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NEW JERSEY
Court of Errors and Appeals.

CLAYTON B. ROBERTS,
Plaintiff-Respondent,
vs.
J. CHARLES REMLINGER,
Defendant-Appellant. } Action at Law
On Appeal.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

COUNTY OF CAPE MAY, }
STATE OF NEW JERSEY, } ss.

Personally appeared before me Conrad C. Schatt, 10
who being sworn upon his oath, deposeth and saith that
he is the Special Deputy Sheriff of the County of Cape
May, State of New Jersey, and that as such sheriff he
served the annexed Action at Law, Summons and Com-
plaint personally on J. Charles Remlinger on the 2d day
of July, A. D. 1927, by showing him the original and
leaving with him a copy thereof.

CONRAD C. SCHATT,
Special Deputy Sheriff.

Sworn and subscribed before me this 2d day of July, 20
A. D. 1927.

FRANCES V. SMITH,
Notary Public of N. J.

THE STATE OF NEW JERSEY: To J. CHARLES REMLINGER:

You Are Summoned to answer the annexed complaint of Clayton B. Roberts, in an action at law in the New Jersey Supreme Court, in and for the County of Cape May. And Take Notice that unless you file your answer to said complaint with the Clerk of said

10 New Jersey Supreme Court at Trenton, N. J., Within Twenty Days after service upon you of this writ and the annexed complaint, plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the said New Jersey Supreme Court, at Trenton, New Jersey, this 2d day of July, 1927.

EDW. J. KELLEHER,
Clerk.

20 BOURGEOIS & COULOMB,
Attorneys.

NEW JERSEY SUPREME COURT,
CAPE MAY COUNTY.

CLAYTON B. ROBERTS,
Plaintiff,

vs.

Action at Law.

30 J. CHARLES REMLINGER,
Defendant.

COMPLAINT.

(Filed July 12, 1927.)

Plaintiff, Clayton B. Roberts, a resident of the City of Ocean City, County of Cape May and State of New Jersey, says:

1. That on the 25th day of July, 1925, he entered into a verbal agreement with defendant for the purchase of a certain tract or parcel of land, situate in the City of Ocean City, County of Cape May and State of New Jersey, particularly described as follows:

Beginning at a point in the northeasterly line of Seventh Street, five hundred and eighty (580) feet southeasterly from the southeasterly line of Atlantic Avenue, said point being the southeasterly line of a twenty-foot street, extending northeastwardly one hundred sixty-five (165) feet along the said twenty-foot street, to the southwesterly line of Plaza Place, and of the width extending southeastwardly to the high-water line of the Atlantic Ocean, with riparian rights.

Land lying between Plaza Place and Seventh Street, the above-mentioned twenty-foot street, and the Atlantic Ocean.

2. That the price agreed upon between plaintiff and defendant for said land was the sum of \$240,000.00. 20

3. That on the 25th day of July, 1925, plaintiff paid to the said defendant \$5,000.00 on account of the purchase price of said property.

4. That on or about said 25th day of July, 1925, plaintiff sold said lands to Edward M. Sutton and James M. Chester, for the sum or price of \$275,000.00.

5. That plaintiff and defendant thereupon agreed that instead of defendant making the agreement of sale to plaintiff and plaintiff making an agreement of sale direct with Edward M. Sutton and James M. Chester, that defendant would make the agreement of sale directly to Edward M. Sutton and James M. Chester, and would pay to plaintiff the difference, to-wit: the sum of \$35,000.00. 30

6. That said agreement of sale was so made and executed by the said defendant and Edward M. Sutton and James M. Chester, and that upon the date of settlement, the said Edward M. Sutton and James M. Chester made

settlement with defendant, according to the terms of said agreement of sale.

7. That thereupon plaintiff demanded of defendant the difference between the price to plaintiff and the price that Edward M. Sutton and James M. Chester paid, to-wit: the sum of \$35,000.00.

8. That the said J. Charles Remlinger, defendant, neglected and refused, and still neglects and refuses to pay to plaintiff the said sum of \$35,000.00.

10 Wherefore plaintiff demands of the said J. Charles Remlinger, defendant, the sum of \$35,000.00 with interest from the 27th day of September, 1925.

BOURGEOIS & COULOMB,
Attorneys of Plaintiff.

To the within named defendant:

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

(NOTE: Lawful service upon a corporation defendant is personal service for the above purpose.)

30 BOURGEOIS & COULOMB,
Attorney.

I hereby deputize Conrad C. Schatte to serve this writ 7-2-27.

JAMES T. HOFFMAN,
Sheriff.

Personal service made July 2d, 1927, upon J. Charles Remlinger, by showing him the original and leaving with him a copy thereof, in Ocean City, N. J.

Sheriff's fees, \$5.12.

JAMES T. HOFFMAN,
Sheriff.
By CONRAD C. SCHATTE,
Special Deputy Sheriff.

10 NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

CLAYTON B. ROBERTS,
Plaintiff,

vs.

J. CHARLES REMLINGER,
Defendant.

Action at Law.

20

AFFIDAVIT OF MERITS.

(Filed July 5, 1927.)

STATE OF NEW JERSEY, }
COUNTY OF CAPE MAY, } ss.

J. Charles Remlinger, being duly sworn according to law, on his oath deposes and says that he is the defendant in the above-entitled cause, and that he believes that he has a just and legal defense to said action on the merits of the case. 30

J. CHAS. REMLINGER.

Sworn and subscribed to before me this 5th day of July, A. D. 1927.

[SEAL.]

RUTH V. REILEY,
Notary Public of N. J.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

	CLAYTON B. ROBERTS, <i>Plaintiff,</i>	}	Action at Law.
	<i>vs.</i>		
10	J. CHARLES REMLINGER, <i>Defendant.</i>		

ANSWER.

(Filed July 9, 1927.)

J. Charles Remlinger, defendant in the above-entitled cause, answers the complaint filed herein and says that:

1. He denies each and every allegation in the Complaint filed in this cause.

20

KREPS & BELL,
Attorneys of Defendant.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

	CLAYTON B. ROBERTS, <i>Plaintiff,</i>	}	Action at Law.
	<i>vs.</i>		
30	J. CHARLES REMLINGER, <i>Defendant.</i>		

AMENDED ANSWER.

(Filed December 17, 1927.)

J. Charles Remlinger, defendant in the above-entitled cause, amends the Answer heretofore filed herein and says:

1. He denies each and every allegation in the Complaint filed in this cause.

FIRST SEPARATE DEFENSE.

Defendant, by way of further defense, says that the alleged oral contract between the plaintiff and the defendant is not valid and binding upon the defendant, in either law or equity, as the same is not in compliance with the Statute of Frauds.

KREPS & BELL,
Attorneys of Defendant.

10

Due and legal service acknowledged this day of
December, A. D. 1927.

Attorney of Plaintiff.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

	CLAYTON B. ROBERTS, <i>Plaintiff,</i>	}	Action at Law.
	<i>vs.</i>		
	J. CHARLES REMLINGER, <i>Defendant.</i>		

AMENDED ANSWER.

(Filed December 20, 1927.)

J. Charles Remlinger, defendant in the above-entitled cause, amends the Answer heretofore filed herein and says:

1. He denies each and every allegation in the complaint filed in this cause.

FIRST SEPARATE DEFENSE.

Defendant, by way of further defense, says that the alleged oral contract between the plaintiff and the defendant is not valid and binding upon the defendant, in either law or equity, as the same is not in compliance with the Statute of Frauds.

KREPS & BELL,
Attorneys of Defendant.

10

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

CLAYTON B. ROBERTS,
Plaintiff,

vs.

20 J. CHARLES REMLINGER,
Defendant.

Action at Law.

ORDER PERMITTING AMENDMENT
OF ANSWER.

(Filed December 20, 1927.)

30 This matter being opened to the Court by Kreps & Bell, attorneys of the defendant, for application to file an Amended Answer, and it appearing to the Court that such application should be granted, it is, therefore, on this fifteenth day of December, A. D. 1927, Ordered, that said defendant be permitted to amend his Answer to plead the Statute of Frauds.

W. F. SOOY,
Judge C. C.

Entered December 20, 1927.
On motion of

KREPS & BELL,
Attorneys of Defendant.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

CLAYTON B. ROBERTS,
Plaintiff,

vs.

CHARLES J. (OR J. CHARLES)
REMLINGER,
Defendant.

Action at Law.

10

POSTEA.

(Filed December 21, 1927.)

This case came on to be heard before the New Jersey Supreme Court, Cape May County Circuit, and a jury, on the fifteenth day of December, 1927, and 20 the jury returned a verdict against the defendant, Charles J. Remlinger, and in favor of the plaintiff, Clayton B. Roberts, for the sum of thirty-nine thousand six hundred thirty-seven dollars and fifty cents (\$39,637.50).

W. F. SOOY,
Circuit Court Judge.

NEW JERSEY SUPREME COURT.

	CLAYTON B. ROBERTS,	} Plaintiff,	
	vs.		
10	CHARLES J. (OR J. CHARLES)	} Defendant.	Action at Law.
	REMLINGER,		
	\$39,637.50		
	67.12		
	<hr/>		
	\$39,704.62		

ON POSTEA.

20 It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of thirty-nine thousand six hundred and thirty-seven dollars and fifty cents, besides costs to be taxed nisi.

Entered December 21, 1927.
On motion of

BOURGEOIS & COULOMB,
Attorneys.

NEW JERSEY SUPREME COURT.

	CLAYTON B. ROBERTS,	} Plaintiff,	
	vs.		
	CHARLES J. (OR J. CHARLES)	} Defendant.	Action at Law. 10
	REMLINGER,		
	\$39,637.50		
	67.12		
	<hr/>		
	\$39,704.62		

ON POSTEA.

BOURGEOIS & COULOMB, *Attorneys.*

Judgment entered this twenty-first day of December, A. D. nineteen hundred and twenty-seven, in favor of plaintiff and against the defendant for the sum of thirty-nine thousand six hundred and thirty-seven dollars and fifty cents damages and sixty-seven dollars and twelve cents costs. 20

WM. S. GUMMERE,
C. J.

I, Edward J. Kelleher, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in the above stated cause as the same remain on file and of record in my office. 30

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-ninth day of December, A. D. nineteen hundred and twenty-seven.

[SEAL.] EDWARD J. KELLEHER,
Clerk.

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

CLAYTON B. ROBERTS,

vs.

J. CHARLES REMLINGER.

Action at Law.

10

TESTIMONY.

Cape May Court House, Thursday, December 15, 1927.

Before SOOY, J., and a jury.

Present of Counsel—G. A. BOURGEOIS, ESQ., for Plaintiff; F. STANLEY KREPS, ESQ. (KREPS & BELL, ESQS.), for Defendant.

20

Mr. Bourgeois—(To the Jury).

In 1925 there was quite a real estate boom throughout the State and especially throughout the seashore resorts of New Jersey.

As a result of that boom there was quite an influx of speculators who came from other towns. Amongst these was a man by the name of Remlinger, the defendant in this case, who came from Pittsburg to Ocean City.

30 He bought some properties, one of which was a property at Seventh and Atlantic Avenue, Ocean City. Sometime after he purchased that property he had a conversation with Mr. Roberts in Ocean City and said he wanted to sell it, but that he wanted a profit of fifty thousand dollars. He had given \$190,000 for it and wanted to sell it for \$240,000. Mr. Roberts, I think, was talking to him at the time from Pittsburg. Mr. Roberts agreed to buy the property for \$240,000, and on that day forwarded to Mr. Remlinger a check for \$5,000, the first payment.

On the same day, or the day following, I don't know which, Mr. Roberts went out and resold the property to J. M. Chester and Edward Sutton, of Ocean City, for \$275,000, giving \$50,000 profit for Mr. Remlinger and \$35,000 profit for himself.

After having made that sale to Chester & Sutton he went to Remlinger and told him what he had done. Remlinger expressed great pleasure at the fact that he was going to get his \$50,000 and that Mr. Roberts was going to get his \$35,000.

10

At that time no agreement of sale had been executed between Mr. Roberts and Mr. Remlinger. It had been spoken of, but they were friends and Mr. Roberts said, "We can do that at any time."

After Mr. Roberts had notified Mr. Remlinger that he had sold the property to Chester & Sutton, then it was that the question about the agreement came up and Mr. Remlinger said, "Oh, well, what difference does it make. We can make the contract with Chester & Sutton, or the other way about," and then suggested

20

there was no use making two agreements but that one agreement should be made direct from Remlinger to Chester & Sutton. That was done, it being agreed at the time that Mr. Remlinger should get his \$50,000, and that he would turn over to Mr. Roberts his \$35,000 at the time of settlement. It went along all right at the beginning but, at some point of time between his getting the agreement, when made, and the time of settlement, Mr. Remlinger changed his mind and did not notify Mr. Roberts anything about it. Mr. Roberts went into the settlement before it was completed and they made the settlement ignoring him, so that instead of Mr. Remlinger getting \$50,000 and Mr. Roberts getting \$35,000, Mr. Roberts didn't get anything.

30

This suit is brought for the purpose of recovering from Mr. Remlinger that \$35,000 profit which he agreed should go to Mr. Roberts in view of the fact that the agreement was going to be made direct from him to Chester & Sutton.

Perhaps some of you may be in the real estate business. Others of you may know something of real estate law. Perhaps there may come into your minds the question of the Statute of Frauds. The law will be given to you by the Judge but I am going to state to you the theory in this case as it comes to us. Agreements concerning the sale of land must be in writing and Courts make the distinction and hold that profits out of land need not be in writing. This agreement
10 that we are suing on is a profit arising out of the sale of land; not out of any interest in land. We had nothing to do with the title. We had an agreement whereby we were to have that profit by arrangement made between Mr. Remlinger and Mr. Roberts. The sum of \$35,000 Mr. Roberts was entitled to from the sale of this property and it is to recover that that this suit is brought.

If we shall succeed in showing you the facts as I have narrated to you and that they are correct, then
20 we will be entitled to a verdict of \$35,000 with interest from the date of settlement for that property, which was on—the agreement provided for August 27th, 1925, but I think, as a matter of fact, they settled on the day before. They thought Mr. Roberts would be less likely then to know about it than if they settled on the day set for it. Settlement was made on August 26th, 1925, and, if so, we are entitled to the interest on \$35,000 from that date to to-day.

Mr. Kreps—I move for a non-suit on the opening for the reason that no valid contract has been alleged
30 by Mr. Bourgeois. He says in his opening that Mr. Roberts made an oral contract over the telephone with Mr. Remlinger, agreeing to sell this piece of property to Mr. Roberts for \$240,000.

I say that the contract is not enforceable; that no action could ever have been brought on it because it was not in writing and that if there was no contract in existence on which suit could be brought between Mr. Roberts and Mr. Remlinger then there was abso-

lutely no consideration for any agreement of any kind that may have been made between Mr. Remlinger and Mr. Roberts whereby Mr. Remlinger agreed to convey to Chester & Sutton and to pay Mr. Roberts \$35,000.

If there had been an agreement in writing certainly there wouldn't have been any question about it, but there was not and if that situation were allowed it would open the door for fraud so that there wouldn't be anything to it. In a matter of this kind the seller of
10 real estate has no chance to defend himself and I do not think that Mr. Roberts can come into this court and say he is entitled to moneys arising out of the sale of this real estate when there was no contract in the beginning on which action can be brought. I do not think that the Court needs any law from me or requires me to produce any law on the question as to whether or not a contract for the sale of real estate must be in writing.

And for these reasons I ask for a non-suit. 20

(Following motion made out of presence of jury.)

Mr. Bourgeois—With regards to Mr. Kreps' statement about opening the door for fraud, the same thing is true as to any other contract; every contract is open to fraud if any one can get away with it and lie about it. The Statute of Frauds is only an additional protection; it does not protect those outside of a written contract.

This contract pertains exclusively to profits arising out of a sale of real estate.

The Court—What is the consideration for the con-
tract? 30

Mr. Bourgeois—The consideration was that this man sold the property.

The Court—I mean as between Roberts and Remlinger what was the consideration moving from Roberts to Remlinger or Remlinger to Roberts, whatever way you want to put it.

Mr. Bourgeois—The \$5,000 paid.

The Court—Roberts paid Remlinger \$5,000?

Mr. Bourgeois—Yes. Then after he paid Remlinger \$5,000 instead of an agreement being made to Roberts it was made from Remlinger to Chester & Sutton.

The Court—The money was never returned?

Mr. Bourgeois—No they still have it.

