stock in the same. This Gem Dredging Company's certificate of incorporation was filed in South Dakota, February 23, 1909; its first meeting of incorporators was held at Roselle Park, N. J., on March 8, 1909 (Exhibit P10, p. 167), and the lease held by the defendant offered to the company and accepted by them. The company went ahead, bought machinery, shipped the same to Brazil, sent employees there, and proceeded to erect the machinery upon its leased property. It appears that on May 1, 1911, the Gem Exploration Company was formed as set forth in the complaint and admitted in the answer, and defendant exchanged his shares of stock in the Gem Dredging Company for shares in the Gem Exploration Company, which shares he now holds.

POINTS.

1. *The Trial Judge correctly ruled at the close of plaintiff's case that the evidence did not establish a cause of action for fraud and deceit.*

Although the voluminous complaint in this action alleges many representations made and sets forth that they are untrue, no testimony was offered as to any representations made by defendant to plaintiff except that the plaintiff testifies (p. 41, line 20) that Mr. Fish said "there is a mine in Brazil, and the name of Jack, and the name of the company is Gem Dredging Company," and (p. 41, line 27), "Mr. Fish said it was tested by experts, expert engineer and expert man, proved to be gold, diamonds, and the sand will pay all expenses," and (p. 41, line 35):

> Q. What else, if anything, did he say in regard to that company in that conversation on the 27th of February?
>
> A. All he said, the company owns a lease.
>
> Q. What did he say they owned a lease on?
>
> A. On the Jack.
>
> Q. This Jequitinhonha River?
>
> A. Yes; we will call it that way. I call it Jack so everybody understands me.
>
> Q. What company did he say owned this lease?
>
> A. The Gem Dredging Company.

Later on in his evidence (p. 43, line 7) he says Fish told him the Brazilian Dredging Company owns the lease and again he says (p. 43, line 15) it was the Gem Dredging Company, and at the bottom of page 43 he repeats that Fish told him "it was proved by expert engineer and expert man

and there is gold, diamonds and the sand will pay for all expenses." The rest of plaintiff's direct examination was taken up with having him state that he believed Fish and that he paid in all twenty-two hundred and fifty dollars for his stock. This conversation he alleges took place on February 27, 1909, four days after the filing of the certificate of incorporation of the Gem Dredging Company in South Dakota, so that the representations alleged to have been made by Fish drift down to this: (There is no testimony as to representations except that given by the plaintiff as above): That Fish told him this Jequitinhona proposition in Brazil had been tested by experts and showed diamonds and gold and that the Gem Dredging Company (although in one place plaintiff says Brazilian Dredging Company) had a lease.

Upon cross examination a different story about the transaction was developed. After re-affirming (p. 45, line 31 and following) that he was induced solely by the representations made by Mr. Fish in the conversation of February 27, 1909, to invest in the company, Lams admitted (p. 46) that he had paid a deposit on his stock long before February 27, 1909, and when asked in a series of questions (pp. 47-52) how he could have been induced by representations made on February 27, 1909, to take stock in the Gem Dredging Company when as a matter of fact he had long before paid a portion of the amount of his subscription to certain shares in that company, he could make no intelligible explanation. The Court even attempted to have him explain by patiently putting the question in different ways to the witness (pp. 50-51) and finally all he could say was that when he went into the venture and paid a certain sum he wasn't "quite satisfied," but that on February 27, 1909, he became fully convinced. Lams was shown his signa-

ture as a witness to a contract of employment of one William J. Lovell (top p. 59), made as early as February 8, 1909, and made to admit that as early as that he was taking part in the arrangements for this mining venture. And he admits (pp. 59-60) that he paid four hundred and fifty dollars into the company on February 9, 1909.

Then, after some confused testimony, Lams finally settled down and told a connected story, which we quote from the book at page 62, line 34:

> Q. * * * Then, as a matter of fact, Mr. Lams, weren't these conversations which you had with prominent gentlemen from Elizabeth and Mr. Fish, and so forth——
>
> A. Yes.
>
> Q. (Continued)—didn't they result in an agreement among a lot of you that you would go into this thing providing it proved to be a profitable investment?
>
> A. Yes.
>
> Q. Was not the arrangement that you made then among all of you that if the thing looked good you would take a certain amount of stock?
>
> A. Yes.
>
> Q. And that you would pay down then a deposit, as you did, and others, and after hearing from somebody who was in Brazil, if the report was favorable, you would go on with the concern, wasn't that the arrangement?
>
> A. Well, I never heard nothing only what Fish told me.
>
> The Court: The question is, was that the arrangement?
>
> Q. Was that the arrangement among a number of your people?

A. Of course, it was. I suppose so. I will say it was.

Q. In pursuance of that agreement a number of you put up a certain amount of money. Your share of it was four hundred and fifty dollars, I understand that you testified you paid, that is correct, isn't it?

A. Yes.

Q. And the arrangement was, was it not, that if the investigation being made in Brazil at that time proved unfavorable, you would all stop, and the money would be paid back, but if it proved favorable you were to go on?

A. Yes.

The next clear step in the development of the story of the transaction comes with the testimony (pp. 64-66) that he, Lams, knew an engineer named Hedden, who had been sent to Brazil, and he had heard read a cablegram from Hedden as follows:

Diamantina, February 4th, 1909.

"Have examined the property and find it fully as represented. The values are certainly here. Go ahead with the financial end of it."

Leaving the plaintiff's testimony for the moment, we find that Mr. Hedden, the man alluded to above, was placed on the stand by plaintiff's counsel and testified generally on direct examination (p. 130 and following pages), that he went to Brazil in December, 1908, to investigate and report upon the Jequintinhona property; that he went to the property with an engineer named Ross and made soundings along the property and as a result of these soundings found "cascalhao," which is the

diamond bearing ground. On cross examination Mr. Hedden testifies as follows:

Cross examination by Mr. Codding:

Q. Mr. Hedden, you went down with the proposition of looking over the properties and making a report to Mr. Fish of what you found there?

A. Yes, sir.

Q. And in order to enable you, not being an engineer, to discover what you could, you took Mr. Ross with you, I suppose?

A. I did.

Q. Mr. Ross was an engineer, was he not?

A. He was.

Q. Therefore, when Mr. Ross, an engineer, made these statements to you, you relied upon them, didn't you?

A. I did.

Q. And you made a report, I suppose, of what you found down there, to the company?

A. I did, sir.

Q. And you were honest about it, weren't you?

A. I was.

Q. How did you communicate, Mr. Hedden, by cable?

A. I communicated by cable several times, and by letter also. I first communicated by letter, I believe.

Q. Of course, the letter, I suppose, took longer than the cable?

A. Yes.

Q. And your cable might have distanced the letter?

A. Yes, sir.

* * * * * *

Q. Did you send a message to Mr. Fish, dated February 4, 1909, "Have examined the property and find it fully as represented. The values are certainly here. Go ahead with the financial end of it"?

A. I did.

We submit, therefore, that at the close of the plaintiff's testimony the following facts were before the Court. In the latter part of 1908, a number of prominent people, as Mr. Lams says, although he mentions only the defendant, Mr. Fish, who is the Mayor of Roselle Park, former Prosecutor Swift of Elizabeth, Mr. Wetton, who is an officer of one of the banks in Elizabeth, and Mr. Cawthorne, who is another officer of another bank, and himself, became interested in this mining venture in Brazil. Mr. Hedden was sent to Brazil to investigate the proposition. The people who were interested agreed to go into the proposition if the report from Brazil was favorable. On the 4th of February, 1909, Mr. Hedden cabled, "Have examined the property and find it fully as represented. The values are certainly here. Go ahead with the financial end of it." Lams heard this cablegram read. On the 9th of February, Mr. Lams and others paid in a deposit on account of subscriptions to stock in the Gem Dredging Company to be organized, and steps for organization were taken, with the result that on the 23d of February, 1909, the Gem Dredging Company was incorporated under the laws of South Dakota. On the 27th of February (just time enough for the certified copy of the certificate of incorporation to come back from South Dakota), Mr. Lams (and presumably the others), paid the balance of their subscriptions.

The first meeting of the incorporators for organization took place on March 8th (Exhibit P10,

p. 167), and on that day Mr. Fish transferred the lease he held to the company thus organized, and the Gem Dredging Company proceeded to business, and Mr. Lams, the plaintiff, became a director in the same and some time after May 1, 1911, as is established by the pleadings, exchanged his stock in the Gem Dredging Company for stock in the Gem Exploration Company, another South Dakota corporation, which stock he supposedly now holds, although the evidence is silent on that point.

This statement of the evidence before the Court at the conclusion of plaintiff's case conclusively disproves the allegations in the complaint that plaintiff was induced to purchase stock in the Gem Dredging Company by representations made to him by the defendant on or about February 27, 1909.

Assuming, however, in the face of the above facts, that Fish did tell Lams on February 27, 1909, that the property had been tested by engineers, etc., and that the Gem Dredging Company had a lease, there is no evidence that these statements were untrue, and, on the contrary, plaintiff's case showed them to be substantially correct.

As to the property having been tested by experts, there isn't a line of testimony to show that it had not been examined and reported upon by any number of engineers. And as this representation is alleged to have been made on February 27, 1909, and as Hedden, who had been sent to Brazil to investigate, and had employed an engineer and reported by cable as early as February 4, 1909, having also, as he testified, reported by letter, we submit that the truth of this representation if made has been affirmatively established by the plaintiff's own case.

As to the Gem Dredging Company having a lease, it is manifestly impossible that on February

27, 1909, a company whose certificate of incorporaton had only been filed away out in South Dakota on February 23d could formally have acquired the lease, but Lams had been in the venture from the beginning and must be presumed to have known that fact.

> "The common law affords to everyone reasonable protection against fraud in dealing, but does not go to the romantic length of giving indemnity against the consequences of indolency and folly, or a careless indifference to the ordinary and accessible means of information."
>
> 2 Kent Com. 485.

At any rate, at the very first meeting of the incorporators the lease was made over to the company and this took place on March 8, 1909, only nine days after Lams says the conversation took place. It was urged at the trial that, as the lease from the Brazilian Dredging Company to Fish, required the consent of the said Brazilian Dredging Company to its assignment to the Gem Dredging Company, the lease was not a valid lease, even when accepted by the Gem Dredging Company on March 8, 1909. But, again, the evidence shows (p. 96, line 1) that on April 16, 1909, the formal approval of the transfer of the lease from Fish to the Gem Dredging Company was given by the directors of the Brazilian Dredging Company. So that every little formality to make the lease a perfectly valid one was attended to as rapidly as corporate action could be had, and the plaintiff could have suffered no damage from these facts.

The case of *Byard* v. *Holmes*, 34 N. J. Law, p. 296, treats of this alleged point exactly. That was an action on the case for deceit—and came up on

a demurrer to a declaration. The representation alleged was that the defendant on a certain day was "the owner of seventy acres of good oil land on Oil Creek, near McClintockville, in the State of Pennsylvania, which said seventy acres of land he, the said defendant, was to put into said company, to be owned and used by the said company in boring for and procuring oil therefrom, and that there were seven oil wells upon the said land." The averment was "whereas, in truth and in fact, at the time, etc., the said defendant was *not* the owner of seventy acres, etc." The Court says (p. 298): "Now, what is the effect of this general denial of the alleged pretence or pretences of the defendant? Is it to be understood as terminating upon the time, and does it mean nothing more than that the defendant, on the very day stated, did not own, etc.? Assuming this to be its meaning—and it certainly may mean this and nothing more—the misrepresentation is manifestly immaterial, for the defendant may have owned the land described, on the next day, and may have put it into the company as the basis of its stock; and if he did it could make no possible difference in the value of the plaintiff's stock, whether the defendant owned the land on the day stated or not."

Another attempt to show that the Gem Dredging Company did not have a valid lease was made by introducing extracts from the laws of Brazil showing that foreign corporations had to be registered in Brazil in order to carry on business there. There is no proof whether or not the Gem Dredging Company was registered there, so this doesn't play any part in the case but in passing, and in the event that any attempt is made to urge this point, attention is called to the language of the statute (p. 161, line 1) "Art. 47—All foreign joint stock companies or their branches or agencies, like-

wise require authorization from Government *in order to carry on business in the Republic* and must observe the following regulations," etc. This undoubtedly means, if it applies at all, that registration, etc., would be required to *operate* under the lease. Registration would therefore be a corporate act of the Gem Dredging Company to be attended to after its organization and could have had nothing to do with any representation made by Fish during the process of organization here in this country that the Gem Dredging Company, a South Dakota corporation, "had a lease."

We submit, therefore, that there was no evidence of misrepresentation of any material fact, and, therefore, no fraud.

> Proof of fraud must be clear and satisfactory.
>
> Smith on Fraud, Sec. 264.

> The burden of proof is on the complainant and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations.
>
> Smith on Fraud, Sec. 267.

> Where there is no evidence to justify a finding of fraud, the question is not for the jury, but for the Court, and a non-suit or direction of a verdict is proper.
>
> Smith on Fraud, Sec. 280.

2. *The Court correctly ruled on all the evidence at the end of plaintiff's case that it failed to show damage suffered by the plaintiff.*

The complaint alleges and the answer admits that the plaintiff exchange his shares in the Gem Dredging Company for shares in the Gem Exploration Company. There is not a word of testimony as to the value of these shares of stock. *In fact, the Gem Exploration Company is not mentioned from beginning to end of the evidence.* It is difficult to say more than that. The plaintiff, as a result of all these transactions, now owns certain shares in the Gem Exploration Company. Plaintiff must show damage, of course, as part of his case, and no attempt has been made to show the value of Gem Exploration Company stock.

> If there has been no damage there has been no fraud, and hence no recovery can be had. Fraud and injury must both concur in order to furnish ground for judicial action.
>
> Smith on Fraud, Sec. 287.

As to Rulings on Evidence.

3. To the rulings upon all questions embraced within the third ground of appeal, except *a* and the last question under *l*, no objection was taken.

We understand that it is the duty of counsel who believes himself injured by a ruling of a trial judge to object to the same. The rule is usually placed upon the ground that the opposite party should have the proper opportunity to avoid, by amendment, or by supplying any defect in his proof, the effect of the objection (6 Cyc. 662); in this State one purpose of the rule seems to have been to warn the trial judge that the particular ruling was deemed so important as to affect the outcome

of the trial, and thus to afford him an opportunity to pause and reflect and consider well his ruling; and this not only out of fairness to the Judge, but to lessen the chance of reversible error.

> *Garretson* v. *Appleton*, 29 Vr. 396.
> *O'Donnell* v. *Weiler*, 43 Vr. 142.

The practice now is to enter objections to the rulings of the trial judge, and it is submitted that such objections are as indispensable as were exceptions under the old practice. The whole purpose of the new practice act is to simplify procedure and hasten a cause to a final determination upon its merits, and certainly that purpose will not be accomplished if it is to be open to an appellant, for instance, to question any and every ruling of the trial court on the allowance of questions made in the heat of a trial over the ill-considered and often perfunctory objections of counsel. It is submitted that the only change brought about or intended to be accomplished by the new provision of the practice act is to do away with the signing and sealing of exceptions by the trial judge.

But, assuming that proper objections were taken, the rulings referred to in ground of appeal No. 3 were properly made. Questions a, b, c, d and e were all asked on redirect examination. The refusal to allow these questions was expressy stated by the Court (p. 81, line 31) to be because they called for repetition of direct testimony.

> "The scope and extent of the redirect examination is in the discretion of the Court."
> 40 Cyc. 2530.

Question (f) (p. 101, line 27) was properly over-

ruled as immaterial for the reason stated by Mr. Codding. There is no allegation in the complaint about a lease from the Brazilian Dredging Company of New York. The lease to Fish was alleged to have been made by the Brazilian Dredging Company of South Dakota.

Question (g) (p. 129, line 22) was properly overruled. A reading of the previous question will show that the trouble the witness was under was that it had not been shown he was in Brazil previous to or at the time of the alleged representations, and it was of no use to ask him if he was familiar with the property long afterwards.

Question (h) (p. 129, line 28). This was immaterial. The Court offered to admit the question if Mr. Heine would say that witness examined whole concession (p. 130, line 18), but Mr. Reine withdrew the witness. The question was objectionable in form. It implies that witness was able to testify as an expert, although he had not qualified as an expert.

Question (i) (p. 131, line 2) was properly overruled. Witness was detailing a conversation which took place in 1908. The Gem Dredging Company was not incorporated until February 23, 1909.

Question (j) (p. 140, line 29) was correctly overruled for the reason stated in the objection by Mr. Codding in the record.

Question (k) (p. 86, line 3) was properly overruled. It made no difference whether the witness had been accustomed to advise regarding Brazil laws; the question was whether he was competent to do so. Plaintiff, in any event, was not prejudiced because the only object of presenting this witness was to prove a translation of the laws of Brazil, and the Court admitted the translation presented by him, and it is printed as Exhibit P5, page 160.

(L) The questions under this section were allowed except the last one. It will be observed that questions were being asked about the minutes of the Brazilian Dredging Company of New York, concerning which there is no allegation in the complaint, the complaint alleging that Fish said he or the Gem Dredging Company had a lease from the Brazilian Dredging Company of South Dakota. If it were proper to question witness about the minutes of another corporation, the object could only have been to show that Fish's lease was incomplete until some formal corporate approval, and as it is established that Fish had the lease and the Gem Dredging Company in due time acquired it, there was no injury to the plaintiff. The case of *Byard* v. *Holmes*, 34 N. J. Laws, page 296, cited above, clearly established this. Therefore, the overruling of this question could not have affected plaintiff injuriously.

Question (m) and the ruling thereon is found at page 128, line 9. There was no objection on the part of plaintiff to the ruling, but the ruling affected the plaintiff in no way whatever, because subsequently the same question was asked this witness (p. 140, line 2) and answered, so plaintiff had the benefit of the answer to this question, although not at this point.

4. No objection was made to ruling on question (a). As a matter of fact, the case shows the question at page 47, line 27, and also shows that as a result of a comment of the Court the question was not pressed and not answered.

Question (b) was proper. The objection seems to be only to the inference of counsel that $450 is 20 per cent of $2,250, and, as it surely is, it is nonsense to assert reversible error by this use of these words in cross examination.

Question (c) was proper, and there was no objection to ruling. The plaintiff had testified that Fish told him he had a lease or that the Gem Dredging Company had a lease and this witness' evidence had been that Fish had a lease dated February 23, 1909. The witness was concealing the fact that Fish had a lease dated November 2, 1908, and the object of the question was to show that fact, and the next few questions did so, and made the witness admit it. We submit it was proper to make the witness tell the real truth on cross examination.

Question (d), while objected to by Mr. Heine, was not ruled upon by the Trial Judge, and as the answer of witness was, "I don't know anything about that," it is obvious that there was no prejudice to the plaintiff in the answer.

Question (e) was proper on cross examination. The witness had been trying to show that a company couldn't do business in Brazil if it wasn't registered, and he at the same time was secretary of a company admittedly not registered there, and yet making leases on its property there. It was proper to find out whether he was lying or just didn't know anything about it.

Question (f) was proper upon the same theory as the last question, and in logically following up that one.

5. The ruling objected to in this ground of appeal is found at page 41, line 4. The Court had discovered that he had overlooked a clause in the complaint and for that purpose directed that certain testimony be stricken out, and that counsel *begin over again*, so that the Court could rule upon the questions with the knowledge of the clause in the complaint which he had just discovered. Counsel should have asked his questions over again, and had the Court rule upon them, when if the rulings

were not according to his liking he could have noted an objection. He made no objection to this ruling, and apparently acquiesced because he did not repeat the questions and take a ruling upon them. He cannot now complain.

6. Question (a) was irrelevant and the answer to it was stricken out (p. 84, lines 8-17). The colloquy about the question and the reason given by Mr. Codding (foot of p. 84) sufficiently explain the propriety of the Court's action. The plaintiff made no objection to Court's ruling.

Questions (b) and (c) under this ground of appeal were asked of George William Chester, an attache of the Brazilian Consulate at New York, who was called to prove a translation of certain Brazilian laws affecting corporations. The first question appears at page 86, line 11, and the second on page 87, line 7. As will be seen, if the Court reads this witness' testimony starting on page 85, counsel had had an oral understanding with the Court as to the method of using this witness to prove this translation of the corporation laws of Brazil, and counsel for defendant understood that this line of questioning was not in accordance with the understanding; hence the objections. However, as the sole object of calling this witness was to prove the said translation, and as he did so, and the translation is printed as Exhibit P5, at page 160, it is unnecessary to comment of these rulings, because plaintiff was in no way affected by them, and, therefore, no reversible error can be shown.

7. We do not find any such refusal as is mentioned in this ground of appeal, but presume it may refer to a question asked by Mr. Heine at page 101, line 28. If so, the colloquy between counsel and the Court satisfactorily gives the reasons for the Court's action and there was absolutely

no objection on the part of plaintiff's counsel to the Court's ruling.

8. The circumstance upon which this ground of appeal is laid is found at page 104, line 33, and is a warning generally to the witness to testify as to what defendant told him, and not as to statements made by witness to defendant. The witness' statements remain intact in the record, however, and there is no question in the record which was not answered, so there is nothing upon which to complain.

9. This question is found at page 119, line 19, and is redirect examination. As the Court says, witness had been all over the subject on direct examination, and the Court was exercising his legal discretion as to how far he should allow repetition.

Conclusion.

We respectfully submit that the plaintiff's case showed no misrepresentation of a material fact upon which the plaintiff could have relied, but, on the contrary, plaintiff admitted going into the company by reason of the report of Mr. Hedden, who had been sent to Brazil to investigate. Furthermore, plaintiff showed no damage whatever. In the light of these facts, the judgment will not be reversed on the ground of misdirection or the improper admission or exclusion of evidence because the substantial rights of the plaintiff could not have been injuriously affected.

The Practice Act (1912), Sec. 27.
Neff v. *Hannan*, 88 Atl. 1068.

The judgment appealed from should be affirmed

CODDING & OLIVER,
Counsel for Defendant-Respondent.

INDEX.

Notice of Appeal.

Filed November 4th, 1913.

New Jersey Supreme Court.

UNION COUNTY.

10

EMILE LAMS, *Plaintiff,* *vs.* HARWOOD EDWARD ODEREY FISH, *Defendant.*	*Notice of Appeal.*

To Messrs. Codding & Oliver, 20
Attorneys for Defendant.

Sirs:

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in the above entitled cause.

Yours, etc.,

M. CASEWELL HEINE,
Attorney for Plaintiff. 30

Dated November 3d, 1913.

40

Grounds of Appeal.

Filed November 15th, 1913.

New Jersey Court of Errors and Appeals

10 EMILE LAMS,
Plaintiff-Appellant,
vs.
HARWOOD EDWARD ODEREY FISH,
Defendant-Respondent.

On Appeal.
Grounds of Appeal.

To Messrs. Codding & Oliver,
Attorneys for Defendant.

20 Sirs:

TAKE NOTICE that the following are the grounds of appeal which the plaintiff-appellant hereby assigns and upon which he will rely at the hearing:

1. Because the court ruled, at the end of plaintiff's case, that plaintiff be non-suited and that the evidence did not establish a cause of action for fraud and deceit by the plaintiff against the defendant.

2. Because the court ruled on all the evidence at
30 the end of plaintiff's case that it failed to show damage suffered by plaintiff.

3. Because the following questions were overruled:

a. *By Mr. Heine.* Q Now, Mr. Lams, you have been trying to tell Mr. Codding, or inform Mr. Codding about this subscription on February 27th. Will you just explain to the jury the facts in regard to this seven hundred and fifty dollar subscription which Mr. Codding asked you about, and also the subscrip-
40 tion on the 27th of February, when you paid the

eighteen hundred dollars, just explain that? (~~S. M., pp. 71-73.~~ (Case p. 80 l. 10 and p. 81 l. 18)

b. *By Mr. Heine.* Q When you went to Mr. Fish's office on the 27th of February, had you already subscribed to stock of the Gem Dredging Company? (~~S. M., p. 73.~~ (Case p. 81 l. 22)

c. *By Mr. Heine.* Q Mr. Lams, on the 27th of February, how many shares of stock of this Gem Dredging Company did you subscribe for? (~~S. M., p. 73.~~ (Case p. 81 l. 26) 10

d. *By Mr. Heine.* Q The amount of four hundred and fifty dollars which you paid prior to the 27th of February, did that amount apply to a subscription of five thousand shares of stock of this company? (~~S. M., p. 74.~~ (Case p. 81 l. 35)

e. *By Mr. Heine.* Q What was that check in payment of? (~~S. M., p. 77.~~ (Case p. 83 l. 30)

f. *By Mr. Heine.* Q Will you look at the minute book of the Brazilian Dredging Company of New York, if you have it? (~~S. M., pp. 106-108.~~ (Case p. 101 l. 28) 20

g. *By Mr. Heine.* Q Are you familiar with the concession of the Brazilian Dredging Company as it was in your first visit to Brazil in 1909? (~~S. M., p. 150.~~ (Case p. 129 l. 22)

h. *By Mr. Heine.* Q Mr. Wilson, what experience have you, on your first trip to Brazil in 1909, to be able to tell from an examination of the property leased to Mr. Fish under plaintiff's Exhibit 1, whether on that property prior to February 27th, 1909, tests for values of diamonds and gold had been carried on or conducted? (~~S. M., pp. 150-151.~~ (Case p. 129 l. 28 and p. 130) 30

i. *By Mr. Heine.* Q Please state what was said regarding the affairs of the Gem Dredging Company. (~~S. M., p. 153.~~ (Case p. 131 l. 2)

j. *By Mr. Heine.* Q Was it possible for you in July, 1909, on this particular two miles of property referred to in plaintiff's Exhibit 1, to tell from your 40

examination of it whether or not there had been tests to determine values of diamonds and gold on that property made on it prior to February 27th, 1909? ~~(S. M., p. 168.)~~ (Case p. 140 l. 30)

k. *By Mr. Heine.* Q In the regular performance of your duties as first secretary you are accustomed to advise in regard to commercial and incorporation laws of Brazil? ~~(S. M., p. 81.)~~ (Case p. 86 l. 3)

l. *By Mr. Heine.* Q Is there any reference which covers lease that was given by the Brazilian Dredging Company of South Dakota, plaintiff's Exhibit 1? A Yes, sir. Q What is the date of the meeting in which that reference appears? A May 17th, 1909. Q And what is the statement in the minutes? ~~(S. M., pp. 143-144-145.)~~ (Case p. 125 l. 26; p. 126)

m. *By Mr. Heine.* Q Will you state what experience you have had in engineering lines? ~~(S. M., pp. 148-149.)~~ (Case p. 128 l. 9)

4. Because the following questions were admitted over plaintiff's objection.

a. *By Mr. Codding.* Q How could you have been induced, on the 27th day of February, 1909, to take stock in a company, by the representations of Mr. Fish made on that day, to take stock in a company when as a matter of fact you had taken stock already, at least paid for certain stock previously to that time and previous to the incorporation of this company? ~~(S. M., p. 23.)~~ (Case p. 47 l. 27)

b. *By Mr. Codding.* Q Therefore, as I understand it, on the ninth day of February you paid twenty per cent. on the twenty-two hundred and fifty dollars, which is four hundred and fifty dollars, and after the 27th you paid the balance of eighteen hundred dollars to make up the twenty-two hundred and fifty dollars? ~~(S. M., pp. 40-41.)~~ (Case p. 60 l. 4)

c. *By Mr. Codding.* Q Was there ever any lease made by the Brazilian Dredging Company, to your

knowledge, previous to the one that you testified to on the book? A The records speak of none.

The Court. That is not the question.

(Question repeated by stenographer.)

By Mr. Buchanan. Objected to, unless the question states to whom the lease was made.

By Mr. Codding. To the defendant in this case, by the Brazilian Dredging Company. 10

Mr. Buchanan. Objected to as not being material to the question in issue.

The Court. Question allowed.

Mr. Buchanan. The question is whether there was any other lease made to the defendant, Harwood Fish. The issue in this case and what has been testified to in this case, relates to leases owned by the Gem Dredging Company at the 27th day of February.

The Court. Question allowed. ~~(S. M., pp. 121-125.)~~ (Case p. 111 l. 1-20)

d. *By Mr. Codding.* Q Who received any money that was paid for that lease? ~~(S. M., p. 125.)~~ (Case p. 113 l. 18) 20

e. *By Mr. Codding.* How then do you justify your statement that a company could not do business in the United States of Brazil unless it was registered there, or hold property, when you say not that your own company didn't do it? ~~(S. M., p. 125.)~~ (Case p. 113 l. 28)

f. *By Mr. Codding.* Q What excuse had you for giving such a lease then? ~~(S. M., p. 126.~~ (Case p. 114 l. 18)

5. Because the court struck out the evidence regarding conversations prior to February 27th and offered as leading up to the representations made on February 27th. ~~(S. M., pp. 1-13.~~ (Case p. 41 l. 4; pp. 37-40) 30

6. Because the court struck out the answers to the following questions:

a. *By Mr. Heine.* Q Do you remember who requested you to sign that paper as a witness? A Mr. Fish. ~~(S. M., p. 78.~~ (Case p. 84 l. 8-18)

b. *By Mr. Heine.* Q Do you know the law of Brazil governing foreign corporations? 40

Mr. Codding. Objected to as incompetent, irrelevant and immaterial. A Yes. ~~(S. M., p. 81.)~~ (Case p. 86 l. 12)

c. *By Mr. Heine.* Q Are you familiar with the law governing the foreign corporations in Brazil? A Yes. ~~(S. M., p. 83.)~~ (Case p. 87 l. 12)

7. Because the court refused to allow plaintiff to offer evidence that all the stock of the Brazilian Dredging Company of New York was owned by Brazilian Dredging Company of South Dakota as a holding company. ~~(S. M., p. 108.)~~ (Case p. 102 l. 20)

8. Because the court refused to allow plaintiff's witness Case, to testify to the whole of a conversation between defendant and witness Case, and limited the testimony of the witness to statements made to him by defendant, excluding the statements made by the witness to defendant to which defendant made answer and thereby excluding some of defendant's answers. ~~(S. M., pp. 109-111.)~~ (Case p. 102 l. 3 to p. 104 l. 36)

9. Because the court, although defendant's counsel did not object, refused to allow witness Case to answer the following questions:

a. *By Mr. Heine.* Q Will you state then what was done in regard to this question of the leases of the Brazilian Dredging Company? Explain that. A I came home and reported to the Board of Directors as to the conditions as I found them in Brazil—

The Court. He has already testified to that. Do not cumber up the record with repetitions.

