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WITNESSES

EXHIBITS

New Jersey Court of Errors and Appeals

Notice of Appeal

(Filed March 26, 1917)

LEONARD LORENTOWICZ, Plaintiff-Appellant, vs. PHILIP J. BOWERS, Administrator of the Estate of Thomas F. Bowers, deceased, Respondent.	Action at Law.

To:

Nicholas La Vecchia, Esquire,
Attorney for Respondent.

SIR:

PLEASE TAKE NOTICE that the plaintiff hereby appeals to the Court of Errors and Appeals from the whole of the judgment entered in the above entitled cause at the Essex County Circuit Court.

Dated, March 23, 1917.

WILLIAM GREENFIELD,
Attorney of Plaintiff-Appellant.

Summons

(Filed Feb. 7, 1916)

The State of New Jersey to Philip J. Bowers, Executor, under the last Will and (L. S.) Testament of Thomas F. Bowers, deceased, YOU ARE SUMMONED TO ANSWER the annexed Complaint of Leonard Lorentowicz, in an action at law in the Essex County Circuit Court And take notice that unless you file your answer to said Complaint with the Clerk of the Essex County Circuit Court, at Newark, in said County, within twenty days after service upon you of this writ, and the annexed Complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, Frederic Adams, Judge of the said Court at Newark, the first day of February, nineteen hundred and sixteen.

JOSEPH McDONOUGH,
Clerk.

William Greenfield,
Attorney of Plaintiff.

Complaint

ESSEX COUNTY CIRCUIT COURT

(Filed Feb. 7, 1916)

LEONARD LORENTOWICZ, Plaintiff, vs. PHILIP J. BOWERS, Executor under the last Will and Testament of Thomas F. Bowers, deceased, Defendant.	Action at Law.

The plaintiff, residing in the Town of Irvington, County of Essex and State of New Jersey, by William Greenfield, Esquire, his attorney, complains:

1. That on or about the 20th day of November, nineteen hundred and thirteen, at the City of Newark, County and State aforesaid, Thomas F. Bowers, was indebted to the plaintiff in the sum of one thousand dollars, and he then and there executed a promissory note to this plaintiff, payable three months after said date to secure the payment of the sum of One thousand Dollars, of which note a true copy is hereto annexed and made part of this complaint.

2. That on or about the 9th day of February, nineteen hundred and fifteen, the said Thomas F. Bowers, departed his life leaving a last Will and Testament, which was then and there admitted to probate in the Surrogate's Office of Essex County,

and said Philip J. Bowers having been appointed as Executor under the Last Will and Testament of the said Thomas F. Bowers, deceased, he having been qualified as Executor on the 20th day of April nineteen hundred and fifteen.

3. That an Order to limit creditors was duly made on the 8th day of June nineteen hundred and fifteen and this plaintiff in accordance with the Order filed under oath a Proof of Claim on the 4th day of January, nineteen hundred and sixteen, which Proof of Claim, was duly sworn to by this plaintiff before William Grenfield, Esquire, a Master in Chancery of the State of New Jersey, a true copy of the said Affidavit of Proof is hereby annexed and made part of this complaint.

4. That the said defendant in his life time paid to the plaintiff the sum of two hundred and fifty dollars, on account and in part payment of the principal sum on which there is now due a balance of seven hundred and fifty dollars with interest thereon, from the 20th day of February, nineteen hundred and fourteen, that no part of the sum of seven hundred and fifty dollars and interest has been paid, and that the said sum is still due and owing to this plaintiff.

5. That payment having been demanded from the said Thomas F. Bowers in his life time and payment also having been demanded from Philip J. Bowers, who was made Executor under the Last Will and Testament of the said Thomas F. Bowers, deceased, and that no part of the sum of seven hundred and fifty dollars having been paid, therefore the total sum of seven hundred and fifty dollars is still due and owing.

Judgment will be claimed for the aforesaid sum of seven hundred and fifty dollars with interest and costs of suit to be taxed.

WILLIAM GREENFIELD,
Attorney for Plaintiff.

The following is a true statement of account of the balance due on said note, to wit:

November 20, 1913, the sum of $1000, secured by note payable three months after date. $1000.00

CREDITS

June 26, 1914	$150.	
July 6, 1914	50.	
July 26, 1914	50.	
	$250.00	$250.00

Balance of $750 with interest thereon is due $750.00

WILLIAM GREENFIELD,
Attorney for plaintiff.

Amended Affidavit of Proof of Claim

ESSEX COUNTY ORPHANS' COURT

In the Matter
of
Thomas F. Bowers, deceased.

State of New Jersey
County of Essex. } ss:

Leonard Lorentowicz, of full age, being duly sworn according to law on his oath deposes and says, that he is the holder of a promissory note, bearing date November 20th, 1913, payable within three months from the said date, of which note a true copy is hereto annexed and made part of this affidavit, which note was given to secure the payment of the sum of one thousand dollars, which was then due and owing to deponent, and in which amount the said Thomas F. Bowers was indebted to this deponent at the time of the making and delivery of the said note by the said Thomas F. Bowers, deceased to this deponent and which said note was signed in the presence of this deponent.

Deponent further deposes and says on his oath that he has received on account of the said sum of one thousand dollars and in part payment thereof, the sum of two hundred and fifty dollars, in the following payments:

One June 26th, 1914, the sum of one hundred and fifty dollars, on July 6, 1914, the sum of fifty dollars and on July 26, 1914, the sum of fifty dollars, making the total sum of two hundred and fifty dollars, and leaving a balance of seven hundred and

fifty dollars due on the annexed note with interest thereon, that no part of the said sum of seven hundred and fifty dollars having been paid but that the total sum of seven hundred and fifty dollars with interest thereon from February 20, 1914, is still due and owing from the said Thomas F. Bowers, deceased.

LEONARD LORENTOWICZ.

Sworn and subscribed to before me on this thirtieth day of December, A. D., at Newark, N. J.

Wm. Greenfield

A Master in Chancery of New Jersey.

$1000.00 Newark, N. J., Nov. 20, 1913.

Three months after date, I promise to pay to the order of L. Lorentowicz One thousand 00/100 Dollars at Newark Trust Co.,

Value Received

THOMAS F. BOWERS.

No.—Due—

A true copy

L. Lorentowicz,

L. Lawrence & Co.

Reply to Defendant's Amended Answer

ESSEX COUNTY CIRCUIT COURT

(Filed Mar. 13, 1917)

LEONARD LORENTOWICZ, Plaintiff, vs. PHILIP J. BOWERS, executor, etc., Defendant.	Action at Law.

1. This plaintiff, denies the allegations set forth in Paragraph 1 of the special answer filed by the above named defendant, setting forth that the alleged contract bearing date, November 29, 1913, was cancelled in manner and form set forth in the said answer.

2. This plaintiff denies the allegations set forth in paragraph 1 of the special defense of the said defendant, wherein it sets forth that the said note was to be surrendered and the indebtedness cancelled in manner and form as averred in said answer.

Answer

ESSEX COUNTY CIRCUIT COURT

(Filed, Feb. 10, 1916)

LEONARD LORENTOWICZ, Plaintiff, vs. PHILIP J. BOWERS, Executor under the Last Will and Testatament of Thomas F. Bowers, deceased Defendant.	Action at Law.

The answer of the defendant to the plaintiff's action at law in the above entitled cause, is as follows:

I. The defendant admits that on or about the Twentieth day of November, Nineteen Hundred and thirteen at the City of Newark, County of Essex and State of New Jersey, Thomas F. Bowers, deceased, was indebted to the plaintiff in the sum of One thousand Dollars on a promissory note, executed by the said Thomas F. Bowers, deceased.

2. The defendant admits paragraph two or the plaintiff's complaint.

3. The defendant admits paragraph three of the plaintiff's complaint.

4. The defendant denies paragraph four of the plaintiff's complaint.

5. The defendant admits that a demand was made on him for the above mentioned sum, but that same was refused by the said defendant.

NICHOLAS LAVECCHIA,
Attorney for Defendant.

Order

ESSEX COUNTY CIRCUIT COURT

(Filed Dec. 12, 1916)

LEONARD LORENTOWICZ,
Plaintiff,

and

PHILIP J. BOWERS, Exr. etc.,
Defendant.

Application for a new trial having been made on the ground of newly discovered evidence to the Honorable Nelson Y. Dungan, Judge of the above Court in the presence of William Greenfield, of counsel for the plaintiff and Nicholas LaVecchia of counsel for the defendant, and affidavits submitted by both parties having been read; it is on this 8th day of December, 1916, ordered that the judgment obtained in the above entitled cause be, and the same is hereby ordered, opened, and a new trial granted upon condition that the defendant, Philip J. Bowers, Executor, etc., file a bond in the sum of One Thousand Dollars conditioned for the payment of any judgment that may be finally obtained in the above entitled cause. And upon the further condition that the judgment now obtained shall stand as security for any judgment that may hereafter be obtained in this cause, and that the defendant accept short notice of trial of said cause for the December term of this Court.

NELSON Y. DUNGAN,
Judge of the Essex County
Circuit Court.

Affidavit of Nicholas La Vecchia

ESSEX COUNTY CIRCUIT COURT

(Filed Oct., 11, 1916)

LEONARD LORENTOWICZ,
Plaintiff,

vs.

PHILIP J. BOWERS, Exr., etc.,
Defendant.

State of New Jersey,
County of Essex, } ss:

Nicholas La Vecchia, of full age, being duly sworn according to law on his oath deposes and says that he is the attorney of the defendant in the above entitled cause; deponent further says that he made inquiry in reference to the defense in the above entitled cause and communicated with one Alfred G. Mowakoski, Assistant City Attorney of the City of Newark, County of Essex and State of New Jersey; deponent was informed by the said Alfred G. Mowakossi that he was the attorney of the plaintiff in the above entitled cause, and that he was present at several transactions between the plaintiff and one Thomas F. Bowers, deceased.

Deponent further says that he was informed by the said Alfred G. Nowakoski that suit was instituted by the plaintiff about three years ago, and that said suit was discontinued by the payment of the money paid by the said Thomas F. Bowers, deceased to the plaintiff in the above entitled cause. Deponent was also informed by the said Alfred G.

Nowakoski that there is due on said note the sum of One Hundred Dollars, because he was present and knew of the arrangements and settlement made between the said plaintiff in the above entitled cause and the said Thomas F. Bowers, deceased.

Deponent further says that he is informed that the said Alfred G. Nowakoski is now at Douglas, Arizona with the Essex Troop, and that he will return within a period of ten days.

NICHOLAS LaVECCHIA.

Sworn and subscribed to me before this
10 day of October, 1916.
Henry A. Schroll,
Commissioner of Deeds of New Jersey.

Bond

ESSEX COUNTY CIRCUIT COURT

(Filed Jan. 22, 1917)

LEONARD LORENTOWICZ,
Plaintiff,
vs.
PHILIP J. BOWERS, Executor, of Thomas F. Bowers,
Defendant.

Know All Men That We, Philip J. Bowers and Frederick J. Bowers of the City of Newark, County of Essex and State of New Jersey, are held and

firmly bound unto Leonard Lorentowicz in the sum of One thousand dollars; for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators or assigns, jointly and severally, firmly by these presents. Signed with our seals and dated the sixteenth day of December, in the year One thousand Nine hundred and sixteen.

WHEREAS, the said Leonard Lorentowicz recovered a judgment in the above entitled cause, and subsequently to the entry of the same, the said defendant applied for a new trial and such proceedings were led on the said application; that on December—the judgment obtained in the above entitled cause was opened and a new trial granted by his Honor, Nelson Y. Dungan, Judge of the above Court, upon condition that the said defendant file a bond in the amount above mentioned, conditioned for the payment of any judgment that may finally be obtained in the above entitled cause.

NOW THEREFORE, the condition of this obligation is such; That if the said defendant, Philip J. Bowers, Executor of the Estate of Thomas F. Bowers, shall fail to pay immediately any judgment finally recovered in this cause by the said plaintiff, then this obligation shall be void, otherwise to remain in full force and virtue.

PHILIP J. BOWERS, L. S.
FREDERIC J. BOWERS, L. S.

Signed, sealed and delivered
in the presence of
Nicholas LaVecchis.

Bond

State of New Jersey, }
County of Essex. } ss:

Be it remembered, that on this sixteenth day of December, in the year one thousand nine hundred and sixteen, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Philip J. Bowers and Frederick J. Bowers, who I am satisfied are the obligators mentioned in the foregoing bond, and I having first made known to them the contents thereof, they did thereupon acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

NICHOLAS LaVECCHIA,
An Attorney at Law of
New Jersey.

State of New Jersey, }
County of Essex. } ss.

Philip J. Bowers and Frederick J. Bowers, each being duly sworn on his oath, deposes and says; that he is the person who executed the foregoing bond to Leonard Lorentowicz; that he is a resident and freeholder of the City of Newark, and that he owes in fee simple in said City, County and State, real estate in which he has an equity of One thousand dollars free and clear of all encumbrances, debts, and charges whatsoever.

PHILIP J. BOWER,
FREDERICK J. BOWER,

Sworn to and subscribed before me this
16th day of December, 1916.
Nicholas LaVecchia,
Attorney at Law
of New Jersey.

Amended Answer

ESSEX COUNTY CIRCUIT COURT

(Filed Mar. 13, 1917)

LEONARD LORENTOWICZ,
Plaintiff,

vs.

PHILIP J. BOWERS, Executor, etc.,
Defendant.

The defendant residing in the City of Newark, County of Essex and State of New Jersey, in answer to the complaint herein filed, says:

1. He admits the allegations in paragraph 1 of the complaint.

2. He admits the allegations in paragraph 2 of the complaint.

3. He admits the allegation in paragraph 3 of the complaint.

4. He admits the allegations in paragraph 4 of the complaint, to the extent that the plaintiff received the sum of $250.00 on account of the said note, but denies as alleged in said paragraph 4 of the said complaint, that there is now due and owing a balance of $750.00 with interest thereon from the 20th day of February, 1914.

5. The defendant denies the allegation in paragraph 5 of the said complaint and denies that demand for the payment of the alleged balance of the said note was made upon Thomas F. Bowers in his lifetime, and denies that the said sum of $750.-

00 or any sum is now due and owing upon the said note.

The defendant further answering the said complaint says:

1. That the consideration for the said note set forth in the complaint filed, was the making of a certain agreement dated, November 29th, 1913, by and between the said plaintiff, the said Thomas F. Bowers and one Henry A. Rossner, wherein and whereby the plaintiff gave to the defendant the exclusive right to manufacture and sell certain articles known as the "Iber Gas Attachment;" that subsequent to the making of the said contract and in and about the month of December, 1914, the said plaintiff agreed with the said defendant that the contract aforesaid should be considered cancelled, so far as the same established any legal relationship between the said plaintiff and defendant and that the exclusive right to manufacture and sell the aforesaid article should cease and be determined so far as the said defendant, Thomas F. Bowers, was concerned; that the plaintiff should retain the sum of $250.00, paid on account of the said note which was made, executed and delivered by the said Thomas F. Bowers in special consideration of the making of the said agreement, and that the said Thomas F. Bowers should deliver up to the plaintiff a certain number of the said articles then in the possession of the said Thomas F. Bowers, and it was thereupon further agreed that the only sum remaining due from Thomas F. Bowers to the plaintiff would be the sum of One Hundred Dollars.

NICHOLAS LaVECCHIA,
Attorney of Defendant.

Judgment

ESSEX COUNTY CIRCUIT COURT

LEONARD LORENTOWICZ, Plaintiff, vs PHILIP J. BOWERS, Ex., Thomas F. Bowers, dec'd, Defendant.	Action at Law. Verdict by a Jury. Judgment for Plaintiff. Amount $118.38 Cost 71.57 Total $189.95

William Greenfield, Attorney of Plaintiff.

This action was tried before Judge Nelson Y. Dungan with a jury at the Essex County Circuit on March 13, 1917.

