New Jersey Court of Errors and Appeals.

CARLENE K. BROWN, Executrix of William H. Brown, deceased, Plaintiff and Defendant-in-Error, vs. JOHN HONISS, *et al.*, Defendants and Plaintiffs-in-Error.	On Error to Essex Circuit Court.

Brief for Defendant-in-Error.

This judgment brought to this Court by this writ of error was entered in the Essex Circuit Court on the verdict of a jury, November 7, 1904, for Five thousand nine hundred and eighty-three dollars and thirty-seven cents damages and costs. The recovery is based on damages occasioned by the failure of the defendants to complete a contract for the conveyance of certain real estate in the City of Newark to the plaintiff's testator, in accordance with the terms of an option agreement dated July 9, 1901.

A copy of this option is Exhibit P2, on page 159 of the Record; an extension of the option is Exhibit P3 on same page.

The written demand for conveyance in accordance with the option, dated October 17, 1901 (Ex-

hibit P4, Record, p. 160), was accompanied by an actual tender of the option price, Twelve thousand five hundred dollars (Record, p. 6, l. 5; p. 32, l. 34, and p. 33, l. 28).

Notice had before that date been given by Mr. Pennington, representing the defendants, to the plaintiff's testator, that no conveyance would be made. The reason for the refusal to convey was that the land was to be conveyed to the City of Newark for the erection thereon of a contagious disease hospital (Record, p. 32, ls. 14 to 33; pp. 50 to 55).

This case was first tried at the December Term, nineteen hundred and two, of the Essex Circuit Court, and a verdict was then directed by the Court for the amount paid for the option, the fact having developed on the trial that the defendant Honiss was a married man, the Court holding that notwithstanding that the refusal of Mrs. Honiss to sign the deed was not assigned as the reason for refusing conveyance, her existence brought the case within

Gerbert vs. Trustees, 30 Vr., 160.

On writ of error to this Court, sued out by the plaintiff, the judgment entered on the verdict as directed was unanimously reversed and a new trial ordered.

Brown vs. Honiss, 41 Vr., 260.

The opinion of this Court was read by Mr. Justice Garretson, and held that in the case *sub judice* plaintiff was entitled to recover for the loss of his bargain, citing

Engel vs. Fitch, L. R., 8 Q. B., 659.

The assignments of error, based on exceptions taken at the trial, relate both to the admission of

testimony and the charge of the Judge. They are found on page 154 of the Record.

The original plaintiff, William H. Brown, who was sworn as a witness at the first trial, departed this life while the case was pending in this Court on the former writ of error, and his testimony was read in evidence under the Tenth Section of the Evidence Act (P. L., 1900, p. 364).

I.

The first assignment of error relates to the admission in evidence of the original option and extension thereof (Exhibits P2 and P3). The option was exercised within the period fixed by the original, and the extension is without importance at this time.

These papers were offered at page 6 of the Record, after their execution had been proved by the evidence of Samuel H. Pennington (Record, p. 3, ls. 19 to foot of p. 4). Mr. Pennington identified the handwriting of "John Honiss" and said he had himself signed "Anna P. Ranney, by S. H. Pennington, her Attorney," in pursuance of authority given, which was to the witness' recollection oral, but might have been contained in a letter.

After the offer of the option and extension was made, defendants' counsel objected (Record, foot of p. 6) on the ground that the signatures and right to bind the parties had not been sufficiently proved. The objection as to the defendant Honiss was withdrawn (Record, top of p. 7) and was overruled as to Mrs. Ranney and exception asked and allowed.

Oral authority to execute a contract for the conveyance of real estate is sufficient.

Browne on Statute of Frauds, 2d Ed., §§370, 370a.

The testimony of Mr. Pennington as to his agency was competent proof thereof.

This objection was without merit and was properly overruled by the Trial Judge.

II.

The eighth assignment of error is based on an objection to the redirect-examination of Mr. Pennington as to a conversation with the plaintiff's testator about the willingness of the defendants to deliver a deed in accordance with the option.

The objectionable examination is found at the top of page 49 in the Record.

The ruling of the Trial Judge discloses that the witness on cross-examination had stated that no deed was tendered. This certainly made pertinent inquiry on redirect-examination opening up declarations by the defendants disclosing their attitude as to the delivery of a deed if tendered.

But it was in the discretion of the Court to permit further redirect-examination of the witness even if it developed new matter.

State vs. *Fox*, 1 Dutch, 566, *602*.

III.

The fourteenth, fifteenth and sixteenth assignments of error relate to the refusal of the Trial Judge to permit against objection the defendant Honiss to testify why he, Honiss, had asked Brown to state what he was going to do with the property, and whether he (Honiss) relied on the representation alleged to have been made by Brown as to the use of the property; and further to state whether he, Honiss, would have given the option if he had been told or believed that the land was to be used for an isolation hospital.

The questions objected to and exceptions sealed

on which these assignments are based, are found in the record, pages 76, 77, 78, 79 and 80.

The option which was the basis of this action was the result of a negotiation between John Honiss, one of the defendants and William H. Brown, the plaintiff's testator. The property, which was the subject of the option, was owned by John Honiss and Anna P. Ranney, the defendants, and had been so owned since 1872 (Case, p. 74 lines 3 to 22). The property had been in the market during all that time and defendants were ready to "sell it to anybody who offered the price" (Case, p. 74, line 38 to p. 75 l. 13). Brown called on Honiss in June, 1901, and wanted to know the price, and was told that he, Honiss, could not name the price because of Mrs. Ranney's half interest (p. 75, ls. 14 to 30). Two letters followed (Exhibits P5 & P6, Record, pp. 160 and 161). Subsequently Honiss and Brown met in the law office of Mr. S. H. Pennington, where the option was prepared by Mr. Pennington and signed by Honiss and by Mr. Pennington for Mrs. Ranney, pursuant to authority given him for that purpose (Record, Brown, p. 3, ls. 1 to 10; Pennington, p. 3, ls. 20 to 35, p. 4, ls. 8 to 30; Honiss, p. 75, ls. 34 to 40). Both Brown and Honiss agree that at some time Honiss asked Brown what he, Brown, was going to do with the property, and that Brown replied that he was looking for a manufacturing site. Brown says the question was merely incidental and was asked at the lawyer's office while Mr. Pennington was preparing the option (Record, Brown, p. 39, ls. 15 to 31; see also Honiss, p. 76, ls. 5 to 11). Mr. Pennington is absolutely silent as to any discussion of the use of the property prior to the giving of the option, and his power to sign Mrs. Ranney's name to an option does not appear to have been in any way limited or restricted The option itself and the two letters (Ex-

hibits P5 and P6, Record, pp. 160 and 161), which were addressed by Honiss to Brown, during the negotiation make no reference to restricted use of the property. The option is dated July 9, 1901. It includes not only an option to Brown but a promise to refer to Brown any person applying to purchase during the continuance of the option and an agreement to execute all necessary deed or deeds to Brown or his nominees (see Option, Exhibit P2, Record, p. 159). About September 1, Brown told Honiss that the manufacturer for whom he, Brown, wanted the property didn't want it, but that he, Brown, had another party who he thought might take it if the time were extended one month. Honiss said he would see Mr. Pennington, and on September 4, 1901, the extension was signed, also at Mr. Pennington's office (Record, Brown, p. 43 ls. 3 to 18; Pennington p. 3, ls. 35 to 40, p. 36, ls. 1 to 8; Honiss, p. 79, ls. 1 to 18). This extension of the option (Exhibit P2, Record, p. 159) contains no limitation of use of the property, and neither Mr. Honiss nor Mr. Pennington refer in any way to any conversation, with reference to the extension, in any way relating to the use of the property. This silence of Honiss is remarkable, as during cross-examination of Brown with reference to the conversation on the third or fourth of September, bearing on the extension, in reply to counsel's question: "Did you tell him what you wanted it for?" Brown answered "No, sir; he didn't ask me" (Record, p. 44, ls. 8 to 36).

On September 12, 1901, the Common Council of Newark passed a resolution to purchase the land described in this option from Brown for Seventeen thousand five hundred dollars, to be used for isolation hospital purposes (Copy of Resolution, Record, p. 27, beginning at l. 30). This resolution was

approved by the Mayor, September 13, 1901. Brown first learned through Dr. Herold, President of the Board of Health, on the afternoon of the day this resolution was passed, September 12, 1901, that the intended use of the property for which Dr. Herold had been negotiating with him, was for an isolation hospital (Record, Brown, p. 20, ls. 35 to 40; p. 21, ls. 1 to 17; Dr. Herold, p. 55, l. 31 to p. 58 l. 6).

Brown then endeavored to get his deed under his option but was refused, because the property was to go to the City for an isolation hospital. This was, of course, after September 12, 1901 (Record, Pennington, p. 4, l. 39 to p. 6, l. 20; p. 49, l. 1, to p. 55, l. 19; Brown, p. 24 l. 30 to bottom of p. 33; Honiss p. 80, ls. 10 to 16, p. 87 ls. 13 to 35).

On November 7, 1901, the Common Council of Newark passed a resolution, approved by the Mayor, rescinding the resolution to purchase the land described in the option, the resolution reciting the inability of Brown to give the City a deed (Record, p. 47).

This analysis of the facts of this case as shown by the record seems necessary to the considera tion of the assignments of error now under discussion.

It is also necessary to refer more specifically to the pleadings than has yet been done. In addition to the general issue, the defendant Honiss pleaded that Brown "in the negotiation which preceded the making by this defendant of the said option or agreement described in the said declaration, stated and represented to this defendant, that in case of a sale of the said property in accordance with the terms of said option or agreement, the said property would be used by the purchaser thereof for the purpose of erecting, constructing and maintaining a factory thereon,

and that this defendant believed the said statement and relied thereon, and relying thereon executed the said option or agreement in the belief of the truth thereof, but this defendant avers that in truth and in fact the plaintiff did not intend to purchase the said property for factory purposes as aforesaid, nor did he intend to devote the same thereto, but that on the contrary thereof, he intended to purchase the same for the purpose of an isolation hospital or pest house for the Mayor and Common Council of the City of Newark, and this defendant avers that the said option or agreement was procured from him by misrepresentation and fraud, and that the same is null and void."

To this plea the plaintiff replied that said option or agreement was obtained fairly and honestly and not by misrepresentation or fraud.

Now, what are the specific questions overruled by the Court which are the subject of these exceptions:

Honiss was on the stand for the defence and under examination by his own counsel.

> "Q. In this conversation was anything said about the use to which the property was to be put?
>
> *The Court:* In the conversation at your house.
>
> A. No, only he told me—I asked him what he wanted to do with the property; he said he wanted to buy it for a factory site.
> Q. Why did you ask him?"

The last question was objected to and the objection sustained (Record, p. 76).

After exception had been asked and allowed, counsel asked this question, "Now, would you have sold this property at that time at that price or any price for an isolation hospital?" but on objection did not press the question, saying, after

a remark by the Trial Judge, "I will put another question which is suggested to me."

> "Q. In making this option did you rely upon the representation or statement made by Mr. Brown as to the use of the property?"

Objection was at once made that the witness had not developed anything which justified a reason for such reliance and after discussion and the examination by the Court during noon recess of authorities submitted by defendant's counsel, the question was overruled and exception prayed and allowed (Record, pp. 77 and 78).

Later after the witness had described his refusal to convey the land for a contagious hospital, he was asked:

> "Q. If you had been told or believed that the land was to be used for the purpose of an insolation hospital, would you have given any option upon it at all?"

Under objection, this question was overruled, and exception prayed and allowed (Record, p. 80). On these questions the fourteenth, fifteenth and sixteenth assignments of error are based.

In addition to the analysis of the evidence given above, it is to be noted that these defendants owned no other land in the neighborhood. The objection to convey is not alleged to be because of any damage to these defendants, but to benefit a third party, a Mr. Tiffany.

Mr. Pennington says: "I told Mr. Brown in the presence of Mr. Honiss and speaking for him, that a few years previously the parties of this option had conveyed the greater portion of the entire tract of which the property embraced in the option was a small residue—had been sold to Mr. Tiffany; that these parties had received Mr. Tiffany's money, and that they did not think it was a right thing for Mr. Tiffany having sold the property to

him and received their money, to sell the residue of the property for a use which was detrimental to him as he had made extensive and valuable improvements there." This was after it had developed that the property was wanted for an insolation hospital (Record, pp. 51, 52, 53 and 54). See also Brown's testimony, page 25, lines 10 to 20; pages 32 and 33, where it appears that Honiss's whole trouble was over Tiffany, and that these defendants had bonded indemnity against pecuniary loss. Mr. Honiss, himself testifies about the sale to Tiffany and his anxiety to protect Tiffany (p. 81, ls. 5 to 20), and offers no word of contradiction of Brown's evidence. He further says that his refusal to convey was made only when he learned that the property was to go to the City for an isolation hospital (p. 87, ls. 20 to 35).

The charge of the Court to the jury on the law of fraudulent misrepresentation as applied to this case, is found on pages 141 to 146 of the Record, and no exception was taken to the law as declared by the Court.

The questions hereinabove quoted relate entirely to the original option, and have no reference to the extension.

The first question objected to follows an answer which plainly indicated the truth of Mr. Brown's allegation that the inquiry as to the use of the property was *incidental*. Honiss says in effect "In the conversation at my house which preceded the making of this option, nothing was said about the use of the property. I asked him what he wanted to do with the property and he said he wanted to buy it for a factory site." Honiss owned no other property in the neighborhood, the property was for sale to anybody who would pay the price, and he does not pretend that he told Brown that the use of the property was restricted. The restriction to factory use would

be a most peculiar one and would be just as effective against the building of dwelling houses, schools and churches as isolation hospitals. The suggestion is in itself unnatural as applying to a tract of land just opposite the Tiffany tract, containing a large factory and many small dwelling houses. It is clearly outside the range of legitimate evidence, even on an issue of fraud, with no foundation laid suggestive of fraud, and the burden of proof is on the defendants alleging the fraud, to permit a vendor, one of the parties defendant, four years after a conversation with a vendee since deceased, to explain the secret reasons he now thinks he then had for asking a question not then necessary for the protection of the witness in his property rights. If he had undertaken to tell us the *reasons he then gave to Brown*, the offer might have been proper, but such is not the case.

As to the second question: "In making this option, did you rely upon the representation or statement made by Mr. Brown as to the use of the property?" If a proper foundation—arising out of the situation of the parties, the need for protection against all other than factory uses, a proposal to sell only for that purpose, and a reasonable inference of intent to purchase for an isolation hospital—it is quite possible that evidence of the reliance by the witness on Brown's statements, might be permissible, under the plea of fraud in this case, but even then this question, in the form it was put, would be objectionable. The issue of fraud raised by the plea is a concealed intention on Brown's part to buy the property for an isolation hospital for the City of Newark when he was negotiating for the option in July, 1901, and when he was inducing the defendants to give him an option for factory uses only. It had already been shown by the plaintiff's case (both by Brown and Dr. Herold) that Brown did nor know until Sep-

tember 12, 1901, that the property was wanted for an isolation hospital, and that such knowledge came to Brown after Honiss had been informed that the manufacturer did not want the property, but that another customer, not stated to be a manufacturer, might take it, and after Honiss had granted an extension in the hope of securing such other customer without inquiry as to the use of the property. Without in any way challenging this proof, and without setting up any reasonable suggestion of conditions or relations from which a fraudulent intent in July, 1901, might be inferred, the witness is asked a question, not linked in any way with the isolation hospital referred to in the plea, whether he relied on "the representation or statement" made by Mr. Brown as to the use of the property. Where, except in the mind of the counsel who asked the question, is there any basis for inquiring as to "representation" by Brown? The record does not disclose it. It discloses a statement by Brown that he was looking for a factory site, and it also discloses that that statement was true, but it did not disclose at the time this question was asked, any justification for styling that "statement" a "representation" as the basis of action by these defendants in the making of this option of July, 1901. The party alleging fraud must affirmatively prove the existence of all the elements of the fraudulent misrepresentation (14 A. & E. Ens. of L. 190, Title, Fraud & Deceit). It is illogical to precede the proof of the fraud with the reliance upon it. This question assumed in this case a fraud which was not then proved, and which was not afterward proved. In actions for false and fraudulent representation, a false representation, without a fraudulent design, is insufficient. There must be moral fraud in the misrepresentation (Cowley vs. Smyth, 17 Vr., 380).

The third question objected to "If you had been

told or believed that the land was to be used for the purpose of an isolation hospital, would you have given any option on it at all?" merely permits the witness to *now* speculate on what he might have done four years ago under conditions which did not then exist. There is no shadow of proof in this case that at the time this option was given or renewed, Brown had any intimation that the land was wanted by the City of Newark for an isolation hospital or any other purpose.

No one of these questions was improperly excluded, but even if so the exclusion was not sufficiently prejudicial to the defendants to justify a disturbance of this verdict.

The issue of fraudulent misrepresentation raised by the plea was fairly presented by the Court to the jury, accompanied by instructions as to the duty of the plaintiff to disclose any change of intention on his part if material. The evidence of intention from statements made by a witness declaring his secret mental processes is of slight weight when admissible and its absence in this case does not constitute material reversible error. The evidence of fraudulent misrepresentation is otherwise so slight that the defendant Honiss' present declarations in his own interest as to his own mental processes when the contract subsequently reduced to writing was under negotiation, could not sustain the burden of proof on these defendants under this issue of fraud.

IV.

The second, third, fourth, fifth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, seventeenth, eighteenth, twentieth, twenty-first, twenty second and twenty-third assignments of error may be considered together, as the objections to evidence and charge on which they are based, involve the prop-

osition that no act bearing on the sale of the property by Brown to the City for Seventeen thousand five hundred dollars may be properly proved in this case.

It may be said, as to the second, ninth, tenth, eleventh, twelfth, thirteenth, seventeenth, eighteenth and twentieth assignments of error, all of which relate to the admission in the case of the proceedings of the Board of Health, that any error in the reception of such evidence was cured by the defendant's subsequent offer and proof of the same matters in support of the plea of fraudulent misrepresentation in procuring the original option. The testimony of David D. Chandler, Secretary of the Board of Health, beginning on page 88 of the Record, and of Matthew T. Gay, a member of the Board of Health, beginning on page 93 of the Record, both witnesses called by the defence, discloses everything that could possibly be shown bearing on the Board of Health's relation to this property. During the testimony of Mr. Chandler, copious extracts from the minutes of the Board were read and written in the record. These matters were all obviously offered by the defence in support of the plea of fraudulent misrepresentation in the effort to prove that Brown was the agent of the Board of Health through Dr. Herold and was from the time he secured the original option to the day he was finally refused the deed, acting for the Board of Health in securing a site for an isolation hospital for the City of Newark. Some of these matters are undoubtedly properly found in the plaintiff's case to fix dates, and to aid in showing reason for the refusal of the defendants to complete the contract, even if improperly recognized as preliminary to and evidential of the final purchase by the City of the land described in the option. But all that becomes immaterial when the same matters were introduced, even to

the price to be paid (Gay's direct-examination, Record, p. 95, ls. 10 to 20, p. 96. l. 32), by the defence as part of their own case.

As to the assignments of error bearing only on the action of the Mayor and Common Council of the City of Newark (to which the Board of Health proceedings and negotiations were merely preliminary) and the testimony of Brown relating to the sale to the City, the record discloses that this sale to the City was offered by the plaintiff as some evidence of market value, and the Judge charged the jury that they might consider this sale to the City, with the evidence of the real estate experts of both sides in determining the market value of the land described in the option if they concluded that the plaintiff was entitled to recover (Record, p. 147).

It is objected to the receipt of all this evidence that proof of a sale by the plaintiff to a third party of the very premises of which he was refused conveyance, such sale failing of consummation because of the refusal of the defendants to carry out the contract for breach of which the action is brought, is not competent evidence of value; and it is further objected that, if such proof be competent, the contract of sale by Brown to the City in this case may not be proved because the contract was, so far as the City is concerned, *ultra vires*.

The passage of the resolution of purchase by the Common Council of the City of Newark, and its subsequent approval by the Mayor, constituted a memorandum in writing under the Statute of Frauds.

> Dillon on Mun. Corp. (4th Ed.), §449.
> Argus Co. vs. Mayor of Albany, 55 N. Y., 445.

But even if not so, the prohibition of the statute is that *no action shall be brought* on a contract or

sale of lands unless the agreement shall be in writing and signed by the party to be charged. A *bona fide* contract, offered to show the value of the subject of the contract, would be evidential of such value in an action not founded on the contract, if the contract was not in writing.

The establishment of an isolated hospital for the proper care of contagious diseases is within the police power of a great City like Newark without express legislative authority beyond the general authority to care for the public health, and it is immaterial whether the particular statutes designed to cover the erection of a particular hospital were complied with or not. The funds for this purchase were in hand in the "Special Real Estate and Alms House account," and the resolution does not involve the validity of a bond issue under the terms of a statute (Resolution, Record, p. 27).

The original resolution (see Record, p. 90) passed by the Board of Health was undoubtedly intended to set on foot a proceeding for the erection of a hospital for contagious diseases under and pursuant to the provisions of Chapter 132 of the Laws of 1900 (P. L., 1900, p. 321).

Under this act a way was provided for the compulsory erection by the City on the initiative of the Board of Health of a contagious disease hospital, and a way was also provided for the issue of bonds to raise moneys necessary for the scheme. This act, however, was not followed, and the motion instructing the Committee appointed under its provisions to present the matter to the Common Council was by subsequent resolution reconsidered (see Record, p. 92, l. 2).

The charter of the City of Newark conferred power upon the Common Council to make, establish, publish, modify, amend or repeal ordinances, rules, regulations and by-laws for, and among other purposes, the establishment of a Board of

Health, the definition of its powers and duties, and to "provide for the protection and maintenance of health of the City" (see Section 31 of the Newark Charter. P. L., 1857, p. 131).

The act of March 31, 1887, entitled "An Act to establish in this State Boards of Health and a Bureau of Vital Statistics, and to define their respective powers and duty" (P. L., 1887, p. 80; Gen. St., 1634) established a local Board of Health in the City of Newark, and the Board constituted under the provisions of that act was given important powers and became an effective department of the City Government, but the Health Board is left dependent on the City Government for support, being protected only by minimum revenue defined in Section 34 of the Act. Any sums in excess of this minimum must come from the generosity of the Common Council exercised under the exigencies of the local situation as they may appeal to the judgment of the members of the Common Council. By the supplement of March 29, 1892, (P. L., 1892, p. 352. Gen. St., 1645) when an epidemic of contagious or infectious diseases exists, or is threatened, or any special need arises for the protection of the public health, and in the judgment of any local Board of Health an expenditure of any greater sum than that already appropriated to the said Board for the current year is necessary, the local authorities may, on certificate of the Board of Health, appropriate and pay such further sums as may be certified to be necessary, and are given authority to borrow money on the credit of the municipality to raise moneys for such additional expenditures.

None of these enactments deprives the Mayor and Common Council of the City of Newark of the power, or relieves it from the duty, of providing for the protection and maintenance of the health of the City, and under that power and in

the performance of that duty, and in aid of the Board of Health established within the municipality under the provisions of the acts above quoted, and by way of voluntary increase of the moneys appropriated to the local Board of Health, it was competent for the Mayor and Common Council of the City of Newark to pass the resolution for the purchase of land for use as an isolation hospital, and to appropriate moneys in hand for that purpose, or even if the moneys had not been in hand and the emergency had existed, to borrow money for the purpose.

But whether or not the purchase was *ultra vires* it was not so regarded by the City, and the contract was not abrogated on that ground. The contract was rescinded by the Resolution of November 7, 1901 (Record, p. 47), wherein it is recited that the reason for the rescission is the inability of Brown to make title. There is no dispute in this case that Brown was unable to make a title because these defendants refused him a conveyance under his contract with them, after learning that he was to convey the property to the City for isolation hospital uses.

This is not a suit by Brown against the City to compel a specific performance. The City is not here to set up *ultra vires* as a defense. The plaintiff brings before the Court a contract in writing for the sale of real estate—not an offer to buy, or an open proposition, but a completed contract—which failed of fulfilment only because of the acts of these defendants in refusing a conveyance to the plaintiff's intestate. The contract between Brown and the City was made in good faith, was never repudiated by either party to it, and may not be rejected as evidence on the objection of third persons really responsible for its breach.

That contract price on a resale by the plaintiff in this case is evidence of market value there can be no doubt.

Engel vs. Fitch, *L. R.*, *4 Q. B.*, *659*, cited by this Court when this case was formerly here, is express authority to that effect, and, while many cases may be found rejecting proof of *mere offers* to buy at a price, the cases *do not* deny the principle that in a *bona fide sale* may be found evidence of market value. No stronger single bit of evidence of value than a price obtained in *actual bona fide sale* can be had.

Engel vs. Fitch, *supra*
Turner vs. Brooks, *21 S. W. Rep.*, *404*.
Houston vs. Wright, *46 S. W. Rep.*, *884*.
Doriocomb vs. Lacroix, *29 La. An.*, *286*.
Keller vs. Paine, *34 Hun*, *167*, *177*.

And when the case was here on the former writ of error this Court discussed the resale to the City of Newark, thus recognizing the propriety of its proof in this case (Brown vs. Honiss, 41 Vr., 260, at head of page 261).

The seventeenth and eighteenth assignments of error involve further objections to questions in rebuttal allowed by the Court to be addressed to Dr. Herold. This matter was wholly in the discretion of the Court, but the defendants having endeavored to show by the witness Gay—failing to be sure so far as answers were concerned, while insinuating by the questions—(Record, p. 98, ls. 9 to 37, p. 99, l. 30) that Brown was the agent of the Board of Health or of Dr. Herold, the President of the Board of Health, and was not acting independently, it became both appropriate and right that Dr. Herold should be called in rebuttal to refute the slander. It should not be forgotten in this case that Brown was dead before this trial and could not be called to answer these or any other charges or insinuations bearing on his conduct in this matter.

V.

The sixth assignment of error is based on the admission of testimony by Brown that he was told by Samuel H. Pennington that the defendants had a bond of indemnity against pecuniary loss.

The evidence in the case of this kind is found on page 33 of the Record, first at line 27 at the conclusion of an answer by the witness Brown, "And he told me previously to that that they had bonded indemnity against all pecuniary loss." "Q. Who told you that?" "A. Mr. Pennington."

Counsel for defendants objected that the answer was not responsive, but the Court did not strike it out. Counsel at that time made no further objection.

A further question (p. 33, l. 38) was then asked, "Did he tell you from whom the bond of indemnity was had?" "A. I don't know whether he did or whether Mr. Honiss did. One of them told me. I understood that it was Mr. Snyder, Mr. Heller and Mr. Tiffany had given the bond."

Objection was then made to the answer and to testimony as to indemnity. These questions and answers as the record shows were read from Brown's evidence at the former trial, under the Tenth Section of the Evidence Act (Brown having died pending the former writ of error). The objection of counsel to the first answer which disclosed the fact of indemnity was solely on the ground that the answer was not responsive, but the answer stood. The objection to the second question and answer which gave the names of the bondsmen, came after the answer and was too late. The Court overruled the objection taking the answers as stating declarations by the defendants on the subject matter of the controversy, but the Court could have rested on the delay in preferring the objection.

Moreover, the evidence is admissible as sustaining the *willful refusal* of the defendants to convey, indemnity against pecuniary consequences being demanded by them of third persons before the refusal. By its acceptance the defendants practically incapacitated themselves to convey and voluntarily agreed with third persons not to carry our the contract with Brown. It is also admissible on the whole case, under the issue of fraudulent misrepresentation, as indicative of the fact that the refusal of Honiss, who alleged himself deceived in the negotiation out of which the contract grew, was not of his own notion, but was based on the instigation of third persons, who indemnified him against pecuniary consequences of refusal. This care to avoid any pecuniary consequences of a denial of the contract is not consistent with the fraudulent inception of the negotiation.

VI.

The twenty-fourth and twenty-fifth assignments of error are addressed to the refusal of the Trial Judge to specifically charge two certain requests of the defendants set forth in these assignments.

An examination of the charge will show that the propositions contained in these requests were substantially charged with only such limitations as were necessary to define "material" as applied to Brown's change of purpose, if he was at all bound to notify the defendants of such change of purpose. Exception was not taken to the language of the charge, but to the failure to charge specifically as requested.

VII.

The nineteenth assignment of error is as follows:

> "Because the said Justice at the said trial as aforesaid directed the jury to add interest to the amount of their verdict from the seventeenth day of October, 1901."

October 17, 1901, was the day on which Brown tendered the money, $12,500, and demanded conveyance. The Court charged the jury (Record foot of p. 149): "I am requested to charge and I do tell you, that if you find for the plaintiff, that is, if you find that the market value exceeded the option price—you will give interest on the sum which you determine to be that excess from the 17th day of October, 1901." This was obviously correct and in exact compliance with the second request of the defendants (Record, p. 151, l. 19). Following this was a direction, if the jury found against the plaintiff on the subject of market price, and (at the top of p. 150) a couple of questions by a juror and answers by the Court as to interest, which with the context are perfectly clear and in no way misleading. I am unable to find in the charge either verbatim or in effect, the direction alleged in this assignment of error, and I am also unable to find any exception to the charge of the judge on this subject. The assignment, being without foundation on an exception, must be disregarded.

The Court is reminded that this is a second writ of error in this case; that, on the record in the former trial, which resulted in a nominal verdict for the plaintiff by direction of the Trial Judge, this Court declared without a dissenting voice, that the plaintiff was entitled to substantial damages for the loss of his bargain. On the re-

trial ordered by this Court, the present verdict has been rendered as the measure of the plaintiff's damages in the loss of the bargain secured by the option given Brown by the defendants.

JOHN R. HARDIN,
Of Counsel for Defendant-in-Error.

[9845]

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New Jersey Court of Errors and Appeals.

CARLENE K. BROWN, EXECUTRIX, &C., *Defendant in Error,* *vs.* JOHN HONISS, *et al.*, *Plaintiff in Error.*	*On Error to Essex Circuit Court.*

BRIEF FOR PLAINTIFF IN ERROR.

FACTS.

This is a contract action brought by William H. Brown during his lifetime, his widow and executrix having been substituted since his death, as plaintiff, to recover damages for the breach of a contract in the form of an option for the conveyance of land, which land belonged to John Honiss and Anna P. Ranney, and is situated in the northern part of the City of Newark, near the Belleville line.

William H. Brown procured an option from John Honiss and S. H. Pennington, who signed as the attorney of Anna P. Ranney, on the 9th day of July, 1901, for the purchase of the property bounded by Mount Prospect, Sylvan, Summer avenue and Second River, for the sum of twelve thousand five hundred dollars. Mr. Brown represented to Mr. Honiss and to Mrs. Ranney's attorney that he wished to purchase this property for a manufacturing site. He procured an extension of this option on the fourth day of September, 1901, which extension continued the option until the first day of December, 1901.

Smallpox was quite prevalent in the City of Newark in the years 1900 and 1901 and the Board of Health of that City were looking to purchase a piece of property upon which to build an isolation hospital.

About the time of this extension, as appears in the testimony, Mr. Brown was approached by Dr. Herold, the President of the Board of Health of the City of Newark, and they opened up negotiations for the purchase of the property, upon which Mr. Brown had an option, by the Board of the Health of the City of Newark, and the special committee of the Board of Health, chosen to procure a location for the building of an isolation hospital, looked at the property. The committee subsequently delegated a few of their members to appear before the Common Council of the City of Newark and request the purchase of the property. The matter was done very secretly, in order that the public might not know of the property proposed to be selected. The Common Council of the City of Newark passed a resolution on the 12th day of September, 1901, purporting to appropriate the sum of seventeen thousand five hundred dollars to William H. Brown, for the purpose of purchasing the land covered by the option and directing that the amount appropriated should be charged to the "special real estate and almshouse account," and provided that the purchase money should not be paid until a deed of conveyance, of the property purchased, should have been delivered to the auditor and approved by the law department, and specified that the land should be used for isolation hospital purposes.

Mr. Brown demanded a conveyance of this property covered by the option from Mr. Honiss and Mr. Pennington; Mr. Pennington refused, when tendered the sum of twelve thousand five hundred dollars, in cash, to deliver the deed stating that in speaking he refused on behalf of the defendant John Honiss. In his testimony he says he made no direct refusal on behalf of Anna P. Ranney and testified that he had no author-

ity to make a conveyance from her. There is no testimony in the case, other than Mr. Pennington's regarding his agency. There is no doubt but that the refusal to convey the property covered by the option was because it was to be used for an isolation hospital. Mr. Honiss relied upon the representation of Mr. Brown that the property was to be used for manufacturing purposes.

It is for this refusal to convey and the alleged breach of the option contract that this action for damages is brought.

The defendant, in his pleas to the action, have set up in defense, besides the general issue, the misrepresentation of Brown as to the purpose for which the property was to be used and a third plea of no tender to the defendant Honiss. The plaintiff joined issue on these three pleas. This cause was first tried before Justice Swayze and a jury, on the 8th day of January, 1903, and in the lifetime of William H. Brown. It appeared in the case at that time that John Honiss was a married man; that no conveyance had ever been demanded of his wife and the trial Judge held that the defendant John Honiss could avail himself of his inability to make good title to the property by reason of his wife's outstanding right of dower. The action is a contract action and the character of deed which the defendants were to give is not specified in the option. The court, at the trial, directed a verdict for the amount paid for the option, with interest. Under the case *Gerbert* v. *The Trustees*, 30 Vroom, p. 160.

The case was brought before this court on writ of error, and was heard at the November Term, 1903, of this court, and a new trial directed, upon the ground that refusal of Honiss to convey the property to Brown was for a totally different reason than that of his inability to give a good title. The case was sent back to the Essex Circuit Court for re-trial and was tried before Judge Adams and a jury on the third day

of November, 1904. The jury rendered a verdict in the plaintiff's favor for the sum of five thousand nine hundred dollars, and it is for numerous errors, on the part of the trial judge, committed at this trial, as alleged by defendant, that this cause is brought to this court on writ of error.

POINTS.

The errors, as alleged, which were committed as shown by the assignment of errors are twenty-five in number, which resolve themselves into the following points to be considered.

1. The option and extension thereof should not have been admitted in this cause, because of the lack of proof as to the power and extent of Pennington's agency for Mrs. Ranney. She was not bound by it, and if she was not Honiss was not.

2. The trial judge should not have admitted oral testimony of William H. Brown of an alleged contract to sell this property to the City of Newark.

3. The testimony of William H. Brown should not have been admitted on the trial as to the reason why the property in question was not conveyed to the City of Newark. The plaintiff was asked, on page 23, of the state of the case, as follows:

"Q Was the property conveyed to the City?
A It was not.
Q Why not?
A They refused to give me a deed.
Q Who refused to give you a deed?
A Mr. Pennington.
Q And nobody else?
A Mr. Honiss—well, Mr. Pennington acted for Mr. Honiss."

4. There was admitted in evidence at the trial two resolutions of the Common Council of the City of Newark and also several minutes of the Board of Health. Objection was specifically made to the admission of these resolutions, which were, the appro-

priating resolutions for the purchase of the property in question for the isolation hospital, and the resolution which rescinded the appropriating one.

The ground specified for the rejection of this evidence was that the Common Council of the City of Newark had no authority to pass this resolution; there were specific acts to be complied with as directed by the act which gave the City of Newark authority to purchase property for an isolation hosppital, which specific acts were not complied with before the enactment of this resolution. Further we charge that this resolution is not admissible as a contract between William H. Brown and the City of Newark for the conveyance of this property, for the following reasons:

(*a*) That the resolution was passed without authority.

(*b*) That it is void under the Statute of Frauds, never having been officially communicated to Brown and accepted by him.

5. Defendant Brown made a statement to the effect that he had been told by Pennington that the defendants were indemnified against loss by reason of their refusal to convey the property under the option. This statement is not relevant or material and is grossly prejudicial to defendants' case and was illegally admitted. (Case p. 33-34.)

6. The resolutions of the Board of Health, passed on the 17th day of May, 1900, should not have been admitted; they were not relevent or material. (Case p. 61.)