(Reading of citations, payment out of proceeds of sale: *Corpus Juris* 27, page 226; 142 *N. Eastern*, p. 10 386; 100 *Pa.* page 33; 16 *N. J.* 357.)

(Argument.)

(Motion refused.)

(Exception to defendant.)

Mr. Kreps (to jury)—The defense to this action is a general denial.

We will show you that Mr. Remlinger, who is the defendant in this case, was the equitable owner of a piece of beach front situate between 7th and Plaza Place, in Ocean City;

20 That Mr. Roberts, the plaintiff, is a real estate broker conducting a real estate business in the City of Ocean City; that he had, on a number of occasions, approached Mr. Remlinger concerning the sale of this property, not the purchase but the sale of it, that he was trying to sell this property for Mr. Remlinger; that he asked Mr. Remlinger if he would take \$50,000 profit on his purchase, when the boom was on, and Mr. Remlinger said he didn't think he would, but if there was an offer he would consider it; that Mr. Roberts procured a purchaser for this property. That, we do not deny;

30 That these purchasers, there were two of them, Mr. James M. Chester and Mr. Sutton, of Ocean City, agreed to purchase this property for \$275,000; and that an agreement was as a result made between Mr. Remlinger as seller and Messrs. Chester & Sutton as buyers. Mr. Roberts' name did not appear in the contract at all.

We deny absolutely that there was any agreement between Mr. Remlinger and Mr. Roberts whereby Mr. Remlinger agreed to pay Mr. Roberts \$35,000.

So that if we shown you these facts to be true; also that when Mr. Roberts sold this property to Chester & Sutton he represented Mr. Remlinger as the owner of this property and that he did not state that he was the owner of the property, we will then ask you to find a verdict of no cause of action.

Plaintiff's testimony.

C. B. Roberts, sworn.

By Mr. Bourgeois.

10

Q. You reside where?

A. Ocean City, N. J.

Q. What is your business?

A. Real estate and insurance.

Q. What was the state of the real estate market in Ocean City, New Jersey, in 1925?

A. Very active.

Q. And were you there all that year?

A. I was.

Q. Were you there any other year than that one? 20

A. I was.

Q. Were you active in the real estate business there then?

A. I was.

Q. At that time?

A. I was.

Q. Do you know Mr. J. Charles Remlinger?

A. I do.

Q. Was he in the market at that time, down there—

A. He was.

Q. —speculating in real estate? 30

A. He was.

Q. Do you know whether or not he owned a piece of property on 7th Street, I think it was, the northeast line of 7th Street and along Atlantic Avenue?

A. I do.

Mr. Kreps—Objected to. I want evidence of any ownership of this property, in Mr. Remlinger.

The Court—Introduce the deeds.

Mr. Bourgeois—I am not going to try to prove as to any particular property. I only want to know if he was the owner of land there.

Mr. Kreps—I beg your pardon.

By Mr. Bourgeois.

Q. Do you know?

A. He was.

10 Q. Did you have any conversation with him about it?

Mr. Kreps—About what?

Mr. Bourgeois—About land he owned or claimed to own in 7th Street, Ocean City, New Jersey.

Mr. Kreps—I object.

The Court—On what ground?

Mr. Kreps—This man is not qualified—

The Court—I understood him to ask the witness with reference to land Mr. Remlinger owned or claimed to own on 7th Street.

20 Mr. Kreps—He also asked him if he owned it; then Mr. Bourgeois said, "I am only asking about land generally." If he is talking about this particular land, I object.

(Overruled.)

(Exception to defendant.)

(Last question repeated to witness as follows:)

Q. Did you have any conversation about it?

A. I did.

30 Q. What was that conversation?

A. Would you like me to go into detail about that?

Q. Tell me the conversation.

A. Mr. Remlinger and myself were very good friends in Ocean City; we went out fishing together—

Mr. Bourgeois—We don't care about that. Tell us about this transaction.

Mr. Kreps—I move that be stricken out.

The Court—It may be stricken out.

The Witness—He said he purchased a piece of ground in Ocean City.

By the Court.

Q. What conversation did you have with him about this piece of land that he owned in Ocean City, if any?

By Mr. Bourgeois.

Q. What he said to you and you to him?

A. He told me he owned a piece of ground in 7th Street, Ocean City, and that he would like to sell this piece of ground. I asked him what he wanted for this piece of ground and he said he didn't know. I asked him what profit he wanted for it and he said he would take \$50,000 profit.

Q. Do you know what he paid for it?

A. I do.

Q. What did he pay for it?

Mr. Kreps—Objected to.

The Court—He has a right to ask that.

Mr. Kreps—I would like to cross-examine.

By Mr. Kreps.

Q. How much do you know that he paid for it?

A. He told me.

Q. When?

A. One night, fishing on the bay.

Q. Did he show you any agreement?

A. He did not.

Q. Did he tell you how much cash he was to pay for it? And how much mortgage?

A. I don't think he did.

Q. He just told you the figure?

A. Yes.

By Mr. Bourgeois.

Q. How much did he tell you he paid for it?

A. \$190,000.

Q. And he wanted \$50,000 profit?

A. Yes.

Q. Go on and tell the conversation, and how it was that you became interested in it?

Q. At that time I was very active in the sale of real estate in Ocean City.

Mr. Kreps—Objected to. I ask that that be stricken out.

(Motion allowed.)

10 The Court—Just give the conversation, nothing else.

Witness—I called Mr. Remlinger on the phone in Pittsburg and asked him what he wanted for his piece of real estate and he said, "I will take \$50,000 profit above what I paid for it provided settlement is made at the same time my settlement is called," and I said, "All right."

Mr. Kreps—I object to any oral contract between Remingler and Roberts.

20 The Court—I will permit the evidence as being historical of the subsequent agreement between the parties.

An exception is allowed to defendant, not for the purpose however of proving a binding contract between the original parties to the sale.

(Exception to defendant.)

By Mr. Bourgeois.

Q. You said you called Mr. Remlinger on the 'phone and that he said he wanted \$50,000 profit above the price 30 he paid. What did you then tell him?

A. I told him I would buy the ground.

Q. What did he then say or do?

Mr. Kreps—I object to all this line of testimony and questions concerning any oral contract.

The Court—I am going to permit the conversation between plaintiff and defendant, not for the purpose of proving a binding contract

between the original parties to the sale but as leading up to the contract set up.

(Exception to defendant.)

By Mr. Bourgeois.

Q. After you talked with him about it over the 'phone, what did you do with him with regards to it?

A. I waited until he came to Ocean City.

Q. When was that?

A. Friday.

10

Q. When he came to Ocean City did you see him?

A. I did.

Q. What did you do?

A. I gave him a check for \$5,000.

Q. Where is that check?

A. In my pocket.

Mr. Bourgeois—I offer in evidence this check. (Check admitted in evidence.)

(Witness reads checks as follows: "Pay to the order of J. Charles Remlinger. Five 20 Thousand Dollars (\$5,000) To the Ocean City Title & Trust Company, Ocean City, N. J. C. B. Roberts.

Endorsed, J. Chas. Remlinger.")

Witness—Then there are a number of endorsements of the banks and the word, "Paid."

(Check copied as exhibit at end of this transcript.)

By Mr. Bourgeois.

Q. Where were you when you gave him this check 30 for \$5,000?

A. I would say, in the Flanders Hotel.

Q. Where was this hotel?

A. 11th and Boardwalk, Ocean City, New Jersey.

Q. After this time did you make an effort to dispose of the property?

A. I did.

Q. Did you make an agreement of sale at that time?

A. I did.

Q. What was said about it?

Mr. Kreps—Objected to.

The Court—What is the purpose of the question?

Mr. Bourgeois—Simply to get the whole transaction.

10

Mr. Kreps—I think he has had too much leeway.

The Court—I do not think it is material as to what was said about it.

By Mr. Bourgeois.

Q. Did you make an effort to dispose of the property after you had purchased it?

Mr. Kreps—Objected to. It is immaterial whether he made an effort to dispose of it or not.

20

By Mr. Bourgeois.

Q. To whom did you attempt to sell it?

A. To Sutton & Chester.

Q. Did you succeed?

A. I did.

Q. What price were you to get?

A. \$275,000.

Q. That was how much above the price that you were going to pay?

A. Thirty-five thousand dollars was my profit.

30

Mr. Kreps—Objected to. I ask that that be stricken out.

The Court—Strike out as to the profit. "35,000" will be allowed to remain.

By Mr. Bourgeois.

Q. Thirty-five thousand dollars was the amount that you were getting, above the amount you were to pay?

A. Yes.

Q. After you had made an arrangement with Chester & Sutton to purchase this property, what did you do with regards to Remlinger?

A. I told him just what I had done.

Q. What did you tell him?

A. I told him I had sold the property to Chester & Sutton for \$275,000.

Q. What did he say about it?

A. He said he was very well satisfied and glad that I had made a profit up and above what he had made. 10

Q. Did he ever express that same sentiment to you on any occasion except that day?

(Objected to.)

The Court—The question is permitted.

A. He did.

Q. After this time, when you told him you had made this sale to Chester & Sutton, did he ever have any further conversation with you about it?

A. He did.

Q. How long afterward? 20

A. I should say the first conversation was one week.

Q. Did he have more than one conversation with you after that time?

A. Several.

Q. What did he say at these conversations?

Mr. Kreps—Let him fix the time before he answers. I object. I don't quite understand the question.

The Court—I think he wants to prove his contract.

Mr. Kreps—He is talking about a conversation that took place several weeks after he sold the property. 30

The Court—He said he had several conversations. Mr. Bourgeois has asked him to detail this conversation.

By Mr. Bourgeois.

Q. Do you mean a week or about a week?

A. About a week I say.

Q. What was said in this conversation?

A. In this conversation he came to me and said, "Now, we have sold 7th Street, what else have you got to trade or sell?"

Mr. Kreps—Objected to.

The Court—That doesn't amount to anything.

10

By Mr. Bourgeois.

Q. What did he say about the \$50,000 profit that he was to get and the \$35,000 that you were to get?

A. He just said that he was very glad to get it and that he was glad I was going to get mine.

Q. He expressed himself that way to you?

A. Yes, he did.

Q. Was the agreement of sale between Chester & Sutton and Remlinger reduced to writing?

20

A. It was.

Q. Did you ever have an agreement of sale in writing with reference to this property?

A. I did not.

Q. Why didn't you have? What was said about that?

A. I went to him and said, "What about this agreement of sale?" and he said, "Don't bother me. I am going out. We will draw them later." So when I went back to him—I had sold the property—and I said, "What time today do you want to make the contract on your agreement?" He said, "I will make an agreement, one that is satisfactory to me and one that is satisfactory to you. We will draw one agreement between the two parties."

30

Q. What did he say about dividing the moneys? A division of them?

A. He said, "At settlement time you will get your \$35,000 and I will get my \$50,000."

Q. Did he describe it as dollars or use a similar expression, if you remember?

A. It was described as dollars.

Q. Did he say anything to you about profit to you, except what you have already testified?

A. Yes, I think he did.

Q. What did he say about the question of profits?

A. He said that he was very glad we had both made that much profit on the ground.

Q. How much profit?

10

A. He make \$50,000 and I make \$35,000.

Q. I show you an agreement of sale bearing date, July 25, 1925; that is the day after your check is dated—and ask you what it is?

A. That is an agreement of sale between James H. Chester and Mr. Sutton and Mr. Remlinger.

Q. Was it signed by them?

A. It was.

Q. Who witnessed the signatures?

A. I did.

20

Q. That is for the sale of this same land.

A. It is.

Q. It reads:

"This Agreement, made the 25th day of July, 1925, between J. Charles Remlinger, Pittsburgh, Pa., of the first part, hereinafter called the 'Seller,' and Edward M. Sutton and J. M. Chester, Ocean City, N. J., or their nominee, of the second part, hereinafter called the 'Buyer.'

30

Witnesseth, that the Seller agrees to sell and convey and the Buyer agrees to buy ALL THAT CERTAIN LOT, tract or parcel of land and premises situate in the City of Ocean City, County of Cape May, and State of New Jersey, more particularly described as follows:

Beginning at a point in the northeasterly line of Seventh Street, five hundred and eighty

(580') southeasterly from the southeasterly line of Atlantic Avenue, said point being the southeasterly line of a twenty foot street, extending northeastwardly one hundred sixty-five (165') along the said twenty foot (20') street, to the southwesterly line of Plaza Place and of the width extending southeastwardly to the high water line of the Atlantic Ocean, with Riparian Rights.

10 Land lying between Plaza Place and Seventh Street, the above mentioned twenty foot (20') street, and the Atlantic Ocean, for the price or sum of \$275,000 * * * dollars under and subject to the following terms and conditions:

1. A first payment of \$5,000 * * * dollars receipt of which is hereby acknowledged by the 'Seller.'

20 2. The balance of the purchase price shall be paid in the following manner: A second payment of \$5,000 on or before August 27th, 1925.

One hundred thousand dollars in mortgages to remain.

Fifty thousand dollars to remain for a period of three years at six per cent per annum.

Thirty seven thousand five hundred dollars for a term of one year.

Twelve thousand five hundred for a term of two years.

30 Balance of \$65,000 in cash settlement, at the time of settlement, which shall be made at Ocean City Title and Trust Co., Ocean City, N. J., on A. D. 1925,

or the deposit made herewith, at the option of the 'Seller,' may be applied on account of the purchase price or be forfeited as liquidated damages to the 'seller,' and not as a penalty, provided that the necessary title searches can be obtained from a reputable Title and Trust Company by that date. Should there be any delay, not the fault

of the 'Buyer,' in the procuring of such searches, the time for the final settlement shall extend until such searches can be obtained.

3. The title to the premises shall be free and clear of all incumbrances, including municipal liens and assessments, except restrictions of Ocean City Association and all Ocean City exceptions and shall have a marketable title, and the 'Seller' shall tender a special warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the 'Buyer.'

4. All adjustments shall be made as of September 27th, A. D. 1925, and possession shall be given the buyer on settlement time, A. D. 1925.

5. The 'Buyer,' shall pay for searches and all other expenses, excepting the preparation of the deed and the necessary revenue stamps attached thereto, which shall be paid for by the 'Seller.'

6. This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described and also specifically the following items:

7. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

8. Time is the essence of this agreement.

In Witness Whereof, The parties hereto have set their hands and seals the day and year first above written.

J. Chas. Remlinger (L. S.)

Edward M. Sutton (L. S.)

James M. Chester (L. S.)"

Signed, sealed and delivered in the presence of
CLAYTON B. ROBERTS.

- Q. Was settlement made under that contract?
 A. It was.
 Q. When with relation to the date it was to be made?
 A. Settlement was made one day prior to the settlement date.
 Q. Were you notified of it?
 A. I was not.
 Q. How did you find it out?
 A. By hearing it on the street.

10 Mr. Kreps—Objected to.

By Mr. Bourgeois.

- Q. What did you then do?
 A. First I came to you and told you just what had taken place and you asked me to come down here and get a sheriff to attach—

Mr. Kreps—Objected to.

By Mr. Bourgeois.

- 20 Q. What did you do when you heard that settlement for this property was in the course of progress?
 A. I went to the settlement.
 Q. Who did you find there?
 A. J. M. Chester, Edward M. Sutton and Ewing Corson.
 Q. Mr. Remlinger wasn't there?
 A. No, sir.
 Q. Where did settlement take place?
 A. In the back part of Ewing T. Corson's office.
 Q. Not in the title company where the agreement provided for?
 30 A. No.
 Q. What did you demand of them, what did you do?

Mr. Kreps—Objected to. Mr. Remlinger was not there.

Mr. Bourgeois—I suppose he must have had some one representing him there. If I cannot bind him I have a perfect right to show what they did at the time of settlement.

By Mr. Bourgeois.

Q. What did you do?

A. I walked into there and asked if settlement—

Mr. Kreps—Objected to.

The Court—I do not think that any conversation that the witness had out of the presence of Remlinger ought to be binding unless Mr. Remlinger had some one to represent him or otherwise to speak for him.

I do not see how he is going to bind Mr. 10 Remlinger out of Mr. Remlinger's presence.

By Mr. Bourgeois.

Q. What else did you do after you got in there and what did they do?

A. I asked if they—

Mr. Kreps—Objected to.

By Mr. Bourgeois.