Mr. Codding. We have no objection.

The Court. But I have. ~~(S. M., p. 131.)~~ (Case p. 119 l. 18)

M. CASEWELL HEINE,
Attorney for Plaintiff-Appellant.

M. CASEWELL HEINE,
MALCOLM G. BUCHANAN,
Of Counsel.

Judgment Record.

NEW JERSEY SUPREME COURT.

EMILE LAMS *vs.* HARWOOD EDWARD ODEREY FISH.	

10

Harwood Edward Oderey Fish, the defendant in this cause, was summoned to answer unto Emile Lams, the plaintiff therein, in an action at law upon the following complaint.

Complaint.

Filed March, 1913.

20

NEW JERSEY SUPREME COURT.

UNION COUNTY.

EMILE LAMS, *Plaintiff,* *against* HARWOOD EDWARD ODEREY FISH, *Defendant.*	*Action at Law.* *Complaint.*

30

The plaintiff residing at Roselle, in the County of Union and State of New Jersey, says:

1. That on and after February 23, 1909, Gem Dredging Company was a foreign corporation organized under the laws of South Dakota, and maintaining an office at 102 Chestnut street, Roselle Park, County of Union and State of New Jersey.

40

2. That on and after May 1, 1911, Gem Exploration Company was a foreign corporation organized under the laws of South Dakota, and maintaining an office at 102 Chestnut street, Roselle Park, County of Union and State of New Jersey.

3. That defendant was promoter, and president, and general manager, and the largest stockholder in Gem Dredging Company, and was promoter, and secretary, and largest stockholder in Gem Exploration Company.

4. That the laws of the Republic of the United States of Brazil providing for and relating to the authorization of foreign corporations to perform their corporate functions and to carry on their corporate business in the Republic of the United States of Brazil are as follows:

"LEIS USUAES DA REPUBLICA DOS UNIDOS DO BRAZIL, publicadas por ordem do Exm. Sr. Dr. J. J. Seabra, Min. da Justice e Negocios Interiores, pelos Dr. Tarquino de Souza e Dr. Caetano Montenegro, Rio de Janeiro, Imprenta Nacional 1903," being Decree No. 434 of July 4th, 1891, Chapter 2 thereof, that the provisions of said law are as follows:

"Art. 47. All foreign corporations or their branches or agencies, likewise require authorization from Government in order to function and carry on business in the Republic, and must observe the following regulations:

Par. 1. Their articles of association must declare the term, never exceeding two years from the date of their authorization, within which at least two-thirds of the company's capital must be realized and transferred to this country.

Par. 2. Such companies are subject to the same dispositions that control all foreign corporations generally as regards intercourse, rights and obligations between the company and its creditors, shareholders

and all other interested parties, with domicile in Brazil even if temporarily absent.

Par. 3. After obtaining said authorization, such companies must, under penalty of their being annulled, lodge with the Associcao Commercial, or, where no such exists, with the Registrar of mortgages of the respective department (comarca), the statutes of the company, a list of shareholders with note of the number of shares held and amount paid up by each, and the certificate of deposit of a tenth part of the capital, and, moreover, must publish in the "Diario Official" (Gazette) and in the newspapers of the district, the notices exacted by this Decree. (Law No. 3150 of 4th November, 1862, Art. 1, Par. 3, final; Decree No. 8821 of the same year, Art. 130, Par. 1; Decree No. 164 of 17th January, Art, 1, Par. 2, Nos. 1 (a) and 3.

Par. 4. Foreign companies already established in this country must comply with the terms of the preceding paragraph, within six months from the date of publication of Decree No. 164 of 12th January, 1890, under penalty of forfeiting the right to operate in this Republic. (Decree No. 164, Art. 33, sola Par.)

Art. 48. All foreign corporations whose object is the construction of railways conceded by competent authorities do not require authorization from the Federal Government. (Decree No. 5561 of 28th February, 1874; Decree No. 8821 of 30th December, 1882, Art. 130, Par. 2.)

Art. 49. Mutual provident association for provisions of pensions, pawnbroking associations, as also religious associations and corporations, shall be ruled not only as regards their constitution, but also as regards their administration by the laws in force previous to the present Decree. (Decree No. 8821, Art. 131.)

Art. 50. Foreign corporations dependent on authorization from Government (Art. s. 46 and 47), can

only obtain same if their statutes or articles of association have been organized in accordance with the dispositions of this Decree, to which they are, and will continue to be, subject. (Decree No. 8821, Art. 132.)

Art. 51. Petitions for authorization or for the approval of the company's statutes must be addressed to the Government, to Congress, or to the Governor of the respective state in which the company will be constituted according as powers of concession, under existing legislation, lie with one or other of these branches of public authority. (Decree No. 2711 of 19th December, 1860, Art. 8; Decree No. 8821 of 1882, Art. 132, Par. 1.)

Art. 52. Upon receipt of such petitions they shall be subjected to examination in order to determine:

(1) Whether the object of the company is legal and likely to be of use to the public.

(2) Whether the incorporation applied for is opportune and like to be successful.

(3) Whether the capital determined in the statutes is sufficient for the object of the company and whether its realization is properly secured and the dates of the instalments determined in a manner to permit the company to meet its obligations.

(4) Whether the statutes of the company, or the basis on which the petition is founded, are in accordance with this present Decree and other laws in force, and whether they are fair and reasonable.

(5) Whether the administrative regimen of the company offers the moral guarantees indispensable for the credit of the undertaking and the security of the shareholders and public interests.

(6) Whether the dispositions regarding the presentation of accounts, division of profits, constitution of reserve fund, rights and interests of shareholders, and operations in general are such as to inspire the confidence of the public and of parties interested.

Art. 53. Authorization may be granted independently to one or more persons proposing to constitute, organize, or incorporate such companies on previously defined lines, or simultaneously with the approval of the statutes of the company.

Art. 54. The fact that authorization has been granted merely on declaration of the basis for association does not dispense with approval of the statutes or articles of association. 10

Art. 55. In the first of the hypotheses of Art. 53, the incorporation or organization of the company must precede the registration of the deed of authorization. (Decree No. 2711 of 1860, Art. 8.)

Art. 56. In the petition for the deed of authorization must be specified:

(1) The object of the company.

(2) The place at which its operations will be carried on. 20

(3) The prospects of success.

(4) The term which the company should be constituted. (Decree No. 2711 of 1860, Art. 5, Par. 2.)

Art. 57. The petition must be dated and signed, and the signatures be legalized and be accompanied by the address of the petitioners. (Decree No. 2711 of 1860, Art. 3, Par. 2.)

Art. 58. In the second of the hypotheses of Art. 53, and in that of the simple approval of the statutes provided for in Art. 54, the petition must be accompanied by the following documents: 30

Par. 1. A copy of the statutes signed by the promoters.

Par. 2. A list of the shareholders, giving their names, occupations and addresses, and the number of shares subscribed. (Decree No. 2711, Art. 4.)

Art. 59. When the desired authorization, or the approval of the statutes has been granted, and the alterations, or additions demanded by the Decree of 40

Approval have been accepted by the parties interested, a deed of authorization or of approval, or of both together, shall be drawn up. (Decree No. 2711 of 1860, Art. 11.)

Art. 60. When the authorization has been granted and the acts, to which Art. 11 of the above-mentioned Decree 2711 refer, have been duly executed, the foreign corporation will be constituted in the manner laid down by this Decree. (Decree No. 8821, of 1882, Art. 132, Par. 2.)

Art. 61. As soon as these acts have been executed (Art. 11 of the Decree 2711), the company will be free from any further intervention on the part of the Government. (Decree No. 8821, of 1882, Art. 132, Par. 3.)

Art. 62. An authenticated copy of the deed of authorization must be lodged in the archives and published, together with the statutes of the company, in accordance with Par. 3 of Art. 47 of this Decree. (Decree No. 8821, Art. 132, Par. 4.)

Art. 63. For modification of the period of duration or any other alteration in the statutes of companies dependent upon Government authorization must be in accordance with the dispositions of this Decree, by which the constitutions of such companies is regulated. (Decree No. 8821 of 30th of December, 1882, Art. 132, Par. 5.)

Art. 64. For the concession of authorization to companies of foreign origin and their branches, or agencies, the dispositions of Decree 2711 shall be equally observed. (Decree No. 8821 of 1882, Art. 134.)"

That said law, as above set forth, was at the times herein mentioned, in full force and effect and so continued.

5. That on or about February 27, 1909, defendant solicited plaintiff (who was then and there wholly

ignorant of the condition of Gem Dredging Company, its property and prospects) to buy stock in said Gem Dredging Company, and to induce plaintiff to buy the same, and with false and fraudulent intent of so inducing him to buy, did then and there make the statements and representations hereinafter more particularly set forth at the end of this paragraph, which plaintiff then and there believed, and which were material, and upon which plaintiff relied, and plaintiff by reason of said representations and statements then and there made by defendant, and by them only was so induced to buy, fifteen thousand shares (15,000) of stock of said Gem Dredging Company, and received a certificate of said company for said shares and paid therefor the sum of twenty-two hundred and fifty dollars ($2250).

That said statements and representations made by defendant, as above referred to, pursuant to his said fraudulent intent, the falsity of which were known to him as aforesaid, regarding said Gem Dredging Company, are more particularly and in detail as follows:

(a) That the defendant had through great good fortune become acquainted with certain persons in New York who knew of very valuable diamond and gold bearing mines in the State of Minas Geraes, in Brazil, from which it would be easy, with comparatively little capital, to extract large values in diamonds and gold; and that said lands were of great value; and that an investment in any company owning or operating them would be "the chance of a lifetime;" and that Gem Dredging Company had a lease from a corporation known as Brazilian Dredging Company, of South Dakota, of one or more miles of diamond and gold bearing lands on the Jequitinhonha River in said State of Minas Geraes, in the Republic of Brazil, which lease was of great value, as it covered the most valuable gold and diamond bearing lands in Brazil.

Whereas said statements were not true, but the fact is that whether or not said lands were of a diamond and gold bearing character and of great value by reason thereof was not known to defendant, and is not known to-day, and defendant had no knowledge, as he represented of the value of diamond and gold bearing character of said lands, and their value as such has never been determined; and Gem Dredging Company did not have and own a valid, legal and enforceable lease of said lands as represented by defendant, and was not registered or authorized to perform any corporate function in the Republic of Brazil in accordance with the law hereinbefore set forth in paragraph 4 hereof; and said Brazilian Dredging Company, of South Dakota, was not registered or authorized to perform any corporate function in the Republic of Brazil in accordance with the law hereinbefore set forth in paragraph 4.

(b) That said property referred to as covered by the aforesaid lease had been tested and proven by experts to be of great value as a diamond and gold bearing property, and that reports of noted engineers had been made in regard to the said property covered by said lease.

Whereas said statement is not true, but the fact is that no expert ever made a sufficient examination of the said property covered by the aforesaid lease and represented as belonging to said Gem Dredging Company, or obtained facts in regard thereto sufficient to justify the statement that said leased property was of great value as diamond and gold property; or that the same had been tested and proved and value shown in accordance with the usual engineering and investors' understanding of the meaning of said terms.

(c) That the cost of securing the registration of said Gem Dredging Company, so that it would be authorized to operate in the said Republic of Brazil in accordance with the laws thereof hereinbefore set

forth, would be from four thousand dollars ($4,000) or twenty thousand dollars ($20,000); and that this would be done immediately from the first moneys received from the sale of stock; and that said registration would be promptly attended to and the legal position of said Gem Dredging Company in said Republic of Brazil would be thoroughly safeguarded and protected, and the laws of said Republic of Brazil regarding foreign corporations strictly and in good faith complied with.

Whereas said statement is not true, and that as defendant well knew and represented that he knew, the cost, pursuant to the laws of the Republic of Brazil, above set forth, of registering said Gem Dredging Company and securing authorization to perform its corporate function in the Republic of Brazil, required the deposit in some financial institution in said Republic of Brazil of the sum of one hundred thousand dollars ($100,000) in cash, and the investment in said Republic of Brazil, within two years, of an amount equal to at least two-thirds of the capital stock of said Gem Dredging Company.

6. That defendant well know of the falsehood of the representations and statements so made by him and made them with intent to deceive and defraud plaintiff by inducing the purchase by plaintiff of stock of said Gem Dredging Company and defendant knew the entire facts, and represented that he knew them, when he made the aforesaid fraudulent representations to induce plaintiff to buy said stock, and the same were material and believed by plaintiff, and plaintiff was thereby induced by defendant to, and did, purchase, as aforesaid, fifteen thousand (15,000) shares of stock of said Gem Dredging Company, and then and there paid therefor twenty-two hundred and fifty dollars ($2,250), as aforesaid.

7. That defendant thereafter and from time to time, continuing down to May, 1911, in continuance

of and because of, and as a part of the fraud whereby he induced the purchase by plaintiff of said stock of Gem Dredging Company, entered upon a course of conduct and action and made further representations and statements and issued various prospectuses relating to the stock and property and prospects of said Gem Dredging Company (all of which are hereinafter more particularly set forth at the end of this paragraph), which said conduct, statements and prospectuses were fraudulent and false, and defendant then and there, from time to time during the aforesaid period and down to 1911; as he conducted himself and acted and made and issued said statements and prospectuses to plaintiff, knew the same to be false, and in doing, acting, making and issuing which, he had the fraudulent intention of concealing the true facts which he knew, and represented that he knew, and of fraudulently inducing plaintiff to continue to have faith in and believe in Gem Dredging Company and its property and prospects as a desirable investment and to retain said stock so purchased and to hold it as an investment, and to keep plaintiff in ignorance of the fraudulent statements and the fraud practiced upon him in the sale of said stock to him, and to induce plaintiff not to make trouble and not to make any thorough investigation of the affairs of Gem Dredging Company, and to condone many small irregularities in bookkeeping and in making formal reports to various authorities, and to entrust in all its details the management of said company to defendant as president and general manager, without any restriction and without requiring any great detail in the reports of the progress of the company's operations in Brazil, and its financial condition, and to prevent plaintiff from knowing and taking any steps to enforce his legal or equitable rights in the premises; and said conduct and action and statements and prospectuses were material, and plaintiff believed and

trusted defendant in his conduct and actions, and believed defendant to be honest and that defendant knew what he was talking about and stated correctly matters represented to be of his own knowledge, and plaintiff believed the reports and the statements and prospectuses issued from time to time, compiled and written by defendant, and relied on all of the same, and was thereby induced to and did continue to hold said stock of Gem Dredging Company as an investment, with faith in said company, its properties and prospects, and was kept and remained in ignorance of the fraud practiced in the sale to him by defendant of said stock, and was kept in ignorance of his legal or equitable rights in the premises, and took no steps to enforce the same, nor to secure and enforce any thorough or extraordinary investigation of the affairs or conditions of the company (which without reliance upon defendant and his conduct and statements he otherwise would never have done), and did condone the failure to comply with many minor corporate rules and regulations, and left to the management of defendant, as said president and general manager of Gem Dredging Company, the details of corporate policy and operation, and made no trouble, and in no way hampered the action of said defendant in the management of the company.

That at various meetings of directors and stockholders which were from time to time held, and at which plaintiff was present, said defendant, when questioned regarding matters of corporate policy and regarding the details of the company's operations in Brazil, stated that he was doing everything honestly and above board, and that no one had any need to worry; that he had resigned from his business connections in New York for the sole purpose of giving his entire time to the management of this corporation, and that everything was being conducted properly and efficiently, and that if the stockholders and

directors persisted in hounding him with impertinent inquiries and in making him spend his time in foolish and useless explanations of matters which were very simple to men of his business caliber, and which it was tedious to explain to the questioners, and that unless he should be relieved of these complaints and queries, he would withdraw from the entire company and its management and would leave said directors and stockholders helpless in said enterprise; and that thereupon this plaintiff and others were deterred from seeking to find out in greater detail the actual conditions of said company's properties, operations and financial condition, and were persuaded that defendant was a man of great ability and business experience, and that it was safe for them to rely upon his careful conduct and management, and not to further embarrass or annoy him with questions; and this plaintiff thereupon was satisfied that it would be wiser for the success of the venture not to cross or oppose said defendant, but allow him (appearing to be a man of ability, as he represented) to continue in the management, in the hope that thus the best results for the benefit of all and the success of the enterprise might be obtained.

That said conduct, actions, statements and representations of and by defendant, as above referred to, pursuant to his said fraudulent intent, the falsity of which were known to him and intended by him, as aforesaid, regarding said Gem Dredging Company, are more particularly and in details as follows:

(a) That defendant arrogated to himself the entire management of Gem Dredging Company and absorbed all sources of information from its properties and operations in Brazil, and took personal charge of its books of record and account, and its financial books, and represented himself to be possessed of exceptional ability and knowledge regarding the management of corporate affairs by reason of his business

experience in the City of New York, and of exceptional knowledge regarding the conditions existing in the diamond fields of Brazil, and with the properties there and their value, and as being in close touch with Brazilian Dredging Company, and particularly its president, one Meyer, and in possession of confidential and inside information of great accuracy concerning the values of said properties in Brazil;

10

Whereas said statement and representation was not true, and the fact is that defendant was not a man of exceptional business ability, and was more domineering than prudent, and more qualified to describe in glittering generalities the real or alleged merits of a business proposition than to give it conservative, careful, and efficient business guidance and judgment; and the further fact is that defendant was not possessed of any special or confidential information of a reliable character regarding the conditions and values of properties in the diamond fields of Brazil, and had no information in regard thereto of the accuracy and reliability which he represented, and had no particular influence with said Brazilian Dredging Company.

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(b) That he received and sent cipher cablegrams, paid for by the company, the key to which was in the possession of himself only, and that plaintiff and the other stockholders of said company were entirely dependent upon defendant for the translation of the same, and that defendant represented that he always fully disclosed the contents of said cablegrams.

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Whereas the statement was not true, and the fact is that he only partially disclosed the contents of said cablegrams, which frequently contained special information for his private and personal use regarding the securing of private and personal options by him, and that such information as was given out was discolored and distorted to serve the fraudulent purpose of defendant as hereinabove specified.

40

(c) That defendant was conducting all the corporate affairs of Gem Dredging Company as president and general manager in a perfectly legal and proper manner and in compliance with the law and for the best interest of all the stockholders, and that only in minor details were reports informal and statements neglected, largely because of a lack of funds for clerical hire.

10

Whereas said representations were not true, and the fact is that defendant did not, as president and general manager, conduct the corporate affairs of Gem Dredging Company according to the forms of law, either of its domicile or of the places and countries in which it was carrying on its business, and did not protect the stockholders of said company from becoming liable to creditors, and failed to correct errors in the company's records, minute books and financial books and statements, thereby increasing the legal liability of the stockholders and directors, and failed to perform important duties imposed by law upon him as said president and general manager in connection with the maintenance of the corporate powers of said company.

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(d) That Gem Dredging Company had secured options or leases or other rights in lands or concessions in various parts of Brazil, described as Cubas property; Rio Guinda property; Rio Braunas property, Carimbo property, and Mocororo property, and that said Gem Dredging Company could legally own and hold the same, and that defendant knew this from investigations he had made personally in Brazil.

30

Whereas said statement was not true, and the fact is that Gem Dredging Company could not have and did not have any title, right or enforceable contract or lease for or ownership of any option or lease on any land or concession, or right to any of the above-mentioned property, and could not take or hold the same or enforce said option or lease, or do any corporate

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act in the Republic of Brazil, as said company was not registered and authorized under and in accordance with the laws of Brazil, as above set forth.

(e) That defendant reported after having personally investigated the properties in Brazil, which were supposedly leased to Gem Dredging Company, that there was in sight millions of yards of cascalho giving values of upwards of two dollars ($2) per cubic yard on said properties. 10

Whereas said statement and report were not true, and the fact is that there was not and never has been on said properties of Gem Dredging Company millions of yards of cascalho in sight giving values of more than two dollars ($2) per cubic yard.

(f) That defendant, after personal inspection of said properties of Gem Dredging Company in Brazil, reported and represented to plaintiff and others that all preliminary work had been done and that Gem Dredging Company was in complete control of the district in which said properties lay. 20

Whereas said statement was not true, but the fact is that little, if any, preliminary work had been done, and said Gem Dredging Company was not in control at all legally by an enforceable contract or option of any properties in said district referred to.

(g) That said defendant reported, after personal examination of the properties aforesaid, in Brazil, that there was in Brazil, and paid for, three large plants, and all of the necessary machinery for these except a few specialized pieces and the washing machinery, which Mr. Spangler would take back with him on February 18, 1911. 30

Whereas said statement was not true, but the fact is that there were not three plants or any machinery of a sufficiently designed and appropriate character to comprise and be assembled into one efficient plant, and that the part of the said plants, as represented, consisted of disconnected and second-hand machinery 40

of nondescript type, incapable of ever being assembled into an efficient working plant.

(h) That after personal inspection by defendant of the aforesaid properties in Brazil, he represented that the same had been thoroughly tested, with results that proved their immense richness.

Whereas the said statement was not true, but the fact is that no thorough tests of any kind were made on the aforesaid properties by Gem Dredging Company or defendant, and no tests of a character sufficient to comply with the usual engineering rules and experience were made, and no tests of any kind were made in sufficient number to justify or prove the richness or values existing or to be found in said properties.

(i) That defendant, from time to time, told plaintiff various encouraging stories and reports regarding the great features the said diamond properties supposedly owned and controlled by Gem Dredging Company, and continued, in response to questions by plaintiff, to advise him to hold his stock and to keep it as an investment, and that everything would come out well, and on several occasions solicited plaintiff to purchase further shares of stock, stating that a little more money was needed for the running expenses and to place the property in a position to operate successfully and continuously on the rich diamond and gold fields, as aforesaid.

Whereas said representation and statement were not true, but the fact is that said property was not in a position where any small amount of money, or even a very large sum of money would have been able to place the company upon an operating basis, and said stock was not a good investment and had no chance of ever becoming so.

(j) That defendant represented to plaintiff and others that the money which was being received by the company from the sale of its stock was being used

in the development of the company's property, as aforesaid, on the Jequitinhonha and Caethe Mirim Rivers.

Whereas said statement and representation were not true, but the fact is that instead of using said moneys of the Gem Dredging Company to develop said properties on the Jequitinhonha and Caethe Mirim Rivers, defendant diverted them for this and used them to purchase options in his personal name elsewhere about the country.

(k) That said defendant represented to plaintiff and others that buildings had been erected upon the property alleged to belong to said Gem Dredging Company of a value of twelve thousand ($12,000) dollars to fifteen thousand ($15,000) dollars, which same buildings were put up partly under the personal supervision of defendant.

Whereas said statement and representation were not true, but the fact is that said buildings did not cost more than half of said sum.

8. That on or about the 28th day of April, 1911, and pursuant to and as a part of the aforementioned fraudulent scheme of defendant, and for the purposes hereinbefore mentioned in connection therewith, defendant circulated a certain circular or advertisement regarding the Gem Exploration Company of South Dakota, above mentioned, of which the following is a copy:

"Chas. Goldingay, Chairman.
Harwood Fish, Sec.-Treas.

EXPLORATION SYNDICATE.
Suite 29.
Nos. 843-5 Broad St., Newark, N. J.
(Tel. 1914-R Market.)

10 April 28th, 1911.

PLAN OF ORGANIZATION SYNDICATE OF THE 'GEM EXPLORATION COMPANY.'

Capital Stock:

Preferred	$1,000,000
Common	500,000

Preferred stock preferred as to assets and for 6% a year dividend on par in advance of Common, after which each class of stock shares equally in the earnings.

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Assets:

At least 2/3rds of all ostg. stock of the Gem Dredging Co.

At least 2/3rds of all ostg. bonds of the Gem Dredging Co.

Ownership of 'Cubas' property on the Cubas River, on which work will be started this spring.

Contracts on about three miles of upper Cubas River beginning at boundary of the Cubas property.

30

Machinery about to be shipped to Brazil.

Cash and secured notes, which should amount to about $5,000 when syndicate account is closed.

Treasury Stock:

Preferred, $850,000; Common, $300,000. All Common stock issued to be pooled until February 1st, 1914.

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$50,000 shares of fully paid non-assessable preferred stock will be sold at 50c. a share and will be the only stock issued that is transferable. No preferred stock of the new company will be sold for less than 50c. per share except same be stamped non-transferable until February 1st, 1913.

During the organization of the company, a block of 100,000 shares of preferred stock, non-transferable until Feb. 1st, 1913, but otherwise exactly the same as the fully paid preferred stock, will be sold to members of the syndicate and their friends at 25c. in blocks of 1,000 shares, after which the syndicate will be closed. The proceeds from the sale of this stock will go into the treasury of the new company in addition to the $5,000 mentioned above.

Present shareholders of the Gem Dredging Company will be permitted to subscribe for this syndicate stock at 25c. in smaller amounts than 1,000 shares at their discretion, but no certificate will be issued for less than 50 shares."

That thereafter and on or about May 11, 1911, and pursuant to and as a part of the aforementioned fraudulent scheme of defendant, and for the purposes hereinbefore mentioned in connection therewith, defendant circulated a certain circular of which the following is a copy, and one of which was sent by defendant to plaintiff:

"Roselle Park, N. J., May 11th, 1911.

To the Stockholders of the Gem Dredging Company:

Some of the shareholders appear to have misunderstood the 'Gem Exploration Co.' circular recently sent them. This is an entirely separate and distinct company and does not change in any way your rights in the Dredging Company.

In spite of every effort on my part, including a personal sub'n of $2,000, the old shareholders could not or would not subscribe the funds to pay for the Cubas property, and rather than permit strangers to get it, I finally persuaded interested parties to buy it and hold it for the benefit of all. This was done and they have formed a company and through an exchange of stock with the larger shareholders they also control fully 2/3rds of the stock and bonds of the Gem Dredging Company, although the two companies are otherwise entirely separate. This new plan is one that has been worked out entirely in the interests of the Dredging Co., stockholders and has the approval of its Board of Directors.

The first public price of the new company will be 50c. a share but as a favor we secured the privilege to all Dredging Co., stockholders of joining in the organization and subscribing for preferred stock at 25c. if they so desired. This privilege will end on May 25.

If you wish to exchange your old stock for Exploration Co. stock you can do so on exactly the same terms as I and others have done, viz., 1 share of new Common stock for each 2 shares of Dredging Co. stock issued prior to Aug. 1st, 1910. Pooled stock issued since Aug. 1st, 1910, and guaranteed by the bondholders will be exchanged share for share in pooled preferred stock. Treasury stock issued since August 1st, 1910, will be exchanged share for share into Treasury stock of the new company. I personally have exchanged all my stocks and bonds into the new company and have advised my friends to do likewise.

The exchange will give you a stock without bonds ahead of it and so in actual value worth more than double what the old stock is. Those

wishing to make the exchange should send in their old certificates, duly assigned to the 'Gem Exploration Co.' and signature witnessed, and certificates for stock in the new company will be sent them. New preferred is non-cumulative and after getting 6% dividend, common gets the same, and then they share equally.

Very truly yours, 10

HARWOOD FISH.

P. S.—A meeting of the shareholders of the Gem Dredging Company will be held at 102 Chestnut St., Roselle Park, N. J., on Tuesday, May 16th, at 8 o'clock P. M. All shareholders are urged to be present."

9. That thereafter and on or about May 16, 1911, plaintiff attended a meeting of the stockholders of the Gem Dredging Company pursuant to the notice, 20 copy of which appears in the preceding paragraph, and that at said meeting the defendant, pursuant to his aforesaid fraudulent scheme, as hereinbefore enumerated, and to cover up his fraud in inducing the plaintiff to purchase shares of stock of Gem Dredging Company, did represent that said Gem Dredging Company had no funds and that it had nothing but debts and that there were bonds outstanding ahead of the stock, and that money had not been forthcoming to purchase additional properties and to instal addi- 30 tional machinery, and to comply with various recommendations of defendant; and did further represent that the new Gem Exploration Company of South Dakota controlled and owned the Cubas property and the Funil diamond property, and the property on the Jequitinhonha and Caethe Mirim Rivers, formerly leased, or supposed to be leased, to Gem Dredging Company, and also large amounts of machinery in Brazil, and that said properties were proved and tested and showed marvelous values in gold and dia- 40

monds; and further represented that by reason of the fact that defendant had exerted his personal influence, and because of a personal feeling of friendship toward this plaintiff and others, stockholders of Gem Dredging Company, he had by dint of great personal exertion, secured the right and opportunity for this plaintiff and other stockholders of Gem Dredging Company to transfer and exchange their shares of stock in Gem Dredging Company for shares of the common stock of said new Gem Exploration Company of South Dakota, in the ratio of two of the old for one of the new; and defendant then and there urged this plaintiff and others strongly and, as he stated, disinterestedly, and solely for their benefit, to make the exchange of their stock, and represented to them that he personally had exchanged all of his stock in the Gem Dredging Company for stock in Gem Exploration Company, in accordance with said offer outlined above.