7. The trial judge erred in refusing, on the trial, to allow the defendant, John Honiss, to state why he asked William H. Brown what he was going to do with the property at the time he signed the option to convey to Brown. He was asked (see page 76 of the state of the case) "Why did you ask him (meaning Brown) what he was going to do with it?" (meaning the property.) Counsel for the plaintiff objected stating that the witness could not give the reason for

his desiring to know the use to which the property was to be put, stating that it was opinions which he might have worked out since and under other conditions. The Court held that it should be left to the court and jury upon the fact that he had requested to know the use to which the property was to be put, and that he could not state why he asked this question and stated that it would be impossible to contradict the answer, if given. Held that the testimony should be confined to overt acts and audible declarations. Left the court and jury to draw their own inferences, as to his reasons for asking the question.

8. Further error was committed on the part of the trial court in refusing to allow the defendant Honiss to testify as to his reliance upon the representations or statements made by Mr. Brown as to the proposed use of the property. He was asked by his counsel (see page 77, state of the case) the following question: "In making this option did you rely upon the representation or statement made by Mr. Brown as to the use of the property?" Counsel for plaintiff objected. The Court held (page 78) that the witness would be testifying as to what was in his own mind on the subject and that there was no rule of evidence to warrant his so testifying.

9. The Court was not warranted in directing the jury to add interest to the sum which they should find the plaintiff entitled to, from the date of the refusal to pay plaintiff to the time they rendered their verdict. The damages are unliquidated, being the difference between the contract price and the market value. There not being any market value ascertainable with exactness, the plaintiff would not be entitled to interest, upon the amount of damages found to be due them, by the jury.

10. The trial judge erred in refusing to charge a request made by the defendants as set out in the 24th assignment of error. The request was to the effect

that if the jury believed that Brown had represented the property to be used for manufacturing purposes and the purpose was afterwards changed and the change was material, it was Brown's duty to communicate the change to Honiss and a failure to do so would absolve Honiss from his obligation under the contract. This, it seems to us, is a proper direction to make to the jury in this cause. The judge refused this specific charge, and, in his charge, added a further requirement to those set out in the request. This further requirement was that the failure of Brown to notify Honiss of the change of purpose must be with a fraudulent intent. The action is upon contract and it is not necessary that the intent should be fraudulent. (Case p. 146.)

11. Error was committed by the trial judge in refusing to charge a request made by defendant's counsel that if Brown's original statement was true and he changed his purpose, he was bound to notify the defendants of this change of purpose, if the change was material and the failure to do so relieved the defendants. (Case p. 153.)

12. Objection was made and error charged, to the admission of the resolution of the Common Council purporting to appropriate the money for the purchase of this property for the sum of seventeen thousand five hundred dollars, upon another ground. An exception was taken to the judge's charge that this official action of the City of Newark could be taken into consideration by the jury as evidence of market value of the property which was covered by the option. Several requests that the trial judge charge the jury that the resolutions of the Common Council were not evidence of market value were made and denied. It was upon the admission of any evidence which showed the price for which the City had attempted to purchase this property, that this case was most stubbornly defended, the defendants' holding that the price

which the City in their desire to purchase this property were willing to pay, had no reference to its market value. It was to be purchased for a special purpose and to satisfy a great need. That, as shown in the testimony, the intended purchase of the property was kept very secret. The City was evidently willing to give a much larger amount for a piece of property for the purpose of an isolation hospital, if it was sure of getting the property. The admission of this testimony and the directions of the trial judge in relation to it was not only harmful, but, as it appears from the verdict, it was fatal to the defendants' case. The jury did not go any further into the consideration of the damages than to take the difference between the option price and the price mentioned in the resolution of the City Council of Newark, and add interest to that difference. We propose to show the court that this class of evidence has been universally excluded; that values of agreements to sell when unknown to the owner at the time of the option are not evidence of market value. That the rule in estimating market value is the testimony of experts, who deal in real estate in the immediate vicinity where the property is, who have known of the property and of its salability and worth. It is upon this point that we appeal to this court most strongly for the setting aside of this verdict and the granting of a new trial where only legal evidence of value may be admitted.

We have enumerated the legal objections we have raised in this case, and will take up their discussion in the order given.

1.

There is no legal evidence in this case that the option was binding upon Mrs. Ranney. Objection was made, on behalf of Mr. Honiss, to the admission in evidence of the option because it was not binding upon Mrs. Ranney. Pennington's agency did not

go to the extent of giving a written option nor did it include power to give a deed. The only evidence relative to the agency of Mr. Pennington is that evidence given by himself. Testimony showing his authority to execute the agreement of sale on behalf of Mrs. Ranney is to be found on page 4 of the case:

"*Direct examination* of S. H. Pennington:

Q What was your authority to sign those papers?

A My authority was authority given me by the second signatory, Mrs. Ranney.

By Mr. Ten Eyck.

Q A little louder, please, Mr. Pennington.

A I was authorized to give an option for the sale of that property.

By Mr. Hardin.

Q For the price mentioned in the option?

A Yes, for a price not less than that.

Q Was the authority written or oral?

A So far as I can say at this present time, it was oral; it may possibly have been contained in a letter, but I cannot say definitely."

And on page 6 where after testifying about a tender of $12,500 to him Mr. Pennington testifies to the following question:

"Q Was the request for a conveyance complied with?

A I know of no conveyance having been made. I *had no power-of-attorney to execute such a paper.*"

And also Mr. Pennington testifies on page 48:

"Q Mr. Pennington, had you any authority to execute a deed for this property?

A I stated yesterday that I had not.

Q Well, you can answer that, Mr. Pennington?

A As I stated here yesterday, I had no power of attorney to make a deed."

Authority to give an option for a sale would not give him power to execute a written agreement. In the case of *Milne* v. *Kleb,* 17 Stewart, page 378, Vice Chancellor Van Fleet held that, although an agent might be authorized by parol to enter into a written contract for his principal to convey land, the simple parol authority to sell, would not authorize the agent to bind his principal by a written contract; that he was a special agent and could only act in strict pursuance of this authority. The same principle was also announced by the Court of Appeals in the case of *Lindsley & others* vs. *Keim & others,* 19 Dickinson, 418. Statement made by the Vice Chancellor in *Milne* v. *Kleb,* bears out this contention very strongly; he says: page 381,—

"But suppose it be admitted that the defendant gave the agent just the authority which the agent says he did, the question, which this state of facts would present for decision, would be, had the agent authority to bind the defendant by a written contract? He was a special agent, constituted to do a specific act—to negotiate a sale, or to find a purchaser who was willing to purchase on the terms specified. The rule with regard to such agents is settled. Their acts do not bind their principals unless they pursue their authority strictly, and those who deal with them are chargeable with notice of the extent of their authority. *Cooley* v. *Perrine,* 12 Vr. 322; S. C. on error, 13 Vr. 623. The rule is general, that a purchaser, buying of an agent, must, at his peril, satisfy himself as to the extent of the agent's authority. He may also refuse to buy until the agent produces such evidence of authority as to leave no doubt of its extent. In this case no claim is made that express authority had been given to the agent to make or sign a written contract for his principal."

See also *Tyrrell* v. *O'Connor,* 56 N. J. Eq. p. 448.

If this option was not binding on Mrs. Ranney, John Honiss is not chargeable for failure to deliver a deed. He only owned a one half interest in the property; no demand was ever made upon him for a deed for his one half interest. His plea of non-tender sets up a good defense.

Sugden on Vendors, Vol. 1, page 366.
Chitty on Contracts, 13 Ed. by Lilly, page 333.
Poole v. *Hill,* 6 M. & W. Ex. 833-8.
Stryker vs. *Vanderbilt,* 3 Dutch. 68-72.

Under the case of *Gerbert* v. *Trustees* (30 Vr. 160), Honiss could not be held liable under such circumstances for any damages for loss of Brown's bargain, either on account of difference in market value or profits on a resale.

The former judgment entered in this case for $25, entered by the court's direction, was reversed on appeal because it was considered that the mere fact that Mr. Honiss's wife had an inchoate dower right would not excuse him from making conveyance, as there was no evidence that she would not have signed the deed and he had not put his refusal to convey on that ground.

It is our opinion that this court, deciding this case, when it was before it, after the first trial, did not consider that the action in this case is for breach of contract and that the reason for the refusal is of no moment. The case of *Bain* vs. *Fothergill* decided in the English House of Lords, 43 Law Journal, N. S. Common Law, 245, Law Rep. 7 House of Lords, page 158, holds that the proper action to be brought for recovery of damages for the wilful failure to convey is that of deceit, but, however, as we have said, the case of the failure of Mrs. Ranney to be bound presents an entirely different question that that of the outstanding right of dower of Mr. Honiss's wife. We think that the Gerbert case would certainly apply if this court rules that Mrs. Ranney was not bound

by the agreement and Honiss would be absolved in this contract action, whatever his reasons were for refusal to convey.

2 and 3.

The questions raised in this exception will not require any special discussion or citing of authorities. The objection, of course, is that the testimony is not the proper testimony to give, but the contract to sell, if there was a legal and valid one, should be the evidence. The objection goes virtually to the question as to whether or not it is the best evidence.

4.

Error is assigned in this cause because the trial court admitted in evidence a resolution of the Common Council of the City of Newark, passed September 12, 1901, and approved September 13, 1901, which resolution purported to appropriate seventeen thousand five hundred dollars ($17,500) to William H. Brown for the purpose of purchasing the land covered by the option, for an isolation hospital.

One of the objections to the admission of this resolution which was made at the trial was that in order to render it admissible the authority to pass it must be shown.

The trial court admitted it upon the ground that there is enough presumption of regularity in the proceeding and the passage of this resolution to warrant its admission as evidence as to the market value of the property, for which it was passed to purchase.

The law under which the City of Newark could construct an isolation hospital is Chapter 132 of the Laws of 1900 (p. 321). The first section of the act provides:

"1. Whenever the board of health of any city of this state shall by resolution, passed by the votes of a majority of the members thereof, declare that it is necessary to establish and maintain in and for said

city a hospital which shall be devoted exclusively to the treatment and relief of persons suffering from contagious and infectious diseases, and setting forth the estimated cost thereof, a copy of such resolution certified under the hands of the president or chairman and secretary or clerk of such board or body shall be forthwith transmitted to the common council, board of aldermen or other board having charge and control of the finances of such city and thereupon such financial board by resolution shall make an appropriation or appropriations, as hereinafter mentioned."

It will thus be seen that the common council or financial body of the city derives its power to pass the resolution admitted in evidence in this case upon its having presented to it a resolution of the board of health passed by the votes of a majority of the members of it, declaring the necessity of establishing a hospital for the treatment of contagious diseases and setting forth the cost, a copy of which resolution certified under the hands of the president or chairman and secretary or clerk shall be forthwith transmitted to it upon its passage by the board of health.

The plaintiff in this cause did not introduce any evidence to show the authority of the common council to pass the resolution. The defendant called David D. Chandler, the secretary of the Board of Health, and from the examination of him discovered the official action that had been taken by the Board of Health.

This official action did not warrant the Common Council to proceed to pass this resolution under the statute.

The act was first brought up in the Board of Health by the following statement read by the Secretary of the Board of Health (see page 90, State of the Case). The President "invited" Dr. Zeh to occupy the chair, and he then read an act of the Legislature entitled "An Act to authorize and provide for the establishment and maintenance of hospitals for contagious diseases in cities of this State." Moved and seconded

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that a committee of three members be appointed to prepare the necessary resolution and lay the matter before the Common Council.

An amendment was made and seconded that the President be one of the committee. Amendment carried.

The motion as amended was then carried.

Dr. Zeh appointed Drs. Herold, Disbrow and Becker."

The next resolution (page 91, State of the Case) is as follows:

"Moved and seconded, that the board ask for an appropriation of $100,000 for the purpose of buying the necessary land and building thereon an isolation hospital."

Another resolution (page 91, State of the Case).

The Health Officer stated that the letter which he had written in response to the motion instructing him to write and request an appropriation of $100,000 from the Finance Committee of the Common Council for the purpose of purchasing land and erecting thereon a contagious disease hospital was not sent by him as he had been advised that it would be irregular to do so.

The President gave a full statement of the matter which he said should be left to the Special Committee to go before the Finance Committee of the Common Council.

"Moved and seconded that the Committee on Contagious Disease Hospital be given enlarged powers so that they can get an option on property and have power to select a site and have plans prepared for a contagious disease hospital and that Commissioner Gay be added to the committee."

Page 92, State of the Case: "Moved and seconded that the motion instructing the secretary to write to the Finance Committee of the Common Council and request an appropriation of $100,000 for the purpose of erecting a contagious disease hospital be reconsidered."

Carried. On motion the matter was laid on the table.

There were three other statements in regard to this matter in the minutes to be found in the State of the Case (page 92). They do not disclose any proper action, and it is practically admitted by the secretary of the Board of Health that there is still a motion to request an appropriation laid on the table.

It will thus be seen from the foregoing, that the resolution of the Common Council of the City of Newark appropriating the seventeen thousand five hundred ($17,500) dollars to purchase property in question was passed without proper authority by the city. Leaving out the question of the inadmissibility of this resolution by reason of its not being a criterion of market value, it is still inadmissible by reason of the irregularity as above set forth. The city had no power to pay $17,500 to William H. Brown upon the strength of this resolution, and it was error in the trial judge to overrule the defendants' request .

There is further error along this line in that the trial judge refused at defendants request (see exception p. 152) to charge the jury that this resolution was no evidence of a re-sale and that it did not amount to a sale.

This court would probably consider unsound the proposition that the resolution is not admissible until all preliminary steps necessary to its validity have been proved, but another and far different question is raised here. The defendant objects to this resolution and still goes further than objecting. He shows to the court that the resolution was irregular and without force. It then, if not before, became the duty of the trial judge to withdraw from the jury the consideration of this resolution.

The question of the inadmissibility of an ordinance without proper proof of its validity and force has been passed upon in courts of Illinois.

Chicago & Alton Ry. Co. vs. *Engle*, 76 Ill. 317.

The court in this case held that in a suit against a railway company to recover for the killing of an animal within the limits of an incorporated town, on the ground of an alleged violation of an ordinance of the town, by the company, in running its trains at a prohibited rate of speed, it is indispensable to a recovery that the plaintiff should prove that the ordinance was in force at the time of the alleged accident. There the objection was as to the proper publication of the ordinance.

Scott vs. *The People,* 89 Ill. 195.

This case held that where the ordinance in question was objected to as incompetent evidence it devolved upon the defendant, The People, to show or offer to show that the town had authority to pass it. Municipal corporations exercise only delegated and limited powers, and in the absence of express statutory provisions to that effect courts are authorized to indulge in no presumptions in favor of the validity of their ordinance. If in conformity with the express or necessarily implied granting in the charter they are valid, otherwise not.

Again the courts of Illinois in the case of the *City of Alton* vs. *Hartford Fire Ins. Co.,* 72 Ill. 328, held, that an ordinance should be excluded unless the competency of the city which passed it is shown when such ordinance is objected to. This was an action for a penalty, under an ordinance, against a fire insurance company, and the court held in a suit brought by a city to recover a penalty for the violation of a city ordinance, it is proper to exclude the ordinance when offered in evidence, unless the plaintiff shows or offers to show that the city had authority to pass the ordinance. And if such evidence is not offered and there is no evidence except the ordinance itself, it is proper for the court to exclude it.

There are two New Jersey cases, recently decided, which we think decide against the admissibility in evidence of this resolution. They are, the case of the

Mayor and Common Council of Jersey City against *The Town of Harrison and others,* 58 At. Rep., page 109, decided by the Supreme Court June 18, 1904, and the case of *Niles* against the *Board of Education of West Hoboken,* 70 N. J. Law, page 1. The Jersey City case holds that the contract of a municipality and other corporations stand on the same footing as those of natural persons; that a resolution for the purpose of a water supply in order to be binding on the municipality under the statute of frauds must not only be passed, but it must be communicated to the other party by the direction of the town and must be accepted in order to constitute a contract, unless communicated to the other party in pursuance of a proper resolution so ordaining the whole matter is *inter sese.*

The resolution of the Common Council of Newark of September 12, 1901, did not direct that it be communicated to Brown, nor was it ever officially communicated to him, so as to be binding under this case.

The Niles case held that a valid contract could not be entered into by a municipality after a resolution appropriating money for said contract, unless the provisions of the law authorizing the improvement are strictly carried out. The strict provisions of the law authorizing the isolation hospital, as we have heretofore shown, were not strictly carried out.

The resolution was certainly not a sale; it was not evidence of a re-sale. The trial judge should have charged the defendants' request that it was not evidence of a re-sale. He should have also charged that it was not evidence of market value. It seems plain that in this case the most this resolution could be is an offer to purchase. The courts have, time and time again, held that the market value of property cannot be proved by offers and that these offers are inadmissible toward proving the value.

See cases cited under the discussion of damages at the end of this brief.

5.

Plaintiff on his direct examination stated after telling about the tender of the $12,000 to Pennington that Pennington had told him previously, that is before the formal tender, that "they" had a bonded indemnity against all pecuniary loss. This last statement was objected to by defendants' counsel and the court stated they thought though the evidence in relation to the bond was not responsive, it was otherwise permissible and that he would not compel plaintiff's counsel to put another question for that reason. Plaintiff's counsel then asked, "Did he tell you from whom the bond of indemnity was given?" and defendant replied, "I don't know whether he did or whether Mr. Honiss did. One of them told me, I understand, that it was Mr. Snyder, Mr. Heller and Mr. Tiffany had given the bond. Defendants' counsel objected that this testimony was incompetent, and further objected to the testimony upon the ground that the plaintiff had no right to show that any bond of indemnity had been taken by defendants. The trial judge overruled this objection and allowed the testimony to stand upon the ground that it was a declaration by either one of the parties or his attorney in reference to the subject matter of the controversy.

The fact that the defendants were indemnified from loss by reason of their refusal to convey is not material to the issue in this cause. What difference does it make what actuated the defendants in their refusal if such refusal was unconditional and wilful. That its admission was harmful to defendants' case cannot be denied. The issue, as we understand it, that is now presented, is: did John Honiss refuse to convey when he had the ability to convey, and it was incumbent upon him to convey by reason of being bound by his agreement? What difference can it make if the defendants were indemnified from loss by their refusal? Was the bond given for the plaintiff's benefit? Did William H. Brown have any interest in it? Can its

existence have any bearing on the defendants' testimony? No, it is entirely collateral to the issue. The trial judge, as has been said, admitted it as a declaration by one of the parties or his attorney, in reference to the subject matter of the controversy. Not being pertinent to the issue, it is not admissible on that ground. This court has passed upon the rule of evidence relating to declaration by parties regarding the subject matter of the suit in the case of *McBlain* v. *Edgar*, 65 N. J. Law, 637-8, but there is nothing in that case which would warrant the admission of a statement of one of the parties to the suit regarding a collateral matter.

The question of admitting proof of the indemnification of the defendant from loss by the suit has been before this court before in the case of *Day* v. *Donohue*, 62 N. J. L., 380-383.

The case in question was a damage suit and defendant on cross-examination was asked if he was insured against loss if the verdict went against him. Justice Garrison, in his opinion, says:

> "It is not necessary to maintain the broad proposition that a plaintiff who sues for personal injuries has an unqualified right to show that the defendant is insured against losses of that sort."

The ground, according to Justice Garrison, on which the testimony is admissible is that it might relate to the degree of care that an employee would exercise. He is required to exercise a certain degree of care, and in that case the question certainly has a bearing on the degree of care a master would exercise. The point that the plaintiff wished to make is that being insured against loss the master is liable to be less careful because he will not be subjected to loss by reason of his lack of care. Justice Van Syckle and Judge Depue dissented from the opinion of the court; they considered the testimony entirely irrelevant. They did not consider there was any exception which would allow the admission of testimony like this.

We do not doubt that the court is with them in the general proposition in relation to this class of evidence. It is only when it has a particular relevancy by reason of its liability to control the defendant's degree of care that it is admissible.

In the present case, the testimony did not tend to establish any fact which the plaintiff below was bound to prove, nor did it discredit the evidence of the defendant, or impair its value. This action is a simple breach of contract; action and motive are not the prominent features. It seems to us that it was entirely irrelevant and as can be plainly seen materially harmful to defendants' case before the jury.

It has another bad feature; it is brought out by the plaintiff in his own testimony. He makes his own evidence instead of proving it by the agent.

6.

The objections to the admission of the resolutions of the Board of Health passed on the 17th day of May, 1900, above referred to, on the ground that they were not relevant or material, are covered by our discussion as to the admissibility of the resolutions of the Common Council. If resolutions of the Common Council were not admissible these certainly were not.

7.

We have assigned as error the refusal of the trial judge, at the trial, to allow John Honiss to state why he asked William H. Brown what he was going to do with the property at the time he signed the option to convey to Brown. His testimony regarding this subject is to be found on page 76 of the State of the Case. The court held in refusing to allow him to testify that it should be left to the court and jury upon the fact that he had requested to know the use to which the property was to be put.

It seems to us that Mr. Honiss should be allowed to testify to the reason why he asked regarding the use to which the property was to be put. In order for him

to set up this misrepresentation he must show that it was a material misrepresentation and that it was relied upon by him. His answer to this question would certainly show the materiality of the representation. It would show his reliance upon it. His answer, if he had been permitted to testify, would have been that he did not wish a nuisance or anything that would tend to lessen the value of the surrounding property put upon it.

We think that this would be the only evidence on this line; there is no other evidence which we could produce. It would have been the province of the trial judge in his charge to comment upon the reliability of Honiss's testimony in this regard; to instruct the jury as to the reliance to be placed upon it, by reason of the fact that it could not be contradicted; that it was something which was in his mind and which no one else could know.

We think that the objection to his testimony goes entirely to the reliance upon it and the weight to be given to it. It is admissible for what it is worth, and it certainly goes to uphold the plea of misrepresentation. The denial of the trial judge in allowing him to so testify precluded him from vindicating himself to the jury for his refusal to comply with the option.

8.

The error which has been heretofore alleged relating to the testimony excluded of Honiss, regarding his reason for asking Brown what he was going to do with the property is very much the same as the error we charge in the trial judge's refusal to allow Honiss to testify as to his reliance upon the representation or statements made by Brown as to the proposed use of the property. His testimony in this regard can be found on page 77 of the State of the Case. The objection as ruled by the court to his testifying to his reliance upon the representation was that he would be testifying to what was in his own mind. What was in the witness's mind at the time when he entered into this option he has a right to testify to. (See *Moncreiff on fraud and misrepresentation*, page 101.)

It was necessary in order to support the plea of misrepresentation that Honiss should prove that he relied on the misrepresentation. Why should he not testify to it? Why should he not be allowed to tell the jury that he relied upon it? The jury are the judges of the weight to be given to this testimony under the instruction of the trial judge; but Honiss should certainly have the right to say to the jury that he relied upon his representation. If he does not have the right he does not have the right to set up misrepresentation.

These last two exceptions raise the same point of law, which has been discussed in several of the states.

Chief Justice Christiancy, in the Supreme Court of Michigan, passed upon a similar question, denied by the trial judge, in the case of *Beebe* v. *Knapp*, 28 Mich. Rep., 54-65.

This was a deceit action, and he says:

> "We see no ground for the fourth assignment of error in allowing the plaintiff to testify that he relied upon and believed the representations to be true. This was a vital point in the case; the evidence was, therefore, clearly relevant, and no one could know as well as himself whether he relied upon and believed the representation."

This character of question has also been upheld in the case of *Mann* v. *Taylor* (Ebersole), 78 Ia. Reports, 359.

This was another action of fraud. The court says, on page 359, in regard to motives:

> "There is no more striking illustration of the rule than in cases where it is necessary to prove motives, or the reasons which prompt one to act, when these motives or reasons are to be established in his own behalf. The motives or reasons may exist, but without the possibility of proof, except by such direct testimony. The point under discussion may be a forcible instance. it is a question of what induced the plaintiff to make the contract. Who can know? Or what particular facts would show it? Or, perhaps, better, who could know, or what particular facts would show,

how some particular statement or fact in the transaction affected his conduct? Where such facts become material, it is proper for the party to state them directly. The case of *Watson* v. *Cheshire,* 18 Iowa, 202, in principle, supports this rule."

Pridham v. *Weddington,* 74 Texas, 354; 12 S. W. Rep., 49.

The court in this case held:

Where defendant, in an action on a promissory note, given for stock in an insolvent corporation, alleged that the agents of the payee falsely represented such corporation as solvent and in good financial condition, and that, confiding in the truth of these statements, he made and delivered said note, it was not error to permit him to state that he would not have purchased the stock but for the representations made to him. The court says:

"The first assignment of error is: 'The court erred in permitting the defendant Weddington to state, over the objections of the plaintiff, that he would not have purchased the stock had not the representations been made to him because such statement was a conclusion, and permitted the defendant to decide one of the most important issues in the case.' We do not think the statement a mere conclusion, but rather the terse statement of a fact, which was peculiarly within the knowledge of the witness. What particular influence acts upon the mind of an individual to induce him to perform a particular act is known to him alone until disclosed by his declarations and conduct. If there has been no such disclosure, then not only the best evidence, but the only source of information on the subject, is the testimony of the party himself. This testimony, we think, would be none the less admissible if there was also proof of declarations and acts inconsistent with it. The whole evidence should go to the jury, to be considered by them in deciding the issue as any other question of fact. The assignment is not well taken."

Thorn v. *Helmer,* 2 Keyes, 27.

The New York Court of Appeals in this case held in an action for fraudulent misrepresentation, that a party's belief in such representation is one of fact to be proved and that the plaintiff's own testimony directly upon the point may be received and the weight to be attached to it is a question for the jury.

The question in this case which was asked and objected to was as follows: "Did you believe the representations so made to you by the defendant?" The witness answering under objection said that he did believe them, and the court held the ruling was not erroneous and held that the case of *Seymour* v. *Wilson,* 14 N. Y., 567, was decisive upon the point.

The court further said that the impracticability of contradicting a witness when he is allowed to testify to the operation of his own mind forms no objection to the admissibility of such testimony. It is to be received and the weight to be given to it is a question for the jury. See also

Nixon v. *McKinney,* 105 N. C., 23; 11 S. E., 154-6.
Angel v. *Pickard,* 61 Mich., 561;
Glazer v. *Mason,* 24 Mo. App., 321;
Clark v. *Marshall,* 62 N. H., 498;
Commonwealth, to the use of Bentzel v. *Julius,* 34 Atl., p. 21.

This case holds that the rule, that the unexpressed intent in the mind of one signing a paper cannot bind the other party, does not prevent the signer from testifying that certain false and fraudulent representations were what induced her to sign.

Weaver v. *Cone,* 34 Atl., 553;
Wharton on Evidence, Sec. 482;
Bradner on Evidence, 390.

It would seem from the way the courts of this country have looked upon this character of questions that they are admissible.

They are not conclusions but are statements of fact which are peculiarly within the knowledge of the witness.

The denial of the right to ask them is prejudicial error, and we think this point alone is sufficient to warrant a new trial in this cause.

9.

INTEREST ON DAMAGES.

The court specifically directed the jury to add interest to the damages for the number of years from the time the contract was not fulfilled, up to the date the jury should render their verdict.

We find but one case in New Jersey which has directly passed upon the question of the allowance of interest in the recovery of unliquidated damages.

That case is *Speer* v. *Van Orden,* reported in 3 N. J. L., 232.

The court says in a three line opinion:

> "Without deciding how far the master of a negro is liable for his tortuous acts, interest on uncertain and unascertained damages cannot be recovered."

The courts of New York State have lately rendered several decisions upon this point which, if this court adopt, would require the setting aside of this judgment on the ground that the jury assessed interest in their damages.

The damages in this case were certainly unliquidated. There was no special market value of this property in question which could be computed or ascertained to a definite sum.

Gray v. *Central R. R. of N. J.* 157 N. Y. 483.

This was an action to recover from the defendants damages for the breach of a contract to buy a steamboat. Plaintiffs had judgment upon the verdict of the jury which awarded interest upon the sums in which the plaintiffs were found to have been damaged.

The court held:

> "In actions to recover unliquidated damages for breach of contract, unless the means are accessible to the party sought to be charged of ascertaining, by computation or otherwise, the

> amount to which the plaintiff is entitled, the the plaintiff may not be allowed interest on the amount of damages found, and the submission to the jury of the question as to such allowance is error."
>
> "In actions to recover unliquidated damages for breach of contract to buy personal property, the access of the defendant to means of computation of damage, as a basis of a right in the plaintiff to recover interest, may be established by proof of the existence of a market value, as distinguished from the actual value, of the property; and the recovery of interest is defeated by the absence of satisfactory proof of market value."

The court held further: That a steamboat had no ascertainable market value upon which to compute interest.

This case was followed in New York State by *Sloan* v. *Baird,* 162 N. Y. 327. This was an action which greatly resembles the present case. It was a breach of contract to convey certain lands and the factories and fixtures on the lands.

The defendant instead of conveying it according to contract conveyed it to some other person and this action was brought to recover damages for the failure to convey. The court followed the case of *Gray* v. *Central R. R. Co. of N. J.* and held:

> "Any actions to recover unliquidated damages for the breach of an executory contract to convey property, interest is not allowable unless there is an established market value of the property or means accessible to the party sought to be charged of ascertaining by computation or otherwise the amount to which the plaintiff is entitled."

And the court held—That in this case the value could not be computed so that the defendant could not ascertain upon what sum to pay interest.

These two cases are followed by the case of *Excelsior Terra Cotta Co.* v. *Dudley S. Harde,* 181 N. Y. 11. which holds

"While the old common-law rule has been modified, which required that a demand should be liquidated,

or its amount ascertained, before interest could be allowed, the extent of its modification is that if the amount due is capable of being ascertained by mere computation, the allowance of interest is proper.

Where the court, upon the trial of an action to foreclose a mechanic's lien, found that there were defects in the work done and delay in performance, allowed a certain sum upon the defendant's counterclaim for damages caused thereby, disallowed the plaintiff's claim for extra work and then directed judgment in his favor with interest for the difference between the payment called for by the contract and the amount allowed upon defendant's counterclaim, the allowance of interest is erroneous for the reason that the contract price was subject to a reduction for damages, incapable of being ascertained as to amount and the claim for extra work was in dispute."

The New York rule has been followed in the U. S. Cir. Court of Appeals in the case of *Stephens* vs. *Phoenix Bridge Co.,* 139 Fed. Rep. 248.

This was an action upon a building contract. The action was brought to recover the reasonable value of materials and labor furnished by the plaintiff for a viaduct which the defendants were erecting for the city of New York, upon a written contract between them, and the city.

The court held in this case that notwithstanding the greater liberality of the more recent adjudications in allowing interest by way of damages or withholding the payment of money justly owing against the delinquent party, none to which we have been cited go to the length of allowing it in a case like the present. The sum owing from the defendants to the plaintiff was uncertain and unascertainable by computation, at the time of the commencement of the action.

The case refers to several New York cases cited along this point.

We refer you also to the cases cited in Vol. 29 of the Century Digest under title of Interest, pars. 35-40, particularly par. 35.

See also *Jones on Danger,* Vol. 2, sec. 1286.

Interest may, in many cases, be allowed in actions to recover damages for breach of contract. But it has been decided that interest cannot be allowed on unliquidated damages awarded in such actions, unless they are such as might have been easily ascertained and computed at the time of the breach, from the facts then known to exist.

(See case cited in Notes.)

It seems to us that although it may have been the practice of the trial courts in this State to direct juries to award interest after ascertaining damages and those damages are unliquidated, that this court when the matter is now placed before it, will not hesitate to decide otherwise.

The damages in this case were certainly unliquidated and unascertainable.

We can plainly see how interest should be directed to be added in an action for the failure to deliver stocks. In that case there is a market value which is ascertainable. There is a market price for stocks every day but in the present case this property was not actively treated in there was no value which could be ascertained, as can be plainly shown by the testimony of the experts in this case.

We do not think that the defendant should be held liable for interest in a sum which he could not calculate and ascertain.

10.

The trial judge erred in his refusal to charge the seventh request of the defendant. The request was in these words

"If the jury believe that at the time Honiss gave the option, Brown represented that the property was to be used for manufacturing purposes, and Brown afterwards changed his purpose and proposed to use

it for a materially different purpose, it was his duty to communicate such change to Honiss, and his failure to do so absolved Honiss from all obligation to execute a deed in pursuance of the option. Brown was thereafter entitled only to a return of the $25 paid with interest."

His charge in reference to this point is to be found on page 146 of the printed case. The trial judge there charges the jury in reference to the materiality of the change of purpose as to the use that the property covered by the option was to be put. That is, the change from that of a factory site to an isolation hospital site. But the judge did not charge the jury that if they found the change of purpose was material then the failure of Brown to communicate it to Honiss absolved Honiss from his obligation to deliver a deed. That is, of course, providing the jury found this change of purpose material.

The judge charged the jury as follows (bottom of page 146):

"That no such disclosure was made is an admitted fact in the case, and if you find that it should have been made *and that the failure to make it was due to a fraudulent intent to deceive the owners, then your verdict should be for the defendants.*"

The judge here adds the requisite that the failure of Brown to notify Honiss of the change of the proposed use must be with a fraudulent intent.

We maintain that if the change of purpose was material regardless of the question as to whether or not it was with a fraudulent intent, it excused Honiss from executing a deed.

The request to charge which is here charged to be ground of error contained all the necessary facts to entitle the defendant to rescind the contract, if these facts the jury found to be true, and the court in adding that a fraudulent intent to deceive the owner must be proved, required the jury to find a further

fact which was not necessary to entitle the defendant to rescind and therefore erred.

Snyder v. *Finley,* 1 N. J. Law 92, holds that a false assertion or representation by which another is induced to contract is fraudulent though believed to be true. And the Chief Justice says in his opinion,

> "Whoever positively and generally makes a false assertion as an inducement for another to contract with him and succeeds on that ground is guilty of fraud which vacates the contract. It must be as represented or it is fraudulent. A man who does so assert ought to suffer. He must answer for the truth."
>
> "The case of Sir Crisp Gascoigne is full of this. I do not say that Finley was guilty of wilful dishonesty. It seems from M. Shares' evidence that he might have thought Harris solvent; but he made an assertion of a matter of fact, which the jury have found was false; and then as to the legal operation, his belief of it one way or the other is of no consequence."

This case seems to settle the point that the fraudulent intent is not necessary to be proved in order to rescind the contract.

See *Moncreiff on Frauds and Misrepresentation,* p. 310, 317 and p. 321.

"When one party to a contract has made a representation which is calculated to deceive the other party and induce him to contract, he is bound to disclose the truth, if he is or becomes aware of it before the completion of the contract. There is a duty to speak in any of the following three cases:

1. Where the representation was true when it was made, but to the knowledge of the person making it becomes false before it has been conclusively acted on.

2. Where the representation was made in good faith, but was in fact false; and the person making it discovers the truth before it has been acted upon.

3. Where the person making the representation knew it to be false when it was made.

On such communication the deceived party is entitled to avoid if he pleases." (Moncrieff p. 321-2.)

Traill v. *Baring* (1864), 4 D. J. & S., 329.

Reynell v. Spyre, 1 D. M. & G. 660-709.

Kerr on Fraud and Mistake (1st Am. Ed.) 67.

14 *Am. & Eng. Enc. of Law* (2d Ed.), p. 102, Par. H.

> "As was shown in a previous section a person who makes a false representation in good faith, believing at the time that it is true, is guilty of fraud if he afterwards ascertains that it is false and fails to correct his statement, providing he acquires knowledge of its falsity before the contract is consummated." (See cases cited.)

Page 103, Par. B.

> "If a representation has been made with actual knowledge of its falsity, or with what the law regards as equivalent to actual knowledge, an intention that it should be acted upon and should deceive will be presumed." (Cases cited.)

Where the misrepresentation is set up as a defense in an action on the contract a different case is presented than in a tort action for deceit.

The New Jersey case of *Kennedy* v. *McKay,* 43 N. J. L. 288, was an action for deceit on the ground of misrepresentation of the agents of one of the defendants in regard to some stock. The agents were sued with the principal and the court after finding that the principal was innocent as to the misrepresentation of his agents, at the end of the case intimates that a rescission of the contract might be had in the proper action and says, speaking of the defendant principal (page 292): "By bringing his action in its present form the plaintiff has given up all idea of rescission of the contract of sale, and the consequence is that according to the doctrine of the cases cited, he must connect the name of the last named defendant (the principal) with the fraud by which the sale was effected, if he would obtain judgment against him."