The cause having ben heard and submitted to the jury, they return their verdict as follows:

They find in favor of the plaintiff and assess the damage against the Defendant at the sum of One hundred eighteen dollars and thirty-eight cents.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of One hundred eighteen dollars and thirty-eight cents damage and costs which are taxed at the sum of Seventy-one dollars and thirty-seven cents, making in the whole the sum of One hundred eighty-nine dollars and ninety-five cents.

Judgment entered and signed March 13th, 1917.

Book 94—page 129.

Clerk's Certificate

ESSEX COUNTY CLERK'S OFFICE

State of New Jersey, }
County of Essex. } ss.

I, Joseph McDonough, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey.

Do Hereby Certify, that the foregoing is a true and correct copy of a certain Notice of Appeal, Transcript of entire proceedings and Judgment Record in the case of Leonard Lorentowicz vs. Philip J. Bowers, *et als.* and the same is taken from and compared with original papers and record and as the same now remains on the files of said office.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said county at Newark, N. J., this 31st day of March, A. D., 1917.

JOSEPH McDONOUGH,
Clerk.

(Seal.)

Testimony

ESSEX CIRCUIT COURT

LEONARD LORENTOWITZ,
vs.
PHILIP J. BOWERS, Executor.

Transcript of shorthand notes of testimony, and so forth, taken upon the trial thereof, at the Court House, Newark, N. J., on Monday, March 12, 1917.

Before HON. NELSON Y. DUNGAN, Judge and a Jury.

Mr. William Greenfield for plaintiff.
Mr. Nicholas LaVecchia and Mr. Saul Cohn for defendant.

Mr. Greenfield opens for plaintiff.
Mr. LaVecchia starts to open for defendant.

The Court: If I have the pleadings here you cannot put in any such defense in this case, Mr. LaVecchia. You have admitted everything by the pleadings except that the note is paid. Has there been any amendment that I have not here?

Mr. Greenfield: Not that I know of.

Mr. LaVecchia: At the bottom of the answer we distinctly deny that there is anything due.

The Court: But you admit the making of the note, the death of Mr. Bowers, the filing of the claim, the demand and refusal. You cannot put

in any such defense as you are outlining to the jury under that answer.

Mr. LaVecchia: Then I would like to ask the Court to amend the answer to interpose that defense.

The Court: You will have to state your amendment.

Mr. Greenfield: I shall object to the amendment at this time. This is the second time.

Mr. LaVecchia: Of course, I understand the Court has jurisdiction to consider an amendment to the answer.

The Court: The question is whether, if the Court allows this amendment, there would be any surprise.

Mr. Greenfield: I certainly am.

Mr. Cohn: The specification of defenses are all set up by Mr. LaVecchia in his application for a new trial.

The Court: I should certainly think that you ought not to be permitted to set up such a defense as this without stating it in the pleadings. I do not think that any plaintiff could possibly know from your mere statement that you were going into such an affirmative defense as this.

Mr. Cohn: I should imagine that we could set up any affirmative defense with the facts already set up in the application for a new trial.

The Court: You may set it up and have your answer in here tomorrow morning, and of course, if Mr. Greenfield alleges surprise you will have to give him an opportunity to meet the defense. I am inclined to permit it, Mr. Greenfield, because it is not a surprise; because it is set forth in the affidavit of Mr. Charles Weldon.

Mr. LaVecchia continues to open for defendent.

The Court: The plaintiff's case is made out by proving your note, isn't it?

Mr. Greenfield: Yes, sir.

The Court: Then you may show it to the other side and see if they identify it.

LEONARD LORENTOWITZ, sworn for the plaintiff:

Direct-examination by Mr. Greenfield:

Q. Mr. Lorentowitz, you are the plaintiff in this suit? A. Yes, sir.

Q. You are the holder of this note bearing date November 20, 1913, for $1,000? A. Yes, sir.

Q. Did you know Mr. Thomas Bowers in his lifetime? A. Yes, sir.

Q. Do you know his signature? A. Yes, sir.

Q. Is that his signature? A. Yes, sir.

Q. How much is the balance due on it? A. $750.

Mr. Greenfield: I offer it.

The Court: It will be received.

Marked Exhibit P-1.

CROSS-EXAMINATION by Mr. LaVecchia:

Q. Where was that note signed, Mr. Lorentowitz? A. By Mr. Bowers' office.

Plaintiff rests.

Adjourned to March 13, 1917, at 10 o'clock, a. m.

SECOND DAY

Newark, N .J., March 13, 1917.

Continued pursuant to adjournment.

Appearances as before.

The Court: You may continue in this case. Have you your amendment ready?

Mr. Cohn: I have it ready, and served it yesterday before 5 o'clock on Mr. Greenfield.

Mr. Greenfield: I have hastily prepared a reply.

(Papers handed to the Court.)

The Court: The amendment and reply will be filed; and then you are willing to proceed?

Mr. Greenfield: Yes, sir, I will proceed.

PHILIP J. BOWERS, sworn for the defendant:

Direct-examination by Mr. Cohn:

Q. Mr. Bowers, you are the executor of Thomas F. Bowers? A. Yes, sir.

Q. About when did Thomas F. Bowers die? A. February 9, 1915.

Q. He was your brother? A. Yes, sir.

Q. Did you get this letter subsequent to your appointment as executor? Look at the letter inside of that envelop. A. Yes, sir.

Q. From whom? A. J. Edward Smith, attorney at law.

Q. Was he attorney for your brother? A. He was before his death.

Said letter marked D-1 for identification.

The envelop is marked D-2 for identification.

Not cross-examined.

CHARLES WELDON, sworn for defendant:

Direct-examination by Mr. Cohn:

Q. Mr. Weldon, what is your business? A. Real estate.

Q. And where do you reside? A. South Orange.

Q. How long have you lived in the County of Essex? A. About forty-four years.

Q. And have always been engaged in business in the County of Essex during that period? A. Yes, sir.

Q. Did you know Thomas F. Bowers in his lifetime? A. I did.

Q. Do you know Mr. Lorentowitz, the plaintiff in this case? A. I do.

Q. Can you fix approximately the date when you first became acquainted with Mr. Lorentowitz? A. I have known Mr. Lorentowitz, I guess, for ten years.

Q. Did you know of any negotiations made between Mr. Lorentowitz and Mr. Bowers? A. I do.

Q. Do you remember the occasion of conversation at the Halsey Street place of business of Mr.

Lorentowitz towards the close of the year 1914? A. I do.

Q. Who was present at that conversation? A. Mr. Lorentowitz, Mr. Bowers, and his son, Mr. Lorentowitz's son, and I think his bookkeeper.

Q. And prior to this conversation had you visited Mr. Lorentowitz and talked with him in relation to a gas saving apparatus about which he and Mr. Bowers has a contract? A. Yes, sir.

Q. How long had you seen him prior to this conversation in relation to this matter?

Mr. Greenfield: If they are talking about a contract at this time the contract ought to be produced, and in evidence, if there is any such contract.

The Court: Do I understand you mean you object to the question?

Mr. Greenfield: I do.

The Court: The objection will be overruled. An exception to this ruling is noted by the plaintiff as ground of appeal.

Q. (Question read.) A. You mean regarding this particular matter?

Q. Yes, sir. A. Five or six months

Q. And did you go with Mr. Bowers to see Mr. Lorentowitz?

Mr. Greenfield: I object to the question as leading.

The Court: I sustain the objection.

Q. With whom did you go to Mr Lorentowitz in relation to this matter prior to the time of the conversation in December, in 1914?

Mr. Greenfield: I object to that question, he did not say he went there prior to the converastion.

The Court: You must have missed that, Mr. Greenfield.

A. I went there with Mr. Rossner I went there on two occasions, and also went with Mr. Bowers alone, and also with Mr. Bowers and Mr Rossner.

By the Court: Q. Which Bowers? A. Thomas F. Bowers.

By Mr. Cohn: Q. Relate to us the conversation you had with Mr. Lorentowitz in the presence of Mr. Bowers prior to the time of the conversation in 1914.

The Court: As suggested by Mr. Greenfield, what would be the relevancy of this testimony unless you have first proven the agreement mentioned in your answer as having been made on November 29, 1913?

Mr Cohn: I do not desire to prove the contents of the agreement, I simply desire to prove that a contract was in existence, and desire to prove the conversations in relation to that contract.

The Court: Unless you do that you have not proven your answer; you have set up as consideration of this note such an agreement, and stated what the agreement provides, and in support of that it would be a written agreement, and the only way that could be proven is by the written agreement itself.

Mr. Cohn: The defense is not based on the contract in any way.

The Court: Then why did you set it up in your answer?

Mr. Cohn: Simply as explanatory of the situation. I desire to show how the par-

ties treated with reference to an existing contract; I simply want to show the fact that a contract was made; I can prove the existence of the contract without production of proof of the contract itself, and I am not going to attempt to prove the contents of that agreement at all, simply going to attempt to show the conversations and agreements between the parties in relation to the existing contract, and that is why I did not make any preparation to produce the original contract, although I may say that Mr. Greenfield must have it in his papers. It seems to me that I may be permitted to prove, not the contents of the agreement, but the mere fact of its existence, and any conversations or relationship in relation to it.

The Court: Surely, if there be a written contract, you would not be permitted to prove the contract stated in your answer without production of the original contract.

Mr. Cohn: It seems to me it is not necessary or indispensable for me to prove the consideration for the defendant's note. That may be a matter of proof by him.

The Court: It would not be necessary except that you have set it up in your answer as a reason for what subsequently took place between them. In your answer you connect it all up with the original consideration of the note, and then state, as a modification of that agreement, that a return was made of the note which was delivered under that agreement, as a consid-

eration for the agreed settlement, which you say was made upon the note, and for that reason less than the face amount of the note was due. A mere coming together of the defendant and plaintiff, even assuming you are right, and the plaintiff's intestate saying "You need not pay but $100 of that note," without any other consideration, would not be binding upon the plaintiff, would it?

Mr. Cohn: No, but the testimony will be adduced to show what the consideration for this final modification was; and I have never considered it indispensable to prove the original agreement. I might say to your Honor we have the original agreement, the only difficulty will be that the subscribing witness has not been subpoenaed, and, in fact, I do not know where she can be found.

Mr. Greenfield: She lives in Mt. Prospect Avenue, and has a telephone.

Mr. Cohn: If Mr. Greenfield will admit this agreement upon putting his client on the stand, and proving his client's signature, I can prove the signature of the defendant, Thomas F. Bowers, without calling the subscribing witness, I will produce it.

Mr. Greenfield: I have admitted enough.

The Court: I am inclined to permit you to go ahead with this testimony. I have indicated my views, and unless they are changed I am afraid you will not succeed under your present answer.

Mr. Cohn: Perhaps by the time we finish with the testimony this morning we may be able to locate the subscribing witness.

The Court: Mr. Greenfield says he will give you her address and her telephone number.

Q. (Question read as follows: "Relate to us the conversation you had with Mr. Lorentowitz in the presence of Mr. Bowers prior to the time of the conversation in 1914.")

Mr. Greenfield: At this time he should fix the time, "prior to 1914."

The Court: He said five or six months prior.

A. Why, I went down with Mr. Bowers to Mr. Lawrence's—I have always known him by the name of Lawrence—we went down to Mr. Lawrence's to discuss the different sizes of the gas savers; for trucks they were to be one size; for pleasure cars a different size; and at that time Mr. Lawrence was having some of them made and attached to cars here in the city; simply followed up to find out how they were working, and in what quantities they could be made; there had been some difficulty, I believe, in getting some of the parts made, and I went down with Mr. Rossner to—

By the Court: Q. No, you were asked to state the conversation with Mr. Lorentowitz in the presence of Mr. Bowers. A. That was the line on which we talked, the several conversations we had pertaining to the gas saver.

By Mr. Cohn: Q. What was the conversation, give us the entire conversation which took place at the office in 1914 about which I have spoken, at

the Halsey Street premises of Mr. Lawrence, at which you and Mr. Thomas F. Bowers were present?

Mr. Cohn: I ask your Honor to allow a moment interruption, and ask Mr. Greenfield the address of the subscribing witness to that contract.

Mr. Greenfield: She is married and lives on Mt. Prospect Avenue, I do not remember her married name.

Mr. Cohn: The difficulty about that is we are representing a dead man, a man who was burned to death, and whose papers and effects were burned with him, at his home in 1915, and we have made every attempt to locate the subscribing witness and we have been unable to locate her.

The Court: I suppose that ought to be made to appear by the proof.

Q. Just give us the details of this conversation as fully as you can remember.

The Court: That conversation when?

Witness: In December.

The Court: What year?

Witness: 1914.

A. I went down to Mr. Lawrence's with Mr. Bowers, because Mr. Lawrence—

The Court: Not why.

A. (Continued.) Went down there to discuss the matter of the gas saver.

The Court: That will be stricken out.

Q. Just tell us, Mr. Weldon, not why you went there, or anything except this, tell us fully that which was said by either Mr. Lorentowitz, yourself, or Mr. Bowers, at this conversation? A. Mr.

Bowers stated to Mr. Lorentowitz that he had made several tests of the gas saver which were not satisfactory. He told Mr. Lawrence that he wanted to come to an agreement with him to terminate a suit which Mr. Lawrence had pending, he told Mr. Lawrence that the test made by the Kissel Motor Car Company, and other tests, had proved that the gas saver was not all that it was claimed to be; that a great many people had stated that in order to avail themselves of the use of the gas saver they had to change the design of their motor, in order to attach it and that nearly all the reports were to the effect that the minute they had put on the gas saver they had to change the adjustment of the carburetor, and it was not what it was claimed to be. Mr. Lawrence stated that he had a chance to dispose of the matter to a Brooklyn concern, but that he was unable to do so on account of the contract that he and Bowers had. They then discussed the matter of the note on which there was a balance of $750, and at the time Mr. Bowers said he would like to clean up the thing and get it out of the way, that he was busily engaged in other matters which took all his time and attention; that he felt there was nothing in the matter; that had he known as much before he executed the contract as he knew then, he never would have executed it. So there was a good deal of talk both ways; I talked to Mr. Lawrence, tried to convince him that if he would release Mr. Bowers from this contract—

The Court: That will be stricken out, what you tried to convince him, you must state what was said.

A. (Continued.) Well, the statement was made

that Mr. Lawrence had a chance to dispose of this—

The Court: That will be stricken out. State the conversation, and who said it.

Q. Try and tell us what was said, the words that were said, and who said it? A. Mr. Bowers told Mr. Lawrence that there was nothing in the gas saver; Mr. Lawrence stated that if Mr. Bowers had stated this to him at an earlier date that he would have closed the matter with a Brooklyn concern, that he would have closed it anyhow but his contract with Mr. Bowers stood in his way. Then they talked on the matter of the note, and Mr. Bowers made a proposition to Mr. Lawrence—

The Court: That will be stricken out. What Mr. Bowers said to Mr. Lawrence he may state.

A. (Continued.) Mr. Bowers said to Mr. Lawrence that he would return all the gas savers, that Mr. Lawrence should retain all the gas savers that he had in his possession, and Mr. Bowers would return any gas savers he had, and Mr. Lawrence could keep the $250 which had been paid on the note, and they would call the matter quits. Mr. Lawrence was not satisfied with that arrangement, he felt that he was entitled to more than that—

The Court: That will be stricken out.

Q. Did he say he was entitled to more—

Objected to.

The Court: The objection is sustained.

Q. Mr. Weldon, let me advise you again that what we are trying to get is just the conversation, not anybody's state of mind, but just the conver-

sation only. A. Mr. Lawrence stated that if Mr. Bowers had made this proposition at an earlier date he would have accepted it; he was not sure at that time whether he could still take the matter up with the Brooklyn people, or not. Mr. Bowers asked Mr. Lawrence to make a proposition of what he would accept, and they started out with some figures, I cannot remember exactly what they were, but they were not acceptable to Mr. Bowers. Then Mr. Bowers made a proposition to Mr. Lawrence—

The Court: That will be stricken out. Don't you understand, Mr. Weldon, I don't quite understand why you should continue to say propositions were made; you have been told several times to state the conversation, we will judge whether it was a proposition, or not.

