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Service Notice

THE STATE OF NEW JERSEY,
TO FREDERICK JAY.

(L. S.)

You are summoned to answer the annexed complaint of Julius G. Fabry and Edward W. Spector in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

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WITNESS, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this 14th day of October, nineteen hundred and twenty-six.

20

EDWARD J. KELLEHER,
Clerk.

KOEHLER & AUGENBLICK,
Attorneys.

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Complaint

NEW JERSEY SUPREME COURT
ESSEX COUNTY

10	JULIUS G. FABRY and EDWARD W. SPECTOR, <i>Plaintiffs,</i>	}	Action at Law
	—vs— FREDERICK JAY, <i>Defendant.</i>		COMPLAINT

20 The plaintiff, Edward W. Spector, residing in the City of Newark, in the County of Essex and State of New Jersey, and the plaintiff Julius G. Fabry, residing in the Boro of Bradley Beach, in the County of Monmouth, and State of New Jersey, say:—

1. At the time hereinafter mentioned, the defendant Frederick Jay was and still is a duly licensed practicing attorney and counsellor at law of the State of New Jersey.

30 2. On or about the 16th day of March, 1926, the plaintiffs, Julius G. Fabry and Edward W. Spector retained the said defendant Frederick Jay to represent them as attorney in a certain realty transaction involving the sale and purchase of certain real estate lying and situated in the Township of Brick, in the County of Ocean and State of New Jersey.

40 3. The said defendant Frederick Jay, attorney at law, negligently and carelessly and without exercising due care, advised, permitted and caused the plaintiffs to take an assignment of a certain contract for the sale and purchase of the lands and premises mentioned aforesaid, which contract is

Complaint

dated September 5th, 1925, made and executed by C. C. Osborn and I. B. Osborn, vendors, and Frank Holzhauser, vendee, and which contract is unenforceable by reason of the facts stated in paragraph four of this complaint.

10 4. The said contract dated September 15th, 1925, made between the aforesaid vendors and the aforesaid vendee, was and still is an unenforceable contract under the laws of the State of New Jersey, in that the signature of Carrie C. Osborn, wife of I. B. Osborn, vendors, is not acknowledged in accordance with the Statute in such cases made and provided.

20 5. That the said contract between the aforesaid vendors and the aforesaid vendee, Frank Holzhauser, was drawn, prepared and drafted by the defendant Frederick Jay, attorney at law of the State of New Jersey.

30 6. That the assignment to the plaintiffs of the aforesaid contract, unacknowledged, was prepared, drawn and drafted by the defendant Frederick Jay, attorney at law of the State of New Jersey, representing the plaintiffs herein, and the said Frederick Jay, attorney of the plaintiffs herein, informed and advised the plaintiffs that the contract assigned by the said Frank Holzhauser was a legal, valid and enforceable contract under the laws of the State of New Jersey.

40 7. That the plaintiffs, relying upon the knowledge, skill and advice and experience of the said Frederick Jay, their attorney, paid unto the said Frank Holzhauser, vendee, the sum of \$2100.00, in cash, in consideration of obtaining said assignment

Complaint

of contract. That the said sum was paid by the plaintiffs in various installments up until the 19th day of May, 1926, on which date the last installment was paid and the assignment delivered.

8. That the said sum of \$2100.00 was turned over and paid by the plaintiffs unto the said Frank Holzhauser and the said plaintiffs, relying upon the advice, skill, representations, experience and legal knowledge of the said Frederick Jay, their hired attorney, believed that the said contract was a valid, legal and enforceable contract under the laws of the State of New Jersey.

9. For said services as above, the plaintiffs paid the defendant Frederick Jay the sum of \$40.00, relying on his legal knowledge, skill, experience, advice and representations.

10. The plaintiffs have made several attempts to obtain a conveyance of the premises mentioned aforesaid in accordance with the terms of the contract entered into between the said Osborne and the said Frank Holzhauser, and assigned to the plaintiffs but the plaintiffs have been unable to and are still unable to obtain title by reason of the fact that the said Carrie C. Osborn, wife of I. B. Osborn, refused and still refuses to convey her dower interest to the said premises. And the said plaintiffs are advised and verily believe that they cannot obtain a marketable title to said premises from the said Carrie C. Osborn and I. B. Osborn for the reason that the signature of said Carrie C. Osborn, wife of the said I. B. Osborn is not acknowledged in accordance with the laws of the State of New Jersey.