Q. Not that. Did you sit up, stand, go out, stay, or 20 what did you do?

A. I didn't stay very long.

Q. What were they doing—not saying?

A. They were making settlement on the piece of ground we are talking about.

Q. This same piece of ground or property described in this agreement?

A. Yes.

Q. Did you get your money?

A. I did not.

Q. When did you next see Mr. Remlinger?

A. When I got to Pittsburgh. 30

Q. When was that with relation to the time when settlement took place?

A. I don't recall, whether it was before or after I went to Pittsburgh. I don't recall.

Q. Was anything said between you and Mr. Remlinger about your agreement at that time?

A. There was.

Q. About settlement?

A. There was.

Q. What was said?

A. I asked him how about my portion of that profit in the sale. He said, "I don't know what I am going to do with you." He said, "I may take care of you later." Judging from that I presume it was before settlement that I went to Pittsburgh.

Q. He said he may take care of you?

10 A. Yes.

Q. Did he ever pay you the profit?

A. He did not.

Q. Did you ever have an opportunity to demand it of him?

A. I did.

Q. What did he say about it?

A. He said he wasn't going to pay it.

Q. Did he say why he wasn't going to pay it?

A. He said he didn't think I treated him fair.

20 Q. In what way?

A. In my making \$35,000 and—

Mr. Kreps—Objected to.

Q. In what way did he say you didn't treat him fair?

A. He thought I wasn't entitled to my money, my profit, out of the transaction.

Q. What did he say if anything about the \$5,000 you had paid to him?

A. I don't think he spoke of the \$5,000.

Q. He sort of lost sight of it?

30 A. Yes.

Q. When you sold the property to Chester & Sutton did you get any payment?

A. I did.

Q. How much did they pay you?

A. \$5,000.

Q. What did you do with this money you got from them?

A. Placed it to my credit in the Ocean City Title & Trust Company.

Q. You didn't turn it over to Remlinger?

A. I did not.

Q. How long was it after you paid your money to Remlinger before you got a check from Chester & Sutton?

A. Three days—the fourth, including the day I got the money.

Q. I asked you who was present at the time of settlement and you said, Chester, Corson and Sutton. Was there anyone else present then?

A. There was.

Q. Who?

A. Mr. Kreps, representing Remlinger.

Mr. Kreps—I object What is the ruling?

The Court—Your objection was made subsequent to the answer. It has been answered.

Cross-examination, by Mr. Kreps.

20

Q. When did you ask Remlinger for a written contract?

A. On Saturday afternoon.

Q. Was that the day you gave him the \$5,000 check?

A. It was not.

Q. When did you give him the \$5,000 check, before or after that?

A. I should say it was before.

Q. You gave him the \$5,000 check before you asked him for a written contract?

A. There was a reason for not getting that contract, 30 if I may answer the question.

Q. Just a minute. At the time you asked Remlinger for this contract that you speak about, had you the agreement between Remlinger and Sutton and Chester signed, had it been signed?

A. It had not.

Q. When was that signed?

A. The following day at the time I asked for the contract.

Q. The following day?

A. Yes.

Q. At the time you asked for the contract there was no agreement existing between you and Remlinger?

A. No written agreement.

Q. And there had been no sale to Chester & Sutton.

A. There had not.

10 Q. On the following day did you ask Mr. Remlinger to pay you \$35,000?

A. The following day from when?

Q. After you asked him for the contract—the next day when you made the sale to Chester & Sutton, did you ask him for \$35,000 that day?

A. I told him that I had sold the property and the amount of money he had made with it and that I had made with it.

Q. Did he agree that day to pay you \$35,000?

20 A. On the day of settlement.

Q. What day did he agree to pay you—the day following that you asked for the contract?

A. The day following that I asked for the contract.

Q. That was the day he agreed to pay you \$35,000?

A. It was.

Q. You are sure of that?

A. I am.

Q. There is no question about that?

A. No, sir.

30 Q. When you went to sell this property to Chester & Sutton what did you tell them concerning who owned the property?

A. I didn't say anything about ownership.

Q. Did you say you owned it?

A. I did not.

Q. Did you say you had any interest in it?

A. I did not. At the time that I went to them and suggested them buying this property.

Q. Did you tell them Mr. Remlinger owned it?

A. I did not.

Q. You are sure of that?

A. I am.

Q. —that you didn't tell Chester & Sutton that this was Remlinger's property?

A. I am.

Q. Did Mr. Sutton come to you after this contract was signed?

A. No.

Q. And ask you why you represented this as Mr. 10 Remlinger's property?

A. He did not.

Q. Did Mr. Chester?

A. No.

Q. When did you get the check from Chester or Sutton?

A. The date the contract was signed.

Q. Are you sure of that?

A. I am.

Q. This contract was dated the day it was signed? 20

A. It was not.

Q. When was it dated?

A. The day prior.

Q. Why was that?

A. Because it was Sunday afternoon.

Q. What was?

A. The day I went down to see Remlinger and asked him about the agreement and he was leaving town.

Q. So that it wasn't dated that day?

A. No.

Q. It was dated a day prior? 30

A. Yes.

Q. To what contract do you refer?

A. The contract signed between Remlinger and Chester.

Q. That was the day that—

Mr. Bourgeois—It wasn't dated on Sunday.

- By Mr. Kreps.
 Q. Did he sign that day?
 A. He did.
 Q. That was the contract between Remlinger and Chester & Sutton?
 A. Yes.
 Q. Naturally, you told him you had sold the property to Sutton & Chester on that day?
 A. It was. I did.
 10 Q. Did Remlinger agree to pay you \$35,000 before or after or at the time the contract was signed?
 A. At the time the contract was signed, and after.
 Q. And at the time the contract was signed he agreed to pay you \$35,000?
 A. He did.
 Q. Did you give him any money that day?
 A. I did not.
 Q. Did you ever give him any part of the \$5,000 you had gotten from Chester and Sutton?
 20 A. I did not.
 Q. What became of that?
 A. It was deposited to my credit in the Ocean City Title & Trust Company.
 Q. To whom was that made?
 A. Myself.
 Q. Personally?
 A. It was.
 Q. Wasn't it made to you as agent?
 A. Yes.
 Q. Agent for whom?
 30 A. I don't know. That was a mistake.
 Q. It was made to you as agent?
 A. It was.
 Q. You accepted the check?
 A. I did.
 Q. Did you deposit it?
 A. I did.
 Q. Did you object to its being made out to you as agent?

- A. I did not.
 Q. Whose check was it?
 A. J. M. Chester's check.
 Q. Did you sell the property representing yourself to be the agent?
 A. I did not.
 Q. Why did he make out the check to you as agent?
 A. I don't know.
 Q. You didn't sell it representing yourself to be the owner? 10
 A. To who?
 Q. To Sutton & Chester?
 A. I did.
 Q. You told them you owned it?
 A. I did.
 Q. Didn't you a minute ago say you didn't?
 A. What is that?
 Q. You didn't sell the the property representing yourself to be the owner?
 A. I don't remember. 20
 Q. Didn't you just say a minute ago when you went to see Sutton & Chester that you didn't mention anything about the ownership of the property?
 A. When I first went to them I didn't say anything about the ownership.
 Q. Before the agreement was signed?
 A. Before the agreement was signed I didn't say anything to them as to who owned the property.
 Q. Now you just say you told them you owned the property?
 A. At the time the agreement of sale was signed I 30 told them.
 Q. And before the agreement of sale was signed?
 A. No.
 Q. Before you got the check?
 A. Yes.
 Q. And yet they made the check out to you as agent?
 A. They did.
 Q. Did they ask you for an agreement of sale?

A. They asked for an agreement of sale but didn't ask me for it.

Q. You told them you had a valid contract to buy the property and that you were the equitable owner of it?

A. At the time the agreement of sale was signed, yes.

Q. Before the agreement of sale was signed?

A. No.

Q. At the time of signing of the agreement?

10 A. At the time of the signing of the agreement they knew that I was the owner of the property.

Q. Before they signed?

A. Yes.

Q. Are you sure?

A. I am.

Q. Do you mean to say they didn't ask for any agreement from you?

A. They did not.

Q. Did you give them any written agreement.

20 A. Not for myself.

Q. The only agreement that has ever been in existence is this agreement between Remlinger and Sutton & Chester. Is that right?

A. No.

Q. That is the only written agreement?

A. No.

Q. Was there another written agreement?

A. Yes.

Q. What was that?

A. I agreed to take back—

30 Q. Wait a minute. Before this contract was signed?

A. Agreement between Sutton, Chester and myself.

Q. We are not talking about that. I am talking about the agreement that Mr. Remlinger is a party to.

A. No.

Q. No written agreement with you?

A. No, no written agreement.

Q. You are quite positive that you represented to Mr. Sutton and Mr. Chester that you owned this property as an equitable owner before this agreement was signed?

A. At the time the agreement was signed?

Q. Before they put their names on the paper?

A. Yes, fifteen minutes before the agreement was signed.

Q. What did you represent it before, prior to those fifteen minutes?

A. I didn't tell them who the owner was.

Q. Did they ask you?

A. No.

Q. They didn't ask who the owner was?

10

A. They did not.

Q. They didn't ask you who you were going to give this \$5,000 to?

A. They did not.

Q. What day was it you gave this check to Mr. Remlinger?

A. Whatever day it is the check is dated; I think it was the twenty-fourth?

Q. The agreement was not signed that day?

A. No.

20

Q. When was it signed?

A. Two days later from the date of that check.

Q. Two days later?

A. Yes.

Q. At the time the agreement was signed, or just prior to the time the agreement was, Mr. Remlinger you say agreed with you whereby he agreed to pay you \$35,000? Is that right?

A. He did.

Q. Where was it?

A. At the Flanders Hotel.

30

Q. Who was there?

A. I don't recall anybody else was present except Mr. Remlinger and myself. It was in the lobby of the Flanders Hotel.

Q. What day was it?

A. Sunday afternoon.

Q. Did you sell this property to Mr. Chester and Mr. Sutton the same day you bought it from Mr. Remlinger?

A. I did not.

Q. You say in your pleadings that you did. That is a mistake, is it?

A. It is a mistake if I said it.

Q. What are the terms of the agreement between you that you say you had with Mr. Remlinger whereby he agreed to sell to you?

A. I can't say that I recall these terms now.

Q. Did you have a contract? Was it to be all cash?

110 A. It was not.

Q. How much cash were you to pay?

A. I don't recall except that it was all cash above the present mortgages on the property.

Q. That is correct?

A. Yes.

Q. When were you to make settlement?

A. The same day his settlement was due.

Q. Where?

A. At the Ocean City Title & Trust Company.

20 Q. Who was to take title?

A. To the property?

Q. Yes.

A. I was to take title.

Q. In your individual name?

A. Yes.

Q. Did his wife join in the agreement?

A. I didn't have any conversation with his wife at all, whatever.

Q. Where did this conversation take place?

A. The first time was over the 'phone, between my office and Pittsburgh.

30 Q. Where were you?

A. It was over the 'phone, in the office.

Q. Were you to assume the mortgages?

A. I was.

Q. You were to assume them and pay them off?

A. I was to buy subject to the terms of the mortgages.

Q. Did you say to him over the 'phone that you would buy the property subject to the mortgages or that you would buy and assume the mortgages?

A. That I would buy subject to the mortgages.

Q. Did all this conversation take place over 'phone?

A. It did.

Q. When was the second payment to be made?

A. If I recall correctly, now—I don't know without looking at the agreement.

Q. I am talking about the oral agreement?

A. It was seventy days after the time he put the money on the ground.

Q. Was there any payment to made before final settlement?

A. \$5,000—from the time that I made—

Q. (Last question read to witness: Was there any payment to be made before final settlement?)

A. \$5,000.

Q. How many payments were there all together?

A. Two payments before final settlement.

Q. Did you have all this conversation over the 'phone?

A. I wouldn't say about the \$5,000 over the 'phone, but I was talking to him after he came to Ocean City.

20 Q. When was the conversation over the 'phone?

A. On Thursday.

Q. You are sure of that?

A. Positive.

Q. This check of \$5,000 that you gave Mr. Remlinger, when did you give him that?

A. On the 24th.

Q. What date was it. 24th of what?

A. I should say it was Friday.

Q. The next day?

A. Yes.

Q. You gave Mr. Remlinger the check the following day?

A. I should say—now this has been two years ago. I am trying to remember it the best I can. I wouldn't say exactly but I am positive that is when it is.

Q. Did you send it to him or hand it to him?

A. Handed it to him.

Q. You handed him the check?

- A. I did.
- Q. Did Remlinger come to you from Pittsburg to Ocean City the next day?
- A. I think he did.
- Q. You asked him for a written agreement and you gave him a check for \$5,000?
- A. I did.
- Q. What did he say?
- A. He said he was busy; that he was going out and
10 that he would see me some other time.
- Q. Didn't you make a memorandum of the check?
- A. Of what?
- Q. For what the check was?
- A. I did not.
- Q. You just gave him a check for \$5,000?
- A. I did.
- Q. That was all there was to it. Did you have any other deals with him whereby you paid him money?
- A. Not up until that time.
- 20 Q. Tell me again: Was there anybody else present when he made this agreement with you that you allege?
- A. I don't recall that there was.
- Q. You don't recall.
- A. Which agreement?
- Q. The \$35,000 agreement that you claim was made?
- A. I don't think there was.
- Q. That was made in the lobby of the Flanders Hotel Sunday afternoon—is that right?
- A. Right.
- Q. That is the day that the agreement between Sut-
30 ton, Chester and Remlinger was signed?
- A. It was.
- Q. But you post dated the agreement?
- A. I did.
- Q. When this agreement says on its face it was made July 25th, that wasn't right?
- A. The agreement was drawn prior to Sunday. I don't know what the 25th is, here.

Q. The 25th is Saturday. The agreement was actually signed on Sunday?

A. It was.

Q. You post-dated the agreement?

A. I did.

By Mr. Bourgeois.

Q. You say that the agreement about where he agreed to pay you \$35,000, as to that, when and where was that to be paid? 10

A. It was to be paid to me in cash the day of settlement.

Q. You say that that was on Sunday, but you had other conversations with him afterward?

A. Several.

Q. About the same thing as has been reiterated here?

A. I did.

Q. Were they on week-days or Sundays?

A. Week-days.

Q. On a week-day he reiterated he would give you 20 \$35,000?

A. He did.

Mr. Kreps—Objected to. I ask that be stricken.

The Court—It may be stricken.

By Mr. Bourgeois.

Q. What did he say to you on a subsequent day to that, with relation to the \$35,000?

A. That he was glad that I was able to sell the property and make the \$35,000 profit. 30

Q. What did he say with regards to the time when you would get the \$35,000?

A. At the time of settlement. He said I would get the \$35,000 at settlement time.

Q. That was after Sunday he told you that?

A. Yes, it was.

Q. Did they go through with this written agreement made on Sunday?

A. They did.

Q. That was the agreement on which he got his money?

A. It was.

Q. The agreement under which he got the \$65,000 which was mentioned in it?

A. It is.

Q. He signed it on Sunday?

A. He did.

10

By Mr. Kreps.

Q. Did Remlinger at any time after this agreement was signed say anything other than "I am glad you made the \$35,000?"

A. I had many conversations.

Q. Concerning the \$35,000?

A. We did.

Q. What did he say?

A. The conversation I can't recall, over in Pittsburg.

20 Q. Didn't you say a while ago that the only time you saw Remlinger after this agreement was signed, up to the time of settlement was made, was in Pittsburg?

A. I did not.

Q. You did not?

A. No.

Q. What did you say concerning your trip to Pittsburg, relative to talking to Remlinger?

A. The question that was asked me prior to this time?

Q. Yes.

30 A. I don't know whether my trip to Pittsburg was prior to the date of settlement or afterwards.

Q. You say you had another conversation with Remlinger in Pittsburg concerning this \$35,000. Is that right?

A. I did.

Q. What other conversations, if any, did you have with Mr. Remlinger, concerning the \$35,000, after the original agreement which was made?

A. In reference to this property he spoke to me on two or three occasions.

Q. I mean with reference to your alleged agreement with him?

A. I will get to that in a minute.

Q. All right.

A. In our conversation about this property, about the \$35,000 conversation between Mr. Remlinger and myself—

Q. When and where? 10

A. As I can recall, he and I were talking twice about it, once on the bay, fishing, and once on the Ocean City boardwalk.

Q. When?

A. After the agreement was signed, before the settlement took place.

Q. When—in July, August, September or when?

A. In August.

Q. What did he say?

A. He said he was very glad I had made the \$35,000 20 on the sale of the piece of ground that we are speaking about and that he was also glad that he had made his \$50,000.