That plaintiff was then and there wholly ignorant of the true conditions and of the property and prospects of said Gem Exploration Company of South Dakota, and believed the statements then and there made by defendant to him and others, and believed that defendant had acted in the manner in which he said he did, in transferring said stock of his own to the new company, and that said statements and representations by defendant, and his conduct, were material and were relied upon by plaintiff, who was thereby induced to and did exchange his shares of stock in the Gem Dredging Company for seventy-five hundred (7500) shares of common stock of Gem Exploration Company of South Dakota, and that said statements, as aforesaid, made by defendant to plaintiff and others, were made with knowledge of their falsity by defendant and were made with intent on the part of defendant to induce plaintiff and others to exchange their stock of Gem Dredging Company

for stock of the new Gem Exploration Company of South Dakota.

Whereas said statements were not true, but the fact is that then and there, on said May 16, 1911, and thereafter on said May 26, 1911, when plaintiff received his certificate for seventy-five hundred (7500) shares of stock of the Gem Exploration Company of South Dakota, said company did not legally own the Cubas property and did not legally own or control nine miles on the Jequitinhonha and Caethe Mirim Rivers, and did not legally own and control the Funil property, and had no building or enforceable contract, option or lease of any of the same, and was not authorized to do and perform any corporate act in the Republic of Brazil, and had not complied with the laws thereof regarding foreign corporations, as hereinbefore set forth.

That said stock of Gem Exploration Company of South Dakota had no actual advantage over and was not more valuable than said stock of Gem Dredging Company, and the only purpose of defendant, pursuant to his aforesaid fraudulent scheme, was to attempt to fraudulently and by misrepresentations secure a change of position on the part of plaintiff and others by reason of the aforesaid exchange of their stock, urged by defendant and induced by said misrepresentations, so that as a result thereof plaintiff and others could not enforce their legal and equitable rights by reason of the fraud practiced upon plaintiff by defendant in the sale to plaintiff by defendant of the said stock of Gem Dredging Company.

10. That said Gem Exploration Company and said Gem Dredging Company are both wholly insolvent, and that said companies have no assets or property, and all leases of any kind or nature which they may have once held have long since expired and been forfeited, and that the former employees of said companies have seized upon the machinery and property

thereof, in Brazil, for payment of their services and salaries, and that said stock of Gem Exploration Company of South Dakota held by plaintiff is wholly worthless and of no value, all to plaintiff's damage.

Plaintiff claims twenty-two hundred and fifty dollars ($2,250) with interest from February 27, 1909, together with costs of suit.

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M. CASEWELL HEINE,

Attorney for Plaintiff.

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Answer.

Filed April 2, 1913.

NEW JERSEY SUPREME COURT.

Union County.

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EMILE LAMS, *Plaintiff,* *vs.* HARWOOD EDWARD ODEREY FISH, *Defendant.*	*Action at Law.* *Answer.*

The defendant, residing at Roselle, in the County of Union, and State of New Jersey, answering the said plaintiff, says: 20

1. He admits the first paragraph.

2. He admits the second paragraph.

3. He admits the third paragraph, except that he says that he was not the sole promoter of the companies therein referred to.

4. He neither admits nor denies the allegations contained in the fourth paragraph, but as to the same, puts the plaintiff upon his proof. 30

5. He denies the truth of the matters contained in paragraph five.

6. He denies the truth of the matters contained in paragraph six, except that it is true that the plaintiff did purchase fifteen thousand (15,000) shares of stock of the Gem Dredging Company, and paid therefor to said company the sum of twenty-two hundred and fifty dollars ($2,250.00). 40

7. He denies the truth of the matters contained in paragraph seven.

8. He denies the truth of the matters contained in paragraph eight, except that the circular and letter therein described were issued and circulated as charged.

9. He denies the truth of the matters contained
10 in paragraph nine, except that it is true that the said plaintiff did sell his shares in the said Gem Dredging Company in exchange for shares in the Gem Exploration Company.

10. He denies the truth of the matters contained in paragraph ten, except that it is true that the Gem Dredging Company is insolvent.

April 2, 1913.

CHARLES A. TRIMBLE,

Attorney of Defendant.

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Postea.

This cause was tried before Judge Benjamin A. Vail and a jury at the Union County Circuit on the 14th and 15th days of October, 1913.

Judgment.

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NEW JERSEY SUPREME COURT.

HARWOOD EDWARD ODEREY FISH, *ads.* EMILE LAMS.	*Action at Law.* *On Postea.*

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It is ordered that judgment of non-suit be and hereby is entered in favor of defendant and against the plaintiff with costs to be taxed *nisi.*

Entered October 25th, 1913.

On motion of

CODDING & OLIVER,
Attorneys.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains in my office.

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IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said court at Trenton, this day of November, 1913.

(SEAL.) WILLIAM C. GEBHARDT.

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NEW JERSEY SUPREME COURT.

Union County Circuit.

October Term, 1913.

10 EMILE LAMS, *vs.* HARWOOD EDWARD ODEREY FISH.	*Action at Law. No. 7 in the List.*

Transcript of stenographer's notes of evidence taken in the above entitled cause, before Hon. Benjamin A. Vail, Judge, and a jury, at the Court House in the City of Elizabeth, N. J., on the fourteenth day of
20 October, A. D., 1913, at 10.35 A. M.

Appearances:

Mr. M. Casewell Heine, Mr. Malcolm G. Buchanan, for the plaintiff.

Mr. Charles A. Trimble, Messrs. Codding & Oliver, for the defendant.

A jury being empanelled and found satisfactory, they were sworn.

Mr. Heine opens the case for the plaintiff.

30 Mr. Codding opens the case for the defendant.

EMILE LAMS, the plaintiff, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Heine.

Q Mr. Lams, where do you reside?

A Roselle, New Jersey.

Q How long have you lived there?

A Five years.

40 Q What is your native place?

A My native place is Alsac.

Q You are a veteran of the Franco-Prussian war?

Mr. Codding. Objected to.

The Court. That does not matter.

A I was an old veteran.

Q How long have you known the defendant, Mr. Fish?

A About five years too. 10

Q In what connection did you first meet him?

A Why, in real estate. He sub-let a house for me, and then after—

Mr. Codding. I object.

Mr. Heine. We produce this to show the matter of the business dealing between them, which would be material towards the question of confidence in statements made, that is, to show reliance on the statements made later in connection with this other dealing. 20

The Court. No. I understand from your opening the foundation of your case is entirely one of fraud. It does not make any difference what other business relations these people might have had with each other; the only question is did they have this business transaction with each other, and was it founded upon fraud, which you claim. They might have had thousands of other transactions which might have been perfectly satisfactory to both of them, and they would not throw any light or discredit on this case. 30

Mr. Heine. I will withdraw that question.

Q Do you remember when you had first a conversation with Mr. Fish in regard to the Gem Dredging Company?

A Yes, sir.

Q About when did you have your first conversation with him?

A In the beginning of 1809. 40

Q No, not 1809. Do you mean 1909?

A 1909 I meant to say.

Q Will you state, as nearly as you can recall now, the substance of these conversations that you had along early in 1909 with Mr. Fish about this company?

Mr. Codding. I object to the substance of a conversation.

10 *The Court.* It is not the substance we want.

Q Can you remember the words that were used in that conversation?

A I can remember we had several talks together several times. Well, Mr. Fish told me—I came to the meeting, there were several meetings, what good proposition he has got in Brazil. And I says why—I asked Mr. Fish if he knows about those propositions. Mr. Fish said yes, they was examined by experts, by this expert engineer and expert man, and after a good 20 many, you know, a good many talks, why, one day I said, well, I agree to take five thousand shares, or seven hundred and fifty dollars worth.

Q Did he say anything in this conversation about what this expert, or what you have stated there, examined?

A Well, they said, there is lots of diamonds, gold, and even black sand, after they are sifted the black sand would pay the expenses.

Q Where did he say, if he did, where this prop- 30 erty was?

A In Brazil.

Q Did he mention where?

A Well, yes, as far as was called Jequitinhonha; I used to call it plain Jack.

Q That was the Jequitinhonha we speak of, was it not?

A Yes, some name like that.

Q At the time that he said this and that you said you would take the five thousand shares—

40 A Yes.

Q (Continued)—what property did he refer to?

Mr. Codding. I object to the question unless it is connected—

Q Did he say what property these diamonds and gold were on?? On the Jequitinhonha River, was it?

Mr. Codding. I object to the question unless he connects it with the time set forth in his complaint. We cannot wander all over the earth. 10

The Court. You will have to do that, Mr. Heine. You will have to connect it substantially with the time alleged in your complaint.

Mr. Heine. He said this was in the early part of 1909, that he had this first conversation. There were a series of conversations—

The Court. The early part of 1909 is rather indefinite. Some might think it was early when it was six months over, and some might think it was early when it was one month over. 20

Q Can you fix, Mr. Lams, when the first conversation—

A The first conversation is about January in that year, in '9.

Q Do you remember what part of January, whether it was the early part of January?

A We met together several times, many times, talking, and it was always the same thing, lots of diamonds, lots of gold, lots of black sand. That was all in the early part of the year. 30

Mr. Codding. Can we not have this in a little more orderly manner?

The Court. Just listen to the question.

Q The question was whether this was in the early part or the latter part of January?

A Some time in January.

Q And that is the time to which you refer when you say that you were willing to take five thousand shares? 40

A Yes, or seven hundred and fifty dollars worth.

Q That was some time in January?

A In January.

Q What was the name of the company of the shares of which you were willing to take these five thousand shares?

Mr. Codding. I object to this evidence. The complaint shows, and it is admitted by the answer, that he was induced to take stock on or about the twenty-seventh of February in a certain company, which wasn't organized until the twenty-third of February, long after the conversations that he is detailing. It seems to me that the proof should be somewhat near consistent with the cause of action set up in the complaint.

The Court. You allege in your complaint that on or about February 27th the defendant solicited the plaintiff—

Mr. Codding. To take stock in an existing company.

Mr. Heine. On or about that date he was solicited to take stock. The transaction is, in fact, of such a nature that the on or about refers to the latter part of January and early in February. In other words, the charge in the complaint is not that this took place and that this man was sold on one specific talk. The conversations extended on or around that period, and were consumated on the 27th of February in the sale.

Mr. Codding. There is no such allegation.

The Court. I want to know what your complaint says.

Mr. Heine. It says on or about the 27th of February.

The Court. On or about the 27th of February the defendant solicited the plaintiff to buy stock

in the company known as the Gem Dredging Company.

Mr. Codding. And the complaint sets up in the first part of it that the Gem Dredging Company was incorporated on February 23rd, and we admit it. Now he is going back to January, long before the incorporation of the company in which he was solicited to take stock.

The Court. I do not think that would be competent.

Mr. Codding. He don't charge that he solicited him to join in a promotion scheme, but to take stock in a company.

Mr. Buchanan. It is not essential that the sale of stock take place on the specific date alleged in the complaint.

The Court. Oh, no.

Mr. Codding. No, we don't claim that.

The Court. I do not so rule.

Mr. Buchanan. The allegation is that this solicitation took place on or about this date. The conversations which resulted in the sale of the stock of this particular company to the plaintiff were conversations which were continuing conversations, and which referred back from one to the other, so that in order to get the whole dealing which culminated in the sale of this particular stock to the plaintiff on this particular day, you have got to get the whole course of those conversations which took place at or about the same time.

The Court. Do you think that would be competent, Mr. Buchanan? Here the complaint alleges that on or about a certain date, February 27th, 1909, the defendant solicited the plaintiff to buy certain stock, which you go on in the complaint and say that he did buy, and it turned out to be a fraudulent representation, in a company which

it appears by the pleadings was not formed until four days before February 27th, and these conversations which this witness has now related were over a month prior to that. Do you think that would be competent in a case of fraud?

(Argument by Mr. Buchanan.)

The Court. I think you are held to the case made by your complaint, and your complaint is that on the 27th of February—I do not mean to say I will hold you down to the one date of the 27th of February, but about that time he was solicited to buy stock in a certain corporation, and it appears by your pleadings that that corporation wasn't formed until—

Mr. Heine. That is conceded, the 23rd of February.

Mr. Buchanan. But obviously he could be solicited to buy stock in a company which wasn't formed, but was to be formed.

The Court. The company did not exist in January, and he says he was solicited to buy stock in something that according to the testimony you are now giving was entirely in the air.

Mr. Buchanan. I suppose it is only a question of whether you start at the beginning and go on, or start at the back and then go forward. If the testimony refers to conversations that took place before that time, then we will have to change the order of the proof.

The Court. No, you will have to change your complaint. Your complaint is that he was solicited on or about February 27th to buy stock in a company. Anything which goes to sustain that allegation I will admit, but conversations which occurred away back in January, thirty days or more before the complaint alleges, I do not think would be competent in this case. But rather than let the witness go on, you had better

ask specific questions and I will rule upon those questions and give you the advantage of an objection.

Strike out now all testimony he has given relating to conversations in January, because I had not noticed that clause in the complaint. I think you are restricted to that.

Mr. Buchanan. I ask an objection. 10

(Question repeated by stenographer.)

The Court. Strike that all out and start over again.

Q Did you have a conversation with the defendant, Mr. Fish, on the 27th of February in the year 1909?

A Yes, sir.

Q Will you state just what that conversation was?

A Well, that day Mr. Fish sent for me and we had a conversation for quite a while. Mr. Fish told 20 me there is a mine in Brazil, and the name of Jack, and the name of the company is Gem Dredging Company. So naturally, I admit we had conversations before. Well, Mr. Fish made me believe that day—

Mr. Codding. I object.

Q What did he say?

A All right. Mr. Fish said it was tested by experts, expert engineer and expert man, proved to be gold, diamonds, and the sand will pay all expenses. Naturally enough I believed Mr. Fish all what he 30 said.

Q What else, if anything, did he say in regard to that company in that conversation on the 27th of February?

A All he said, the company owns a lease.

Q What did he say they owned a lease on?

A On the Jack.

Q This Jequintinhonha River?

A Yes, we will call it that way. I call it Jack so everybody understands me. 40

Q What company did he say owned this lease?

A The Gem Dredging Company.

Q What did he say to you about the question of buying the shares of this Gem Dredging Company?

A Oh, you know, he said this conversation I said we had before. We had a conversation before.

Q On the 27th of February what did he say to you
10 about buying the stock of this Gem Dredging Company?

A Oh, well, you know, I had that day my mind made up to buy seven hundred and fifty dollars worth, that day I had my mind made up for five thousand shares. Mr. Fish said, why, you can easy afford to take more, because you have got money invested in the Roselle Park Building Loan. Well, then he repeated the same thing again and again, as how good a chance I got, and I will make more money by invest-
20 ing in the Gem Dredging Company as I do get in the Roselle Park. Why, by taking and having confidence—

Q That you got in Roselle Park?

A You know, the Roselle Park Building Loan Association. By having confidence in Fish, Mr. Fish made me believe, naturally—

Mr. Codding. I object.

Q Just what he said.

30 A That is what he said. He said I made more money in that.

Mr. Codding. I move to strike out the statement that he had confidence in Mr. Fish. I move to strike out the answer that Mr. Fish made him believe.

Mr. Buchanan. He said nothing as to what he made him believe.

Mr. Codding. I object to having even those words in the record.

40

The Court. I stopped that before he said anything. Just relate the conversation you had with the defendant, and that would be competent.

Q What did Mr. Fish say to you, just his language, over there on the evening of the 27th of February, about this company?

A Well, that day that is all—the Brazilian Dredging Company owns the lease. He represented that what a good luck I got if I will put my money from the Roselle Park Building Loan in it, as I never see another chance like that. 10

Q You said what company was it?

A The Gem Dredging Company. Naturally, if I—

Mr. Codding. I object.

A Furthermore—let me finish that day.

The Court. No. You answer his question.

Q What did he say to you on that night, if anything, in regard to the examination by experts, as you have said, on this property covered by this lease? 20

Mr. Oliver. I object to the question as leading.

Mr. Heine. I have got to direct his attention.

The Court. You can ask him if he said anything, and then you can ask the other question. You assume in your question that he said something.

Mr. Heine. Strike that last question out.

Q Did he say anything to you that time regarding these tests that you have spoken about being made on this particular property covered by the lease? 30

A Well, he said—

The Court. Answer yes or no.

A Yes, sir.

Q What did he say?

A Well, he said it was proved by expert engineer, and expert man, and there is gold, diamonds, and the sand, and the sand will pay for all expenses. 40

Q Did you believe what Mr. Fish told you at that time?

A Of course.

Q And as the result of what he said to you on that night what did you do?

A Well, you know, I told Fish—

Mr. Oliver. That question is objected to as leading. He infers that he did something. He may not have done anything.

10

Q What did you do, if anything?

A If anything?

Q Yes, what did you do, if you did anything?

A Oh, well, I agreed then—first I agreed for seven hundred and fifty dollars, and by the conversation Mr. Fish told me—

The Court. Stop. You do not answer the question.

20

Q What did you do after you got through the conversation?

A After we got through the conversation?

Q What did you do?

A Well, I agreed to take it.

Q Take what?

A To take the shares.

Q How many shares?

A Well, I got to explain that. First I agreed—

Q No. On that night?

30

A Well, I agreed to take the full amuont.

Q How much was the full amount?

A Well, twenty-two hundred and fifty dollars.

Q Shares of what company?

A Shares of the Gem Dredging Company?

Q How did you pay for them?

A Well, I paid that night, I paid a deposit down first for the seven hundred and fifty, and that night Mr. Fish had money—

Mr. Codding. I object to the question. Just answer what he did.

40

Q What did you pay that night?

A The full amount.

Q Twenty-two hundred and fifty dollars?

A No, that night I only paid eighteen hundred dollars.

Q After you became a subscriber or stockholder of this company, did you go to some of the meetings?

A Oh, yes.

Q When you went to these meetings what did you find out about this matter of the company having a lease? 10

Mr. Codding. I object to putting it that way.

The Court. That question is too indefinite, Mr. Heine.

Q Well, when was the first meeting you went to after you had this conversation with Mr. Fish?

A Oh, I went right short time after. Short time. The minutes should prove that. 20

The Court. You say meeting; what do you mean, meeting of the corporation, or meeting of individuals, or what do you mean?

Q What meeting was it?

A Oh, well, I even think that night we had—I am not sure, you know, I can't—the meetings, the minutes should prove that, when we had meetings.

Q You went to some of the meetings of the Gem Dredging Company after you became a stockholder?

A Yes, a good many, after. 30

Cross examination by Mr. Codding.

Q You say this conversation took place on the 27th of February, 1909, Mr. Lams?

A Yes, sir.

Q In the evening of that day?

A Yes. And previous.

The Court. Answer the questions.

Q And as the result of the representations made to you on that day you went in this company? 40

A Yes, sir.

Q And that was the sole reason you went into it, because of the representations of Mayor Fish to you?

A Well, of course, I believed—

Q Answer me yes or no?

A Say it again.

(Question repeated by stenographer.)

10 A Yes, sir.

Q Made on the 27th day of February, 1909?

A Yes, sir.

Q And as the result of that you paid for your stock in the Gem Dredging Company?

A That what he said, yes, I believed Mr. Fish.

Q As a matter of fact hadn't you paid for your stock before that, Mr. Lams?

A I paid a deposit on it.

Q When did you pay the deposit?

20 A That I couldn't exactly tell.

Q Was it before the 27th of February?

A I paid what I got there a receipt to prove.

The Court. Just answer the question.

A The full amount was paid on the 27th day.

(Question repeated by stenographer.)

A Yes, sir.

Q Wasn't it two weeks before that?

A I can't swear to that.

30 Q Wasn't it before the Gem Dredging Company ever was incorporated?

A I paid a deposit for—

Q Never mind. Answer the question.

(Question repeated by stenographer.)

A Well, the deposit I paid for the seven hundred and fifty shares. Yes, I paid a deposit.

(Question repeated by stenographer.)

A Yes, sir.

Q When was the Gem Dredging Company incor-

40 porated?

A Well, the exact date I can't tell.

The Court. That is admitted in the pleadings.

Mr. Heine. It is admitted in the pleadings to be February 23rd.

Q The statement in your complaint that the Gem Dredging Company was organized on February 23rd, 1909, is correct, is it not?

A Yes, sir. 10

Q Then, as a matter of fact, you couldn't have been induced on the 27th day of February, 1909, by the conversation with Mr. Fish on that date, to take stock in that company, could you?

A My dear friend, you know—

Q Never mind. Answer the question.

A I told you before we had many—I don't know even what the answer there.

The Court. If you do not understand the question, have it repeated. 20

(Question repeated by stenographer.)

A Of course, that was the 27th day, you know, he told me all that stuff what I repeated before. He induced—

The Court. You have answered the question.

Q How could you have been induced, on the 27th day of February, 1909, to take stock in a company, by the representations of Mr. Fish made on that day, to take stock in a company, when as a matter of fact you had taken stock already, at least paid for certain stock previously to that time, and previous to the incorporation of this company? 30

Mr. Buchanan. Objected to. The question assumes that he had agreed to take stock in this Gem Dredging Company previously. He has not said anything of the kind. He simply said he paid a deposit to Mr. Fish two weeks previously, but he has not said what for. 40

The Court. That is true, Mr. Codding. He said he paid a deposit on something, but so far as the case goes it does not appear what it was for.

Q You say you paid, some time previously to the incorporation of the Gem Dredging Company, a certain sum of money as a deposit?

A As a deposit, yes.

10 Q As a deposit for what?

A For a deposit is when the Gem Dredging Company—

The Court. Strike out the answer.

(Question repeated by stenographer.)

A For shares when the Gem Dredging Company is going to be organized.

Q Then it was for shares in this Gem Dredging Company that you paid the deposit some time previously to the organization?

20 A Yes, sir; some time previously. Not for the full amount, though.

Q But it was for a certain number of shares?

A For certain number of shares; yes, sir.

Q If the company was going to be organized, was it not?

A Yes, sir.

Q Suppose the company never was organized, what would happen?

A Oh, well, then I would have trusted Mr. Fish

30 so I get the money back again.

Q Well, the arrangement was among you, wasn't it, that if the company wasn't organized the money should be paid back?

A Well, I had that much confidence in Fish.

Q As a matter of fact, that is what was talked over, wasn't it?

A I don't even think that was talked over. You know when you talk, we talked so much—

Q I know, but in conversations wasn't it a fact

40 that if anything should happen, if you should learn

unfavorable news, or anything of that sort, you would call the whole thing off, and pay back the money?

A Yes, sir; of course, that is understood.

Q That is understood?

A Yes.

Q Now, as a matter of fact, it must have been previously to this payment of yours, Mr. Lams, that you got representations that made you put up that money, wasn't it? 10

A I got—of course, I got—that is understood, that is.

Q Then, as a matter of fact, the representations of February 27th, which you say were made by Mr. Fish to you, weren't the reasons why you went into this company, were they?

A Yes.

Q What?

A The reason what I told you before. 20

Q Just answer this question.

(Question repeated by stenographer.)

A Of course I went in it.

The Court. That is not responsive. Strike out that answer and repeat the question.

(Question repeated by stenographer.)

A I went in it—

The Court. Answer the question.

A Yes. 30

Q How could they have been the reasons, Mr. Lams, when you had already two weeks previously, or some time previously, paid your money, or a portion of it?

A Well, my attorney—I don't understand you quite, tell me now.

The Court. If you don't understand the questions, you can say so.

A I can't answer. I explained to you before.

(Question repeated by stenographer.) 40

A That one word I can't make out.

(Question repeated by stenographer.)

A I can't say yes or no in such a question, because I believed Mr. Fish.

By the Court.

Q Don't you understand that question?

A Not quite.

10 Q What don't you understand about that question? What is it you don't understand?

(Question repeated by stenographer.)

A I didn't pay it on that conversation. Only I paid it, naturally, after what Mr. Fish told me. The real facts were what—

The Court. His answer is he didn't pay it on that conversation.

A We had different conversations before that time.

20

Mr. Codding. I don't know exactly when the time comes to move to dismiss.

The Court. Ask another question. I will let this stand as it is.

Mr. Codding. I want to be perfectly fair about it. I know the witness is a little bit flustered, and I will take any suggestions about the proposition.

The Court. Ask another question.

30 *By the Court.*

Q You have already said that you put in your money on account of representations made to you by Mr. Fish?

A Yes, sir.

Q And you have said that those statements were made on or about the 27th of February.

A Yes, sir.

Q You have also said that you paid your money some time before that?

40 A Yes, sir; a deposit.

Q Well, you paid a portion of your money some time prior. Now counsel asks you, if you paid your money before that, how could you have paid it on the representations made on February 27th? Is that any clearer than the other? How could you have paid your money in January on representations made to you in February?

A I paid the money on the Brazil representation. 10

Q No, the question is, how could you have paid your money in January on representations which you say were made the 27th of February? You understand me, don't you?

A Yes.

Q He does not want to confuse you, he just wants the facts. Nobody wants to confuse you. You have said the representations upon which you paid in your money were made February 27th, haven't you?

A Yes, sir. 20

Q You have said that, haven't you?

A Yes, sir.

Q And you mean that, don't you?

A I paid it on the 27th day.

Q Twenty-seventh of February?

A Yes, sir.

Q If the representations were made then—

A Yes.

Q How is it that you paid your money on those representations in January? 30

A Well, you know—

Q That is what counsel asks you. The reason I put it in a little different form was so that you could understand.

A You know, on the conversation, I can state the way I felt, I wasn't quite satisfied, and then I put down a deposit, see. He only convinced me on the 27th day.

Q You were not satisfied then when you made your deposit? 40

A No, I wasn't quite. I didn't have enough confidence.

Q You paid your money after being satisfied?

A No, that is what I want to get to. On the 27th day, when I paid the whole amount, then Mr. Fish convinced me then. Other way he didn't convince me. He told me just what I said before.

10 *Mr. Heine.* I think if Mr. Codding or the court will allow me to ask one question, it may straighten this entire matter out.

By Mr. Heine.

Q Mr. Lams—

Mr. Codding. One moment.

Mr. Heine. In the interest of getting at the facts, if you will allow me to ask one question, or if you will ask it yourself, I think it will clear up the entire situation.

20 *Mr. Codding.* What is the question?

Mr. Heine. The question is, ask him how much stock he subscribed to when he paid his deposit.

Mr. Codding. You can bring the facts out later.

Mr. Heine. That is the fact, and he can't explain it to you. If you will ask him that it will let the whole thing out.

By Mr. Codding.

Q Did I understand you to say that you paid 30 twenty per cent. down on the deposit?

The Court. He said he paid seven hundred and fifty dollars.

A No, I didn't pay seven hundred and fifty dollars. I made application, you know—

Q How much did you pay down?

A I couldn't answer that question. I had no proof of it.

Q You have been served, or your attorney has, 40 with—

Mr. Heine. I think his statement was not that he had paid seven hundred and fifty dollars, but in the portion of testimony which was stricken out he had originally subscribed to that.

The Court. He said he made a deposit. He didn't say the amount.

Mr. Codding. I call upon you to produce the receipt given to Mr. Lams for his deposit. 10

Mr. Heine. We haven't the receipt for the deposit. We simply have the receipt for the eighteen hundred dollars paid on the 27th of February.

The Court. That is not what he asked for.

Mr. Heine. We have not a receipt or a check of that original deposit.

Q Did you receive a receipt for this deposit you made?

A No, sir. 20

Q Never got a receipt?

A No.

Q How did you pay it?

A That I couldn't exactly tell. You see it is so long, and that I couldn't tell you.

The Court. If you don't know just say so.

A No, I don't know.

Q As a matter of fact, wasn't the amount you paid twenty per cent. of the amount you subscribed for? You have testified that you subscribed for twenty-two 30 hundred and fifty dollars worth of stock, and you paid seven hundred and fifty dollars as a deposit?

Mr. Heine. I object on the ground the testimony does not show that.

Q If it does not show it, tell us the fact? How much did you pay on that first date?

A That I couldn't tell neither. It is too long. Only thing I can swear to what I paid the last payment, what I paid on the last payment, and which way 40 it was paid.

Q How much did you subscribe for all told?

A The total?

Q Yes.

A You know the total—

Q How many shares did you subscribe for?

A The first was seven hundred and fifty, five thousand shares. Mr. Fish convinced me—

10 Q Never mind.

A He told me I should take it.

Q I am asking you how many shares you subscribed for, don't you know?

A Seven hundred and fifty first.

Q Seven hundred and fifty shares?

A Five thousand shares, seven hundred and fifty dollars worth.

Q That is, you paid seven hundred and fifty dollars?

20 *Mr. Buchanan.* I object. He has not said that.

The Court. It is cross examination.

Q Mr. Lams, tell us what money you paid as a deposit?

A I don't know that.

Q You don't know?