Cowley v. *Smyth,* 46 N. J. L. 380.

This is a well considered decision on an action for deceit. The court held that the intent to deceive

must be proved in action for deceit and after reviewing the English cases, cites the words of Park, *B.*—

> "We entirely dissent, because we are of the opinion that, *independently of contract,* no one can be made responsible for a misrepresentation unless it be fraudulently made."

The court goes so far in this case as to say (page 388); in action for deceit:

> "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."

The case of *Becker* v. *Atchason,* 70 N. J. L. 157, sets out clearly the difference in proof between action in tort for deceit and action on contract.

So it will appear that even in actions for deceit, although the intent is one of the elements necessary to make out a case, if the misrepresentation is material and is relied on and is a matter peculiarly within the knowledge of the party making the representation and it is false to his knowledge, evidence tending to show lack of corrupt or malicious motive will not be admitted, the intent is presumed. Much more so would this rule apply in a contract action where the defendant set up the recission of a contract on the ground of a false representation made, which representation was particularly within the knowledge of the party making it and was relied on by the party to whom it was made. The court certainly would not admit evidence of lack of corrupt or malicious motive in an action to compel a completion of the contract or for the recovery of damages for the failure to complete.

The rule of law is well settled that a material misrepresentation of one of the facts which induces a party to enter into a contract if untrue, and especially

so if to the knowledge of the party making it, is a ground for the rescission of the contract.

That the misrepresentation of the purpose to which the property is to be put is a representation of fact has been decided by the case of *Edgington* v. *Fitzmaurice*, 29 Chy. Div., 479. (1885.)

The defendant issued a prospectus for the purpose of raising money on debentures, the declared object of the loan being to complete buildings, buy vans, and horses, and develop trade, while the true object was to pay off pressing liabilities.

Cotton, *L. J.*, agreed that the statement in the prospectus "was one of intention, but it is nevertheless a statement of fact, and if it could not be fairly stated that the object of the issue of the debentures were those which were stated in the prospectus, the defendants were stating a fact which was not true."

Bowen, *L. J.*, added: "There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion."

It was pointed out that the intention of the directors in that case was most material.

> "The view that a representation of intention is a representation of fact, is tacitly acted on in every transaction of life. The person who buys on credit represents impliedly at least that he intends to pay, and if it can be proved that when he buys he does not intend to pay there is a case of fraudulent misrepresentation."

The case of *Cannon* v. *Berry*, 15 C. B. (6 J. Scott.) 597, is also a case of proposed intention, and is one which would apply to the case before the court.

It will be seen that the trial judge in requiring the jury to find, besides the materiality of the misrepresentation and the reliance upon it by the defendant, the further fact that the failure to disclose the change of the proposed use (which is to the same effect as a new false misrepresentation, as can be seen by the cases previously cited), *must be due to a fraudulent intent to deceive the owners*, required the defendants

to prove a fact which was not incumbent upon them in order to maintain a rescission of the contract for the falsity of the representation. The facts necessary to be proved to form a complete defense on the ground of the rescission of the contract for the falsity of the representation are contained in the defendants' requests to the charge, which requests were denied by the trial judge to the material damage of the defendant. The jury would have had to brand William H. Brown a fraud in order to find in favor of the defendant on the ground of rescission after this charge of the trial judge.

11.

The objection that the trial judge erred in refusing to charge the request of the defendant's counsel in the following words: "If Brown's original statement was true after he changed his purpose he was bound to notify the defendant if the change was material and not having done so the defendant would be no longer bound by the agreement."

The same objection applies to this exception as applies to the exception we have just discussed.

Moncreif on Frauds and Misrepresentation (p. 321), states one of the grounds for rescission of a contract on ground of misrepresentation as

> "Where the misrepresentation was true when it was made but to the knowledge of the person it becomes false before it has been conclusively acted upon."

There can be no difference between the case where the representation was true when made but was false to the knowledge of the party making it before it was acted upon, and where the representation is false when made. If the trial judge was wrong in denying the 7th request he was certainly wrong in denying the 8th.

12.

DAMAGES.

The questions raised as to the admission of certain evidence to prove the damages in this case are of the

gravest. The ruling of the trial judge on these questions and the admitting of the evidence of damage proposed by the plaintiff were vital to the case of the defendant. Those admissions were so prejudicial to the defendant's case that a verdict followed in conformity with this particular evidence objected to by the defendant.

We refer to the admission in evidence of the resolution of the Common Council of the City of Newark which purported to appropriate $17,500 for the purchase of the property covered by the option in this case.

The admission in evidence of this resolution is to be found at page 27 of the case. The trial judge refused to charge in reference to this resolution as requested by defendant and the requests are to be found on pages 151-152 of the case. Exceptions were taken to the requests to charge and to the admission in evidence of the resolution.

The principal ground to these objections is that this resolution or the testimony in regard to it is not evidence of market value.

The rule of damages has been established in this case as the difference between the price the property covered by the option would bring in the open market at the time of the refusal to convey, and the price fixed in the option, namely, $12,500.

The plaintiff in order to establish her damages must prove the market value to be in excess of $12,500, and must prove this market value by competent and legal evidence.

Is this resolution of the Common Council appropriating $17,500 *for the purchase of the property covered by the option to be used for the erection of a "pest house," evidence of market value?*

We think not.

It is at most an offer and offers are not evidence of market value. Offers are not admitted in evidence because of several reasons.

In the first place, to admit them is to deny to the

defendant the right of cross examination. Defendant is not given an opportunity to find out from the person making the offer as to why he made it, his good faith in making it, his judgment and knowledge of values, his experience and ability to judge of values or whether the offer was made in reference to the market value or to supply a particular need or to gratify a fancy. Defendant cannot inquire into the good faith of the offer.

The testimony is certainly inadmissible as hearsay. It is a statement of what some person or persons will give for a piece of property, if they are legally able to. They are not present to tell what influenced their minds in making the price. They are not present to tell how they made up the figures of $17,500. They are not present to qualify themselves and tell of their knowledge of real estate and their ability to pass upon values.

The plaintiff undoubtedly relies to sustain the evidence of the official action of the City of Newark as evidence of damage, upon the case of *Engel* v. *Fitch*, reported in L. R. 3 Q. B. page 314 and afterwards in the Exch. Chambers in L. R. 4 Q. B. 659.

The facts in the case of *Engel* v. *Fitch* were these:

The defendant sold by auction to the plaintiff a lease to a house and the particulars of the sale stated that possession would be given on completion of the purchase. The plaintiff resold at an advance to a third party and when requiring possession of the plaintiff it appeared that the mortgagor was in possession and refused to give it up. The defendants were in a position to oust the mortgagor by ejectment, but they refused to complete the sale on the ground of expense, and the court held that the plaintiff could recover damages for the loss of his bargain and that the measure of damage was the profit which it was shown he could have made on a re-sale.

In this case the actual damages proven were the loss of the re-sale. No evidence of market value was introduced.

The court of Q. B. held that they thought that this case was not within the exception of failure of title on the part of the owner and that the contract to re-sell the lease was good evidence of its market value, which must be proved by ascertaining what it would probably fetch.

The court further said:

> "And I also agree with the observations of his Lordship as to the damages upon the re-sale being within the rule in *Hadley* v. *Baxendale*. At any rate in this particular case the defendants have made default not because of the state of their title but because of the improvident contract to deliver possession."

In the lower court counsel for the owners raised the point that the damages sought to be recovered were too remote when tested by the rule established in *Hadley* v. *Baxendale*, and the court said (page 334):

> "We think that this objection also fails. The purchase of real property sold by auction for the purpose of re-sale is a matter of every day occurrence; and the possibility of a re-sale cannot be taken to be beyond the contemplation of the parties to such contract. In all of the cases on this subject which have come before the court this objection if well founded would have been a conclusive answer to the claim for damages, but none of them was taken."

This court in its opinion in this case taken up from the former trial (which opinion is to be found in 70 N. J. L. 260) cites the case of *Engel* v. *Fitch* (on page 264) and says: "There is no allegation of any disability in the seller to convey but a refusal to convey for a totally inadequate reason, and in such case the plaintiff is entitled to recover for the loss of his bargain."

The court that cites *Engel* v. *Fitch*.

We do not think that this court in citing this case meant to say that proof of a re-sale is evidence of market value—it simply meant to say that the plaintiff was entitled to substantial damages. The case of *Engel* v. *Fitch* has been decidedly overruled by the case of *Bain* v. *Fothergill,* L. R. 7 H. L. 158, and we do not think that this court will follow the rule laid down in *Engel* v. *Fitch* after it has been overruled by the English House of Lords in so well considered a case as *Bain* v. *Fothergill.*

Ld. Chelmsford in *Bain* v. *Fothergill* says in reference to *Engel* v. *Fitch:*

> "In a more recent case of *Engel* v. *Fitch,* Law Rep. 3 Q. B. 314, in error, 4 Id. 659, to which I shall presently have occasion more particularly to refer, Lord Chief Justice Cockburn, in an elaborate judgment, expressed his opinion that the case of *Flureau* v. *Thornhill* was unsatisfactory, and gave his sanction to Lord Chief Justice Abbott's doubt as to the soundness of the decision in that case.
>
> There is, perhaps, some difficulty in ascertaining the exact grounds of the judgment in *Flureau* v. *Thornhill;* but, in addition to those which have been previously assigned, it seems to me that the following considerations may be suggested as in some degree supporting the correctness of the decision: 'The fancied goodness of the bargain,' must be a matter of a purely speculative character, and in most cases would probably be very difficult to determine, in consequence of the conflicting opinions likely to be formed upon the subject; and even if it could be proved to have been a beneficial purchase, the loss of the pecuniary advantage to be derived from the re-sale appears to me to be a consequence *too remote* from the breach of the contract. I am aware that in *Engel* v. *Fitch,* where, after the contract and before the breach of it, the purchaser contracted for a re-sale at an advance of £105, the Court of Queen's Bench and the Court of Exchequer Chamber, though pressed with the decision in *Hadley* v. *Baxendale,* 9 Ex. 341, held that 'if an

> increase in value has taken place between the contract and the breach, such an increase may have been taken to have been in contemplation of the parties within the meaning of that case.' But it must be borne in mind that this question as to damages depends, as Baron Alderson said, in *Hadley* v. *Baxendale,* upon what 'may reasonably be supposed to have been in the contemplation of *both* parties at the time they made the contract, as the probable result of the breach of it.' "

"Now, although the purchaser in *Engel* v. *Fitch,* when he entered into the contract, may have contemplated a re-sale at an advance, it is not at all likely that the loss of this profit should have occurred to the vendor as the probable result of the breach of his contract. The judges were no doubt influenced by the fact of the profitable re-sale having actually taken place, and were, in consequence, drawn aside from considering what must have been in the minds of both parties at the precise time when they made the contract.

But in the case of *Engel* v. *Fitch* the Court of Queen's Bench, Law Rep. 3 Q. B. 314, and afterwards the Exchequer Chamber, Law Rep. 4 Q. B. 659, 664, proceeded expressly on the cases of *Hopkins* v. *Grazebrook* and *Robinson* v. *Harman,* the Chief Baron quoting the very words of the Lord Chief Justice, and relying on these cases. In that case the mortgagees of a house sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on completion of the purchase. The purchaser resold the house at an advance in the price to a person who wanted it for immediate occupation. The mortgagor refused to give up the possession. The mortgagee could have ousted him by ejectment, but refused to do so on the ground of the expense. The purchaser brought an action upon the contract of sale, and it was held that as the breach of contract arose not from inability of the defendants to make a good title, but from their refusal to take the necessary steps to give the plaintiff possession pursuant

to the contract, he could recover not only the deposit and the expenses of investigating the title, but damages for the loss of his bargain; and that the measure of such damages was the profit which it was shown he would have made upon a re-sale. *It was after this decision in Engel* v. *Fitch that the plaintiffs in error declined to argue the present case in the Exchequer Chamber,* as the authorities on the subject could only be freely reviewed by a higher tribunal. The case therefore comes to your Lordship's House without the advantage of the opinions of the learned judges of that court."

The court in the case of *Bain* v. *Fothergill* further goes on to say, that it deems it the universal rule that the damages to be recovered upon the breach of a contract for the sale of real estate must be taken to be without exception that the purchaser cannot recover damages beyond the expenses he has incurred and his deposit money by an action for breach of contract; he can only obtain other damages by action for deceit.

This is a contention which we urged before this court upon the argument of this case after the former trial.

The court in its opinion did not distinguish between actions on contract and actions for deceit, but simply held that damages for the loss of the bargain could be recovered.

In the case of *Engel* v. *Fitch,* the plaintiffs proved a re-sale. In the present case a re-sale is not claimed. The court in its charge says (page 147 of the State of the Case) in speaking of market value: "You may also consider the evidence afforded by the official action of the Board of Health and Common Council."

The court charged on page 148 at the plaintiffs' request, that "in ascertaining the market value of the premises described in the option the jury may consider the official action of the Board of Health and the Common Council."

In discussing the admissibility of the resolution of the Common Council we have, we think, plainly shown this court that there could be no charge of a re-sale to the City of Newark of this property.

The only ground of admissibility which the plaintiffs may claim is that it shows evidence of market value. This immediately brings it back to the class of offers.

The New Jersey case of *Skirm* v. *Hilliker,* 37 Vr., 410, although a personal property case, should thoroughly dispose of the contention in the case of *Engel* v. *Fitch.*

The court can readily see from this case that the rule of the Supreme Court of this State is that an offer is absolutely no evidence of value. In that case, the only evidence of damage before the trial court was an offer to purchase, and the verdict was the difference between the offer and the option price. The court held that the market value had not been proven and therefore no damages, and made the rule for a new trial absolute. The court in that case cites the leading case of *Hadley* v. *Baxendale,* and we cannot see how the defendant could be bound in any way by the offer of the Common Council under the rule of *Hadley* v. *Baxendale* which has been so thoroughly approved in this state.

See also *Masterton* v. *Mayor of Brooklyn,* 7 Hill, 62, and the cases cited in the report of the case in *Beale's Cases on Damages,* page 463.

Wolcott v. *Mount,* 7 Vr., 262;

Clair v. *May,* 6 Adol. & Ellis, 519.

As we have before said, the only evidence of market value in this case is the evidence of the experts called to prove the value of the property.

We have carefully reviewed the cases throughout the United States relating to evidence of offers to prove market value, and they seem to have been universally held to be inadmissible.

The case of *Keller* v. *Paine*, 34 Hun. (N. Y.), 177, shows the reasons for not admitting offers.

The court said:

> "It has been intimated in some cases that offers are some evidence of value, but it is a class of evidence which it is safer to reject than to receive. Its value depends, upon too many circumstances. If evidence of offers is to be received it will be important to know whether the offer was made in good faith, by a man of good judgment acquainted with the value of the article and of sufficient ability to pay; also whether the offer was cash for credit in exchange and whether made with reference to the market value of the articles or to supply a particular need or to gratify a fancy. Private offers can be multiplied to an extent for the purpose of a cause and the bad faith in which they were made would be difficult to prove. The reception of effect of private offers to sell or purchase stands upon an entirely different footing from the evidence of actual sales between individuals or by public auction and also upon a different footing from bids made at auction sales."

Young v. *Atwood*, 5 Hun., 234.

> "The reception of this class of evidence would multiply the issues upon questions of damages to an extent not to be tolerated by courts aiming to practically administer justice between litigants."

Ross v. *Manhattan El. R. Co., et al.*, N. Y. Supp. Vol. 8, 495 (p. 496).

> "The other exceptions relied on by defendant is to the denial of a motion to strike out a part of the answer to a question put to a real estate expert, as to what was the market value of plaintiff's premises at any time since 1883, and prior to the construction of the defendant's structure. The witness answered that that property was valued at one time as high as $30,000, and he had submitted an offer to Mr. Ross of $30,000. Plaintiff moved to strike out the portion of the answer stating that he had submitted an offer of $30,000 which motion was denied. That this testimony was incompetent to prove a value is clear, but the evidence as to the value of the property was competent; and this was simply a remark of the wit-

> ness, as a basis for forming his judgment. While it would not have been error to have excluded the testimony, we do not think that it was incompetent, in the connection in which it was given, or that the testimony in any way affected the result. On the whole case, we think that there are no exceptions that require a reversal of the judgment; and it should therefore be affirmed, with costs."

The case which bears very strongly upon the point in this case is the case of *Keitel, et als.* v. *Zimmerman,* 43 N. Y. Supp., 676 and 678.

This was an action brought by the vendee of a contract of sale of realty against the vendor to recover the deposit paid by him upon the making of the contract of sale, and also to recover the fee for searches made upon the property to be purchased.

The vendee refused to take the property upon the ground of the defectiveness of its title and about five defects are named. The vendor, who was the defendant, asked for affirmative relief alleging that the title offered was merchantable, and also alleged that after the refusal to purchase by the vendee he had sold the property to a third party for $700 less than the contract price, and he claimed that he should be reimbursed the $700 lost.

The court held the true measure of damages to be as follows:

> "The true measure of damages against the vendee in default of such a contract is the difference between the price fixed in the contract and the value at the time fixed for delivering the deed, "and cites 1 Sedgwick Measure of Damages, 7 Ed., 382, 383, and other cases, and then says: "Of this there is no proof other than that he furnished by the subsequent sale by private compact without notice to the plaintiffs, and the price realized being the result of negotiations with which they had nothing to do, a proper measure of recovery is not established as against them."

The case of *Van Brocklen* v. *Smeallie,* 19 N. Y. Supp., 788, is a case similar to the one before the court. The court in this case distinguishes between public

sales by order of court and at auction from private sales.

This was an action brought by the vendor of a contract of sale of real property against the vendee to recover for the breach of the contract by the vendee, by reason of his refusal to take the property which he had agreed to.

The plaintiff claimed the difference between the contract price and the price at which he had sold the property, after notifying the defendant that he would make a sale to private persons. The plaintiff insisted upon his claim at the trial, but the court held that the rule of damages was the difference between the contract price and the actual value of the property, and also held that the mere fact that the plaintiff had notified the defendant that he proposed to sell the property at private sale and charge him with the difference did not bind the defendant.

In the case the plaintiff did not ask to go to the jury on the question of value, nor did he claim that the amount received on the re-sale was evidence of the value to be submitted to the jury. And the court in discussing this case says:

> "The cases cited by appellant, decided by courts of this state, are not similar. *Pollen* v. *LeRoy*, 30 N. Y., 549, was a case of the sale of personal property, but in that case the rule of damages was stated to be the difference between the contract price and the real value of the property. It was held that a fair public sale, in the absence of other evidence, was competent evidence of value. But in this case, as we have seen, the plaintiff did not claim that the price for which he sold the property was evidence of its value, or ask to go to the jury on that question. The case of *Miller* v. *Collyer*, 36 Barb., 250, was that of a judicial sale under a decree in equity; and the court held that the purchaser could, by order of the court, be compelled to complete the sale or that the court could, upon his failure, order a re-sale and compel him to pay the deficiency, he having by signing the memoranda of sale submitted

himself to the jurisdiction of the court. I doubt whether the doctrine stated in *Bowser* v. *Cessna,* 62 Pa. St., 148, is in all regards sustained by the decisions of the courts of this state. But in that case the rule of damages is stated to be the difference between the contract price and the market value of the property at the time of the breach. That case assumes that the price brought on the re-sale is evidence of the market value, but it holds that the sale must be a public one, not, as in this case, private. In *Griswold* v. *Sabin,* 51 N. H., 171, also cited by appellant, the court remarks: 'The plaintiff having sold the land at private sale, he cannot claim that the price obtained was the true value. There was no evidence, except that offered by defendant, as to the re-sale, and as above stated, plaintiff did not ask to have that question submitted to the jury.' "

Another thoroughly discussed case is that of *Lewis* v. *Lee,* 15 Indiana, 499.

The facts in this case are the reverse of those in the case before the court. Here the purchaser, Lewis, notified Lee, the seller, that he would not pay for the property he had agreed to buy. Lee after the time set for the transfer had passed brought suit for damages against Lewis for his breach of the contract.

Lewis attempted to introduce evidence of offers to purchase made to Lee by third parties shortly after Lewis's breach. The trial court excluded these offers. And on appeal in this case the court said:

> "We think the court did not err in this. The action which Lee had elected to bring was one for damages, not for specific performance; and, on failure of Lewis to comply with his contract, he became liable to Lee for the damage he would sustain in consequence of the breach. This would be shown by the difference in value, then, of the land from the contract price. Men who made offers could have been called *as witnesses to swear to value; but a man is not bound, necessarily, by offers he makes. Suppose* Lewis had gone for a specific performance, what would have been the amount of his recovery? Why, the amount of the debt and interest; to be enforced, first,

by a sale of the land, and secondly, by execution against Lewis for the balance. This is just equivalent to a sale for the best price without judicial proceedings, and the holding of the original defaulting purchaser for the deficiency. So on a sale, not executed, of personal property, the difference between the original price and that obtained upon re-sale, may be the measure of damages. *It is the general value; not what some man might give, in a case of real estate, for purposes of a slaughter house, or we know not what other offensive purpose.* So, it must be a cash in hand value. The seller would not be bound to take the hazard of another breach."

The case of *Muller* v. *Railway Co.*, 23 Pac. Rep. 265, holds in condemnation proceedings that the owner cannot show offers received for the property.

The case of *Parker* v. *City of Seattle* (Sup. Ct. of Washington, 1894), 35 Pac. 594, held that in an action against the City for injuries to property caused by the negligent grading of the street in front thereof, evidence as to the amount offered to plaintiff for the land before the grading is inadmissible to prove its value.

Scott (*J*) said:

"The first point raised is with reference to proof admitted relating to the value of the premises which were damaged. The plaintiff was allowed to testify, over the objection of the defendant, that a man from Portland had offered him $14,000 for said property. The respondent contends that the testimony was inadmissible, although he admits that the majority of the courts of the various states have held otherwise. Some cases are cited by the respondent as favoring his contention, but none of them go to the extent that it would be necessary to go to sustain the admission of this testimony and we are clearly of the opinion that its admission is erroneous."

The court cites *Hine* v. *Railway Co.* (132 N. Y. 477).

"And it is further contended by the respondent that, if the court committed error in this particu-

lar the testimony was not prejudicial to the defendant on the ground that it is apparent that the jury attached no weight to it. But we think that the record fails to show this, and consequently its admission was harmful error."

Chief Judge Parker delivered an able opinion in the New York Court of Appeals in the case of *Hine* v. *Manhattan R. Co.*, 132 N. Y. 477; 30 N. E. 985; 15 L. R. Ann. 591, he says:

"The relief sought by the plaintiff rendered it important that he should show the market value of the premises in controversy prior to the building of defendants' railroad. Part of the evidence introduced for that purpose consisted of his own testimony, to the effect that he had received certain offers for the property. We agree with the general term that the court erred in receiving it. It must be borne in mind that we are not considering the admissibility of an offer made in an open market, such as the Produce Exchange, for an article of recognized uniform character, constantly bought and sold in the market, and having a place in the daily reports of prices current, such as No. 1 wheat or corn, but that of and unaccepted offer for a piece of real estate, having a market value, it is true, but one not generally known in the market or to the public. Such market value may be shown by the testimony of competent witnessess, but not by an offer. In the first place, the evidence adduced in this case is objectionable, because it places before the court or jury an absent person's declaration or opinion as to value, while depriving the adverse party of the benefit of cross-examination. The highest value at which an offer standing alone, can be estimated is that it represents the opinion of him who makes it as to the worth of the property. Nevertheless the assertion that he offered to part with his money might give to such hearsay opinion more weight with a jury than an opinion given by a witness before them, not thus supported. While, notwithstanding his opinion was backed by a promise to pay money, which was not enforceable, he may not have been competent in a legal sense, to express

an opinion on the subject. If he was, other reasons may have prompted the offer than an expectation of actually becoming the purchaser, or of obtaining it at its market value. But we pass to the objection that, in such a case as we have under consideration, offers may not be proven even by the party making them. The general term of the fourth department had the question before it in *Keller* v. *Paine*, 34 Hun., 167, 177. And in discussing the question the court said: (He here quotes the extract of the opinion in that case we have quoted.) The reasons thus assigned in support of the decision made we fully approve. That decision has been followed in *Leale* v. *Metropolitan Elev. R. Co.*, 61 Hun. 613; *Lawrence* v. *Metropolitan Elev. R. Co.*, 15 Daly, 502. The proposition has been asserted in *Ross* v. *Manhattan El. R. Co.*, 29 N. Y. S. R. 517; *Kuh* v. *Metropolitan Elev. R. Co.*, 31 N. Y. S. R. 406. * * * * While we agree with the general term in the view expressed touching the question so far considered, we cannot indorse the position taken that a reversal should not be had because such testimony did not affect the result. We do not see how this court can ascertain or determine what weight it had. The question of value was sharply contested, and, if we cannot say that this testimony did not influence the decision of the court, the appellant is entitled to have its admission declared to constitute reversible error. The presumption necessarily arises from the situation presented by the evidence and the decision of the court that the evidence was considered, and it is strengthened by the fact that the trial court, after passing on the admissibility of the testimony, and listening to the answer of the witness, asked the plaintiff how long before the building of the road the offer of $55,000 was made."

The case of *Lawrence* v. *Metropolitan El. Ry. Co.*, N. Y. Supp., Vol. 8, 327, (which case was cited by Chief Judge Parker in Hine case), was decided by Larremore (*C. J.*), who says:

"The printed case discloses one error which is fatal to the judgment appealed from. A wit-

ness, who is a real estate agent, and, as such, has had charge of the renting of the premises to which this action relates for many years, was allowed, against defendants' objection, to testify as follows: Question. Did you receive, in 1872, an offer of purchase of 80 Amity Street? Answer. After the property fell into my hands, the property next door was bought. A man came to my office half a dozen times. He sent me letters, and finally came to see me personally, wanting to buy the property, and very anxious to buy. I did receive an affer of $16,500. Then I offered for $17,500, and then they asked for $16,000. * * *! There is evidence that the premises at present are worth but $15,000, and that immediately after the building of the elevated road they were worth but $13,000. The testimony above quoted, therefore, bore very cogently upon the question of deterioration in value of the property, and although the trial was by the court, and not before a jury, it would be impossible for us to say that the finding and assessment of damages was not in some degree influenced by it. In *Keller* v. *Paine,* 34 Hun. 167, Judge Follett used the following language, of which we approve:

The court here quotes the extract of this case we here give. In our judgment, the reasons given by Judge Follett for holding evidence of private offers incompetent upon the question of value are conclusive, and it is unnecessary for us to attempt to add anything to what he has said. It is proper, however, to observe that this question has been raised in the courts of several sister states, and that there is a very general concurrence in the conclusion we have reached. *Whitney* v. *Thacher,* 117 Mass. 523; *Wood* v. *Insurance* Co. 126 Mass. 316; *Fowler* v. *Commissioners,* 6 Allen, 92; *Watson* v. *Railway Co.,* 57 Wis. 332, 15 N. W. Rep. 468; *Railroad Co.* v. *Ryan,* 64 Miss. 399; *Railroad Co.* v. *Orr,* 8 Kan. 419."

It will be well to note that in this last case (*Lawrence* v *Metropolitan Elev. R'y Co.*) the Court of Appeals held that the admission of an offer bore so very cogently upon the question of value of property that a

trial judge trying a case without a jury could not possibly avoid being in some degree influenced in his finding and assessment of damages by considering this offer.

The case of the *Minnesota Belt Line Ry. Co.* v. *Glucke,* 48 N. W., 194, holds that upon the question of damages for the appropriation of land in condemnation proceedings, "evidence of the prices previously offered the land owner of the land is inadmissible; and error in receiving it will be presumed to be prejudicial unless it is reasonably clear from the whole case that the finding or verdict could not have been influenced by it.

It will be plainly seen that in the case before the court the jury were influenced by the admission of this evidence."

The court in *Atkinson* v. *Chicago & N. W. Ry. Co.,* 67 N. W. Rep., 703, holds that on issues involving the question of the value of land testimony as to offers received for the land is incompetent.

> "The evidence as to what the plaintiff had been previously offered for his lands, so injured, or any part of them, per acre, was not competent on the question of damages.
>
> Evidence of actual *bona fide* sales of like lands similarly situated might be properly received, especially on cross examination, but not mere offers, even for the identical lands. *Watson* v. *Railway Co.,* 57 Wis., 332, 350, 351; 15, 468. *Transfer Co.* v. *Glucke,* 45 Minn., 463, 48 N. W., 194. The evidence thus received was presumptively prejudicial. The question of damages was much controverted, and we cannot say, from the entire case, that it is reasonably clear that the verdict was not affected by this evidence. For this reason there must be a new trial."
>
> *City of Santa Anna* v. *Harlin,* 34 Pac., 224. (Sup. Ct. of California.)

The case of *Dady* v. *Condit,* 58 N. E. Rep., 900-903 (Sup. Ct. of Illinois), is a case covering the points presented in this case and is one which has been very

thoroughly considered, and we take the liberty to recommend its perusal at length.

It holds:

> "In an action for damages for breach of a contract to convey land, an instruction that the market value of land is the highest price which it will bring in the market, regardless of the causes which contribute to its value, was erroneous, since land, on favorable terms, and under peculiar circumstances, may bring more in the market than its fair cash value."

The criticism of the trial judge by the court in this case in reference to his charge regarding the damages might well apply to the trial judge in the case before the court.

The court should not have admitted this evidence objected to in this case because the price fixed in the official action of the Common Council was a price for property to be used for special and extraordinary circumstances.

An offer to prove the value of real estate was considered in this state by this court in the case of *Montclair R. R. Co.* v. *Benson,* 7 Vr., 557-558. In that case, the property was wanted for a special purpose and although the proof related to an offer of property adjoining the property in question, the court said at page 558:

> "The evidence overruled would have introduced other collateral issues and if admitted would have entitled the plaintiff to show that the adjoining owner was under some pressure to sell or that there were some circumstances which influenced him to offer his property below its actual worth."

This question was considered in the case of *Tedens* v. *Sanitary District of Chicago,* 36 N. E. Rep., 1033-1036.

The case was a condemnation case and the charge of the trial court in reference to estimating market value was followed by the Supreme Court of Illinois. The charge was:

> "The sixth instruction in substance directed the jury that they were not to consider the price

> that property would sell for under special or extraordinary circumstances."

The principle announced was approved in *Brown* v. *R'y Co.*, 121 Ill., 600; 18 N. E., 283, and we see no reason for changing the rule declared.

The case of *Brown* v. *Calmet River R'y Co.*, 18 N. E., 283 (Ill.), holds, in reference to an instruction given by the court at the trial at the instance of the petitioner, as follows:

> "The jury are instructed that, in considering the compensation to be paid to the defendant for the land about to be taken, they are to fix the actual cash market value of the land taken; and that they are further instructed that they are not to consider the price at which the property would sell for under special or extraordinary circumstances, but its fair cash market value, if sold in the market under ordinary circumstances for cash, and not on time, and assuming that the owners are willing to sell, and the purchaser is willing to buy."

It is objected that this introduces a condition and qualification as to the measure of the compensation to be allowed, not warranted by authority or reason, in that it draws a distinction between the market value and the cash value of the property. This precise form of instruction was approved in

Kierman v. *Railway Co.*, 123 Ill., 195; 14 N. E. Rep., 18;

Railway Co. v. *Moore*, 15 N. E. Rep., 764.

Lewis on Eminent Domain, sec. 446, vol. 2, page 970, says regarding offers:

> "It is not competent for the owner to prove what he has been offered for his property. (In condemnation case where market value is to be proved) or what persons who have been looking for similar property were willing to give for it." (See cases cited under this paragraph.)

That this evidence which we deem inadmissible was the controlling evidence as to value in the minds of the jurors, is evinced by their verdict. The difference between the option price, $12,500, and the price fixed in the resolution—$17,500—is $5,000, and interest on the $5,000 from October 17, 1901, to the date of the trial is about fifteen days over three years. Three years' interest would be $900, thus making the verdict $5,900. There can be no doubt that this resolution absolutely controlled the jurors' minds in arriving at the damages.

The defendant's witnesses as to value, seven in number, all competent real estate men familiar with the property, placed the value of it at from $6,000 to $11,600. Charles Gies says from $6,000 to $7,000; James Keating, $7,000 to $7,500; Robert Kuebler, $7,500; Harrison Van Duyne, $10,000; Henry Russell, $7,200; John H. Francisco, $11,000; Thomas J. Gray, $11,600.

The plaintiff produced but two witnesses, one a former partner of William H. Brown, and these two witnesses put the value of this property at $18,000 or $18,500.

The values put upon this property by these two witnesses are inflated beyond reason. Mr. Berry does not qualify as an expert. He says that there was a ready sale for property in that locality. This was denied by defendant's witness. And when Mr. Berry was pressed to describe the section he referred to he says the Forest Hill section. The property in question is not in the Forest Hill section, but is east of Mt. Prospect Avenue and in the section known as Woodside. A section in which there has been no boom such as in the Forest Hill property.

The greatest criterion as to the highest value is the fact that John Honiss, the defendant, an experienced real estate man himself, agreed to part with this property, after holding for thirty years, at $12,500.

The amount of $17,500 was the price the city officials were willing to pay to secure a piece of property quickly, and a piece that was available for the special purpose of a pest house. The price of the property was not of such concern to them as their getting a piece quickly, without the public getting a chance to prevent them and raise a clamor against their locating near them. They were willing to pay $17,500 because it was the cheapest Mr. Brown was willing to sell it for.

We have taken the liberty to quote at some length from the cases cited. We have done this in order to make the work of this court easier as the cases cited are some of them very long and cover a great number of questions. We have tried to give the court the part of the case which bears directly in point.

We respectfully submit that for the numerous errors here alleged this case should be reversed.

COULT, HOWELL & SMITH,
Of Counsel with
Plaintiffs in Error.

INDEX

ASSIGNMENT OF ERRORS.

New Jersey Court of Errors and Appeals

CARLENE K. BROWN, Executrix, etc.,
Defendant in Error
vs.
JOHN HONISS, et al.
Plaintiffs in Error
} *In Error*

WRIT OF ERROR

NEW JERSEY, *ss.*

SEAL

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

GREETING:

For as much as in the record and proceedings and also in the giving of judgment in a certain plaint which was in our Circuit Court holden at Newark in and for the said County of Essex between Carlene K. Brown, Executrix of William H. Brown, plaintiff, and John Honiss and Anna P. Ranney, defendants, in an action upon contract, manifest error hath intervened to the great damage of the said defendant, as it is said, we being willing that speedy justice should be done to the parties aforesaid in this behalf, do command you distinctly and openly to send under your seal the record and proceedings aforesaid to

our Judges of our Court of Errors and Appeals in the Last Resort in all Causes, at Trenton on the twentieth day of April, instant, together with this writ, that the record and proceedings aforesaid, being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done.

WITNESS our Chancellor and President Judge of our said Court of Errors and Appeals at Trenton aforesaid, the fifth day of April, One thousand nine hundred and five.

COULT, HOWELL & TENEYCK,
Defendants' Attorneys.

S. D. DICKINSON
Clerk.

(Endorsement).

I direct that proper return be made to the within writ.

FREDERIC ADAMS
Circuit Court Judge.

Filed April 20th, 1905.

S. D. DICKINSON
Clerk.

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

I, Arthur Horton, Clerk of the Circuit Court in and for the County of Essex, New Jersey, do hereby certify and return to the Court of Errors and Appeals in the Last Resort in all cases the Judgment rendered and proceedings together with all things touching and covering the same as by the within writ to me directed, I am commanded.

Witness my hand and the official seal of said Court and County this 20th day of April A. D. 1905.