Ewing Corson, sworn.

By Mr. Bourgeois.

Q. You live where?

A. Ocean City.

Q. Your avocation is what?

A. Real estate.

Q. Were you in the real estate business in 1925? 30

A. I was.

Q. It has been spoken of here of a settlement having been made in your office sometime in 1925 for a piece of ground, property, on 7th Street, in Ocean City, New Jersey. Do you recall that incident?

A. I do, very well.

Q. I show you an agreement of sale marked P-2, and ask you to examine that agreement of sale and ask you if you know to what it relates?

A. I beg pardon?

Q. Examine that agreement of sale and tell us to what it relates?

A. This is an agreement of sale for property at 7th and Boardwalk, Ocean City, between Mr. Remlinger and Mr. Chester and Mr. Sutton.

10 Q. Is that the agreement of sale under which they made settlement in your office?

A. Yes, sir.

Q. Tell me, if you can, why settlement was made in your office instead of in the Title Company where it is mentioned?

A. Because this property was purchased by J. Charles Remlinger from the Fidelity Realty Company through me and a settlement, a joint settlement, was made at that time in my office, namely, from Remlinger to Chester & Sutton and with Remlinger and the Fidelity Realty Company, whom I represented.

20 Q. So that the money that Sutton & Chester put up went to make settlement with Remlinger for his purchase; is that right?

A. Yes.

Q. Who was present at that settlement?

A. That was two years ago and to my mind, the ones that I can remember were Mr. Sutton and Mr. Chester, Mr. Kreps and myself.

Q. You representing whom?

30 A. The Fidelity Realty Company.

Q. And Mr. Kreps as representing whom?

Mr. Kreps—Objected to.

A. Mr. Kreps was representing Mr. Remlinger.

Mr. Kreps—I ask that that be stricken.

The Court—It may be stricken out. Objection was made prior to the answer. I will order the answer to be stricken out.

Q. What did Mr. Kreps have to do with it, what did he do?

A. Mr. Kreps brought certain papers, namely, the mortgages, and spoke in this settlement.

Q. Not what he spoke. But as to these mortgages, by whom were they executed, signed?

A. These were signed by Sutton and Chester.

Q. Were there any other mortgages?

A. I don't remember. It has been too long ago.

Q. How much money, if you recall, had been paid 10 by Mr. Remlinger to the Fidelity Realty Company before final settlement?

A. I don't remember.

Q. At the time of that settlement how much money was paid by Chester & Sutton for the property, in cash?

A. At the time of settlement?

Q. Yes.

A. The agreement, I would say, would speak for itself.

Q. I thought maybe you remembered. 20

A. I know it was a considerable amount of money.

Q. They settled according to this agreement?

A. Yes.

Q. Sutton and Chester were there representing themselves?

A. Yes.

Q. Do you recall the date on which settlement was made?

A. Settlement was made one day prior to the date specified in the agreement of sale.

Q. I don't suppose you know why it was made then? 30

A. I do.

Q. Why?

A. It was stated by Mr. Sutton and Mr. Kreps that they didn't want Mr. Roberts to know this settlement was to take place.

Mr. Kreps—Objected to.

The Court—It is too late.

By Mr. Bourgeois.

Q. Did Mr. Roberts come in during the settlement?

A. Mr. Roberts came in during the settlement.

Q. Did he get any portion of the \$35,000?

A. He did not.

Q. What did he get?

A. Nothing.

Cross-examination, by Mr. Kreps.

10 Q. Do you know why objection was made to Mr. Roberts being present?

A. I beg pardon?

Q. Do you know why they objected to having Mr. Roberts there, why they didn't want him to know settlement was going to be made?

A. Yes, I am thoroughly familiar with it.

By Mr. Bourgeois.

Q. Who said it?

20 A. This sale was made by Mr. Roberts to Sutton & Corson. The way I know it, they spoke to me a number of times about it.

By Mr. Kreps.

Q. He acted as agent?

A. Mr. Sutton spoke to me personally about it. Mr. Sutton purchased this property for a certain amount.

Q. Wait a minute. What did I ask you?

A. I am going to tell you why he wasn't wanted there.

30 The Court—You asked him why he wasn't wanted there. He is trying to tell you. Maybe he started back a little bit too far.

Mr. Kreps—I don't think we have the history of the whole case.

Witness—I think it is well to have it. I will try to answer the best I can. Mr. Roberts was to have received—

Mr. Kreps—Objected to. He doesn't know what Mr. Roberts was to have received.

Witness—Only by hearsay.

Q. Only by hearsay. Do you know why?

A. Could Mr. Remlinger have told me that and it would not have been evidence? Or could his attorney tell me that?

By the Court.

Q. Do you know why Mr. Roberts was not wanted there? That is the question. 10

Mr. Bourgeois—He doesn't want it answered.

Witness—I would like to answer it as it should be answered. I can tell you exactly why he wasn't wanted.

Mr. Kreps—There is a question here.

Witness—I don't know how to answer it.

By Mr. Kreps.

Q. Do you know why Mr. Roberts wasn't wanted there? 20

The Court—The witness said yes, he did.

Witness—I might say, because they wished to avoid paying him the \$35,000.

By the Court.

Q. Who did?

A. Mr. Remlinger, through his attorney, Mr. Kreps.

By Mr. Kreps.

Q. Do you know whether or not Mr. Roberts had issued a writ of attachment? 30

A. That is hearsay. He told me so.

Q. Any other hearsay?

A. Through yourself as attorney for the defendant.

Q. What did I tell you? Did I tell you that I didn't want Mr. Roberts there because he had issued an attachment for \$35,000 and that we didn't want this money

tied up so that it wouldn't go through as originally intended?

A. Not as originally intended, but you didn't want Mr. Roberts to tie up the \$35,000.

Q. Did I tell you I heard from the Sheriff that he had an attachment out for \$35,000?

A. You did.

Q. And that that was the reason?

A. You may have told me that that was the reason.

10 Q. Did I?

A. I think you told me that was the reason.

By Mr. Bourgeois.

Q. Were these mortgages from Sutton and Chester made to Mr. Remlinger?

Mr. Kreps—Objected to as immaterial.

By Mr. Bourgeois.

Q. For part of the purchase of this property—were 20 they made payable to Mr. Remlinger?

Mr. Kreps—That is absolutely immaterial.

Mr. Bourgeois—I am going to show why they wanted to avoid him getting his money—who made it so they couldn't attach it.

He is asking him what took place there.

Mr. Kreps—You asked him what took place there.

The Court—I will sustain the objection.

(Plaintiff rests.)

(Recess to 1:30 o'clock.)

30

(After recess, 1:30 o'clock.)

(Plaintiff's testimony resumed.)

Mr. Bourgeois—I desire to call a witness that I did not call.

Richard Johnson, sworn.

By Mr. Bourgeois.

Q. You live in Ocean City?

A. I do.

Q. Were you in Mr. Robert's office in July, 1925, on an occasion when he telephoned to Pittsburgh?

A. I was.

Mr. Kreps—Just a minute. May I ask Mr. Johnson the question as to how he knew—

The Court—He said he was there the after- 10 noon when he telephoned to Pittsburgh.

By Mr. Bourgeois.

Q. Do you know to whom he phoned?

A. Mr. Roberts called up Mr. Remlinger.

By Mr. Kreps.

Q. Did you hear him say that?

A. I couldn't swear it was his number, but we were talking about Mr. Remlinger and we went in there for 20 that purpose, we went to Mr. Robert's office for that.

Q. How did it happen you went there?

A. Mr. Roberts said he knew where I could make some money on the beach front. He suggested Seventh and the Beach front; he said he could sell it and asked me to go in on it with him. I thought maybe if we went to his office I might think about it, then he talked to Mr. Remlinger on the phone.

Q. What part of the conversation did you hear with him?

A. He called up Remlinger as to what he would do 30 about it, the best price he would take and so forth and Mr. Roberts was talking to him.

Mr. Kreps—I object to this.

The Court—I do not see how he is going to detail a conversation on the other end of the wire between other parties.

By Mr. Bourgeois.

Q. What did you hear in the conversation?

Mr. Kreps—I also object to that. That is not binding upon this defendant as to what he heard Roberts says.

The Court—It would be binding upon this defendant if what Roberts said to Remlinger was communicated to the witness.

Mr. Kreps—Not if it was an oral contract.

10 The Court—I do not see the propriety of your objection.

Mr. Kreps—I object to the conversation because he did not prove that he knew he was talking to Remlinger.

Secondly, I object to the testimony on the ground that what he is attempting to testify to is an alleged oral contract between Remlinger and Roberts, to which he has no right to testify.

20 The Court—I do not believe he has identified the other end of the wire, to bind Mr. Remlinger in the conversation.

By Mr. Bourgeois.

Q. You say that Mr. Roberts wanted you to go in with him?

A. I did.

Q. Did you stay in with him?

A. I did.

Q. I don't mean, in the office—I mean in this deal?

30 A. As far as the deal was concerned I said I would go through with part of the deal with him; I told him I would go through with it. I changed my mind that night and went around to tell him I wouldn't go through with the deal.

Q. Did you see him after that?

A. I didn't see him. I had my girl in my office call up Mr. Roberts and tell him I wouldn't go through with the deal.

Mr. Kreps—Objected to.

By Mr. Bourgeois.

Q. You didn't go through with it, you dropped out?

A. No.

(No cross-examination.)

Mr. Kreps—I again wish to renew my motion for a non-suit on the ground that Mr. Roberts did not have a valid and binding contract with Remlinger for the purchase of this property, for the reason that the contract which he alleges was not in writing and therefore was not enforceable upon Mr. Remlinger; the alleged oral agreement between Roberts and Remlinger could not be enforced and is not enforceable now, because there is no consideration. 10

It has been proved that the \$5,000 which Roberts paid Remlinger, Mr. Roberts got from Sutton & Chester and that there was no consideration passed between Roberts and Remlinger for the \$5,000 which he paid, as being applied on part of the purchase price between Sutton & Chester, and it is not the \$5,000 which Roberts deposited. 20

The Statute of Frauds says, that no action shall be brought upon any agreement for the sale of lands or hereditaments, in or concerning them, unless the agreement upon which said action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto, by him or her lawfully authorized.

Further that the alleged contract between Remlinger and Roberts was made on Sunday, as Mr. Roberts testified, and was, therefore invalid *ab initio* and cannot therefore be ratified except by some act upon the part of Mr. Remlinger which has not been performed. 30

The Court—My understanding of the testimony is that the original undertaking was on Sunday and that thereafter the same contract was made on one or two occasions.

I will charge the jury that if the contract was made on Sunday it is absolutely void and there can be no recovery; but, on the other hand, if that same contract was made on another day than Sunday, there can be.

I will overrule your motion.

Mr. Kreps—Will you allow me to speak a little further?

The Court—Certainly.

10 Mr. Kreps—The testimony is that this contract was made on Sunday and this is the contract on which this action is based.

There is nothing in the pleadings, there isn't anything anywhere to show that a new contract was made.

They say the contract was made on the twenty-fifth. That wasn't Sunday. It wasn't made on the twenty-fifth. For the first time we learn, this morning, that it was made on Sunday and we have no way to meet it, because there was no such contract.

20

Mr. Bourgeois—If that contract was reiterated on a week-day it is perfectly good.

The Court—On or about July 25th plaintiff sold said land; the defendant thereupon agreed that instead of defendant making an agreement of sale he would pay him \$35,000, on or about July 25th.

30

Mr. Kreps—If you will remember the testimony I asked Mr. Roberts what he said, what the contract was and he said that Remlinger said, "I am glad you made \$35,000." Now there is no contact there; there is no consideration for it.

We contend that if it is a ratification of an alleged original contract, it can't be ratified if made on Sunday, but if it was a contract made on any other day—

The Court—The witness Roberts testifies that on three different occasions his contract of Sunday was reiterated; that is, on two different occasions I believe.

Mr. Kreps—He doesn't say that.

The Court—On cross-examination by you at one point of the testimony my recollection is that the witness said he had made the contract again on another day. Then you asked him finally what was said and he said that on such and such a day he made the contract. He had previously said, as I recall, that on a day other than Sunday, I forget the day or days, that Remlinger had said, "I will pay you \$35,000 as your share of the profits,"—or words to that effect.

10

Mr. Kreps—I contend that that was not the testimony and renew my motion for a non-suit.

I further submit to the Court that there was no consideration submitted for any new contract that may have been made after Sunday. It is not contended that that contract was ratified and we also contend that it couldn't be ratified.

20

The Court—If there was a consideration for the Sunday contract there was a consideration for the other contract.

Mr. Kreps—Will the Court allow me to read something here?

The Court—Yes.

(Mr. Kreps quoting *Genvert, &c.*, 52 *Equity* p. 302.)

The Court—I do not think the consideration was void. I think that the consideration for the Sunday contract was the consideration for the other contract.

30

Mr. Kreps—That is my motion.

The Court—I will overrule your motion and allow you an exception.

Mr. Kreps—On all of it?

The Court—Yes.

Mr. Kreps—I mean on all points?

The Court—Yes.

(Check, P. X. 3, offered and admitted.)

DEFENDANT'S TESTIMONY.

J. Charles Remlinger, sworn.

By Mr. Kreps.

10

Q. Where do you reside?

A. Pittsburgh, Pa.

Q. Do you know Clayton B. Roberts, the plaintiff in this case?

A. I do.

Q. Were you living in Ocean City, New Jersey, in the summer of 1925?

A. I was, part of the time.

Q. You had been coming there during the summer time off and on?

20

A. Positively, for several years.

Q. How long have you known Mr. Roberts in a business way?

A. In a business way, since the summer of 1925, or a little previous to that.

Q. Did Mr. Roberts ever speak to you about the property situate in Ocean City between Seventh and Plaza Place and Plaza and the Boardwalk?

A. Yes.

Q. Were you the equitable owner of that property?

30

A. I was.

Q. You had an agreement to purchase?

A. Absolutely.

Q. Did Roberts ever come to you concerning the sale of this property?

A. He talked with me a number of times about trying to sell it for me.

Q. Did he ever at any time say to you that he wanted to buy the property himself?

A. He never wanted to buy the property himself; he wanted to sell it for me.

Q. Did he say why he wanted to sell it for you?

A. He said that at different time he had property and that if he could sell this he could make some money and make some money for me; he wanted me to buy some of his property.

Q. He wanted you to buy some property from him?

A. Yes.

Q. What did you tell him?

10

A. I told him I would have to sell my property first before that could be done.

Q. I show you an agreement between J. Charles Remlinger and Edward M. Sutton and J. M. Chester and ask you if at the time that agreement was signed—I ask you who was present at the time that agreement was signed?

A. There was no one present only Mr. Roberts and myself.

Q. Yourself and Mr. Roberts?

A. Yes.

20

Q. Had you received a check from Mr. Roberts, or anyone before this agreement was signed?

A. Yes, I think the day before that was signed Mr. Roberts gave me a check for \$5,000 and told me he had sold it to Sutton and Chester.

Q. For what price?

A. \$275,000, and that they had given him a check for \$5,000, which he was turning over to me and gave me his check for that.

Q. Did you at any time agree to pay Mr. Roberts \$35,000?

30

A. I did not.

Q. Did you ever at any time tell Mr. Roberts you would sell him this property for \$240,000?

A. I did not. He asked me if I would take \$50,000 profit and I told him no, I wouldn't.

Q. When he says you agreed to pay him \$35,000 he is mistaken?

A. That is right.

Q. You never made such agreement?

A. I did not.

Q. Did he, at the time he gave you this check for \$5,000, ask you for any memoranda in writing?

A. No, sir.

Q. Did he ask you to give him your agreement where-by you were to convey to him for \$240,000?

A. \$240,000 was never mentioned.

10 Q. Do you remember Mr. Roberts calling you on the phone when you were in Pittsburgh?

A. Mr. Roberts called me once and said he thought he had a sale for the property. That was about all that was said. No figures discussed on the phone. I told him I would see him in Ocean City. That was all there was to it.