A No.

Q What did you pay this money, whatever the amount was, what did you pay it for?

30 A Naturally I paid it when I am convinced—

Q Never mind that.

A For shares of the Gem Dredging Company.

Q You paid it for the shares, or did you pay it as a deposit?

A As a deposit.

Q On a certain number of shares?

A On a certain number of shares; yes, sir.

Q How many shares did you pay that as a deposit

40 on?

A I paid a deposit of seven hundred and fifty on five thousand shares.

Q How much did you agree to pay per share?

A Fifteen cents.

Q Fifteen cents for five thousand shares would be how much money?

A Seven hundred and fifty dollars, or something like that. 10

Q Seven hundred and fifty dollars, wouldn't it?

A Yes.

Q Then you didn't pay it as a deposit on five thousand shares at fifteen cents, did you?

A Not on the five thousand.

Q What was it paid for?

A On the first payment was seven hundred and fifty shares—or seven hundred and fifty dollars, the first payment. The first payment was for the five thousand shares of the Gem Dredging Company. 20

Q It was paid for outright?

A That wasn't paid. I had no receipt for it.

Q Then it wasn't a deposit, was it?

A Of course it was a deposit. I hadn't got no receipt. Of course it is a deposit.

Q How much did you pay into this thing, either before or after the 27th of February?

A How much I paid?

Q How much you paid altogether?

A On the 27th day of February? 30

Q No, altogether, all told?

A Twenty-two hundred and fifty dollars.

Q You say you paid seven hundred and fifty dollars some time previously?

A No, I didn't say that.

Q What did you say?

A I said I paid a deposit, you know, like a daposit for the seven hundred and fifty dollars on five thousand shares. I only wanted to take five thousand

40

shares in the beginning, and having money, Fish knowed I had money—

Q Never mind that.

A That is what it was.

Q As a matter of fact a number of people had been talking for some time about this concern, hadn't they?

10 A Yes, sir.

Q For a long while back?

A Yes, sir.

Mr. Codding. I don't know whether I am entitled to go into that subject until—I want to avoid cumbering the record with a lot of stuff. I will take your honor's suggestion—

The Court. This is a case of fraud. He has got to show, in order to sustain his case, not only that the representations were made, but that 20 they were fraudulent, that he relied upon them, and in consequence of that he lost money. Now those are what you have got to prove.

Mr. Heine. Yes, sir.

The Court. If he did not rely on them, of course, that breaks one important link in the chain, and if he knew as much about the situation as the people who represented it to him, he didn't rely on it. I think this would be competent cross examination.

30 *Mr. Codding.* I am perfectly satisfied. All right, we will go along.

The Court. Anything that would legitimately show, Mr. Heine, that he had no reason to believe that the representations were any different than things he knew himself, would rebut the question of fraud.

Mr. Heine. Yes, I think—the burden is to show reliance on the representations as made.

Mr. Heine. Anything which will rebut the wit- 40 ness' statement that he relied on what was said to him at that time is competent.

The Court. I think this is legitimate cross examination. At least, I will allow it.

Q You and a number of other people had a lot of talk about this Brazilian proposition, didn't you, Mr. Lams?

A Yes, sir.

Q And when did those conversations begin?

A Oh, in the beginning that year. 10

Q In the beginning of that year?

A Yes, sir.

Q These conversations about this Brazilian project began in the early part of the year, you say, Mr. Lams?

A Yes, sir.

Q You had a lot of talk about it, didn't you?

A Yes, sir.

Q And I suppose you people met and discussed the prospects of whether there could be any money 20 made in that thing or not?

A No. Very seldom that I talked to the people.

Q You had certain circulars shown to you, didn't you?

A Well, the circulars was only shown after the money I had put in. Mr. Fish made me believe, that is what I want to get you at.

Q The jury will say whether he made you believe or not, Mr. Lams, now stop talking that way.

A All right. 30

Q But at any rate you took part in the meetings did you not?

A Yes, sir.

Q In the meetings of people who were discussing the feasibility of going into this thing?

A Yes, sir.

Mr. Heine. When?

Mr. Codding. Prior to the incorporation of the Gem Dredging Company. 40

Q Who did you meet in that?

A Oh, them days, you know, I met, you know, prominent men from Elizabeth and Roselle, business people from Roselle.

Q And you talked with them, I suppose?

A I had very little conversation to them.

Q As a matter of fact you were together with them in rooms, weren't you, a number of men?

10 A Oh, of course; yes, sir.

Q And you took an active hand in discussing the prospects, didn't you, and made a lot of inquiries?

A No, sir; I did not.

Q You just sat there—

A I only relied on Mr. Fish. Not on them.

Q Didn't you take an active hand in things?

A Active hand?

Q Yes.

20 A Well, you know, the only active part I did what Mr. Fish told me.

Q Do you remember sending Mr. Lovell down there?

A Mr. Fish sent Mr. Lovell down there.

Q You didn't know anything about that?

A Well, I know, though, yes, I know something about that.

Q What did you know about it? Didn't you know the agreement that was made with Mr. Lovell?

A I heard it read off.

30 Q You were present then and knew that?

A Yes.

Q That was long before the 27th of February, wasn't it?

A I couldn't tell the time.

Mr. Heine. I object to it unless it is shown to be prior to the 27th of February.

Mr. Codding. We will show it all right.

The Court. Yes, it must be shown to be prior

40 to the 27th of February.

Q I hand you what purports to be an agreement made on the eighth day of February by and between Harwood Fish, as agent for the Gem Dredging Company of Roselle Park, party of the first part, and William J. Lovell, hereinafter called the party of the second part, and ask you if the name signed to that agreement as a witness is not your own?

A Yes, that is possible.

Q What? 10

A Yes, that is right.

Q What did you say?

A Correct.

Q That is your name, is it not, signed to that agreement?

A Yes, sir.

Q Then as early as the eighth day of February you were with people discussing or attending to business connected with the Brazilian scheme, were you not? 20

A Well, we was discussing, and about made that.

Q You were, weren't you?

A Yes.

Q Then you must have known something about the Brazilian proposition as early as the eighth of February by the record here?

A Of course. Yes.

Q Now, isn't it a fact that on the ninth day of February, the very next day, you paid a certain sum as a deposit on your subscription to stock? 30

A Yes.

Q How much was that?

A Couldn't remember.

Q Isn't it a fact that it was four hundred and fifty dollars?

A It must be four hundred and fifty dollars because the last I paid eighteen hundred.

Q In other words, you paid twenty per cent. of the twenty-two hundred dollars on this ninth day of February, and eighteen hundred dollars afterwards? 40

A I must have paid it. Yes, I paid it. You know, I want to explain. All right, I will say yes. Go ahead.

Q Therefore, as I understand it, on the ninth day of February you paid twenty per cent. of the twenty-two hundred and fifty dollars, which is four hundred and fifty dollars, and after the 27th you paid the balance of eighteen hundred dollars to make up the twenty-two hundred and fifty dollars?

Mr. Heine. I object to that question on the ground that it includes in the question matter which is not in evidence. The witness testified that he must have paid the four hundred and fifty dollars because that, together with the eighteen hundred that he paid on the 27th, made the total amount, but he didn't testify the facts that are assumed in here, the twenty per cent., and the word "balance," which implies something that is not in evidence.

The Court. I do not see the distinction.

Mr. Heine. He has testified that he paid eighteen hundred dollars.

The Court. He is asking him whether that is not so.

Mr. Codding. He can say it is not so.

Mr. Heine. But the question contains in it statements from facts which are not in evidence.

The Court. Yes, but I think this is legitimate cross examination.

(Question repeated by stenographer.)

By the Court.

Q Is that so, or isn't it?

A If my lawyer will allow me, I didn't state it that way, about twenty per cent. I said for seven hundred and fifty dollars, that is all. There is no twenty per cent. about it. That is Fish's doing.

The Court. Just answer the question.

By Mr. Codding.

Q You did pay four hundred and fifty dollars on that day?

A Yes, I paid four hundred and fifty dollars.

Q What did you pay it for?

A To get the shares for the Gem Dredging Company. That is when I had get satisfaction.

Q Why didn't you pay five hundred dollars? 10

A Because I had a certain amount just in the building loan, and Mr. Fish calculated I get that out. That is about all.

The Court. Answer the question.

A Because I only had four hundred and fifty dollars, I suppose.

Q Did you get that money out of the building loan, the four hundred and fifty dollars you paid?

A Couldn't swear to that. I even think I made a check for that. I couldn't swear to that. 20

Q Well, why didn't you pay five hundred dollars?

A Well, I didn't pay five hundred dollars on account Mr. Fish—

Q Never mind.

A How could I pay it?

Q How did you fix the amount then of four hundred and fifty dollars that you paid? All I am trying to find out is just how you happened to pay four hundred and fifty dollars, and why you didn't pay one thousand, or two thousand, or whatever it was? 30

A Well, I didn't pay it. I paid four hundred and fifty dollars with the impression to take only seven hundred and fifty dollars worth of shares.

Q How did you come to pay four hundred and fifty dollars instead of some other amount?

A How I come to pay that?

Q How did you figure it up that you were to pay four hundred and fifty dollars on that day?

A That is Mr. Fish, I suppose, had that figured up. 40

The Court. He is asking you why you parted with that amount of money.

Q You say Mr. Fish had it figured out. How did he have it figured out?

A Because he was at me all the time. He was at me to take fifteen thousand shares.

Q How did he figure out this amount that you were to pay, long before you said you got into this thing by representations of his?

By the Court.

Q Can't you answer that?

A I can't answer why.

Q Counsel merely asks you why it was you happenened to pay this amount?

A I know I paid it—

Q Counsel asks you how it is that you happened to pay this particular amount of four hundred and fifty dollars at that time, rather than some other amount. Can you say? How did you get at four hundred and fifty dollars, that is what he asked you? Can you answer that?

A Not to tell you true I can't answer just that. I must have had it. I can't answer that question.

By Mr. Codding.

Q As a matter of fact, Mr. Lams, isn't four hundred and fifty dollars just twenty per cent. of twenty-two hundred and fifty, the amount that you testified you had in this company?

A I don't deny that. It is figured out so. I think—

Q No, you have answered. Then as a matter of fact, Mr. Lams, weren't these conversations which you had with prominent gentlemen from Elizabeth, and Mr. Fish, and so forth—

A Yes.

Q (Continued.) —didn't they result in an agreement among a lot of you that you would go into this

thing providing it proved to be a profitable investment?

A Yes.

Q Was not the arrangement that you made then among all of you that if the thing looked good you would take a certain amount of stock?

A Yes.

Q And that you would pay down then a deposit, as you did, and others, and after hearing from somebody who was in Brazil, if the report was favorable, you would go on with the concern, wasn't that the arrangement? 10

A Well, I never heard nothing only what Fish told me.

The Court. The question is, was that the arrangement.

Q Was that the arrangement among a number of your people? 20

A Of course it was. I suppose so. I will say it was.

Q In pursuance of that agreement a number of you put up a certain amount of money. Your share of it was four hundred and fifty dollars, I understand that you testified you paid, that is correct, isn't it?

A Yes.

Q And the arrangement was, was it not, that if the investigation being made in Brazil at that time proved unfavorable, you would all stop, and the money would be paid back, but if it proved favorable you were to go on? 30

A Yes.

Q Who was Mr. William J. Lovell?

A William J.—

Q Lovell?

A As I understand he is a carpenter.

Q Lived in Roselle, didn't he?

A Yes, sir. 40

Q And he was one of the first men you sent down there, wasn't he?

A Mr. Fish sent him down there.

Q Well, he went down, didn't he?

A Yes.

Q And he went down in pursuance of this contract which you witnessed, didn't he?

10 A Why, I witnessed that contract, you know, I was there and I was—

Q Did you witness it?

A Yes.

Q And he went down to work for the company, didn't he?

A Yes, sir. I don't think he worked for the company. He didn't work for the company, Mr. Lovell. He got only half way down.

Q Was there anybody else in Brazil at that time

20 that you knew in connection with the company?

A Not at that time.

Q There wasn't anybody down there that you knew?

A No, not at that time.

Q Did you ever know Mr. Hedden?

A No, sir.

Q Never heard of him, did you?

A Is it Hedden or Henry?

Q H-e-d-d-e-n.

30 A What is he supposed to be, an engineer?

Q I don't know what he is supposed to be.

A You know there was a fellow named Hedden, and another named Heller. I don't want to mix them two names up.

Q If you know there were two men, one by the name of Hedden, and one by the name of Heller, you know there was a man by the name of Hedden, don't you?

A Yes.

40

Q Where was he when you were talking about this organization of the company?

A I couldn't tell.

Q Don't you know that he was in Brazil?

A Well, long after, yes, I know he was in Brazil.

Q Didn't you know that he was in Brazil at this time?

A That time, no. He was sent down.

Q You had cablegrams from him, that is, the company did, and they were read, weren't they? 10

A Yes.

Mr. Heine. When?

Q Long before the organization, while you were talking things over with these Elizabeth people, and one thing another?

A That I don't know nothing. I can't remember that. That I don't remember.

Q Did you ever hear read any cablegram from him, or ever see any from him? 20

A After I had my money up.

Q Didn't you ever see any cablegram from him before?

A No, I never saw any cablegram, only what was read off.

Q Did you ever hear any cablegrams read from him before you had paid any money?

A No, sir; not before.

Q Was there not, at one of these informal meetings of yours before the 27th day of February, 1909, a cablegram from Hedden in Brazil read at that meeting, which read as follows: 30

"Diamintina, February 4th, 1909.

"Have examined the property and find it fully as represented. The values are certainly here. Go ahead with the financial end of it."

Do you remember that cablegram from Hedden?

A No, I can't remember. 40

Q You have heard that before, haven't you, somewhere?

A Oh, I heard it, yes.

Q Where did you hear it?

A You know, I can't—

Q Never mind.

A You want a yes or no, but I can't say before or after.

10

The Court. If you cannot answer it, say so.

A Well, I can't answer that question.

Q You say you have heard this cablegram read before. When did you hear it, not where? You don't know, do you?

A No, I don't think I know that.

Q You are not prepared to swear you didn't hear it when it is dated, or shortly after that, are you?

Mr. Heine. When is the date of it?

20

The Court. February 5th.

By the Court.

Q Will you answer that?

A I can't remember that. That is all. It is no use swearing to it when I can't remember.

By Mr. Codding.

Q Did you ever advise anybody to take any stock in this concern before the 27th of February, 1909?

A I advised three servant girls and a nephew of mine.

30

Q That was before the 27th?

A That I couldn't even tell.

Q My question was, did you ever before that time, before the 27th?

A I can't say if that is before or after.

Q You did advise some people?

A I advised some people, I admit that, but before or after I couldn't swear.

Q Did you ever advise Mr. Frank Dobbins to take stock in it?

40

A No, sir.

Q You didn't?

A No, sir.

Q Didn't you take Mr. Hillers, an engineer, who was afterwards employed by your company, didn't you take him to Mr. Dobbins?

A No, sir.

Q You never did?

A Never did. 10

Q Before the 27th?

A Not before, nor not after.

Q Were you ever in Mr. Dobbins' place of business with Mr. Hillers?

A No, sir. I was in Dobbins' place, but not with Hillers.

Q You know Mr. Hillers?

A Mr. Hiller, I see him 102 Chestnut street, and that is all, and nowhere else.

Q Who was Mr. Hillers? 20

A I had very little to say to him.

The Court. That is not the question.

A Hillers is or was engineer for the Gem Dredging Company.

Q You saw him in 102 Chestnut street?

A Yes, I did.

Q That was the office of the company, wasn't it?

A That was the office of the company.

Q And when was that? 30

A Oh, that—I can't tell you the exact date.

Q Well, he told you things, and told the rest of you things about Brazil, didn't he?

A No. Hiller?

Q Yes.

A Why, I had very little to say to him.

Q You had very little to say?

A Yes, very little to say.

Q But he was a man who made representations about Brazil, and the successes of this company, wasn't he? 40

A The most conversation I had with him, I asked him one day what experience he had. That is about all the conversation I had with him.

Q Well, as a matter of fact, you hired him, didn't you, made a contract with him, that is, I mean the company, as an engineer, and you know he went down there, do you not?

A I know he went down there.

10

Mr. Heine. I object as immaterial. I do not see where any of this is leading to.

The Court. This occurred after the payment of his money. I do not see how it is material.

Mr. Codding. It was before the allegation made in the complaint of taking stock in an existing corporation. I am prepared to move to dismiss at any time.

The Court. These conversations, or representations, or whatever they were, if they were made after the 27th of February, they are not admissible.

20

Mr. Codding. By my next question I will show they could not be.

Q I show you a contract dated the first day of February, 1909, between Harwood Fish as agent for the Gem Mining Company of Roselle, party of the first part, and Charles W. Hillers, hereafter called the party of the second part, which purports to be a contract of hiring of Charles W. Hillers as an engineer to go to Brazil, and ask you if you ever saw the contract?

30

A My name is on it. I must have saw it. I didn't read it myself. It was read off, and naturally I put my name to it.

Q I don't say that you read it. You simply heard it read off?

Mr. Buchanan. Maybe he is thinking about the other one that he signed before?

40

Mr. Codding. That is another man altogether.

A I can't remember that.

Q Well, you remember being present with Hillers?

A Oh, I remember that.

Q In 102 Chestnut street?

A In 102 Chestnut street, I remember that.

Q And talking about the mining affairs, and all that sort of thing?

A Yes. 10

Q And he was the man who was employed in pursuance of some contract and went to Brazil, didn't he?

A He went to Brazil, yes.

Q Representing the company?

A Yes, sir.

Mr. Buchanan. Representing what company?

Mr. Codding. The Gem Dredging Company.

A Yes.

Mr. Heine. Was that prior to February 27th that he went? 20

Mr. Codding. I will tell you just now.

Q Don't you know that Mr. Hillers sailed for Brazil on the tenth day of February, 1909?

A I couldn't exactly tell. I know he sailed, and I know I saw him, and I couldn't exactly tell. I don't remember that date. I can't swear to that.

Q Do you know any officers of the Brazilian Dredging Company?

A Officers? 30

Q Yes.

A Yes, sir.

Q Who do you know?

A I know Mr. Cawthorne.

Q What is Mr. Cawthorne's name? Of Elizabeth, here?

A Yes, sir.

Q Who else besides Mr. Cawthorne?

A Mr. Wetton.

Q Mr. Walter Wetton, is that? 40

A I couldn't tell the first name.

Q He is a man from Elizabeth here?

A Yes, sir.

Q Who else do you know?

A Ex-prosecutor Swift.

Q These are all officers of the Brazilian Dredging Company?

10 A He is what you call attorney.

Q Mr. Swift was the attorney?

A Yes.

Q For the Brazilian Dredging Company?

A Yes, sir.

Q Why, isn't it a fact that all these men were officers of the Gem Dredging Company, and not of the Brazilian Dredging Company?

A They are the officers of the Gem Dredging Company.

20 Q Mr. Cawthorne—

A But you are talking about the Brazilian Company.

Q I am talking about the Brazilian Dredging Company.

A I thought you were talking about the Gem Dredging Company. I thought you talking about the Gem.

Q You don't mean to say that Prosecutor Swift and the others were officers of the Brazilian Dredging Company?

30 A No, I thought you said the Gem Dredging Company.

Q I meant to ask you, Mr. Lams, if you knew any of the officers of the Brazilian Dredging Company?

A Yes, Brazilian, and I misunderstood it for Gem.

Q You don't want the jury to understand these gentlemen you mentioned ever had anything to do with the Brazilian Dredging Company?

A No.

40 Q They are only officers of your own company?

A They are the officers of the Gem Dredging Company.

Q Just answer the question, Mr. Lams?

A At that time I didn't know nobody from the Brazilian Dredging Company.

Q At what time?

A At that time.

Q What time is that time?

A The time, you know, I only know the officer from the Brazilian Dredging Company— 10

By the Court.

Q You say that time, and counsel asked you what do you refer to?

A I refer to when I paid my money; I didn't know nobody from the Brazilian Dredging Company at the time I paid my money on the 27th day of February.

Q 27th day of February?

A Yes. 20

Q Did you pay any money on the 27th day of February?

A Is it February or—that is the day I paid the full amount, at that time I didn't know nobody from the Brazilian Dredging Company. Ain't that the time you refer to?

Q Weren't you present at a meeting at which Mr. Meyer, the president of the Brazilian Dredging Company addressed you people in Roselle?

A Yes, I was there. My money was invested that time. 30

Q I asked you if you knew any of the officers and you said you didn't know anybody.

A I asked you the time.

Q You didn't know anybody from the Brazilian Dredging Company at the time?

A At the time I paid the money I didn't know nobody.

Q Hadn't you seen Meyer at that time?

A No, not at that time. 40

Q He wasn't out there before that and addressed you people and made a speech to you?

A No.

Q I don't want to lead you into a trap, Mr. Lams, but think about that carefully now.

A Yes.

Q Answer the question. You have thought about it carefully then, have you?

10 A I didn't see Meyer—I only saw Meyer after I had my money invested.

Q You are sure about that, are you? Now just be careful, as I said, I don't want to lead you into a trap?

A You see, I can't remember that.

Q Well, isn't it a fact, Mr. Lams, that Mr. Meyer, the president of the Brazilian Dredging Company, was out at Roselle on the evening between the time when you paid your first deposit on the shares of stock

20 which you were going to take, and the time that you completed the balance of your payment? That is true, isn't it, as a matter of fact? If you don't recollect, say so?

A I don't recollect that.

Q But you are not prepared to say that is not so, are you? You don't recollect, in other words?

A Well, in my mind, at the present time in my mind it was after Mr. Meyer—I paid the money before.

30 Q Well, after you paid the first payment and before you paid the last, wasn't it, as a matter of fact, Mr. Lams? Just think about it.

A You talking about Meyer now?

Q Yes, Meyer, the president of the Brazilian Dredging Company, the fellow who wears all the diamonds, don't you know him?

A Now you mean to say if I see him after or before?

Q What I mean to say is, isn't it a fact that Mr.

40 Meyer came out to Roselle—

A Yes, sir.

Q (Continued.)—between the time you paid your first money and the time you paid your second money, and you all had a speech from him, and he made glowing statements, and all this, that, and the other, made a fine speech that night, don't you remember?

A Well, to tell you the truth I thought Meyer came only after I paid this second money.

Q You don't know anything about it, you can't remember that? 10

A No.

Q When did you pay your second money?

A The second money I paid, the full amount I paid the 27th day of February. Ain't the receipt there?

Q Sure, we have got it all. Now, Mr. Lams—

Mr. Buchanan. He has answered the question.

Q You say you paid it on the 27th of February? 20

A Let the receipt show.

Q You say you paid that money on the 27th of February?

A Say, Mr. Heine, give me that receipt.

Mr. Heine. I object to counsel's statement anticipatory of this testimony, that what will show in the minutes is absolutely false. The minutes have not been shown, and that statement is improper.

The Court. I do not understand the statement was made offensively, but to warn the witness that he was making a statement that he could show was not true. 30

Mr. Codding. The statement was made to the counsel as a warning to him, I was giving him fair warning—

The Court. Proceed.

(Question repeated by stenographer.)

A Well, they can prove it then if I can swear to it. 40

Q Did you ever see that pamphlet before, or one like it, I mean?

A No.

Q Never saw anything like that?

A No, I didn't see this. I will say no.

Mr. Codding. I would like to have that marked for identification.

10 (Pamphlet marked D. 1 for identification.)

Q I hand you what purports to be a report of M. J. Patterson, Sr., mechanical engineer, dated New York, May 7th, 1908, addressed to the Brazilian Dredging Company of New York, and ask you if you ever saw that paper, or one similar to it?

A I never saw that, nothing similar neither.

Q Did you ever hear it read?

A Maybe I have heard it read, that is possible. I can't remember that.

20 Q You won't say that that wasn't one of the papers that were read at one of these meetings, will you?

A Well, I can't remember.

Q You can't remember?

A Yes. I can say yes or no.

(Report marked D. 2 for identification.)

Q I hand you a letter dated 6971 Lombard street, Toronto, Canada, November 23rd, 1908, addressed to Mr. E. Willfong, city, and reading—

Mr. Heine. Objected to.

30 Q I ask you if you have ever seen that or heard it read?

A I don't remember that. I can't remember that.

(Paper marked D. 3 for identification.)

Q You have read this letter that I have just handed you, haven't you, to Mr. Willfong?

A You know—

By the Court.

Q He asks you if you read it now?

40 A Yes, I read it now this moment.

By Mr. Codding.

Q And you say you can't recall whether you ever heard it read or not?

A Yes. I read it now.

Q You can't ever recollect whether you heard it or not?

A No. That is five years ago.

Q You testified on your direct examination that certain representations were made to you about the value of black sand, didn't you? 10

A Yes.

Q Isn't it a fact that you got your estimate of value of black sand from this letter which I have just shown you (D. 3 for identification), this assay report?

A That is on there I know.

Q And isn't it a fact that you got it from this?

The Court. Is there any—

Mr. Heine. Diamonds and gold, and black sand was added by the witness. 20

The Court. There is no such allegation in your complaint.

Mr. Heine. No.

Mr. Codding. I understand your Honor rules that any representation regarding black sand does not come in the case?

The Court. That does not come in the case.

Q Do you know Mr. Willfong? 30

A I saw him.

Q And where did you see him?

A In the office from the Gem Dredging Company.

Q And when did you see him?

A When?

Q Yes.

A Oh, that I couldn't exactly tell.

Q When with reference to making your payments did you see him?

A I couldn't swear if it was after or before. 40

Q Mr. Willfong was a man who had spent a good deal of time in Brazil, hadn't he?

A I understand.

Q And he told you interesting accounts of mining down there, and that sort of thing?

Mr. Heine. Object to that unless it is identified in time as prior to the payment of February 27th.

10

Mr. Codding. Well, he says he doesn't know.

A If it is after I can answer it.

By the Court.

Q Can you answer or not?

A I can answer I know Mr. Willfong, but I can't remember what time.

By Mr. Codding.

Q I hand you a circular headed "Land of Gold and Diamonds, Mr. E. Willfong chats of the mining operations he saw in Brazil," and ask you if you have ever seen that, or ever heard it read?

20

A That is hard to tell. There was so much talk and so much things said—

By the Court.

Q The question is did you?

A I can't remember.

By Mr. Codding.

Q You can't remember?

A No.

30

(Circular marked D. 4 for identification.)

Mr. Codding. I call upon you to produce the receipt for payment in whole or in part for the stock of the Gem Dredging Company, as called for in my notice to produce.

Mr. Heine. This is the only one (handing counsel paper.)

Q I hand this receipt to you and ask you if it is a receipt you received?

40

A That is the receipt I received; yes, sir.

(Receipt marked D. 5 for identification.)

Mr. Heine. I will offer it at this time.

Mr. Codding. Wait until you get your chance.

Q How was that payment made, Mr. Lams?

A Which payment?

Q The eighteen hundred payment?

A That payment was made through the withdrawal of the money from the Roselle Park Building Loan. 10

By Mr. Heine.

Q Who withdrew it?

Mr. Codding. Wait a moment.

A It was paid from the building loan, from the Roselle Park Building Loan.

By Mr. Codding.

Q You got a check from the building loan, is that it?

A Mr. Fish has got it. Will you let me explain it? 20

Q You went to the building loan and wanted your eighteen hundred dollars out?

A About that amount.

Q How did you get it, in money?

A No, in check.

Q What did you do with the check?

A Fish had it all prepared, the check—

The Court. Just answer the question.

A I endorsed the check.

Q What did you do with it then? 30

A Left it in Fish's hands.

Q That was a payment which was given under this receipt here?

A Yes.

Mr. Heine. I will ask you to produce the check of the Roselle Park Building and Loan covering this payment.

Mr. Codding. As far as that is concerned I will simply say to you, Mr. Heine, we have got the 40

check stub. You served Mr. Fish with a subpoena late yesterday afternoon. He is perfectly sure he can find this thing, but he worked half of the night trying to do it; and we would be very grad to admit anything within reason, that you want; or, if this case goes on, we will produce the thing, but there has been an honest effort made. We have got the check book.

10

Mr. Heine. Will you let me see the check stub, please, just that particular one?

Mr. Codding. Yes, certainly.

Adjourned until 2.00 P. M.

Afternoon session, 2.00 P. M.

Mr. Heine. With your permission I would like at this time to put in the translation of this new edition of laws. I now offer in evidence a book purporting to be the laws of the United States of Brazil, published under authority of the Minister of Justice, and the Brazilian Government.

20

Mr. Codding. I object to the relevancy, under any issue that is raised here, of any such proposition.

The Court. But you do not object to the form?

Mr. Codding. I will not object, as I understand the statute, if your honor is satisfied from inspection of the book that it is an official publication.

30

The Court. I do not know how I can be satisfied from an inspection of that book.

Mr. Heine. I think Mr. Codding's pleadings really admit this.

Mr. Codding. Under no issue that has been raised yet is the law of any importance.

Mr. Heine. There is a representation in evidence regarding these laws for the reason he has stated this company has a lease.

40

The Court. For the purpose of this trial I will admit them formally, and you can reserve the motion to strike them out.

Mr. Codding. Providing nothing of importance arises in connection with them.

Mr. Heine. I have to have the translation made. I will withdraw the offer of the laws for the present. 10

EMILE LAMS, resumed.

Cross examination (continued).

By Mr. Codding.