{ SEAL }

ARTHUR HORTON
Clerk

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

ARTHUR HORTON
Clerk

Essex County ss

John Honis and Anna P. Ranney, the defendants in this suit were summoned to answer William H. Brown, the plaintiff therein in an action upon contract, and thereupon the plaintiff, by John R. Hardin, his attorney, complains; For that whereas, the said defendant heretofore to wit, on the ninth day of July, Nineteen hundred and one, at Newark, in said County, did by agreement in writing, signed by the said defendants, represent themselves to be the owners of the premises therein described, and did thereby for the valuable consideration therein expressed, to wit; the sum of Twenty-five dollars, by the said plaintiff to the said defendants paid, give and grant to the said plaintiffs an option to purchase at any time on or before the first day of November then next, all that certain tract of land in said City of Newark, in said agreement described, bounded by Mount Prospect avenue, Sylvan avenue, Summer avenue and Second River, for the sum of Twelve thousand dollars, and did thereby further agree upon the payment of said sum of Twelve thousand dollars by said plaintiff to the said defendant on or before the said first day of November then next, to execute and deliver all necessary deed or deeds of conveyances of said premises to the said plaintiffs or such other party or parties as he should name, and the said plaintiff in fact says that thereafter to wit; on the seventeenth day of October, Nineteen hundred and one, he, the said plaintiff, tendered and offered to the said defendants the said sum of Twelve thousand dollars, and then and there requested the said defendants to make a deed of conveyance to him the said plaintiff, of the premises aforsaid mentioned and described in the said agreement, in compliance

with the terms thereof; yet the said defendants not regarding the said agreement and their said promise and undertaking, but contriving and fraudulently intending to injure and defraud the said plaintiff in this behalf, did not, nor would when so requested as aforesaid, or at any time, before or since, make or procure to be made to the said plaintiff a deed of conveyance of the premises aforesaid, but then and there to wit, at Newark aforesaid, declared to the said plaintiff that they did not intend so to do, and wilfully neglected and refused so to do, contrary to the said agreement and the promise and undertaking of the said defendants; by reason whereby, he, the said plaintiff has been deprived of all the benefits and advantages which would have arisen from the making of the said conveyance, and had expended large sums of money, to wit; the sum of Five hundred dollars, in endeavoring to procure the said conveyance and the completion of the said agreement, and has been and is by means of the premises, otherwise greatly injured and damnified to wit, at Newark aforesaid, to the damage of the said plaintiff Ten thousand dollars.

And whereas also, the said defendant afterwards, to wit, on the first day of February, Nineteen hundred and two, at Newark aforesaid, was indebted to the plaintiff in the sum of Ten thousand dollars, for goods sold and delivered by the plaintiff to the defendant at their request; and in the like sum for work done and materials furnished, by the plaintiff for the defendants at their request; and in the like sum for money lent by the plaintiff to the defendants at their request; and in the like sum for money paid by the plaintiff for the use of the defendants at their request; and in the like sum for money received by the defendants for the use of the plaintiff, and in the like sum for interest for the forbearance by the plaintiff at the defendants' request of money due and owing from the defendants to the plaintiff; and in the like sum for money due from the defendants to the plaintiff on an account stated between them; and being so indebted the defendants in consideration thereof, then and there promised the plaintiff to pay him the said several sums of money on

request; Yet the said defendants disregarded said several promises and have not paid the said several sums of money or any of them or any part thereof, although often requested so to do by the plaintiff, but to do so have hitherto wholly refused and still do refuse to the damage of the plaintiff Ten thousand dollars, and therefore the said plaintiff brings his suit etc.

JOHN R. HARDIN
Plaintiff's Attorney.

And the said defendant John Honnis impleaded with one Anna P. Ranney, comes and defends the wrong and injury when etc. and says that he did not undertake or promise in manner and form as in said declaration alleged and of this he puts himself upon the country.

And for a further plea in this behalf, the said defendant John Honiss, impleaded etc. by leave of the Court for this purpose first had and obtained, according to the form of the statute in such case made and provided as to the allegation in the first count of the said declaration says, that the plaintiff ought not to have or maintain the said action against him, because he says, that heretofore to wit, on the ninth day of July, Nineteen hundred and one, at Newark, in said County, the plaintiff in the negotiation which preceeded the making by this defendant of the said option or agreement described in the said declaration, stated and represented to this defendant, that in case of a sale of the said property in accordance with the terms of the said option or agreement, the said property would be used by the purchaser thereof, for the purpose of erecting, constructing and maintaining a factory thereon, and that this defendant believed the said statement and relied thereon and relying thereon executed the said option or agreement in the behalf of the truth thereof, but this defendant avers that in truth and in fact the plaintiff did not intend to purchase the said property for factory purposes as aforesaid, nor did he intend to devote the same thereto, but that on the contrary thereof, he intended to purchase the same for the purpose of an isolation hospital or pest house for the Mayor and Com-

mon Council of the City of Newark, and this defendant avers that the said option or agreement was procured from him by the plaintiff by misrepresentation and fraud and that the same is for that reason null and void, and this the defendant is ready to verify; wherefore he prays judgment whether the plaintiff ought to have or maintain the said action thereof against him.

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

COULT & HOWELL
Defendants' Attorneys.

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

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

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

PITNEY & HARDIN
Plaintiff's Attorneys.

Therefore let a jury thereupon come before the Judge aforesaid, at Newark aforesaid, the second Tuesday of September next, who neither because etc. to recognize etc. and the said day is given to the parties here etc.

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

And now at this day that is to say, the seventh day of November A. D. 1904, until which day the issue as aforesaid joined had been continued before the Judge aforesaid, at Newark aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the Jurors of the Jury of whom mention is before made; being summoned also come who to speak the truth of the matter within contained, being chosen, tried and sworn upon their oath say they find for the plaintiff and assess his damages against the defendant at the sum of Five thousand and nine hundred dollars and so they say all.

Whereupon it is considered that the said plaintiff do recover against the said defendants his damages in form aforesaid found and also the sum of Eighty three dollars and thirty seven cents as for his costs about his suit in this behalf expended by the Court now here adjudged to him of increase with his assent which damages, costs and charges in the whole amount to Five Thousand Nine hundred and eighty three dollars and thirty seven cents.

And the said defendant in Mercy etc.

Judgment signed November 7th, 1904.

WILLIAM S. GUMMERE,
Judge.

The Schultz-Gasser Co., Law Case Printers, 68-70 Market Street, Newark, N. J.

Essex Circuit Court

Thursday, November 3d, 1904.

CARLENE K. BROWN, Executrix, etc.,
vs.
JOHN HONISS, et al.
} *On Contract*

BILL OF EXCEPTIONS

Before Hon. Frederic Adams, *J.*, and a Jury.

For plaintiff appear Pitney & Hardin.
For defendants appear Coult, Howell & TenEyck.
Mr. Hardin opens for the plaintiff.

Mr. Hardin. If the Court please, I desire to read the evidence of Mr. Brown, given on the former trial, which, I believe, is made competent by the tenth section of the Evidence act. I understand that the other side will have no objection to my reading from the printed book, rather than have the stenographer produce his notes. [Reading:]

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

"*Direct Examination by Mr. Hardin.*

"Q Mr. Brown, you are the plaintiff in this case?
"A Yes, sir.
"Q Where do you reside?
"A 78 Fourth Ave.
"Q How old are you?
"A Fifty-eight.
"Q What is your business?
"A Real estate.
"Q Were you engaged in the real estate business in July, 1901?

"A Yes, sir.

"Q Do you know Mr Honiss?

"A I do; yes, sir.

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

"A I did; yes, sir.

"Q With reference to what?

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

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

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

Now, with reference to that map: that original map was lately returned to the possession of Mr. Honiss, and I have here a map made from the same survey, which it is agreed shall be used in lieu of that original.

[Reading:]

"Q You have seen that map before?

"A Yes, sir.

"Q When did you get it?

"A At the time I received the option.

"Q And from whom?

"A From Mr. John Honiss.

"*Mr. Hardin.* I offer the map in evidence."

I will make the same offer now, using this instead of the one referred to.

[Marked Ex. P. 1.]

[Reading:]

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

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

"*By Mr. Coult.*

"Q What is that?

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

"Q Prepared?

"A Yes, drawn by Mr. Pennington.

"*By Mr. Hardin.*

"Q By whom is that signed?

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

"Q In whose presence was it signed?

"A In my presence.

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

"A Yes, sir."

Now I will call Mr. Pennington, and pursue the same course that we did before. I interrupt the reading of the testimony here.

SAMUEL H. PENNINGTON sworn in behalf of plaintiff.

Direct Examination by Mr. Hardin.

Q Mr. Pennington, I show you the option agreement in this case and direct your attention to the signatures (paper shown to witness). You have seen that paper before?

A I have seen that paper before.

Q Do you recognize the handwriting of the signatures?

A I recognize the handwriting of Mr. Honiss in the signature "John Honiss," and my own writing, "Anna P. Ranney, per S. H. Pennington, her attorney."

Q Who drew the paper?

A That was prepared under my direction, at my office, with such suggestions as Mr. Brown had to make at the time.

Q And where was it executed?

A It was signed in my office.

Q I show you another paper purporting to be an extension of that option, and ask you to look at the signatures to that (shown to witness). You have seen that paper before?

A Yes, sir; I have. I can say the same with regard to that as I said with regard to the signatures to the

other paper. I recognize the signature of "John Honiss," and also my own handwriting in the signature "Anna P. Ranney, per S. H. Pennington, her attorney." That was prepared, not in Mr. Brown's presence, but he requested it, as I understand.

Q That was also executed in your office?

A Yes, sir.

Q What was your authority to sign those papers?

A My authority was authority given me by the second signatory, Mrs. Ranney.

By Mr. TenEyck.

Q A little louder, please, Mr. Pennington.

A I was authorized to give an option for the sale of that property.

By Mr. Hardin.

Q For the price mentioned in the option?

A Yes, for a price not less than that.

Q Was that authority written or oral?

A So far as I can say at this present time, it was oral; it may possibly have been contained in a letter, but I cannot say definitely.

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

A She was up in Northern New York State, at her country place.

By Mr. Coult.

Q I can't hear you, Mr. Pennington.

A Mrs. Ranney was at her country place in Northern New York at the time this option was signed and during the whole controversy.

By Mr. Hardin.

Q And she resided in New York State, did she not?

A She resided in New York State and resides there still. She has not been served in this case.

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

Mr. TenEyck. Well, he answered the question right after that.

Mr. Hardin. Yes. There is an objection by Mr. Coult right after that, if he renews it.

Mr. TenEyck. Well, it will be renewed now.

Mr. Hardin. [Reading:] "I asked him a general question, if he made some efforts to dispose of the property;" and the witness said, "I already had a possible purchaser in view for this property." Now, Mr. Coult has an objection to that question.

Mr. Coult. That answer is not responsive to the question, that is all.

The Court. Well, it was competent evidence, was it not? If it was competent, Mr. Hardin is the only person who can object that it is not responsive.

Mr. TenEyck. If that objection is overruled, he can state what Mr. Brown stated next, I presume.

Mr. Hardin. The Court then stated what the question was that the next answer of the witness was responsive to.

[Reading:]

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

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

Mr. Coult. The answer of the witness was not responsive. "I did not" answers that question, and he gives his reason.

The Court. This is the direct examination, is it not?

Mr. Hardin. Yes, sir.

The Court. As I understand the rule, when a question is asked on direct examination, and the

witness gives an answer which, though not responsive to the question, is yet competent in the case, the counsel who asks the question is the only one who can object to the answer; he is not obliged to take it, but if he is willing to take it the other side cannot object.

Mr. Coult. Then I understand the rule to be that a witness may inject testimony on a general question of that kind which is not responsive.

The Court. If it is competent.

Mr. Coult. Yes. I move to strike it out.

The Court. You now move to strike it out?

Mr. Coult. Yes, that part of the answer which is not responsive to the question.

The Court. Understanding the rule as I do, I deny your motion.

Defendant's counsel pray an exception to this ruling of the Court.

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Mr. Hardin. [Reading:]

"*By Mr. Hardin.*

"Q I can't hear you.

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

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

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

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

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

"Q Who is Dr. Herold?

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

Now there is an objection.

Mr. Coult. That is objected to as a conversation with a third person.

The Court. That is true, isn't it?

Mr. Hardin. Yes, sir.

The Court. Isn't this hearsay?

Mr. Coult. That ought to be stricken out, then.

The Court. It would seem to be hearsay.

Mr. Coult. It is hearsay, and it was sustained as hearsay in the previous case—"Objection sustained."

The Court. Well, I sustain the objection now.

Mr. Hardin. [Reading:]

"*Witness.* I only want to put the thing right; that is all."

Mr. Coult. That is stricken out, and ought therefore to be left out.

Mr. Hardin. I didn't know whether your objection would be renewed or not.

The Court. Strike it out.

Mr. Hardin. [Reading:]

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

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

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

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

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

"A Yes, sir.

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

"A I did; he spoke to me about—"

And then comes an interruption.

[Reading:]

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

Mr. TenEyck. One minute. That is not what he testified to.

Mr. Hardin. I am leaving all that discussion out.

Mr. TenEyck. [After discussion.] There does not seem to be any question which makes that answer competent at any point, and unless the Court thinks it is competent on other grounds, I don't see how it can be put in here.

Mr. Hardin. Well, I want the Court to rule on it.

The Court. All you want me to hear is the evidence?

Mr. Hardin. Yes, sir.

The Court. The questions and the answers. Is there any embarrassment about doing that, about reading the questions and answers?

Mr. Coult. I suppose this testimony that is being read is subject to objection on grounds not stated before.

Mr. Hardin. Certainly.

The Court. Yes.

Mr. Hardin. I only want to get before the Court what the witness said, in order that the Court may rule on it.

The Court. It is just as though Mr. Brown were here present in court and testified in answer to those particular questions in those particular answers, subject to any objection you may choose to make.

Mr. TenEyck. I don't see any question there which would make what you propose to read his answer; I think he interjected that in the case.

Mr. Hardin. The Court interrupted him and he finished his answer.

Mr. TenEyck. It appears subsequently that he said he sold it to the city, and we object to any evidence as to a sale to the city without showing authority first to make the sale by the city.

Mr. Hardin. All I can do is to ask the Court to rule on what is here: "I did; he spoke to me about—" and then on the next page he says, "I had sold it; it was bought by the City of Newark."

Mr. Coult. That is objected to until authority is shown by the city to purchase it.

Mr. Hardin. The Court could perhaps handle it in this case by striking that out if no evidence of that kind should be forthcoming.

Mr. Coult. Well, I don't want it to go before the jury; it is incompetent. If you have any evidence you can produce it now.

The Court. What have you to say as to this particular objection?

Mr. Hardin. I haven't anything to say as to this particular objection. It anticipates proof that may or may not be forthcoming.

The Court. A possible embarrassment arises out of the fact that the course of the evidence at the former trial was controlled by the rulings of the judge at that trial, about which I am supposed to know nothing, and yet which did control the proof at time.

Mr. Hardin. I have no objection at this time to introducing a resolution passed by the Common Council of the City of Newark on this subject, which by stipulation of counsel on the other side is to be used as though the original were here.

The Court. Mr. Coult has made an objection that, I suppose, he wants me to rule on. I am going back to your other objection. Do you want me to rule on that, about the witness's oral statement of a sale to the city?

Mr. Coult. Yes, sir.

The Court. I sustain your objection. That will give you a ruling on that point.

Mr. Hardin. Your Honor perhaps, in making that ruling, will reserve the right to me to have in the case the benefit of that statement by the witness, now deceased, provided it appears in the subsequent course of the trial that it becomes proper.

The Court. If anything makes it proper I will bring it back into the case.

Mr. Hardin. [Reading:]

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

Mr. Coult. I object to it on the same ground.

The Court. That is a question that was susceptible of an answer yes or no, whether he made any any arrangement; it does not ask him what the arrangement was. I think it belongs to a class of questions very often asked and answered: "Did A give B a deed?" "Yes." But when you inquire as to the contents of the deed you must go further and prove it strictly. I do not know what answer the witness made to this question.

Mr. Coult. I understand the witness to say or attempt to say that there was a sale made to the city.

Mr. Hardin. That has been struck out.

Mr. TenEyck. You are now questioning about a sale to Dr. Herold ?

Mr. Hardin. No, I am not.

Mr. TenEyck. Isn't that your question ?

Mr. Hardin. No, if he made any arrangement about the transfer of the property.

Mr. TenEyck. What is the purpose of the question? It does not seem to be relevant to the question in this case.

The Court. Well, it might be introductory. If the witness were on the stand and the question were asked, I should allow it, but I should tell the witness to answer it yes or no, and not state what the arrangement was. I do not know what answer the witness gave in this case or whether that would confuse the matter.

M. TenEyck. Then that answer ought not to be given, perhaps.

The Court. I do not know how the witness answered it, you see; I have not heard it.

Mr. TenEyck. He didn't answer it the way the Court just ruled he ought to answer it.

Mr. Hardin. Practically so.

Mr. TenEyck. And as we know now what his answer would be, I think unless it was as the Court indicated it ought not to be read.

Mr. Hardin. I ask your Honor to read the 10th section of the Evidence act, under which this testimony is going in [handing book to the Court].

The Court. Well, Mr. Hardin, how do you construe this section ?

Mr. Hardin. I construe it to mean that the plaintiff now in a representative capacity shall not be deprived of the benefit of the evidence given on the

former trial by the deceased party, and that that is to be kept in mind by this Court on this trial. I do not understand that it makes evidence not otherwise competent now competent.

The Court. That is what I mean.

Mr. Hardin. No, sir.

Mr. Coult. Any objection that could have been taken at the time, and properly taken, can be taken now.

The Court. The statute says "may be proved and admitted." I suppose if it appears to the Court to be competent evidence, it may be admitted to that extent. Do you think it goes beyond that?

Mr. Hardin. I think possibly it does, but I don't want to endanger the result of this trial by insisting on it. I think the law is intended to go further than that. I think that that statute probably binds the parties in this trial to the objections to former evidence as they were made before, and by failing to make those objections at that time they have waived the right to make them now, and except so far as the law may have been changed in this case and this Court is forced to apply different rules by the action of the Court of Errors on the writ of error in this case, that these defendants are bound by that record so far as the testimony of Mr. Brown is concerned. Otherwise that statute is without value.

Mr. Coult. We do not understand it so at all. Competent testimony is to be read and incompetent testimony is to be excluded. It could not, certainly, make it of any higher character than it was; it could not place Mr. Brown in any better position than if he were on the stand testifying.

The Court. That would be my impression. I suppose there is no authority to be citied either way.

Mr. Hardin. No, sir; I think not.

The Court. I will so rule; I will take that view

of it, and grant you an exception if you think I am wrong.

Plaintiff's counsel prays an exception.

Mr. Hardin. As I understand, your Honor has ruled that the witness may answer the question asked as to whether any arrangement had been made with Dr. Herold.

The Court. Yes, I think the question is not objectionable; I do not know whether the answer will be or not.

Mr. Hardin. [Reading:]

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

"Q Was the price agreed upon at that time?"

Mr. Coult. One minute. That is not an answer to the question, and that is the extent to which the Court allowed it, whether he made any arrangement.

The Court. Well, he said that he did.

Mr. Hardin. The answer is in effect "Yes."

The Court. It is equivalent to an answer "Yes" so far.

Mr. Hardin. [Reading:]

"Q Was the price agreed upon at that time?

"A Yes, sir.

"Q What was it?"

Mr. TenEyck. Now, one minute. The price at which it was to be sold seems to us as improper to be put in this case. The damages to which they are entitled is the difference between the contract price and the market value. Now, what Dr. Herold or any other one particular buyer was willing to give cannot be competent on the question of damages in a case of this kind. That is not evidence of market value; that is a special sale. There might have been reasons why he would be willing to pay more than the market value. Mr. Honiss did not know that there was to be a sale for any special purpose.

Mr. Hardin. I will argue that it is admissible and offer it subsequently as tending to show market value, and that it is therefore relevant on the question of damages.

The Court. I will overule the objection.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Mr. Hardin. [Reading:]

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

"A Well, there was no price. I told him the price, $17,500. I told him the price would be $17,500, and he asked me to give him the option at that price, and I told him—this was after the 1st of September—and I gave it to him.

By Mr. Hardin.

"Q When did you next see Dr. Herold about the property?

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

"Q And where was it?

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

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

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

The record shows an objection, and the witness then goes on [Reading]:

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

"Q Well, you had such a conversation?

"A Yes, sir."

Mr. TenEyck. Where is that, Mr. Hardin?

Mr. Hardin. Top of page 22.

Mr. Coult. Mr. Hardin says, at the bottom of page 21, "I will prove the contract by the minutes of the Common Council."

Mr. Hardin. Yes, but the Court also says that the fact that he had a conversation was admissible.

The Court. I have heard no objection.

Mr. Coult. Just what were you reading?

Mr. Hardin. I skipped that colloquy between the Court and Mr. Hardin and went on over to the top of page 22.

Mr. Coult. May it please the Court, what led up to what is testified to on page 22 is explained by this colloquy that took place on page 21.

Mr. TenEyck. You have no objection to reading that, I suppose, Mr. Hardin?

The Court. You may read it if it is necessary to an understanding of the testimony.

Mr. Hardin. I have no objection to reading it. [Reading]:

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

"*Mr. Hardin.* Yes, sir.

"*The Court.* A verbal contract?

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

"*The Court.* You will have to do it that way. You see, this involves the sale of lands. I do not see how that conversation would be admissible, Mr. Hardin."

Mr. Coult. That is what we want to get at.

Mr. Hardin. There is no objection of that kind on this record now.

Mr. Coult. The Court intervened and said that the attempt was an attempt to prove a verbal contract, and it was a contract for the sale of lands and should have been in writing, and we make objection.

Mr. Hardin. Well, I haven't made any attempt yet.

The Court. Proceed.

Mr. Hardin. [Reading:]

"Q Well, you had such a conversation?
"A Yes, sir."

Now, shall I read that colloquy also?

The Court. Does that develop the point? Let Mr. Hardin go on until the point is developed.

Mr. Hardin. That was objected to.

[Reading:]

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

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

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

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

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

I haven't offered that at this time, except to read it at the request of Mr. Coult.

[Reading:]

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

Mr. Coult. That was objected to.

Mr. Hardin. Yes, and the objection was overruled.

[Reading:]

"*Witness.* Until that Friday afternoon, when he called on me at the Grand Jury room, I never had the slightest idea for whom he wanted the property; I thought he wanted it for himself. I had been dickering with him for ten years, but never before for a city job.

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

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

Mr. Coult. This was objected to.

Mr. Hardin. Well, he was stopped. The Court declined to strike it out.

[Reading:]

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

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

"Q At what price?

Mr. Coult. Now we come to the point where I object again; we come to the point of the power of the Common Council to buy and the authority to buy.

The Court. What is it you object to?

Mr. Coult. Any evidence tending to show that there was any contract entered into with the Common Council to sell this property to the city or any agreement made to buy this property, unless they show the authority of the city to purchase.

The Court. How do you apply your objection to the testimony that has been read?

Mr. Coult. "Did you finally come to any arrange-

ment with the city about the sale of this property?'' I think that brings the question up directly.

The Court. Do you object to the question or do you object to the answer?

Mr. Coult. He then answered that by saying—

The Court. I see no objection to the question.

Mr. TenEyck. There is an objection to the answer, your Honor, at any rate.

The Court. I don't think I have heard the answer yet.

Mr. TenEyck. Mr. Hardin read that.

Mr. Hardin. No, I didn't read the answer.

The Court. The question is proper.

Mr. Hardin. The question was, ''At what price?''

Mr. TenEyck. You read, ''I believe by resolution of the Common Council,'' didn't you?

Mr. Hardin. Yes. I read that.

Mr. TenEyck. We object to that answer. That is not proper evidence of the city's action in attempting to buy this property, if they did attempt to.

Mr. Hardin. That doesn't prove the contents of the resolution.

The Court. It does not prove the resolution, nor do I suppose that it was ever supposed to have that efficacy.

Mr. Hardin. No, sir.

Mr. TenEyck. Well, it could only be by some action of the City Council, by resolution or otherwise.

The Court. Well, I will make a ruling to this effect: that I allow this answer to stand as merely introductory, but not as legal proof, plenary proof, of a contract with the city.

Defendants' counsel pray an exception to this rul-

ing of the Court.

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Mr. Hardin. [Reading:]

"Q At what price?"

Mr. Coult. Hold on now.

Mr. Hardin. That is the same kind of an answer, and I suppose will receive the same ruling.

The Court. Well, I don't know. Now you are going into the terms of a contract which apparently ought to be formally proved.

Mr. TenEyck. The Court did strike that out, by the way, in the former suit.

Mr. Hardin. Well, do you object to it?

Mr. TenEyck. Yes.

The Court. I sustain the objection as to proof of the contents or terms of the contract in this way.

Mr. Hardin. [Reading:]

"Q Was the property conveyed to the city?
"A It was not.
"Q Why not?"

Mr. Coult. Now, I object to that. All this, may it please the Court, is apparently supplemental to a contract. Now, we want the authority to make that contract proved before there is any evidence in relation to it.

Mr. Hardin. This has nothing to do with the contract; it goes back to the option.

Mr. TenEyck. It says "conveyed to the city;" that has something to do with the contract.

Mr. Hardin. I have already read that.

Mr. TenEyck. And then you read, "Why not?"

The Court. Do you object to the question why it was not conveyed to the city?

Mr. Coult. Yes.

The Court. Do you insist on that, Mr. Hardin?

Mr. Hardin. I insist on that question; yes sir.

Mr. Coult. May it please the Court, it is improper for any evidence to be given of a contract made with the city or in relation to any offer made by the city unless they show authority on the part of the city to purchase. We want the authority, and we object to any question which goes to show such a contract with the city or any evidence in relation to what is supposed to be a contract.

Mr. Hardin. We have left the question of what is supposed to be the contract for the conveyance to the city, and the only present question is, "Was this land conveyed to the city?" and the answer is, "No," and then the question is, "Why not?"

The Court. I will overrule your objection to the question why the property was not conveyed to the city; I will allow that, and grant you an exception.

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

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

FREDERIC ADAMS, (L.S.)
Circuit Court Judge.

Mr. Hardin. [Reading:]

"A They refused to give me the deed.

"Q Who refused to give you the deed?

"A Mr. Pennington.

"Q And anybody else?

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

"Q Did you ask for your deed?

"A I did.

"Q Whom did you ask?

"A Mr. Pennington and Mr. Honiss.

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

"A May I repeat the conversation?

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

"*Witness.* Well, he told me—

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

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

"Q What is that?

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

"Q Who said that?

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

"Q What purpose?

"A For the purpose of an isolation hospital.

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

Mr. Coult. That is the same matter. I object to that question unless it is shown that there was some resolution passed.

The Court. The question assumes the existence of a resolution by the Common Council, which apparently has not yet been proved. If it is objected that it should first be shown that there was a resolution, I should incline to think that that objection would be good in regard to the order of proof,

Mr. Hardin. If the Court please, we will interrupt this reading again, and offer in evidence a resolution passed by the Common Council of the City of Newark, on the 12th day of September, 1901,

presented to the Mayor, September 12, 1901, and approved September 13, 1901, as follows—

Mr. Coult. One moment. I shall object to the offer on the ground that it is not made to appear that the Common Council had any authority to pass the resolution.

Mr. Hardin. Do you want me to prove the public laws of the State of New Jersey?

Mr. Coult. Yes, sir.

Mr. Hardin. Well, I don't have to do it.

Mr. TenEyck. We want to produce one of them for the Court's attention—the laws of 1900.

Mr. Hardin. The fact of the resolution is what I am offering now.

The Court. I will receive the resolution as evidence of action of the Common Council in reference to the subject matter of this controversy, leaving the question of the power to be considered hereafter; in other words I will receive it as a fact—as evidence of a fact.

Mr. Coult. May it please the Court, ought there to be any testimony with regard to the passage of a resolution by the Common Council unless as a preliminary to that the Court is convinced that the Common Council had power to pass the resolution.?

The Court. I see no impropriety.

Mr. Coult. In this case I think it is quite important that the order of the testimony should be directed in that way; we should have the authority to pass it first. We would not only lumber up the case, but perhaps prejudice it, if the resolution was not authorized If there is any authority it should be very easily produced before this Court.

The Court. It would be rather difficult to determine whether an act of the Common Council was authorized without knowing exactly what that act

was.

Mr. Coult. Well, they have outlined that sufficiently. We understand that they say that the Common Council passed some resolution for the purchase of this land.

The Court. I have no idea what is in this resolution except a most general idea.

Mr. Coult. Well, I have said all I need to say on the subject. I shall object to any evidence on the subject until they show authority for the passage of such a resolution. I do not think it is proper to put it in the case without showing authority. I think that that is a fair proposition.

Mr. Hardin. May I read it, your Honor?

The Court. Yes, you may read it. I will adhere to my first impression about it. I will receive it subject to future consideration as to the legal force and validity of it; in other words, I receive it as evidence of a legislative act under color of authority and as bearing on the controversy between the parties.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Mr. Hardin. [Reading:] "Resolved, That the sum of seventeen thousand five hundred dollars be and the same is hereby appropriated to William H. Brown, for the purpose of purchasing a plot of land situated between Sylvan avenue and Second river, bounded on the west by Mt. Prospect avenue and east by Summer avenue, that amount to be charged to the account known as 'Special Real Estate and Alms House.' Provided, however, that the purchase money shall not be paid until a deed conveying the property purchased shall have been delivered to the

auditor, approved by the Law department. The land to be used for Isolation Hospital purposes."

Mr. Coult. For what purpose is this offered, may I ask?

Mr. Hardin. Just now it is offered for the purpose of fixing the date, the time of the date that is referred to in Mr. Brown's testimony.

The Court. That is the way it came in. The witness was asked as to some event, I do not remember what; whether it was before or after the passage of the resolution, and an objection was made, and the ruling was that the question assumed something that had not been proved—the passage of a resolution—and I suggested that the order of proof, if that objection was insisted on, would be first to make proof of the resolution for the purpose of fixing that date.

Mr. Coult. Then I understand that all that it is offered for or admitted for is to prove the date when a certain resolution was passed.

The Court. It was offered for that purpose. Whether it is also offered for some other purpose, I do not know. It is admitted for that purpose, at any rate.

Mr. Coult. Alone?

The Court. So far as the Court is now informed.

Mr. Coult. Well, we renew our objection and take an exception.

The Court. I think you already have an exception.

Mr. Hardin. [Reading:]

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

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

Mr. Coult. Now, I object to that, and ask to have

that answer stricken out.

The Court. All of it?

Mr. Coult. All that part of it which says that they agreed to buy.

The Court. Well, I think I may grant that motion. The resolution speaks for itself.

Mr. Hardin. [Reading:]

"Q Did you see Mr. Honiss more than once?

"A Yes, sir; a number of times.

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

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

"Q Did he refuse you a deed on that occasion?"

That question was not pressed.

[Reading:]

"Q What did he say?

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

"Q Did you see him again?

"A Yes, sir.

"Q And what did he say then?

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

Then there is a little argument, and the Court held that he had the right.

The Court. Read on until some objection is made.

Mr. Hardin. [Reading]:

"*Witness.* He was his counsel.

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

"*Witness.* Certainly it was."

Do you want that?

Mr. Coult. I suppose I have got to renew those objections?

The Court. Yes, I think you are entitled to make any objection that occurs to you now, whether old or new; but if there is no objection I shall consider that the testimony is not opposed, for I know nothing of what is in that book, nor does the jury; neither the jury nor I have ever seen that book, and as Mr. Hardin reads it, if it is not objected to, it goes in the case and becomes part of the testimony.

Mr. Coult. The objection was that Mr. Pennington was not the attorney of Mr. Honiss for any such purpose.

The Court. Well, what was that an objection to; how does it come in?

Mr. Coult. It is all stated here.

Mr. Hardin. It comes in, in this way: that Mr. Honiss referred Mr. Brown to Mr. Pennington as his counsel, and Mr. Brown went and talked to Mr. Pennington in that capacity, and that conversation between Mr. Brown and Mr. Pennington is what is now offered.

The Court. Well, Mr. Brown there makes the assertion that Mr. Pennington was Mr. Honiss's attorney, does he?

Mr. Hardin. Yes, sir.

The Court. Now, what is it that Mr. Coult objects to?

Mr. Coult. It says here [Reading:]

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

"*The Court.* But Mr. Brown says that he referred him to Mr. Pennington as his counsel."

My objection was that he had no right to say what Mr. Pennington said on such testimony as that. It is not shown that Mr. Pennington was in any way authorized to speak in regard to this particular matter.

The Court. Mr. Brown is testifying to his understanding of Mr. Pennington's relation to the parties defendant.

Mr. Hardin. And the source of Mr. Brown's information was Mr. Honiss.

The Court. That is what he understood, and Mr. Pennington, who was a professional gentleman, appears to have been acting in a representative capacity in reference to this matter.

Mr. Coult. He said he represented Mrs. Ranney only.

The Court. You mean that Mr. Pennington had previously said so?

Mr. Coult. I understand so.

Mr. Hardin. That is not the evidence.

The Court. Well, that is neither here nor there. We are dealing with Mr. Pennington's testimony today, are we not?

Mr. Hardin. Yes, sir.

The Court. I will overrule the objection; I do not see that it raises anything that I can deal with.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Mr. Hardin. [Reading:]

"*Witness.* When I went to Mr. Pennington he

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

"Q Did you see Mr. Honiss again?

"A Yes, sir.

"Q And what did he say?

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

"Q What did he say?

"A He kept saying that he couldn't do it on account of Mr. Tiffany; that he did a great deal of business with Mr. Tiffany, and he didn't want the thing done; he had no objection himself.

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

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

"Q What did he say?

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

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

"A Before the money had been tendered?

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

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

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

"A Yes, sir.

"Q In accordance with this option?

"A Yes, sir.

"Q Do you remember when that was?

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

"Q Where was that?

"A At Mr. Pennington's office.

"Q (Paper shown to witness.)"

That paper has a mark on it so that it can be identified; it was this paper [producing paper].

The Court. What you have called a demand for a deed?

Mr. Hardin. Yes, sir.

[Reading:]

"Q Does that help you to recall the date?

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

That paper was then offered in evidence, and I now offer it in evidence.

[Marked Ex. P.4.]

Mr. Hardin. [Reading:]

"Q What was done on that occasion?

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

"Q Who told you that?

"A Mr. Pennington."

Mr. Coult. [Reading:]

"*Mr. Coult.* That was not inquired about.

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

Mr. Hardin. [Reading:]

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

"A I don't know whether he did or whether Mr.

Honiss did. One of them told me, I understood, that it was Mr. Snyder, Mr. Heller and Mr. Tiffany had given the bond."

Mr. Coult. This was objected to as incompetent, and I want to put in a further objection to the testimony on the ground that they had no right to show in this case that any bond of indemnity had been taken; it had nothing to do with the issue in this case.

The Court. Well, this is a part of Mr. Pennington's or Mr. Honiss's conversation with Mr. Brown, what they said, is it not?

Mr. Hardin. Yes, sir.

The Court. Not independent evidence; it was what they said to Mr. Brown, one of them, in reference to this controversy. I do not see why everything that either Mr. Honiss said about this affair or that Mr. Pennington said within the scope of his attorneyship is not competent. If it had been offered as an independent item of proof it would have presented another aspect.

Mr. Coult. Does the Court admit the testimony? I want to make a formal objection to the testimony, to the answer of the witness or to any proof on that subject.

The Court. Well, to this proof. We have not yet come to the question whether any other proof will be offered. You may make it as a danger signal, if you please.

Mr. Coult. Or any statement to that effect by this witness.

The Court. Well, I will overrule the objection, and receive the testimony as a declaration by either one of the parties or his attorney in reference to the subject matter of the controversy.

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

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

accordingly.

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Mr. Hardin. [Reading:]

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

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

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

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

The witness was interrupted.

[Reading:]

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

That is the end of the direct examination.

Mr. Coult. [Reading:]

"*Cross Examination by Mr. Coult.*

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

"A Yes, sir.

"Q How long have you been engaged in that business?

"A Twenty-five years or more, perhaps.

"Q What?

"A About twenty-five years or more,

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

"A Yes.

"Q Is that your steady business?

"A Sir?

"Q Are you steadily employed in that business?

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

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

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

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

"A No, sir.

"Q Eh?

"A No, sir.

"Q And Sylvan avenue or in that vicinity?

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

"Q What?

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

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

"A No, sir.

"Q Did you attempt to get one?

"A No, sir.

"Q Eh?

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

"Q Did they adjoin?

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

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

"A It was some time in August, the fore part of August.

"Q Wasn't it earlier than that?
"A No, sir.
"Q Are you sure of that?
"A I am positive of it.
"Q Have you anything to fix your date?
"A Well, I know it was three or four weeks; I had had this option on this property at least three or four weeks before I ever had any conversation with Dr. Herold about it.
"Q I understood you to say that you obtained this option for some other purpose?
"A I obtained it for another purpose; that is, I was looking for the option for another purpose.
"Q What other purpose?
"Objected to as immaterial.