Q. You see, Mr. Weldon, instead of stating a proposition was made, just state what was said, what was finally said by Mr. Bowers in relation to the matters.

The Court: What did Mr. Lawrence say, that is proper.

A. Mr. Lawrence seemed to feel—

The Court: That will be stricken out, how do you know what he seemed to feel?

Witness: By reason of what he said.

The Court: That is it exactly, now you have answered the very objection that is being made to your testimony, we want you to tell us what was said that led you to think those very things.

A. (Continued.) Mr. Bowers stated to Mr. Lawrence in addition to the $250 which he had

paid on account of this note, that he had been put to a great deal of expense in investigating the gas saver, and going to different people who would use it, and carfares, and other items; stated he had suffered loss enough, that he would not pay any more than the $250; that if that was not acceptable to Mr. Lawrence, then he would start a suit to recover the $250, and damages in addition.

Q. Did he state why? A. Because the gas saver was not as represented. Mr. Lawrence and Mr. Bowers went out into the hall and had some talk out there, I don't know what it was, and when they came back Mr. Bowers called me out in the hall and said that I—

Q. Not what he said to you.

By the Court: Was Mr. Lawrence there? A. No, he was not.

By Mr. Cohn: Q. As a result of your talk with Mr. Bowers in the hall you came back into the room? A. Came back into the room again.

Q. Then what was said? A. And Mr. Lawrence said to Mr. Bowers that—he went back again talking about the Brooklyn matter, and Mr. Bowers stated then, he said "I will make you a proposition, and it is my last and best proposition, that we will consider this matter, as far as the note is concerned, settled, and I will pay you $100, and you are to retain all the gas savers, and I will leave these with you," which he had with him, "which are all I have, and we will call the matter square." Mr. Lawrence said that he would take the matter up with his counsel, and Mr. Bowers and myself left.

Q. Well, what was said with reference to counsel; what did Mr. Lawrence say? A. He would

let Mr. Bowers hear from him after he talked the matter over with his counsel.

Q. And did you go to see the counsel later? A. I did.

Q. Who was the counsel to whom Mr. Lawrence referred? A. Mr. Nowakoski.

Q. What did Mr. Nowakoski say?

Objected to.

Objection sustained.

Q. What is it that Mr. Lawrence said? The word "him" has been used here rather indiscriminately; will you repeat, as best you can remember, what Mr. Lawrence finally said with reference to the proposition? A. He said he would take it up with his counsel, and he, meaning the counsel, would let Mr. Bowers hear from him.

The Court: That latter part will be stricken out.

Q. What is it that he said, in so many words? Can't you remember as to whether he—

Objected to.

Q. Can't you remember as to what his exact language was?

Mr. Greenfield: I think he gave us the exact language.

A. Well, the way Mr. Lawrence stated it was that the matter was in his counsel's hands, that he did not want to do anything without the—

By the Court: Q. You say the way he stated it, are you stating what Mr. Lawrence said? A. As best I remember it.

Q. All right, state what Mr. Lawrence stated. A. Mr. Lawrence stated that he had placed the matter in his counsel's hands for suit on the note, and he didn't want to do anything without con-

sulting his counsel, and that he would talk with Mr. Nowakoski, that Mr. Bowers would receive word from Mr. Nowakoski who had the matter in hand.

By Mr. Cohn: Q. Subsequent to this conversation did you go and see Mr. Nowakoski? A. You mean pertaining to the $100 or pertaining to the suit?

Q. Pertaining to anything in relation to this conversation. A. I went to see Mr. Nowakoski after Mr. Bowers had received a letter from him in which Mr. Nowakoski—

Objected to.

Q. And did you confer with Mr. Nowakoski in reference to this conversation that you had with Mr. Lorentowitz in December, 1914? A. I saw Mr. Nowakoski in the latter part of January, after Mr. Nowakoski had written Mr. Bowers.

Q. What was said at this conversation?

Mr. Greenfield: I object to that.

The Court: I sustain the objection. The only privilege waived by this was that Mr. Bowers would hear from him; not permitting Mr. Nowakoski to talk indiscriminately about his business with others.

Mr. Cohn: Then we offer for introduction the letter written by Mr. Nowakoski to Mr. Bowers which has been marked for identification.

The Court: It has already been marked for identification, and may be considered as offered after the cross-examination of this witness.

Q. What was said by Mr. Nowakoski at that interview?

Mr. Greenfield: Objected to.

The Court: I sustain the objection. That is the very question asked before, and the Court overrules it.

(Argued.)

The Court: An exception to the Court's ruling will be noted.

Q. In this conversation in December, 1914, there was no final statement, so far as you can remember, by Mr. Lorentowitz, as to what he would do personally? A. Yes, subject to his attorney's approval.

Q. What was that statement? A. He agreed to drop—

The Court: That will be stricken out.

Q. Just state what he said, not what he agreed. A. Mr. Lawrence said he would drop the suit for the balance due on the thousand dollar note, and would enter into a new agreement with Mr. Bowers to pay him $100.

Q. Say that last thing again; who was going to pay him? A. Mr. Bowers to pay Lawrence $100 and the return of all the gas savers, and Mr. Lawrence to keep all parts of the savers which he had, or in process of manufacture.

CROSS-EXAMINATION by Mr. Greenfield:

Q. Mr. Weldon, the conversation six months previous to December, that you said was afterwards put in writing, was it not relative to the gas savers? A. The conversation that took place before December?

Q. Yes, before December, you stated, December, 1914, did you ever see a written contract? A. I did.

Q. Concerning the gas savers arrangement? A. I did.

Q. The conversation that you referred to was about six months before the written contract was entered into, is that right? A. Some of the conversations were before the contract, and some afterwards.

Q. Those conversations had before the written contract afterwards was embodied in the written instrument, was it not all parties signed? A. Why not all the conversations, were not, no.

Q. But the conversations that took place before the written contract was a great deal of it embodied in the written contract? A. I should not think so.

Q. Did you see the contract? A. I did.

Q. And that was after some of the conversations? A. Yes.

Q. That you told us here about? A. After some of the—the conversations that took place before the contract were all relevant to what the possibilities of the business were.

Q. Now, Mr. Weldon, what is your business? A. Real estate.

Q. Where is your place of business? A. Kinney building.

Q. How long have you been in the real estate business? A. About twenty-three or twenty-four years.

Q. Anything else? A. I was in the restaurant business, winding up my stepfather's estate.

Q. Where was that? A. Allen's, Six hundred and ninety-one Broad.

Q. Anything else? A. No.

Q. You live where? A. South Orange.

Q. Have an insurance business in South Orange, too? A. No, sir.

Q. Have you tried to venture out in some patent things with Mr. Bowers, didn't you? A. Why, no.

Q. Well, did you have any interest in the patent? A. No.

Q. None at all? A. No.

Q. Where did you meet Mr. Bowers before you went to Lorentowitz? A. Why, I have known Mr. Bowers about—

Q. I didn't ask you how long you have known him, I ask you where did you meet him to go to Mr. Lorentowitz? A. On which occasion? A. On any occasion. Sometimes I met him in his office, and sometimes I met him down to Mr. Lawrence's.

Q. What did you go down to Lawrence's for? A. I went down to have Mr. Lawrence do a little repairing for me.

Q. On what? A. On the machine, straighten out the mudguard.

Q. And then you would happen to meet Mr. Bowers? A. No—happened to meet him on occasions that way, yes.

Q. Now, why did you recall this December, month 1914, what was there to impress upon your mind, if you didn't have any interest in this transaction? A. I had been having tests made for Mr. Bowers on this gas saver.

Q. Where did you make those tests? A. Some of them were made in New York.

Q. Did you make them? A. I did not, I had them made.

Q. I ask you, when you said you had them made, that you made them, that was not true, was

it? A. I did not say that, I said I had them made.

Q. Did you go to see it when it was being made? A. The tests?

Q. Yes. A. No.

Q. Did you see them made at any place? A. Yes.

Q. Where? A. I saw motors run with the attachment on.

Q. Where did you see it? A. At the Kissell Motor Car Company.

Q. At their warehouse? A. At their factory, service station.

Q. Where is that? A. On Fifty-first Street.

Q. Where? A. New York.

Q. You went over there? A. No, I was there; my business at that time kept me in New York ninety per cent of the time.

Q. In the building where the Kissell Car Company is? A. No.

Q. What did you go to the Kissell Car Company for? A. Because Mr. McCroslin was a personal friend of mine, I took a gas saver over to him, and he put it on the machine, I saw it on the machine, saw the machine run with it on, and saw the machine run with it off.

Q. Do you know anything about the operation of a machine? A. About automobiles?

Q. Yes. A. A little.

Q. Do you know the different mechanism? A. I do.

Q. Know anything about how this gas saver worked? A. Why, the gas saver, as I understood it—

Q. Do you know, yes, or no. A. Only from observation.

Q. Where is it attached? A. On the manifold.

Q. How does it work?

Objected to.

Q. When you saw it tell us how it worked. A. You could not see the working of it, you can only see what it does to the engine.

Q. Did it stop the engine, or let it run? A. Both.

Q. When you disconnect the power it stops, I suppose? A. Certainly.

Q. But you didn't see the effect of it, did you? A. Yes, I rode in the car without the attachment, and with the attachment.

Q. What effect did it have in the operation of the car with the attachment?

The Court: I am afraid you are treading on dangerous ground; we do not want to try the merits of this attachment.

Q. How did you come to go there on December, 1914, with Mr. Bowers? A. Mr. Bowers came to my office.

Q. When? A. In December.

Q. What part of December? A. I could not say the exact date.

Q. Early part or later part? A. I should say around the middle.

Q. How long did you stay there with Mr. Bowers? A. I should say we got there about half-past ten, and we left there after twelve.

Q. Where did you meet Mr. Bowers? A. At my office.

Q. Where was your office? A. 800 Broad Street then.

Q. And you say you went to Mr. Nowakoski's, where was Mr. Nowakoski's office? A. In the Essex building.

Q. Sure of that? A. I am positive of it.

Q. You cannot be mistaken on that, can you? A. I don't think I am.

Q. And there is where you went to see him? A. That is where I saw Mr. Nowakoski.

Q. In 1914? A. I saw Mr. Nowakoski in 1914, and in—

Q. In the Essex building in 1914? A. I should say yes.

Q. Now, Mr. Weldon, give us the conversation, repeat the conversation that took place in December, 1914, in Mr. Lorentowitz's office. A. I went down to Mr. Lorentowitz's office—

Q. Just give us the conversation, I didn't ask you how you got there, you are there now listening to the conversation. A. Mr. Bowers said to Mr. Lawrence "I came down here to see if we can adjust and straighten out this note matter. I paid you $250 on account, and suit is still pending, after investigation I am satisfied there is no money in the gas saver, I have gone into another ilne of business, and I want to get the matter out of the way." He said. "Lawrence, I will allow you to retain the $250 which has been paid on account of the note, I will return all gas savers that I have, you can keep all that you have in stock, or in course of manufacture, and that will free you, and enable you to go on with these Brooklyn people if you want to." He said, "I have spent a great deal of money in investigating this thing, carfare, sending people to New York, and my reports lead me to believe that I do not care to go into it.

Q. Was that all that was said? A. No, they talked on about the settlement, and Mr. Lawrence and Mr. Bowers went out into the hall and had a talk, I don't know what took place at that talk. Mr. Bowers called me out and asked me what my advice—

By Mr. Greenfield: Q. Was Mr. Lawrence there? A. No, Mr. Lawrence was not there. We came back into the office and Mr. Bowers said if Mr. Lawrence did not want to accept that matter why he would start a suit to recover the $250.

Q. (Showing witness paper.) Is this your signature? A. Yes, sir.

Q. You signed this affidavit? A. I did.

Q. And swore to it? A. I did.

Q. Did you say anything in this affidavit about any suit against Lawrence when you made it? A. I don't think I did.

Q. And your memory then is as good as it is now, what took place in the office of Mr. Lawerence in the presence of Mr. Bowers, was it? A. Yes.

Q. And did you say anything—why didn't you mention that fact in the affidavit? A. Since I made that affidavit Mr. LaVecchia came over to the office one day and asked me if I had any recollection of anything taking place between Mr. Lawrence and Mr. Bowers. I told him I had.

Q. Did Mr. LaVecchia ask you if you had any recollection, when he asked you to sign this affidavit, what took place in Mr. Lawrence's office? A. He asked me—

Q. Did he ask you, yes, or no? A. What is the question?

Q. (Question read.) A. He did.

Q. Did you tell him about the threatened suit against Mr. Lowrentowitz? A. I don't—

Q. Did you, yes, or no? A. —remember.

Q. You don't remember? You knew at the time you gave him the facts about this affidavit, you knew of that fact, didn't you, that Mr. Bowers said he was going to sue Mr. Lawerence? A. Not necessarily.

Q. You didn't know that? A. I didn't remember it.

Q. But you recollected the fact after you went over all the facts with Mr. LaVecchia, counsel for the defendant, did you? Yes, or no? Can't you answer that? A. I am trying to remember. I think Mr. Cohn asked me that question. I don't think Mr. LaVecchia asked me that, I think Mr. Cohn did.

Q. When? A. Two or three days ago, I should say.

Q. Where? A. We had a talk in Mr. Cohn's office.

Q. Now, Mr. Weldon, what did Mr. Bowers do, if anything, when he was there in December, 1914, when this alleged conversation took place? A. Why, simply as I have stated.

Q. Didn't do anything? A. Only talked the matter over with Mr. Lawerence.

Q. Now you went away after that, did you? A. Mr. Bowers and I went away together.

Q. At that time, Mr. Weldon, the final arrangement was there was no final agreement to adjust that matter, was there? A. I should say yes, there was.

Q. Didn't you testify a moment ago that Mr. Lawerence said that he would take up this mat-

ter with his lawyer? A. That was the arrangement.

Q. Well, was it finally settled to wind the whole thing up in December, 1914, when this conversation took place? A. Subject to Mr. Nowakoski's approval, yes.

Q. Then there was no final settlement? A. I should say there was; I took it for granted there was.

Q. You took it for granted? A. So did Mr. Lawerence.

Q. Where did Mr. Bowers come from when he went to Mr. Lawerence? A. I think he came right over from his house, Atlantic Street.

Q. Where did you meet him? A. My office.

Q. Now, did you ever go to see Mr. Lawerence after that with Mr. Bowers? A. Not that I recall.

Q. And you never spoke to Mr. Lorentowitz after that? A. I might have, yes.

Q. Concerning this matter? A. In an offhand way.

Q. When was that? A. I can't recollect the exact date.

Q. Now, you are also quite sure that nothing else took place in the office of Mr. Lorentowitz in your presence in December, 1914, except that conversation that you have related? A. They both got excited, certainly.

Q. Nothing else? A. Not that I remember.

Q. And they parted, after the excitement and conversation they parted? A. Oh, no, that was smoothed over, and they parted, I should say, the best of friends.

Q. Nothing else took place? A. Not that I recall.

Q. Well, you were there, you would recall, wouldn't you, if anything else took place? A. There was nothing took place that I recall.

Q. But you would recall if something would have taken place? A. If it was of importance, yes, I should say so.

Q. I will read this affidavit to you and see whether that is true, part of it, "Deponent further says that at this meeting Mr. Bowers brought with him all of the gas condensors which were in his possession, and which had been used by Mr. Bowers and this deponent for demonstration purposes," did that take place? A. That I stated.

Q. Did that take place? A. I stated he brought the gas savers with him.

Q. Did you? A. I think I did.

Q. When I asked you a moment ago, Mr. Weldon, if anything took place at that meeting except the conversation and parting, you said nothing else, was that true? A. You misunderstood—

Q. Was that true? A. That was part of the conversation.

The Court: Just one minute. You need not answer that question. You cannot require a witness to characterize his own testimony.

Q. Did you have any of the gas savers that you had with you? A. I might have carried one down—

Q. Do you know whether you did or not, or don't you? A. I don't think I did personally, no.

Q. Did Mr. Bowers have with him? A. Yes.

Q. Where did he have it? A. In his hands.

Q. How many did he have? A. One or two, I

am not sure, they were done up in a package, I didn't open the package.