Q Mr. Lams, you were a director of the Gem Dredging Company, were you not?

Mr. Buchanan. Objected to unless it is shown it was prior to the 27th of February.

Mr. Codding. There are two counts to this. 20

Q Do you know, Mr. Lams, of any subscriptions to the stock, or to the syndicate that was formed to investigate whether or not a company should be formed, were made by Mr. Fish?

Mr. Heine. I object as immaterial.

Mr. Codding. Question of good faith.

The Court. I will allow it.

Mr. Heine. The further objection, it is not located in time prior to the date of the subscription, February 27th. 30

The Court. It must be prior to February 27th.

Mr. Codding. I will withdraw the question in that form.

Q Do you know whether or not Mayor Fish made subscriptions to the syndicate that was formed for the purpose of investigating the Brazilian project with a view, if found to be favorable, of organizing a company?

A I can't remember that. 40

Emile Lams, re-direct.

Q You don't know whether Mayor Fish ever put up any of his own money in this thing?

A He claimed so.

Q You don't know as a matter of fact?

A No, I don't know.

Re-direct examination.

By Mr. Heine.

10

Q Now, Mr. Lams, you have been trying to tell Mr. Codding, or inform Mr. Codding about this subscription on February 27. Will you just explain to the jury the facts in regard to this seven hundred and fifty dollars subscription which Mr. Codding asked you about, and also the subscription on the 27th of February, when you paid the eighteen hundred dollars, just explain that?

Mr. Codding. I object. There is no testimony as to any seven hundred and fifty dollars subscription.

20

The Court. I would not go over this again.

Mr. Heine. This witness has been limited in cross examination and made to answer yes or no to questions, which have eliminated the explanation. Now I want—

The Court. If his testimony was not satisfactory to you that is no reason to allow you to re-direct examination.

30

Mr. Buchanan. To explain the things which he did testify to.

The Court. But Mr. Heine asked him the general question to explain the manner in which this payment of February 27th was made. He went over all that this morning. I am not going over it again.

Mr. Heine. His testimony this morning was that he made a part payment on a seven hundred and fifty dollar subscription.

40

The Court. I know, and he answered that about a dozen different times. What is the use going over it again?

Mr. Heine. Mr. Codding then asked him whether or not this subscription or part payment was on the total subscription of twenty-two hundred and fifty dollars, and the witness was unable or was not allowed to testify.

The Court. The witness answered. I cannot allow you to refresh his recollection. He ought to know what he testified to. 10

Mr. Heine. That is what I asked him, to explain that situation.

The Court. I overrule the question that you asked.

Mr. Heine. Prays exception.

The Court. You do not take exceptions any more, you take an objection.

Mr. Heine. I take an objection. 20

Q When you went to Mr. Fish's office on the 27th of February, had you already subscribed to stock of the Gem Dredging Company?

Mr. Codding. I object.

The Court. Question overruled.

Q Mr. Lams, on the 27th of February, how many shares of stock of this Gem Dredging Company did you subscribe for?

Mr. Codding. I object. 30

The Court. Overruled. I am overruling these questions upon the ground that it is re-direct examination, and the whole matter was gone over this morning.

Q The amount of the four hundred and fifty dollars which you paid prior to the 27th of February, did that amount apply to a subscription of five thousand shares of stock of this company?

Mr. Codding. I object.

The Court. Overruled for the same reason. 40

Q When you received this receipt, Mr. Lams, D. 5 for Identification, that was the time that you endorsed the check for eighteen hundred dollars?

A That is the time I endorsed the check, yes, that is the very date.

Q In whose handwriting was that check?

Mr. Codding. I object.

10 *The Court.* Overruled. It does not make any difference who wrote it, whether he wrote it, or a clerk; the only material part is, did he sign it.

Mr. Heine. I called for the production of that check and it was stated it couldn't be found.

The Court. I do not see what difference it makes who drew the body of the check. It is the signature to the check which is the material part.

Q How much of that endorsement on the check
20 did you write?

Mr. Codding. I object to the question on the ground that it does not make any difference. The legal effect of the endorsement is the signature by himself.

The Court. Overruled. Did you call on the other side to produce the check?

Mr. Heine. It was a check of the building loan. It was a subpoena *duces tecum* on the defendant, as secretary of the building and loan,
30 to bring the check, and he says he cannot find it, although he has looked for it, and Mr. Codding was willing to stipulate almost anything about it. The secretary of the Roselle Park Building and Loan is the proper person to subpoena.

The Court. I do not see the materiality of it, because this defendant testified that he signed the check and turned the check over to the defendant.

Mr. Heine. His testimony is that he endorsed
40 the check.

The Court. They do not question it.

Mr. Buchanan. They have questioned the date. They have intimated by their questions that they were going to attack the date of the payment of this money.

The Court. I do not care anything about intimations in this case, it is the legal questions which concern me.

Mr. Codding. On cross examination we haven't asked one question about that. 10

Mr. Buchanan. You asked him if he was sure of the date, whether he paid this money on the 27th of March, you repeated that time and time again.

Mr. Codding. Ask him a question about that on re-direct examination.

Mr. Heine. I think it is a question in which the matter was presented to this defendant at the time these presentations were made. 20

The Court. Unfortunately, Mr. Heine, you and I do not agree as to the legal evidence, and you must submit to my decision now.

Mr. Heine. Yes, sir.

Q You are asked, Mr. Lams, if it was on that occasion when you received this receipt that you endorsed this check?

A I endorsed the check, yes.

Q What was that check in payment of? 30

Mr. Codding. Objected to. He testified on direct examination, and no questions were asked about it on cross examination.

The Court. Overruled.

Q When you looked at this agreement or contract with Mr. Lovell, do you recall anything of the way in which that was shown to you?

Mr. Codding. I don't understand the question.

Mr. Heine. I will withdraw that question in that form. 40

Q You were shown an agreement with Mr. Lovell in which your name was signed as a witness?

A Yes.

Q Do you recall the circumstances attending that signing of that paper?

A No, I don't recall it at all.

Q Do you remember who requested you to sign that paper as a witness?

10

Mr. Codding. I object.

A Mr. Fish.

The Court. He said he don't recall it at all, so how can he go into particulars?

Mr. Codding. I will move to strike out the answer.

The Court. Strike it out.

Mr. Buchanan. He remembered he signed it.

20

The Court. You cannot cross examine your own witness. You asked him the question and he said he cannot recall. Now you are going on to ask him to recall something that he said he cannot recall.

Mr. Buchanan. We asked him the question whether he could recall the circumstances at the time.

The Court. He said he could not.

Mr. Buchanan. The question we have now asked is whether he recalled who asked him to sign it. He could very well recall that, although he could not recall the general circumstances.

30

The Court. I do not see that that makes any difference, who asked him to sign it.

Mr. Codding. The paper was produced and the witness's attention called to it solely and simply to show that at certain date this man was taking part in the administration of a syndicate before a company was formed, two or three weeks before the incorporation of this company in

40

which the complaint alleges that he was solicited to take stock. It was only to fix a date.

The Court. I think the question is irrelevant.

GEORGE WILLIAM CHESTER, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Heine. 10

Q Mr. Chester, you are connected with the consulate of Brazil?

A Yes, sir.

Q New York consulate. What is your position there?

A First secretary.

Q Have you made a study of the Brazilian law?

A Yes.

Mr. Codding. That was not in accordance with our agreement. 20

Mr. Buchanan. There was no agreement.

Mr. Codding. Then I object to going into that line of questioning now.

The Court. The answer to that question does not harm you.

Mr. Codding. I understood we had an arrangement as to a certain extent that the plaintiff could go in producing and proving a certain book, and a translation of it. Now he proposes, he says, to qualify him as an expert on Brazilian law, and go ahead. 30

The Court. He may not get very far, possibly.

Mr. Heine. I felt, as I told your Honor, it was my duty to offer him in that capacity first. I understand your Honor's ruling privately was adverse, and it is simply for the purpose of putting it on the record that I make the offer.

Mr. Codding. Then I object to the admission of any book purporting— 40

The Court. It has not been offered yet. Just wait, I will allow this answer to stand.

Q In the regular performance of your duties as first secretary you are accustomed to advise in regard to commercial and incorporation laws of Brazil?

Mr. Codding. Objected to as incompetent, irrelevant and immaterial.

10 *The Court.* Overruled.

Q Do you know the law of Brazil governing foreign corporations?

Mr. Codding. Objected to as incompetent, irrelevant and immaterial.

A Yes.

The Court. The proper way, I think, is to show the witness a book and ask him if that book is the authorized statute of Brazil on that subject.

20

Mr. Buchanan. There are two methods of proving the law, both by the statute, and also by the testimony of a witness who is qualified to testify as to the law.

Mr. Codding. Yes, but our objection now is to your attempting to prove the law at all.

Mr. Buchanan. You haven't let it get that far yet.

30 *Mr. Heine.* I wish to have your Honor's ruling on this expert as knowing the law,, and then your Honor's ruling, as I understand from our conversation, will be adverse on that point.

The Court. I do not understand the law to be as Mr. Buchanan says. If you have a volume of statutes in front of you, instead of offering the statutes, ask him if he knows what the statutes are. He can say he knows that book as the authorized publication of the statutes of a certain place, and then offer the book.

40

(Question and answer repeated by stenographer.)

Mr. Codding. I move to strike out the answer.

The Court. Yes.

Q Are you familiar with the law governing the registration of foreign companies in Brazil?

A Yes.

Mr. Codding. I object to the question. 10

The Court. Do not answer the questions until counsel has an opportunity to object. Question overruled. Strike out the answer.

Q I show you a book and ask you whether that is a copy of the official edition of the laws of Brazil?

A Yes, it seems so. This is not the official published by the government of Brazil. This is authorized to be published by the secretary of the justice.

Q Minister of justice?

A Yes. 20

Q And is that accepted in Brazil as a correct copy of the law?

A Yes.

By the Court.

Q That is accepted in the courts of Brazil, is it, as the law of Brazil?

A No. We have a special law for the corporations, and this is the part referring to the corporations.

Q Would that be accepted in the Brazilian courts? 30

A Decidedly.

Q As the law of the country upon the subject which it is supposed to cover?

A I think so.

The Court. I will allow that.

Mr. Heine. I offer that for your Honor's inspection. I offer that in evidence now, for the court to pass upon, and under the rule of the Practice Act I think the court must pass on this as official. 40

The Court. I will accept that as a copy of the laws of Brazil.

Mr. Codding. But it is not offered actually in evidence to be put before the jury, is it?

The Court. The jury can have it if they want. I do not think it will do them any good. It is printed in Portuguese. The testimony does not get before the jury, excepting as they hear it.

10 *Mr. Codding.* The point I make, I am perfectly willing to have the witness identify this as the law of Brazil, and I am perfectly willing, if he can produce a translation of it, to testify that is a translation, but I don't want, unless some representation regarding the laws as a fact can hold the defendant, I don't want it introduced in evidence so that it can be read to the jury, or anything of that sort.

20 *The Court.* I do not believe there is anybody here can read that book to the jury.

Mr. Codding. I think I see your Honor's point. My objection should be to the translation.

Q You are, of course, familiar with the Portuguese language?

A Yes, sir.

Q I will ask you to turn to the decree number 434 of July 4th, 1891.

Mr. Codding. I object to testifying from a

30 book. I don't object to his turning to it.

Mr. Buchanan. Wait until there is a question asked.

The Court. I will allow you to put in for the present the translation of the part of the law which you think is material to this case, and there I think you will have to stop, reserving to the other side the motion to strike it out before the jury.

Mr. Heine. That is, your Honor does not wish

40 the translation to be read at the present time?

The Court. No.

Mr. Codding. That is what I imagined you were going to do.

Mr. Heine. No.

The Court. You can submit that to him, and let the witness say, if he can, that is a translation in English of that part of the statute, and then it will go for what it is worth. 10

Q I show you section 11 taken from the Brazilian year book, a compilation with which you are familiar, and ask you if you will look at the translation here of the section to which I have just called your attention in the official law, and state whether this is a correct translation of the official edition?

Mr. Codding. I object to the form in which it is put. It must be a translation either made by himself, or examined clearly through and compared. 20

Mr. Buchanan. He is doing that now.

A Am I to compare the whole thing now?

The Court. You will have to, sir, unless you can say that you have already examined it, if you have.

A Well, the first and second sections seem to me to be exactly the same.

The Court. You must not read that out loud, you must read it to yourself. 30

A It is impossible to translate reading aloud; I have to compare first.

The Court. How much of that is it that you want? Why not let the witness take it, and go on with another witness?

A I can positively say this is a translation of that.

Q You can?

A Yes. This is the English translation of the Brazilian law. 40

The Court. That is the question you were asked.

Q That has been examined by you?

A Yes, so far as the four articles, or four sections, as you call it, are, it is all right, it is absolutely the true translation.

Q Are you familiar with the year book from which this is taken?

10

A Very much so.

Q Have you consulted the translation in that year book and compared it with the original law?

A We have got it as information many times for the people to copy it from our office.

Q From the consulate?

A Exactly.

By the Court.

Q And you have compared the translation?

20

A Exactly. These four articles or four sections that I have read up to the present seem to be perfectly translated into English.

The Court. Let it appear on the stenographer's notes the numbers of those sections, so that there can be no question about it.

A I have checked off up to the fourth section.

By Mr. Heine.

Q Look at chapter two, please.

30

Mr. Heine. He referred to the first four sections of chapter one.

Q Turn to chapter two.

A What article?

Q Article forty-six.

A Yes.

Q And I direct your attention particularly to article forty-seven, and I will ask you to compare this translation of article forty-seven right on down?

40

The Court. I think the witness had better take the original statutes and compare them, so that

we will not be losing time. Give him the number of the sections you want him to identify, and then let him say that the translation you produce is the correct English translation of the Brazilian law.

Q Witness is asked to compare the following sections from chapter two of the decree number 434 of July 4th, 1891: Kindly compare the translation of articles 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 85 and 79? 10

(Witness withdrawn.)

FRANKLIN O. CASE, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Heine.

Q Mr. Case, you are the secretary of the Brazilian Dredging Company of South Dakota? 20

A Yes, sir.

Q And you were so in January and February, 1909?

A Yes, sir.

Q And you were at that time also the secretary of the Brazilian Dredging Company of New York?

A From its organization; yes, sir.

Q From its organization in 1909?

A I have forgotten whether it is 1909 or 1908.

Q Well, from its organization? 30

A From its organization.

Q And you are the custodian of the records of both those companies?

A I am.

Q And you have produced in court, as called for, the minute books of those two respective companies?

A Yes, sir.

Mr. Heine. Subpoena *duces tecum* served on the defendant, Harwood Fish, to produce a lease 40

from the Brazilian Dredging Company of South Dakota to Harwood Fish, dated February 23rd, 1909, and has failed to produce the same.

Mr. Codding. I ask, for the purpose of that proposition, that the defendant be sworn, and asked why he didn't produce it. In other words, I don't care to leave the record in that shape, as if he had refused to do it.

10

The Court. Well, I suppose at this stage of the case all you can do is to prove that they made a demand, and you can say you haven't got it, and then, of course—

Mr. Heine. I can obviate that by other evidence.

The Court. The rule is, of course, that when a demand is made for the production of papers, and they are not produced, then that opens the door to secondary evidence.

20

Mr. Codding. I want to be utterly frank and fair about the thing, and I wanted to have the defendant tell where we think that is. As a matter of fact, I supposed this was the one. This is a lease from the Brazilian Dredging Company of New York, and apparently what he is after is from the Brazilian Dredging Company of South Dakota.

Mr. Heine. That is what the notice said, South Dakota.

30

Mr. Codding. In looking over these papers I attached this notice to this one, supposing I had the right one. I am perfectly willing to explain, for the benefit of Mr. Heine, where we think he can get that lease.

Q Have you, as secretary of the Brazilian Dredging Company of South Dakota, in your possession a duplicate original, or is it a copy of that lease to Mr. Fish of February 23rd, 1909?

40

A It is a duplicate original.

Q It is a duplicate original?
A Yes, sir.

Mr. Codding. May I have that statement stricken from the record. My colleague has called my attention to the fact that this was a subpoena *duces tecum,* and not a notice to produce. That is a different proposition.

Mr. Oliver. My point was that the witness has a right to be sworn and should be asked where the paper was. 10

The Court. When you serve a subpoena *duces tecum* that presumes the witness is going on the stand to produce something. That is very different from a notice to produce. So that statement should be stricken from the record.

Mr. Heine. I consent to that.

Q Is this your signature? Is that the seal of the company? 20
A Yes, sir.
Q Do you know the signature of Mr. Fish?
A Yes, sir.
Q Is that it?
A Yes, sir.
Q Do you know the signature of J. G. Meyer?
A Yes, sir.
Q Is that his signature as attesting witness?
A It is.

Mr. Oliver. Is the attesting witness here? 30

Q Do you know where Mr. Meyer now is?
A J. G. Meyer is living in Brooklyn. This is J. G. Meyer.
Q Do you know the signature of Mr. Fish attached to the assignment on the instrument purporting to be an assignment?
A I have always taken that for his signature. I didn't see him sign it.
Q The other was signed in your presence? 40

A Yes, sir.

Mr. Heine. I offer this lease from the Brazilian Dredging Company of South Dakota to Fish, dated February 23rd, 1909.

(Lease entered in evidence and marked Exhibit P. 1.)

Q Do you know when that consent of the Brazilian Dredging Company of South Dakota to the assignment of that lease was given?

Mr. Codding. Objected to on the ground that the document speaks for itself.

The Court. You cannot contradict the record.

Mr. Heine. I am not trying to.

The Court. Then it speaks for itself. Dated March—

Mr. Heine. No, sir; that is the assignment to the Gem Dredging Company. I am asking about the consent.

Mr. Codding. Then I object on another ground, that the consent is not a consent until it is signed.

Mr. Buchanan. Very well, then there was never any consent given.

Mr. Codding. I object to any testimony explaining the document.

Q Was this assignment of this lease, Exhibit P. 1, by Harwood Fish to Gem Dredging Company, ever consented to by the Brazilian Dredging Company of South Dakota?

A Yes, sir.

Q If you know, when?

Mr. Codding. I object to the question as—

The Court. He says yes, that it was, but he does not know when. There is nothing on that paper to show when it was. The witness has said that he had a duplicate original. He has not said all those assignments were duplicate originals.

Mr. Heine. He identified the signature of Mr. Fish on the assignment, and that is all.

The Court. Now you are asking about something else. It may very well be that there was some other paper which was signed; it does not appear, and you have got to show either that it was not, or show the failure to produce it.

Mr. Heine. He has now testified that there was a consent, and I have asked him when, if he knows. 10

The Court. A consent by a corporation, there is only one way a corporation can act. They cannot act by parol. It must appear it was either by some authorized signing of a paper, or by some resolution passed on the minutes. Is not that so?

Mr. Heine. Yes, sir; but this is in the nature of secondary evidence, and I presume in order to ask this question I should question Mr. Fish, and if he didn't produce it, that the document— 20

The Court. Not at all. You have to produce the corporate minutes to show, and then if you produce the corporation minutes and they fail to show any assignment, then you have a right to offer secondary evidence to show that there was some resolution offered, which the secretary failed to put on the minutes.

Q Have you, Mr. Case, the minutes of any meeting of the directors or stockholders of the Brazilian Dredging Company of South Dakota? 30

A Yes, sir.

Q Which would show the fact, as you have testified, that this lease was consented to?

A I have the minutes here, and if you will let me have the lease I will look and see. Yes, sir.

Q Will you read into the record the resolution?

The Court. First give us the date of the meeting. 40

A "Meeting of the Board of Directors of Brazilian Dredging Company of South Dakota, April 16th, 1909," on page 114 of the minute book.

Q Read the resolution?

A "Secretary presents request of Mr. H. Fish that this company give its consent and approval to his transfer of the lease he holds to the Gem Dredging Company. Moved by F. O. Case; seconded by Mr. Meyer that such approval be given. Carried."

Q That is correct—

Mr. Codding. They haven't proved them, but inasmuch as I want this evidence I am not objecting.

By the Court.

Q Were those minutes kept by you as secretary?

A Yes, sir.

By Mr. Heine.

Q And they correctly set forth the transactions and doings at the various meetings, as kept by you?

A Yes, sir.

Q And it is approved as a correct and proper statement of those transactions?

A Yes, sir.

Mr. Heine. I offer in evidence that resolution which has been read by the witness.

The Court. Admitted.

Q Is this the assignment referred to in that lease? I show plaintiff's Exhibit 1 and ask you if that is an assignment, on the last page of that exhibit?

The Court. That is not an assignment; it has not been signed by anybody.

Q A consent?

The Court. It is not signed by anybody.

Mr. Buchanan. We are not asking about the consent. We are asking about the assignment. The question is, is this the lease and the assignment referred to in that resolution.

Mr. Codding. I object to the question on the ground that it calls for the conclusion of the witness as to the effect of a legal document.

The Court. No, he is asking him as a matter of fact whether this is the lease and the assignment that resolution refers to. He is not asked to construe it.

A Yes, sir; it is. That is the lease and assignment referred to. 10

Q Is there in your minute book of the minutes of the South Dakota Brazilian Dredging Company, any prior consent to this particular lease of February 23rd, 1909, of Harwood Fish?

A Consent to what?

Q Consent to the assignment?

A No, sir.

Q Have you got the map which was used? I have asked you to produce the original map of the concession of the Brazilian Dredging Company. Are you able to do so? 20

A I am not.

Q The reason is that—

A It is in Europe at this time.

Q And is that a correct copy?

A Yes, sir.

Q Of the official and authorized map issued to the Brazilian Dredging Company of New York?

A It is. 30

Q At the time of their registration of their company in Brazil?

Mr. Codding. I object, unless the witness shows some knowledge in the matter.

The Court. Yes, unless he knows. How does he know when it was registered in Brazil?

Mr. Heine. I will withdraw that part of the question. What I am trying to do is to prove the map. 40

Q Do you know this is a copy of the original map?

A I do.

Q Showing the concession of your Brazilian Dredging Company of New York?

A Yes, sir.

The Court. Is that the property referred to in that lease which you have offered in evidence?

10 *Mr. Heine.* Part of this; yes, sir. I will offer this map in evidence.

(Map entered in evidence and marked Exhibit P. 2.)

Q Mr. Case, I show you a paper which is entitled "Sketch of our Concession," and ask you if you know what that is?

A Yes, sir.

Q What is it?

A It was a sketch that Mr. Meyer drew of the 20 concession of the Brazilian Dredging Company before the property was surveyed.

Q Do you know the date when the property was surveyed?

A Approximately.

Q What is it?

A The map was made fifth of August, 1909. That is immediately after the survey was completed.

Q And this was the map of your concession used by the Brazilian Dredging Company prior to that 30 date?

A Yes, sir. This sketch was used prior to the survey's completion.

Q And was that sketch the sketch from which the lease referred to, Plaintiff's Exhibit 1, was made, and to which it refers in the body of the lease?

A This is the sketch that was used to define this property.

Mr. Heine. I offer that in evidence.

Mr. Codding. Offer what in evidence?

40 *Mr. Heine.* The sketch.

Mr. Codding. Let me see it. I object to the admission of the sketch on the ground that it has not been shown to have any relevancy to the issues raised by the pleadings.

The Court. The witness says it refers to the property described in the lease, which has been admitted in evidence.

Mr. Codding. In a lease.

The Court. I thought he said in the lease. 10

Mr. Heine. In the lease marked in evidence.

Mr. Codding. Yes, in this lease marked in evidence, but that is not the only lease in existence.

The Court. Oh, no. As long as that lease was admitted, and as long as he says that sketch refers to this property, it seems to me that is admissible.

(Sketch entered in evidence and marked Exhibit P. 3.) 20

Q Mr. Case, will you examine the minute book of the Brazilian Dredging Company of South Dakota and state whether down to March 8th, 1909, the company had any lease other than the one marked in evidence, Plaintiff's Exhibit 1, to Mr. Fish, or with the Gem Dredging Company?

Mr. Codding. I object, that on the evidence of representations there was no evidence given that the defendant represented that he had a lease from the Brazilian Dredging Company of South Dakota. All that he represented was that he had a lease, according to the plaintiff's testimony, on valuable lands in Brazil. 30

Mr. Heine. The representation was that the Gem Dredging Company had a lease on the 27th day of February.

Mr. Codding. But he didn't represent, according to his own statement— 40

The Court. The minutes might not necessarily show the transfers of title of property to the corporation; they might and they might not. Of course, if you could show by some resolution they authorized payment for the property, or something of that sort, that would show. But here you have offered the lease, which has been admitted.

10

Mr. Heine. This is a transfer from the Brazilian Dredging Company to the Gem Dredging Company, and in order to necessarily segregate the *locus,* in order to show the misrepresentation was made, I have got to show that there was only this one lease at that time from this concession, that covered a large amount of territory. I would be open to the charge of uncertainty as to the proof of misrepresentation if I didn't specifically pin it down to that particular property. I want to exclude any other property from the ownership of the company at this time, so as to negative—I have got to do that in order to make good my charge of misrepresentation.

20

(Question repeated by stenographer.)

The Court. You can ask him if the minutes show anything.

(Question repeated by stenographer.)

The Court. That question I will overrule.

Mr. Heine. I will reframe that question by inserting those words.

30

Q Do the minutes of that company show any lease to the Gem Dredging Company, or Mr. Fish, prior to that date, March 8th, 1909?

A That is the only lease the minutes show a record of.

Q Now, Mr. Case, do you know whether down to that date, March 8th, 1909, the Brazilian Dredging Company of South Dakota gave any lease of any lands on its concession to Harwood Fish, or to the Gem Dredging Company, other than Plaintiff's Exhibit 1?

40

Mr. Codding. I object to the question.

The Court. I do not see what your object is in proving that, Mr. Heine, because the corporation could not act unless it appeared on the minutes. Not unless you want to show that something was done which the secretary failed to put in the minutes, then you could prove it.

Mr. Heine. I think, as a matter of precaution, there is nothing that appears in the minutes, and now the secretary does not know of anything. It seems to me by that I have tied the rope at both ends. 10

Mr. Codding. I am objecting to this whole line of examination on the ground that he is simply inquiring as to a lease from the Brazilian Dredging Company of South Dakota, and there is no allegation on the part of the plaintiff that any description of a lease was made, that he simply said he had a lease on grounds in Brazil, and I really feel as if I ought to move to strike out the whole testimony. 20

The Court. I will let it stand for the present.

Mr. Heine. I have got to show—

The Court. It is in, Mr. Heine. There is nothing to argue about.

Q Will you now look at the minute book of the Brazilian Dredging Company of New York, if you have it? 30

Mr. Codding. I object, because there are no such allegations in the complaint.

The Court. There is no allegation in the complaint of having a lease made from the Brazilian Dredging Company of New York.

Mr. Heine. No, but if your honor will allow me, the proof that I am endeavoring to put in now is to this effect: That the representation made by Mr. Fish was that the Gem Dredging Company had a lease of certain lands in Brazil, 40

and certain specific lands in Brazil on the Jequitinhonha River.

The Court. From a corporation known as the Brazilian Dredging Company of New York? You might just as well offer proof to show he had a lease from the Standard Oil Company, when the lease was from the Pennsylvania Railroad Company.

10

Mr. Codding. If the gentleman is attempting to prove by exclusion that this man didn't have a lease, he has to take every man in the United States and prove that he didn't give him a lease.

The Court. The allegation is that they had a lease made by the Brazilian Dredging Company of South Dakota, and there is evidence that there was such a lease, and you have got to confine your proof to that. If you want to bring in the other corporation, you have got to amend your complaint.

20

Mr. Heine. The fact is that the Brazilian Dredging Company of New York is owned by the Brazilian—

The Court. I do not care anything about that, Mr. Heine. You have asked a question which I have overruled, in relation to the Brazilian Dredging Company of New York. If you want to bring that in, as I say, you must amend your complaint.

30

Q Did you have any conversation with the defendant in this case in January, or early in the year 1909, regarding the Gem Dredging Company?

A Yes, sir.

Q When and where was this conversation, as nearly as you can fix it?

A At the office of the Brazilian Dredging Company of South Dakota, 237 Broadway, New York.

Q Was anything stated in any conversation, and if you can identify it do so, regarding the subject of registration of companies in Brazil?

40

Mr. Codding. Objected to as immaterial to any issues raised here. There is no allegation in the complaint to substantiate it.

The Court. The only allegation is that he represented that the Gem Dredging Company had a lease from a corporation known as the Brazilian Dredging Company of South Dakota, and that you have proved. 10

Mr. Heine. This proof is directed to the question of knowledge of the Brazilian law. That is the question that has been raised before.

The Court. There is no such allegation in the complaint.

(Argument by Mr. Codding.)

(Question repeated by stenographer.)

The Court. I will allow the question.

Mr. Codding. I object to the question on the ground that the witness has not been shown to be a lawyer. 20

The Court. No, he cannot testify to his conclusions.

Mr. Heine. I am not going to ask him as to the law.

The Court. He can only testify to statements made by the defendant. That is all.

(Question repeated by stenographer.)

A Yes, sir.

Q Then state what the defendant said, and what you said to the defendant on that subject? 30

Mr. Codding. Objected to as irrelevant and immaterial and incompetent, and not having to do with the question raised in the pleadings, or not having anything to do with the representations as proved by the plaintiff on the stand.