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

Mr. Hardin. I do not make that objection now.

Mr. Coult. [Reading:]

"Q Well, you say some other purpose; what other purpose?
"A I was looking for a manufacturing site.
"Q Was it for yourself or for some customer of yours?
"A It was for a customer, a friend.
"Q A friend of yours, eh?
"A Yes, sir; a customer; he is a friend, a personal friend.
"Q Who was that friend?
"A I decline to answer that.
"Objected to as immaterial."

Mr. Hardin. Leave that out; there is no use in putting that in. I do not make any objection to it now.

Mr. Coult. [Reading:]

"*The Court.* Is that essential?

"*Mr. Coult.* It may become material before we

get through; it may not be now, but the Court will allow me some little leeway in the cross examination."

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

Mr. Hardin. Mr. Coult, if you will permit me: In reading the direct examination I left out the rulings of the Court before.

Mr. Coult. Well, it seems to me quite proper that they should be read, because they are explanatory of the testimony just at that particular point in many instances. I will do as the Court says about it; that I must do.

The Court. Well, as a general rule, I should say that all that the Court and jury are now interested in, is the testimony. If the answer is not intelligible, I think that may be made the subject of an application to the Court, but I think as a general rule you should leave out everything but the testimony itself. If you come to anything that you think the jury and the Court cannot understand without hearing what the Court said, you may read it.

Mr. Coult. This colloquy I will leave out, then.

[Reading:]

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

That is, referring to the person for whom he was purchasing, as I understand.

[Reading:]

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

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

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

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

"A This plot I had the option on?
"Q Yes.
"A Mr. Honiss.
"Q John Honiss?
"A Yes, sir.
"Q Where?
"A At his house.
"Q Where does he reside?
"A Corner of Carteret street and, I think, Lincoln avenue.
"Q When was that?
"A Some time in June.
"Q How long before the option was obtained?
"A Perhaps a couple of weeks.
"Q Did you tell him for what purpose the property was to be used?
"A I did not until it was agreed to give us the option, and then he said in an incidental way, as though it was none of his business, 'What do you propose to do with this property?'
"Q Did you tell him what purpose the property was to be used for?
"A I am trying to tell you how it came about.
"Q I want an answer to that question.
"A I told him I was looking for a manufacturing site. He asked me in an incidental way, not that he cared or it didn't make any difference about the property.
"Q He asked you for what purpose the property was to be used, and you told him it was to be used for a manufacturing site?
"A I told him I was looking for a manufacturing site.
"Q Did you say to him at that time or at some subsequent time that the person for whom you were purchasing was abroad?
"A Yes, sir.
"Q Eh?
"A Yes, sir. Do you want to know what else I said to him about it?
"Q Oh, I will ask you lots of questions about it.
"A Well, I want to tell it.

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

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

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

"A I did not; no, sir.

"Q Did you ever see such plans?

"A Never did in my life; no, sir.

"Q Eh?

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

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

"A An extension.

"Q Why was that?

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

"Q Why did you obtain an extension?

"*Witness.* Now, your Honor, I am placed in an embarrassing position.

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

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

"*By the Court.*

"Q Was it in consequence of a conversation with Dr. Herold?

"A Yes, sir; if he took the property—

"*By Mr. Coult.*

"Q One moment. It was in consequence of some

conversation you had with Dr. Herold?

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

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

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

"Q One moment.

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

"*The Court.* Mr. Coult has a right on cross examination to a responsive answer, and if there is something else to be brought out, Mr. Hardin will have to look out for it on redirect, Mr. Brown.

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

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

"A No, sir.

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

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

"*Mr. Coult.* No.

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

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

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

"Q What month?

"A October.

"Q October?

"A Yes, sir.

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

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

"Q You had made no application for it?

"A No, sir.

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

"A No, sir.

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

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

Mr. Hardin. [Reading:]

"*Redirect Examination by Mr. Hardin.*

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

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

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

"A What do you mean, the first option?

"Q Yes.

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

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

"A Well, I am a little undecided about that. My recollection of it was that it was whilst Mr. Pennington was in the back room dictating this first option. I may be mistaken about that.

"Q Was it on the day the option was executed?

"A Yes, sir. And I think Mr. Honiss asked me, 'Mr. Brown, what are you going to do with this property?' I said, 'I am looking for a manufacturing site.' I think

that was the time, but I am not positive about that; it might have been earlier than that.

"Q Now, you got an extension of this option?

"A Yes, sir.

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

"A The 4th of September.

"Q Yes, that is the day of its date.

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

"Q That is, the extension?

"A Yes, sir; and he certainly has misunderstood—

"*Mr. Coult.* One moment.

"*Witness.* But I wanted to set that right.

"*The Court.* Don't argue the question."

Mr. Coult. [Reading:]

"*Recross Examination by Mr. Coult.*

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

"A Yes, sir.

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

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

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

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

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

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

"Q Did you tell him what you wanted it for?

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

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

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

Mr. Hardin. You read the ruling of the court on the former trial.

Mr. Coult. Yes. I move now to strike it out.

The Court. Well, just what is it that you move to strike out?

Mr. Coult. I asked him [reading:]

"Q Did you tell him what you wanted it for?

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

The Court. The first word of the answer answered the question; he said, "No."

Mr. Coult. I move to strike it out.

The Court. Yes.

Mr. Hardin. I think it is not proper to stop at the first word. He said, "No, sir; he didn't ask me." I think that is responsive.

The Court. Oh, yes, that is all right.

Mr. Coult. [Reading:]

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

"*Mr. Coult.* No, not now.

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

Mr. Hardin. [Reading:]

"*Further Direct Examination by Mr. Hardin.*

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

"Objected to.

"*Witness.* It was with reference to the—

"*The Court.* I think I will admit it.

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

"*Mr. Coult.* One moment."

Do you object again?

Mr. Coult. I said, "One moment." That is all I said there.

Mr. Hardin. [Reading:]

"*By the Court.*

"Q This is a conversation with Mr. Honiss?

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

Mr. Coult. I moved to strike that out and the Court admitted it.

Mr. Hardin. That is the end of this testimony.

Adjourned until to-morrow, Friday, November 4, 1904, at ten o'clock, A. M.

Second Day

Friday, November 4, 1904.

Met pursuant to adjournment.

Present, counsel as before stated.

Mr. Hardin. I would now offer in evidence a resolution of the Common Council of the City of Newark, passed on the 7th day of November, 1901. That is the rescinding resolution.

The Court. Is that another resolution?

Mr. Hardin. Yes, sir.

Mr. Coult. We object to this resolution, as well as to the other; we object to them both; one is a resolution attempting possibly to appropriate and the other to annul.

The Court. I will admit the resolution subject to your exception and subject, of course, to whatever you may have to say or show to the Court as to the power of the Common Council to deal with this subject.

Mr. Coult. I can do it now. I object to it unless they show the power of the Common Council. I think it ought not to be admitted and go in the case tentatively. The law is very explicit about this, and they have not laid before the Court facts sufficient to authorize the Common Council to take any action at all.

The Court. My view yesterday about the other resolution—which, perhaps, strictly, was only offered to prove a date, but I expressed myself more-broadly than necessary for that question—my idea about it was that I would receive proof of the passage of the resolution as a fact in the case, subject to be controlled by what conclusion the Court might come to as to the power of the Common Council, just as you might receive proof of the fact that the State of South Carolina passed a resolution of secession; it is a governmental fact, without admitting or denying the power of the state to take itself out of the Union.

Mr. Coult. The mere fact of the passage of a resolution on this subject at either one of these times would be of no weight at all. The evident object of this is and the only object can be for the purpose of showing that there was some agreement to take this property on the part of the city. We object to its going into the case for that purpose. Certainly, it would be of no use to them or to us to show that there was an unauthorized resolution passed.

The Court. If it turns out to be unauthorized it will

go out of the case.

Mr. Coult. Well, I would like to put it out of the case now, if your Honor will permit me.

The Court. I am inclined to receive it, Mr. Coult, and leave that question for future consideration.

Mr. Coult. I object to its receipt, and ask for an exception, on the distinct ground that I offer to prove to the Court and to show to the Court that the Common Council had no authority whatever to pass any resolution on this subject.

The Court. Read the resolution.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

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

The resolution was subsequently approved by the

Mayor. I presume that date is immaterial

Defendants' counsel ask for what purpose said resolution is offered.

Mr. Hardin. It is offered for the general purposes of the suit to sustain the plaintiff's cause of action.

SAMUEL H. PENNINGTON recalled in behalf of plaintiff.

Cross Examination by Mr. TenEyck.

Q Mr. Pennington, had you any authority to execute a deed for this property?

Objected to.

A I stated yesterday that I had not.

Objected to as immaterial and irrelevant.

Objection overruled.

Plaintiff's counsel pray an exception.

Q Well, you can answer that, Mr. Pennington.

A As I stated here yesterday, I had no power-of-attorney to make a deed.

Q Did Mr. Brown at any time ever tender you a deed for execution?

Objected to as immaterial and irrelevant.

Objection overruled.

Plaintiff's counsel prays an exception.

By Mr. Coult.

Q Was there any deed tendered to you?

A No deed was tendered to me for execution. If I remember the option correctly, it requires the execution of a deed, but says nothing about its preparation.

Q I can't hear you.

A If I remember the terms of the option correctly, the option requires the execution of a deed, but says nothing with regard to its preparation.

Mr. Hardin. I move to strike that answer out. The option speaks for itself and is in evidence.

The Court. The option is the evidence of its own contents. Strike out the latter part of the answer; the question is fully answered by the first part of the answer.

Redirect Examination by Mr. Hardin.

Q Do you recall whether anything was said at the time that you were asked for this deed, on the occasion in your office to which you referred yesterday, whether anything was said at that time about the willingness of the parties to the option to deliver a deed?

Objected to as not proper redirect examination.

The Court. [After discussion]. The witness having been asked on cross examination whether a deed was tendered and having said no, I think you are entitled to ask whether anything was said on that subject.

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

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

FREDERIC ADAMS, (L.S.)
Circuit Court Judge.

The Court. You may answer the question.

A Do I understand the question to relate to the time when that tender was made of money, or is it a general question?

Q [Question read.]

A As I had been previously instructed by Mr. Honiss, I definitely refused on his part to convey the property for the purpose of an isolation hospital. I gave no answer with regard to the other defendant.

Q Had you before that occasion said the same thing to Mr. Brown?

A I had not.

Mr. Coult. That is not proper redirect examination.

Mr. Hardin. It is still with reference to the deed.

Mr. Coult. No, it was allowed as part of the same conversation, as I understand it.

The Court. It seems to me that would logically permit inquiry, not as to any subsequent, but as to

any previous conversation on that subject between the parties. I will allow the question.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

[Question and answer read.]

Witness. May I explain that answer, your Honor?

The Court. If Mr. Coult or Mr. Hardin asks you.

Mr. Hardin. I have no objection. I haven't any doubt but that Mr. Pennington will give us the facts as he remembers them. His explanation is satisfactory to me.

The Court. You may make your explanation.

Witness. No refusal had been made previous to this occasion. There had been considerable conversation about it, and the parties—at least, Mr. Honiss, and also the other party through me, had expressed reluctance to convey, but never had refused.

Q You recall testifying in this cause on the previous trial?

A I do.

Q Do you recall testifying in response to this question, in response to a question asked by Mr. Coult on your direct examination on behalf of the defendants:

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

"*Answer.* The reasons had been given previously. On the occasion when Mr. Hardin and Mr. Brown together made the tender to me of the $12,500, nothing was said about the reasons, I think, excepting I may have said at that time, as I had said before, that we refused—that Mr. Honiss refused to convey for the purpose of a

hospital, an isolation hospital; but whether that, even, was said at that particular time, I couldn't say; but I had frequently expressed to Mr. Brown the reason why they refrained from making a conveyance?''

A Why they refrained.

Q You recall that question and answer?

A Yes, sir.

Q That question and answer is in accordance with your recollection of the facts?

A The answer is, but if the question implied that there had been a definite refusal, the error is in the question, but not in my response.

Q It is true, then, is it not, that prior to the occasion when the $12,500 was tendered at your office, that you had frequently expressed to Mr. Brown the reason why they refrained from making a conveyance?

A Undoubtedly, Mr. Brown fully knew the reason from what had been told him.

Q Do you remember when you first stated to Mr. Brown the reason for the refusal to make a conveyance?

A After it had developed that the property was wanted by the city or Mr. Brown for the purpose of an isolation hospital, I had an interview with Mr. Brown, he calling at my office, and at that time, in expressing reluctance to make the conveyance for this purpose, I explained to him the reason; but no refusal was made until the time that tender was made of the money.

Q Do you remember what was said to him at that time?

A I can't remember the precise words—

Mr. Coult. One moment. What the witness said at that time would not be proper. Would what he said to Mr. Brown at that time be competent? He is not a party to this suit.

Mr. Hardin. He was the agent of the parties. We disposed of that yesterday.

Mr. Coult. I do not think so. I ask the Court whether that is a competent question? I object to it. I do not know anything about what the answer

will be.

The Court. I will overrule the objection.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Q [Question read.]

A I told Mr. Brown, in the presence of Mr. Honiss and speaking for him, that a few years previously the parties of this option had conveyed the greater portion of the entire tract, of which the property embraced in the option was a small residue—had been sold to Mr. Tiffany; that these parties had received Mr. Tiffany's money, and that they did not think it was a right thing for Mr. Tiffany, having sold the property to him and received their money, to sell the residue of the property for a use which would be very detrimental to him, as he had made extensive and valuable improvements there.

Q Well, the character of the use was referred to in this conversation?

A It was.

Q And what was that use?

A The use of an isolation hospital, a hospital for the treatment of contagious diseases.

Q Do you remember anything further that was said on that occasion?

A Well, there was so much said that unless my attention was particularly called to it, I don't know that I could state it from memory.

Q Do you recall on the former trial of this case having stated in describing the conversation which you have been describing: "And, further, Mr. Brown urged upon me the duty and the—"

Mr. Coult. I object to this method of examination.

Mr. Hardin. This witness is the agent of the other party, and I have the right to cross examine

him if I want to.

The Court. What is your objection, Mr. Coult?

Mr. Coult. I object to this method of examination. The witness is called by the plaintiff. He is not examining him now; he is cross examining him, and asking him whether he testified to this and that in the former trial. He is here to testify in response to questions without regard to any former trial. He is a witness called by the plaintiff; he is not under cross examination, and I object to that method of examination.

The Court. Your objection virtually is that the question is leading, is it not?

Mr. Coult. Well, perhaps so, but it is worse than that. He is asking whether this witness did not testify so and so, reading from his former testimony, and asking him whether he recalls what his testimony was at the former trial. I have never known of any examination of that kind in chief of a witness on a former trial called again to testify by the party himself, using his former testimony, except it may be on the theory that Mr. Hardin seems to put it: that he is a party to this suit, and therefore that he has a right to cross examine him as a hostile witness. If that is the ground upon which he puts it, I object to it. I object to it on any ground as improper, an improper method of examination.

The Court. It seems to me that the question is essentially whether this question is leading. Leading questions are sometimes objectionable and sometimes not, when asked, I mean, by the side on whose behalf the witness is called. The rule, as I understand it, is to ask questions that are not leading as to the topic that is under consideration, and having got in that way as much information as the witness is able to give, then if the counsel desires to particularize and call the witness's special attention to this feature or that feature of the matter, he may direct his mind to

it by questions that are leading in form.

Mr. Hardin. That is my understanding.

The Court. I think this is substantially a leading question within the rule.

[By request of defendants' counsel, the stenographer reads the question.]

Mr. Coult. He is reading from his former testimony.

The Court. I understand that, and of course I understood that in making my ruling. Complete the question; the question is incomplete.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Q "And, further, Mr. Brown urged upon me the duty and the honorable obligation of fulfilling this option. I told him that we considered our duty to Mr. Tiffany, under the circumstances of the case, as more cogent and more obligatory in morals and in honor than it was to convey this property under the option to him." Do you recall having said that?

A I do recall that. I don't remember at this time whether that remark was made at that first interview after the purpose of the purchase was discovered or whether it was at a subsequent time; but it was previous to the tender of the money.

Q You have stated that you made no refusal on the part of Mrs. Ranney to make a conveyance?

A My refusal was on the part of Mr. Honiss, the only one for whom I—

Q Directing your attention to your former examination. Do you recall having testified thus in reply to a question by Mr. Coult:

"*Question.* Why Mr. Honiss refrained?"—

Mr. Coult. This is subject to the same objection that I made before, as cross examination of his own witness.

The Court. I make the same ruling.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

"*Answer.* Why both of them refrained. Mr. Honiss on the occasion when the tender was made, made his absolute refusal, but before that time the parties had refrained from making the conveyance, although they hadn't finally refused."

Q Do you recall that?

A I do. They merely did refrain; they did not refuse.

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

Direct Examination by Mr. Hardin.

Q Dr. Herold, where do you reside?

A 75 Congress street, Newark.

Q And what is your occupation?

A Practicing physician.

Q How long have you been such?

A Since 1878.

Q Did you know William H. Brown in his lifetime?

A Yes, sir.

Q Do you occupy any official position in Newark?

A Yes, sir.

Q What is it?

A President of the Board of Health of Newark.

Q Were you President of the Board of Health during the year 1901?

A Yes, sir.

Q Do you recall the fact that the Board of Health during the summer of 1901 was engaged in an effort to find a site for an isolation hospital?

A Yes, sir.

Q Did you have anything to do with that effort?

A Yes, sir.

Q As President of the Board of Health?

A Yes, sir.

Q Do you recall whether the land in the City of Newark bounded by Mt. Prospect avenue, Sylvan avenue, Summer avenue and Second river was considered with reference to the locaction of an isolation hospital there?

A It was.

Q Did you by reason of your official position have any negotiation with Mr. Brown with reference to that property?

A Yes, sir.

Q Do you remember when that negotiation was, what part of the year?

A That was on three occasions, I think.

Q Well, do you remember the first one?

A Not accurately.

Q Do you remember the month?

A I think it was in August.

Q And when was the second, as to the month?

A That was either at the end of August or the beginning of September.

Q And when was the third time?

A The afternoon of the day that the council passed the resolution; I think it was October 17th—September 17th. I may be in error about that; I don't remember the month.

By the Court.

Q 1901?

A 1901; yes, sir.

By Mr. Hardin.

Q Do you remember when you first disclosed to Mr. Brown the purpose for which you desired to use this property.

Mr. Coult. One moment. I suppose this leads up to and is part of some conversation between the

witness and Mr. Brown.

The Court. This particular question can be answered yes or no, whether he remembers the date when a certain communication was made by him to the plaintiff's testator.

Mr. Coult. That would be immaterial unless it was for some purpose. I would object to it as immaterial.

The Court. It might be introductory; it is not necessarily immaterial. I think the witness may answer the question either yes or no, whether he remembers.

[Question read.]

A Yes, sir.

Q When was it?

Mr. Coult. I object to that on the same ground, on the ground that the conversation and the time is immaterial unless it is connected with some testimony that is to be material for fixing the date, and that that purpose ought to be disclosed.

The Court. The question is not concerning a conversation, but concerning something said by the witness to Mr. Brown; it does not ask what Mr. Brown said or what the witness said to him. Whether it will be hereafter connected with something else, the Court cannot forsee and need not anticipate. The case cannot be put in all at once.

Mr. Coult. Well, should not the purpose be disclosed to the Court and the offer made on the basis that it will be connected?

The Court. I will not require counsel to do that.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

[Question read.]

A The date of my last visit to Mr. Brown on that matter.

Q That is the day that the resolution was passed by the Common Council?

A That evening; yes, sir.

Q At any of these interviews with Mr. Brown did you receive from him a price at which he would sell this property?

Objected to.

Objection sustained.

Cross Examination by Mr. TenEyck.

Q Dr. Herold, you say that you first began to talk with Brown in August about this matter, is that so?

A I can't recollect the exact date, but I think it runs in my mind that it was in August.

Q You are sure it was in August?

A I can't recall accurately.

Q Do you know when the second one was?

A I can't recall the dates, but I can tell you where it happened.

Q You can say what?

A I say I can't recall the dates, but I can tell you where it happened.

Q Can you tell me the time of the year, the month?

A No, I can't give you the month, even. I think it was in August; I am not positive; I can't recollect.

By Mr. Coult.

Q As a member of the Board of Health, President of the Board, you had had plans prepared for an isolation hospital, I understood you to say?

A Yes, sir.

Q When were those plans prepared?

A They were ordered prepared soon after the formation of the committee, which was in May. No plans were prepared, but sketches—

Q Please just answer my question. Be careful about that, will you, because I don't want you to answer anything more than the question. In May?

The Court. They were ordered prepared soon after the appointment of the committee, which was in May. The witness has not yet said when they were prepared.

Q When were they prepared?

A Soon after that.

Q When?

A I can't recall, Mr. Coult; that is three years ago.

Q What?

A I can't recall what time they were ordered prepared.

Q You can't tell?

A No, sir.

By the Court.

Q Not when they were ordered prepared, but when they were prepared.

A That I don't know.

By Mr. Coult.

Q Who prepared them?

A The Messrs. Ely, John and Wilson Ely.

Q Architects?

A Architects; yes, sir.

Redirect Examination by Mr. Hardin.

Q Doctor, if the second interview that you have referred to with Mr. Brown was not in the month of August, when was it?

Objected to as not redirect examination.

[Question withdrawn.]

Mr. Hardin. Is it necessary to call the Secretary of the Board of Health to prove these minutes? He is here.

I offer in evidence a minute of the Board of Health of Newark at the meeting of May 17, 1900.

Mr. Coult. I object to it on the ground that it is incompetent, immaterial and not authorized. It does not appear that the Board of Health had any power to pass a resolution on this subject or do anything. You might just as well have a letter from the files of

that department on any other subject. It has no relevancy whatever, unless it is shown to be competent in some way and authorized.

[Plaintiff's counsel hands a book to the Court.]

The Court. I will receive it.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Mr. Hardin. [After discussion.] I think I will have to recall Dr. Herold to the stand in order to make this motion intelligible.

HERMAN C. H. HEROLD recalled in behalf of plaintiff.

Direct Examination by Mr. Hardin.

Q Doctor, were you present at a meeting of the Board of Health held on the 17th of May, 1900? I will show you the minutes of the board [book shown to witness.]

A Yes, sir.

Q Did you on that occasion read to the board an act of the legislature entitled, "An Act to authorize and provide for the establishment and maintenance of hospitals for contagious diseases in cities in this state?"

Mr. Coult. I object to it.

The Court. Isn't that irrelevant?

Mr. Hardin. No, sir; it is not irrelevant, because the motion follows referring to that act, so that to make the motion intelligible I have got to prove—

The Court. Well, your minutes are in evidence; I have received them against objection. I understood you to offer them.

Mr. Hardin. Yes, I offered them.

The Court. And I received them.

Mr. Hardin. I was going to offer, not the minute, but the resolution, and so was making the resolution intelligible.

The Court. You produced a minute of the Board of Health of May 17, 1900. I thought that you offered them, and counsel on the other side apparently thought so, for he objected.

Mr. Coult. He offered the resolution, as I understand it.

The Court. I intended to receive it.

Mr. Hardin. Yes, I offered the resolution. Mr. Coult is right about that. I was about to offer the resolution, and my purpose in calling the Doctor was to show what preceded the resolution.

The Court. I suppose the minute showed the resolution; does it or not?

Mr. Hardin. Yes, it does by reference, but if you take the resolution by itself alone, it is not intelligible.

The Court. Well, I will pass on any offer you wish to make.

Mr. Hardin. I have asked a question and it is objected to.

Mr. Coult. The question is whether he read before the board some law of the State of New Jersey.

The Court. If you offer the minutes I will receive them.

Mr. Hardin. I will offer the minutes and read it: "The President invited Dr. Zeh to occupy the chair, and he then read an act of the legislature entitled 'An act to authorize and provide for the establishment and maintenance of hospitals for contagious diseases for cities in this state.' Moved and seconded that a committee of three doctors be appointed to prepare the necessary resolution and lay the matter

before the Common Council. An amendment was made and seconded that the President be one of the committee. Amendment carried. The motion as amended was then carried."

Mr. Coult. The Court takes this subject to my objection.

The Court. Subject to your objection and exception.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

The Court. What is the act referred to?

Mr. Hardin. Chapter 132 of the Laws of 1900, page 321.

Mr. Coult. What is the purpose of this offer?

Mr. Hardin. The minute discloses the purpose.

The Court. To show some action, I presume, on the part of the Board of Health affecting the merits of this case.

Mr. Hardin. Yes, sir.

Mr. Coult. Well, I understand that the witness is asked whether he read before the Board some law.

Mr. Hardin. That question is withdrawn, and I offer the minute now.

Mr. Coult. For the same purpose?

Mr. Hardin. Yes, I recalled this witness for the purpose of showing that he read this act; that you objected to and it was withdrawn, and I now read the whole minute.

Mr. Coult. And that is admitted subject to our objection.

Mr. Hardin. Yes, sir.

CARLENE K. BROWN sworn in behalf of plaintiff.

Direct Examination by Mr. Hardin.

Q Mrs. Brown, you are the widow of William H. Brown.

A Yes, sir.

Q And the plaintiff in this action?

A I am.

Q Do you know Mr Honiss?

A I never met Mr. Honiss but once.

Q When was that?

A He called at my house about a year ago.

Q Since Mr. Brown's death?

A Yes.

Q When did Mr. Brown die?

A Eighteen months ago.

Q Did you have at that time any conversation with Mr. Honiss about this suit?

A A short conversation.

Objected to.

Mr. Hardin. I propose to prove by this witness that Mr. Honiss then stated—

The Court. I would not state what you mean to prove. You mean to prove some statement by Mr. Honiss?

Mr. Hardin. Yes, sir.

Mr. Coult. Hadn't you better have Mr. Honiss on the stand to prove whether he had any such conversation?

Mr. Hardin. You can do that.

Mr. Coult. You can't prove it in advance, can you?

Mr. Hardin. I don't think Mr. Honiss will contradict this lady.

Mr. Coult. I understand it is for the purpose of stating what conversation she had with Mr. Honiss with relation to the subject matter of this suit.

The Court. He is a party to the suit. You do not have to lay any foundation.

[Objection withdrawn.]

Mr. Hardin. I will withdraw Mrs. Brown.

LOUIS SCHLESINGER sworn in behalf of plaintiff.

Direct Examination by Mr. Hardin.

Q Mr. Schlesinger, where do you reside?
A 74 Clinton avenue.
Q What is your occupation?
A Real estate and insurance business.
Q Where is your office?
A 749 Broad street.
Q Did you know William H. Brown in his lifetime?
A I did.
Q Were you at one time in business with him?
A Yes, sir.
Q In partnership?
A Yes, sir.
Q When did that partnership terminate?
A December 31, 1899.
Q Are you familiar with the property in the City of Newark bounded by Mt. Prospect avenue, Sylvan avenue, Summer avenue and Second river?
A I am.
Q Have you seen it?
A Yes, sir.
Q [Map shown to witness.] I show the witness Exhibit P. 1. Does that map represent the property you referred to?
A Yes, sir.
Q When did you last see this property?
A Yesterday morning.
Q Are you able to tell us what that property was worth in October, 1901.
A I think so.

Mr. Coult. I suppose this question is with reference to its market value?

Mr. Hardin. Yes, sir.

Q What was it worth?
A About $18,000.

Cross Examination by Mr. Coult.

Q Did you see the property at that time?
A Yes, sir.
Q Did you go up and look at it at that time?
A Yes, sir.
Q It is fronting on Sylvan avenue, isn't it?
A It has three fronts.
Q Will you answer my question? The main front is on Sylvan avenue, isn't it?
A Yes, sir.
Q And it is bounded on one end by Mt. Prospect avenue?
A Yes.
Q And on the other by what avenue?
A Summer avenue.
Q Summer avenue?
A Yes, sir.
Q Now, it runs from the avenue down to the river in a steep descent, does it not, quite a steep descent?
A Yes.
Q How wide is it; what is the width of the lot from the avenue down to the river?

The Court. That is, on the north and south line?

Mr. Coult. On the north and south line.

A What is the width? I don't quite catch your—Here is the map. What do you mean, Mr. Coult?

The Court. From Sylvan avenue to Second river.

Q What is the depth?
A Oh, it varies from 170 feet to about 200 feet.
Q It is along the line of Second river, is it not?
A Yes, sir.
Q Second river runs right in the rear of it?
A Right here [indicating on the map.]
Q Do you know whether there is a sewer running along the river on that side of the property?
A Yes, there is what is called the Orange outlet sewer;

there is a sewer on Sylvan avenue and there is a—

Q Will you answer my questions? I won't ask you any others, and I don't want you to answer any others. In the construction of that Orange outlet sewer is there not a reservoir or receiving basin near the line there?

A I think there is.

Q You spoke with reference to what date, October, 1891?

A About that time.

Mr. Hardin. 1901.

Q 1901, I mean.

A 1901; yes, sir.

Q What was the condition of Sylvan avenue at that time, do you know?

A It was ungraded at that time.

Q Without curbing or flagging?

A Yes.

Q Or paving?

A No paving.

Q Was your valuation put upon this property by the lot valuation?

A Yes.

Q Then your idea would be to retail it in lots?

A Yes.

Q Have you any knowledge of the sale of lots in that vicinity at that time?

A To some extent.

Q Well, do you recollect any sales in that immediate vicinity of lots? I speak with reference to that immediate vicinity.

A Nothing nearer than the south side of the Erie Railroad; that is the nearest; on both—

Q That is on the other side of Sylvan avenue?

A The other side of Mt. Prospect avenue, on the south side of the Greenwood Lake branch of the Erie Railroad.

Q How far from this property?

A Probably a thousand feet.

Q In what direction?

A South.

Q In a southerly direction?

A Southerly direction.

Q And what property was that, what number and what street?

A Well, it was on—I know of sales on both Mt. Prospect and on Summer avenues, but I can't recall the numbers just at this time.

Q On Mt. Prospect avenue and Summer avenue?

A Yes.

Q Did you know of any on Sylvan avenue?

A No sales.

Q How long had that property been in that condition at that time?

A I don't know.

The Court. Which property do you refer to?

Mr. Coult. This lot, this described lot.

Witness. I don't know.

Q How long does your memory extend back?

A Well, I think it was in a section of what was called Bird's woods once upon a time, when I was a boy.

Q Have you known it ever since Sylvan avenue has been laid out?

A I think so.

Q How long is that?

A Well, I don't know—I knew that street was called Sylvan avenue as long as twenty years ago.

Q Then there had been no change in that property for twenty years, so far as you know?

A Not as to this particular parcel.

Redirect Examination by Mr. Hardin.

Q Had there been any changes in the neighborhood in twenty years?

A Oh, considerable.

Q Changes for the better or worse?

A For the better; the trolley service has been extended.

Q How near did the trolley come to this property—what line?

A The so called Forest Hill line now. Probably within 500 feet. The sewers have been introduced in some of those streets and various buildings have been erected within easy access to it.

Q Is there any large improvement of property nearby?

A The Tiffany works is but a short distance from there.

Q How far away?

A I should say within 500 feet.

Q What kind of works are the Tiffany works?

A I believe their silverware department.

Q Is that a large or small factory?

A Oh, a very large works.

JAMES A. BERRY sworn in behalf of plaintiff.

Direct Examination by Mr. Hardin.

Q Mr. Berry, where do you reside?

A 239 Garside street, this city.

Q What is your occupation?

A Real estate and insurance.

Q Where is your office?

A 41 Clinton street.

Q How long have you been in that business?

A Over thirteen years.

Q The witness is shown Exhibit P.1. [shown to witness]. Are you familiar with the property bounded by Mt. Prospect avenue, Sylvan avenue and Summer avenue and Second river, shown on the map Exhibit P.1.?

A Yes, sir.

Q Are you acquainted with values in that part of the city?

A Yes, sir.

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

A I think I figured it up—

Mr. Coult. What value, I would like to know, what kind of value?

Witness. My value, I will give you.

Mr. Hardin. The value in October, 1901.

Mr. Coult. I think the rule must be the market value of the property.

Mr. Hardin. That is what the witness will give us.

By the Court.

Q You are asked to state the market value.
A I figured it at that time at, I think, $18,500.

Cross Examination by Mr. Coult.

Q Did you ever sell any lot in that vicinity?
A I did.
Q Where?
A Southerly from there.
Q Where?
A Below the line of Verona avenue.
Q On what street?
A On Mt. Prospect avenue.
Q How far down Mt. Prospect avenue?
A At the corner of what would be Irving street.
Q Irving street and Mt. Prospect avenue is where you sold a lot?
A That is where I sold the lot.
Q That is, one lot?
A There were two, I believe.
Q What?
A There were two in one plot.
Q Any other property?
A I don't recall any in that immediate vicinity just now.
Q Then your entire information about the sale of lots is derived from two lots on Mt. Prospect avenue at the corner of Irving street?
A I wouldn't agree to that.
Q What?
A I wouldn't agree to that.
Q So far as the sale of lots is concerned?
A Those were the two that I sold.

Q Did you know of any other sales?

A Well, it is a section in which lots are readily salable.

Q What?

A It is a section in which lots are readily salable.

Q What section?

A The Forest Hill section.

Q The Forest Hill section?

A Yes, sir.

Q How long have you known this property?

A Practically all my life.

Q Did you ever know any lot to be sold on that plot?

A Well, the plot remains intact, as I understand it.

Q There has been no part of it ever sold. How long has it been in the market for sale?

A That I couldn't say to you.

Q Do you know?

A If I did I would tell you.

It is admitted that the plaintiff is the executrix of William H. Brown, deceased.

It is also admitted that the defendants have title to the property described in the option in question.

PLAINTIFF RESTS

Mr. Coult. Now, may I renew just here the motion I made to strike out the testimony that was offered in relation to the resolutions of the Board of Health and the Common Council? Before we commence our case we ought to have a ruling on the subject, I think, in order to know how we ought to adapt our testimony; we ought to know whether the testimony will go in or out.

The Court. What is the motion?

Mr. Coult. My motion is to strike it out on the ground that it is irrelevant; that it is unauthorized; that no authority is shown for the action or proposed action of either body.

The Court. What is it you move to strike out?

Mr. Coult. The resolution and minutes of the Board of Health and the resolutions of the Common Council and the testimony that was connected with that offer.

Mr. Hardin. I think the reference to the testimony should be made more specific.

Mr. Coult. Well, it struck me that that is just as specific as it can be made without my getting a copy of the testimony and going over it to indicate just exactly what parts of it—

Mr. Hardin. I think it can be made more specific by reference to the questions that were objected to as they were asked. Your objections at that time were overruled; you practically now renew them on the motion to strike out; but there may be questions that you did not object to that the broad language that you used a minute ago might include.

Mr. Coult. It was intended to cover the same objections that I made at the time the evidence was offered and received, and I ask the Court to make ruling on it in order that we may know how to proceed with our case on the defense.

The Court. I will hear you in support of your motion.

Mr. Coult. I may state to the Court, after an examination, that the only act which would give the Common Council the authority to pass any such resolution of the Board of Health to take any action in relation to it is the act of the Legislature of this State passed on the 23d of March, 1900. It was an act passed for the express purpose of authorizing the city, without authority, to build an isolation hospital and to appropriate moneys for that purpose. Now, the first section of this act provides [reading].

The Court. Is that chapter 132?

Mr. Coult. Yes, sir. [Reading further.] Now, I say it does not appear and, as I understand, after an examination, it is not a fact, that any such resolution as that was ever presented to the Common Council. If there was, I ask that it be produced.

The Court. Does the resolution of the Common Council recite any such resolution of the Board of Health?

Mr. Coult. No, sir.

Mr. Hardin. It simply says that the purpose of the appropriation is for the isolation hospital.

Mr. Coult. We understand, as a matter of fact, that no such resolution was passed or presented, and I have so understood from the start.

Mr. Hardin. There was one passed.

The Court. I cannot proceed upon that. We will consider what the proof is in comparison with what it seems it ought to be. Mr. Coult seems to have concluded what he had to say, and I will hear you, Mr. Hardin.