Q. Did you see what was in the package? A. No.

Q. How do you know they were gas savers? A. By Mr. Bower's statement.

Q. And how big a package was it? A. Oh, a package, I should say, about that long, and that wide, and about that high (illustrating).

Q. And you don't know what was in it? A. Only from what Mr. Bowers said "Here are the gas savers."

Q. Why didn't you tell us when you first testified that Mr. Bowers said " Here are the gas savers"? A. I think I did.

Q. Why didn't you tell us when I asked you a moment ago what took place if anything else took place except the conversation you had related—

Mr. Cohn: One minute. I object to it because the witness has already stated that fact in his previous cross-examination.

The Court: If he did I didn't hear it.

Mr. Cohn: I think the record will show that Mr. Bowers brought the gas savers with him.

The Court: I didn't hear it if he did. The jury will remember.

Q. Why didn't you tell us that Mr. Bowers said, "Here are the gas savers"? A. I thought I had already stated that.

Q. You thought? A. Yes.

Q. Now, Mr. Weldon, you also testified that Mr. Lorentowitz told Mr. Bowers if he knew about that before he could have closed the deal with the Brooklyn concern, is that right? A. Yes, sir.

Q. You are sure that is the way the conversation took place? A. That is as I remember it.

Q. Now, I will read this affidavit and ask you whether this is true: "Deponent further says that he was present during the entire conversation, and that Mr. Lorentowitz was perfectly willing to make this arrangement because he declared to Mr. Bowers and this deponent that he had some concern in Brooklyn who were willing to take up the exclusive sale and marketing of these articles in question upon terms which he, the said Lorentowitz claimed were advantageous to him," did he say that? A. Words to that effect, yes.

Q. Well, do you know the difference between having a concern ready and willing to take up or, that he did have a concern who was ready and willing to take up? A. I understood—

Q. Do you know the difference? A. Certainly.

Q. Did he say that he was then willing to release him right there and then at that conversation? A. Before they got—

Q. Did he say that? A. Before they got through, yes.

Q. Then he did not tell Mr. Bowers that he would first consult with his counsel, did he? A. He didn't tell him that until the last part of the talk.

Q. Well, when was it during the conversation that he said he was willing to release him right there and then, was it at the last, or in the first part of the conversation? A. It was in the last part, I should say.

Q. Then when was it that he told Mr. Bowers that he would first consult his counsel before he would say anything, before he would release him? A. The last part of the conversation, the final

windup; he didn't say that he would release him when Mr. Bowers made the last proposition Mr. Bowers made to him was that he was to be released, and he, Bowers, was to pay $100. Then Mr. Lawrence said that he would take the matter up with his counsel.

Q. But he was perfectly willing to release him right there and then, was he? A. Subject to his counsel's approval.

Q. You didn't say that in your affidavit, did you (showing witness a paper)? A. I haven't seen this affidavit since I made it.

Q. Do you find it anywhere in the affidavit? A. If I didn't state it in the affidavit I have gone over it more closely in the examination.

Q. After you have gone over the facts with counsel, is that right? A. After I have gone over the facts with myself.

Q. Not with counsel? A. I talked the matter over with Mr. Cohn, or Mr. Cohn talked it over with me.

Q. And at that conversation the bookkeeper, and his son, were present? A. At some of the time, I don't know that they were there all of the time or not; they were in and out.

Q. You don't know whether they were there all the time? A. I say they were in and out, yes.

Q. Why didn't you tell us, when Mr. Cohn asked you who were present at this conversation, you said the bookkeeper, and his son, you didn't tell us then they were in and out, did you? A. Mr. Lawrence and Mr. Bowers were in and out, they were not in the office all the time.

Q. Where were they? A. They would go out in the hall, out in the shop, and back.

Q. I ask you why you didn't tell us on direct-examination that the bookkeeper and his son were in and out? A. I didn't think it was material.

Q. So you only gave answers what you think is material, is that right? A. No, that is not right.

Q. Did the conversation that you have related such events as you think were material? A. No, I thought I was answering the question fully.

RE-DIRECT-EXAMINATION:

Q. At this conversation was there any definite—was there anything said with reference to a definite date of paying the $100? A. No.

Q. And did you call on Mr. Nowakoski subsequent to the date, subsequent to January 23, 1915? A. Well, yes, very close to that time, Mr. Cohn.

Q. What did you say to him?

Mr. Greenfield: To whom?

Mr. Cohn: To Mr. Nowakoski.

Mr. Greenfield: I object.

The Court: I sustain the objection.

(Argued by Mr. Cohn.)

The Court: Exception will be noted.

The Court: Before the witness leaves the stand I will look at the letter D-1 for identification.

(Same handed to the Court.)

The Court: Mr. Greenfield, I will hear you as to why this letter should not be introduced.

Mr. Grenfield: I called upon the plaintiff in this suit for any letter which he might see fit to write; the letter is direct contradiction of this witness's statements.

The entire tone of that letter is in direct contradiction of this witness's statement.

(Argued.)

The Court: The letter will be admitted and an exception to that ruling will be noted.

An exception to this ruling is noted by the plaintiff as ground of appeal.

The letter marked Exhibit D-1 and the envelope marked Exhibit D-2.

Mr. Cohn: I desire again to address myself to evidence as to what the counsel stated to the witness, what was said in express pursuance of this letter. Your Honor allows the admission of this letter, if, on the basis of that letter Mr. Bowers did something relying upon Mr. Nowakoski's apparent authority, as contained in that letter, why should not he be permitted to state what he did.

The Court: Mr. Bowers?

Mr. Cohn: Yes, sir; or his agent, Mr. Weldon. I think when the client gives the attorney the right to send such a letter, he gives him the further right to treat with the other side in reference to the contents of the letter.

The Court: An exception will be noted to the Court's overruling of the offer.

NICHOLAS LA VECCHIA, sworn for the defendant:

Direct-examination by Mr. Cohn:

Q. You have had charge of this litigation in which Mr. Lorentowitz is plaintiff and Mr. Philip J. Bowers as executor of Thomas F. Bowers, is defendant? A. Yes, sir.

Q. And you have had this contract?

The Court: If you desire to put the contract in I have no objection to your proceeding, but I am obliged to confess that I have changed my mind on the proposition made at the outset of the case.

Mr. Cohn: With regard to the admissibility of this?

The Court: Not with regard to the admissibility of it, but with regard to the necessity of it. You may proceed to endeavor to prove it, if you want to do so, but I am inclined to think it is not absolutely necessary to produce it.

Mr. Cohn: Then I won't prove it.

The Court: I want you to take the responsibility of that, however.

Q. Mr. LaVecchia, I think you answered my question and stated you had charge of this litigation? A. Yes, sir.

Q. And have you seen this contract before? A. Yes, I have seen it.

Q. Have you noted who the subscribing witness was? A. Yes.

Q. What efforts did you make to locate the subscribing witness? A. I talked to people connected with the Bowers' office, if they knew Florence L.

Farrand, and they said they did, and I tried to locate her address, but was unsuccessful.

Q. Did you make inquiry of every person in the office? A. I did, that I thought knew anything about it. I also inquired from the attorney who represented Mr. Thomas F. Bowers in his lifetime.

CROSS-EXAMINATION by Mr. Greenfield:

Q. Did you look at the city directory? A. I don't remember.

Q. You would not say that you did? A. No, I would not say that I did, I don't remember.

Q. Would you be surprised if the name appears in the city directory? A. No, I would not be surprised.

(The Court sends out for a city directory.)

Q. What is her name? A. Florence L. Farrand.

Q. F-a-, is it? A. F-a-r-r-a-n-d.

(Mr. Greenfield examines the city directory.)

Q. Did you try 228 Verona Avenue? A. No, sir.

Q. Five Hundred Summer Avenue? A. No, sir.

Q. You know she is there, don't you? A. I don't know anything of the kind.

Q. Did you look for her under Farrand in the telephone book, the last name, not the first name? A. I did not personally; I think I had somebody look to see if she had a telephone or was listed in the telephone book.

Q. Now, did you try to communicate with those addresses given in the city directory? A. No, I didn't look in the city directory.

Q. Did you see the telephone number 826 W. Branch Brook, Five Hundred Summer Avenue? A. What name.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

eonard Lorentowicz,
Plaintiff-Appellant.

vs.

hilip J. Bowers, Administrator
f the Estate of Thomas F. Bowers,
eceased,
Respondent.

: Action at law.

EXHIBIT D 3 AS REFERRED TO IN THE

PRINTED STATE OF THE CASE ON PAGE 53.

hereas:-

Agreement of Contract, made this 29th day of November
1913. by and between L. Lorentowicz of the City of Newark.

Q. Farrand. A. E. C. Farrand?

Q. Yes. A. I didn't think that that referred to it.

Q. You didn't try, did you? A. I didn't try that no. My information was that she was married, and had left town.

Q. That as a matter of fact she lived there? A. I don't know, that is not her name, her name is Florence, and this is E. C.

Q. Her brother? A. I don't know.

Mr. Cohn: I offer the contract in evidence.

The Court: Any objection to the contract?

Mr. Greenfield: No.

The Court: The contract will be admitted.

Marked Exhibit D-3.

ALFRED NOWAKOSKI, sworn for the defendant:

Direct-examination by Mr. Cohn:

Q. Mr. Nowakoski, you are a member of the bar of New Jersey? A. I am.

Q. You are Assistant City Attorney of Newark? A. Yes.

Q. Did you represent Mr. Lorentowitz in a litigation against Mr. Thomas F. Bowers, pending about the 1st of January, 1915? A. Yes, I think so, about that time.

Q. And did you write this letter (showing witness Exhibit D-1)? A. It was dictated by me, yes.

Q. And did you write that pursuant to instructions of Mr. Lorentowitz?

Mr. Greenfield: I object to any conversation had between client and counsel.

The Court: This is not conversation, the question is whether it was written pursuant to instructions.

Q. Did Mr. Weldon call on you prior to the writing of this letter in relation to this litigation at any time? A. I don't know when he called; I know he was in my office several times in reference to this matter; the exact date in reference to writing of this letter I don't know; I can't tell; my memory is not clear on that at all.

Q. Do you remember whether in pursuance of this letter Mr. Weldon called at your office? A. As I stated before, I don't remember just exactly when he called, whether it was in pursuance of this letter; I know that someone called in reference to it; whether it was Mr. Weldon or Mr. Smith, the attorney at that time, I think his name was Smith, but I know either one of these gentlemen called.

Mr. Cohn: I desire to show the conversation. I desire to make the offer, if your Honor still entertains the view that it cannot be offered.

The Court: Any objection to it?

Mr. Greenfield: Oh, yes.

The Court: The objection will be sustained.

Mr. Cohn: I desire to get on the record the form of the question proposed.

Q. Mr. Nowakoski, will you relate the conversation between Mr. Weldon, or the person that

you remember who called on you representing Mr. Bowers in relation to this matter, subsequent to the writing of this letter?

Mr. Greenfield: I object.

The Court: I sustain the objection. An exception may be noted if you desire.

CROSS-EXAMINATION by Mr. Greenfield:

Q. Mr. Nowakoski, you say you wrote this letter pursuant to instructions from Lorentowitz? A. I did, yes, sir.

Q. Did you see Mr. Lorentowitz personally before you wrote that letter? A. I did.

Q. Senior or junior? A. Junior—or, senior.

Q. When did you see him? A. He called at my office.

Q. Where was your office? A. In the Essex Building.

Q. How long did you remain in the Essex Building? A. I was there, I think, until May or June, 1915.

Q. When was your office in the Scheuer Building? A. Well, let me see; I started there 1912, I was there, perhaps, until 1913, some time in 1913, I don't remember the exact date of my removing from the Scheuer to the Essex Building, but I know I was in the Essex Building at this time.

Mr. Cohn: I believe it is admitted that Mr. Thomas F. Bowers died in February, 1915; it is admitted in the complaint, and the answer. I desire to offer in evidence the proof of claim that Mr. Lorentowitz filed with Mr. Philip J. Bowers as executor of the Estate of Thomas F. Bowers.

Mr. Greenfield: There is another proof of claim, an amended proof of claim.

Motion to overrule defense

Mr. Cohn: I beg your pardon, I didn't know that. I want to offer both of these.

Mr. Greenfield: We object to that; we only sue on one.

Mr. Cohn: You sue on the amended one?

Mr. Greenfield: Exactly.

The Court: What is the purpose of offering it, Mr. Cohn?

Mr. Cohn: I want to show that the claim made to the executor was contrary to the arrangement which his intestate had agreed upon. The filing of that claim is admitted in the answer, and I think it is alleged in the complaint.

The Court: This will be admitted.

Same marked Exhibit D-4.

Defendant rests.

Mr. Greenfield: I move to overrule the defense in this suit on their own proof. They have admitted they were indebted to us for $1000; they have admitted there was a contract signed to pay $1000 to us for which the note was given; they have also admitted that they only paid $250; they have also admitted this fact, that an arrangement was made to release the defendant from the obligation of the balance of the $750, upon what condition? What was the consideration? The payment of the further sum of $100 which they have failed to pay, they have not paid. Assuming, for the sake of the argument, taking the most advantageous view in favor of the defendant,

that we have agreed to accept that sum of money and release the parties on the contract, no payment of the $100 was made. Their own evidence shows that we had to go to a lawyer to demand the payment in that letter sent by Nowakoski, and they have not complied with that. Therefore, if there was any such arrangement, there was a failure of consideration; there was a failure on the part of Mr. Thomas F. Bowers to carry that out, and therefore, we come back and are entitled to our original sum of money, $750, the balance due to us. If they would have paid the $100, and then come in with such a defense, then I say it would be up to us to refute that contention. On their own case they have shown that they have failed in that essential part of this contract, namely, the payment of the consideration to us to release. It was an executory contract, and that executory contract was never fulfilled, carried out, hence I ask that the defense be overruled, and the direction of a verdict.

(Mr. Cohn replied.)

The Court: The motion to strike out the defense will be denied. An exception to that ruling will be noted.

An exception to this ruling is noted by the defendant as ground of appeal.

LEONARD LORENTOWITZ, re-called in rebuttal:

Direct-examination by Mr. Greenfield:

Q. Mr. Lorentowitz, do not give any conversation that you had with Mr. Bowers himself, just listen to my question closely, and then answer it. Do you know Mr. Weldon? A. Yes, sir.

Q. Charles Weldon? Mr. Weldon testified that he called at your office in December, 1914, in the presence of Mr. Bowers, and that you said the gas savers could be returned and $100 paid, and the contract cancelled. Was Mr. Weldon present at any such conversation? A. He never been there, Mr. Bowers himself—

Q. Now, listen to my question, don't tell us anything about any conversation with Bowers. Did you, Mr. Lorentowitz, ever authorize Mr. Nowakoski to write to Mr. Bowers such a letter that there was a balance due of $100? Did you, yes or no? A. No, I didn't do that.

Q. Did you, while Mr. Weldon was present in your office, say anything to Mr. Weldon or to Mr. Bowers, while Mr. Weldon was present, that you would take up the matter with your lawyer and let him know about it?

Mr. Cohn: Objected to. He has testified that Mr. Weldon was not present; as to his conversations with Mr. Bowers, I believe that the door is closed.

The Court: Just repeat that question.

(Question read.)

Mr. Grenfield: I will withdraw this question.

Q. Did you tell Mr. Weldon at any time that you

would take up the matter with your lawyer and let him know about a settlement for $100 and the return of the gas savers at any time? A. No, I didn't see—

Q. No, that is enough.

The Court: Did you say that in the presence of Mr. Weldon?

Witness: No, I didn't see Mr. Weldon.

Q. Did you say that in the presence of Mr. Weldon? A. No.

Q. Was there any gas savers, or whatever that patent article was, returned to you in a package? A. No.

CROSS-EXAMINATION by Mr. Cohn:

Q. Mr. Lorentowitz, did you have a conversation with Mr. Bowers in the latter part of December, 1914? A. Yes, sir.

Q. As a result of that did you visit Mr. Nowakoski? A. No.

Q. Did you call on Mr. Nowakoski? A. No.

Q. You never saw Mr. Nowakoski after this occasion? A. No, I never been up there; my son been up there.

Q. Was Mr. Nowakoski your attorney? A. Yes.

Q. Didn't you go at any time to him and relate the fact that you had had a conversation with Mr. Bowers? A. I never been up there; my son been up there.