Q. When Roberts called you on the phone did he say he would buy this property for \$240,000?

A. No.

20 Q. Did he say he would pay you all cash above the mortgages?

A. He didn't say anything about paying me.

Q. Did he say he would assume the mortgages which were on the property?

A. He did not.

Q. Did he say he would make settlement in accordance with the terms of your agreement which you had, to purchase?

A. Never said anything. The only thing that was said was the conversation regarding the sale of the prop-
30 erty.

Q. At that time you didn't agree to sell this property to Roberts for \$240,000?

A. What?

Q. Did you at any other time or at any time, offer to sell this property to Mr. Roberts?

A. I did not.

Q. Were you present when Sutton and Chester signed this agreement?

A. I was not.

Q. This \$5,000 that Mr. Roberts paid you, did that apply on account of the purchase price in the settle-ment with Chester & Sutton?

A. Yes, he said he received their check for that.

Q. You didn't get the additional \$5,000? In other words, Mr. Roberts is not out the \$5,000 that you got?

A. No, he told me the day he got the check that he
10 had their check.

Q. Whether or not he had that you don't know?

A. No.

Q. He told you he had sold the property to Chester & Sutton?

A. Yes.

Q. Do you remember when that was? Was it the day before this agreement was signed?

A. I think it was on Saturday afternoon he came to see me and gave me the check and I told him to bring
20 me the agreement, that I was going home Sunday night, and I think he came Sunday afternoon; I am not quite sure.

Q. This agreement was signed on Sunday?

A. I think it was.

Q. At that time you didn't have any conversation with Mr. Roberts concerning the \$35,000 to be paid to him?

A. I did not.

Q. Did he request that you incorporate in this agree-
30 ment of sale that he was to receive \$35,000?

A. He did not.

Q. I show you check dated July 24th, 1925, and ask you if that is the check which Clinton B. Roberts gave to you? (Check shown witness.)

A. That is the check.

Q. When he gave you this check did he say he was buying this property for himself?

A. He did not. He said Chester & Sutton had bought the property for \$275,000; that he had received \$5,000 and was giving me this check for that amount.

Q. That was the one he deposited?

A. Yes.

Q. Do you know whether or not Mr. Roberts is a real estate broker?

A. I believe so.

Q. He has an office in Ocean City?

10 A. Yes.

Q. He conducts a real estate business there?

A. Yes.

Q. Do you know whether or not, of your own knowledge, he buys real estate?

A. Yes.

Q. For commission?

A. Yes, I think so.

Q. Does he sell real estate for people who list it in his office, for commission?

20 A. I think so.

Q. That is his business, real estate broker?

A. That is what I understand.

Q. Did he come to see you and ask you if you would allow him to sell this property for you?

Mr. Bourgeois—Objected to.

A. Talked about that a number of times.

Mr. Bourgeois—My objection is based only upon the ground that the questions are leading.

The Court—Yes.

30 Cross-examination, by Mr. Bourgeois.

Q. Where were you when you received this check of Mr. Roberts, which bears date July 24, 1925, and which you say you did receive?

A. In the lobby of the Hotel Flanders.

Q. In Ocean City?

A. In Ocean City, yes.

The Court—Overruled. Exception allowed.

Q. (Last question read to witness.)

A. I never gave that any thought.

Q. If his contract was made on Sunday, if it was made on Sunday, then this contract was also made on Sunday?

A. Yes, it is so signed.

Q. In this contract made on Sunday, as you say, it alleges that you are to receive \$275,000—\$65,000 of which is in cash, at settlement.

10

Q. Did you go through with that settlement?

A. It was gone through with.

Q. Who represented you at the time of settlement?

A. Mr. Kreps.

Q. Then he did represent you? Did you get the money?

A. I did.

Q. From Mr. Kreps, or through Mr. Kreps' office?

A. I think it was through his office. I don't know just who it came from.

20

Q. You say that Mr. Roberts, when he called you on the phone, in Pittsburgh, told you that he thought he had a sale for the property. Are you quite sure that that is what he said to you?

A. I am not quite sure that that is what he said, but that is inferred. He said he thought he could do something with the property.

Q. What was said?

A. What was said—it was with relation to the property and I told him I would see him when I got in Ocean City.

30

Q. You say you never offered to sell to him for \$240,000, that you never mentioned it. Was the sale of the property for \$275,000 mentioned?

A. A number of times, but I told him I wouldn't accept it.

Q. When Mr. Roberts spoke to you over the phone and said he wanted to know if you would take \$50,000 profit, you said yes?

Q. I show you check of J. M. Chester for \$5,000, bearing date the twenty-seventh day of July—three days after the other check. Did you ever see that check?

A. No, sir.

Q. You never saw it?

A. No, sir.

Q. You never got it?

A. No, sir.

Q. What excuse did Mr. Roberts make to you for not
10 giving you the check of J. M. Chester, if he had received it himself?

A. Nothing was said about that except that he had received the check and was giving me his check.

Q. You didn't care whether the check he received from Chester was for \$10,000 or what it was for, as long as you got \$5,000? That was all you cared about?

A. I won't say that. That is the check I received.

Q. What I am trying to get at is this: If Roberts had sold that property for you to Chester & Sutton and he
20 had told you he had received their check, wouldn't you naturally want to see that check—how much it was for?

A. He told me what it was. He said he had sold the property for \$275,000 and that he had received \$5,000 on it.

Q. You were satisfied that was what he received?

A. Yes.

Q. You didn't ask to see the check or anything of the kind?

A. I didn't know he had the check. He told me. I didn't know whether or not he had it.

Q. You accepted that as being the fact without seeing
30 the check at all?

A. I accepted the check he gave me, yes.

Q. As to this Sunday transaction. Do you allege and claim that you are not liable in this transaction with Roberts, if the jury should find one to exist, because it was made on Sunday?

Mr. Kreps—Objected to.

A. No, nothing said of the kind.

Q. What was said?

A. Nothing about the price at all. He said he had a sale for the property. I told him I would talk about it to him when I got to Ocean City.

Q. Then there wasn't any conversation except that he had a purchaser for the property?

A. That was it. He wanted to know when I was coming to Ocean City and I told him I would be down Saturday noon.
10

By Mr. Kreps.

Q. Did you at any time after this contract was signed say to Mr. Roberts that you would pay him \$35,000?

A. No.

J. M. Chester, sworn.

By Mr. Kreps.

Q. You are in the real estate business in Ocean City?
20

A. Yes.

Q. Are you the J. M. Chester mentioned in that agreement? (Shown witness.)

A. Yes.

Q. That is your signature?

A. Yes.

Q. When you signed this agreement of sale with Mr. Remlinger for the purchase of this property, who did you believe to be the owner of it?

Mr. Bourgeois—Objected to.

The Court—What is the difference?
30

A. I had no other thought.

The Court—What is the difference as to what he may have believed?

Mr. Kreps—I will reframe the question.

By Mr. Kreps.

Q. At the time you signed this agreement of sale—prior to the time you signed this agreement of sale, did

Mr. Roberts say to you that he had bought this property from Mr. Remlinger and that he was selling it to you?

A. I would infer that.

Q. Did he say that at the time you signed?

A. I am not so sure about that, but I infer that by him taking back another mortgage for \$35,000 he was the owner of the property.

Q. You signed the agreement with Remlinger?

10 A. Yes.

Q. You didn't ask Mr. Roberts to sign any agreement?

A. No, sir.

Q. Mr. Roberts didn't tell you he had to sign an agreement in order to make this binding?

A. No.

Q. You didn't ask him to do it?

A. No.

Q. Did he say he had an agreement with Remlinger?

20 A. I don't think he did.

Q. Did he say Mr. Remlinger owned this property, when he sold this to you?

A. I think there was some mention of Mr. Remlinger owning the property.

Q. This check which you gave Mr. Roberts, made out to C. B. Roberts, agent—was that made out to him for any special reason, as agent?

A. No, not that I know of. I don't remember ever seeing that check until yesterday.

Q. It is your check?

30 A. It came out of my bank account.

Q. It is your money?

A. I think so. My son-in-law has power of attorney.

Q. It is signed by your son-in-law?

A. Yes.

Q. Who delivered that check to Mr. Roberts, do you know?

A. I do not.

Q. Did you?

A. I don't know. We had many transactions about that time.

Q. You said something about \$35,000 in mortgages, what was that?

A. That is what he agreed to take.

Q. When?

A. At the time we bought the property; otherwise I don't think we would have bought it. 10

Q. Before or after the agreement was signed?

A. I should say that was before.

Q. Before?

A. Certainly. I don't think we would have taken title to the property otherwise.

Q. Didn't you sign the agreement?

A. Yes, afterwards.

Q. You signed an agreement with Remlinger whereby you agreed to pay all cash? 20

A. Positively; that is usually the case.

Q. That was the agreement you were to settle on?

A. That is the one we did settle on.

Q. Did you ask Mr. Roberts to give you any written memorandum concerning this \$35,000 worth of mortgages?

A. How is that?

Q. Did you ask Mr. Roberts to give you any written memorandum?

A. No.

Q. Didn't that question arise after you signed that agreement? 30

A. Didn't what?

Q. Didn't you and Mr. Sutton discover something after you signed the agreement?

A. Along what line?

Q. Didn't you learn that Roberts was claiming \$35,000 of this after the agreement was signed and that then you went to see Mr. Roberts and asked him about

this transaction and that then he said if he got this through he would take \$35,000 in mortgages?

A. I don't remember it. The only thing I remember about the \$35,000 transaction was that Mr. Roberts was to take that back in mortgage. We knew what we were paying for this property.

Q. Was that before or after the agreement was signed?

A. I would say that was before.

10 Q. Before?

A. Before. I don't think there is any question about it. That is the reason I bought it, because only \$30,000 had to be put up in cash.

Q. That is what the agreement said?

A. No, the agreement said more. We had more the same way over there, where it was more when it came to the time.

Q. You buy and sell a great many pieces of real estate?

20 A. Yes.

Cross-examination, by Bourgeois.

Q. Do I understand you to say that you understood when you signed this agreement that of that \$65,000 Roberts was to take \$35,000 in mortgage?

A. Positively, yes.

Q. So that you had to put up only \$30,000?

A. Yes, no question about it.

Q. When you made settlement how much did you have to put up?

30 A. \$65,000.

Q. This check you gave is dated the twenty-seventh. Did you direct that to be made to Clinton B. Roberts, agent?

A. I would say yes. They wouldn't make it without it.

Q. Did you tell them to make it to Roberts as agent, or what?

A. I couldn't say. Probably I did. I don't think they would do anything unless I told them to.

Q. What occasion or reason had you to say to make the check out as agent?

A. I couldn't say now.

Q. Was there any special reason?

A. I would say, no.

Q. Who made the deed to you. Who was the man that made the deed to you in the settlement?

A. Sir?

10

Q. Who made the deed to you in the settlement—Remlinger or someone else?

A. Fidelity Realty Company.

Q. Then he never had title to the property, at all?

A. No, that is frequently the case.

Q. He was dealing on an agreement, and Roberts said he was dealing on an agreement?

A. Yes.

Clayton B. Roberts, recalled for further cross-examination. 20

By Mr. Kreps.

Q. I show you check made out to Clayton B. Roberts, agent, and ask if that is the check you received from Chester & Sutton on account of the purchase price of this property?

A. It is. It is my signature on the back.

Q. Did you object to this check being made out to Clayton B. Roberts, agent?

A. I did not. I didn't pay any attention to the "agent" part. 30

By Mr. Bourgeois.

Q. Did you have the check from J. M. Chester to you which bears date July 27, 1925, at the time you gave Mr. Remlinger your check which bears date July 24, 1925?

A. I did not.

Q. I would like to ask the witness some questions in rebuttal.

The Court—All right.

Testimony in rebuttal.

By Mr. Bourgeois.

Q. Mr. Remlinger has stated that you asked him or told him in this conversation over the 'phone that you thought you had a sale for this property. Did you
10 so state to him?

A. I did.

Q. What did he say?

A. He said he wanted \$50,000 above the price he paid for it, and settlement to be made at the time his settlement was due.

Q. That was the over-the-'phone conversation?

A. Yes, it was.

Q. He says he never offered to give you \$35,000 profit that you were making over that purchase price—
20 is that true?

A. That is not true.

Q. He says that at the time you gave him your check for \$5,000 that you told him that Chester & Sutton had given you their check for that same sum—is that true?

A. That is not true.

Q. He says you told him that you had sold the property for him to Chester & Sutton—is that true?

A. That is not true.

Q. Did you tell him that you had sold it to Chester
30 & Sutton for yourself?

A. I did.

Q. He says you never told him you wanted to buy the property for yourself. Is that true?

A. No.

Cross-examination, by Mr. Kreps.

Q. You say that this contract which was made between Mr. Remlinger and Sutton & Chester, was signed

by the parties to it with full knowledge that you had an agreement with Mr. Remlinger. Is that true?

A. It is.

Q. That is true?

A. It is.

Q. There is no question about that?

A. No.

Q. Did Mr. Sutton come to you after that agreement was signed and ask you why you didn't divulge that fact to him?
10

A. He did not.

Q. Did Mr. Sutton come to you and say that he was going to report you to the real estate board if you did not make some arrangement about the \$35,000?

A. No, sir.

Q. Did Mr. Sutton come to you and say to you that you would have to take that \$35,000 in mortgages if you got it?

Mr. Bourgeois—Objected to. This is not cross-examination.
20

The Court—It is not cross-examination of your rebuttal. But there is something in the cross-examination which was overlooked and on which he desires to re-cross.

Q. (Last question read to witness: Did Mr. Sutton come to you and say to you that you would have to take that \$35,000 in mortgages if you got it?)

A. He did not.

Q. Did you ever agree to do it?

A. Take \$35,000 in mortgage?

Q. Yes.
30

A. I did.

Q. When?

A. At the time I sold it to Sutton & Chester.

Q. Why didn't you incorporate that in the agreement?

A. I didn't think it was necessary.

Q. You had considerable real estate business?

A. Yes.

Q. You have drawn a number of agreements of sale?

A. Yes.

Q. Do you mean to sit here and tell this Court and jury that you didn't think it was necessary to incorporate in that agreement that \$35,000 more was to be taken back in mortgages when a man was signing a bond and mortgage where they had to pay \$275,000?

A. I do; and I made a lot of other mistakes that I have learned about since, in law.

Q. You are quite positive that Mr. Sutton and Mr. Chester, especially Mr. Sutton, did not come to you after this agreement was signed and say that you had to make this thing right or they were going to report you to the real estate board?

A. They never said that.

Richard H. Johnson, recalled.

By Mr. Bourgeois.

Q. It has been shown there was a conversation between Mr. Remlinger and Mr. Roberts. Will you state to the jury what part of the conversation you remember?

A. I was alongside of Mr. Roberts, in his office, when he said he seemed to know where we could make some money. I sat in there while he called up Mr. Remlinger. I was close to him, to Mr. Roberts,—

Mr. Kreps—Objected to. I don't know how he knows it was Mr. Remlinger.

The Court—I do not see how this witness is going to testify to a conversation over the phone with some one else in Pittsburgh whose voice he cannot identify.

The mere fact that Mr. Remlinger testifies there was at one time or at some time a conversation between himself and Mr. Roberts does not seem to justify the admission of this testimony.

Mr. Bourgeois—I would like to ask Mr. Johnson a question while he stands where he is.

(Addressing Mr. Johnson): Just stand.

By Mr. Bourgeois.

Q. Did you ever talk to Mr. Remlinger on the phone at any time?

A. I don't recall. I don't think I did.

(Both sides close.)

(Charge of Court follows.)

10

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY, NEW JERSEY.

CLAYTON B. ROBERT,
vs.
J. CHARLES REMLINGER. } Action at Law.

20

Cape May Court House, New Jersey.

December 15, 1927.

Before Sooy, J., and a Jury.

CHARGE OF THE COURT.

Ladies and Gentlemen of the Jury:

There are some cases in which the issues involved are complicated and in which a Judge may, in his charge, instruct and help; but in this case there is but a single issue involved, therefore the charge of the Court will not be very helpful to you in determining your verdict.

The plaintiff alleges that the defendant agreed with him that he, the defendant, would pay to plaintiff \$35,000 out of the \$85,000 profit which the defendant admitted he got from the sale of the property, Seventh Avenue and Atlantic Avenue, Ocean City.

30

The defendant states that that is not true; that he never made any such promise to the plaintiff. And there lies the issue. If you find that the plaintiff has proved, by the greater weight of the believable evidence, that the defendant did promise that he would pay the plaintiff \$35,000 out of the \$85,000 profit, then your verdict would be for plaintiff in the sum of \$35,000 together with interest at six per cent. from September 27, 1925.

10 On the other hand, if you find from your consideration of the evidence that the plaintiff has not convinced you by the greater weight of the believable evidence that the defendant made such promise, then your verdict would be for the defendant and would be, in form, no cause of action.