The Court. [After discussion.] In view of the fact that we are not in this case trying the question whether the city can be held, isn't there enough

presumption of regularity arising out of these proceedings, notwithstanding the gap in them, to sustain the evidence as proof of market value? I am inclined to think that there is.

Mr. Coult. Well, I want to take an exception to your Honor's ruling, and I want it put in such a form that I can take advantage of it.

The Court. Your motion is to strike out, and I will deny the motion to strike out the resolution and minutes of the Board of Health and the resolution of the Common Council, and the testimony relative thereto to which objections were made, on the ground that I think that evidence is afforded by that part of the plaintiff's case as to the market value of the property. You can take an exception that will save that point to you.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Mr. Coult opens for defendants.

JOHN HONISS sworn in behalf of defendants.

Direct Examination by Mr. Coult.

Q You reside in this city, Mr. Honiss?
A Yes, sir.
Q How long have you resided here?
A Well, thirty-two or thirty-three years.
Q How old are you, Mr. Honiss, about?
A I am eighty years next January.
Q Where is your place of residence?
A 226 Lincoln Avenue.
Q You had an interest in a plot of ground on Sylvan Avenue?
A Yes, sir.

Q Shown on this map or diagram [shown to witness]?

A That is a map of my property.

Q Were you the owner or only part owner of that property?

A What say, sir?

Q Were you the owner of the entire title or did you hold it in common with somebody else?

A No, I own an undivided half with Mrs. T. P. Ranney.

Q Where does Mrs. Ranney live?

A I couldn't tell you, sir.

Q Well, she doesn't live in Newark, does she?

A No, sir.

Q How long have you had an interest in that property, Mr. Honiss?

A How long have I owned it?

Q Yes.

A I think since 1872, from that time.

Q Since 1872?

A Yes, sir.

Q Thirty years, about, at that time?

A Yes, sir; about thirty years.

Q Has any part of it ever been occupied?

A No, sir.

Q You gave an option on that property to William H. Brown?

A Yes, sir.

Q In July, 1901, was this option given?

A I can't hear you.

Q Do you recollect the date of the option?

A Yes, sir.

Q What date was it?

A 1901.

Q What?

A 1901.

Q What month?

A The month of July.

Q Had this property been in the market for sale before?

A Oh, yes.

Objected to as immaterial.

Witness. Yes, sir.

The Court. It may be introductory to an inquiry as to the value.

Mr. Coult. That is what I am going to ask.

The Court. I think I will allow it.

Q What was your answer to that question? [Question read.]

A Yes, sir.

Q How long?

A Oh, 'most ever since we had bought it, I suppose; we would sell it to anybody who offered the price.

Q Where did you see Mr. Brown in relation to this property?

A I saw him up to my house; he called to see me.

Q Do you recollect what time in the day it was?

A Well, it was, I think, near twelve o'clock; I am not positive.

Q What did he want?

A He wanted to know if that property was for sale.

Q What did you tell him?

A I told him it was.

Q Well, now, state what conversation you had with him at that time about it.

A Well, I told him I couldn't give him the price; he wanted to know the price; I told him I couldn't give him the price because T. P. Ranney's wife owned it with me, an undivided half.

By the Court.

Q Go on and state all the conversation that you remember, Mr. Honiss.

A So we agreed to meet down to Mr. Pennington's office; I told him we would have to go down there; and there the option was made, in that office of Mr. Pennington, Jr's.

By Mr. Coult.

Q When did you go, after that time when you saw

him or he came to your house; how long was it before you went down to write the option?

A Well, it might be two weeks; I couldn't say; I am not positive about it.

Q In this conversation was anything said about the use to which the property was to be put?

The Court. In the conversation at your house.

A No, only he told me—I asked him what he wanted to do with the property; he said he wanted to buy it for a factory site.

Q Why did you ask him?

Objected to.

Q Why did you ask him what he was going to do with it?

Mr. Hardin. That is objected to. He asked him; that is the fact. The witness is not entitled to give the reason for it—an opinion that he may have worked out since under other conditions.

The Court. [After discussion]. The question is how far a witness may be allowed to state his mental processes, whether the law permits him to make declarations on that subject, or whether he is required to state the facts and it is then left to the Court and jury from the facts to draw their conclusions as to the extent which the matter under consideration may have operated as an inducement on his mind. It is quite obvious that if witnesses are allowed to say why they said something or why they did something, it is impossible to contradict them. It would seem to be the safer rule to confine the testimony to overt acts and audible declarations, and leave the Court and jury to draw their own inferences. My present impression is against the question. I will rule that way.

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

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

accordingly.

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Q Now, would you have sold this property at that time at that price or any price for an isolation hospital?

Objected to.

The Court. That, of course, raises the same question, and it is the question that I though of in connection with this case as a question that would probably be asked. While I have not consulted the authorities on the subject, I think it is very doubtful about your right to ask it. I will be glad to hear any cases that you can refer me to.

Mr. Coult. I will put another question that is suggested to me.

Q In making this option, did you rely upon the representation or statement made by Mr. Brown as to the use of the property?

Mr. Hardin. That is objected to because the witness has not developed anything which justifies a reason for such reliance. He has told this conversation; he said he asked Brown what he wanted it for, and Brown said he wanted it for manufacturing purposes. This is all preliminary, as your Honor understands, to the making of a subsequent written agreement.

The Court. I appreciate perfectly the importance of the inquiry and the force of the objection It has, to my mind, the aspect of a comment by the witness on the transaction rather than a narrative of it.

Mr. Hardin. As your Honor put it a moment ago, the witness is describing his mental operations.

Mr. Coult. I can refer your Honor, I think, to a pretty good authority on this subject, Moncreif on Frauds [reading].

The Court. I will look at the matter during

recess.

At one o'clock, P. M., the Court took a recess of one hour.

AFTER RECESS

[Question read].

The Court. I have looked at the authorities that you refer me to, and I think they amount to this. The original rule was that matters of intention, expectation, are not matters of fact, and so could not be given in evidence. That is not the rule now. In England, it seems, probably, if not in this country, the rule is that evidence of an intention may be a question of fact. For example, I say to a man, "I intend or expect to do so and so," and he, on the faith of that, acts. Why, I have made a statement of fact, which he by his action has made the basis of changing the situation. But I do not think that rule justifies this question. The witness is asked not as to what someone else said as to his intention, but as to his own mind on the subject, and I have not seen any case that warrants that kind of inquiry.

Mr. Coult. How can it otherwise be proved?

The Court. Proved by legitimate inference from the facts in evidence. It is for the Court and jury to say, after hearing the testimony, and in view of all the circumstances, what was the natural and probable consequence of such a representation, such a statement.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Q There was an extension of the original option?

A Yes, sir; there was an extension, I think in September, 1901.

Q Where were you when that extension was made?

A In Mr. S. H. Pennington's office.

Q How did you come to make that?

A Well, because he said the man was in Europe and he wouldn't get back in time, and so he wanted another extension; that is what he said.

Q And you gave the second extension?

A Yes, sir.

By the Court.

Q When you say "he," I suppose you mean Mr. Brown?

A Yes, sir.

Q You say, "he said;" I suppose you meant to say that Mr. Brown said the man was in Europe?

A Yes, sir; Mr. Brown.

By Mr. Coult.

Q Did you learn at any time before the option expired from any—how long before the option expired did you learn that it was to be used for an isolation hospital?

A Well, I couldn't state exactly. I saw it in the paper the first thing; yes, that is the first thing I knew anything about it; and of course I was dumfounded to think that it was to be a hospital.

Q You saw it stated in the newspaper?

A What say?

Q You saw it stated in the newspaper?

A Yes, sir; in the paper, in the Newark paper.

Q Did you see Brown after that?

A Well, I really 'most forget, it is so long ago. I presume I did.

Q Well, he came back at one time to demand a deed from you, did he not, or to ask for a deed or—

A Yes, sir; and I referred him to Mr. Pennington.

Q Was anything said then about the purpose for which you understood by the papers that the building was to be used?

A I don't understand your question.

Q After you had learned about it and when he came back and asked for a deed or demanded that you execute a deed, and you referred him to Mr. Pennington—

A Yes, sir.

Q —did you say anything to him then about what you discovered was the use the property was to be put to?

A No, I don't remember. Well, I supposed, of course, that the use was for a factory site.

Q But when you found by the newspapers that it was to be used for some other purpose, did you mention what you had seen in the papers to him when he came back?

A Well, I told him, of course—I think I told him, but I won't be sure, that I wouldn't deed it to him, but I referred him to Mr. Pennington—not for a contagious hospital; I didn't sign it for that purpose.

Q If you had been told or believed that the land was to be used for the purpose of an isolation hospital, would you have given any option upon it at all?

Objected to.

The Court. That is within the ruling already made, and the objection is for the same reason sustained.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Q You are married?

A What say?

Q You are a married man?

A Yes, sir.

Q And your wife is living?

A Yes, sir.

Q You were married at the time this option was executed?

A Yes, sir.

Q What was the market value of that tract of land at that time?

Mr. Hardin. That is objected to, unless it appears that this witness is in some way qualified.

Q You owned some considerable tracts of land in that vicinity did you not?

A Yes, sir.

Q And you had sold them from time to time?

A Yes, sir; I sold twelve acres to Mr. Tiffany, of New York, to build a factory and houses there, and of course I didn't feel it was right and just to deed that for an isolated hospital, not to injure Mr. Tiffany's property; I didn't think it was a just thing.

Mr. Coult. Now, isn't he authorized to speak? He owned other lands adjoining and sold them.

The Court. Let it appear when that sale was.

Q When did you sell to Tiffany?

A Well, I think it was about six years from then.

By the Court.

Q Six years now?

A Six years from the time, before I made a bargain with Mr. Brown.

Q Six years before 1901?

A Yes, sir; before that.

Q That would be about 1895?

A I think it was; I am not quite sure that it is quite as long as that.

By Mr. Coult.

Q Have you any relation to a building loan association in that end of the town?

A Yes, sir; I have been a director there eighteen years.

Q Well, have you been on the committee for the examination of titles?

A Yes, sir.

Q And loaned—

A Yes, sir; loaned money to them and built houses for people there surrounding this property.

Q In making loans you had to put valuations upon property, did you not?

A Yes, sir.

Mr. Coult. I think that qualifies him, if the Court please.

The Court. Do you object to the witness testifying on the subject of valuation? It seems to me that he has shown some qualification.

[Objection withdrawn.]

Q What was the market value of that property at that time?

A What, the property that I agreed to sell Mr. Brown?

Q Yes.

A Well, $12,500

Q Has that value increased since in any way?

A Well, I persume it has, because it has got all improvements now; the streets are graded.

Q Well, without the grading of the street in front, the property itself without the grading?

A Why, it was worth $12,500 before it was graded, and it is all through there now with brick, paved with brick.

Q In front?

A Yes, right in front.

Q Would you sell it still for that?

Objected to.

A Yes, sir; I would sell it for that to-day, provided they would pay for the—

The Court. One moment, Mr. Honiss.

Mr. Hardin. I move to strike that answer out until the objection is passed on.

Mr. Coult. That is a question of its value.

Mr. Hardin. It is not its value in 1901.

The Court. The question is what the witness would sell it for now?

Mr. Coult. Yes.

The Court. I think it is competent. I will admit it.

Plaintiff's counsel prays an exception.

Q The question is whether you would sell it at that price now.

A Yes, if they would pay for the improvements.

Q In any conversation that you had with Brown after this option was given, did he state that if anybody bought it of him that they would have to pay a great deal more than that for it?

A No, sir; he never said anything of the kind, or I never heard him.

Q When you said that you would sell the property for $12,500, do you mean with or without the charge for improvements?

A Yes.

Q Well, which?

A Well, I wouldn't sell it unless they would pay for the improvements, no.

Cross Examination by Mr. Hardin.

Q What are the improvements to which you refer?

A Why, the street was graded and it was paved with brick.

Q Which street?

A Sylvan avenue.

Q There was a sewer in Sylvan avenue at the time this contract was made, was there not?

A What say?

Q There was a sewer in Sylvan avenue at the time this contract was made?

A Yes, sir.

Q And Mt. Prospect avenue?

A Yes, sir.

Q And there was water in Mt. Prospect avenue and in Summer avenue?

A No, not Summer avenue, not on our property.

Q Are you sure of that?

A I am pretty sure of that, sir, no further than Sylvan avenue; then it went up to Verona Avenue.

Q Is there water in Summer avenue now along this property?

A Yes, sir; I think there is.

Q When was it put there?

A I couldn't tell you, sir.

Q But you are sure it was since 1901?

A I couldn't tell you that; I don't know.

Q You are not positive, then, that there was no water along this property in Summer avenue in 1901, when this contract was made?

A No, I couldn't say positively.

Q There might have been water there?

A There might have been.

Q At the time you sold this land to Mr. Tiffany, the twelve acres that you have referred to, it was woodland, was it not?

A Yes, sir.

Q And it was subsequently very handsomely improved?

A Yes.

Q Now, where was this property that you sold to Mr. Tiffany with reference to the property that was described in the option to Brown?

A Why, it was bounded on Mt. Prospect avenue, adjoining mine.

Q That is, the property that you sold to Tiffany was on one side of Mt. Prospect avenue and this was on the other?

A Yes, sir.

Q Mr. Tiffany has built a large factory there and a whole lot of workman's houses?

A Yes, sir.

Q And developed the neighborhood a great deal, has he not?

A Yes, sir.

Q And the whole neighborhood has improved?

A Yes, sir; it has.

Q By reason of that sale to Tiffany?

A Yes, sir.

Q The witness is shown a letter and asked whether

he knows the handwriting [shown to witness.]

A Yes, sir; that is my signature.

Q Is the whole letter in your handwriting?

A Yes, sir.

[The paper referred to is shown to defendants' counsel].

Q You and Mr. Brown had had some talk about this matter before this letter was written?

A I presume we had; yes, sir.

Mr. Coult. What is the date of it?

Mr. Hardin. I will offer it; I will just read it.

The Court. Can you offer it on Mr. Coult's case?

Mr. Coult. There is no objection to it at all, sir.

Mr. Hardin. It merely shows the course of the negotiations.

Plaintiff's counsel reads and offers in evidence letter dated Newark, June 29, 1901, as follows:

"MR. WILLIAM H. BROWN.—DEAR SIR: The party is out of town, so I can't give you my answer what we will do before some time next week. Will let you know so you can come and see me some noon or evening. Very respectfully yours, JOHN HONISS."

[Marked Ex. P. 5.]

Q Do you recognize that letter, Mr. Honiss [another paper shown to witness]?

A Yes, sir.

Q Is that your handwriting?

A Yes, sir.

[Shown to defendants' counsel].

Mr. Hardin. I offer this letter in evidence.

[Reading:]

"Newark, July 6, 1901. MR. WILLIAM H. BROWN.—DEAR SIR: Will you please call at my house Monday evening or Tuesday morning, and I can give a price of the land and you can have an option on it for ninety days if we can agree on the

price. Very respectfully yours, JOHN HONISS."
[Marked Ex. P. 6.]

Q You and Mr. Brown had a meeting in consequence of that letter?

A What say?

Q You and Mr. Brown met in consequence of that letter?

A Yes, sir.

Q And subsequently the option was prepared at Mr. Pennington's office?

A Yes, sir.

Q I show the witness Exhibit P. 2. Do you recognize that as the option [shown to witness]?

A Yes, sir.

Q You read that before you signed it?

A Yes, I did; yes, sir.

Q And that is your signature?

A Yes, sir.

Q [Witness being shown Exhibit P. 3.] You recognize that as the extension of the option?

A Yes.

Q You read that before you signed it?

A Yes, sir.

Q You have owned a good deal of property yourself in your lifetime, have you not?

A Yes, sir.

Q Dealt in property quite a good deal?

A Yes, sir.

Q Bought and sold?

A Yes, sir.

Q I think you said when Mr. Brown asked you for a deed you referred him to Mr. Pennington?

A I referred him to Mr. Pennington; yes, sir.

Q Do you remember the occasion on the 17th of October, 1901, at Mr. Pennington's office when Mr. Brown tendered the $12,500?

A I don't remember.

Q You do not remember that?

A No.

Q Will you say you were not there?

A I couldn't say, really, it is so long ago.

Q Do you recall ever having been present with Mr. Brown in Mr. Pennington's office with reference to a deed under this option?

A I don't think I was there when he asked for a deed. I 'most forget about it; of course, it is so long ago that I am not positive.

The Court. A little louder, so that those gentlemen will hear you, Mr. Honiss.

Witness. I am not positive whether I was there or not.

Q Well, you told Mr. Pennington not to give him the deed?

A Yes, I did.

Q You told him that after you knew that the City wanted the property for an isolation hospital?

A Yes, sir.

Q Now, didn't you tell Mr. Brown that before that occasion, before Mr. Brown went to Mr. Pennington, that he couldn't have the deed?

A No, sir; not before I knew it was for a hospital.

Q After?

A After.

Q After you knew it was for a hospital you told Brown he couldn't have it?

A Yes, sir; after I knew it was for a hospital.

Q And up to that time you were perfectly willing he should have it?

A Yes, sir; sure; if it was for a factory site I would sell it to him.

Q And the reason you refused to make the deed was because you learned the property was to go to the city for an isolation hospital?

A Yes, sir; that is the reason I wouldn't make the deed.

Q You have been indemnified in this case, have you not, against the result of this trial?

Objected to.

The Court. [After discussion]. I do not quite

see why it makes any difference what it was the result of, if it was in fact a failure to carry out this contract. I sustain the objection.

Plaintiff's counsel prays an exception.

DAVID D. CHANDLER sworn in behalf of defendants.

Direct Examination by Mr. Coult.

Q Mr. Chandler, are you the Secretary of the Board of Health of the City of Newark?

A Yes, sir.

Q And have been for how long?

A About nine years.

Q Do you recollected when the Board proposed to erect an isolation hospital?

A About.

Q Is there in your minutes any resolution of that Board in relation to the establishment and maintenance of a hospital devoted exclusively to the treatment and relief of persons suffering from contagious and infectious diseases, and setting forth the estimated cost thereof?

A Yes, sir.

Q Where is it?

A In this book. I am looking for a key of this; I can't turn right to them. Oh, yes, here it is.

Q Let me look at it and see.

A [Witness indicates in book.]

Q Is this the one that you refer to?

A I didn't read it. [After examining]. Yes, sir.

By the Court.

Q On what page?

A Page 132.

By Mr. Coult.

Q When was it passed?

A Under May 7, 1901, meeting held May 7, 1901.

Q Well, read it.

A The resolution?

Q Yes.

A [Reading.] "Resolved that the Board of Health

of the City of Newark, after due examination and consideration, deems the construction of a sewer''——No, that is not the one; that is not right. You asked for a resolution, did you?

Q I asked you if there was any resolution.

Mr. Hardin. That is it [indicating in book].

Q Do you find anything?

A Yes, sir. [Reading] "Moved and seconded that the Board ask for an appropriation of $100,000, for the purpose of buying the necessary land and building thereon an isolation hospital."

By The Court.

Q That is page 133?

A 133, your Honor; yes, sir.

By Mr. Coult.

Q Now, is that all you find there?

A I haven't gone over this book, Mr. Coult.

Q What?

A I don't know.

Q Well, you are secretary of the Board?

A Yes, sir; but I am not supposed to commit all these minutes to memory for four or five years back.

Q Haven't you been hunting through them for counsel?

A No, sir; I have not.

Q Why have you got that memorandum there?

A For pages on matters referring to this case only.

Q Didn't I ask you to make such an examination a year ago, when this case was first tried?

A I made this key that I have got here.

Q Then you went through the minutes for that purpose?

A Yes, sir.

Q And that is all you could find?

A Yes, sir; what is on here.

Q That is all you find in relation to this matter, is it?

A Yes, sir.

Q Was any such resolution as that—

Mr. Hardin. He doesn't understand you, Mr. Coult. He is talking about what is on the paper. He has other references on the paper beyond the one you developed.

Witness. Oh, yes, I have six pages here of reference on this.

Q I ask you with reference to the passage of a resolution pursuant to the act of 1900. Is there anything?

A I shall have to go over these pages, but I can answer you.

Q Well, go through them.

A I will go over them, then.

By The Court.

Q Please mention the pages which you consult.

A Yes, sir; I will your Honor. On page 100 is the appointment of the committee.

By Mr. Coult.

Q What is that.

A Appointment of the committee.

Q Well, read it out.

A [Reading.] "The President invited Dr. Zeh to occupy the chair, and he then read an act of the legislature entitled, 'An act to authorize and provide for the establishment and maintenance of hospitals for contagious diseases for cities in this state.' Moved and seconded that a committee of three doctors be appointed to prepare the necessary resolution and lay the matter before the Common Council. An amendment was made and seconded that the President be one of the committee. Amendment carried. The motion as amended was then carried. Dr. Zeh appointed Doctors Herold, Disbrow and Becker."

The Court. That is the one we have already had.

Witness. Yes, sir.

Q What else?

A That is all on that page, that I can see.

Q Well, go on to anything else that relates to this

subject. You say there is something; we want to find out what there is.

A The second on page 133 is: "Moved and seconded that the Board ask for an appropriation of $100,000, for the purpose of buying the necessary land and building thereon an isolation hospital. Carried."

By the Court.

Q That is the one you have just referred to?

A Yes, sir. Page 133, that is.

By Mr. Coult.

Q Go on.

A On page 137: "The Health Officer stated that the letter which he had written in response to the motion instructing him to write and request an appropriation of $100,000 from the Finance Committee of the Common Council, for the purpose of purchasing land and erecting thereon a contagious disease hospital, was not sent by him, as he had been advised that it would be irregular to do so. The President gave a full statement of the matter, which he said should be left to the Special Committee to go before the Finance Committee of the Common Council. Moved and seconded that the Committee on Contagious Disease Hospital be given enlarged powers so that they can get an option on property and have power to select a site and have plans prepared for a contagious disease hospital, and that Commissioner Gay be added to the committee."

By The Court.

Q What is the date of that?

A Page 137, and the meeting was held June 4, 1901.

By Mr. Coult.

Q Now, was any subsequent action taken in relation to it?

A There is a little more of this.

Q Well, anything subsequent to that?

A Well, do you want me to finish on this page first?

Q Go on, if there is anything there.

A "Moved and seconded that the motion instructing the Secretary to write to the Finance Committee of the Common Council and request an appropriation of $100,000 for the purpose of erecting a contagious disease hospital, be reconsidered. Carried. On motion the matter was laid on the table."

Q Well, so far as your minutes are concerned, it lays on the table yet, does it not?

A It says so here.

Q Is there any subsequent resolution?

A I shall have to go further to find that out. On page 144, under September 25, 1901: "Special meeting of the Board of Health held at the Mayor's office, City Hall, by order of his Honor, the Mayor." It states the members present. "The Mayor stated that the meeting had been called to consider and take official action in relation to property recently ordered to be purchased by the Common Council on behalf of the city for the purpose of an isolation hospital. After a full discussion the meeting adjourned for further consideration of the matter until the next regular meeting of the Board."

Q Well, have you got anything more?

A Yes, on page 145, under October 1, 1901. "At a regular meeting, Mr. Heller addressed the Board on the subject of the proposed contagious disease hospital site at Woodside, and handed in a protest signed by several persons. On motion the protest was received. The President then replied to Mr. Heller in a very appropriate manner. Mr. P. L. Thiery, of Mt. Prospect avenue, also addressed the Board in opposition to the proposed site. Dr. Weeks, of New York, stated to the Board that he had property in the Eighth Ward which he was willing to sell to the city as a site for a contagious disease hospital."

Q Well?

A Under date of November 19, 1901, on page 151, "A communication from George H. Phillips, in reference to a plot of ground he had to offer for a contagious disease hospital was read. On motion it was referred to

the committee on hospital site."

Q That hasn't anything to do with it.

A I have marked these all on the key here; you asked me what there was with reference to the contagious disease hospital, and I have got this here.

Q I asked you in reference to the contagious disease hospital.

A Well, that is, all of interest to us, that is all.

Q Then you have given us all, have you?

A That is all; yes, sir.

Q Was any resolution of the members of the Board in relation to this matter certified and sent to the Common Council or Finance Committee, to your knowledge?

A I think I have referred to the one that I did not give them; that was certified to by the Secretary, which this book says I did not give them.

Q Which you did not give them?

A I believe it says so here.

Q Then there was none given?

A It says it was referred, as these minutes say, to a special committee to explain.

Q What?

A It was referred to a special committee for them to explain personally to the Common Council.

Q As far as you know, there was none given.

A I know nothing of any, no.

CROSS-EXAMINATION WAIVED.

MATTHEW T. GAY, sworn in behalf of defendants.

Direct Examination by Mr. Coult.

Q Mr. Gay, you were a member of the Board of Health of the City of Newark, in 1900?

A I was; yes, sir.

Q 1901?

A Yes, sir. 1901.

Q And during that time it was proposed to erect

an isolation hospital by the Board of Health or in conjunction with the City of Newark?

A I was.

Q That matter was taken up in your Board after the passage of the act of 1900, was it not?

A It was.

Q And were you put upon a committee to see about it?

A I was on the committee, but simply added to the committee after it had been organized for several months.

Q Did you have plans prepared for a building?

A We did.

Q By architects?

A By architects.

Q Well, what architects?

A W. C. and J. Ely.

Q Did they prepare plans?

A They did.

Q Did you see the plans?

A I did.

Q Elaborate plans, were they?

A Yes, rather elaborate plans.

Q Showing the elevations, the mode of construction and details of the work throughout?

A I am not positive, I wouldn't want to say; but I know they were elaborate plans—gave us an idea what was proposed to be erected there.

Q When were those plans prepared, what year?

A 1901.

Q What time in the year?

A I think about August of that year; my recollection is about August of that year.

Q Were they adapted to any particular site?

A They were adapted to the site that the committee had selected.

Q Where?

A Alongside of the Second river, Summer avenue.

Q This lot of land?

A This lot of land.

Q When did the committee go to examine that, be-

fore the plans were prepared?

A Before the plans were prepared.

Q Then it must have been some time during the month of July?

A Either June or July.

Q Did you know who was the owner of the tract when you examined it?

A No, I think not.

Q Well, were you not told who the owner was?

A I don't recollect.

Q Did you learn the price at which it could be obtained, when you examined it?

A We learned the price before we decided on it; whether when we examined it or not, I don't recollect.

Q Before you decided on it?

A Yes, sir.

Q Well, you decided on it before you had the plans prepared?

A Yes.

Q How much was the price to be?

A $17,000 or $17,500, I think.

Q Whom did you learn that from, about the price?

A I can't say which member of the committee.

Q What?

A I can't say which member of the committee; there were four on the committee; I can't tell now.

Q Who was on the committee?

A Dr. Herold, Dr. Disbrow, Dr. Becker and myself.

Q You examined the plot?

A Yes, sir.

Q And looked at it?

A Yes, sir.

Q And the price was stated; everybody on the committee knew it. Now, who stated it?

A I couldn't say.

Q Haven't you any memory about that?

A I wouldn't say who stated about it.

Q You got it from some one on the committee?

A Some one on the committee.

Q What?

A I know it was generally spoken of. I know we selected one member to try and make a deal for the property and get the price on it reduced, if possible.

Q Who was that member?

A Dr. Herold was to see about getting the price reduced.

Q Dr. Herold was to see about that?

A Yes.

Q Didn't you have any curiosity to know who owned the land at all?

A I don't think I had very much curiosity to know.

Q What?

A I don't think I had very much curiosity to know.

Q Was it understood that there would be an option on the land?

A We instructed the chairman to try and get an option on the land.

Q At that price?

A The best price that could be obtained.

Q The best price that could be obtained?

A Yes.

Q When was that instruction given?

A Well, according to my recollection, some time in July or August, perhaps in August, 1901.

Q And did he report to you that an option had been obtained?

A Yes, I believe so.

Q And what was the option that he said was obtained?

A That he couldn't reduce the price below what had been named; he couldn't get it for any less.

Q Well, less than what?

A Less than the $17,000 or $17,500 originally mentioned.

Q Did you hear from him or from anybody how the option had been obtained?

A No, I did not.

Q Or as to where it was or who held it?

A No.

Q Why was all this kept so quiet?

A Because we knew whatever point we selected,

there would be objection by the neighbors to putting an isolation hospital there. We weren't looking for bargains on property, but we were looking for an eligible site.

Q So you all kept your hands over your ears and your mouths closed?

A We kept our mouths closed, yes.

Q But you did go to look at this property before August?

A Oh, yes, I think so.

Q And were told before August, in July, that an option was obtained on it?

A No, I wouldn't want to say that. This wasn't the first piece of property which we decided upon.

Q Well, I am talking about this one; never mind about the others.

A This wasn't the piece of property decided upon.

Q I understand you to say that you, as early as the 1st of August——

A Had the price of the property, yes.

Q Had the plans adapted to that lot?

A That is right.

Q Then you understood when that was done that you had some hold on it, didn't you?

A I considered so, yes.

Q And you understood that you had some hold on it through some arrangement that had been made to secure an option by Dr. Herold?

A Yes, sir.

Q Now, you subsequently found that this arrangement had been made through Mr. Brown, didn't you?

A I did.

Q When did you learn that?

A I learned that when one of the neighbors called upon me and stated that that was the fact.

Q What?

A I learned that when one of the neighbors or residents of the vicinity called on me and stated that that was the fact.

Q Well, at what time was that in the progress of

affairs?

A I should think some time in September; I wouldn't be positive about that; I can't remember.

Q Did you see the Doctor about that?

A You mean did I speak to him about it?

Q Yes.

A I did.

Q Well, what did he say he had got Brown for?

Mr. Hardin. I object to the conversation between Dr. Herold and Mr. Gay, as incompetent. It is a statement of a conversation with a third person, not a party to this suit, and no testimony has been given to which it can be a contradiction; it is pure hear-say now.

Mr. Coult. [After discussion.] I want to show by this witness that Dr. Herold stated that he had employed Brown to buy this property.

The Court. No, do not state what you want to show. You want to contradict Dr. Herold?

Mr. Coult. Yes, sir.

The Court. The point can only be settled by reference to the stenographer's notes; I can't determine by reference to my notes. It is some conversation between Dr. Herold and this witness.

Mr. Hardin. Mr. Coult has stated what he desired to ask the witness, and I will withdraw my objection to that question.

A No, sir; Dr. Herold never said that he had employed Mr. Brown.

Q What did he say Brown's connection with it was?

A That Brown had an option upon the property which we desired to obtain.

Q Well, didn't he say that he had that option at the request of the Board of Health or Dr. Herold?

A He did not; no, sir.

Q How did you account for the fact that you had some option before the building was adapted to that site?

A I don't understand your question.

Q Well, I understand that you say that plans for the building were prepared by the architects to go upon this particular property early in August?

A Yes.

Q And that you had selected that property and knew what its price was to be?

A Yes.

Q Before that time, is that so?

A That is correct.

Q Well, did you ascertain how that price had been fixed and established?

A No.

Q You didn't know anything about it?

A No.

Q You did learn that somebody had got an option on it for $12,500, didn't you?

A Never, or not until I was informed of that by the neighbor who called to see me.

Q When did you first learn of that?

A After the whole matter had become public.

Cross Examination by Mr. Hardin.

Q By the expression, "After the matter had become public," you mean that this neighbor came to you after this isolation hospital matter had been in the newspapers, after the passage of the resolution by the Common Council?

A That is the idea, yes.

Q Mr. Gay, were you ever told from any source, by Dr. Herold or anybody else, that Mr. Brown was employed by the Board of Health or Dr. Herold as an agent to purchase this property?

A Never.

Q What is that?

A I never was; no, sir.

Q You considered other sites besides this site for an isolation hospital?

A A great many of them.

Q And there were other plans drawn fitting other

sites, weren't there?

A I don't think there was.

Q Isn't it true that there was a general plan, not specially applicable to any particular site, under consideration by this committee for some time?

A There might have been before; I was only on the last end of the committee's meetings.

WILSON C. ELY sworn in behalf of defendants.

Direct Examination by Mr. Coult.

Q You did draw plans at your office, did you not, as architects?

A We did.

Q And those plans were adapted to the site on Sylvan avenue?

Objected to as incompetent, unless plaintiff's decedent be in some way connected with the plans in question.

[After discussion, the question is withdrawn.]

CHARLES GIES sworn in behalf of defendants.

Direct Examination by Mr. TenEyck.

Q Where do you live, Mr. Gies?

A I live at No. 48 Irving street, Woodside.

Q How near is that to the property in question in this suit?

A It is about three blocks, I presume?

Q What is your business?

A My principal business is selling shoes for a living.

Mr. TenEyck. Do you want me to qualify this witness?

Mr. Hardin. Well, I was going to say that you need not, but as he says that his principal business is selling shoes, I think you had better.

Q Have you dealt in real estate at all?

A I have ever since I located in Woodside.

Q How long is that?

A Since 1885.

Q Have you sold a number of properties up that way?

A I have sold probably above fifty personally.

Q Do you own any property now in Woodside north of the Greenwood Lake Railway?

A I own a part of a strip; I owned for a number of years a strip about 124 feet front.

Q I asked you whether you now own any property?

A I own a portion of it; I have sold a portion of it and have a lien against the other.

Q Did you formerly own any property immediately opposite this property in question?

A Not immediately opposite; there is a strip between me and this property, owned by Mr. Hendricks, I believe.

Q The block opposite?

A Yes, sir.

Q Then I understand that your property is between Sylvan avenue and the railroad?

A Yes, sir.

Q And between the property in question and the railroad?

A Yes, sir.

By the Court.

Q On the other side of Sylvan avenue?

A Yes, sir.

Mr. TenEyck. On the south side of Sylvan avenue; the property in question is on the north side.

Q Mr. Gies, did you know, from your experience in real estate in that vicinity, what the market value of the block in question was in 1901?

Mr. Hardin. May I ask this witness a single question?

Mr. TenEyck. Certainly.

Cross Examination by Mr. Hardin.

Q You buy and sell property as agent for other people or—

A I buy and sell for myself and also as agent for other people, and I am often called by people in the

neighborhood to advise about buying.

Q I understood you to say that you made your living by selling shoes?

A Yes, sir.

Q And in adition to that you make your living by acting as agent for other people and in dealing in real estate?

A I don't know as you can call it making a living; I add to my income.

Q And you take commissions for buying real estate for other people?

A In the way of commissions I have exacted very little, but I have advised—

Q You advise people, then, in buying and selling real estate?

A I don't go to them unsolicited; they come to me.

Q And you give them your advice?

A Yes, sir.

Q And you, as a matter of fact, don't charge them for it?

A As a rule I do not.

Q Have you any sign out as real estate agent?

A No, sir.

Q Have you ever had one?

A No, sir.

Q You consider that your judgment in the matter of real estate is such as you have acquired from your own dealings, and not dealing in behalf of other people, do you?

A It is gathered from my own dealings, carefully following up all that has been going about and advising with people in all sections of the city.

Q How many real estate transactions have you conducted during the past year?

A I have conducted within one month, six.

Q For other people?

A For other people and myself.

Q What do you mean by that?

A I have bought and sold.

Q How many did you conduct in the year 1901?

A I couldn't tell without going back; I couldn't tell exactly.

Q Well, what is your business, selling shoes or real estate?

A Both; principally selling shoes.

Q And incidentally real estate?

A If a man offers me something that I think is cheap, I will buy it.

Q Well, isn't that chiefly what you do, buying and selling real estate yourself?

A I do some of it.

Mr. TenEyck. For the purpose of qualifying this witness as an expert, I think this examination has gone far enough.

The Court. [After discussion]. The Court is prepared to rule if counsel desire a ruling.

Mr. Hardin. I haven't any objection.

Witness. Could I state a fact?

The Court. You had better answer questions, sir.

Redirect Examination by Mr. TenEyck.

Q Now, Mr. Gies, from your knowledge of real estate transactions in that part of the city, what would be your judgment as to the market value of this block in question in 1901?

A As near as I can get at it—I have been carefully over the place a number of times—I should judge it was worth, to the best knowledge, say from six to seven thousand dollars.

Q What was the character of this block in 1901?

A It was very rough; on the south side there was an avenue called Sylvan avenue going through; that, I believe, at that time was not opened, because in going through it would indicate something resembling the roughest kind of country road.

Q That is, not graded, you mean?