Q. Well, you authorized Mr. Nowakoski to start the suit that was then pending? A. I done at the beginning.

Q. And didn't you personally take charge of this litigation? A. No.

Q. Didn't you make inquiry from him as to how

the litigation was progressing? A. The first you know, through Mr. Bowers, and the Mr. Bower after that when the case first came out, he comes to me and he says—

Objected to.

Q. Don't tell what Mr. Bowers said to you, but didn't you go to the office of Mr. Nowakoski after the suit was started? A. No.

Q. Never went there once? A. No; went there when he started suit.

Q. After the suit was started you never went to the lawyer's office and asked him how the suit was getting along? A. No. My son went there.

Q. And you didn't know that Mr. Nowakoski wrote this letter? A. No, sir.

JOHN K. LORENTOWITZ, sworn for the plaintiff in rebuttal:

Direct-examination by Mr. Greenfield:

Q. Mr. Lorentowitz, Leonard Lorentowatz is your father? A. Yes, sir.

Q. You are in business with your father? A. Yes, sir.

Q. Did you know Thomas F. Bowers in his lifetime? A. Yes, sir.

Q. Did you know anything about the arrangement made relative to the gas saver apparatus? A. Yes, sir.

Q. Now, after this contract was signed, Exhibit D-3—do you know where that was signed? A. I understood it to be signed—

Q. No, no, did you see it? A. No, sir.

Q. You heard about this contract being signed. Now, did you ever see Mr. Weldon in your office? A. Yes, sir.

Q. When was it? A. Prior to the signing of the contract.

Q. Did you ever see him after that? A. Yes, I saw him once after that.

Q. With whom was he there? A. He brought a machine to be repaired there once.

Q. Was he ever there with Mr. Bowers? A. No, sir.

Q. Mr. Weldon testified that he was there in December, 1914, and that a certain conversation took place between your father and Mr. Bowers in his presence, was he there? A. No, sir.

Q. Were you there in December? A. Yes, sir.

Q. What were your duties with your father at that time? A. General manager.

Q. And you were in the office? A. Office, or in the works, according to what I had to do.

Q. What line of business is your father in? A. Coppersmithing and body building.

Q. Automobiles, general repairing of automobiles? A. Metal works.

Q. Was there any such conversation in your presence by Mr. Bowers, between Mr. Bowers and your father, in the presence of Weldon, when Mr. Bowers returned a package of this gas saver apparatus?

Mr. Cohn: I think, now, this witness has testified that Mr. Weldon was not there, the ordinary rebuttal, to ask what a witness said, what was done, does not apply. We are now in the same position the defendants are, we must now have the witness say what was done and said.

The Court: He says Weldon was not there, it is quite improper to go over the details of Weldon's testimony.

Q. Did Mr. Bowers ever return those gas saver apparatus? A. Not to my knowledge.

Q. Well, would you know it if he did? A. Yes, I would. Nobody told me anything about it, I never saw him bring any.

Q. You have charge of this litigation, the suit instituted by Mr. Nowakoski against Bowers? A. Yes, sir.

Q. Did you go up to Mr. Nowakoski? A. Many times.

Q. Did you ever authorize Mr. Nowakoski to write this letter for $100 balance due on the contract? A. At that time there was a balance af two months payment, it was to be $50 a month until the $100 was paid and he paid $250, and there was $100 due at the time, and I told Mr. Nowakoski that he owed $100, and write a letter to him about that.

Q. Did you ever instruct him to write a letter that $100 was in full settlement? A. No, sir.

Q. Or balance due on the total contract? A. No, sir.

Q. Do you know when the arrangement was made that he was to pay up this $100? A. Fifty dollars a week.

Q. Fifty dollars a week? A. A week, or month, I don't remember just that.

Q. That was after the suit was started on the $1000 note, the arrangement was made? A. Yes, after the note was due.

Q. Did you ever instruct or authorize Mr. Nowakoski to say that it was in full settlement

Mr. Cohn: I object. I think the proper inquiry is what did he tell Mr. Nowakoski.

The Court: That would be quite objectionable, if you wanted to object to it.

Mr. Cohn: Then I will withdraw the objection.

Q. What did you tell Mr. Nowakoski to write to Mr. Bowers relative to the note? A. Why, that note was due us, and write for the balance, for the two months' payment, there was $100 due at that time.

CROSS-EXAMINATION by Mr. Cohn:

Q. Mr. Lorentowitz, do you remember the date of the note? A. No, I don't remember it. It was in 1913, I think.

Q. And in your recollection, was it a three or four months' note? A. I don't remember.

Q. How do you know—you say that the note, after the note became due, was to be—February 20, 1914, an arrangement was made that Mr. Thomas Bowers was to pay $50 a month on it, is that correct? A. Yes.

Q. Are you familiar with the payments that were made on the note? A. Yes, sir.

Q. What were they? A. Well, in the beginning he paid the first time, if I remember right, was $100, then a month slipped by, and he told me that he could not pay, allow one month go by, and he paid another fifty; anyway he skipped one or two months between those times, if I remember right.

Q. Do you keep the books for your father? A. No, sir.

Q. Did you give him the statement on which he made this claim against Thomas J. Bowers and Philip Bowers as executor? A. No, sir.

Q. Do you know the contents of the paper he signed? A. No, sir.

Q. Would you be surprised to find that the paper alleged that $150 was paid on July and $50 on July 6, 1914, and $50 on July 26, 1914? A. He may have paid $150 first.

Q. And is it according to your best recollection that he paid the other two installments in the month of July, 1914? A. No, I don't remember that, I don't think it is so far back.

Q. I am trying to find out when about you got the money from Mr. Bowers that you did get? A. Oh, I can't remember.

Q. Upon what did you base your statement that there was two months due? A. Because Mr. Bowers said he would pay $100 at the time I told him we would sue him if he did not pay.

Q. Up to what date? A. The date I told him.

Q. If he made the last payment he did make in July, 1914, and had not paid anything since, and you had this conversation in December, 1914, and you saw Mr. Nowakoski after that, will you explain how it was there was only two months overdue? A. I don't remember how the payments were, because I was continually travelling about. The only time I had any conversation was when I would stop in a day and see Mr. Nowakoski about this, or call up over the telephone about payments by Mr. Bowers.

Q. Were you in charge of this, or your father in charge of this? A. My father was too busy to bother with an attorney, and so I did it.

Q. Who told you that he owed $100 on two months payment on this note? A. If I remember right I asked the bookkeeper how much Mr. Bowers owed us.

Q. Well, do you remember right what she told you, or he? A. Well, I don't know, I don't remember, it is so long ago, but I know that I went to Mr. Nowakoski's office, I called him up previously to see him, and then had made an appointment with him, and see him about this.

Q. You remember very acutely that you went to see him after you made this appointment with him? A. Yes, sir.

Q. And you remember acutely that when you went to see him you told him there was two months overdue to the arrangement, that he must collect the $100, why can't you remember how you arrived at the basis of that $100? A. I don't just remember that.

Q. As a matter of fact, Mr. Bowers had made no payment since July 6th, so around the first of January he would owe five or six payments, isn't that so? A. Well, we had a lot of trouble—

Q. Isn't that so? A. No, I don't remember just how the $100 came about.

Q. But when Mr. Greenfield examined you you said you went there and told Mr. Nowakoski to collect two overdue payments? A. Yes, sir.

Q. Were those the only two payments overdue? A. Those are the only two that I knew about at that time.

Q. Well, didn't you have a record in your books to show when he made the payments in July, 1914? A. No, sir.

Q. Have you any record at all to show when these payments were made? A. Not myself, only the bookkeeper, to find out how much he owed. I think I recollect now, I called up Mr. Bowers—he said he would pay $100 at that time; I think that

is how that $100 came; it is so long ago I can't remember just exactly.

Q. You remember when Mr. Greenfield examined you that you gave Mr. Nowakoski instructions to collect $100 for two overdue monthly payments? A. I would not put it down just exactly that way.

Q. Are you correcting your statement now when you told Mr. Nowakoski then that Mr. Thomas F. Bowers was two months overdue? A. Yes, I remember.

Q. Did you visit Mr. Nowakoski after this talk with Mr. Bowers? A. No.

Q. Well, can you fix the time approximately when you did visit him in relation with this $100 business? A. I don't think I visited him in the last year and a half, or two years.

Q. I want you to fix, as near as you can, approximately the time when you called on Mr. Nowakoski in relation—that is, the time when you gave him instructions to write this letter? A. About two years ago, I should think.

Q. Well, can you fix that visit as being before, or after, the time you met Mr. Bowers at the Halsel Street plant? A. After.

Q. Now, at that time, when you say Mr. Bowers did not return any gas savers, was there any conversation with reference to the contract that was then in existence? A. You mean the first contract?

Q. Yes. A. Ask me that again, please.

Q. (Question read.) A. Yes.

Q. When you say the first contract, do you mean by that there were two contracts? A. No, just the one contract.

Q. When was that conversation with Mr. Bowers? A. He stated that he could not push this

business because he did not have the kind of men that knew the mechanical construction of machinery; they had Mr. Rossner and Mr. Rossner was not satisfied with the percentage he was working under at the time, and there was some disagreement between Mr. Weldon and Mr. Rossner, and they separated, and after that they stopped selling anything and the company broke up.

Q. Did you know at the time of this conversation that Mr. Weldon was associated with Mr. Bowers? A. From Mr. Bower's statement, yes.

Q And did not Mr. Bowers say something about having made tests of this article? A. Not at that time, no, sir, he knew about it before he took the contract; the tests were made before the contract was signed.

Q. And did he show you at any time this letter? A. No.

Q. Did you show it to him? A. No, I never saw that letter.

Q. Did you know of the existence of the letter? A. No.

Q. Did he show it to you? Don't you remember that on the occasion of this visit, or shortly thereafter, he showed you this letter? A. I don't know anything about this letter.

Q. You don't know who this concern is that wrote this letter? A. No, sir.

Q. At this conversation, Mr. Lorentowitz, what else was said in addition to what you have already told us? A. The only thing he said he could not pay the note; every time he came in he says he could not pay the balance of the note; every time I called him up or threatened suit he came in and tried to put the thing off.

Q. He had not paid anything in six months at the time you had this conversation, did you threaten him during those six months? A. What six months?

Q. Between the date when he paid the $50 on this note, the last of the $250 that he did pay on it, and the approximate date of the conversation in December, 1914. A. Well, I don't remember, no, I don't think I threatened suit during the—once or twice I did; the result, my father talked to him, and he sort of gave a story that he could not pay, and put it off all the time.

Q. Was not this answer to you that he could not pay any more money because he ascertained this gas saver was a fraudulent thing, and it would not work, and he would not try to sell it to the public? A. He never complained; all the time he did we never had any complaint from him of the gas saver.

Q. Didn't you hand him this letter I just showed you? A. No, sir.

Q. Who conducts correspondence for L. Lawrence & Company? A. At that time Mr. Schick conducted that, or a stenographer.

Q. At this conversation in December, 1914, there was nothing said with reference to the contract being terminated? A. No, sir.

Q. As a matter of fact did Mr. Bowers have any relationship with you on this gas saver after that conversation? A. In what way do you mean?

Q. Did you ever give him any to sell that you had manufactured subsequent to December, 1914? A. Before the contract?

Q. No, not before the contract, after this conversation in December, 1914, did you ever hand

him any of these gas savers to sell? A. I think I did refer him to customers that wanted to buy the gas savers.

Q. When did you refer? A. That was in the beginning, I can't remember the date.

Q. The beginning was 1913; now just understand me, Mr. Lorentowitz, after this conversation in December, 1914, did you at any time give him any of these savers to sell, or did he at any time ask you for any to sell? A. No, sir, not a year after that contract.

Q. Did he do anything after this conversation which indicated to you that he was still operating under this contract?

Mr. Greenfield: Objected to as not cross-examination; in the second place he would have to state what somebody else may have told him; he could not tell what Mr. Bowers did after leaving the office.

The Court: The objection will be sustained.

JOHN SCHICK, sworn for the plaintiff in rebuttal:

Direct-examination by Mr. Greenfield.

Q. What is your business? A. Just at the present time?

Q. Yes. A. Welding.

Q. Have you ever been employed by Mr. Lorentowitz? A. I have.

Q. In what capacity, A. Bookkeeper.

Q. How long were you employed there? A. About three years.

Q. You are not now employed? A. No, sir.

Q. You are in competition with Mr. Lorentowitz now, Mr. Schick. Did you know Mr. Thomas F. Bowers in his lifetime? A. I did.

Q. Do you know Mr. Charles Weldon? A. I did.

Q. Did you ever see Mr. Weldon and Mr. Bowers in December, 1914, in the office of Mr. L. Lawrence? A. No, sir.

Q. Was there any conversation or arrangement whereby Mr. Bowers was to give up his contract, cancel the contract, and Mr. Lawrence surrender the note in payment of $100? A. No, sir.

Q. Do you know of any—was there any conversation at all between Mr. Bowers and Mr. Lorentowitz in December, 1914? If so, kindly give that conversation relative to the gas saver apparatus. Do you remember any conversation? A. Very little of it, because I was engaged in bookkeeping, and I did not pay particular attention to the conversation he carried on.

Q. Give us as much as you recall. A. (Not answered.)

By the Court: Q. When was the conversation? A. In December, I can't recall the exact date.

By Mr. Greenfield: Q. 1914? A. Yes, the exact date I don't recall.

By the Court: Q. Between whom? A. Between Mr. Bowers and Mr. Lawrence, Mr. Lorentowitz.

Mr. Cohn. I understand the rule to be the evidence is admissible except between the plaintiff and the defendant. I have always understood you can prove a conversation with a deceased by anyone except the plaintiff.

Mr. Greenfield. That is the way I am going to prove it.

The Court. I do not quite know why you make this remark. What is the point of it?

Mr. Cohn: I thought your Honor was questioning the admissibility of this testimony; I was wondering whether my conception of the rule was correct or not.

The Court. No, I just did not understand. I understood him to say he heard no conversation between Bowers and Weldon in December, 1914, and I did not just get the idea that it was just between Bowers and Lorentowitz when Mr. Weldon was not present.

By the Court: Q. Is that the situation, conversation between Bowers and Lorentowitz when Weldon was not present? A. Mr. Weldon was not present.

By Mr. Greenfield: Q. Give us the conversation that took place, as much as you recall. A. The general theme, not remembering the exact conversation, Mr. Lawrence was continuously asking him for money, and they came to an agreement whereby Mr. Bowers was to pay so much a month, $50, and there was nothing said about returning any attachments. The fact of the matter is that there were attachments got ready for Mr. Bowers' orders to be called for by him.

Q. After that conversation? A. After that conversation.

Q. And how do you know this? A. I saw them there.

Q. How do you know it was by Mr. Bowers' orders that after that conversation? A. Because he had ordered them.

Q. Well, you say he had ordered them, of who? To whom did he give the order actually? A. Well, Mr. Lawrence was making them for him, a few of them, I can't recall just how many, but he made several from time to time.

Q. After that conversation? A. After that conversation.

Q. In December, 1914? A. December, 1914.

Q. Now, Mr. Schick, you kept account of the moneys paid, did you? A. Yes, sir.

Q. Turn to the book and see how the payments were made on this note.

The Court. Is there any question about the payment?

Mr. Greenfield. Very well, never mind.

Q. Can you state how this arrangement of payment installments of this note took place more in detail, and why that was? A. Well, they were in consequence of a trial that was going to be instituted against Mr. Bowers, and Mr. Bowers came to Mr. Lawrence and he pleaded with him not to go ahead on it as he wanted to keep his name out of the papers, and they came to an agreement whereby he was to pay off $50, I think every week, or so, which he did. He paid $150, and then paid $50 twice following the $150, and since then there was nothing paid.