The Court. The question as asked is too broad. Any statements made by this witness to the defendant certainly would not be competent. Any statements made by the defendant showing that 40

he knew that the Brazilian Dredging Company did make a lease might be competent. I will admit them.

Mr. Buchanan. Or statements made by this witness to the defendant.

The Court. But you cannot manufacture testimony that way, by having somebody go to a defendant and make a statement, and hold them for that. What he said, or what he said in answer to something this witness may have said might be competent.

Mr. Heine. I will withdraw that question.

Q State, giving the date as near as you can, what was said by the defendant to you, and by you in answer to the defendant, regarding this subject of registration of companies in Brazil?

A About the first of February, I should say, possibly a little before that, in talking with Mr. Fish in regard to the requirements of Brazil, I informed him that his company would have to be registered before they could enter into a possession of their property, or operation of their lease. Mr. Fish said he didn't believe that was necessary as long as they were only leasing the property; that that might apply while they were owning the property, or owning the concession, such as the Brazilian Dredging Company of South Dakota did. I told him that the company must absolutely be registered under the laws of Brazil, before they could do anything, otherwise they had absolutely no protection.

The Court. Not what you said to him. It is what he said.

Mr. Buchanan. May we note an objection to that ruling, your Honor?

Q You have been in Brazil, Mr. Case?

A Yes, sir.

Q When did you make your first trip there?

A 1908, about the first of August, I should say, my first visit, and I have been there since.

Q And were you, at the time you visited Brazil in 1908, on the property covered by the concession of the Brazilian Dredging Company?

A Part of it; yes, sir.

Q Did you, at that time, go over the property covered by the lease, plaintiff's Exhibit 1?

A No, sir; I didn't go as far north as Mr. Fish's concession or lease. 10

Q Did you, while in Brazil, make a search for engineering reports covering the property held by the Brazilian Dredging Company?

A Not particularly in Brazil.

Q Have you made search anywhere?

A Yes, sir.

Q State where, and what your efforts have been?

Mr. Codding. Objected to as irrelevant and incompetent. I don't know what it has to do with the case. 20

The Court. I can see how it might possibly be made competent. Go on.

A The published reports of the United States consul. The books that were published by Brazilian authority and distributed at the World's Fair; the Pan-American, and various—

The Court. Do you think that is competent testimony? 30

A (Continued)—various engineers' reports.

The Court. Stop. Do you think that is competent testimony, to go to the World's Fair and gather up a lot of reports and make them competent?

Mr. Heine. I am simply wanting to prove we made a search for engineers' reports.

The Court. He made a search by gathering up circulars at a World's Fair. Certainly that is not testimony. 40

Q There was at that World's Fair a Brazilian exhibit, was there?

A It was the official Brazilian bulletin that was issued at the World's Fair at St. Louis, Missouri, issued by the Brazilian Government.

The Court. You cannot prove it legally that way.

10 Q You made a search for engineering reports?

A Yes.

Q What source did you go to to find reports on this Brazilian property?

Mr. Codding. Objected to as irrelevant and immaterial and incompetent.

The Court. Where he went is competent.

Mr. Codding. I will withdraw that objection.

A Various engineers who had been to Brazil, and various published reports on Brazil.

20 Q Can you name any of those engineers, or the names of engineers who made those reports?

A Mr. T. Milton Johnson, who is reputed to be an engineer. I have seen the report. Messrs. Challot and Sharp. Touzeau of London.

Q Did you read those reports and go over them?

A Yes, sir; I have read them all.

Q Did you find in any of those reports matters covering the concession of the Brazilian Dredging Company?

30 A Not that identical property; no, sir.

Q Did you find in any of those reports matters covering the specific lots covered by this lease, plaintiff's Exhibit 1?

Mr. Codding. I object.

The Court. It seems to me that is the worst kind of hearsay testimony you are trying to get in now.

Mr. Heine. I am asking him whether he

40 found—

The Court. You are asking him if he read something, and what he found. The best evidence of that is to produce the paper, and we can see for ourselves.

Mr. Buchanan. There was nothing found, and we haven't anything to produce.

The Court. You can produce the papers and show by them what was there. Not what somebody else thought he found, or didn't find. 10

Q I show you booklet prospectus of Brazlian Dredging Company, and on page two I ask you to look at a report by W. G. Meyer, referring to Identification D. 1.

Mr. Buchanan. Can we interrupt now to put the consul back on the stand, in order to let him go?

The Court. Yes, you may do that.

(Witness withdrawn.) 20

GEORGE WILLIAM CHESTER, resumed.

Direct examination (continued).

By Mr. Heine.

Q Have you compared these sections which I detailed to you?

A Yes, sir.

Q With the translation?

A Absolutely true.

Q From the year book? 30

A Yes, sir.

Q How have you found it?

A Absolutely true.

Mr. Heine. Then I offer the book and the laws of the sections.

The Court. The witness testifies that the numbers of the sections as read to him he has compared with the English translation, and the English translation is absolutely correct. 40

Mr. Heine. I offer the official book.

The Court. I admit the original law, and I admit the translation, for the time being, reserving you the motion to strike out.

Mr. Codding. We admit that is the Brazilian law, and that is a correct translation of those sections.

10 *Mr. Heine.* I want to have this yellow paper marked as the sections that were examined by the witness.

Mr. Buchanan. Let the record show first the offer of the volume of the Brazilian laws.

The Court. That is in, and I have admitted it, reserving the motion to Mr. Codding to strike it out.

Mr. Codding. Do I understand that is in such shape Mr. Buchanan can read it to the jury?

20 *The Court.* If he can read it, yes.

(Volume of laws entered in evidence and marked Exhibit P. 4.)

(Translation of sections entered in evidence and marked Exhibit P. 5.)

Mr. Buchanan. Exhibit P. 5 is offered as to sections 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 79 and 85, of Chapter two, being the paper which the witness has testified contains the true translation of the respective sections of the Brazilian law.

30 *The Court.* That I admit, reserving the right for Mr. Codding to move to strike out.

NO CROSS EXAMINATION.

40

FRANKLIN O. CASE, resumed.

Direct examination (continued) by Mr. Heine.

Mr. Heine. I offer in evidence the prospectus marked D. 1 for Identification. This is a prospectus of the Brazilian Dredging Company, containing reports of W. G. Meyer, and what purports to be reports of other engineers.

(Prospectus heretofore marked D. 1 for Identification, entered in evidence and marked Exhibit P. 6.) 10

Q Are you familiar with the contents of that prospectus?

A Yes, sir.

Q Did you assist in the preparation of it?

A To a certain extent; yes, sir.

Q Did you compare the extracts from engineers' reports there with the original reports?

A Not with the originals; no, sir. Only in some instances. 20

Q In what instances, if any?

A In Mr. Meyer's.

Adjourned until to-morrow.

Wednesday, October 15, 1913, at 10.00 A. M.

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40

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

October Term, 1913.

10

EMILE LAMS *vs.* HARWOOD EDWARD ODEREY FISH.	*Action at Law. No. 7 in the List.*

Transcript of stenographer's notes of evidence taken in the above entitled cause, before Hon. Benjamin A. Vail, Circuit Court Judge, and a jury, at the
20 Court House in the City of Elizabeth, N. J., on the fifteenth day of October, A. D. 1913, at 10.00 A. M.

Appearances:

Mr. M. Casewell Heine, Mr. Malcolm G. Buchanan, for the plaintiff.

Mr. Charles A. Trimble, Messrs. Codding & Oliver, for the defendant.

FRANKLIN O. CASE, resumed.

30 *Cross examination* by Mr. Codding.

Q Did you testify that there had been any lease made to Mr. Fish by the Brazilian Dredging Company previous to that one you read over there?

Mr. Buchanan. Objected to as an improper question.

The Court. It is cross examination.

Mr. Buchanan. It is a question whether he testified. That is not proper.

40 *The Court.* Yes, if that is your objection.

Q Was there ever any lease made by the Brazilian Dredging Company, to your knowledge, previous to the one that you testified to on the book?

A The records speak of none.

The Court. That is not the question.

(Question repeated by stenographer.)

Mr. Buchanan. Objected to, unless the question states to whom the lease was made. 10

Q To the defendant in this case, by the Brazilian Dredging Company?

Mr. Buchanan. Objected to as not being material to the question in issue.

The Court. Question allowed.

Mr. Buchanan. The question is whether there was any other lease made to the defendant, Harwood Fish. The issue in this case, and what has been testified to in this case, relates to leases owned by the Gem Dredging Company at the 27th day of February. 20

The Court. Question allowed.

A Can I answer that question in my own way?

The Court. No, you can answer the question. If you cannot answer it, you can say so.

A I don't know whether you call it a lease or not. There was a document issued.

Q What?

A There was a lease drawn up and signed by the president and the secretary. 30

Q Who is the secretary?

A Myself.

Q And you did, the secretary, sign a lease to the defendant, in the name of the Brazilian Dredging Company, before the one you testified to?

A I signed a document purported to be a lease; yes, sir.

Q I hand you a document which purports to be a lease from the Brazilian Dredging Company, a cor- 40

poration organized under the laws of South Dakota, and Harwood Fish, of the City of New York, dated the second day of November, 1908.

Mr. Heine. To whom?

Mr. Codding. To Harwood Fish.

Q And this lease purporting to be signed by the Brazilian Dredging Company, W. G. Meyer, president, and F. O. Case, secretary, and ask if you signed that document?

10

A I signed that.

Q Is that the corporate seal of the Brazilian Dredging Company?

A It is.

Q Affixed there how?

A By myself.

Q What is the signature of the man purporting to be president, who is that?

20

A W. G. Meyer.

Q Was he president of the company?

A He was president of the Brazilian Dredging Company of South Dakota; yes, sir.

Mr. Codding. I offer the lease in evidence.

Mr. Heine. Objected to.

Mr. Codding. I will mark it for identification at present.

(Lease marked D. 6 for identification.)

30

Q You said, did you not, on direct examination, that you told Mr. Fish that a company not registered in Brazil could not do business there?

A Yes, sir; I did.

Q Was the Brazilian Dredging Company of South Dakota, whose name, and who apparently executed the lease I have just shown you marked for identification D. 6, was that company registered at the time in Brazil?

A No, sir.

40

Q What did you get as a company?

A That was New York.

Q That is New York, yes.

A No, sir; it was not.

Q What did you get from Mr. Fish for that lease?

Mr. Heine. Objected to.

A I never knew.

Q As a matter of fact, do you not know that the company received five thousand dollars for that lease? 10

Mr. Heine. Objected to.

A They did not.

Mr. Codding. I asked him if he knew. He is an officer of the company.

The Court. The question is do you know?

A They did not.

Q Who received any money that was paid for that lease?

Mr. Heine. Objected to.

A I don't know anything about that. 20

Q Then what property at that time did the Brazilian Dredging Company of South Dakota purport to own in the United States of Brazil along the Jequitinhonha and Caethe Mirim Rivers?

A About a concession of about twenty miles of river property on the Jequitinhonha and Caethe Mirim Rivers.

Q How then do you justify your statement that a company could not do business in the United States of Brazil unless it was registered there, or hold property, when you say now that your own company didn't do it? 30

Mr. Heine. Objected to. That is purely an argumentative question.

The Court. I think it goes to the question of the accuracy of this witness' testimony, who is an officer of the company. He has said, and it appears now that he executed papers which might be inferred from his testimony were of no valid- 40

ity. I think it goes to the credibility of his testimony.

A We didn't own it.

The Court. Just answer the questions.

Q You didn't do any business?

A We did not own it.

10 Q You didn't own it?

A No, sir.

Q Then this lease which purports to be given by the Brazilian Dredging Company of South Dakota, upon property in Brazil, was given, and signed by the president of the Brazilian Dredging Company and by you as secretary, when you didn't own any property there?

A Yes, sir.

Q What excuse had you for giving such a lease

20 then?

Mr. Heine. I object as irrelevant.

The Court. Perfectly relevant on cross examination of this witness.

A The president, Mr. W. G. Meyer, had been to Brazil many times and had deeded, we supposed, the property to the Brazilian Dredging Company of South Dakota, and the board of directors believed that they owned the property and had title to it. I had been to Brazil, just returned about the time of this lease,

30 and reported to the board of directors that under the law of Brazil we did not own property and could not own property in the State of Brazil. We simply had a contract with Mr. Meyer for the titles. The board of directors—

Q Then on top of that you went ahead and gave this lease, did you?

A Personally; yes, sir. The board of directors never gave a lease until they had the right.

Q You spoke of a concession in Brazil of this

40 property along the Jequitinhonha River. That con-

cession must have been made to somebody by the Government?

A Yes, sir.

Q Who was it made to?

A Made to Louis Esteven Furtado da Leite.

Q Then this gentleman with the unpronounceable name had the concession from Brazil?

A No, you didn't let me finish. And from him was supposed to be transferred to Jesse R. Grant. 10

The Court. No supposition about it.

A I don't know that.

Q As a matter of fact, so far as you know as an officer of the Brazilian Dredging Company, the title of the company, rightly or wrongly, came through Jesse R. Grant?

A Yes.

Q Who was Jesse R. Grant?

A Jesse R. Grant was the president of the Brazilian Dredging Company, or at least had been the president of the Dredging Company of South Dakota. 20

Q Son of former President General Grant?

A Yes, sir.

Q Then the Brazilian Dredging Company of South Dakota was practically the holding company, that is through a trustee, at this time when you gave the lease?

Mr. Heine. Which lease?

Mr. Codding. The lease marked as D. 6 for identification. 30

A No, I should say no.

Q Do you admit then that the giving of this lease marked for identification D. 6, was a fraudulent transaction on your part and the president of the Brazilian Dredging Company?

A I don't know whether I would admit it as a fraudulent transaction or not.

Q Had you ever given any other leases of this kind on this property? 40

A No, sir.

Q You had not?

A I believe not, prior to that date.

Q Just think that over and I will wait a moment for you?

A I believe there were no leases given prior to this.

10 Q Are you sure about that?

A Practically positive.

Q You looked through the minutes to discover that, didn't you?

A Yes, sir.

Q You can't find any in the minutes?

A I see no record. Simply hastily glancing over them.

Q Well, you are satisfied there isn't any record of it in the minutes, aren't you?

20 A Yes, I think there is no record.

Q Yesterday you didn't find the record of this lease in the minutes, did you?

A No, sir.

Q I mean the lease marked for identification D. 6, you didn't find that in the minutes yesterday?

A No, sir; no record of it.

Q Then when you answered that you didn't discover any other leases given by this company to other people, you mean that so far as the minutes of the

30 company show, don't you?

A Yes, sir.

Q Have you any personal knowledge of any other?

A I think this was the first lease issued.

Q Do you know a Mr. T. J. Yost of New York?

A Yes, sir.

Q Who is he?

A I don't know who he is.

Q Did you ever have any business dealings with him?

40 A Yes, sir.

Q Ever make a lease to a company of which he was president?

A No, sir.

Q Ever sign any such lease?

A No, sir; not that I know of.

Q Did you ever know of a lease being made by the Brazilian Dredging Company of South Dakota, to anyone, which lease afterwards became the property of the Diamond Gold Dredging Company? 10

A I can't place the Diamond Gold Dredging Company. If you will let me see who the officers were.

Q I will show it to you, but just answer the question first, if you can?

A I can't place the Diamond Gold Dredging Company, no.

Q I hand you a document endorsed on the outside "Diamonds and Gold," and ask you if that document does not refresh your memory about a lease of that kind? 20

A No, sir; it does not. I don't believe Mr. Yost ever had a lease.

Q Did Mr. Yost, or anybody representing him, ever have an option from your property?

A Yes, sir; he did.

Q When was that?

A I can't give you the exact date, but it was between March 3rd and November 4th, 1908, some time.

Q Where did you discover that, Mr. Case? 30

A It was issued while I was in Brazil.

Q But the records show?

A No, the records show nothing.

Q But as a matter of fact you remember there was some kind of an option?

A I know there was an option given to Mr. Yost; Yes, sir.

Q When were you in Brazil?

A I was in Brazil July, August, September and part of October, 1908. 40

Q Is that another case of this company giving an option on property they didn't own?

A Yes, sir; it seems to be.

Q Anybody else have one of those peculiar leases?

A Yes.

Q Who?

A Several different parties. Mr. Willfong, Mr. Paterson, Mr. Ernge, and the Black Sand Company, and several other parties may have had options. Several of them were given while I was in Brazil, that I have heard of.

Q The Toronto Brazilian Company?

A I don't know the official titles of those companies. I only know the names of the parties with whom we dealt. I think that was either Paterson or Willfong.

Q These people paid for these options, didn't they, or don't you know?

A I don't know. Some of them did and some of them didn't.

Q You were shown on direct examination a prospectus of the Brazilian Dredging Company, which was marked Plaintiff's Exhibit 6, and as I remember it, you testified that you assisted in the preparation of it?

A Yes, sir; slightly.

Q On the second page of this prospectus I call your attention—this is a prospectus of the Brazilian Dredging Company which you identified and said you took part in preparing, I call your attention to these words: "This is not a company gotten up to rob innocent buyers. We have our property bought and paid for." Do you remember that?

A I remember it most distinctly.

Q Was that true?

A It was not. It was bought and paid for, yes. I will change that. It was bought and paid for as far as we knew.

Q Mr. Fish had copies of this prospectus, didn't he?

A Undoubtedly, several of them.

Q Didn't you give them to him? Didn't you give him what literature he asked for?

A I don't know as he ever asked me, but they were supplied freely.

The Court. Answer the question. 10

A If he asked me I gave them to him?

Re-direct examination by Mr. Heine.

Q Mr. Case, you testified that when you went to Brazil in 1908, you found that the Brazilian Dredging Company of South Dakota had nothing but a lease from Mr. Meyer?

A Yes, sir.

Q Will you state what was done then in regard to this question of the leases of the Brazilian Dredging Company? Explain that. 20

A I came home and reported to the Board of Directors as to the conditions as I found them in Brazil—

The Court. He has already testified to that. Do not cumber up the record with repetitions.

Mr. Codding. We have no objection.

The Court. But I have.

Q Did the Brazilian Dredging Company, after you found this situation in Brazil which you have testified to, do anything to rectify that situation? 30

A Yes, sir.

Mr. Codding. It is a corporate act, and I object to it. I move the answer be stricken out. The best evidence are the minutes.

The Court. Strike out the answer.

Q Can you tell from the minute book whether any corporate action was taken by the Brazilian Dredging Company? 40

The Court. The best evidence is to offer the book and we will see.

Q Can you turn to a resolution there which has reference to corporate action on the subject of this lease?

A Yes, sir.

Mr. Codding. I am not sure whether the book has been offered. I think by your question that you doubt it yourself.

10

Mr. Heine. Only one page of it was offered. I will offer that entire minute book in evidence.

Mr. Codding. We don't object to it.

The Court. Now you can refer to the book. That is the best evidence, and the only evidence.

(Minute book entered in evidence and marked Exhibit P. 8.)

20

A Shall I read?

Q Have you found it?

A Yes, sir.

Q State the date of the minutes of that meeting?

A November 20th, 1908.

Q Will you state what action was taken at that meeting?

A Meeting of the Board of Directors of Brazilian Company of South Dakota, pages 78 and 79. After general discussion as to the needs for an immediate registration of the company under the laws of Brazil, and a statement of the requirements, the following resolution was presented by F. O. Case: Resolved, that whereas the Brazilian Dredging Company of South Dakota find difficulty in registering in Brazil by reason of the fact that a certificate from a responsible foreign bank that a sum equal to ten per cent. of the capitalization has been actually paid in cash to the company, and whereas, as a matter of fact, the entire capital stock of this company has been fully paid up by taking therefor the property in Brazil

30

40

and it being impossible to get the said certificate without paying into a bank one hundred thousand dollars in cash, and this company finding it is unable to do so, now, on the advice of counsel, a holding company is to be organized under the laws of the State of New York, having a capital of one hundred thousand dollars; the aforesaid property in Brazil is to be conveyed to the said New York company in consideration of all of its stock, which stock is to be turned over to the Brazilian Dredging Company of South Dakota. Now, therefore, be it resolved that we do hereby authorize and instruct Mr. Jesse R. Grant, as trustee of Mr. W. G. Meyer, to transfer to the Brazilian Dredging Company, a company to be organized under the laws of the State of New York, with a capital of one hundred thousand dollars, all the rights or interest this company may have in Brazil by virtue of contract of purchase originally made with William G. Meyer, in payment of its entire capital stock, to be issued in the name of the Brazilian Dredging Company of South Dakota. Transfer of property or concession to be made as soon as the Brazilian Dredging Company of New York is registered in Brazil, and we hereby authorize and request Mr. Grant, or Mr. Meyer, or both, to make such contracts, or take such steps in their own name, or in the name of this company, under the advice of counsel, as may be necessary to effect such transfer to the Brazilian Dredging Company of New York. Moved by Mr. Beck, seconded by Mr. Griswold, that the foregoing preamble and resolution be adopted. Carried.

Q Is that all?

A Yes.

Q After that resolution the Brazilian Dredging Company of New York was incorporated and registered in Brazil?

A It was.

10 20 30 40

Q And thereafter a lease was given by the duly registered company in Brazil to Harwood Fish?

A Yes, sir.

Q And substituted for the plaintiff's exhibit—

Objected to as leading.

The Court. I thought I had ruled upon this a number of times. The only way of proving those things is to produce the corporate minutes. You are asking the secretary what was done. It may have been done and may not have been done. I will strike out all this testimony this witness has given as to what occurred afterwards, because it appears that the best evidence would be the corporate minutes.

Mr. Heine. I will withdraw the question.

Q Have you with you the minutes of the Brazilian Dredging Company of New York?

A I have.

Q Will you kindly produce them?

Mr. Heine. I offer those in evidence.

Mr. Oliver. You haven't proved the incorporation of it yet.

The Court. This whole examination is irregular because it is re-direct examination. All this should have been brought out on the direct examination.

Q Have you a certificate of the registration of the Brazilian Dredging Company of New York?

A Yes.

Mr. Heine. Here is a certified copy of the certificate of the Brazilian Dredging Company of New York, which I offer.

Mr. Codding. I have no objection whatever.

The Court. It is admitted.

(Certificate entered in evidence and marked Exhibit P. 7.)

Mr. Codding. The defendant was under a subpoena *duces tecum* to produce an original lease. It was proved yesterday, but I want to be put on record as obeying all subpoenas. We have discovered the lease and we will produce it now.

The Court. It was a subpoena *duces tecum.* The only way they can offer that is to put the witness on the stand, he was subpoenaed, and ask him to produce it. 10

Mr. Codding. I mean I want to announce I have it here.

Mr. Heine. The duplicate original was admitted in evidence yesterday.

Mr. Oliver. We want to obviate any question about the failure of the defendant to produce it.

Mr. Heine. No, there is no question. The only thing we would like to get is the check of the building and loan association. 20

Q Will you produce the minute book of the company?

A Yes, sir.

Q Does that show the meeting of the incorporators, and so on?

A Yes, sir.

Mr. Heine. I offer that in evidence now.

The Court. It is admitted.

(Minute book of the Brazilian Dredging Company of New York entered in evidence and marked Exhibit P. 8.) 30

Q Can you find on record in those minutes now any action in regard to the registration of that company in Brazil?

A Yes, sir.

Q What is the date of those minutes?

A December 3rd, 1908.

Q What do you find recorded in regard to that?

A "First meeting of the Board of Directors of 40

the Brazilian Dredging Company of New York, December 3rd, 1908. Upon motion regularly made, seconded and unanimously adopted, it was resolved that this company be registered under the laws of Brazil, and the officers of the company forthwith cause to be prepared, executed and delivered a power of attorney to William G. Meyer, and all instruments to carry this resolution into effect."

10 Q Do you find anywhere a reference to whether or not that registration was effected?

Mr. Codding. I object as immaterial.

Mr. Buchanan. It is for the purpose of explaining testimony which was brought out on cross examination by the defendant.

The Court. I do not see that at all. The examination of this witness was perfectly legitimate. I do not see that you can bring in another

20 corporation, although it is nearly the same.

Mr. Buchanan. They brought in the other company on cross examination.

The Court. They had a right to do it to affect the credibility of this witness, and there is nothing for you to explain.

Mr. Buchanan. Haven't we a right on re-direct examination to have him explain the acts testified to on cross examination?

The Court. This does not explain it at all.

30 You are asking him to go now into the organization and business transactions, and it is entirely incompetent.

Mr. Heine. Simply to show that the company was registered, and a lease was given to Mr. Fish, substituted for the lease from the company that was not registered by a company that was registered.

The Court. Then that would sustain their contention that he made a statement that he had the

40 lease, that he did have it.

Mr. Buchanan. His statement was that the company had the lease.

The Court. I will allow you to do that.

A There is no record in the minutes of the New York company that the registration was completed.

Q Have you any official evidence, or any certificate of registration of that company?

A Yes, sir. 10

Q Will you produce that?

Mr. Heine. I offer in evidence certificate of registration of the Brazilian Dredging Company of New York, dated January 21st, 1909, issued by the President of the Republic of the United States of Brazil.

(Certificate entered in evidence and marked Exhibit P. 9.)

Q Can you find, Mr. Case, in the minute book of the Brazilian Dredging Company of New York, a record of any lease given by the New York registered company, to Mr. Fish, for the same property covered by Plaintiff's Exhibit 1? 20

A No record of any specific lease in the New York company's minutes.

Q Is there any reference which covers lease that was given by the Brazilian Dredging Company of South Dakota, Plaintiff's Exhibit 1?

A Yes, sir. 30

Q What is the date of the meeting in which that reference appears?

A May 17th, 1909.

Q And what is the statement in the minutes?

The Court. That is two months subsequent to the time these alleged representations were made.

Mr. Heine. Yes, but it is not addressed to the question of representations; it is addressed twofold, first, to the question of— 40

The Court. If you have any fraud which would sustain a verdict, the fraud must have been committed on or about the 27th of February, 1909. What was done afterwards is not material to this case at all.

Mr. Heine. We have got to show the falsity of the representations, the representations being—

10 *The Court.* I have opened the door quite broad in this case, more than I think I ought to. I will not allow you to prove anything that occurred subsequent to the 27th of February, unless it is an admission by the defendant. The fraud was committed at that time.

Mr. Buchanan. I take an objection.

Mr. Heine. Has your honor ruled on this question as to the minutes?

The Court. I have ruled on it.

20 *Mr. Heine.* I take an objection.

Q You stated, Mr. Case, if I remember your testimony, that the property in the Brazilian concession which was owned, or which the Brazilian Dredging Company of South Dakota had, was in the prospectus Plaintiff's Exhibit 6, in which the statement was that the property was bought and paid for, you stated that the property was bought and paid for, but not owned. Will you kindly explain that statement, if I have got it correctly?

30 A I think you have pretty near it, if we didn't have title to it. Why, the property was—Mr. Meyer represented the property was under option to him through leases, and the Brazilian Dredging Company of South Dakota was organized, and its stock paid in full by buying from Mr. Meyer this property. They issued the stock to Mr. Meyer in payment for the property, but the title had not yet passed, and was still in him.

40

Re-cross examination by Mr. Codding.

Q Mr. Case, you testified that at the execution of this lease which has been marked for identification D. 6, which was witnessed by you as secretary, that Mr. Fish didn't pay anything for that lease, as far as you knew?

A I said I didn't know of anything being paid.

Q I hand you the lease and ask you if on the second page of it this does not occur?— 10

Mr. Buchanan. Objected to; of course, the lease speaks for itself, if it is going to be offered in evidence.

The Court. The lease speaks for itself. You cannot refer to the contents of it unless it is in evidence.

Q As a matter of fact don't you know, Mr. Case, that the money you received for that lease—the company received for that lease, which is marked D. 6, was the money that was used by the Brazilian Dredging Company to pay for its registration in Brazil? 20

A I know that it wasn't.

Q Did you ever tell anybody it was?

A No.

Q Didn't you tell him it was?

A I never knew when the money was paid, if it was paid, so I could not.

The Court. That is not the question. The question is, did you tell him it was? 30

A No, sir.

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GEORGE S. WILSON, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Heine.

Q Mr. Wilson, you are an engineer by profession?

A Yes, sir.

Q Will you state what experience you have had in engineering lines?

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Mr. Codding. Objected to, unless there is some previous evidence laid to show what relevancy an engineer's testimony may have.

The Court. I cannot see now what relevancy an engineer's testimony would have on the representations, unless you had shown that the representations were founded upon something that the engineers had told the defendant.

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Mr. Heine. The testimony of this witness will be addressed to the representation that the leased property on the Jequitinhonha River was tested and proved as a diamond and gold property. The plaintiff's testimony was that engineers had said, or tested it as a gold and diamond property. He also added the question about the black sand, which was eliminated.

The Court. Supposing you prove by this witness that he examined it and didn't find it, that would not prove that other engineers didn't examine it and find anything.

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Mr. Heine. It is some evidence.

The Court. If you had brought out the names of the people that you allege the defendant had used in saying that they examined it, it would be perfectly proper to show that they made examinations and they hadn't found it to be as the defendant represented, but to show that somebody else had gone there, whom it does not appear that he had ever known, I do not see how

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you could sustain your action of fraud. The question now asked is overruled.

Q You were in Brazil in what year?

Objected to.

The Court. I will allow that.

A 1909.

Q Are you familiar with the concession of the Brazilian Dredging Company in Brazil? 10

A Yes, sir.