A No, sir; it was not graded at all. From there it sloped down by irregular slopes to the river, and I should

judge at the river it was—well, I one day just measured it from one of the bridges, and that itself, I guess, is 5 feet or ten feet below grade at the highest point, at Sylvan avenue, and my tape measured 20 feet.

Q From your knowledge of that tract in 1901, would you say it could be sold readily by cutting it up into building lots?

A I don't believe there was much sale for it; it was too rough; there would have to be considerable of money spent in grading and putting it in shape for the market.

Recross Examination by Mr. Hardin.

Q Is that value of $6,000, you say.

A I should say a valuation of six, not exceeding seven thousand dollars, at that time.

Q Is that with or without improvements?

A There were no improvements at that time. I think they had just started a sewer, but I don't think it had been levied against the property.

JAMES KEATING sworn in behalf of defendant.

Direct Examination by Mr. TenEyck.

Q Where do you live, Mr. Keating?

A 879 Clifton Avenue, Forest Hill.

Q The Forest Hill section?

A Yes, sir.

Q What is your business?

A Carpenter and builder and real estate seller.

Q Have you had occasion within the last few years to buy and sell real estate up in that section?

A Yes, sir.

Q About how much of it have you done and for how long?

A I have sold about $26,000 or $28,000 worth of property in these last three years.

Q In that section of the city?

A In that section of the city.

Q Do you buy the lots?

A I buy the lots; yes, sir.

Q And build houses on them?

A Build houses and sell them.

Q Have you had occasion to keep informed as to the value of land up that way?

A Yes, sir.

Q Do you know this property bounded by Sylvan avenue, Mt. Prospect and Summer avenues and the Second River?

A Yes, sir.

Q How often have you seen that place?

A Well, I see it occasionally, 'most every week.

Q And for how long, for how many years?

A How many years have I seen it?

Q Yes, how many years have you known that property?

A I have known that property for twenty years.

Q In your opinion, what was that block worth in 1901 in the condition in which it was then?

A In the condition it was, it is a hard matter to place it into lots; you would have to place it into a factory site; but judging from property that I had bought in a small radius from there, I shouldn't think a lot would be worth any more than $125 in that neighborhood.

Q Taking the property north of the Greenwood Railroad, between there and the Second River, what is the general character of the property?

A Very rough, very rough.

Q What would be a fair price for that block in 1901?

A The block in question?

Q Yes.

The Court. You may look at that map, if you like.

A I know it well, Judge. I should judge between $7500 and $7000 would be a good, fair price for it in 1901.

Q Do you know what the condition of the street improvements was at that time?

A Yes.

Q What was it?

A There were no improvements whatever in the

street; it was merely, you may say, a lane to walk through.

Q What street do you refer to now?

A I refer to Sylvan avenue. It was a hard matter to get through there.

Q From your knowlege of the conditions up there, was there or not a ready sale for such property as this in 1901?

A No, sir; not unless it was a factory site.

Cross Examination by Mr. Hardin.

Q You understand that the rear line of this property runs from Mt. Prospect to Summer avenue along Second River?

A Yes, sir.

Q These lots, that are shown on this map consist of blocks of land, four of them without any frontage on the street, and backing up on the river?

A Yes, sir.

Q And they are worth how much?

A I shouldn't think they would be worth a dollar without you had front entrance to them.

Q You don't think that block is worth anything, then [indicating on the map]?

A No, sir.

Q If these lots should be sold off as indicated on that map, these lots would not be worth anything?

A No, sir; they would be fenced in; you couldn't get at them.

Q And you think the lots shown there would not be worth more than $125 a piece?

A As a whole; yes, sir; taking them all together.

Q Then how do you figure out that the property is worth $7,500?

A I figure that out by buying real estate around there, and the prices I pay for it, and the price it could be bought for in 1901.

Q Then your notion, as a real estate man of long experience, is that you get, as a rule, more by selling your land all together than by selling it in lots?

A I get it cheaper by buying it all together than in lots.

Q So that you say this tract of land is not worth more than $7,000 or $7,500?

A Yes, sir.

Q So you say as a tract it is worth more or less than if sold by the lot?

A Worth more? No, sir.

Q Less if sold—

A It should be worth less if sold in a plot.

Q And more by the lot?

A Yes, sir.

Q But the lots are worth only $125 a piece?

A I should judge so, by buying it all in a whole.

Redirect Examinalion by Mr. Coult.

Q You mean by putting it all into lots?

A Putting it all into lots; yes, sir.

By the Court.

Q What do you mean by a lot?

A A lot is 25 by 100, a city lot.

By Mr. Coult.

Q Blocking it all up into squares of 25 by 100?

A Yes, sir.

Q That is what I understand you to say?

A Yes, sir.

ROBERT KUEBLER sworn in behalf of defendant.

Direct Examination by Mr. TenEyck.

Q Mr. Kuebler, where do you live?

A 752 DeGraw avenue.

Q Is that in Forest Hill?

A Yes, sir.

Q What is your business?

A Real estate dealer and builder.

Q How long have you been such in that part of the town?

A Fifteen years, about fifteen years.

Q Have you dealt extensively up there?

A Yes, sir.

Q Are you familiar with this property on Sylvan avenue?

A Yes, sir.

Q How long have you known that property?

A Fifteen years, anyway.

Q Do you remember its condition in 1901?

A Yes, sir.

Q From your knowlege of real estate up in that section, what would you say was its value at that time?

A Well, it was property that I should value per acre, and at that time I think a valuation from $2,000 to $2,500 per acre would be a fair valuation.

Q Do you know how many acres were in it?

A No, but I think there was between three and four acres, if I am not mistaken.

Q What would you say would be a proper value for that block, the fair market value, in 1901?

A Well, as I say, I don't know exactly how many acres there is in it, but I should say from $2,000 to $2,500 per acre. I am basing my opinion on other sales in that vicinity.

Q From your knowledge of conditions there in 1901, what would have been the most advantageous way to have disposed of that property if anybody wanted to sell?

A There is only one way that I should have done or advised any one, and that is as a whole, for a factory site.

Q That is, as one parcel?

A That is, as one parcel.

Q And do you think that it would be better that way than to cut it up into lots?

A Well, it was very undesirable property for building lots.

Q Why was it undesirable?

A Why, the position it laid in; it was very rough, irregular; in fact, the rear lots could never be utilized, to my belief.

Cross Examination by Mr. Hardin.

Q Mr. Kuebler, do you know how many square feet

there are in that plot?

A Not exactly, but I know about.

Q As I understand there are 111,391 square feet, about.

A Yes.

Q That is a little less than three acres, isn't it?

A I know there was around three acres; I know that.

Q Less than three acres?

A Well, I can't say.

Q Well, how many square feet in an acre?

Objected to.

The Court. The witness can either state or he cannot.

By The Court.

Q Do you remember?

A No, sir.

By Mr. Hardin.

Q Is there more or less than 40,000 square feet?

Objected to.

The Court. The witness says he does not remember.

Q You have not put any lump price on this property; you say it is worth about so much an acre?

A That is the way I got at my valuation; yes, sir.

HARRISON VAN DUYNE sworn in behalf of defendant.

Direct Examination by Mr. Coult.

Q Mr. Van Duyne, you are a resident of the city of Newark?

A I am.

Q You have had some experience in buying and selling real estate?

A I have.

Q And acting as agent for sale?

A I have.

Q How long has that continued?

A Over thirty years.

Q What is your profession?

A Surveying and dealing in real estate.

Mr. Hardin. I will admit Mr. VanDuyne's qualification.

Q Were you one of the adjustment commissioners of the city of Newark?

A I was.

Q For how many years?

A Why, during the time that those matters were considered by the commission, during the whole term that we reviewed all the back taxes and assesments covering all the city.

Q Covering all the property in the city.

A Yes, sir.

Q That made it necessary to put valuations on all the lands in the suburbs, did it not?

A It did, it made it necessary to study the values of all the lands in all parts of the city.

By the Court.

Q When was that, Mr. Van Duyne.

A That was from 1887 to 1892, I think about that.

By Mr. Coult.

Q Then you have continued since that to practice in your profession?

A Yes, sir.

Q After you went out of that office?

A Yes, sir.

Q Now, are you acquainted with the values of land in the Woodside District?

A I think so.

Q Have you been the owner of tracts of land there yourself, in the Woodside district?

A I have.

Q You know this property that was owned by Honiss and Ranney?

A I do.

Q How long have you known it, Mr. Van Duyne?

A Well, as long as—well, twenty-five or thirty years.

Q And up to 1901 had its condition changed in that time at all except as there had been other surrounding

property improved?

A Not this immediate property. Mt. Prospect avenue had been opened to the city line before 1901, and Summer avenue was the original old road to Belleville, so that that had been there; that was a very old road.

Q An old road?

A Yes, sir.

Q Just describe to the jury, in your own way, what was the condition of that ground prior to the pavement of Sylvan avenue?

A The ground extended, as this diagram shows, from Sylvan avenue to what is called the Second River, or, rather, to a pond or lake in Second River that was caused by the dam at Summer Avenue; and the other way it extended from Summer avenue to Mt. Prospect avenue. It was an exceedingly irregular piece of ground, running from the highest point at perhaps Mt. Prospect avenue and Sylvan avenue down to the line of this dam, perhaps 30 to 35 feet differences of level on the property.

Q Was that difference of 35 feet in 200 or less?

A 200 or less.

Q Well.

A And it had been undeveloped entirely up to that time.

Q Now, from your knowledge of the value of real estate, what was the market value of that lot of land in 1901, in September?

A Well, in my judgment, a sale at that time, anywhere between $10,000 and $12,000 would be an exceedingly good sale for the property.

Q How, in your judgment, could it then have been disposed of best, by an auction sale of lots or by selling the tract all together?

A Of course, if a manufacturer wanted and could use that site and could get the connection with the railroad, nearly a block away, why, it would be best to sell it as a manufacturing site.

Q Was there, so far as you know, any demand in that vicinity that would have warranted the sale of those lots at an auction sale?

A I don't think so; I think an auction sale would have been a failure.

The Court. You mean the sale of city lots?

Mr. Coult. As city lots; yes, sir.

The Court. 25 by 100?

Mr. Coult. Yes, sir.

Q If you had owned the property and had to make an immediate disposition of it, what, in your opinion, would be its best disposition?

A Well, I would consider myself exceedingly fortunate to be able to get $10,000 for it.

Cross Examination by Mr. Hardin.

Q Mr. Van Duyne, there was a sewer in Sylvan avenue in 1901, was there not?

A Well, I was trying to think of the time. I had charge of all the development of the Tiffany property, across the way from this property, following up along the railroad, and about that time the needs of that property made it necessary for the city to run a sewer up from Washington avenue, and I suppose about that time a sewer was run up Sylvan avenue and a ways in Mt. Prospect avenue and then up the street leading to Tiffany's factory.

Q Do you know where the Tiffany Boulevard is?

A The street running up to the Tiffany property?

Q Yes.

A I had charge of laying that out and developing it; yes, sir.

Q How is that street paved?

A Well, my impression is now that it was just some telford, although I haven't been on just that particular street in some time.

Q Is that also true of the cross streets from the Greenwood Lake road to Tiffany Boulevard that you laid out; are they paved streets?

A I think we did some telfording there, yes.

Q And there is a good class of workmen's houses

there?

A Yes, Tiffany built some houses there on that property.

Q Right across Mt. Prospect avenue from this property?

A Well, most of these buildings are three or four hundrd feet west.

Q And Tiffany's factory is a large, handsome property, isn't it?

A Yes, sir.

Q This property is not far from the Heller factory, is it?

A The Heller factories are on the other side of the railroad from this property.

Q Well, how far is that?

A Well, the nearest factory, I should say, was parallel with this property perhaps 250 feet.

Q And when you cross the railroad, along the railroad and along Verona avenue, the neighborhood is pretty well built up, isn't it?

A Yes, sir; and a great deal better property than this.

Q And a good class of buildings there?

A Yes, sir; from there until you get up in Forest Hill it is fine.

Q Don't you know, as a matter of fact, that there was a sewer in Sylvan avenue in 1901?

A Well, I tell you it was put in about that time or a little before; I don't remember the exact date.

Q And you don't care whether you know that or not for the purposes of this case, do you?

Mr. Coult. I don't think that is fair.

A A sewer is an advantage.

Mr. Hardin. I ask him whether he cares for the purposes of this case.

Witness. A sewer is an advantage to a piece of property; there is no doubt about that.

Q And would that affect your valuation of that tract of land?

A Well, with the sewer there, I still think that my figures are very conservative, very full up as to the value

of that property.

Q But when you make that figure you are not positive as to whether there was a sewer there or not, are you?

A Of course, this matter was up a year or more ago, and then I looked into all these matters very carefully.

Q Now, I was notified that this case was coming on and I was to give my testimony again, and just for the time it escaped my mind as to just when the sewer was built.

Q Well, it certainly must affect your valuation of this property.

A Oh, I have no doubt—my judgment was made up in studying this matter some time ago, and then I came to that conclusion in reference to the value of the property being—very large value being between $10,000 and $12,000, and then I knew absolutely in reference to the sewer and everything else around there, because I had examined it specially then, at that time.

Q But you don't remember now?

A Well, I say I don't remember now whether the sewer was there and had been assessed or not at that time.

Q You have stated that there is a difference in level of 35 feet in less than 200?

A 30 to 35.

Q In less than 200?

A Well, in 200 and less, I said.

Q You mean by that, less than 200 in the distance from Sylvan avenue to Second River?

A Yes, from Sylvan avenue to Second River.

Q Now, is that a gradual slope from Sylvan avenue back to the Second River?

A It is very, exceedingly irregular.

Q Isn't it a matter of fact that there is a bluff along Second River?

A Yes, sir.

Q A low bluff?

A Yes, sir.

Q And when you tell us about 35 feet difference between Sylvan avenue and Second River, you are not talk-

ing about the land at the foot of the bluff in the rear and the land on the street front?

A I am giving the extreme, of course, but I say it is very irregular, it isn't an inclined plane from Sylvan avenue and Mt. Prospect avenue down to this river, but it is very irregular.

Q Well, how high is that bluff along the Second River?

A Well, that varies; in places it is probably 20 to 25 feet.

Q And the top of that bluff is not more than 8 or 10 feet from Second River, is it?

A Oh, a great deal more than that.

Q Well, how far?

A Well, mainly from 50 to 75 or 80 feet.

The Court. You asked for the top of the bluff?

Mr. Hardin. Yes.

The Court. And the witness answered as to the whole tract.

Mr. Hardin. I thought I understood him, but perhaps I didn't.

Witness. The top of the bluff —

By the Court.

Q What do you mean by the bluff?

A The top of the bluff—I mean the brow, the top of the steep part, and that is where it begins to run less steep.

Q You are now speaking of the whole tract?

A Yes, sir.

Q The high point on the tract?

A The high ridge.

Q You are not speaking about the bank at the river?

A I am speaking about the top of that bank at the river.

By Mr. Hardin.

Q The Second River runs through a gully, doesn't it?

A Well, most rivers run through a gully.

Q Does Second River run through a gully at this point?

A Undoubtedly.

Q A high bank on the Belleville side and a less high bank on our side?

A Well, the high bank on the Belleville side, I think, is a little further from the river.

Q The top of the bank of this gully, through which Second River runs, on the Newark side, you say, varies from how close to the river to how far away?

A Well, I should think from 40 to 75 feet.

By the Court.

Q Oh, that is the distance from the river?

A Yes, sir.

Q I thought you meant the elevation.

A No, sir; measured along the surface of the ground.

The Court. That is my mistake.

By Mr. Hardin.

Q In some places, you say, it is as high as 25 feet?

A I should think so.

Q You have begun with 35 feet, the highest point on the front at the corner of Mt. Prospect avenue and Sylvan avenue?

A Yes, sir.

Q All the front is not that high, is it?

A No, sir; I think not; it runs down Summer avenue much lower.

Q As a matter of fact, isn't there a string of lots along Sylvan avenue for at least a hundred feet about at grade?

A Not at grade; the ground is very irregular; but, still, they are adaptable—with the paving of Sylvan avenue, they are adaptable for lots.

Q There is no such serious difference in grade as the difference of 35 feet, is there?

A No, sir, not in a hundred feet.

Q If you take a strip of a hundred feet or more than a hundred feet—

A No, but taking all that in consideration, you would

have great difficulty in disposing of them.

Q No, Mr. Van Duyne, don't answer questions until I ask them. It is true, isn't it, that the lots fronting on Sylvan avenue all the way along there are for a distance of more than a hundred feet, possibly 150 feet, practically at grade, or at least adaptable to easy improvement?

A They are not at grade, no.

Q Well, adaptable to easy improvement?

A Well, they can be made available.

Q Oh, you could fill a hole fifty feet deep, I suppose; I appreciate that.

A Of course.

Q There isn't a serious difference in elevation, is there?

A Well, there is enough difference not to make them desirable for buyers. I suppose that is one reason why they haven't sold.

Q I suppose there isn't a difference of more than 8 or 10 feet there, is there?

A Well, I don't think so. There may be places where the gully runs up, but generally I shouldn't think it would be more than that.

Q That map was made by you, was it [shown to witness]?

A Yes, that was made by us in 1893.

Q Do you recall why the map was laid off in lots?

A Do I recall why it was laid off in lots?

Q Yes.

A To show the possibilities of the property.

Q Contrary to your views as to the proper way to dispose of the property, isn't it?

A Not at all, not at all. I think it was right to lay it off in lots to get an idea of what might be available in either way.

Q But you now think it is a poor way to sell it?

A I don't think that is a poor way to sell it at all.

Q Well, I understood you to say—

A I said I thought the best figures—if the plot suited a manufacturer, why, the best figures to get for the property would come in that way; but I didn't intend to say

that it wasn't possible to sell it off in lots at some price.

Q Well, don't you say that the best way to sell it is all together?

A Well, that depends, too. If a manufacturer doesn't want it as a whole plot, if a builder bought it, why, he might prefer, and undoubtedly would, to start improvements, in the hope of selling it off in lots.

Q Then your idea of the best way to sell is that it depends on what the customer wants; if he wants it in lots, that is the best way to sell, and if he wants it in a whole plot, that is the best way?

A Yes, sir; what the owner wants to do with the property.

Q You were pretty outspoken in opposition to the location of this isolation hospital up there, were you not?

A Well, it so happened—I was reading my testimony while I was listening to the other case. I suppose I would have forgotten it if I hadn't; but it so happened that I was out of town while this discussion was at its height.

Q You mean when the public meetings were held?

A Yes.

Q But you were in town enough to express yourself quite freely on the subject, weren't you?

A Well, I don't doubt it. I was one of those who were opposed to the permanent location of an isolation hospital as a permanent institution anywhere. I believe that these temporary buildings in the time of an epidemic would answer the purpose better and would not damage any property, and after the epidemic they could be destroyed, and it would be better for the city and property in every direction.

Redirect Examination by Mr. Coult.

Q Now, I understand you to say that you are not sure but possibly the sewer improvement might have been put either about the time of this option or it might have been before. Suppose there had been a sewer in Sylvan avenue at that time, would that have affected your judgment as to the value of this property as you have stated it?

A Well, I want to answer that in this way: That when

my judgment was formed as to the value of this property I absolutely knew whether the sewer was there and had been assessed for or not. Of course, a piece of property that is available at all for city lots, the cost of an ordinary pipe sewer, as that is, would enhance—the lots would be enhanced at least by the cost of an ordinary pipe sewer like that; that is, their share of the cost.

Q Well, that would have to be paid for, I suppose, by the owner of the property?

A That would have to be paid for by the owner of the property.

Q Now, could those lots, in your opinion, have been disposed of at an auction sale?

A I don't think so, unless they had been practically given away.

Q What would they have brought, in your opinion, at an auction sale?

A Well, I don't believe those Sylvan avenue lots, in the condition it was that time, would have brought at an auction sale over from $150 to possibly $200.

By the Court.

Q What lots are you now referring to?

A I am referring to the Sylvan avenue lots, Sylvan avenue being entirely in its natural condition.

Q Laid out in the size of city lots?

A Yes, sir; laid out in the size of city lots.

By Mr. Coult.

Q And the lots as they are laid off on the other street?

A Well, Summer avenue and Mt. Prospect avenue—at that time lots were selling on Mt. Prospect avenue, much more desirable lots, south of the railroad, at $500 or $600 a lot, and these lots on Mt. Prospect avenue, I don't believe, if it was sold at auction, at $400, and they would have had very hard work to have got that for them at private sale, on Mt. Prospect avenue.

Q Now, those down on the other street.

A On Summer avenue, between $300 and $400.

Q Sylvan avenue you put at—

A Well, that is at auction.

Q I mean to make disposition of the whole thing at once. What would the rear land have brought at auction?

A Well, of course, whoever bought the rear land would necessarily have had to buy some front lots, otherwise he couldn't get on it, and it is very hard—

Q Well, bought it with the idea of getting, possibly, access to it some other way or somehow?

A Well, it is very hard to put a value on a piece of bluff property, as that rear property was If these lots had been extended all the way across, making them nearly 200 feet deep, perhaps $50 or $60 extra might have been obtained in selling them to somebody who wanted extra deep lots.

Q But do I understand you to say that if they had been set up and sold at auction, while this might be a possible price, that they could have been sold at one sale for anything like that price?

A At the aggregate of $10,000 or $12,000? I don't think so; I don't think so, by any possibility.

Recross Examination by Mr. Hardin.

Q Mr. Van Duyne, will you tell me what the total that you gave Mr. Coult of the lot plan figures? I didn't follow that; I am quite interested in that.

A Well, I will figure it. [Figuring on paper.] Now, assuming the possibility of selling at auction the Sylvan avenue lots at $150—there are sixteen lots—would make $2400; the Mt. Prospect avenue lots at $350, the eight lots would be $2800; and the seven lots on Summer avenue at $300 would be $2100; making an aggregate of $7300; and it would be a very fortunate auction sale if they brought that.

Q And yet you could figure the whole tract as worth $10,000?

A And yet I figure the whole tract, treating it as an owner not compelled to sell, and a very full price, being somewhere between $10,000 and $12,000.

Q Well, that is contrary to your usual rule in estimating the value of unimproved property, isn't it?

A I think not, no.

Q Don't you customarily work it out on the lot plan and then discount the value of it by lot plan to get at the value of it as you would sell it as a whole tract without development?

A You are talking about an auction sale, are you?

Q I am not talking about an auction sale; I am talking about the value of this property. I understand you to say on your lot plan that it is worth $73co, on the lot valuation?

A I understand you to ask me what the result would be, carrying out the auction sale that Mr. Coult was asking me about, if I was actually selling at auction?

Q Oh, I shouldn't have disturbed you if I understood that; I understood it was a lot valuation.

A Oh, no.

Q What is your lot valuation on this tract?

The Court. At auction?

Mr. Hardin. No, sir; not at auction. Between a willing buyer and a seller willing to sell.

The Court. In October, 1901?

Mr. Hardin. Yes, sir.

Mr. Coult. It seems to me that there is one feature that ought to go into that, and that is the sale of all the lots at one time.

A [Figuring on paper.] Now, in figuring the value of those lots, not in selling—not on a price that you could sell off in a month or even in six months, but as a fair asking price in the hopes of making sales occasionally—the lot price—I would put the lots on Mt. Prospect avenue at $500; that is a very full price; the lots on Sylvan avenue at $300, and the lots on Summer avenue at $400; that makes a price of $11,600 Now, if it was my property and I had the opportunity, under those conditions, under my judgment as to the value of the lots singly—if it was my property and I had an opportunity to sell it at twenty-five per cent. off as a whole, I would

be very glad to do it.

Q That is, twenty-five per cent. off $11,600?

A Yes, sir.

Q What would that leave?

A That would be $9200.

Q Then $9200, you think, is the fair selling price for that plot in 1901?

A That is the reason I have said each time that from $10,000 to $12,000 would be a very fair selling price for that property.

By the Court.

Q When did Tiffany take hold of his tract to improve it?

A Well, it is hard to remember back, but I should judge most of his purchases were made within a year or two of this time.

Q Somewhere about 1901 or a year or two before?

A Perhaps a little before.

Mr. Hardin. His purchase was some four or five years before.

Q When did he build his factory, if you remember?

A The same time that the improvements were going on. Of course, I am very familiar with all that was done there, because I had charge of that.

Q In its original condition was the Tiffany tract wooded?

A Quite heavily wooded; yes, sir.

Q And was that wood removed?

A Well, of course, necessarily, where the factory was. Part of the factory site was not wooded, but part of the tract, 700 or 800 feet down towards Mt. Prospect avenue, it was quite heavily wooded, and some of the wood is there still.

Q And what was the condition of this tract in question in 1901 as to being wooded or clear?

A There wasn't as much wood on this tract as on the Tiffany tract.

By Mr. Coult.

Q Never had been?
A I don't think there was as much.
Q Or at least for a great while?
A No.

By the Court.

Q Can you tell us about how near the nearest part of the Tiffany tract is to the nearest part of this tract?
A Tiffany bought right down to Mt. Prospect avenue; his tract, while it ran on Mt. Prospect avenue exactly opposite this plot, also extended around in an L, with a large front on the railroad.
Q He owns on the west side of Mt. Prospect avenue?
A Yes, sir.
Q Opposite—
A This tract, running 1200 or 1500 feet; but he didn't own on Mt. Prospect avenue right up to the railroad, but back of the first property fronting on Mt. Prospect avenue, it comes up to the railroad and runs to the river.
Q Runs to the river?
A Yes, sir.
Q And how far away from any part of this tract—the nearest part of this tract—is the Tiffany property?
A Well, that may be 700 or 800 feet west.
Q Where are the houses that you speak of?
A Well, the houses are on the first two blocks, as I remember now, east of the factory, towards this property.
Q On what street?
A On some little streets that he opened himself in his property.
Q Is there any improvement on Mt. Prospect avenue on the Tiffany tract?
A No, sir.

Further Direct Examination by Mr. Coult.

Q These improvements that have been made by Tiffany are especially made for the use of the factory, are they not?

A They are; they are especially made for the use of some of his employees.

Q And made at his own private expense?

A Certainly; the whole business, the whole improvement of the property was made by him.

Q Do you know whether he bought that property by the acre or by the lot?

A He bought most of that by the acre.

Further Cross Examination by Mr. Hardin.

Q Mr. Van Duyne, there are very few trees on this Sylvan avenue tract outside of some low trees along the brook?

A That is my impression.

Q There are no trees on the front part of the property at all, are there?

A I think not; my impression is that they have either been cut down—I guess there are some stumps there yet.

Q I didn't understand what you meant when you said there were no improvements on Mt. Prospect avenue on the Tiffany tract.

A I didn't say there were no improvements; on the tract itself—that is, when we were talking about the buildings that had been put up between the factory and east, but on the Tiffany tract along Mt. Prospect avenue, there were no buildings put on that tract there.

Q Well, there is a bridge, isn't there, over Second River at Mt. Prospect avenue?

A Oh, yes, there is a bridge there,

Q And the roadway is in good shape?

A Yes, sir.

Q It goes across the river?

A Yes, sir.

Q And you don't mean to say that this property was not improved at all between this place and this Tiffany tract?

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

Q This Tiffany Boulevard that you laid out opens out into Mt. Prospect avenue about opposite the middle of this Sylvan avenue tract, doesn't it?

A I think a little north of that. The original commissioners' map extended Sylvan avenue straight across, but on the Tiffany property that was discarded, as I remember, and the street was moved—

Q Nearer the river?

A Quite near the river.

Q Do you remember how wide that street is?

A My impression is 60 feet.

Q That is curbed and graded and sidewalked?

A Oh, yes, that was all put in shape at the time.

Adjourned until Monday, November 7, 1904, at ten o'clock, A. M.

THIRD DAY

Monday, November 7, 1904.

Met pursuant to adjournment.

Present, counsel as before stated.

HENRY RUSSELL sworn in behalf of defendants.

Direct Examination by Mr. TenEyck.

Q Mr. Russell, where do you live?

A Belleville.

Q Do you know the property bounded by Sylvan avenue, Summer avenue, Mt. Prospect avenue and Second River?

A I do; yes, sir.

Q How long have you known that property?

A Ten years.

Q Have you seen it often?

A Yes, sir.

Q Do you know the character of it?

A Yes, sir.

Q What is your business, Mr. Russell?

A Real estate.

Q Real estate agent? How long have you been such?

A Ten years.

Q In Newark?

A Yes, sir.

Q In what part of Newark was your business located in former years?

A Corner of Washington avenue and Verona.

Q That is in Woodside?

A Yes, sir.

Q Did you make a specialty of property up in that section?

A I did.

Q And do you now?

A I do.

Q Now, you may state what, in your opinion, that block, that tract, was worth in 1901?

A In bulk, $5000.

Q $5000?

A Yes, sir.

Q Do you know of any way that any better price could be gotten for it?

A Cutting it up into lots.

Q Suppose it was cut up into lots, was it practicable to sell lots up there in 1901?

A Well, that is a hard question to answer. I think they could have been sold at a price.

Q Do you know the condition of the streets there in 1901?

A Yes, sir.

Q Now, considering the condition of the streets there in 1901, if it had been cut up into lots and sold, what would be your idea of what could be gotten for it?

A $7200.

By the Court.

Q $7200.

A Yes, sir.

By Mr. TenEyck.

Q You think that is the best that could be done with it at that time?

A For cash.

Cross Examination by Mr. Hardin.

Q Where is your office now, Mr. Russell?

A 22 Clinton street.

Q Have you handled any property in the neighborhood of Sylvan avenue lately?

A Not very recently.

Q You have given us the value of this property in 1901, have you?

A Yes, sir.

Q How many real estate transactions did you have during the year 1901?

A I couldn't tell you, sir, without referring to my books.

Q How many did you have during 1900?

A I couldn't tell you any year without referring to my

books.

Q Did you have a good many?

A Well, I had a number; I couldn't say how many, as I said before.

Q Fifteen?

A I can't give the numbers.

Q Ten?

A I can't state any numbers.

Redirect Examination by Mr. TenEyck.

Q Did you sell any property in the northern part of Woodside in 1901?

A Well, now, I couldn't say without referring to my books. I have sold property in that section, but just what year it was, that I couldn't say.

Q You have been selling constantly up that way?

A Yes.

Recross Examination by Mr. Hardin.

Q What do you mean by selling constantly?

A Well, off and on through the year.

Q Well, how many properties did you sell up there during this year, 1904?

A I couldn't tell you without referring to my book.

Q Have you sold any during 1904 up there?

A Yes, sir.

Q Whereabouts?

A In Forest Hill and adjacent property around there.

Q Well, whereabouts?

A Well, I sold some on Parker street.

Q Who was the owner?

A Mr. Tucker.

Q And who was the purchaser?

A I don't recall his name at this moment.

Q And when did it take place?

A Oh, within six or eight months.

Q Is that the only one this year?

A No.

Q The only one up there, I mean; I am not talking about other parts of the city?

A No, sir.

Q Well, where is there another?

A I sold a small piece on Washington avenue near Sylvan.

Q Who is the owner?

A Belonging to the Ballantine Brewing Company.

Q And who bought it?

A A man by the name of Betz.

Q Where was it?

A On Washington avenue south of Sylvan avenue, on the west side. It was only a small piece where the building projected over onto it.

Q Any other pieces up in that neighborhood during this year?

Mr. Coult. This inquiry is as to this year?

Mr. Hardin. Yes.

A How many transactions did you have up there last year?

A I don't know without referring to my books.

Q Is your business confined to that part of the city?

A No, sir.

JOHN H. FRANCISCO sworn in behalf of defendants.

Direct Examination by Mr. TenEyck.

Q Mr. Francisco, where do you live?

A 728 Summer avenue.

Q What is your business?

A Surveyor.

Q Have you any other business?

A No, not particularly.

Q Do you do anything in the real estate line?

A Occasionally.

Q How long have you been a surveyor?

A Over thirty years.

Q Whereabouts?

A In Newark.

Q And how long have you been selling real estate?

A Well, twenty-years, probably.

Q How long have you lived in the Woodside section of the city?

A About fourteen years.

Q Do you know the premises bounded by Sylvan avenue, Mt. Prospect avenue, Summer avenue and Second River?

A I do.

Q How long have known that property?

A Forty years.

Q Do you know what condition it was in in October, 1901?

A Yes.

Q Were you familiar with it?

A Yes, sir.

Q From your judgment of land values in that neighborhood, what would you say was the fair market price of that property at that time?

A It was worth between $10,000 and $11,000 in my judgment.

Q Between $10,000 and $11,000?

A Between $10,000 and $11,000.

Q On what do you base your idea of its value?

A The lots on Mt. Prospect avenue, I think, would be worth in the neighborhood of $325 a lot; with the sewer they would be worth in the neighborhood of $355; the Summer avenue lots would be worth the same price, and the lots on Sylvan avenue would be worth in the neighborhood of $330 a piece with the sewer; that is, a lot fronting on Sylvan avenue and extending back to Second River, taking the entire depth.

By the Court.

Q How much?

A $330.

Q Let me see if I understand you. Lots fronting on Sylvan avenue, taking the entire depth, would wipe out all the other lots, would they not?

A Not at all, no; cutting the lots up on Summer and Mt. Prospect avenue, with a depth of 100 feet—

Q And taking the lots you had left on Summer

avenue?

A Yes, sir; the depth of each lot.

By Mr. TenEyck.

Q Was there a ready sale for lots around that locality in 1901?

A I don't think there was.

Q Has there ever been, to your knowledge, what might be called a ready sale for lots around there?

A I think not.

Cross Examination by Mr. Hardin.

Q You said that the lots on Summer avenue were worth $325?

A Yes.

Q And with the sewer they would be worth more?

A They would be worth more with the sewer.

Q Now, the lots on Mt. Prospect avenue are worth $325?

A Yes, sir.

Q And with the sewer they would be worth more?

A Yes, sir.

Q Don't you know, as a matter of fact, that there was a sewer in Mt. Prospect avenue in 1901?

A Yes, there was, but it didn't take in the entire frontage on Mt. Prospect avenue.

Q Then so far as the lots that have a sewer in front of them are affected, they would be worth $350 instead of $325?

A $355; that is my judgment.

Q Now, don't you know, as a matter of fact, that there was a sewer in Sylvan avenue in 1901?

A Yes.

Q And there was water, was there not, in Summer avenue?

A Yes.

Q And in Mt. Prospect avenue?

A Yes.

THOMAS J. GRAY sworn in behalf of defendants.

Direct Examination by Mr. TenEyck.

Q Mr. Gray, where do you live?

A Second avenue, Newark.

Q How long have you lived in Newark?

A About thirty-five years,—thirty four.

Q What is your business?

A Real estate.

Q How long have you been in that business?

A A little over thirty-three years.

Q Are you familiar with the properties in Woodside, the upper end of Woodside?

A Yes, sir.

Q Have you sold property up that way?

A Yes, sir.

Q For how long?

A Oh, well, I have sold different plots at different times during that time.

Q Are you familiar with the property bounded by Mt. Prospect avenue and Sylvan avenue and Summer avenue and Second River?

A Yes, sir.

Q How long have you known that property?

A Well, I have known that property in a general way a good many years.

Q Have you examined it within a recent time?

A I examined that property particularly in February.

Q Of this year?

A Yes, sir.

Q For what purpose did you examine it?

A Well, I didn't know at that time; I was asked to go and examine the property and put a price upon it.

Q Put a price on it?

A Yes, sir.

Q Did you know anything about the object for which you were making an appraisement?

Objected to as immaterial.

The Court. It seems to be immaterial.

[Question withdrawn.]

Q Did you put a price upon it?

A I did, yes, sir.

Q What condition did you find that property in as to street improvements, paving?

A Mt. Prospect avenue was graded, flagged and curbed and sewered; Summer avenue was the same; Sylvan avenue, the street was simply opened; I think there had been a little work done to it at that time.

Q There was some work done in the way of starting—

A Starting to grade; I judged at that time that they were about grading the street to put it in condition.

Q Now, regarding that as it was in 1901, with no pavement in Sylvan avenue, and the street not being graded, what is your judgment as to its value at that time?

A I should judge that there would be but little difference between the value in 1901 and when I valued it.

Q Well, what would that be?

A I valued that property in February at $11,600.

Q At the time when you saw it all the improvements had been made by the Tiffany Company just near there?

A Oh, yes.

Q And you had them in mind, did you?

A I can't say that I did have them in mind.

Q Did you ever see anything of it?