CROSS-EXAMINATION by Mr. Cohn:

Q. Were you the general correspondent for this firm also, this company? A. Yes, sir.

Q. Do yon know who the Fay & Baun Company are? A. I don't.

Q. Did you ever see this letter (showing witness letter)? A. I did not.

Q. Did Mr. Bowers ever tell you about it? A. Mr. Bowers had no conversation with me.

Q. None with you at all? A. No, sir.

Q. Did you keep any books on this gas saver appliance, as to what you made, and what was ordered? A. Just what do you mean by that?

Q. Keep a sales book as to what was delivered by you, or a factory book to show what was made? A. Delivered to who?

Q. Delivered to anybody? A. That book was keep by the foreman in the shop. The appliances were made, and I imagine some records where they had been delivered, sent out to people.

Q. Have you got the book? A. I have not.

Q. Is it available at the plant? A. I actually don't know, I have been away from Lawrence & Company since last May.

Q. Did you have anything at all to do intimately with these gas savers? A. No.

Q. Did you know with what persons Lawrence & Company had made contracts relating to the marketing of these gas savers?

Objected to as immaterial and not cross examination.

Objection overruled.

Q. And did you follow the manufacture of these appliances to the extent of knowing how much was manufactured? A. No, sir.

Q. Did you follow the manufacture or the conducting of the business of L. Lawrence & Company in relation to these gas savers to know who were giving the orders? A. Just repeat that question again.

Q. (Question read.) A. What do you mean, the orders from customers?

Q. Yes. A. I did not follow the manufacture of them, just keeping the books.

Q. Did you keep an order or sales book? Have you that book? A. I don't know, as I said before, I have been away since May, I don't know whether the books are there or not.

Q. If Mr. Bowers gave you any orders for gas savers would they have been recorded in this book? A. I presume they would.

Q. Would he have given you a written order for them? A. Mr. Bowers had no transactions with me whatsoever; I don't know whether he would have give a written order or verbal.

Q. How would you know he ordered these gas savers? A. Conversations.

Q. With whom? A. Mr. Lawrence.

Mr. Cohn: I object, I ask that his testimony on that subject be stricken out.

The Court. It may remain.

Q. On what do you base your recollection that any of these gas savers were ordered after December, 1914? A. What is it I base my recollection on?

Q. Yes. A. Nothing particular, just as it comes in my mind; I haven't any markings in any book, or anything of that sort.

Q. Are you positive about that, or are you simply guessing? A. I am not positive about it, I would not swear in black and white there was, but am testifying to the best of my ability.

Q. Do you know how many of those gas savers had been ordered altogether from the time of the the making of the contract in December, 1914? A. No, I do not.

Q. Do you know any occasion where they had been ordered prior to December, 1914? A. I do not.

Q. Then your testimony that you gave on Mr. Greenfield's examination, when you said they were ordered by Mr. Bowers subsequent to this conversation in December, 1914, was incorrect? A. I answered to the best of my ability.

Q. Was it correct or incorrect? A. I told him in the examination that they were ordered after that time.

Q. But you say now—A. I could not exactly say whether they were ordered exactly after that time or before.

Q. You did not overhear this conversation in December, 1914, sufficiently to give any distinct statement of what was said? A. No.

Q. Now, you saw Mr. Weldon quite frequently at the plant, did you not? A. I saw him at different times; saw him on the street.

Q. Did you see him at the plant? A. I presume I did.

Q. Do you know whether you did? A. I did.

Q. How often did you see him at the plant? A. It is pretty hard to remember just exactly how many times I saw him; maybe once or twice, three times.

Q. Did he ever come down to the plant with Mr. Bowers? A. No, sir.

Q. Did you know that he was interested or that he was associating himself with Mr. Rossner and Mr. Bowers in this business? A. Only from conversation with Mr. Rossner.

Q. Not through conversation with Mr. Lawrence? A. He might have mentioned it casually.

Plaintiff rests.

Testimony closed.

Mr. Greenfield: I renew my motion for the direction of a verdict at this time. It seems to me, if your Honor please, that the defense has failed; they have not shown that they have carried out the alleged contract whereby they cancelled, or obviated the first contract in any way. They have not carried out the conditions of the alleged arrangement which took place in December, 1914.

(Argued.)

The Court: The motion will be denied, and an exception noted.

An exception is noted for the plaintiff as ground of appeal.

Counsel summed up.

Charge

The Court charged the jury as follows:

DUNGAN, J.

Gentlemen. This is an action upon a promissory note made by Thomas F. Bowers, represented in this case by his executor, Philip J. Bowers, to the order of Leonard Lorentowitz, the plaintiff in this case, on the 20th day of November, 1913, for $1,000, upon which the plaintiff admits that $250 has been paid, leaving a balance of $750 due.

The making of this note by Thomas Bowers is admitted on behalf of the defendant in this case, his executor. That the note is still in the possession of the plaintiff is admitted. That Thomas Bowers is dead, and that the defendant is his executor, is admitted as stated in the complaint; and that a claim required by law to be filed by a creditor against an estate has been filed with him

as executor of the estate of Thomas Bowers is admitted.

These admissions, together with the testimony of Leonard Lorentowitz that he is the holder of this note, and that the amount of $750 is due, would require the Court to direct you to render a verdict in favor of the plaintiff, and against the defendant, for $750 with interest from the maturity of this note, which was the 20th day of February, 1914, to this 13th day of March, 1917, three years and twenty-three days, were it not for the defense which has been introduced by the defendant, which requires the Court to leave the questions raised by that defense to the jury.

This note was given in pursuance of a contract which was made on the 29th day of November, 1913, by which Mr. Lorentowitz, the plaintiff in this case, gives to Mr. Bowers, now deceased, the exclusive selling right, or agency, of an automatic gas attachment for the United States of America, and foreign countries, for a period of six months from the date of the contract, and provides for an extension of this contract, provided that during the six months he has not sold a thousand. The consideration of this selling right is $1,000, and it appears that this note was given in consideration for that right.

At this point, since so much has been said in the argument about the merits of this gas attachment, the Court ought to say to you that you are not concerned with any controversy whatever about the merits of this attachment. There is no suggestion in the defendant's answer that this contract was fraudulently entered into. There is no suggestion in the defendant's answer

that this gas attachment was not all that it was to be under this contract of the 29th day of November, 1913. No such defense is made in this case, and with the question of whether or not it was as represented by Mr. Lorentowitz to Mr. Bowers, if, in fact, any such representations were made, you are not concerned in this case. It is not an issue in this case, except, perhaps, incidentally, in considering the probabilities of whether or not the arrangement was made as the defendant now insists.

It is insisted on behalf of the defendant that in December, 1914, Mr. Bowers went to the place of business of Mr. Lorentowitz, after a suit had been brought for the balance due, and made a proposition for the settlement of their difference. Mr. Weldon testifies to this: he appears to have been some way concerned in it, just how does not appear. Mr. Weldon says that they had considerable discussion about the merits, and tests that had been made with this gas saver, as it has been called in this case; and that several propositions were made by Mr. Bowers, one of which was that the $250 which he had already paid would be retained by Mr. Lorentowitz, that he would return all the gas savers which he had received, Mr. Lorentowitz to retain all that had been manufactured for his (Mr. Bowers') account, and they would call the matter square. He says that Mr. Lorentowitz declined to accede to this, and that they went out in the hall and had a conversation, and when they came in Mr. Bowers said "I will make you my best and last proposition; we will consider this matter settled by your retaining the $250 that I have already paid,

retaining the gas savers which you have already made, I return to you the gas savers which I have received, and I will pay you $100;" and that Mr. Lorentowitz then said he would take it up with his counsel, and he would let him hear from him later. That was his testimony until there was a little argument, you will remember, about the propriety of admitting certain testimony with reference to that, and then he said that Lorentowitz said he had placed the matter in his counsel's hands, and did not want to do anything without consulting him, that he would consult him, and Mr. Bowers would hear from him, that is, from his counsel. This was in December, 1914, and it appears that a letter was sent directly to Mr. Bowers by Mr. Nowakoski, who was then the attorney of Mr. Lorentowitz; and this letter says "Mr. Lorentowitz informs me that you still owe him $100 in the matter of the settlement of $1,000 note on which you have made a payment. I have been instructed to institute proceedings to collect the same if it is not paid by January 29th." Mr. Nowakoski, who is produced here as a witness, says that that letter was sent by him in pursuance of instructions given to him by Lorentowitz; and when asked whether it was the father, or son, he said Mr. Lorentowitz, Sr.

The burden is upon the defendant, Mr. Bowers, before he can succeed in this defense, to show that there was an absolutely new agreement made between these parties in the month of December, 1914, as testified to by Mr. Weldon, because it all depends upon Mr. Weldon's testimony. Mr. Weldon has made an affidavit which has been alluded to here, and, of course, if you do not credit Mr.

Weldon's testimony, then the defense entirely fails, because the fact that there was a new agreement depends solely upon the testimony of Mr. Weldon; and, as I have stated, you must find by the greater weight of the evidence in the case—and that does not mean the greater number of witnesses, necessarily, but by the greater weight of the evidence in the case which you credit—that there was a new and substituted agreement which was to take the place of this agreement of 1913, by which Mr. Bowers was to give up his rights in this contract, and was to deliver these gas savers that he had received, and that Mr. Lorentowitz was to retain the $250, and that he, Mr. Bowers, was to pay $100, and that was to settle the whole matter.

You have a right to consider a matter which was mentioned to you in the argument, as to whether or not this new agreement actually was made between these parties. Because here at this trial we find the agreement binding Mr. Lorentowitz in the hands of the defendant; and we find the note binding Mr. Bowers in the hands of the plaintiff, just where those documents would belong if there had been no such arrangement made between the parties as is insisted upon by the defendant. But, of course, in that connection you have a right to take into consideration the carelessness with which some people do business. That is not at all conclusive upon the parties to this case. Some people do business just that way, very carelessly, and you have a right to take that into consideration in considering the probabilities as to whether or not the new arrangement was made as the defendant says it was.

On the other hand, denying this we have the testimony, first, of Mr. Lorentowitz himself, that Mr. Weldon was never present when he had conversations with Mr. Bowers. That is about as far as he could go under the law. Ordinarily you would expect a person, when the opposite party is alive, to go upon the stand and deny that he ever had such conversation with the other party, and if he failed to do so it would be an argument against him that he had not denied that statement. But that is not an argument against the plaintiff in this case, because he is absolutely forbidden by the statute to give testimony of any transactions with Mr. Bowers.

He could not testify to it, and if his counsel had asked him any questions upon the subject of transactions with Mr. Bowers, and it had been objected to, the Court would have been obliged to exclude it by reason of this statute. Our law provides this, that in all civil actions any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity—and the defendant is sued in representative capacity—provided this section shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator or intestate represented in said action, unless the representative offers himself as a witness on his own behalf, and testifies to any transaction with or statement by the testator. In this case, while Mr. Bowers was called to the stand, and gave a few words of testimony, he was not asked about any transactions with Mr. Lorentowitz, consequently Mr. Lorentowitz, under this statute,

was absolutely forbidden to make any denial, or to testify to any transactions with Mr. Bowers.

His son testifies that he was in this place of business in December, 1914, and that there was no such conversation as was testified to by Mr. Weldon when he was there. He says that Mr. Weldon was never there with Mr. Bowers; and he testifies as to how this letter came to be written. He says that this letter was written at his solicitation—by the way, I should say that Mr. Lorentowitz, the plaintiff in this case, denies that he authorized Mr. Nowakoski to write this letter. The son says, it was written at his direction, and it was written because there were two monthly payments of $50 each, which Mr. Thomas Bowers had agreed to pay upon this note, which were at this time overdue. Mr. Schick, who was the bookkeeper for Mr. Lorentowitz, testifies to a conversation when Mr. Weldon was not present —he says Mr. Weldon was not present with Mr. Bowers—but to a conversation between Mr. Bowers and Mr. Lorentowitz, in which Mr. Lowrenwitz asked Mr. Bowers for money; and they same to an agreement by which Mr. Bowers was to pay $50 a month.

It is for you to say whether or not you find that this letter was written at the direction of Mr. Lowrentowitz, or his son; whether or not it was by reason of a direction given by Mr. Lowrentowitz to Mr. Nowakoski that there had been an agreed settlement between him and Mr. Bowers for $100, which might be inferred from the words of this letter, which says "Mr. Lawrence informs me that you still owe him $100 in the matter of the settlement of the $1,000 note, on which you

have made a payment;'' or whether it was written, as suggested by the son, and by the testimony of Mr. Schick, because after this suit had been brought by Mr. Lowrentowitz against Mr. Bowers, Mr. Bowers had come there and agreed to pay $50 upon it, and that at this time $100 was due. The son, upon his direct-examination, seemed to be very hazy about this transaction. He said $100 was paid at one time, and upon having his recollection refreshed said it was $150 was paid and $50 at two different times after that, which made the $100 more, or $250. It appears that the last payment was in July, 1914, so, if that was the only agreement, you will see at the time this letter was written there would have been six payments of $50 each due, or $300 instead of $100.

It will be for you to say whether or not the defendant has established, by the greater weight of the evidence, that there was a new agreement made in December, by which everything before that time was to be settled and ajusted by the plaintiff retaining the goods, and retaining $250 which had been theretofore paid, and by the agreement of Mr. Bowers to pay him $100 more. If you find that has been established by the greater weight of the evidence, then your verdict should be in favor of the plaintiff for $100, with interest from January 1st 1915, to this date, at six per cent. If you find it has not been established by the greater weight of the evidence, then your verdict should be in favor of the plaintiff for $750 with interest from the 20th day of February, 1914, to this 30th day of March, 1917, which counsel says is $137.75. You may retire.

The jury retires.

Exhibit D-1

The Court: Have I covered your requests to charge, Mr. Greenfield?

Mr. Greenfield: Yes, sir.

The Court: Then the requests are withdrawn.

Exhibit P-1 as of March 12, 1917

$1,000.00 Newark, N. J., Nov. 20th 1913.

Three months after date I promise to pay to the order of L. Lorentowitz One Thousand 00/100 Dollars at Newark Trust Co.

Value received

No. Due Feb. 20.

THOMAS T. BOWERS.

L. Lorentowicz,

L. Lawrence & Co.

Exhibit D-1

Law Offices
A. G. NOWAKASKI,
Essex Building,

Newark, N. J., January 23, 1915.

Thomas F. Bowers, Esq.,
22 Clinton Street,
Newark, N. J.

Dear Sir:

Mr. Lorentowicz informs me that you still owe him $100 in the matter of the settlement of the $1,000 note, on which you have made a payment.

I have been instructed to institute proceeding to collect the same if it is not paid by January 29th.

Yours very truly,

A. J. NOWAKASKI.

A. G. N./M. G. K.

Grounds of Appeal

NEW JERSEY COURT OF ERRORS AND APPEALS

ESSEX COUNTY CIRCUIT

LEONARD LORENTOWICZ, Plaintiff-appellant, vs. PHILIP J. BOWERS, Executor of the Estate of Thomas F. Bowers, deceased, Defendant-Respondent.	On Appeal.

To Nicholas La Vecchia and Saul Cohn, Esquires, Attorneys for defendant-Respondent.

SIRS:

PLEASE TAKE NOTICE that the following are the Grounds of Appeal which the plaintiff hereby assigns and upon which he will rely at the hearing.

FIRST: Because the Court admitted the following illegal evidence over the plaintiff's objection, A letter dated January, 1915, sent by one Alfred Nowakowski to Thomas F. Bowers, deceased,

marked Exhibit D-1 and envelope marked Exhibit D-2.

SECOND: Because the court erred in overruling the motion to overrule the defendant's defense and direct a verdict in favor of the plaintiff and against the defendant for the sum of $750, with interest thereon.

THIRD: Because the Court erred in admitting the letter of Alfred Nowakowski marked Exhibit D-1, because there was no evidence that Nowakowski was authorized to write such letter demanding $100 in settlement of claim.

FOURTH: Because there was no evidence in the trial of the cause showing that Nowakowski was ever authorized to accept $100 in settlement of the claim of $750.