Mr. Codding. Objected to, unless he shows that he was in Brazil and had some knowledge of conditions previous to the representations alleged to have been made by the defendant.

The Court. The conditions might have entirely changed after this representation was made.

Mr. Heine. What I want to prove by this witness is that— 20

The Court. Do not state what you are going to try to prove.

Q Are you familiar with the concession of the Brazilian Dredging Company as it was in your first visit to Brazil in 1909?

Mr. Codding. Objected to.

The Court. Overruled.

Q Mr. Wilson, what experience have you, on your first trip to Brazil in 1909, to be able to tell from an examination of the property leased to Mr. Fish under 30 Plaintiff's Exhibit 1, whether on that property prior to February 27th, 1909, tests for values of diamonds and gold had been carried on or conducted?

Mr. Codding. Objected to on the ground—

The Court. I think that is entirely too indefinite. The evidence shows they had a concession on about twenty miles of river.

Mr. Heine. This question covers the particular two miles of the lease. 40

The Court. Unless you can show that he went over that whole two miles and examined every foot of it, how can he say that no tests or examinations were made.

Mr. Heine. That is what I am trying to show, and if I am allowed to qualify him as an expert, or allowed to ask him the question now, he can be crossed on the question as to how much ground he did go over, and the jury judge of that.

10

The Court. Is it objected to?

Mr. Codding. I object to the question on the ground that he must show knowledge of the property at the time representations were alleged to have been made. This is an action for fraud, and you can't prove fraud by expert evidence.

The Court. I think the question is objectionable upon another ground. I think the question is too general, for a man to go down there, unless you will say you will show he examined every bit of that two miles, in a tropical country, where everybody knows the growth is very rank, unless you say you propose to show that he examined the whole of it, if you will say that, I will admit the question.

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(Witness withdrawn.)

CLAUDE E. HEDDEN, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith.

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Direct examination by Mr. Heine.

Q Mr. Hedden, do you know the defendant?

A I do.

Q Did you have any conversation with him regarding the affairs of the Gem Dredging Company?

A I did.

Mr. Codding. I object, unless the date of the conversation is fixed.

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Q Late in 1908?

A Yes, sir.

Q Please state what was said regarding the affairs of the Gem Dredging Company?

Mr. Codding. The Gem Dredging Company, as shown by the minutes, was not shown to be in existence until February 23rd, 1909.

The Court. Question overruled.

Q Did you have any conversation with the defendant regarding a piece of property on the Jequitinhonha River in Brazil, late in 1908? 10

A I did.

Q Will you state what that conversation was? If you can identify the date more particularly, do so.

A In December, 1908—

The Court. Then you ought to identify the property too. This conversation might relate to some other property. 20

Mr. Codding. I object to the question on the ground that it is too general, and is not shown to be related to—to be confined to the particular property in question.

The Court. You have to show that the conversation related to this particular property in controversy in this suit.

Q You had conversations in regard to property in Brazil?

A Yes, sir. 30

Q Can you state in regard to what particular property that conversation related?

A Property on the Jequitinhonha River.

Q Can you identify more particularly what property on the Jequitinhonha River?

A I couldn't at that time, no.

Q What property was talked about at that time?

A In a general way property on the Jequitinhonha River.

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Q How was that property identified to you in that conversation?

Mr. Codding. Objected to.

The Court. If it is competent at all, you must show that the conversation related to this particular property.

Q Was anything said to you in that conversation
10 about any special portion or section of the Jequitinhonha River?

Mr. Codding. Objected to.

The Court. I will allow that.

(Question repeated by stenographer.)

A Not that I recall.

Q Was anything said to you by the defendant at that time in regard to property on the Jequitinhonha River on which he expected to have a lease, or had an
20 option, or in which he had an interest?

Mr. Codding. Objected to.

The Court. That does not identify this particular property, Mr. Heine. He might have had options on lots of other property.

Q Were you ever in Brazil?

A I was.

Q When did you go?

A December, 1908.

30 Q Where did you go when you got there?

A Diamantina.

Q Who asked you to go to Brazil?

A Mr. Fish.

Q What conversation did you have with him in regard to going there?

A To look over in a general way properties there which had been represented as having diamond and gold values.

Q Properties where, Mr. Hedden?

40 A On the Jequitinhonha River in Brazil.

Q What did he say to you in regard to these properties on the Jequitinhonha River?

A To go there and look them over in a general way and see if certain representations which had been made by the promoters of this property were true or not.

Q Who did you say the promoters were?

A The Brazilian Dredging Company.

Q What instructions did he give you at the time of your going to Brazil? 10

A To look over the property and report what I found.

Q What if anything was said to you at that time of your departure for Brazil, by the defendant, regarding his own knowledge of that property?

A I don't recall anything being said on that.

Q What particular property did you examine as the result of these instructions received of Mr. Fish when you left, what particular property in Brazil? 20

A Property in the Jequitinhonha River on which I understood a lease was going to be obtained.

Q Who told you that a lease was going to be obtained?

A Mr. Fish.

Q Did he tell you that before you left for Brazil?

A Yes, sir.

Q Did he describe to you the particular property on the Jequitinhonha River on which he expected to obtain that lease? 30

A He did.

Q What was that property?

A About two miles below a river called the Caethe Mirim, which enters into the Jequitinhonha.

Q Was that two miles north or south of the Jequitinhonha.

A I can't place it from that location.

Q Do you remember was that in the direction of any other tributary of the Jequitinhonha, that two miles? 40

A I can't say.

Q I show you Plaintiff's Exhibit 1, and call your attention to the first page, it says, "All that certain lot or parcel of land beginning as near as possible to the northern boundary of the Caethe Mirim, lot shown by survey to be made by the Brazilian Government surveyor, of said property, for the Brazilian Dredging Company, and running northerly two miles on the Jequitinhonha River, in the State of Minas Gereas, Republic of Brazil, S. A.," etc., and ask if you can identify from that whether or not that is the property about which Mr. Fish spoke to you at that time?

A It is.

Q And when you reached Brazil did you go to that property?

A I did.

Q About what time or date was it that you first reached that property?

A I think it was early in February.

Q Will you describe just what you did?

By the Court.

Q Was this 1908 or 1909?

A 1909.

By Mr. Heine.

Q On that two miles of property referred to in this Plaintiff's Exhibit 1?

A I was accompanied by a gentleman by the name of Ross, who was in Diamantina at the same time I was there, and he went down to the property with me in order to identify it. We took a canoe and started at the head of the property and floated down the river, I think we were gone about a half a day on this property, floating down, examining each side of the river as we went down, and looking over the property.

Q Did you make any tests on the property?

A What do you mean by tests?

Q You had better state what you did while you were there. That is the entire extent of the time you spent on the two miles that half day?

A Yes, sir.

Q Will you state in detail what you did on that half day, as nearly as you can remember?

A We took a divining rod, or a sounding rod along with us, about twelve or eighteen feet long, I should say, and at various places we would go ashore and sound for what is known as cascalhao, the diamond bearing ground. 10

Q What do you mean by sounding?

A Place a rod down through the sand, and it strikes the cascalhao, it is claimed could be found by striking this cascalhao with the rod, you could feel that it was hard, and naturally would be cascalhao.

Q You put this rod down into the ground then, and when it struck something hard, you could not see what the rod struck? 20

A Oh, no.

Q How did you know, or believe, or understand it was cascalhao?

A I was told so.

Q Who told you?

A There was two natives we met down there after we had gone down on the property, and Mr. Ross and they said that was cascalhao.

Q They couldn't see it there? 30

A They could not.

Q How many times did you poke that rod down into the ground in the course of that half day's trip?

A Why, I should say probably ten times.

Q And how far apart were the places where you put that rod down?

A Well, they were at different points. I can't specify the exact distances. We went along the property, first on one side, and the other, where it would look promising, as they said. 40

Q Who told you it looked promising?

A Mr. Ross.

Q You were not an engineer yourself?

A No, sir.

Q How many of these times that you put the rod down were on the river, and how many times on shore?

10 A Well, I should say about three times in the bed of the river, that is, not in the water itself, but in the bed of the river, the river was practically dry at that time, and I should say the balance on the shore, not down in the bed of the river.

Q How far back from the river bank on either side was the farthest test?

A Well, right close to the river bank; I can't specify just how far back; it was right at the edge of it; we didn't go back in at all.

20 Q Could you tell from any of these tests, or the rod work which you did on that property, striking this hard substance, whether or not there was any value in diamonds and gold on the property?

A No.

Mr. Codding. Objected to. He has already testified he was not an engineer.

Mr. Heine. He was there and he can tell what he saw.

30 *The Court.* Well, he says he could not tell, so it does not make any difference.

Q Did you see anybody else, while you were on that property, on that particular two miles, making any tests?

A I did not.

Q Did you see any excavations, or diggings, or workings of any kind on that particular two miles of property?

A Yes, we saw one small working there.

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Q Do you know of your own knowledge who did that working, or who made that working, or what the result of it was?

A I learned afterward—

Q Of your own knowledge?

A No, sir.

Q And that was the only one you saw?

A Yes, sir.

10

Cross examination by Mr. Codding.

Q Mr. Hedden, you went down with the proposition of looking over the properties and making a report to Mr. Fish of what you found there?

A Yes, sir.

Q And in order to enable you, not being an engineer, to discover what you could, you took Mr. Ross with you, I suppose?

A I did.

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Q Mr. Ross was an engineer, was he not?

A He was.

Q Therefore, when Mr. Ross, an engineer, made these statements to you, you relied upon them, didn't you?

A I did.

Q And you made a report, I suppose, of what you found down there, to the company?

A I did, sir.

Q And you were honest about it, weren't you?

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A I was.

Q How did you first communicate, Mr. Hedden, by cable?

A I communicated by cable several times, and by letter also. I first communicated by letter, I believe.

Q Of course, the letter, I suppose, took longer than the cable?

A Yes.

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Q And your cable might have distanced the letter?

A Yes, sir.

Q Do you remember cabling this message to Mr. Fish—

Mr. Heine. Objected to.

The Court. That is not in evidence. You can show him the paper and he can say whether he sent such a message, without reading it, and then afterwards that is admitted.

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Mr. Codding. I believe the matter has been read into the record.

Mr. Oliver. The subject matter was read, and it was identified as having been read, or heard by Mr. Lams at a meeting.

The Court. Oh, yes, it was.

Mr. Oliver. It was read into the record.

The Court. And he was asked if he had heard such a telegram read, and he said yes. If that is the one. There was some cablegram read.

20

Q Did you send a message to Mr. Fish, dated February 4th, 1909, "Have examined the property and find it fully as represented. The values are certainly here. Go ahead with the financial end of it."

A I did.

Q I hand you a letter dated Diamantina, Brazil, January 14th, 1909, and simply ask you if that is your signature to the letter?

30

A It is.

Q One of the reports you made, I suppose?

A Yes. I haven't looked at the letter, but that is my signature.

Q Look at the letter and just see if you wrote it?

A Yes, sir.

(Letter marked D. 6 for Identification.)

Q I hand you another letter dated Diamantina, January 21st, 1909, and purporting to be signed by

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you, Mr. Hedden, and ask you if you wrote that letter?

A I did; yes, sir.

Mr. Codding. I ask to have that marked for Identification.

(Letter marked D. 7 for Identification.)

GEORGE S. WILSON, re-called.

Direct examination (continued) by Mr. Heine.

Q When you were in Brazil in 1909, were you on the particular two miles of property referred to in Plaintiff's Exhibit 1, leased to Harwood Fish?

Mr. Codding. Objected to, unless he is shown to have seen Plaintiff's Exhibit 1, and knows what it is. Let him identify the property in some other way.

Q Referred to in Plaintiff's Exhibit 1 on the first page, of which I ask you to look at the description?

Mr. Codding. Do I understand this witness's testimony was cut out that he gave before? I have objections in there.

The Court. He was only asked one or two immaterial questions.

Mr. Codding. My objection I made at the time was that unless he shows he was there previous to these misrepresentations, it would have no effect.

The Court. There is nothing in the record so far.

Mr. Heine. Your honor ruled out everything, unless it was prior to the 17th, that part of the examination didn't go in.

The Court. All he said during the summer, or subsequent to February 27th, was ruled out.

Q Will you answer that?

A Yes, sir.

Q Are you an engineer, Mr. Wilson?

A Mechanical.

Q Will you state what has been your experience?

A Construction of all descriptions, excavation, installation.

Q With what companies have you been connected, over what period?

A Too various to mention. In Jersey here with the Raritan Copper Works, superintendent of construction; the Petroleum Iron Works; the New Jersey Boiler Works, at Boonton, New Jersey.

Q How long have you been engaged in engineering?

A All my lifetime practically.

Q Have you had experience with alluvial mining?

A Not prior to Brazil.

Q What was your experience in Brazil?

A Why, making examinations of the different stratas. It was a Simon pure excavating proposition, and being thoroughly familiar with that, I was employed to go down there and do the excavation for different companies.

Q When did you first go down?

A Leaving New York on May 20th, 1909, on this particular trip.

Q Mr. Wilson, was it possible for you at that time—in June, was it?

A Arrived there in June.

Q Was it possible for you in July, 1909, on this particular two miles of property referred to in Plaintiff's Exhibit 1, to tell from your examination of it whether or not there had been tests to determine values of diamonds and gold on that property made on it prior to February 27th, 1909?

Mr. Codding. Objected to upon the ground that the witness is only qualified as an expert in excavation and mechanical engineering. He has shown no knowledge whatever of diamonds and gold values. And furthermore states that his

only experience of that kind was in Brazil, and shows by his own testimony that he never arrived there until July, three months afterward.

The Court. Question overruled.

NO CROSS EXAMINATION.

HARWOOD EDWARD ODEREY FISH, the defendant, being duly sworn according to law on his oath, saith: 10

Direct examination by Mr. Heine.

Q Mr. Fish, you have received a subpoena *duces tecum* to produce the minute book of the Gem Dredging Company?

A I have.

Q Have you the book with you?

A I have.

Q Are those the minutes of the Gem Dredging Company? 20

A I believe so. I wasn't secretary.

Q You were the president?

A I was president.

Q And in whose custody were the books?

Mr. Oliver. We will admit they are the minutes of the Gem Dredging Company.

Q Will you turn to the minutes of the incorporators' meeting?

The Court. Do you mean the first meeting? 30

Mr. Heine. First meeting; yes, sir.

Q And will you look at the minutes of that meeting, and the subsequent meetings down to March 8th, 1909, and ascertain, if you will whether the Gem Dredging Company had any lease of any property from the Brazilian Dredging Company, or from any other company, on the Jequitinhonha River in Brazil?

Mr. Oliver. I object to the question because that calls for a conclusion. 40

Mr. Heine. I ask him whether there is any record.

A There were no minutes before that date.

Q What?

A March 8th. The company wasn't incorporated, or wasn't organized.

Mr. Oliver. That was the organization meeting.

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Q What is the date of the incorporators' meeting?

A March 8th.

Q Is there any reference in the minutes of March 8th to a lease of land on the Jequitinhonha River, from the Brazilian Dredging Company, or any other company?

Mr. Codding. Do you want to prove a lease?

Mr. Heine. No. The lease is in evidence.

20

A In under this date there is a copy of it.

Q Copy of what?

A Of the lease held by myself at that time. It hadn't yet been taken over by the company.

Q The minutes show that on March 8th then no lease was taken over by the company?

A Not on that date. The company wasn't organized.

Q Or prior to that?

A There wasn't any meeting.

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The Court. It could not be, because it was not organized, the witness says.

Q Have you the certificate of the Gem Dredging Company, which is admitted in evidence was incorporated in South Dakota on February 23rd?

The Court. The pleadings admit that.

Mr. Codding. The pleadings admit the company was incorporated, and I suppose that is included. I think we have the original certificate here if anybody wants it.

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Mr. Heine. If that is admitted, that is all.

Q The incorporators' meeting is dated March 8th?
A March 8th, 1909.
Q That is the first meeting?
A That is the incorporators' meeting, before there were any directors, or company.

Mr. Heine. I offer the minutes of the first meeting—I offer the book in evidence.

The Court. It is admitted.

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By Mr. Oliver.

Q What page is that?
A First page.

PLAINTIFF RESTS.

Motion for Non-Suit.

Mr. Codding. I move to dismiss the complaint upon the ground that the only representations made, even according to the plaintiff's own testimony, was that he was induced to go into this proposition by representations made on the 27th of February, 1909. That the charge in the complaint is that he was induced to take stock in a then existing company, the Gem Dredging Company. By the plaintiff's testimony on cross examination it shows that he made his payment on account of that stock two weeks previously, his first payment, and that payment was a deposit on the full amount of shares he took. Therefore, it is clearly evident that he must have been induced to go into this thing, if at any time, long previous to the time stated in the complaint.

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Furthermore, another very vital thing to this proposition is that they have absolutely, either forgotten to, or could not, prove any damage. Not one word of testimony has been taken in this case to show damages.

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The Court. There is not the slightest evidence in the case to show that the property is not just as valuable as they say that it was, not the slightest.

Mr. Codding. There is no evidence that there is not any gold and diamonds there. There has not been a scintilla of evidence produced to show that anyone of these representations might not have been true. And on top of it, another thorough complete failure of proof is any damage that he has suffered whatever. There is not a word of testimony, and that is one of the vital things that they must show, to have any claim for a verdict.

The Court. I will hear what the other side have to say.

Mr. Heine. The evidence, I concede, is not as full as the allegations of the complaint, but there remains, under the rules of law, I believe, a question here for the court and jury. The allegation is, and the proof of Mr. Lams supports it, that the statement made on the 27th day of February was that the Gem Dredging Company had a lease of—Mr. Codding says he has looked at the testimony and it does not say the Brazilian Dredging Company, but at any rate, it is conceded that the Brazilian Dredging Company had a lease of lands on the Jequitinhonha River in Brazil. That is the first representation. The burden on the plaintiff in the case is to show that that representation, first, is false. There is a specific representation of fact, that they had a lease on the 27th of February. The evidence is that on that date Mr. Fish had a lease from the Brazilian Dredging Company of South Dakota, and that that lease was not transferred to the Gem Dredging Company until the 8th day of March, and not consented to, according to the minutes of the Brazilian Dredging Company of South Dakota, until the 16th day of April, 1911; and the lease itself states in the provisions of it, which are in evidence, that there is no assignment of that lease valid without the con-

sent of the lessor in writing, and that provision was complied with on the 16th day of April.

The Court. You said 16th day of April, 1911. You do not mean that?

Mr. Heine. No, I mean 1909. There, therefore, is testimony that on the 27th day of February the statement was made that the Gem Dredging Company had a lease of lands on the Jequitinhonha River; that it was not so, but that Mr. Fish individually had a lease of lands, which did not come into the possession of the Gem Dredging Company until the 16th day of April.

Mr. Codding. That particular lease, Mr. Heine?

The Court. About six weeks later.

Mr. Heine. Yes, something of that kind. And proof was also adduced on the subject of the Brazilian law, which has been held in abeyance, subject to our arrangement; but that the lessee company had a capacity, and it now develops that the lessor company at the time, the 27th of February, also was under the same disability as the lessee, so that it practically, as far as the Brazilian law is concerned—two outside parties contracting about something to which neither one had a legal title.

Mr. Codding. No Brazilian law in the case at all.

Mr. Heine. That is subject to that ruling. But the clean cut evidence is that the representations on the 27th day of February, that the company had a lease, was not so, because the lease was in Mr. Fish's name at that time.

The Court. But it afterwards came in.

Mr. Heine. Yes, it afterwards came in. The question of the knowledge by the defendant of this lease, being in his name at that time, is, of course, conclusively shown by his own signature on the assignment, subsequent to the date of the representation. The evidence further shows that there could have been no other lease in the premises, because the incorporators' meeting was not held until the 8th day of

March, consequently the company had on the 27th day of February, absolutely nothing.

The Court. That is conclusive.

Mr. Heine. Under the case of (citing case) Justice Depue lays down the proposition on an action for deceit.

The Court. Assuming now that that representation was untrue when it was made, but that afterwards, within a few weeks the infirmity was removed, and title was put into the company, where the defendant said it was at the time the representation was made, how was anybody injured by that condition of affairs? The mere fact that a representation might not have been true does not entitle you to a verdict in an action of fraud, unless you can show some damage was proved.

Mr. Heine. That is the question I will now address myself to the court. The liability I claim under that first section of this case. On the damage, the defendant has testified that originally he intended to put in—

The Court. You admit it shows in this case that some time a few weeks later the title was put in the corporation wherein, so the defendant says, it was at the time the representation was made.

Mr. Heine. Under this case of damage the rule is laid down here, I will read just this section from it (reading).

The Court. What evidence is there in this case to show this property is not worth every dollar that the plaintiff in this case paid for his stock?

Mr. Heine. There is evidence to that effect. In the first place, Mr. Lams testified that he originally subscribed to seven hundred and fifty dollars worth of stock at fifteen cents a share, and that on the night of the 27th of February he said that was all he wanted to take, but Mr. Fish made these representations and told him now was the chance, and he then increased

his subscription to fifteen thousand shares, or a total of twenty-two hundred and fifty dollars, so that necessarily the representation being made on that date, we must exclude the question of the seven hundred and fifty dollars prior subscription, and deal only with the damage caused by the increase of the subscription on the 27th of February, which would be the difference between the fifteen hundred dollars additional that he paid at that time, and the value of the stock at that time. It is shown conclusively by Mr. Fish on the stand that the stock at that time, the incorporators meeting not having been held, nothing having been turned over to the company, and the company yet being almost inchoate, had no value. There is evidence there from which the jury, or almost the court, could infer as a matter of law the company was possessed, prior to the date of the incorporators' meeting, of nothing.

The Court. That company was not formed any differently from the way thousands and thousands of other companies are formed.

Mr. Heine. Between that date and the date the company, as a legal entity, acquired title to anything, the representation was made, and was false, and consequently it must almost be presumed as a matter of law that there was no value to that property of the legal entity.

The Court. Oh, no. That particular question—

Mr. Heine. It is for the jury. On that question. I admit it was a surprise to me when Mr. Fish was on the stand, but on that testimony appearing, I admited it, that no proof is necessary, that that question as to the value of the stock at that particular time is a question for the jury to pass upon.

The Court. It would be if there was anything to go to the jury, but there is not the slightest evidence in the case to show that that stock, after the company was formed, was not worth every dollar which you

say they represented it to be. It may be worthless, it may be nothing but a lot of black sand, as you term it, but there is no proof in the case. You cannot just assume that because a man buys stock in a corporation, and does not get all the dividends he thinks he ought to get, that therefore the company is worthless.

Mr. Heine. Is not it a question of fact—

10 *The Court.* It is a question of fact, if there are any facts in the case.

Mr. Heine. Here is the first fact, that the company was incorporated on the 23rd of February. The second fact is that its incorporators' first meeting was held on the 8th of March, and that it had no assets until the eighth of March. Consequently there are two methods of showing the value of stock, one is to show it has a market value and the other is to show

20 what its assets and liabilities are, and to divide the difference into that amount of outstanding stock.

The Court. Do you claim that that fact alone, standing by itself, would be any evidence of fraud?

Mr. Heine. No evidence of fraud. (Further argument.) I have shown when the money was paid in the company had been incorporated four days previously, and was a legal entity, but that it had no assets, had acquired no assets of any kind until the 8th day of March; consequently there are two facts, the

30 fact of the incorporation, the proof of the existence of the company, the sale of the stock of that company, and the fact that at the time, on the 27th of February, it had no assets. I submit to your Honor that it is a question for the jury to say whether or not, from those three facts, there is shown damage, which under this case need not flow from the specific representation, but from the entire transaction. If the fraudulent premise is proved, any damage, not necessarily hitched up to that particular misrepresentation, but

40 any damage from that transaction, which legitimately

or approximately flows from that transaction, that damage is a question as to amount, and so on, for the jury, and I submit that the question as to whether or not that stock, the conditions of the company shown to be as they were by the evidence, that is a question which the jury must find, and could find either damage, or not damage, as a matter of fact, and that as a matter of fact it must go to them.

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(Argument by Mr. Buchanan.)

Mr. Buchanan. At the time he got the right to get the stock, on the 27th of February, the company didn't own a dollar's worth of assets, and consequently the right to the issuing of the stock at that time wasn't worth a cent, and that is the damage.

The Court. I really do not see how this case can be held. In an action of fraud you must not only prove that the representations were made; you must 20 go further and prove that they were false, that they were known to be false by the person who makes them, and that as the result of that the plaintiff suffered some damage. The only evidence in this case of misrepresentation of fact was the statement of the defendant to the plaintiff that the Gem Dredging Company had this lease of the property in Brazil. At that time the Gem Dredging Company was not incorporated, so, of course, that statement was untrue; but it was incorporated, and the incorporation was ef- 30 fected a few weeks afterward, and this plaintiff got the stock which the defendant agreed to give him at the time they had this meeting on the 27th of February; and so far as the falsity of the representations is concerned, your own witness testified that he went to Brazil to look at this property, and cabled back that the property was all that it was represented; that is your own witness.

In addition to that there is no evidence at all in the case to show that this plaintiff suffered a dollar loss. 40

There is no evidence to show that the stock was not worth par when he got it, and that he could not have disposed of it, if he wanted to, immediately afterward. I do not see any cause which would justify me at all in sending this case to the jury, because I do not see any facts from which they would have a right to infer fraud. The most they could do would be to give you a verdict of six cents.

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I will relieve you gentlemen from the further consideration of this case.

Mr. Buchanan. I enter an objection on the record to granting the motion for non-suit.

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Exhibit P. 1.

KNOW ALL MEN BY THESE PRESENTS, that we, THE BRAZILIAN DREDGING COMPANY, a corporation organized and existing under the laws of the State of South Dakota, U. S. A. for and in consideration of One Dollar and other valuable consideration now deposited by HARWOOD FISH of Roselle Park, County of Union and State of New Jersey—the receipt whereof is hereby acknowledged—does hereby lease and let to Harwood Fish all our right, title and interest in and to the following:

All that certain lot or parcel of land beginning as near as possible to the Northern Boundary of the Caethe Mirim Lot, as shown by a survey to be made by the Brazilian Government surveyor of the said property for the Brazilian Dredging Company and running Northerly two miles on the Jequitinhonha River in the State of Minas Geraes, Republic of Brazil, S. A., for and during the term that the grantor herein has the right to own, hold and exploit said property and for such further term as the grantor is entitled to secure extension thereon, or by any means may secure any such extensions.

And the grantee herein does hereby lease from the said grantor, the said concession and all of the grantors right thereto, subject to the following terms and conditions:

FIRST. That the grantee shall on or before April first, 1910, place upon the said leased property, and have in operation, at least one dredge, pump or other machinery of a capacity to handle and sluice at least fifteen hundred (1500) cubic yards each, of river bed material per day of twenty-four hours, and shall keep the same in repair and working order during the pendency of this lease; the act of God, flood, fire, civil war, or labor strikes alone accepted. The said dredge,

pump or other machine shall be placed in operation at or near the lower end of the property hereby leased, or at or near the end of the first mile, and such property shall be worked from such a point in a southerly direction against the current of the river, and that all sand, gravel, or other material, taken from the leased property in the operation of the dredge, pump or other machine as aforesaid, shall not be placed in the river bed, but shall be dumped on or beyond the bank of the river where it would not naturally flow back into the river bed, and such machine may be moved about upon said premises as shall be deemed advisable or expedient.

SECOND. That the grantee herein shall operate the said dredge, dredges, plant, pump or other machine in the usual and ordinary workmanlike manner, for the purpose of saving out of the sand, gravel or other material handled, the gold, diamonds or other precious stones, or things of value therein contained, and shall keep daily record of such operations and shall preserve such values, and at the end of each month, or as soon thereafter as shipments can be made, shall ship and consign all the values secured under seal to the New York representative of the British Bank of South America, for the joint account of the grantor and the grantee herein, and that the said consignee, under the direction of the parties hereto, shall sell and dispose of the same at the best price possible, accounting to the grantor for one-third (1/3) of the NET proceeds thereof, and the grantee herein, two-thirds (2/3). For the purpose of this lease the word NET used in connection with the values secured from the property described herein, shall be deemed to mean such funds as shall from time to time remain in the hands of the British Bank of South America after all and every expense necessary and properly incurred in Brazil and certified to said bank by the said Harwood Fish, has been deducted from the gross values

consigned to the said bank for sale and the distribution of the shares of the respective parties hereto shall be made only from such net proceeds and in the manner above set forth. Provided, however, that the first $30,000 of the net receipts from said dredge, dredges or other machinery shall be paid to the grantee hereunder, or his assignee, before said grantor is entitled to its one-third (1/3) as above; thereafter such one-third (1/3) of all the NET proceeds to be paid to the grantor.

THIRD. The grantee herein further agrees, that the grantor shall have the right and privilege at all times, on and after the beginning of operations, to have a representative at and about the property hereby leased. The grantee shall furnish such representative, board and lodging when required, without cost to the grantor or such representative. Such representative shall have the right and privilege at all times by himself, or by such agents or assistants as he may see fit to select without expense to the grantee, free access to any dredges or pumps upon the works and premises leased to the grantee herein, and the right to examine and make extracts from the books, records and vouchers of the grantee herein, to inspect and tally at all times, the product of the dredges, pumps, lock boxes and works, lock boxes to be opened in his presence only, or in the presence of his representative, and weights and measurements to be made at that time; the right and duty of said representative and his agents being to guard the interests of the grantor only, and to see that the terms of this lease are being carried out.