I have said that the burden of proof rests on the plaintiff, and that simply means that he must convince you by the greater weight of the believable evidence that that which he asserts is true, to wit, that the promise which he alleges was made by the defendant was so made
20 by the defendant.

You must also find, if you find that there was such promise made by the defendant, that that promise was made on a day other than Sunday. And I charge you that in so far as this conversation is concerned, between the plaintiff and the defendant, that whatever that conversation may be, it could not have amounted to a binding contract if made on Sunday.

The plaintiff, as I remember the testimony and if I am wrong you will correct me, says that the first conversation wherein the defendant made his alleged promise was made on Sunday. I charge you that that promise cannot amount to a valid contract and if you find for the plaintiff you must find that the promise was made on a day other than Sunday. That is all the instruction the Court can give you. You are the judge of the fact.
30

Mr. Bourgeois—Will you call the jury's attention to the fact that if the promise was made on Sunday it would not be binding, but if there was another contract made on a week-day it would be good?

The Court—I think I have covered that; that the promise if made on Sunday would be void, but if there was another contract made on a day other than Sunday it would be binding.

I call your attention also to the fact that this is not a suit to recover commissions. It is a suit based on the allegation of the plaintiff, to wit, that the defendant promised to pay him \$35,000 out of the \$85,000 profit; and not a suit to recover commissions.

(Jury out.)

10

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

CLAYTON B. ROBERTS,

Plaintiff,

vs.

J. CHARLES REMLINGER,

Defendant.

Action at Law.

20

NOTICE OF APPEAL.

To Bourgeois & Coulomb, Esquires, Attorneys of the Plaintiff:

Take Notice, that the defendant in the above-entitled cause, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this case.

KREPS & BELL, 30

Attorneys of Appellant.

Due and legal service acknowledged January 5th, 1928.

BOURGOIS & COULOMB,
Attorneys for the Plaintiff.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CLAYTON B. ROBERTS,
Plaintiff-Respondent,

vs.

10 J. CHARLES REMLINGER,
Defendant-Appellant.

Action at Law.

GROUNDS OF APPEAL.

The appellant, J. Charles Remlinger, states the following grounds of appeal:

1. Because the Trial Court denied the defendant's motion for a non-suit at the close of the plaintiff's opening, whereas such motion should have been granted.

20 2. Because the Trial Court permitted the plaintiff to testify concerning an alleged oral contract for the sale of real estate over the objection of the defendant, whereas said testimony should not have been permitted.

3. Because the Trial Court permitted the following questions and answers over the objection of the defendant, whereas the same should not have been permitted:

Clayton B. Roberts—direct examination.

Q. "What did he say about it?"

A. He said he was very well satisfied and glad that I had made a profit up to and above what he had made.

30 Q. Did he ever express that same sentiment to you on any occasion except that day?

(Objected to.)

The Court—The question is permitted.

A. He did."

4. Because the Trial Court refused to grant the defendant's motion for a non-suit at the close of the plaintiff's case, whereas such motion should have been granted.

5. Because the verdict of the jury is contrary to the weight of the evidence.

KREPS & BELL,
Attorneys of Defendant-Appellant.

F. STANLEY KREPS,
Of Counsel with Defendant-Appellant.

Due and legal service acknowledged January 14th, 1928.

BOURGEAIS & COULOMB,
Attorneys for the Plaintiff.

NEW JERSEY
Court of Errors and Appeals.

CLAYTON B. ROBERTS,
Plaintiff-Respondent,

vs.

J. CHARLES REMLINGER,
Defendant-Appellant.

} Action at Law.
} On Appeal.

Brief of Defendant-Appellant.

Statement.

Plaintiff, Clayton B. Roberts, was a real estate agent in Ocean City, New Jersey, during the summer of 1925.

The defendant, J. Charles Remlinger, a summer resident of Ocean City for a number of years, was the owner of a piece of ground located in Ocean City at Seventh Street and the Boardwalk.

The plaintiff alleges that he agreed to purchase the Seventh Street property from defendant, under an oral agreement and that he paid defendant the sum of five thousand dollars (\$5,000) on account of the purchase price, under the oral agreement. Plaintiff further alleges that after the oral agreement was entered into, he the plaintiff, sold the property to parties by the name of

Sutton and Chester, for a sum of thirty-five thousand dollars (\$35,000) in excess of the amount that he, the plaintiff, was to pay the defendant, for the property. Plaintiff claims that instead of making two written agreements, one from defendant to plaintiff, and one from plaintiff to Sutton and Chester, it was agreed between plaintiff and defendant that defendant would make the agreement of sale direct with Sutton and Chester, and pay plaintiff thirty-five thousand dollars (\$35,000) of the profit from the sale.

The defendant alleges that he never agreed to sell the property to the plaintiff, and that plaintiff was simply acting as a real estate broker in all the transactions which he, the defendant, had with plaintiff concerning this piece of ground. Defendant further alleges that he never agreed to pay plaintiff thirty-five thousand dollars (\$35,000) or any other part of the profit that he received from the sale to Sutton and Chester, and that plaintiff was merely acting in the capacity as a real estate broker in making the sale of property from defendant to James M. Chester and E. M. Sutton. Defendant further alleged that there is no consideration passing from plaintiff to defendant, either on account of an alleged oral contract or on account of a contract for profits, as the five thousand dollar (\$5,000) check given by plaintiff to defendant was considered a first payment on account of the sale agreement between Remlinger and Sutton and Chester, and that the five thousand dollars (\$5,000) was given by Sutton and Chester to plaintiff.

According to the plaintiff's testimony, the contract of sale from defendant to Sutton and Chester was actually consummated on Sunday, July 26th, 1925, and on that day plaintiff claims defendant agreed that he would pay to plaintiff the sum of thirty-five thousand dollars (\$35,000) of the profit from the sale. The agreement as to profit being made the same day as the contract from defendant to Sutton and Chester, which was on Sunday, July 26th, 1925. Plaintiff alleges that he gave

defendant a check for five thousand dollars (\$5,000) on July 24th, which check was a first payment on account of the alleged oral contract between plaintiff and defendant, for the purchase of defendant's property. Plaintiff testified that on July 27th, Sutton and Chester gave a check to the plaintiff for five thousand dollars (\$5,000) which was the first deposit on account of their contract with defendant. Plaintiff received this check, and deposited it to his own account, and did not turn it over to the defendant.

The defendant, at the time of the sale, moved for a non-suit on plaintiff's opening, on account of the fact that no valid binding contract was alleged, and if any contract was alleged, it was in contravention of the statute of frauds, but the motion was denied by the court. The defendant moved for a non-suit after plaintiff's case on account of the fact that no valid, binding contract had been proved, between defendant and plaintiff, and the contract for profits, if proved, was invalid, because of falling within the statute of frauds, but this motion was denied, and after the defendant's case, the Court gave the case to the jury, and the jury returned the verdict against the defendant in the sum of thirty-five thousand dollars (\$35,000), together with interest, which amounted to thirty-nine thousand six hundred thirty-seven dollars fifty cents (\$39,637.50).

NON-SUIT ON OPENING SHOULD HAVE BEEN GRANTED.

In the opening address, Counsel for plaintiff neglected to set forth or allege a valid contract, based on a valuable consideration. Mr. Bourgeois said, "Mr. Roberts agreed to buy the property for two hundred forty thousand dollars (\$240,000), and on that day forwarded to Mr. Remlinger a check for five thousand dollars (\$5,000)." (State of Case, page 12; line 34.) That is the only mention of any consideration passing from Roberts to Remlinger, and the five thousand dollars (\$5,000) he specifically mentioned was a first pay-

ment on account of an oral contract for purchase of land, which oral contract was unenforceable and invalid. Mr. Bourgeois implies that the oral contract for the purchase of the land was the consideration for the oral contract as to profits. He said, "We can make the contract with Chester and Sutton, or the other way about, and then suggested there was no use making two agreements, but that one agreement should be made direct from Remlinger to Chester and Sutton." (State of Case, page 13, lines 19, 20, 21, 22 and part of 23.) The statement clearly shows this was not an agreement for profits but an agreement for sale of an interest in land, and contrary to the statute of frauds.

Nothing is mentioned in the opening address of any consideration for the oral contract on profits, except the oral agreement for purchase of land, which contract was invalid. The Court, in considering the motion for nonsuit on the opening, asked Mr. Bourgeois about the consideration. Mr. Bourgeois stated that the five thousand dollars (\$5,000) was the consideration. (See line 1, page 16, State of Case.) The Court at that time said, "The money was never returned?" (See line 6, page 16, State of Case.) Yet, in the opening address, no mention is made of the five thousand dollars (\$5,000) as any consideration for the oral agreement for profits.

If the five thousand dollar (\$5,000) check was a consideration at all, it would be past consideration as it was given as a payment on an invalid contract on July 24th, 1925, and the agreement for profits upon which the plaintiff was suing was made on July 25th, or after the consideration had been given, and Roberts makes no mention of giving any other consideration.

There is no consideration for the contracts for profits between plaintiff and defendant, because there was no benefit conferred on the promissor, and no detriments suffered by the promisee. The five thousand dollars (\$5,000) Remlinger received from Roberts simply came through his hands as an agent. The giving up of the oral contract to purchase real estate was not a considera-

tion because neither the plaintiff or defendant were bound by that oral contract. There is no consideration when the promissor neither undertakes to do anything which he is not bound to do, nor forbear to do anything which he has a right to do. (Section 13, *Corpus Juris*, page 317.) "A detriment to the promisee which suffices as a consideration for a contract, must be a detriment on entering into the contract not from the breach of it." (See the case of *Sommers v. Myers*, 69 New Jersey Law, page 24, where a promise made by one of the plaintiffs, to remit royalties on an observation roundabout wheel, unless plaintiffs could stop other wheels from running in competition with defendant's wheel, the Court held that the contract with defendant was without consideration, and would not support it.)

If the five thousand dollar (\$5,000) check could be taken as a consideration, it was past consideration because it had passed from the plaintiff to defendant before the making of the Sunday agreement, and was not given even in contemplation of the Sunday agreement for profits. Therefore, it would fall within the rule laid down in the case of *State, Siemers, Pros.*, against *Houser*, 52 New Jersey Law, 125, for in that case, plaintiff was to receive a certain percentage of the money received by the defendants, provided plaintiff succeeded in having the said liens on defendant's property reduced. The authorities of the city had reduced the liens before the contract was made, therefore, the Court held that the contract was without consideration, as the benefit going from the plaintiff to defendant had passed before the contract was actually entered into.

THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF TO TESTIFY CONCERNING AN ORAL CONTRACT FOR THE SALE OF REAL ESTATE.

Roberts testified: "I told him I would buy the ground."

Question: "What did he then say or do?" (see lines 31 and 32, page 20, State of Case). Counsel for de-

defendant objected to the above question, and to all questions concerning any oral contract for the sale of land. The Court overruled the objection, and permitted the testimony, allowing an exception to the defendant. This testimony should have been excluded by the Court as it was entirely immaterial and irrelevant, and highly improper, and although admitted by the Court only "as facts leading up to the contract," it might easily have prejudiced the jury, and influenced them, and also might have been confused by them as to the consideration for the contract for profit. This testimony concerning an invalid contract should have been excluded, as the testimony was all concerning an agreement within the Statute of Frauds and not in writing.

THE TRIAL COURT ERRED IN PERMITTING THE FOLLOWING TESTIMONY:

Question: "Did he ever express that same sentiment to you on any occasion except that day?" Objected to. Answer: "He did." (See lines 11 to 14, page 23, State of Case.)

This question was very leading and improper, and should have been excluded by the Court as in no other place in the testimony is there any evidence that the plaintiff had any contract or understanding with the defendant concerning profits after the original contract, which was made on a Sunday. If this testimony had been excluded, there would have been absolutely no testimony to the effect that any contract was made after the original Sunday contract.

THE COURT ERRED IN REFUSING DEFENDANT'S MOTION FOR NON-SUIT AT CLOSE OF PLAINTIFF'S CASE.

The plaintiff failed to prove a valid binding contract with defendant, because the contract between plaintiff and defendant, if proved, came within the Statute of Frauds, and should have been in writing, and therefore non-suit should have been granted.

The defendant's counsel, in argument for non-suit, after plaintiff's case, stated in the motion as follows: "The Statute of Frauds says, that no action shall be brought upon any agreement for the sale of lands or hereditaments, in or concerning them, unless the agreement upon which said action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto, by him or her lawfully authorized." (Lines 22 to 29, page 51, State of Case.)

Defendant claims that this case is no different from a line of cases in New Jersey, starting with the case of *Schultz* against *Waldons*, 60 New Jersey Equity, 71, which cases hold that where there is no previous partnership or joint enterprise between the parties, and they agree by parole that defendant should purchase and take title to land in his own name, and hold it for the joint benefit of both, and where the plaintiff contributed no money to the enterprise, the contract was within the Statute of Frauds, and required that the agreement should be in writing.

The above was the statement made by Vice-Chancellor Pitney, in the case of *Schultz* against *Waldons*, and the Court held that the plaintiff could not recover any interest in the land without written proof of the contract.

The case of *Schultz* against *Waldons* we believe is entirely analogous to this case, on account of the fact that in the testimony the plaintiff has testified that he went to the defendant, and asked him for a written agreement, but that the defendant would not give him one, and said that he would make one later (see line 26, page 24, State of Case); where it is stated that the parties agreed between themselves that Roberts should have an interest in the real estate, and that the effect of the agreement was to be Roberts selling to Sutton and Chester for two hundred seventy-five thousand dollars (\$275,000), and Remlinger selling to Roberts for two hundred forty thousand dollars (\$240,000).

There is no evidence to show that Remlinger and Roberts were on a joint enterprise and went into the deal together, because Roberts testifies on a number of occasions that he went to Remlinger asking for an agreement showing his interest in the land, but on each time, the defendant refused to enter into such an agreement. To allow the plaintiff's contention that this is an agreement for profit would clearly be in contravention of the Statute of Frauds, which clearly shows that any interest in or concerning the lands must be in writing in order for an action to be maintained. The doctrine of the case of *Schultz* against *Waldons* is again upheld in the case of *Partridge* against *Cummings*, 99 New Jersey Equity, page 14, in which case Partridge alleged a joint adventure for speculation in real estate, where Cummings Brothers were to acquire in their own name, a contract for the purchase of certain land, and then were to form a corporation to sell and operate the land purchased, and that he was to have an equal interest in the corporation. Partridge sued for a joint interest in the corporation holding the land, and also for an accounting as to moneys received from the sales already made.

In that case, Partridge had not given any money toward the purchase price, and therefore the Court held that this type of contract came clearly within the fifth section of the Statute of Frauds, and that any contract of such a nature, in order to be the basis of a suit, had to be in writing, and further held, that that type of contract was not a contract for profits, as distinguished from a contract for an interest in real estate. The case of *Partridge* and *Cummings* is identical with the case at bar, because in both instances, the defendant was to take the contract in his name, and later give an interest in the land to the plaintiff. If Sutton and Chester had not settled on the contract with Remlinger, Roberts would have claimed to have owned the ground, so that clearly, from the intention of the parties, as shown by the testimony, and from the contract in writing between Remlinger

and Sutton, it is clearly proved that Roberts was claiming an interest in the land, and not simply a part of the profit which Remlinger was to receive.

The case of *Grant v. Steenland Construction Company et al.*, 99 New Jersey Equity, page 84, is another case which held that a joint venture in the sale of a piece of real estate, the defendant paying the purchase price, and taking title in his own name, is within the Statute of Frauds, and unenforceable unless in writing.

Counsel for plaintiff has cited 27 *Corpus Juris*, page 226, as upholding the doctrine that contracts for profits from real estate do not come within the Statute of Frauds, but we wish to quote as follows from this citation:

"Oral contracts to sell *an interest in the profits* of sale of realty are not contracts for the sale of real estate within the meaning of the statute." We hold that under no construction could the present case be held to be a contract to sell an interest in the profits. It is clearly shown throughout the testimony that Roberts was to purchase the ground and that Remlinger was merely to pay Roberts the thirty-five thousand dollars (\$35,000) which he was to receive from Sutton and Chester, because Roberts had already purchased the ground from Remlinger. There was no agreement that because Remlinger had sold to Chester and Sutton that he was selling a part of his profit to Roberts, and clearly, in this case, if there was such an agreement, as is alleged by the plaintiff, it would amount to a declaration of trust, which would attach to the land itself, and therefore would be within the Statute of Frauds.