FIFTH: Because the Court erred in denying the motion to direct a verdict in favor of the plaintiff against the defendant, by reason that the defendant's testimony shows that there was a failure of consideration for the alleged new contract and the release of surrender of the original contract.

Wm. Greenfield

Attorney for Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

LEONARD LORENTOWICZ, Plaintiff-Appellant, vs. PHILIP J. BOWERS, Administrator of the Estate of Thomas F. Bowers, deceased, Respondent.	Action at law. On Appeal from the Essex County Circuit Court.

BRIEF FOR PLAINTIFF-APPELLANT

Facts

This was a suit instituted by Leonard Lorentowicz, plaintiff, against Philip J. Bowers, as Administrator of the Estate of Thomas F. Bowers, deceased, to recover the sum of $750 from the estate, being the balance due on a promissory note dated November 20, 1913, and signed by Thomas F. Bowers (see copy of note on p. 7 of the printed State of the Case. See also copy of account on p. 5 of the printed State of Case).

This note was given in consideration of a certain contract bearing date November 29, 1913 (as shown, Exhibit D-3, at p. 53 of the printed State of the Case). There was $250.00 paid by the defend-

ant, and hence the suit to recover the balance of $750. In the meantime, the said Thomas F. Bowers and Henry H. Rosner, who entered into the contract with the plaintiff, departed their lives.

The defendant never contended that the note was fully paid but put in a defense, that the plaintiff agreed to accept $100 in lieu of the $750, which was contested. There was a judgment in favor of the plaintiff and against the defendant, as Administrator of the Estate of Thomas F. Bowers, deceased, for $118.00, being $100 principal, and interest. The plaintiff appeals from the verdict on exceptions, where the Court refused to strike out the defense and enter judgment for the plaintiff for the full amount, and also on the refusal of the Court to direct a verdict, at the close of the case, in favor of the plaintiff and against the defendant.

POINT ONE

The contention of the plaintiff is, that nowheres in the testimony, is there anything to justify the Court to allow this case to go to the jury. There was no positive testimony adduced on the part of the defendant, that the plaintiff agreed to accept $100, in lieu of the liquidated claim of $750, then due.

On this particular point, I desire to call the Court's attention to the testimony of the defendant's chief witness, Charles Weldon, as appears on page 31 of the printed State of the Case.

> "Q. Try and tell us what was said, the words that were said, and who said it? A.

Mr. Bowers told Mr. Lawrence that there was nothing in the gas saver; Mr. Lawrence stated that if Mr. Bowers had stated this to him at an earlier date, that he would have closed the matter with a Brooklyn concern, that he would have closed it anyhow but his contract with Bowers stood in his way."

Again on the same page, folio 20, he says:

"A. Mr. Bowers said to Mr. Lawrence that he would return all the gas savers, that Mr. Lawrence should retain all the gas savers that he had in his possession, and Mr. Bowers would return any gas savers he had, and Mr. Lawrence could keep the $250 which had been paid on the note, and they would call the matter quits. *Mr. Lawrence was not satisfied with that arrangement.*"

Again on page 33, folio 30, he says:

"Q. Then what was said? A. And Mr. Lawrence said to Mr. Bowers, that—he went again talking about the Brooklyn matter, and Mr. Bowers stated then, he said, 'I will make you a proposition, and it is my last and best proposition, that we will consider this matter, as far as the note is concerned, settled, and I will pay you $100 and you are to retain all the gas savers, and I will leave these with you,' which he had with him, 'which are all I have, and we will call the matter square.' Mr. Lawrence said that he would take the matter up with his counsel and Mr. Bowers and myself left."

See page 47, folio 40:

"Q. Then when was it that he told Mr. Bowers that he would first consult his counsel before he would say anything, before he would release him? A. The last part of the conversation, the final windup; *he didn't say he would release him* when Mr. Bowers made the last proposition, Mr. Bowers made to him was that he was to be released, and he, Bowers, was to pay $100. Then Mr. Lawrence said he would take the matter up with his counsel.

"Q. But he was perfectly willing to release him right there and then, was he? A. Subject to his counsel's approval."

This is the most favorable testimony in favor of the defendant, that there was an accord and satisfaction, that Mr. Lawrence agreed to accept $100 for the $750 due on the note, admitted in the pleadings of the defendant (see Par. 1 of the Defendant's Answer on p. 9 of the printed State of the Case).

On this point counsel desires to call the Court's attention to the case of *Green vs. The Wallis Iron Works, et al.*, 49 N. J. Eq., p. 48. At page 54, Chancellor McGill, says:

"It was thus very plainly stated that the bargain was for the future acceptance of a sum of money which, when paid, would be full satisfaction of the debt, and that such agreement was to be binding upon the creditors upon a specified notice being given. It was not an agreement to substitute a new undertaking for the existing obligation, but an agreement to compromise the existing obligation by accepting a sum which, if paid by a certain time, would sat-

> isfy it. *The old debt was not extinguished by the agreement.* If the money was not paid as agreed, the whole debt could be enforced."

In the case of *Oliver vs. Phelps,* 20 N. J. L., p. 180; at page 188, Hornblower, C. J., says:

> "The difficulty is created in the mind of counsel, by considering an accord and satisfaction as one entire thing. *It is so when executed;* but an accord is one thing and satisfaction or the execution of it is another. An accord executory, that is an agreement that the debtor shall give and that the creditor shall receive a hawk or a horse in satisfaction of the debt, is no bar; but an accord executed, that is the agreement carried into effect, is a complete bar; because the party has accepted the thing, in satisfaction. In this view of the subject, of what importance can it be, when the accord, that is the agreement, to do or give something in satisfaction, was made? I can perceive none; for whether it was preliminary to making the lease, or after the rent became due, it would be equally inoperative; it could not be pleaded or enforced in any way, unless the creditor chose to consummate the agreement by accepting the service or the thing in satisfaction. It is the acceptance in satisfaction and not the time, when the accord or agreement to accept was made, that constitutes the essence and gist of the plea.
>
> "Suppose I owe a man one hundred pounds, for which I am going to give him my bond; but before it is executed, it is

> agreed between us, that if I give him a horse, he shall receive it in full satisfaction of the bond. Now, this agreement can never be pleaded in bar, of an action on the bond. But if I deliver the horse and he accepts it in satisfaction it is a good defense. It is not enough for me, however, to prove that I delivered and he accepted the horse; *I must prove that he accepted it in satisfaction of the bond.*"

Again in the case of *Nassoiy vs. Tomlinson, et al.,* Court of Appeals of New York, 42 N. E. Rep., p. 715, at page 716, Vann, J., says:

> "The question presented by this appeal is, whether the undisputed evidence so conclusively established on accord and satisfaction as to leave no question of fact for the jury upon that subject. An accord and satisfaction requires a new agreement *and the performance thereof.* It must be an executed contract, founded upon a new consideration. If the claim is unliquidated, the acceptance of a part, and an agreement to concel the entire debt furnish a new consideration, which is found in the compromise."

In the case of *Jaffray et al. vs. Davis, et al.,* Court of Appeals of New York, 2nd Div., 26 N. E. Rep., p. 351, at page 352 the Court says.

> "That a creditor can never bind himself by simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such agreement being *nudum pactum,* but, if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that

> additional weight will turn the scale and render the consideration sufficient to support the agreement. That giving further security, for part of a debt, or other security, though for a less sum than the debt, *and acceptance* of it in full of all demands make a valid accord and satisfaction. If a note endorsed by a third party for a less sum then the debt, but in full satisfaction of the debt, *and it is received as such,* the transaction constitutes a good accord and satisfaction, or where by mode or time of part payment, different than that provided for in the contract, a new benefit is or may be conferred, or a burden imposed, a new consideration arises, out of the transaction, and gives validity to the agreement of the creditor.''

It seems to counsel in view of the authorities above cited, and in view of the meager evidence adduced on the part of the said defendant, that there was no cause, or reason for the said plaintiff, Leonard Lorentowicz, agreeing to accept the $100 in payment of the liquidated claim of $750, then due to him, as admitted in the pleadings by the defendant, without any consideration, or reason for the said plaintiff to lose $650. Counsel cannot perceive on what theory was this a question for the jury, but it seems to me that the Court should have granted the motion to strike out the defence and direct a verdict in favor of the plaintiff and against the defendant for the full amount of $750 (see Argument on Motion at pp. 56 and 57 of the printed State of the Case).

What reason did Mr. Lorentowicz have to waive $650.00 on the liquidated debt of the defendant,

then due and owing, and accept $100.00 in the place and stead of the $750? This is beyond the comprehension of counsel, unless Mr. Lorentowicz can be considered one of the stupid and ignorant business men of the City of Newark, or that he felt charitably inclined towards Mr. Bowers.

Again I desire to call the Court's attention to the fact, that the contract, as relied upon by the learned Judge Dungan in his charge to the jury, was in the possession of the defendant and not in the possession of the plaintiff. Mr. Bowers and Mr. Rosner were named in and were the parties who executed the said contract, as the party of the second part. There was no evidence adduced on the part of the defendant that the contract was re-assigned; that Mr. Rosner or his estate, had surrendered his or their interest in the contract; or that Mr. Bowers or his estate had surrendered his or their interest in the contract or in the patent rights secured in that contract (see Contract, Exhibit D-3, p. 53 of the printed State of the Case). There was a total, absolute failure of consideration for the alleged new contract or agreement, which the defendant attempted to show, that the plaintiff agreed to accept the $100 in lieu of the liquidated claim of $750 then due and owing from the defendant (as admitted to be due and owing by the defendant's counsel in the answer filed (see Amended Answer on p. 15 of the printed State of the Case).

In the case of *Bandman vs. Finn,* 78 N. E. Rep., p. 175 (Court of Appeals of N. Y.), the Court says, at page 176:

> "Doubtless the general rule is that an executory agreement for accord without satisfaction made under it does not bar a

> cause of action, and that tender of performance is insufficient for that purpose."

In the case of *Chicora Fertilizer Co. vs. Dunan, et al.* (Court of Appeals of Md.), 46 Atl. Rep., p. 347, at page 350, it is said:

> "It required Dunan to pay his indebtedness several months before it was due, and it gave to the Chicora Co. the advantage of receiving the amount agreed to be paid considerably in advance of the maturity of the debt, and enabled it to receive in cash and property what it consented to accept without being obliged to wait under the original contract."

In that case, it is true that there was a good consideration, the defendant was to receive money before the maturity and receive additional security, but in the case at bar, the debt was past due, and payment of the same was demanded repeatedly. The said Thomas F. Bowers had agreed to pay it (as shown by the testimony of Mr. Weldon) but he did not pay it. He never paid the $100; never re-assigned the agreement or contract. What consideration is there for Mr. Lawrence to waive the $650 and interest? Counsel for the plaintiff conceives none. It therefore seems to counsel that the Court should have overruled the defense and directed a verdict in favor of the plaintiff.

In the case of *Hyde vs. Boorman,* 41 U. S. Rep., p. 167, Story, J., says at page 174:

> "On the breach of any obligation to do or not to do, the other party in whose favor the obligation is contracted, is entitled either to damages, or, in cases which per-

> mit it, to specific performance of the contract at his option or he may require the dissolution of the contract. But nowhere provides that the party in default has asked for, or would be entitled to, a dissolution of the contract. That would enable the party committing the default to avail himself of his own wrong."

In the case at bar, Bowers offered to pay the sum of $100, as testified to by Mr. Weldon. Has he paid it? Did he ever make a tender to pay it, although even a tender is not sufficient, as cited in the above authorities. He did not even tender to pay this $100. There was not even a tender made by the Administrator of the Estate of Mr. Bowers to fulfill the alleged new contract or agreement entered into by Mr. Bowers and Mr. Lorentowicz, as testified to by Mr. Weldon. There is no evidence to show that the defendant was ready and willing to perform the alleged new contract and that the plaintiff refused to accept, before suit was instituted. It, therefore, seems to me that the Court has erred in refusing to overrule the defense and direct a verdict in favor of the plaintiff.

POINT TWO

Was there a novation of the old contract in the alleged new contract, to accept $100 in payment of the $750?

On this point I desire to call the Court's attention to the case of *Huger vs. Cunningham,* 126 Georgia, 684, 56 S. E. Rep., page 64, where it is said:

> "If the obligation sought to be extin-

guished arises from contract, it requires the substitution of a new contract in place of the old one."

In *Kromer vs. Heim,* 75 N. Y. Rep., p. 574. At page 576, Andrews, J., citing from *Blackstone,* says:

> "Accord is a satisfaction agreed upon between the party injuring and the party injured; which *when performed,* is a bar to all action upon this account. An accord executory without performance accepted is no bar; *and tender of performance is insufficient.* So also accord *with part execution cannot be pleaded* in satisfaction, and every accord ought to be full, perfect and complete; for if divers things are to be done and performed by the accord, the performance of part is not sufficient, but all ought to be performed. The rule that a promise to do another thing is not a satisfaction, is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty, and the agreement is based upon a good consideration, and is accepted in satisfaction, then it operates as such, and bars the action."

There was no substituted contract or agreement in the case at bar. No performance of the alleged new contract, no tender of performance, though tender is not sufficient, as stated by the learned Justice Andrews, in the above cited case, at page 577:

> "The doctrine which has sometimes been asserted that mutual promises which give

> a right of action may operate and are good, as an accord and satisfaction of a prior obligation, must, in this State, be taken with the qualification that the intent was to accept the new promise, as a satisfaction of the prior obligation. *Where the performance* of the new promise was the thing to be received in satisfaction, *then, until performance, there is not complete accord; and the original obligation remains in force.*"

In the case at bar, as testified to by Mr. Weldon, the witness upon which the defendant relied, Mr. Lorentowicz had not agreed to accept nor did he say that he would accept $100 in full satisfaction of the indebtedness of $750. He said that he would consult his counsel. Therefore, in order to execute the alleged new contract the payment of $100 was necessary and the plaintiff should have accepted the same. Neither of the conditions were performed and neither Mr. Bowers nor his estate even offered to perform the conditions of the said alleged new contract.

In *29 Cyc.*, at page 1134:

> "If the first debt does not depend on any condition, but the second agreement, intended as a novation, is conditional, the novation can only take effect by the performance of the condition before the debt is extinct. Therefore a novation will be prevented from taking place, not only by failure of the condition, but also by the extinction of the original debt before the condition is performed."

Assuming that Mr. Lorentowicz agreed to accept $100 in settlement of the $750, then a part of

the principal, then such an agreement by way of compromise, is *nudum pactum.*

See case of *Daniels vs. Hatch et als.,* 21 N. J. L., p. 391 (Supreme Court). At page 392, the Chief Justice says:

> "The question raised, and very elaborately argued on the briefs of counsel in this case, is, whether a parol agreement by a creditor to accept from his debtor by way of compromise less than is due, is a discharge or satisfaction of the original debt, or may be set up in bar as an accord and satisfaction of the whole claim. It would seem to be well settled by authority, that such an agreement is *nudum pactum* and void, and although payment of the sum agreed upon by way of composition is tendered, or actually received, it is no discharge of the original debt."

See case of *Line & Nelson vs Nelson & Smalley,* 38 N. J. L., p. 358.

Counsel also desires to call the Court's attention, on the question of novation, to the case of *Cook vs. McAdoo,* New Jersey Court of Errors and Appeals, 85 N. J. L., p. 692. At page 695, Kalisch, J., says:

> "What has been said regarding the defence of accord and satisfaction is equally applicable to that of novation, which is a species of accord and satisfaction. The principal distinguishing feature between them is that a novation implies the extinguishment of an existing debt or obligation, by the parties thereto, and its transition into a new existence between the same or different parties, whereas, an accord and

satisfaction relates solely to the extinguishment of the debt or obligation. *Every novation embraces necessarily, an accord and satisfaction,* but the converse of this proposition is not true.