FOURTH. The grantee herein further agrees and obligates himself at the end of each month during the dredging operations to present or send a report to the grantor of the detailed daily workings and the amount of product shipped and when shipped.

Exhibit P. 1.

FIFTH. The grantor agrees and obligates itself, for the protection of the rights of the grantee herein, to do all things at all times required of it by the laws of Brazil, to maintain its concession or leasehold rights in perpetuity to the property hereby leased and use its best endeavors from time to time to secure extensions of time to such concessions, and in case of its failure so to do, then the grantee herein is hereby authorized and empowered, in the name of, and in behalf of the grantor, to do all such acts as are required by law, and to make such payment of taxes, dues or other imposts legally imposed for the account of the grantor, which expenditures shall be repaid on demand in writing to the grantee by the grantor. And for its further protection the grantee is authorized to retain such expenditure out of the grantors portion of the product of the leased property, as hereinbefore provided for.

SIXTH. The grantor herein promises and agrees with the grantee to pay all rental of the said property and all Government and Municipal taxes, assessments and rates now due or hereinafter to become due on the said property. It being the understanding that the grantee is to acquire the said property free from all costs, charges or incumbrances of any kind whatsoever.

SEVENTH. The grantee herein further agrees, not to sell, transfer, set over, assign or in any wise dispose of the whole or any part of the property of this lease with the grantor to any person, or company, or corporation without the written consent of the grantor, to each and every transfer letting or other disposition of the whole or any part of said property, or lease, which consent shall not be arbitrarily withheld.

EIGHTH. The grantee herein further agrees that if he shall fail to perform any of the conditions of

this lease or grant, or shall discontinue the operation of the dredging, works, or machinery for a longer term than four months consecutively, except by the act of God, civil war, flood, fire, unavoidable accident or strikes, and the grantor herein shall have made a written demand for such performance, such demand to be personally served upon the representative of the grantee in Brazil, and also mailed to their office in the State of New Jersey, according to the address, filed with the grantor and such demand has not been complied with for sixty days thereafter; then and in that case the grantor may, at its option, cancel and terminate this lease and contract. And upon giving the aforesaid notice of its determination so to cancel this contract, the said grantor shall have immediate right of entry at expiration of sixty days upon the leased property and of possession of the same and all right, title and interest of every kind and description of the said grantee or other persons or corporations in this lease shall forever cease and be void.

NINTH. The grantor hereunder further agrees that if any further leases are made to said grantee or his assigns, the same form of lease shall be given as hereunder.

TENTH. It is hereby agreed by said grantee that he will pay an additional $1,000 on signing of this lease on or before February 24th, 1909, and $4,000 further on or before March 3rd, 1909, being the balance due on second mile hereunder, and if these payments are not so made then all rights to said second mile, or lower mile of this option to be forfeited.

ELEVENTH. All rights accruing under or by virtue of the terms of this contract shall also vest and be binding upon the heirs, executors, assigns and successors of the parties hereto.

IN TESTIMONY WHEREOF WITNESS, the hand and seal of the grantee herein and of the Vice-President

and Secretary to the grantor under the seal of the company, duly authorized by the Board of Directors, this twenty-third day of February, 1909.

THE BRAZILIAN DREDGING COMPANY,

(SEAL.) S. H. CONGDON,
Vice-President.

10 F. O. CASE,
Secretary.

HARWOOD FISH.

Witness:

J. G. MEYER.

In consideration of the sum of One Dollar and other valuable considerations, to me in hand paid, the receipt of which is hereby acknowledged, I hereby sell, assign and transfer unto Gem Dredging Co., a corporation created and existing under and by virtue
20 of the laws of the State of New Jersey, all my right, title and interest in and to the lease hereto attached between the Brazilian Dredging Company and myself, bearing date of February 23rd, 1909.

Signed and sealed this 8th day of March, 1909.

HARWOOD FISH. (SEAL.)

Signed and sealed,
in presence of,

W. F. CAWTHORNE.

30 We hereby accept the transfer and assignment of the within lease and agree to all the terms and conditions thereof. Signed by the President and Secretary, and the seal attached by order of the Board of Directors, this 8th day of March, 1909.

DAVID DAVIS,
(SEAL) *President.*
GEO. S. RUSS,
Secretary.

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Exhibit P. 1.

April 16th, 1909.

We hereby consent to the assignment and transfer of the within lease to the GEM DREDGING COMPANY, subject however to all the terms and conditions of said lease.

Signed by the President, and the seal attached by order of the Board of Directors, this 16th day of April, 1909.

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BRAZILIAN DREDGING COMPANY.

.....

President.

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EXHIBIT P. 2.

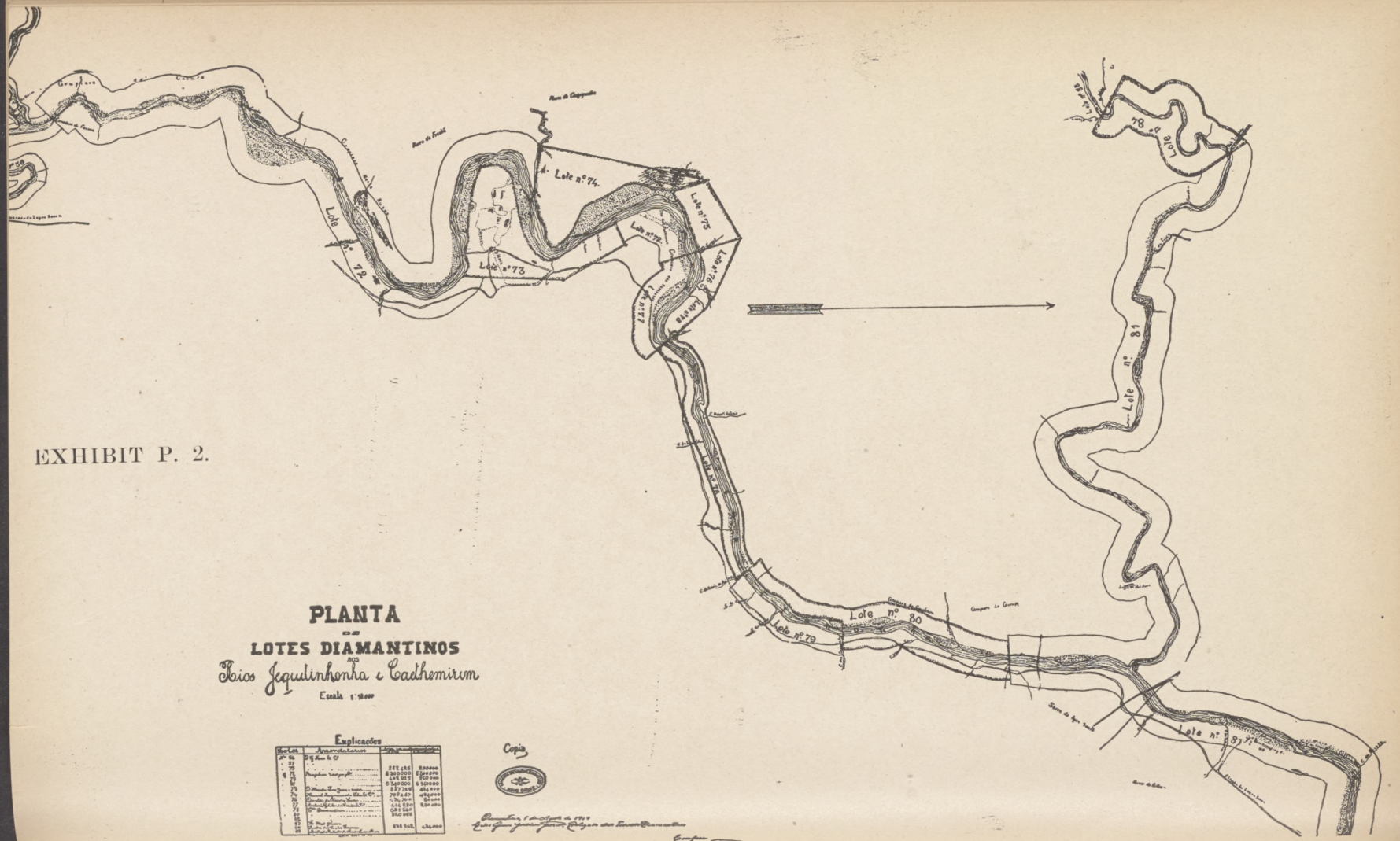
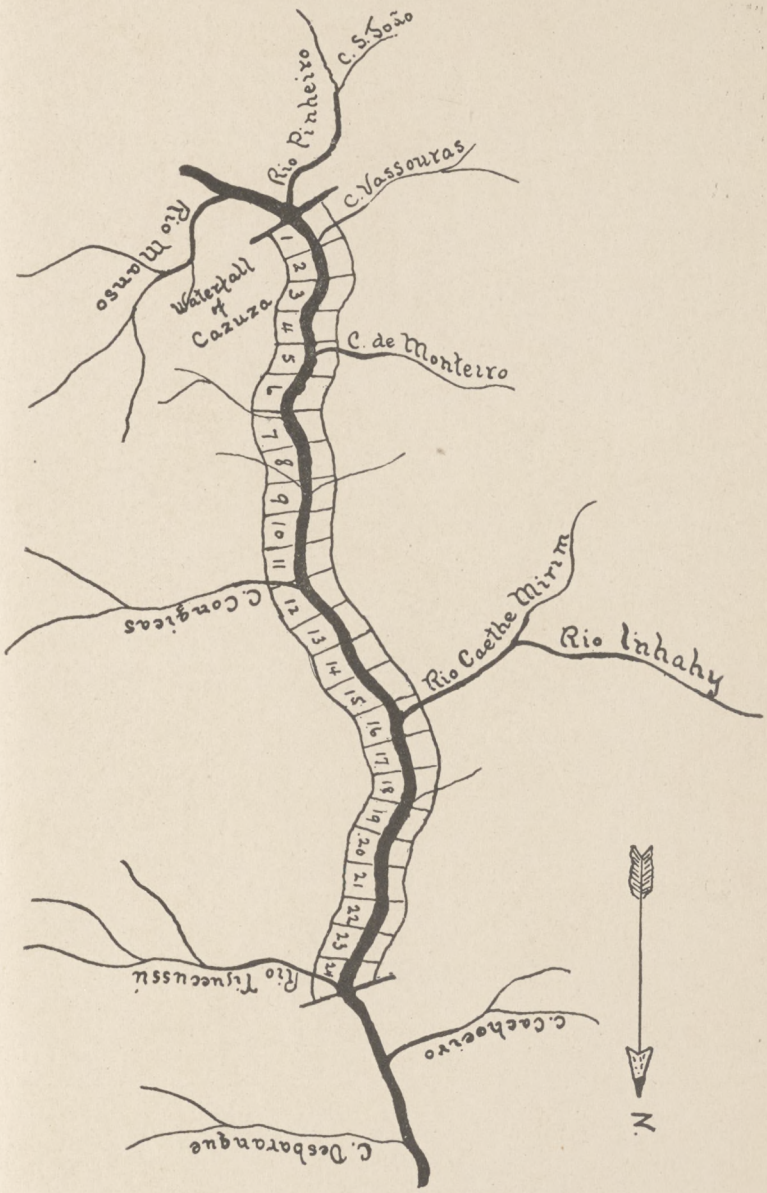

PLANTA
DOS
LOTES DIAMANTINOS
NOS
Rios Jequitinhonha e Cachoeirinha
Escala 1:
Explicações
Copia
Lote nº 72
Lote nº 73
Lote nº 74
Lote nº 75
Lote nº 76
Lote nº 77
Lote nº 78
Lote nº 79
Lote nº 80
Lote nº 81
Lote nº 82

Exhibit P. 3.

EXHIBIT P. 3.



SKETCH OF OUR CONCESSION

EXHIBIT P. 5.

Law Relating to Joint Stock Companies Working in Brazil.

Art. 46.—Companies of the following description are dependent for organisation on the authorisation of Government:—

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1st. Banks of issue. (Law No. 3403 of 24th November, 1888, Art. 1; Decree 10144 of 5th January, 1889, Art. 1; Decree No. 10262 of 6th July of the same year, Art. 1; Decree No. 164 of 17th January, 1890, Art. 1, Par. 1, No. 1; Decree No. 165 of 17th January of the same year, Art. 1.)

2nd. Real Estate Banks. (Decree No. 3471 of 3rd June, 1865, Art. 1; Decree No. 8821 of 30th December, 1882, Art. 130, No. 4; Decree No. 169a of 19th January, 1890, Art. 13, Par. 1; Decree No. 370 of 2nd May of the same year, Art. 278; Decree No. 164 of 17th January of the same year, Art. 1, Par. 1, No. 2.)

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3rd. Mutual Provident Associations, for provision of pensions, Pawnbroking Associations Savings Banks and Mutual Insurance Companies. (Law No. 3150 of 1882, Art. 1, Par. 2, No. 2; Decree 8821 of 30th December of the same year, Art. 130, No. 2; Decree No. 164 of 17th January, 1890, Art. 1, Par. 1, No. 3.)

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4th. Joint stock companies dealing in or furnishing alimentary produce or manufactures. (Law No. 3150 of 1882, Art. 1, Par. 2, No. 3; Decree No. 8821 of the same year, Art. 130, No. 3; Decree No. 164 of 17th January, 1890, Art. 1, Pars. 1 or 4.)

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Exhibit P. 5.

ART. 47.—All foreign joint stock companies or their branches or agencies, likewise require authorisation from Government in order to carry on business in the Republic, and must observe the following regulations:—

PAR. 1.—Their articles of association must declare the term, never exceeding two years from the date of their authorisation, within which at least two-thirds of the company's capital must be realised and transferred to this country. 10

PAR. 2.—Such companies are subject to the same dispositions that control joint stock companies generally as regards intercourse, rights and obligations between the company and its creditors, shareholders and all other interested parties, with domicile in Brazil even if temporarily absent. 20

PAR. 3.—After obtaining said authorisation, such companies must, under penalty of their being annulled, lodge with the Associcao Commercial, or, where no such exists, with the Registrar of mortgages of the respective department (*comarca*), the statutes of the company, a list of shareholders with note of the number of shares held and amount paid up by each, and the certificate of deposit of a tenth part of the capital and, moreover, must publish in the "Diario Official" (Gazette) and in the newspapers of the district, the notices exacted by this Decree. (Law No. 3150 of 4th November, 1882, Art. 1, Par. 3, final; Decree No. 8821 of the same year, Art. 130, Par. 1; Decree No. 164 of 17th January, Art. 1, Par. 2, Nos. 1 (a) and 3.) 30

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Exhibit P. 5.

PAR. 4.—Foreign companies already established in this country must comply with the terms of the preceding paragraph, within six months from the date of publication of Decree No. 164 of 12th January, 1890, under penalty of forfeiting the right to operate in this Republic. (Decree No. 164, Art. 33, sola Par.)

10

ART. 48.—Joint stock companies whose object is the construction of railways conceded by competent authorities do not require authorisation from the Federal Government. (Decree No. 5561 of 28th February, 1874; Decree No. 8821 of 30th December 1882, Art. 130, Par. 2.)

ART. 49.—Mutual provident associations for provisions of pensions, pawnbroking associations, as also religious associations and corporations, shall be ruled not only as regards their constitution, but also as regards their administration by the laws in force previous to the present Decree. (Decree No. 8821 of 1882, Art. 131.)

20

ART. 50.—Joint stock companies dependent on authorisation from Government (Arts. 46 and 47) can only obtain same if their statutes or articles of association have been organised in accordance with the dispositions of this Decree, to which they are, and will continue to be, subject. (Decree No. 8821, of 1882, Art. 132.)

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ART. 51.—Petitions for authorisation or for approval of the company's statutes must be addressed to the Government, to Congress, or to the Governor of the respective State in which the company will be constituted according as powers of concession, under existing legislation, lie with one or other of these branches of public authority. (Decree No. 2711 of 19th December, 1860, Art. 8; Decree No. 8821 of 1882, Art. 132, Par. 1.)

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Exhibit P. 5.

ART. 52.—Upon receipt of such petitions they shall be subjected to examination in order to determine:—

(1) Whether the object of the company is legal and likely to be of use to the public.

(2) Whether the incorporation applied for is opportune and likely to be successful.

(3) Whether the capital determined in the statutes is sufficient for the object of the company and whether its realisation is properly secured and the dates of the instalments determined in a manner to permit the company to meet its obligations.

(4) Whether the statutes of the company, or the basis on which the petition is founded, are in accordance with this present Decree and other laws in force and whether they are fair and reasonable.

(5) Whether the administrative regimen of the company offers the moral guarantees indispensable for the credit of the undertaking and the security of the shareholders and public interests.

(6) Whether the dispositions regarding the presentation of accounts, division of profits, constitution of reserve fund, rights and interests of shareholders, and operations in general are such as to inspire the confidence of the public and of parties interested.

ART. 53.—Authorisation may be granted independently to one or more persons proposing to constitute, organise, or incorporate such companies on previously defined lines, or simultaneously with the approval of the statutes of the company.

ART. 54.—The fact that authorisation has been granted merely on declaration of the basis for asso-

ciation does not dispense with approval of the statutes or articles of association.

ART. 55.—In the first of the hypotheses of Art. 53, the incorporation or organisation of the company must precede the registration of the deed of authorisation. (Decree No. 2711 of 1860, Art. 8.)

ART. 56.—In the petition for the deed of authorisation must be specified:—

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(1) The object of the company.

(2) The place at which its operations will be carried on.

(3) The prospects of success.

(4) The term during which the company should be constituted. (Decree No. 2711 of 1860, Art. 5, Par. 2.)

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ART. 57.—The petition must be dated and signed, and the signatures be legalised and be accompanied by the address of the petitioners. (Decree No. 2711 of 1860, Art. 3, Par. 2.)

ART. 58.—In the second of the hypotheses of Art. 53, and in that of the simple approval of the statutes provided for in Art. 54, the petition must be accompanied by the following documents:—

PAR. 1.—A copy of the statutes signed by the promoters.

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PAR. 2.—A list of shareholders, giving their names, occupations and addresses, and the number of shares subscribed. (Decree No. 2711, Art. 4.)

ART. 59.—When the desired authorisation, or the approval of the statutes has been granted, and the alterations, or additions demanded by the Decree of approval have been accepted by the parties interested, a deed of authorisation or of approval, or of both to-

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gether, shall be drawn up. (Decree No. 2711 of 1860, Art. 11.)

ART. 60.—When the authorisation has been granted and the acts, to which Art. 11 of the above-mentioned Decree 2711 refer, have been duly executed, the joint stock company will be constituted in the manner laid down by this Decree. (Decree No. 8821 of 1882, Art. 132, Par. 2.)

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ART. 61.—As soon as these acts have been executed (Art. 11 of Decree 2711) the company will be free from any further intervention on the part of the Government. (Decree No. 8821 of 1882, Art. 132, Par. 3.)

ART. 62.—An authenticated copy of the deed of authorisation must be lodged in the archives and published, together with the statutes of the company, in accordance with Par. 3 of Art. 47 of this Decree. (Decree No. 8821, Art. 132, Par. 4.)

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ART. 64.—For the concession of authorisation to companies of foreign origin and their branches, or agencies, the dispositions of Decree 2711 shall be equally observed. (Decree No. 8821 of 1882, Art. 134.)

ART. 79.—Duly constituted joint stock companies cannot commence operations or legally perform any act, until the following documents have been lodged in the archives of the Junta Commercial, or, failing that, at the Registry of Mortgages of the respective department (*comarca*) :—

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1st.—The statutes or articles of association of the company.

2nd.—A list showing the names of the shareholders, with indication of the number of shares held and instalments paid by each.

3rd.—The certificate of the deposit of the tenth part of the subscribed capital.

40

Exhibit P. 5.

4th.—The minutes of installation of the general meeting and the appointment of the administration. (Law No. 3150 of 4th November, 1882, Art. 3, Par. 4; Decree No. 8821 of 30th December of the same year, Art. 32; Decree No. 164 of 17th January, 1890, Art. 3, Par. 4.)

10 ART. 85.—No contracts may be entered into, or operations effected on account of the company until it has been duly constituted in accordance with Art. 3, Pars. 1, 2 and 3, of Decree No. 164 of 17th January, 1890, and until all formalities regarding publication of documents have been complied with, as determined in Pars. 4 and 5 of the same Article of the said Decree.

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EXHIBIT P. 10.

EXTRACT FROM MINUTES OF INCORPORATORS' MEETING OF THE GEM DREDGING COMPANY

(A South Dakota Corporation)

The first meeting of the corporation was held on the 8th day of March, 1909, at eight o'clock in the afternoon at the office of the Company in the City of Roselle Park, State of New Jersey, pursuant to a written waiver of notice, signed by all the incorporators fixing said time and place. 10

* * * * * * *

"To the Stockholders and Board of Directors of the Gem Dredging Company:

Gentlemen:— 20

I, the undersigned, HARWOOD FISH, am the owner of a certain lease made on the 23rd day of February, 1909, by and between the Brazilian Dredging Company, and myself, which said lease read as follows, to wit:

KNOW ALL MEN BY THESE PRESENTS, that we, the BRAZILIAN DREDGING COMPANY, a corporation organized and existing under the laws of the State of South Dakota, U. S. A., for and in consideration of one dollar and other valuable consideration now deposited by 30 HARWOOD FISH of Roselle Park, County of Union and State of New Jersey—the receipt whereof is hereby acknowledged—does hereby lease and let to Harwood Fish all our right, title and interest in and to the following:

ALL that certain lot or parcel of land beginning as near as possible to the Northern Boundary of the Caethe Mirim Lot, as shown by a survey to be made by the Brazilian Government surveyor of the said property for the Brazilian Dredging Company and 40

running northerly two miles on the Jequitinhonha River in the State of Minas Geraes, Republic of Brazil, S. A., for and during the term that the grantor herein has the right to own, hold and exploit said property and for such further term as the grantor is entitled to secure extension thereon, or by any means may secure any such extensions.

And the grantee herein does hereby lease from the said grantor, the said concession and all of the grantor's rights thereto subject to the following terms and conditions:

FIRST:—That the grantee shall on or before April first, 1910, place upon the said leased property, and have in operation, at least one dredge, pump or other machinery of a capacity to handle and sluice at least fifteen hundred (1500) cubic yards each, of river bed material per day of twenty-four hours, and shall keep the same in repair and working order during the pendency of this lease; the act of God, flood, fire, civil war, or labor strikes alone excepted. The said dredge, pump or other machine shall be placed in operation at or near the lower end of the property hereby leased, or at or near the end of the first mile, and such property shall be worked from such a point in a southerly direction against the current of the river, and that all sand, gravel or other material, taken from the leased property in the operation of the dredge, pump or other machine as aforesaid, shall not be placed in the river bed, but shall be dumped on or beyond the bank of the river where it would not naturally flow back into the river bed, and such machine may be moved about upon said premises as shall be deemed advisable or expedient.

SECOND:—That the grantee herein shall operate the said dredge, dredges, plant, pump or other machine in the usual and ordinary workmanlike manner, for the purpose of saving out of the sand, gravel or other material handled the gold, diamonds or other precious stones, or things of value therein contained, and shall

keep daily record of such operations, and shall preserve such values, and at the end of each month, or as soon thereafter as shipments can be made, shall ship and consign all the values secured under seal to the New York representative of the British Bank of South America for the joint account of the grantor and the grantee herein, and that the said consignee, under the direction of the parties hereto, shall sell and dispose of the same at the best price possible, accounting to the grantor for one-third (1/3) of the NET proceeds thereof, and the grantee herein, two-thirds (2/3). For the purpose of this lease the word NET used in connection with the values secured from the property described herein, shall be deemed to mean such funds as shall from time to time remain in the hands of the British Bank of South America after all and every expense necessary and properly incurred in Brazil and certified to said bank by the said Harwood Fish, has been deducted from the gross values consigned to the said bank for sale and the distribution of the shares of the respective parties hereto shall be made only from such net proceeds and in the manner above set forth. Provided, however, that the first $30,000 of the net receipts from said dredge, dredges, or other machinery shall be paid to the grantee hereunder, or his assigns, before said grantor is entitled to its one-third (1/3) as above; thereafter such one-third (1/3) of all NET proceeds to be paid to the grantor.

THIRD:—The grantee herein further agrees, that the grantor shall have the right and privilege at all times, on and after the beginning of operations, to have a representative at and about the property hereby leased. The grantee shall furnish such representative, board and lodging when required, without cost to the grantor or such representative. Such representative shall have the right and privilege at all times by himself or by such agents or assistants as he may see fit to select without expense to the grantee, free access

to any dredges or pumps upon the works and premises leased to the grantee herein, and the right to examine and make extracts from the books, records and vouchers of the grantee herein, to inspect and tally at all times, the product of the dredges, pumps, lockboxes and works, lockboxes to be opened in his presence only, or in the presence of his representative, and weights and measurements to be made at that time; the right and duty of said representative and his agents being to guard the interest of the grantor only, and to see that the terms of this lease are being carried out.

FOURTH:—The grantee herein further agrees and obligates himself at the end of each month during the dredging operations to present or send a report to the grantor of the detailed daily workings and the amount of product shipped and when shipped.

FIFTH:—The grantor agrees and obligates itself for the protection of the rights of the grantee herein, to do all things at all times required of it by the laws of Brazil, to maintain its concession or leasehold rights in perpetuity to the property hereby leased and use its best endeavors from time to time to secure extensions of time to such concessions, and in case of its failure so to do, then the grantee herein is hereby authorized and empowered, in the name of, and in behalf of the grantor, to do all such acts as are required by law, and to make such payments of taxes, dues or other imposts legally imposed for the account of the grantor, which expenditures shall be repaid on demand in writing to the grantee by the grantor. And for its further protection the grantee is authorized to retain such expenditures out of the grantor's portion of the product of the leased property, as hereinbefore provided for.

SIXTH:—The grantor herein promises and agrees with the grantee to pay all rental of the said property and all Government and Municipal taxes, assessments

and rates due or hereinafter to become due on the said property. It being the understanding that the grantee is to acquire the said property free from all costs, charges or incumbrance of any kind whatsoever.

SEVENTH:—The grantee herein further agrees, not to sell, transfer, set over, assign or in anywise dispose of the whole or any part of the property of this lease with the grantor to any person, or company, or corporation without the written consent of the grantor, to each and every transfer letting or other disposition of the whole or any part of said property, or lease, which consent shall not be arbitrarily withheld.

EIGHTH:—The grantee herein further agrees that if he shall fail to perform any of the conditions of this lease or grant, or shall discontinue the operation of the dredging, works, or machinery for a longer term than four months consecutively, except by the act of God, civil war, flood, fire, unavoidable accident or strikes, and the grantor herein shall have made a written demand for such performance, such demand to be personally served upon the representative of the grantee in Brazil, according to the address, filed with the grantor and such demand has not been complied with for sixty days thereafter; then and in that case the grantor may, at its option cancel and terminate this lease and contract. And upon giving the aforesaid notice of its determination so to cancel this contract, the said grantor shall have immediate right of entry at expiration of sixty days upon the leased property and of possession of the same and all right, title and interest of every kind and description of the said grantee or other persons or corporations in this lease shall forever cease and be void.

NINTH:—The grantor hereunder further agrees that if any further leases are made to said grantee or his assigns, the same form of lease shall be given as hereunder.

Exhibit P. 10.

TENTH:—It is hereby agreed by said grantee that he will pay an additional $1,000 on signing of this lease on or before February 24th, 1909, and $4,000 further on or before March 3rd, 1909, being the balance due on second mile hereunder, and if these payments are not so made then all rights to said second mile, or lower mile of this option to be forfeited.

10 ELEVENTH:—All rights accruing under or by virtue of the term of this contract shall also vest and be binding upon the heirs, executors, assigns and successors of the parties hereto.

IN TESTIMONY WHEREOF witness, the hand and seal of the grantee herein and of the vice-president and secretary to the grantor under the seal of the company, duly authorized by the board of directors, this twenty-third day of February, 1909.

20 THE BRAZILIAN DREDGING COMPANY,

(Sgd) S. H. CONGDON,
Vice-President.

(Sgd) HARWOOD FISH.

(Sgd) F. O. CASE,
Secretary.

Witness:

(Sgd) J. G. MEYER.

Lease as above is hereby approved.

W. G. MEYER,
per J. G. Meyer,
Attorney.

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Exhibit P. 10.

I hereby agree to sell, assign and transfer all of my right, title and interest in and under the said lease to your company, in consideration of the issue to me, my nominees or assigns, of one million (1,000,000) shares of the capital stock of your company of the par value of one dollar ($1) per share, aggregating one million dollars in amount.

This offer is made subject to acceptance by your corporation within ten days from date hereof. If said offer is not accepted within said time, the same shall forthwith become null and void. 10

Respectfully submitted,

HARWOOD FISH.

Dated March 8th, 1909.

And

WHEREAS, It appears to the stockholders that said lease is necessary for the business of the company, and that the same is of the fair value of one million dollars; now, therefore, be it 20

Resolved, That the Board of Directors be and they hereby are authorized in their discretion to purchase the lease above described for the said price and to issue said stock in payment therefor, to said Harwood Fish, his nominees or assigns.

No further business coming before the meeting on motion the same adjourned.

THOMAS A. McDEVITT, 30

Secretary.

Approved:

GEO. S. RUSS,

Chairman.

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