We also call the Court's attention to the citation of 27 *Corpus Juris*, page 220, line 23, under Section 204: "Also the Statute of Frauds applies to an agreement claimed to constitute a partnership or profit-sharing agreement, where in it, one party is to have an interest in the lands of the other, or lands standing in the name of the other."

This, we claim, is exactly the position of the plaintiff in our case, and on account of this fact that the contract sued upon is plainly within the Statute of Frauds.

IT WAS ERROR BECAUSE THE COURT REFUSED TO GRANT THE NON-SUIT ON ACCOUNT OF THE FACT THAT THERE WAS NO CONSIDERATION FOR ANY CONTRACT EVEN THOUGH NOT EFFECTED OR FALLING WITHIN THE STATUTE OF FRAUDS.

Roberts testified that he gave Remlinger five thousand dollars (\$5,000) on account of agreement to purchase the property (line 14, page 21, State of Case), and this testimony should have been excluded under defendant's objection to testimony concerning oral contract for sale of real estate (see line 33, page 20, State of Case).

Roberts then testified that he went out and sold the land to Sutton and Chester, and made a subsequent agreement with Remlinger that he should share in the profits to the extent of thirty-five thousand dollars (\$35,000) (see lines 8 to 10, page 23, State of Case). In all of Roberts' testimony, there is no mention of any consideration for the contract for profit except the consideration of the oral agreement for purchase of real estate, which agreement was invalid and unenforceable, and could not have been taken as a valuable consideration. As to Mr. Bourgeois' contention that the five thousand dollar (\$5,000) check from Roberts to Remlinger was the consideration, this is absolutely impossible on account of the fact that five thousand dollars (\$5,000) was returned to Roberts by Sutton and Chester on July 27th, 1925. In fact, Remlinger thought that Roberts had the five thousand dollars from Sutton and Chester before he received the five thousand dollar (\$5,000) check from Roberts.

Even if the five thousand dollars (\$5,000) moved from Roberts to Remlinger, it was returned before the contract if any, made on any day subsequent to the

original Sunday, could have been made (line 34 to bottom of the page, page 30, State of Case, and lines 1 to 4, page 31). The original contract for profits was made on Sunday, July 26th, 1925, which contract would necessarily be void *ab initio* (see lines 25 to 28, page 33, State of Case). Plaintiff testified that he paid Remlinger no money on that day (lines 16 and 17, page 34, State of Case), and that it was one week from that day that he next saw Remlinger to have a conversation with him (see lines 20 and 21, page 23, State of Case). This would mean that the plaintiff had received the five thousand dollar (\$5,000) deposit back from Sutton and Chester before there was a possibility that Remlinger could make a new contract.

If the five thousand dollars (\$5,000) had actually passed from Roberts' hands to Remlinger, and had not been returned, it would have been a past consideration, as Roberts paid it to Remlinger on July 24th, while the alleged oral agreement was not made until July 26th. The five thousand dollars (\$5,000) was paid on account of another contract, and not in consideration of the contract sued upon. The Court should have granted a non-suit on defendant's motion because the plaintiff failed to prove any agreement after the original conversation on Sunday, and further, the plaintiff failed to prove any consideration, either for the Sunday agreement or for any subsequent agreement.

THE VERDICT WAS AGAINST THE WEIGHT OF EVIDENCE.

Plaintiff was a real estate broker, doing a brokerage business in Ocean City. Defendant was the owner of the property, anxious to make a sale, and glad to give plaintiff an opportunity to sell his property.

There is absolutely no testimony in plaintiff's case that the defendant actually entered into an agreement to share profits. The plaintiff stated in a number of places "that he was glad I was able to sell the property and make the thirty-five thousand dollars (\$35,000) profit"

(see lines 29 and 30, page 41, State of Case), but defendant contends that these words are not strong enough to make an agreement, and that throughout the testimony there is absolutely no agreement proved, and that if the leading question (see lines 11 to 14, page 23, State of Case), had been excluded, there would not have been one iota of testimony of any subsequent conversation, after the alleged original contract. There is no testimony of the plaintiff to the effect that a contract was made on any other day than on a Sunday, because in the testimony, plaintiff testified that after the original conversation, on July 26th, which was Sunday; the next time he saw Remlinger to have conversation with him was one week from that date (see lines 20 and 21, page 23, State of Case), which would necessarily be a Sunday, and any contracts made on Sunday could not be ratified or no new valid contract could be made on a subsequent Sunday.

Defendant dealt with plaintiff as any ordinary property owner would deal with a real estate broker. There was nothing unusual in receiving a check from a real estate broker, instead of from the owners, as it is the custom for such checks to pass from the broker's hands. In fact, the testimony shows that the check from Sutton and Chester was made to Clayton B. Roberts, agent, instead of to Clayton B. Roberts, personally, and yet that check was deposited in the personal funds of the plaintiff, and there was never any accounting for that check.

The plaintiff absolutely failed to prove any consideration for the agreement for profits, because there were only two possible things from the plaintiff's case that could have been taken as the consideration for the contract. The first would be his oral contract to purchase the ground, this was unenforceable and invalid, and all testimony concerning it should have been excluded. In the second instance, the five thousand dollar (\$5,000) check was a part of the purchase price of the sales contract between Remlinger and Sutton and Chester, and

was money simply handled by Roberts as broker, and could not be considered as money passing from Roberts to Remlinger. Roberts himself testified that the alleged contract for profits was made on Sunday, and the Sunday contract could not be ratified, and there is absolutely no testimony of another contract being made on a subsequent week-day.

No principal is more firmly established or better recognized than that a contract which violates a statute is void.

Hence, a contract made on Sunday, in violation of the statute is an illegal contract and void between the parties. The law of regulating Sunday contracts in New Jersey was conclusively settled, beginning with the case of *Reeves v. Butcher*, 2 Vrome, 224, and they later approved the doctrine in the case of *Brewster v. Banta*, 66 New Jersey Law, 367, which was the case of where a note was given by the defendant to the plaintiff, and where it was found that not only the consideration for the note passed on Sunday, but also the note was signed on Sunday, and there the Judge held that the transaction was wholly illegal, and that the contract was wholly void, and could not be validated by ratification.

The defendant claims that there is no testimony to the effect that a new agreement was ever made between the plaintiff and defendant, after the original contract, but merely statements on the part of the plaintiff that the defendant was glad that he had made the thirty-five thousand dollars (\$35,000) profit. The defendant contends that if a ratification had been possible, the testimony might show some slight form of ratification, but it absolutely cannot be taken as a new agreement, even by implication.

Respectfully submitted,

KREPS & BELL,

Solicitors of Plaintiff-Respondent.

F. STANLEY KREPS,

Solicitor of Counsel.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

CLAYTON B. ROBERTS,
Plaintiff-Respondent,

v.

J. CHARLES REMLINGER,
Defendant-Appellant.

ACTION AT LAW.

ON APPEAL.

BRIEF OF PLAINTIFF-RESPONDENT.

The plaintiff in this case has a judgment of \$35,000 entered upon the verdict of a jury at the Cape May Circuit of the New Jersey Supreme Court, from which judgment the defendant appeals.

POINTS INVOLVED.

The questions raised by this appeal are as follows:

1. Did the trial Court err in permitting the jury to determine as a matter of fact whether the contract was made on Sunday or on a week-day?

2. Should the trial Court have directed a verdict in favor of the defendant because the contract in question was not in writing?

FACTS.

The facts in the case are briefly as follows:

The defendant, Remlinger, was a resident of the City of Pittsburgh, Pennsylvania, spending the summers in Ocean City. In the early part of the summer of 1925, he entered into a contract to purchase a block of land in the City of Ocean City for the sum of \$190,000. Before any settlement was actually had under said agreement, and before Remlinger became the owner of the property, he had several conversations with Roberts, a real estate broker in Ocean City, during which the question of the sale of the property by Remlinger was discussed. Later on, Remlinger agreed to sell the property if he could get a profit of \$50,000 out of it; in other words, if he could sell the property for \$240,000. On Thursday, the 23rd day of July, 1925, Roberts had a telephone conversation with Mr. Remlinger at Mr. Remlinger's office in Pittsburgh, in which he again discussed the price at which Remlinger would sell. Remlinger agreed orally to sell the property for \$240,000. Remlinger came to Ocean City on the next day, Friday, and, on that day, Roberts had an oral agreement with Remlinger for the purchase of the property for \$240,000, and gave Remlinger his

check for \$5,000 to bind the bargain. On Sunday, July 26, 1925, Roberts again saw Remlinger and on that day told Remlinger that he had sold the property to Sutton and Chester, two other real estate men in the City of Ocean City, for \$275,000, and it was agreed that he, Remlinger, could make his agreement to sell directly to Sutton and Chester in order to save the bother of making two agreements of sale, that is: one to Roberts, and the other from Roberts to Sutton and Chester. The written agreement was made and executed by Roberts on Sunday but it was antedated, the date appearing on the agreement being Saturday, the 25th of July, 1925. Remlinger, at this time, expressed his satisfaction of having made \$50,000 on a resale of the property, and further expressed his satisfaction that Roberts had made \$35,000, and told Roberts that he would pay him the \$35,000 when the settlement was made. On several occasions, none of which were on Sunday, Remlinger again said to Roberts that he would pay Roberts the \$35,000, and that he was glad that he, Roberts, had made that much money out of the deal. Settlement was to have been had at the offices of the Ocean City Title & Trust Company, but owing to the fact that Mr. Remlinger had not yet acquired title from the Fidelity Realty Company with whom he had a contract to purchase, the settlement was had at the office of Mr. Corson, and instead of the day provided for in the agreement, it was had on the day previous in order to circumvent Mr. Roberts. After the settlement, in which Mr. Remlinger received \$65,000 in cash, in addition to mortgages, etc., Remlinger repudiated his obligation and Mr. Roberts brought his suit resulting in the judgment now on appeal.

On this appeal, the Court, of course, will not consider the weight of the evidence, but only whether

there is any evidence to justify the jury's finding. In this aspect of the matter, we submit that there was evidence from which the jury was justified in finding:

1. That Mr. Remlinger had entered into a contract with the Fidelity Realty Company for the purchase of land in question for the sum of \$190,000 (p. 19, l. 35).

2. That he would sell the property if he could get a profit of \$50,000 (p. 19, ll. 9-15).

3. That he orally agreed to sell the property in question to Roberts for \$240,000, which price would afford him a profit of \$50,000 (p. 20, l. 28; p. 21, l. 15; p. 40, ll. 1-15).

4. That on Friday, the 24th day of July, 1925, he received Roberts' own check for \$5,000 to bind the bargain (p. 21, l. 15).

5. That on Sunday, July 26, 1925, he was informed by Roberts that Roberts had sold the property to Sutton and Chester for \$275,000 (p. 23, l. 6).

6. That on that same day, it was arranged that he, Remlinger, would make the contract directly to Sutton and Chester (p. 24, ll. 30-33).

7. That, on that same day, he expressed the satisfaction with the transaction and agreed to pay Roberts his \$35,000 at the time of the settlement with Sutton and Chester (p. 24, ll. 34-37; p. 25, l. 11).

8. That he, Roberts, on that same day, entered into a written agreement to sell the property to

Sutton and Chester for \$275,000, which contract was antedated so as to bear date July 25, 1925 (p. 25, ll. 11-24).

9. That, notwithstanding that the agreement of sale to Sutton and Chester was made on Sunday, he, Remlinger, made settlement in accordance with its terms (p. 28, l. 3; p. 41, l. 38; p. 42, l. 20).

10. After the transaction on Sunday, July 26, 1928, on several occasions, Mr Remlinger promised to pay Roberts the \$35,000, representing the difference between the price for which Remlinger had agreed to sell to Roberts and the price Roberts had sold the property to Sutton and Chester (p. 34, ll. 10-14; p. 41, ll. 16-38; p. 42, l. 35; p. 43, l. 24).

11. That Roberts had sold the property to Sutton and Chester on his own account, and not as agent for Remlinger (p. 22, ll. 21-27; p. 34, ll. 4-6; p. 36, ll. 9-12).

12. That Remlinger, or his counsel, made settlement a day before the date fixed in the agreement in order to prevent Mr. Roberts from getting his money (p. 28, ll. 1-38).

We insist that a fair reading of the entire testimony will fully warrant our claim that all of the above findings were justified by the evidence. Having these facts in mind, we proceed to a discussion of appellant's two points.

1.

The appellant did not plead that the contract was illegal because it was made on Sunday. He is, there-

fore, not in a position to raise that question on the present record notwithstanding his motion for a non-suit and for a direction. *Van Scoten, et al. v. Lindsley* (137 Atl. 580); *Mechler v. Fialk* (84 N. J. L. 406); *O'Brien v. Shea* (95 N. E. 99), (208 Mass. 528); Supreme Court Rules No. 58, 1926 Ed. (Facts showing illegality); *Reich v. Bolch* (68 Iowa, 526), (27 N. W. 507); *Fox v. Mensch* (3 Watts & Sergeant, p. 444).

To set up defense of illegality of contract, facts showing nature of illegality, and that contract was made within jurisdiction where prohibitive statute is effective, must be specially pleaded. *Donnelly v. Bander* (216 N. Y. S. 437), (217 App. Div. 59).

We submit, however, that there was ample evidence to justify the jury in finding that there was a subsequent contract to pay \$35,000 made on a week-day. Mr. Roberts testified as follows (p. 34, ll. 10-12):

“Q. Did Remlinger agree to pay you \$35,000 before or after or at the time the contract was signed?

A. At the time the contract was signed, and after.”

(P. 41, ll. 8-36):

“Q. You say that the agreement about where he agreed to pay you \$35,000, as to that, when and where was that to be paid?

A. It was to be paid to me in cash the day of settlement.

Q. You say that was on Sunday, but you had other conversations with him afterward?

A. Several.

Q. About the same thing as has been reiterated here?

A. I did.

Q. Were they on week-days or Sundays?

A. Week-days.

Q. On a week-day he reiterated he would give you \$35,000?

A. He did.

Mr. Kresps: Objected to. I ask that be stricken.

The Court: It may be stricken.

By Mr. Bourgeois:

Q. What did he say to you on a subsequent day to that, with relation to the \$35,000?

A. That he was glad that I was able to sell the property and make the \$35,000 profit.

Q. What did he say with regards to the time when you would get the \$35,000?

A. At the time of settlement. He said I would get the \$35,000 at settlement time.

Q. That was after Sunday he told you that?

A. Yes, it was.”

(P. 42, ll. 11-16):

“Q. Did Remlinger at any time after this agreement was signed say anything other than, ‘I am glad you made the \$35,000’?

A. I had many conversations.

Q. Concerning the \$35,000?

A. We did.”

(P. 43, ll. 10-23):

“Q. When and where?

A. As I can recall, he and I were talking twice about it, once on the bay, fishing, and once on the Ocean City boardwalk.

Q. When?

A. After the agreement was signed, before the settlement took place.

Q. When—in July, August, September or when?

A. In August.

Q. What did he say?

A. He said he was very glad I had made the \$35,000 on the sale of the piece of ground that we are speaking about and that he was also glad that he had made his \$50,000.”

It has been held in our State that a promise made on Sunday is sufficient consideration for a subsequent promise made on a week-day even though the Sunday promise is unenforceable and tainted with illegality.

In the case of *Brewster v. Banta* (66 N. J. L. 367), it appeared that a promissory note upon which suit was brought was made on Sunday. Suit was instituted against the maker and the endorser. The endorser was discharged by reason that the note was signed by him on Sunday. It appeared, however, that the maker made a subsequent promise to the holder to pay the debt. The Court held that he was bound thereby and said:

“The law regulating this subject is conclusively settled in the series of cases beginning with *Reeves v. Butcher*, 2 Vroom, 224. In the first of these cases the Supreme Court held that the statute forbidding worldly employment or business on Sunday rendered void every transaction which, if performed on a week-day, would be enforceable in a court of justice; that such a transaction, being wholly void, could not be validated by ratification; but that the consideration emanating from the tainted contract will be sufficient to form the foundation for a new express promise, on which recovery might

be had. *Reeves v. Butcher*, *supra*; *Ryno v. Darby*, 5 C. E. Gr. 231; *Cannon v. Ryan*, 20 Vroom 314.”