A Oh, yes, I have been over it.

Q You knew about it, did you?

A Yes, sir.

Q Did that affect your judgment any?

A It may have done so. I took the surroundings generally in consideration in putting the value on it.

Q How did you get at your figure as to the value of this property?

A What I supposed those lots should sell for for building purposes.

Q Do you think that it has any value aside from that, any different value?

A I should say not.

Q Would it be worth any more for a factory site?

A I don't think so.

Q Would it be worth as much?

A I don't think it is a desirable location for a factory.

Q Why not?

A On account of the facilities for getting to it.

Cross Examination by Mr. Hardin.

Q Did you make up this valuation of yours on a lot plan?

A I did, yes, sir.

Q What did you value the lots at?

A There were 200—my recollection is, 217 feet front on Mt. Prospect avenue, but not as wide in the rear; I don't know exactly what they were across the rear; so I called that eight lots on Mt. Prospect avenue, at $500 each, would be $4,000. On Summer avenue it is not as wide, quite, about 175 feet; that would be seven lots, at $400 each. That would leave, commencing 100 feet east of Mt. Prospect avenue and running to within 100 west of Summer avenue, 400 feet—

By the Court.

Q On Sylvan avenue?

A On Sylvan avenue; yes, sir. Which would be sixteen lots, and the depth of those would be from 175, 170 or 175 feet, to 200 feet deep, running back to Second River, and those are valued at $300 each, $4800.

By Mr. Hardin.

Q That is a total of $11,600?

A Yes, sir.

Q You think that is the reasonable market value of that property in 1901?

A Yes, sir; or 1904, either.

Q That is the present market value?

A Not the present, because it has been paved since that time.

Q Well, then, I understood you to say you thought it was worth about the same now as it was then?

The Court. In February, he made his valuation.

A Yes, sir, in February. I say at the time I made my valuation; at that time but very little was done to Sylvan avenue.

Q I suppose to sell that plot all together, not in lots, as you have laid it off, it would be worth less than $11,600?

A In my judgment, you couldn't get $11,600 for it in a plot as a whole.

Q If you were selling the plot all together instead of in lots—you would have to charge the owner, you say, $11,600 for it in lots, and if you were selling it all together you would discount that price, wouldn't you?

A I certainly should.

Q Isn't it customary to discount the price when you are selling all together and not in lots?

A Well, as the property stood at that time, if I had anything to say about it and a man had offered me $10,000 for it, I should have taken it.

Q And if anybody had offered you $9,000, I suppose you would have thought awhile?

A No, I don't think I should.

DEFENDANTS REST.

HERMAN C. H. HEROLD recalled in behalf of plaintiff in rebuttal.

Direct Examination by Mr. Hardin.

Q Dr. Herold, did you ever employ William H. Brown as agent to purchase property for the Board of Health of the City of Newark, or for the City of Newark, or for yourself—this particular property?

Objected to.

A No, sir.

[Objection withdrawn.]

Q What was the relation between Mr. Brown and yourself in the negotiation for this property?

Objected to.

Q Tell us about the negotiation.

Mr. Coult. It seems to me we have been through that. I object to it on the ground that if it was a part of the plaintiff's case he ought to have offered it before; it is not in rebuttal of anything.

The Court. [After discussion.] I do not see that this is rebutting, Mr. Hardin. I sustain the objection.

Plaintiff's counsel prays an exception.

Mr. Hardin. In order to get the ruling of the Court applicable to the proffer, I will return to the first question.

Q What was the relation between yourself and Mr. Brown during the negotiation for the purchase of this land in Woodside?

Objected to as not rebuttal.

The Court. [After discussion.] This is the way it lay in my mind. I was considering whether the relation in which Mr. Brown stood toward the Board of Health was part of your principal case as to market value. I think I will take the evidence as to the relation which Mr. Brown sustained towards the Board of Health. The question that is now asked I will allow to be answered.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

[Question read.]

A The first visit or conversation that I had with Mr. Brown was the day that—

Mr. Coult. This question calls for the relation, doesn't it?

By the Court.

Q Do you understand the question?

A The relation, as I understand.

Q That does not call for a narrative of the negotiation, but for a statement.

A The only relation that existed between Mr. Brown and myself was that he held an option on property that the board had looked at, for which we wanted a price.

By Mr. Hardin.

Q Was that option obtained for the Board of Health?

Objected to as not rebuttal.

Objection overruled.

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

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Q Was that option that Mr. Brown held obtained for the Board of Health?

A No, sir.

Q Was it obtained for you?

A No, sir.

Q Or, so far as you know, for the City of Newark?

A Yes, sir; so far as I know, it was not obtained for the City of Newark.

Mr. Coult. I understood that this was admitted by the Court as tending to prove the market value of the property.

The Court. What do you now refer to, the action of the Common Council?

Mr. Coult. Yes.

The Court. It was offered for that purpose and received for that purpose.

Mr. Coult. Yes, alone.

Cross Examination by Mr. Coult.

Q Do you know when that ordinance was passed?

A The ordinance?

Q Yes.

A I do not know the date; no, sir; I know it was on a Friday, but the exact date I do not know. I haven't refreshed my memory; I haven't had any opportunity.

Q Do you know in what month it was?

A No, sir; I stated before I thought it was in September, but I wasn't positive about that.

Mr. Coult. The testimony, as I recollect it, is that it was October. I see by the certified copy there is no doubt but that it was on the 12th of September.

Mr. Hardin. Yes, sir.

The Court. That is admitted, is it?

Mr. Hardin. Yes, sir.

Mr. Coult. The 12th of September.

The Court. Is there any plea in this case by the other defendant, Mrs. Ranney?

Mr. Hardin. None.

Mr. Coult. She was not served.

PLAINTIFF RESTS.

Mr. Coult sums up for defendants.

Mr. Hardin sums up for plaintiff.

BROWN v HONISS

The Court charges the jury as follows:

Adams, J.

Gentlemen of the jury. This is an action to recover damages for the breach of a written contract. The con-

tract that is relied on is what has been called an option, which I hold in my hand, and which reads as follows:

"This is to certify that John Honiss and Anna P. Ranney, owners of the premises hereinafter described, in consideration of the payment of twenty-five dollars, do hereby give and grant to William H. Brown, of 78 Fourth avenue, Newark, N. J., agent, the option to purchase the certain tract of land in said City of Newark, bounded by Mt. Prospect avenue, Sylvan avenue, Summer avenue and Second River, for the sum of twelve thousand five hundred dollars, said option to expire on the first day of November next. Any other person applying to purchase said premises during the continuance of said option shall be referred to said William H. Brown, who agrees on his part to use his best endeavors to effectuate a sale thereof. And the said parties first above named agree on their part to execute all necessary deed or deeds of conveyance upon a sale negotiated in pursuance of the premises unto said William H. Brown or such party or parties as he shall name. Dated Newark, N. J., July 9th, 1901". Signed, "John Honiss, Anna P. Ranney, Per S. H. Pennington, her Attorney."

This contract was extended from the first day of November until the first day of December by a written extension signed in the same way.

It is admitted that the conveyance called for by the option was not made, and the question is whether the defence or defences presented here afford a legal justification for the failure by the defendants to perform their written contract.

The defences are set up in the defendants' pleas, which are in number three. First, a general denial, which puts the plaintiff upon the proof of his case, that there was such a contract; and that has been proved. That plea may be regarded as formal. Thirdly, a plea that the plaintiff never offered the sum of $12,000 or requested a conveyance, and that the option or agreement for this reason was null and void; that is, that the defendants were never obliged to perform, because the money was never tendered. It is enough to say on that subject that the plaintiff was noti-

fied by the defendants that they would not convey, for a reason which they gave; and even if it be true that the money was not tendered, the fact that the plaintiff had notice from the defendants that no deed would in any event be given would be an excuse for not doing the unnecessary act of proffering the money. There is, however, evidence in the case, is there not, that the money was tendered?

Mr. Hardin. Yes, sir.

The Court. That is a question of fact for you, and I do not remember that it was contradicted.

So that the gist of the case is in the second plea, which is denied by the replication. The second plea sets up fraud, and I will read it. It is this:

"That the plaintiff in the negotiations which preceded the making by this defendant of the said option or agreement described in the said declaration, stated and represented to this defendant that in case of a sale of the said property in accordance with the terms of the said option or agreement, the said property would be used by the purchaser thereof for the purpose of erecting, constructing and maintaining a factory thereon, and that this defendant believed the said statement and relied thereon, and relying thereon executed the said option or agreement in the belief of the truth thereof, but this defendant avers that in truth and fact the plaintiff did not intend to purchase the said property for factory purposes, as aforesaid, nor did he intend to devote the same thereto, but that on the contrary thereof he intended to purchase the same for the purpose of an isolation hospital or pesthouse, for the Mayor and Common Council of the City of Newark, and this defendant avers that the said option or agreement was procured from him by the plaintiff by misrepresentation and fraud, and that the same is for that reason null and void."

This the plaintiff denies by his replication, saying that it was obtained fairly and honestly and not by misrepresentation and fraud. So that, you see, the substantial defence set up by the pleadings is the defence of fraud

—the procurement of the option sued on by misrepresentation. What the plaintiff seeks to recover is the value of the bargain he has lost.

What is a fraudulent representation? A material statement which is false in fact, and is made for the purpose and with the intention of inducing the party to whom it is addressed to contract on the faith of it, and which is influential in producing the result—false in fact, intended to induce the party to whom it is addressed to act on it and influential in inducing him to do so. I say a material representation; it must be material. When is a representation material? A material representation is one of which the action complained of is the natural, necessary, legitimate, probable or obvious result—a representation but for which the party to whom it is addressed might be reasonably expected not to have acted as he did. A material representation is one which is intended, or which, from the mode in which it is made, is calculated to induce another to act on the faith of it. If a representation of this character is made, and is false to the knowledge of the party who makes it, and the party to whom it is addressed enters into a contract because he relies upon the representation, and it was made for the purpose of inducing such action, the party to whom it is addressed is not bound by the contract into which he may have entered in consequence of this inducement.

There is another consideration of some importance, relative to a representation that is honest—not false, but true. The responsibility for an honest material representation does not end when the representation is made. If the party who represents changes his intention before the party to whom he has made the representation has acted upon it, he is bound to give notice of his change of intention, or, otherwise, he is clearly guilty of a misrepresentation of fact. A distinguished English judge used these words: "I take it to be quite clear that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterward altered, to the knowledge of the party making the representation, but not to the knowledge of the party to

whom the representation was made, and are so altered that the operation of the altered circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the person who made the representation to communicate to the person to whom he made it the alteration of those circumstances.'' In other words, under those circumstances, he is bound to speak and disclose the change of situation, and if he does not do so, and the other party suffers loss or is prejudiced, he has his remedy.

Now, these being the rules of law that appear to the Court to be so far important to be noticed, let us turn to the facts. What was the representation? I will read from the testimony of Mr. Brown, from his cross examination.

[Reading:]

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

''A This plot I had the option on?

''Q Yes.

''A Mr. John Honiss.

''Q Where?

''A At his house, corner of Carteret street and, I think, Lincoln avenue.

''Q When was that?

''A Some time in June.

''Q How long before the option was obtained?

''A Perhaps a couple of weeks.

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

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

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

''A I am trying to tell you how it came about?

''Q I want an answer to that question.

''A I told him I was looking for a manufacturing

site. He asked me in an incidental way, not that he cared or it didn't make any difference about the property.

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

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

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

"A Yes, sir.

"Q Did you have a manufacturer who wanted this property?

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

"*Redirect Examination.*

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

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

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

"A What do you mean, the first option?

"Q Yes.

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

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

"A Well, I am a little undecided about that. My recollection of if was that it was whilst Mr. Pennington was in the back room dictating this first option. I may be mistaken about that.

"Q Was it on the day the option was executed.

"A Yes, sir. And I think Mr. Honiss asked me,

'Mr. Brown, what are you going to do with this property?' I said, 'I am looking for a manufacturing site.' I think that was the time, but I am not positive about that, it might have been earlier than that.

"Q Now, you got an extension of this option?

"A Yes, sir.

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

"A The 4th of September?

"Q Yes, that is the day of its date.

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

"Q That is the extension?

"A Yes, sir.

Recross Examination.

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

"A Yes, sir.

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

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

"Q Did you tell him before the option was made and given that the customer you desired it for wanted it for a factory site?

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

"Q Did you at any time before you had this resolution passed by the city council inform him that you wanted it

for any different purpose?

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

"Q Did you tell him what you wanted it for?

"A No, sir.

It thus appears from the testimony of Mr. Brown that this statement about wanting it for a manufacturing site was made before and not after the option was signed, and the witnesses on behalf of the defendants agree so far, differing, I think, in this: that Mr. Honiss said that the statement made by Mr. Brown about his wanting it for a manufacturing site was made at his house on Carteret street at the first interview; at any rate, they both agree that the statement was made first and the option was signed afterwards.

Now, you may ask yourselves certain questions: Was this representation false; that is, was it untrue in fact that Mr. Brown was looking for a manufacturing site; that he had a man in view who wanted a lot for a manufacturing site, who Mr. Brown thought, might be suited by this tract of land? On that subject you have no direct testimony except the statement of Mr. Brown, who is not any longer among the living. There is no direct evidence that that statement was not true—no testimony, I mean, of any other witness disproving that. Was it a material representation as I have defined in the word "material"—a representation as to a feature of the transaction sufficiently important to make it probable, considering the motives that men act on, that it would be a statement influential upon the course that the owners would pursue? Was it made in order to induce the defendants to enter into the contract? Was it operative in effecting that result?

If you find all these propositions in the affirmative, you will find for the defendants; that is if you find that that statement was false, that it was material, that it was made for the purpose of inducing the owners to act, and that it did induce them to act—was operative or influential towards that result — why,

then, you will find for the defendants. But if you find that the representation was an honest representation, that pathway to a verdict for the defendants is at once hedged up; it is an end to that argument, and we have to pursue another line of thought. If you find that the representation was honest, that it was true, when it was made, and material, and made before the defendants acted on their option by giving a deed, as the proof shows that it was, then you have to inquire whether the circumstances changed in such a way as to make it the duty of Mr. Brown to disclose to the owners the alteration of the circumstances. That will depend upon your conclusion as to whether the change was a material alteration in the situation; and you may test that by asking yourselves whether the change, if communicated to the owners, would probably have been operative on their minds to induce them to take or not to take a particular course with reference to the contract that they had made, whether it was likely to be influential, whether it was a thing that they ought to have known. For it is not everything that ought to be communicated. Where a fact is not disclosed, where it is concealed, where it is suppressed, still we have to ask ourselves the question whether the party who does not make the communication was bound, under the circumstances, in conscience and in duty, to make a disclosure; and I leave it to you to say — it must be left to you to say — whether you find that the alteration in the situation, assuming the statement to have been originally perfectly true, and that the project of selling to a manufacturer had been dropped, and that the project of selling for the purpose of an isolation hospital had been taken up, whether that alteration in the situation, known to Mr. Brown and unknown to the owners, was such that Mr. Brown, in fairness and honesty, should have disclosed it to them. That no such disclosure was made is an admitted fact in the case, and if you find that it should have been made and that the failure to make it was due to a fraudulent intention to deceive the owners, then your verdict should be for the defendants. They would be,

under those circumstances, exonerated from their contract because of the fraud of the other party to it. If, however, you think that this matter was not a material matter, or, if it was material, it was still not of sufficient importance to make it the duty of Mr. Brown to disclose the situation, why, then, you will find for the plaintiff.

If you find for the plaintiff you will ask yourselves to what damages the estate of Mr. Brown is entitled, for the suit is brought by his executrix. If you conclude that the plaintiff was deprived of the benefit of his bargain by the unjustifiable refusal of the defendants to perform their contract, then he is entitled to the value of his bargain; and the measure of damages is the sum by which the market value at that time exceeded the contract price; if it did exceed it. Market value means the price that property will bring between an owner who is willing, not compelled, to sell and a purchaser who is desirous, not compelled, to buy. You have to consider the evidence in this case on that subject furnished by real estate agents of experience on both sides. You may also consider the evidence afforded by the official action of the Board of Health and Common Council. You may use your own good judgment, and if you find that the market value at that time exceeded the contract price of $12,500, why, then, the excess measures the plaintiff's right to a verdict. On the other hand, if you find that the market value at that time did not exceed $12,500, the contract had no pecuniary value, and the plaintiff is entitled to nothing but the return of the $25, which he paid, with interest from the date of the payment, whenever that was; I do not remember. When was it? The 9th day of June, 1901; is that it?

I have been requested by the learned counsel on both sides to charge certain propositions. I have here eleven requests presented by the counsel for the plaintiff, of which I deny the first, second, third and sixth and eleventh. The fourth request I charge, leaving off a few words of the end:

"That the notification to Brown that the property described in the option would not be conveyed to him

New Jersey State Library

because of its intended use for an isolation hospital, relieved him from the necessity of tendering the purchase price."

That I have already stated.

The fifth request I charge, leaving out the words "and inadequate", toward the end:

"That the fact that Honiss was a married man at the time the option was given and when the deed was demanded and the consideration money tendered, and that Honiss's wife had not joined in the option, did not excuse the defendants in this suit from making the conveyance, the basis of the refusal to convey being for another reason."

I charge the seventh proposition. I think I have already charged it.

"That the measure of damages in this suit, if the refusal to convey was not for adequate reason is the value to Brown of the bargain contained in the option, and that such value is the difference between the option price of $12,500 and the market value of the premises described in the option"—provided, of course, that the market value exceeded the option price.

I think I have already charged the eighth proposition. I charge it, making some alteration in the language:

That in ascertaining the market value of the premises described in the option, the jury may consider the official action of the Board of Health and the Common Council.

The learned counsel for the defendants have presented to me some propositions, which I have numbered from one to eight. I charge the first proposition:

"If Brown obtained the option or the extension of it by a false representation, which was relied upon by Honiss, as to what he proposed to use the property for, the plaintiff can only recover the $25 which was paid down, with interest from the date of payment."

I charge that, with the addition that if he obtained the option by false representation, intended to induce action on the part of the defendants, and it was relied on

for that purpose and effectual for that purpose.

The second proposition I charge:

"That if there was no misrepresentation on the part of Brown, then the plaintiff is entitled to recover as damages the difference between the contract price and the market value at that time."

The third proposition is the first sentence of this paragraph, and I charge it:

"If the contract price was equal to the market value, then the plaintiff can only recover the $25 paid down."

The rest of that paragraph, which I have marked No. 4, I deny.

The fifth proposition I deny except as I have charged. The sixth I deny except as I have charged, and also the seventh.

The eighth proposition I think I have charged. I have no objection to charging it again, perhaps with some change of phraseology:

"If Brown's original statement was true, after he changed his purpose he was bound to notify the defendants, if the change was material, and not having done so, the defendants were no longer bound by the agreement."

I say if the change was material in such a sense and to such an extent that the natural, ordinary, reasonable consequence of the alteration would, if known to the owners, have affected their action in such a way that they would not have made the engagement into which they entered.

This disposes of the requests.

I am requested to charge and I do tell you that if you find for the plaintiff—that is, if you find that the market value exceeded the option price—you will give interest on the sum which you determine to be that excess from the 17th day of October, 1901. You will in form find for the plaintiffs in any event, because if you find against the plaintiff on the subject of market price on the merits of the case, you must still find a verdict for the plaintiff for $25 with interest from the 9th of June.

Mr. TenEyck. That was tendered before the suit was brought, so that would eliminate the interest.

The Second Juror. Do I understand, your Honor, if we find for the plaintiff that we are to say that we add interest to it?

The Court. Add interest to it.

The Juror. For that number of years, from the time that the contract was not fulfilled up to now?

The Court. Yes, if you find that there was a bargain and that there was a failure of the contract, then you give interest from the 17th of October, 1901.

The Juror. Until the present time?

The Court. Until the present time.

[The jury retires.]

Mr. TenEyck. I desire to except to the charge of the Court to this effect: That there was no necessity of tender because the defendants had before that refused to make a deed.

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

Mr. TenEyck. I desire also to except to the charge of your Honor to the effect that the resolution should be considered as evidence of the market value.

The Court. Yes. I did not use those exact words; I said the official action of the Board of Health.

Mr. TenEyck. Yes, sir; whatever action was taken by the city. That appears in the charge.

The Court. Yes.

Mr. Coult. We want to except to it both ways. It was excepted to in the evidence, but it was admit-

ted, on the ground that it was not proved. We want to except to it now on the ground that it is not competent testimony for the purpose of proving market value.

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

DEFENDANTS' REQUESTS AND EXCEPTIONS

(1) If Brown obtained the option or the extension of it by a false representation, which was relied upon by Honiss, as to what he proposed to use the property for, the plaintiff can only recover the $25 which was paid down, with interest from date of payment.

(*Charged.*)

(2) If thete was no misrepresentation on the part of Brown, then the plaintiff is entitled to recover as damages the difference between the contract price and the market value at that time.

(*Charged.*)

(3) If the contract price was equal to the market value, then the plaintiff can only recover the $25 paid down.

(*Charged.*)

(4) In arriving at the market value of the property, the amount which the city, through the Board of Health, proposed to pay for it for the special propose of an isolation hospital cannot be considered. The only evidence in the case of the market value of the property is the testimony of the real estate experts produced by both sides.

(*Denied.*)

Defendants' counsel pray an exception to the re-

fusal of the Court to charge as requested.

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

(5) The amount which the city, through the Board of Health, proposed to pay for the property caunot be taken into consideration as an element of damage, on the ground that there was a re-sale to the city for this amount, as Honiss was never informed that there was any such re-sale or that Brown proposed to sell it to the city for that purpose.

(*Denied ezcept as charged.*)

Defendants' counsel pray an exception to the refusal of the Court to charge specifically as requested.

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

(6) The mere proposition of the city to buy the property for $17,500 cannot be considered by the jury, on the ground that it showed a re-sale. It did not amount to a sale, and is no evidence either of market value or of a re-sale.

(*Denied ezcept as charged.*)

Defendants' counsel pray an exception to the refusal of the Court to charge specifically as requested.

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

FREDERIC ADAMS, (L.S.)
Circuit Court Judge.

(7) If the jury believe that at the time Honiss gave the option, Brown represented that it was to be

used for manufacturing purposes, and Brown afterward changed his purpose and proposed to use it for a materially different purpose, it was his duty to communicate such change to Honniss, and his failure to do so absolved Honiss from all obligation to execute a deed in pursuance of the option; Brown was thereafter entitled only to a return of the $25 paid with interest.

(*Denied except as charged.*)

Defendants' counsel pray an exception to the refusal of the Court to charge specifically as requested.

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

(8) If Brown's original statement was true, after he changed his purpose he was bound to notify the defendants, if the change was material, and not having done so, the defendants were no longer bound by the agreement.

(*Denied except as charged.*)

Defendants' counsel pray an exception to the refusal of the Court to charge specifically as requested.

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

New Jersey Court of Errors and Appeals

CARLENE K. BROWN, Executrix, of WILLIAM H. BROWN, deceased, *Plaintiff, Defendant in Error* *vs.* JOHN HONISS, et al. *Defendants, Plaintiffs in Error*	*On Error to Essex Circuit Court*

ASSIGNMENT OF ERRORS

Afterwards, that is to say, on the Twentieth day of April, 1905, before the New Jersey Court of Errors and Appeals in the last resort in all causes come the said John Honiss and Anna P. Ranney, by Coult, Howell and TenEyck, their attorneys, and say that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, and also in the matters contained and recited in the said bill of exceptions there is manifest error in this, to wit:

(1) Because by the record and proceedings aforesaid it appears that the Justice at the trial of the said cause admitted in evidence, against the objection of the defendants, without proper proof thereof, the original option dated July 9, 1901, and extension thereof, given by the defendants to William H. Brown (Exhibits P. 2. and P. 3.)

(2) Because the said Justice at the said trial aforesaid admitted testimony by William H. Brown, on behalf of the plaintiff, to prove an alleged option and agreement for sale, and the price thereof, to Dr. Herold, for the sale of the land covered by the original option.

(3) Because the said Justice at the said trial aforesaid

admitted testimony given by William H. Brown, in relation to an alleged sale to the City of Newark of the property covered by the option given to him.

(4) Because the said Justice at the said trial improperly admitted testimony by William H. Brown as to why the property in question was not conveyed to the City of Newark.

(5) Because the said Justice at the said trial aforesaid admitted in evidence the resolution of the Common Council of the City of Newark passed September 12, 1901, and approved September 13, 1901, which resolution appropriated $17,500 to William H. Brown for purchase of the land, covered by the option, for an Isolation Hospital.

(6) Because the said Justice admitted testimony by William H. Brown to the effect that he was told by Samuel H. Pennington that the defendants had a bond of indemnity against pecuniary loss.

(7) Because the said Justice at the said trial as aforesaid admitted in evidence a resolution of the Common Council of Newark, passed November 7th, 1901, rescinding the resolution of the same body passed September 12, 1901, appropriating $17,500 to William H. Brown for the purchase of land for an Isolation Hospital.

(8) Because the said Justice at the said trial as aforesaid admitted the evidence of the witness Pennington on his re-direct examination, as to what he had said to Mr. Brown, at the time of the tender to him by Mr. Brown and Mr. Hardin of the purchase money in pursuance of the option and the extension thereof.

(9) Because the said Justice at the said trial as aforesaid permitted the witness Herman H. C. Herold to testify as to when he first disclosed to William H. Brown the purpose for which he desired to use the property in question.

(10) Because the said Justice at the said trial as aforesaid admitted in evidence the minutes of a meeting of the

Board of Health of the City of Newark, held on May 17 1900.

(11) Because the said Justice at the said trial as aforesaid admitted in evidence a resolution of the said Board of Health of the City of Newark, passed on May 17, 1900.

(12) Because the said Justice at the said trial as aforesaid refused, at the close of the plaintiff's case to strike out the resolution and minutes of the Board of Health of the City of Newark, and the resolution of the Common Council of the said City, and testimony relating thereto.

(13) Because the said Justice at the said trial as aforesaid admitted the resolution of the Common Council of the City of Newark, purporting to appropriate $17,500 for the purchase of the land, mentioned in the option given to William H. Brown, for an Isolation Hospital, as evidence of the market value of such land.

(14) Because the said Justice at the said trial as aforesaid refused to allow the defendant Honiss to state why he asked William H. Brown what he was going to do with the property he was taking the option on.

(15) Because the said Justice at the said trial as aforesaid refused to allow defendant Honiss to state whether he relied on the representation made by William H. Brown as to the use of the property covered by the option.

(16) Because the said Justice at the said trial refused to allow defendant Honiss to state whether he would have given an option to William H. Brown if he had been told or believed that the land was to be used for the purpose of an Isolation Hospital.

(17) Because the said Justice at the said trial permitted plaintiff to introduce in rebuttal testimony by Herman H. C. Herold as to the relation between himself and Mr. Brown during the negotiation for the purchase of the land in Woodside.

(18) Because the said Justice at the said trial permitted the plaintiff to introduce in rebuttal testimony of Herman H. C. Herold as to whether the option was ob-

tained for the Board of Health.

(19) Because the said Justice at the said trial as aforesaid directed the jury to add interest to the amount of their verdict from the 17th day of October, 1901.

(20) Because the said Justice at the said trial charged the jury that the evidence afforded by the official action of the Board of Health and Common Council might be considered by them in ascertaining the market value of the property mentioned in the option.

(21) Because the said Justice at the said trial as aforesaid refused to charge the jury, at the defendants' request, as follows: "In arriving at the market value of the property the amount which the City, through the Board of Health, proposed to pay for it for the special purpose of an Isolation Hospital cannot be considered. The only evidence in the case of the market value of the property is the testimony of real estate experts produced by both sides."

(22) Because the said Justice at the said trial as aforesaid refused, at the request of the defendants', to charge the jury as follows: "The amount which the City, through the Board of Health, proposed to pay for the property cannot be taken into consideration as an element of damage, on the ground that there was a re-sale to the City for this amount, as Honiss was never informed that there was any such re-sale or that Brown proposed to sell it to the City for that purpose."

(23) Because the said Justice at the said trial as aforesaid refused to charge the jury, at the defendants' request, as follows: "The mere proposition of the City to buy the property for $17,500 cannot be considered by the jury on the ground that it showed a re-sale. It did not amount to a re-sale, and is no evidence either of market value or of a re-sale.

(24) Because the said Justice at the said trial as aforesaid refused to charge the jury, at the request of the defendants, as follows: "If the jury believe that at the time Honiss gave the option Brown represented that it was to

be used for manufacturing purposes, and Brown afterwards changed his purpose and proposed to use it for a materially different purpose, it was his duty to communicate his change to Honiss, and his failure to do so absolved Honiss from all obligation to execute a deed in pursuance of the bond. Brown was, therefore, entitled only to the return of the $25 paid, with interest."

(25) Because the said Justice at the said trial as aforesaid refused to charge the jury, at the the defendants' request, as follows: "If Brown's original statement was true, after he changed his purpose he was bound to notify the defendant if the change was material, and not having done so the defendants were no longer bound by the agreement."

And the said John Honiss and Anna P. Ranney pray that the judgement aforesaid may be reversed and nulled and together be held as nothing, and that they may be restored to all things which they have lost by the action of the said judgement, etc.

COULT, HOWELL & TEN EYCK,

Attorneys for and of Counsel with Plaintiff in Error.

(Common joinder in error filed)

EXHIBITS

EXHIBIT P. 2.

THIS IS TO CERTIFY that John Honiss and Anna P. Ranney, owners of the premises hereinafter described, in consideration of the payment of twenty-five dollars, do hereby give and grant to William H. Brown, of 78 Fourth avenue, Newark, N. J , agent, the option to purchase the certain tract of land in said City of Newark, bounded by Mt. Prospect avenue, Sylvan avenue, Summer avenue and Second River, for the sum of twelve thousand five hundred dollars, said option to expire on the first day of November next. Any other person applying to purchase said premises during the continuance of said option shall be referred to said William H. Brown, who agrees on his part to use his best endeavors to effectuate a sale thereof. And the said parties first above named agree on their part to execute all necessary deed or deeds of conveyance upon a sale negotiated in pursuance of the premises unto said William H. Brown or such party or parties as he shall name.

Dated Newark, N. J., July 9th, 1901.

JOHN HONISS,
ANNA P. RANNEY,
Per S. H. PENNINGTON, her Att'y.

EXHIBIT P. 3.

THIS IS TO CERTIFY that the option to purchase land on Sylvan avenue given to William H. Brown by John Honiss and Anna P. Ranney is extended from the first day of November next to the first day of December next, said option having been given by writing dated Newark,

N. J., July 9th, 1901.

Dated Newark, N. J., Sept. 4th, 1901.

JOHN HONISS,
ANNA P. RANNEY
per S. H. PENNINGTON, her att'y.

EXHIBIT P. 4.

John Honiss and Anna P. Ranney, and S. H. Pennington, her Att'y.

You are hereby notified that I demand immediate conveyance to me of the tract of land in the City of Newark, County of Essex and State of New Jersey, bounded by Mt. Prospect avenue, Sylvan avenue, Summer avenue and Second River in accordance with the terms of the option given me under date of July 9th, 1901, and I herewith tender you the sum of twelve thousand, five hundred dollars the price for such conveyance named in said option.

Dated October 17th, 1901.

WILLIAM H. BROWN

EXHIBIT P. 5.

NEWARK, June 29th, 1901.

MR. WM. H. BROWN,

Dear Sir:

The party is out of town so I can't give you any answer what we will do before sometime next week will let you know so you can come and see me some noon or evening.

Very Res'y Yours,

JOHN HONISS

A After it developed that this property was intended to be purchased for the uses of an isolation hospital there were several interviews between Mr. Brown and myself. I think it was on the second interview, or perhaps the third, when just as he was leaving my office he said, "I demand a deed." I replied to him, taking a roll of bills out of my pocket, $25 in legal tender, "If you regard this as a sale under this option, I tender you back your $25," and I suited the action to the word and held the money out to him; and he replied, "I will not accept it."

Q Did he see you again about the matter?

A I think he did; I can't say how many interviews, but there were quite a number of interviews.

Q Did he ever offer you the amount of money named in the option, $17,500?

A He did.

Q Or $12,500?

A He did; he came to my office in company with Mr. Hardin, and a written memorandum was made of that tender, which I think Mr. Hardin probably has.

Q I show you a paper addressed to John Honiss and Anna P. Ranney and S. H. Pennington, her attorney, dated October 17, 1901 (shown to witness). Have you seen that paper before?

A I saw it here on the occasion of the former trial. A paper was served upon me making a demand and tender; whether this is an exact copy of it or not, I couldn't say. I have not been requested to produce the original; I think I have the original at my office. But I presume that is a copy.

Q Was the request for a deed complied with, the request made on this occasion, on October 17, 1901?

A I haven't read that paper to refresh my memory as to what is contained in it, Mr. Hardin, whether it contains a demand for a deed or not; I do not know.

Q I only want to fix the date.

A "I demand immediate conveyance," this paper states, "to me of the tract of land in the City of Newark, County of Essex and State of New Jersey, bounded," &c., "in accordance with the terms of the option given

me under date of July 9th, 1901, and I herewith tender you the sum of twelve thousand five hundred dollars, the price for such conveyance named in said option. Dated October 17, 1901."

Q Do you recall the $12,500 being tendered on that occasion?

A I do; it was tendered in bills, legal tender, money; the money was counted there in my presence.

Q Was the request for a conveyance complied with?

Mr. Coult. Now, if that is a request for a conveyance—

The Court. It seems to be.

[The paper referred to is handed to defendant's counsel.]

A I know of no conveyance having been made. I had no power-of-attorney to execute such a paper.

Q Do you recall having had any conversations with Mr. Brown about the willingness of Mr. Honiss and Mrs. Ranney to make the conveyance called for by this option?

Mr. Coult. One moment. There is no attempt to show that the present witness had any authority to make any conveyance. I suggest, therefore, that the question under the circumstances is improper.

Mr. Hardin. I will withdraw the witness, then, temporarily, and go on with Mr. Brown's evidence. It will then develop.

[The witness is directed to stand aside for the present.]

Mr. Hardin. I will now offer in evidence the original option, dated July 9th, 1901, referred to by Mr. Pennington, and the extension of that option.

Mr. TenEyck. We object to the admission of these papers on the ground that they have not been properly proved; the signatures and the right to bind these parties have not been sufficiently proved by Mr. Pennington. There is no evidence that he had any authority in writing in order to bind the

parties who were the owners of the land, Mr. Honiss and Mrs. Ranney.

The Court. John Honiss signed himself.

Mr. TenEyck. As to his signature, I suppose, it may be considered to be sufficiently proved, but not as to Mrs. Ranney.

The Court. Your objection is confined to Mrs. Ranney?

Mr. TenEyck. Yes, sir.

The Court. You say the testimony of Mr. Pennington does not show sufficient authority to bind her?

Mr. TenEyck. Yes, sir.

The Court. [After discussion.] I will receive the papers subject to the objection of counsel.

Defendant's counsel pray an exception to this ruling of the Court.

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

FREDERIC ADAMS, (L. S.)
Circuit Court Judge.

[The papers referred to as the original option and the extension of the option are marked respectively Ex. P2 and Ex. P3.]

Mr. Hardin. I will now continue to read Mr. Brown's evidence on the former trial. [Reading:]

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

That would be Ex. P2, as now marked.

[Reading:]

"A At Mr. Pennington's office.

"Q Was Mr. Honiss there at the time?

"A Yes, sir.

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

"A I did; yes, sir.

"Q To whom did you give it?

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

"Q They were both there?

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

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

"A Well, not before the 1st of September.

"*By Mr. Coult.*

"Q What is that?

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

"Q I can't hear you.

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

And then there is some colloquy between counsel that is not of importance. I have no objection to reading it if you want it.

Mr. TenEyck. You had better read right along, I guess.

Mr. Hardin. [Reading:]

"*Mr. Coult.* What was that question?

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

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

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

Now, there is a ruling by the Court, which should, if made just now, be made by this Court.

EXHIBIT P. 6.

NEWARK, July 6th, 1901.

MR. WM. H. BROWN,

Dear Sir:

Will you please call at my house Monday Evening or Tuesday Morning and I can give a price of the land and you can have an option on it for 90 days if we can agree on the price.

Very Resp'y Yours,

JOHN HONISS