"Now, in the case *sub judice* the appellant claims, because he had on several occasions told the plaintiff that he was prepared to deliver to him a single note for the various separate notes, and received the replies that the notes were in a safety-deposit box in the City of Paterson, and that he, the plaintiff, would get them for him, that this was tantamount to an execution of the terms of the agreement and equivalent to an accord and satisfaction or a novation. But for the reasons already stated this is not so. The appellant, in fact, never made a tender of any note to the plaintiff. It was the duty of the appellant, if he desired the extension of time, to seek the plaintiff and offer the single note in substitution, and this he never did. For the legal rule is well settled that if an agreement intended as a novation *is conditional,* the novation can only take effect by performance of the condition before the debt is extinct."

It seems to counsel that the case above cited is precisely in point with the case at bar. It was the duty of the defendant to pay the $100, if he intended to extinguish the old obligation. It was the duty of the defendant to surrender the contract. Hence his failure to do so, left something for the defendant to perform to complete the alleged novation or the alleged accord and satisfaction, which the defendant failed and neglected to do. Hence the plaintiff

could resort to his original contract, namely, the admitted liquidated liability on the part of the said defendant to the plaintiff at bar, as admitted in the original answer as well as the amended answer filed by the defendant (see pp. 5 and 9 of the printed State of the Case).

Therefore, counsel contends that the Court should have overruled the defense and directed a verdict in favor of the plaintiff, as per the motions when the case was closed. Counsel moved for the direction of a verdict in favor of the plaintiff and against the defendant on the same grounds, *and that motion should have prevailed.*

POINT THREE

The next question is, has the Court erred in admitting the letter sent by A. Nowakoski to Mr. Bowers (as marked Exhibit D-1, at p. 84 of the printed State of the Case, fol. 30)?

It is a well established principle of law, that an agent, particularly a lawyer, cannot bind his principal unless he was specifically authorized so to do.

In this case there is absolutely no evidence to show that Mr. Nowakoski was authorized to write the letter as marked Exhibit D-1, and the plaintiff cannot be bound by the alleged letter, written by counsel, without showing his authority on that particular subject-matter.

On this point see case of *Proctor vs. Old Colony R. R. Co.*, 28 N. E. Rep. (Mass.), page 13.

In that case there was an offer made to show a conversation had between the plaintiff's representative and Judge Harriman, counsel for the defendant Railroad Company, that the officials of

the Railroad Company referred the plaintiff to Judge Harriman. The Court says at page 14, Allen, C. J.:

> "The plaintiff in putting in his case in chief, offered to show certain statements by judge Harriman as the result of an examination of the premises made by him. This evidence was properly excluded. It would not follow from the plaintiff's offer of proof that Judge Harriman was referred to in such a way as to constitute him an agent of the defendant, with authority to make admissions and promises to the plaintiff."

No such authority was given to Mr. Nowakoski, by the plaintiff, in the case at bar, and there is no evidence to show any such authority. Mr. Weldon, the defendant's chief witness, testified, that Mr. Lawrence said that he would consult his counsel and let Mr. Bowers know.

Again in the case of *Ohio & M. Rwy. Co. vs. Levy,* 32 N. E. Rep. (Ind.), on page 815, they attempted to offer in evidence a conversation had between Lawyer Beecher and Cope, Beecher representing the Railroad Company, having made certain admissions to Mr. Cope, who was a witness for the plaintiff.

Elliott, J., says:

> "The appellee was permitted to prove by Mr. Cope who had been the Mayor of the City of North Vernon, declarations and admissions made by Mr. Beecher, the general solicitor of the appellant; and of the ruling admitting this testimony, complaint is made by the appellant's counsel. It seems very clear to us

> that the legal advisor or general counsel of a railway company had no authority, by virtue of his general employment, to bind the company by declarations or admissions outside of the business of the law department. Unless it is appropriately shown that he is invested with special or general authority concerning matters outside of the law department, the scope of his authority is restricted to that department. Certainly a natural person engaged in conducting a railway or any other business could not be bound by the admissions of a lawyer to whom he had intrusted his legal affairs, and there is no conceivable reason why the same rule should not apply to a corporation. There is no evidence tending to prove that Mr. Beecher was invested with authority concerning the use and occupancy of the street in which the excavation was made."

It seems to counsel that this is precisely the same situation as in the case at bar. There was no authority given to Mr. Nowakoski to write the letter to the defendant; there was no evidence adduced to show that he had the authority to write such a letter (see Exhibit D-1, p. 84 of the printed State of the Case), to bind the plaintiff to accept $100 in settlement of the $750. Hence it seems to counsel that it is a reversible error in admitting the letter in evidence, as marked Exhibit D-1.

It is therefore respectfully submitted, on the authorities above cited, from our own State and from foreign States, that the motion to strike out the defendant's defence and the motion to direct a verdict in favor of the plaintiff, should have prevailed (see pp. 56 and 57 of the printed State of

the Case). And the Court having admitted the said letter in evidence, and having refused to overrule the defence and direct a verdict in favor of the plaintiff, on both these grounds, the judgment should be reversed and a new trial granted.

Respectfully submitted,

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with Plaintiff-Appellant.

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New Jersey Court of Errors and Appeals

LEONARD LORENTOWICZ, *Plaintiff,* *vs.* PHILIP J. BOWERS, Administrator of the ESTATE OF THOMAS F. BOWERS, Deceased, *Defendant.*	*Action at Law.* *On Appeal from the Essex County Circuit Court.*

Brief for Defendant-Appellee

Facts

This suit was instituted by the plaintiff against the defendant to recover the sum of $750.00, the balance due on the note dated November 20th, 1913 (see copy of note on page 7 of the State of Case). The defense was that in December, 1914, plaintiff agreed with the defendant that the contract between them, dated November 29th, 1913, which contract was the consideration for the above mentioned note, should be considered cancelled; "that the plaintiff should retain the sum of $250.00 paid on account of the said note, which was made, executed and delivered by the said Thomas F. Bowers in special consideration of the making of the said agreement, and that the said Thomas F. Bowers should deliver up to the plaintiff a certain number of the said articles then in the possession of the said Thomas F. Bowers, and it was thereupon further agreed that the only sum remaining due from Thomas F. Bowers to the plaintiff would be the sum of one hundred dollars." (See Amended Answer, page 16 of the State of the Case.)

Point One

THE TESTIMONY CLEARLY ESTABLISHED THE AGREEMENT SET FORTH IN THE AMENDED ANSWER, BY VIRTUE OF WHICH AGREEMENT THE PARTIES AGREED TO EXTINGUISH THE OLD CONTRACT AND THE NOTE GIVEN PURSUANT THERETO, AND SUBSTITUTED A NEW AGREEMENT AS SET FORTH IN THE AMENDED ANSWER.

The brief of the appellant calls attention (see pages 2 and 3 of appellant's brief), to certain testimony of Mr. Weldon on pages 31 and 33 of the State of the Case.

The appellant has, however, failed to call attention of the court to the following testimony given by Mr. Weldon, by which the witness unequivocally, both on direct and cross examination, sets up a state of facts from which springs the legal principle of novation.

(See page 32, folio 40 of State of Case.)

> "A Mr. Bowers stated to Mr. Lawrence in addition to the $250.00 which he had paid on account of this note, that he had been out to a great deal of expense in investigating the gas saver, and going to different people who would use it, and carfares, and other items; stated he had suffered loss enough, that he would not pay any more than the $250.00; that if that was not acceptable to Mr. Lawrence, then he would start a suit to recover the $250.00, and damages in addition.
>
> "Q Did he state why? A Because the gas saver was not as represented."

(See page 36, folio 20 of State of Case.)

> "Q Just state what he said, not what he

agreed. A Mr. Lawrence said he would drop the suit for the balance due on the thousand dollar note, and would enter into a new agreement with Mr. Bowers to pay him $100.00.

"Q Say that last thing again; who was going to pay him? A Mr. Bowers to pay Lawrence $100.00 and the return of all the gas savers, and Mr. Lawrence to keep all parts of the savers which he had, or in process of manufacture."

Again the same witness said, on cross examination (see page 43, folio 30 to 40 of State of Case and on page 44, folio 10 of the State of the Case).

"Q Now, you went away after that, did you? A Mr. Bowers and I went away together.

"Q At that time, Mr. Weldon, the final arrangement was there was no final agreement to adjust that matter, was there? A I should say yes, there was.

"Q Didn't you testify a moment ago that Mr. Lawrence said that he would take up this matter with his lawyer? A That was the arrangement.

"Q Well, was it finally settled to wind the whole thing up in December, 1914, when this conversation took place? A Subject to Mr. Nowakoski's approval, yes.

"Q Then there was no final settlement? A I should say there was; I took it for granted there was.

"Q You took it for granted? A So did Mr. Lawrence."

Again the same witness said on cross examination (see page 47, folio 30 of State of Case).

"Q Do you know the difference between having a concern ready and willing to take up

or, that he did have a concern who was ready and willing to take up? A I understood—

"Q Do you know the difference? A Certainly.

"Q Did he say that he was then willing to release him right there and then at that conversation? A Before they got—

"Q Did he say that? A Before they got through, yes."

(See page 48, folio 10 of State of Case.)

"Q But he was perfectly willing to release him right there and then, was he? A Subject to his counsel's approval."

(See page 49, folio 10 of State of Case.)

"Q At this conversation was there any definite—was there anything said with reference to a definite date of paying the $100? A No.

"Q And did you call on Mr. Nowakoski subsequent to the date, subsequent to January 23rd, 1915? A Well, yes, very close to that time, Mr. Cohn."

The testimony clearly presents for the determination of the jury the question as to whether there was a novation. The novation of the original debt was proven to the satisfaction of the jury by the defendant, on the basis of testimony that the contract was agreed to be cancelled, the note delivered up, the gas saving apparatus in the hands of Mr. Bowers redelivered and a new liability of $100.00 from Bowers to the plaintiff created. The agreement to pay the $100.00 was not of such nature as engrafted upon the arrangement between the said Bowers and Lorentowicz a conditional novation, which was the situation set forth in *Cooke* vs. *McAdoo,* 90 Atl., Rep. on page 302, because the arrangement was, as testified to by Mr. Weldon (see reference *supra* to excerpt of testimony from page 36 of the State of the Case).

"That Mr. Lawrence (Lorentowicz) said that he would drop the suit for the balance due on the one thousand dollar note, and would enter into a new agreement with Mr. Bowers to pay him $100.00."

That the parties intended to cancel the old contract is evident from the return by Mr. Bowers of the appliances in his hands, and from the further fact that the relationship between the parties was absolutely and permanently cut off, by the absence of all manufacture of the article for Mr. Bowers by the plaintiff or the ordering by the defendant of any of the apparatus for distribution, pursuant to the nature of the transaction and the purposes of the original agreement. Mr. Schick, who was the bookkeeper for the plaintiff at the time of the agreement of novation in December, 1914, testified on direct examination (see page 71, State of the Case, folio 30 to 40), that the plaintiff had manufactured gas saving attachments for the orders of Mr. Bowers, to be called for by him and that these orders were given after the date of the agreement of novation. On cross examination, this witness showed that he was in error by the following testimony. (See page 75, folio 10 to 20 of State of Case.)

"Q Then your testimony that you gave on Mr. Greenfield's examination, when you said they were ordered by Mr. Bowers subsequent to this conversation in December, 1914, was incorrect? A I answered to the best of my ability.

"Q Was it correct or incorrect? A I told him in the examination that they were ordered exactly after that time or before."

The plaintiff had it within his power, by introduction of the order book and sales book which Mr. Schick testified were kept by him, to prove that Mr.

Bowers ordered gas saving attachments subsequent to December, 1914, which would have been an insuperable evidence that the old agreement was not extinguished. This the plaintiff could not do except for a lame attempt on the part of Mr. Schick, which subsequently proved to have no foundation. It will be noted also that in the testimony of Mr. Weldon (see page 33, folio 10 of State of Case), that Mr. Bowers, in the conversation which predicated the novation, alleged fraud in the original contract, because the apparatus had failed to carry out the representations made by the plaintiff and it is significant that, although the son of the plaintiff testifies to conversations in December, 1914, between Bowers and the plaintiff, no denial is made of the fact that Mr. Bowers took this attitude. The whole relationship between Bowers and the plaintiff was therefore a matter of dispute and the case at bar is therefore similar to the state of facts in *Morecraft* vs. *Allen,* 75 Atl., Rep. 920, in which it was said by Justice Minturn (see bottom of page 921):

> "The effect of the testimony in favor of the plaintiff led to the conclusion that the parties recognized an existing legal obligation, disputable in amount, which would require both computation, delay, and perhaps protracted discussion *pro* and *con* to reduce to a financial certainty; that they met and settled their difference by adjusting the indebtedness of one to the other at the sum of $500.00, which the debtor then and there agreed to pay, and took steps at once to make her agreement effectual. This agreement, in legal parlance, became novated or substituted for the prior arrangement between the parties, and the statute of limitations commenced to run only from the inception of the agreement."

That an agreement of novation is a jury question in the absence of ambiguity in the terms of the new agreement, is settled by this case. (See *Ibid.* at top of page 922.)

The failure to pay the $100.00 provided for in the novation was justifiable. The uncontradicted testimony of Mr. Weldon (see page 49, near folio 20 of the State of Case), was to the effect that no definite time was fixed for the payment of the $100.00.

It will be noted that the letter dated January 23rd, 1915, from Mr. Nowakoski was received but a short time prior to the sudden death of Mr. Bowers on February 9th, 1915, and that Philip J. Bowers was thereupon appointed administrator; and that the plaintiff then proceeded to file a proof of claim with the administrator for the full amount of $750.00 and interest, which was in violation of the agreement which the jury found existed; that the administrator, being in possession of the letter of Mr. Nowakowski, stating $100.00 only to be due, was absolutely justified in not tendering the $100.00 balance, assuming that, in the words of Justice Kalisch, in *Cooke* vs. *McAdoo,* that there was a conditional novation and the defendant was obliged to see that the payment was made. The defendant was certainly absolved from this obligation, upon the filing with him of a sworn proof of claim by the plaintiff in which a false demand was made and which claim was inconsistent with the written statement of the plaintiff through his agent of the acknowledged liability of Mr. Bowers to him.

Point Two

THE COURT WAS NOT IN ERROR IN ADMITTING INTO EVIDENCE THE LETTER SENT BY MR. NOWAKOWSKI, FORMER ATTORNEY OF THE PLAINTIFF, TO MR. THOMAS F. BOWERS (marked Exhibit "D. 1" at page 84 of the State of the Case, folio 30).

It will be remembered that Mr. Weldon stated in his testimony (see State of Case, on page 34, folio 30 to 40), as follows:

> "A Well, the way Mr. Lawrence stated it was that the matter was in his counsel's hands, that he did not want to do anything without the—
>
> *"By the Court.*
>
> "Q You say the way he stated it, are you stating what Mr. Lawrence said? A As best I remember it.
>
> "Q All right, state what Mr. Lawrence stated. A Mr. Lawrence stated that he had placed the matter in his counsel's hands for suit on the note, and he didn't want to do anything without consulting his counsel, and that he would talk with Mr. Nowakoski, that Mr. Bowers would receive word from Mr. Nowakoski, who had the matter in hand."

Mr. Nowakowski was placed on the stand to show the reasons for writing the letter (see his testimony on page 54, folio 10, supported by his testimony on cross examination on page 55, folio 10 to 20 of State of Case).

The declaration by the plaintiff to Mr. Bowers, delegating to his counsel Mr. Nowakowski the power to speak for him in the transaction, constituted a removal of the privilege to which the plaintiff would otherwise have been entitled. It is this dele-

gated power or authority from the client to his counsel which constitutes a well established exception in the law of the privilege of clients to seal an attorney's lips as to confidential communication. In *Galle* vs. *Tode,* 26 New York Supplement, 637, the principle was illustrated and it was upon this theory the court admitted the evidence.

It is contended by the appellant in his brief on page 17.

> "That there was no authority given to Mr. Nowakowski to write the letter to the defendant; there was no evidence adduced to show that he had authority to write such a letter. * * * "

The testimony of Mr. Nowakowski plainly establishes his authority for the purpose and legally predicates the admissibility of the evidence.

Respectfully submitted,

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