In the case of *Burr v. Nivison* (74 Eq. 320), it appeared that a contract for the sale of real estate was made by the owner on a Sunday and delivered on that day to the owner's agent, which agent delivered the contract to the purchaser on the following day. It was urged that this contract was invalid because made on Sunday. Vice-Chancellor Howell held that the contract was not complete until delivered to the purchaser and that its delivery on a week-day constituted a valid bargain. This case was affirmed by the Court of Errors (75 Eq. 241).

In the case of *Rosenblum v. Schachner* (84 L. 525), the plaintiff had sold to the defendant a quantity of cucumbers. The sale and delivery was made on a Sunday. On the following Saturday, the defendant claimed some allowance by reason of shortage in the quantity of goods, and after some negotiations gave the plaintiff a check for the amount agreed upon as being due. Payment of the check was stopped and suit was brought. It was urged that the plaintiff could not recover because the contract was made on Sunday. The Court, following *Reeves v. Butcher* and *Brewster v. Banta*, held that the tainted Sunday transaction was sufficient to support the promise afterwards made on a week-day. The Court said:

“At the close of the trial, counsel for the defendant moved for the direction of a verdict in favor of the defendant because the contract sued upon was made on Sunday and was therefore void. The Court refused this motion upon the ground that, while the original contract was

void, the retention by the defendant of the merchandise was sufficient consideration for the new express promise thereafter made by him, as evidenced by the check upon which the suit was brought."

In the case of *Telfort v. Lambert* (79 L. 299), it appeared that a contract was made on Sunday for the repair of boilers, etc. Part of the work under this contract was done on Sunday. There was a subsequent promise by the defendant to pay for the work. The Court held that a promise made on a week-day for work done on Sunday under a contract made on Sunday was valid.

The appellant contends that the contract was without consideration on the ground that his contract to convey to Roberts was an oral one and not enforceable, that his agreement to pay \$35,000 was based upon this invalid contract and that, therefore, there was no consideration for the contract to pay \$35,000. The oral contract to convey the lands in question was made on Friday, July 24th. It was not void as being in violation of any rule of public policy. Mr. Remlinger could recognize it if he desired to do so. When Roberts told Remlinger that he had sold this property to Sutton and Chester for \$275,000, Remlinger expressed his satisfaction, that he had made \$50,000 on the deal and that Roberts had made \$35,000. He said that he would make a contract agreeable to all parties direct with Sutton and Chester, and that on the day of settlement, he would pay Roberts his \$35,000. In other words, Remlinger recognized and acted upon his obligation to deal with Roberts as though he, Roberts, actually had a written agreement for the purchase of the property. This is what is termed in the books a perfect moral

obligation, and has been held sufficient to support an expressed promise.

In the case of *Longstreth v. City of Philadelphia* (91 Atl. 667), it was said:

"The principle was considered in *Kennedy v. Ware*, 1 Pa. 445, 44 Am. Dec. 145 (1845), in which the doctrine as stated by Lord Mansfield was repudiated. Gibson, C. J., said: 'It is shown by a masterly review of all the cases in a note to *Wennall v. Adney*, 3 Bos. & Pul. 248, that Lord Mansfield's principle was intended for cases in which the promisor has received an actual benefit, but is protected from liability for it by some statute or stubborn rule of law. All the cases put forth by him for the sake of illustration are certainly of that stamp. 'Indeed Lord Mansfield, appears,' adds the annotator, 'to have used the term moral obligation, not as expressive of any vague or undefined claim arising from nearness of relationship, but of those imperative duties which would be enforceable at law were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance, from legal liability.'"

In the present case, Remlinger received a benefit by virtue of his oral contract to sell to Roberts, i. e., the making of a profit of \$50,000. He could have made this profit by conveying to Roberts under his oral agreement or by accepting his, Roberts', customer, in consideration of the payment of \$35,000 to Roberts. There is no testimony in the case upon which it could be inferred that he could have obtained Sutton and Chester as customers for his property excepting by agreeing to pay Roberts the \$35,000. Having made his profit of \$50,000 by ac-

cepting this arrangement with Roberts, and having agreed to pay Roberts \$35,000, he can not now be heard to say that there was no consideration for such a promise. The situation is briefly this: Remlinger orally agreed to sell the property to Roberts at a profit of \$50,000. This contract was unenforceable, either by Roberts against Remlinger or Remlinger against Roberts. Roberts says to Remlinger, "I have a purchaser who will buy this property from me for \$275,000 giving you your profit of \$50,000, and me a profit of \$35,000." Remlinger says, "Very well, I will make the agreement satisfactory to all parties, direct with your party and pay you your profit of \$35,000 at the time of settlement." This, it seems to us, made an enforceable contract based upon a good and valuable consideration. That this is so can be shown by going one step further. If we suppose that Remlinger had refused to go forward with the deal under the above terms, he would have had no binding contract with Roberts whereby he could have made a profit of \$50,000, nor can it be said that he would have been able to get a contract with Sutton and Chester whereby he could make that much or more. The situation might be stated as follows: Roberts having procured a purchaser for the property, which would yield Remlinger a profit of \$50,000 and Roberts a profit of \$35,000, and having made known these facts to Remlinger, Remlinger, in consideration of Roberts turning over his contract of sale to him, agreed to pay Roberts the profit of \$35,000.

The appellant contends that the contract is unenforceable because it is a contract concerning land and, therefore, under the Statute of Frauds, must be in writing. The contract, as we have above pointed out, is not one concerning the purchase of land nor is it one to pay a broker's commission or

to pay a sum of money in the nature of a broker's commission. In the first place, Roberts was not selling Remlinger's property. He was selling, what he believed to be, his own property at a profit of \$35,000. He had no reason to doubt his position as owner or, at least, as the holder of a valid contract to sell. In this situation, he procures a purchaser at a price which will yield him a profit of \$35,000. Having no reason to doubt that his oral contract with Remlinger would be recognized by Remlinger as a binding obligation, he goes to Remlinger and informs him that he sold not Remlinger's property, as agent, but his, Roberts' property as owner, to Sutton and Chester for \$275,000, an amount which would yield Remlinger a profit of \$50,000 and Roberts a profit, as owner, of \$35,000. In this situation, Remlinger, instead of repudiating his promise to Roberts and informing Roberts that he would not recognize his oral contract to sell to him, and refusing to make the contract with Sutton and Chester, agrees to make a contract direct to Sutton and Chester, and further agrees to pay Roberts the \$35,000 profit, which he, Roberts, would have made had Remlinger carried out his contract with Roberts and Roberts had, in turn, sold to Sutton and Chester. It is true that Remlinger could have refused to have any part in the transaction thus presented to him by Roberts, and in that posture of affairs, Roberts would not have been able to enforce his demand for \$35,000. Remlinger, however, recognized his obligation to Roberts, made a contract with Robert's purchaser, and agreed to pay Roberts the \$35,000 profit to which he was entitled.

The rule is stated in *27 Corpus Juris* (p. 226) thus

"A promise or contract by one person to pay another a certain sum of money out of, or a certain share of, the proceeds of a contem-

plated sale of land or an interest therein is not within the statute. Oral contracts to sell an interest in the profits of sales of realty are not contracts for the sale of real estate within the meaning of the statute."

In the case of *Trowbrige v. Wetherbee* (93 Mass. 361), it was held that:

"A parole promise to pay to another a portion of the profits made by the promisor in the purchase and sale of real estate is not within the Statute of Frauds, and, if found upon a sufficient consideration, will support an action."

In this case, it appeared that the plaintiff having learned that a property could be purchased and sold at a profit entered into an oral contract with Robbins and Wetherbee, whereby the property was to be purchased and title taken in Wetherbee's name, it being agreed that when the property was sold, the profits would be divided between Wetherbee, Robbins and Trowbrige, each to get a third. Subsequently, Robbins sold his interest to Wetherbee, and finally, Wetherbee sold the property at a profit of \$7,000. In a suit brought by the plaintiff to recover his share of the profits, the trial Court entered a judgment in favor of the defendants on the ground that the contract was within the Statute of Frauds. On appeal, the judgment was reversed.

In the case of *Benjamin v. Zell* (100 Pa. 33), it was held that:

"An interest in contingent profits arising from the sale of real estate to be made thereafter, does not amount to an interest in the land itself within the meaning of the Statute of Frauds."

In this case, it appeared that A and B had entered into a contract to purchase land from C at a given price. D having heard of the contract, agreed orally with A and B that if they would procure C to convey to D, that he, D would pay the entire purchase price, and in the event of a resale, would pay to A and B a portion of the profit. The contract was executed and subsequently, D sold the property at a profit. Upon refusing to carry out his agreement with A and B, they brought suit against him for their portion of the profits. The plaintiffs obtained a verdict and on appeal it was urged that the contract was one concerning land, and under the Statute of Frauds should have been in writing. The Supreme Court of Pennsylvania held that the contract was not within the Statute of Frauds, and affirmed the judgment.

In the case of *McGinnis v. Cook* (57 Vt. 35), it appeared that the plaintiff, being the owner of property upon which there was a mortgage, agreed with the defendant that the defendant should buy the mortgage, foreclose the same and upon a sale of the property was to pay to the plaintiff the amount in excess of the mortgage debt, interest, costs, etc. The defendant bought the mortgage, foreclosed, and took title to the property. Plaintiff, relying upon defendant's agreement, did not redeem within the time limited. The defendant, having refused to pay to the plaintiff, the balance of the amount due under the agreement, plaintiff brought suit in assumpsit. It was argued that the agreement should have been in writing under the Statute of Frauds. The Court held that the agreement was not one concerning an interest in lands and therefore, the Statute did not apply.

In the case of *Bunnell v. Taintor's Admr.* (4 Conn. 568), it appeared that plaintiff and the defendant's

decendent had entered into a contract whereby the defendant was to purchase certain land with the aid of the plaintiff, the plaintiff to do all that could be done in the purchase and sale thereof at a profit. The decendent furnished the money and took and gave deeds in his own name. The property was purchased by the defendant at the suggestion of the plaintiff and was thereafter sold by the defendant at a profit. Upon refusing to comply with his agreement to divide the profit with the plaintiff, suit was brought. It was urged by way of defense that the contract was one concerning an interest in land, and therefore, should have been in writing. The Court held that where the contract was fully executed, an agreement for the division of the proceeds of the sale was not one concerning an interest in land.

In the case of *Linscott v. MacIntire* (15 Maine, 201), it appeared that the plaintiff had conveyed his property to a third person upon the written understanding that the property would be reconveyed to him upon paying to such third party the sum of \$500 within three years. Just before the expiration of three years, the plaintiff procured the defendant to repay the \$500 and take a deed for the property upon the oral understanding that the defendant would sell the property at the best advantage and pay the plaintiff the difference between the amount due him and the sale price. The defendant having sold the property for \$800, the plaintiff brought suit. There was a judgment in favor of the plaintiff for the difference subject to a review by the Appeal Court of the propriety of admission of evidence of the oral contract. The Supreme Court held that the contract did not have to be in writing. It said:

“Where a contract for the sale of land, which

when made was within the Statute of Frauds and might have been avoided thereby, has been fully executed, and nothing remains but to pay over the money received, the Statute furnishes no defense.”

In the case of *Hess v. Fox* (10 Wendell, 436), a mortgagor released his equity of redemption to the mortgagee upon an oral agreement that the mortgagee would sell the property and pay to the mortgagor the difference between the amount of the mortgage debt and the sale price. It was held that such a contract was not within the Statute of Frauds, and a suit could be maintained on assumpsit upon the oral agreement.

In the case of *Hetrick v. Ashburn* (114 N. E. 386 (Ind.)), it appeared that the appellee had agreed to sell certain property to the appellant for \$11,000, \$1,000 having been paid, leaving a balance due of \$10,000, which was to be paid in instalments. The appellee remained in possession of the land and received the rents, issues and profits thereof. Later, by an oral agreement, it was arranged that the appellant should have an extension of time in which to make the deferred payments, and the appellee was to have the privilege of selling the property and upon doing so was to pay the appellant \$1,000. The appellee did sell the property but refused to pay the \$1,000, whereupon the appellant brought suit. The demurrer to the declaration setting forth these facts was sustained. On appeal, it was reversed, the Court holding “that a contract based upon a good consideration to sell the property and pay over a part of the purchase price was not a contract concerning land, and, therefore, not within the Statute of Frauds.”

These cases, it seems to us, amply support the position the trial Court took in submitting the case at bar to the jury. Remlinger, having for a good consideration, agreed to pay part of the purchase price, to wit: \$35,000, to Roberts, and having in pursuance of that promise conveyed the property to Sutton and Chester, and having received the purchase price including said \$35,000, all of the terms of the contract having been fully executed, it would seem that the case fell squarely within the principles above recited.

What may be termed the leading case in our own State upon this point is that of *Birch v. Baker* (85 N. J. L. 660). In this case, Birch was the owner of certain land. It appeared desirable to certain parties that the land should be sold to a manufacturing concern. They agreed in writing with the company to cause a conveyance to be made. They then went to Birch, the owner of the property, and orally agreed with him that if he would convey the property to the company, they would pay him \$2,000. Birch conveyed the property to the Company as agreed, and upon the refusal of the others to pay him the \$2,000, he brought suit against them to recover the same. He obtained a judgment which on rule to show cause was set aside (79 N. J. L. 9). Upon a retrial of the case, the trial Judge, following the opinion of the Supreme Court, directed a verdict against the plaintiff. The plaintiff appealed to the Court of Errors and Appeals, which Court reversed the trial Court. It was contended that the contract was not enforceable because it concerned an interest in land, and therefore, should have been in writing. The Supreme Court so held. Discussing this proposition, the Court of Errors and Appeals held:

“Where a written contract for the sale of land is executed by delivery and acceptance of a conveyance passing the title, a previous oral promise to pay the consideration, whether the conveyance be to the promisor or to his nominee, is not within the Statute of Frauds, for the consideration of the promise is executed, and the law implies a debt recoverable in *assumpsit* when there has been a previous request by the defendant to convey to him or his nominee coupled with circumstances showing that both parties expected that the plaintiff would be recompensed for complying with such request, and the action is not limited to cases where money alone has been expended, but extends to those where money, securities and land have been parted with on a previous express request. Such promise is taken out of the Statute of Frauds by an executed and accepted conveyance, for it is an *assumpsit* to pay for land and not a contract for the sale of land.”

This case was followed in the case of *Andrew v. Westaway* (99 N. J. L. 220). In this case, it appeared that the defendant had agreed to pay the plaintiff \$1,000 if she, the plaintiff, would convey certain land to a third person. The plaintiff entered into a written contract to convey the land to such third person and duly performed the same by the execution and delivery of a deed therefor. Upon a refusal of the defendant to pay the \$1,000, she brought her suit. It was urged that she could not maintain her action because her contract was one concerning an interest in land, and therefore, should have been in writing. The Court of Errors following *Birch v. Baker* held:

“An oral promise to pay \$1,000 from the defendant to the plaintiff in consideration of a sale and conveyance of land to a third person, the grantee named in a written agreement made between the plaintiff and such third person is not barred by the Statute of Frauds. Such a promise is enforceable. The Statute of Frauds is not applicable. The case is controlled by *Birch v. Baker* (85 N. J. L. 660). The principle in that case is reaffirmed and applied.”

There would seem to be no valid distinction between a promise based upon a good consideration made by an owner to pay a third person a certain portion of the proceeds from a sale of land and a promise based upon a good consideration made by a third person to pay the owner a certain sum of money to the owner for his conveyance of the land so far as the application of the Statute of Frauds is concerned. If one promise concerns an interest in land, certainly, the other does. The analogy seems clear.

In the present case, Remlinger having made an oral contract to sell to Roberts for \$240,000, and having received \$5,000 to bind the bargain, recognizes that contract to convey by conveying to Roberts' nominee, i. e., Sutton and Chester, for the price for which Roberts had sold to Sutton and Chester, and agrees to pay to Roberts the difference in price amounting to \$35,000. Remlinger cannot now defend by saying that he never had a contract in writing with Roberts for the sale of the property to him because, according to evidence which the jury was justified in believing, Remlinger executed his oral contract with Roberts by making an agreement conveying the property to Sutton and Chester at

Roberts' direction, Remlinger having full knowledge that Roberts believing that he had a valid contract for the purchase of the property and acting thereon had sold the property to Sutton and Chester. Whether or not Roberts was, in effect, the owner of the land in question, his contract with Remlinger is clearly within the principle enunciated in the above cited cases.

We respectfully submit that the trial Court committed no error in submitting this case to the jury, and that the appeal should be dismissed.

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