11. The plaintiffs have attempted to obtain a re-

Complaint

turn of the said sum of \$2100.00 paid by them as mentioned aforesaid, from the said Osborns and the said Frank Holzhauser, but the said Frank Holzhauser and the said Osborns have refused and still refuse to pay the plaintiffs the said sum.

12. The said plaintiffs have demanded from the defendant Frederick Jay the said sum of \$2100.00 paid by them to the said Frank Holzhauser, but the said defendant Frederick Jay has refused and still refuses to pay the same.

Plaintiffs demand from the defendant the sum of \$2100.00, together with the interest thereon from the 19th day of May, 1926.

KOEHLER & AUGENBLICK,
Attorneys for Plaintiffs.

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Answer

NEW JERSEY SUPREME COURT
ESSEX COUNTY.

10	JULIUS G. FABRY and EDWARD W. SPECTOR, <div style="text-align: right; padding-right: 10px;"><i>Plaintiffs,</i></div>	} Action at Law
	—vs—	
	FREDERICK JAY, <div style="text-align: right; padding-right: 10px;"><i>Defendant.</i></div>	} ANSWER.

The defendant, Frederick Jay, residing in the City of Newark, in the County of Essex and State of New Jersey, answering plaintiffs' complaint, says:

- 20 1. Paragraph 1 is admitted.
2. Paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 are denied.
3. He has no knowledge or information sufficient to form a belief as to the allegations in Paragraph 10, and leaves the said plaintiffs to make due proof thereof.
4. He denies the allegations in Paragraph 11.
- 30 5. He admits the allegations in Paragraph 12, but denies that there is anything due from him to the said plaintiffs, or either of them.

DEFENSES.

By way of separate and distinct defenses to plaintiffs' complaint, this defendant says:

FIRST SEPARATE DEFENSE.

40 He denies that the relation of attorney and clients existed between himself and said plaintiffs, except

Answer

that he was employed by said plaintiffs for the purpose of having prepared and drawn the following papers, to wit: a certain option given to the said plaintiffs by Frank Holzhauer, dated March 16th, 1926; receipt and agreement between said plaintiffs and Said Frank Holzhauer, dated April 2nd, 1926; assignment from said Frank Holzhauer to plaintiff, Edward W. Spector, of all the rights of the said Frank Holzhauer in a certain agreement bearing date October 31st, 1925, between Carrie C. Osborn and I. B. Osborn, and Frank Holzhauer, for certain lands in Brick Township, Ocean County, New Jersey, which assignment is dated May 19th, 1926; a bond and mortgage from plaintiff, Edward W. Spector to Carrie C. Osborn, and miscellaneous receipts, etc., as well also recording the said assignment dated May 19th, 1926, and paying the sum of \$1.50 for its recording in the Clerk's Office of Ocean County, for which the said plaintiffs paid this defendant, the sum of \$40.00, which was a reasonable charge for the same.

SECOND SEPARATE DEFENSE.

The assignment dated May 19th, 1926, referred to in the preceding defense, in which said Frank Holzhauer was the party of the first part, and the said Edward W. Spector was the party of the second part, contained the following clause:

"The party of the second part shall take this assignment to all the equities, rights that exist for and against the party of the first part."

The said plaintiff, Edward W. Spector, therefore, was apprised of any infirmities and omissions, if any, in said agreement between the said Osborns and the said Frank Holzhauer.

Answer

THIRD SEPARATE DEFENSE.

10 Said agreement between said Osborns and said Frank Holzhauser, if not enforceable in equity, is actionable at law, and plaintiffs have a right of action against the said Osbornes for breach of contract.

FOURTH SEPARATE DEFENSE.

Said plaintiffs have not exhausted their remedy against either the said Osborns or the said Frank Holzhauser, all of whom are financially responsible.

FIFTH SEPARATE DEFENSE.

20 Defendant denies any negligence or lack of reasonable skill on his part in any of the transactions between himself and any or either of said plaintiffs.

SIXTH SEPARATE DEFENSE.

Said plaintiff, Julius G. Fabry has no interest in the subject matter of this action, as any and all interest which he had in the Holzhauser transaction, was relinquished by him in favor of the plaintiff, Edward W. Spector.

SEVENTH SEPARATE DEFENSE.

30 Said complaint fails to state a cause of action against said defendant.

NOTICE

Said defendant hereby gives notice that he reserves the right, at or before the trial of the above said cause, to move to strike out the said complaint upon the ground that the same fails to disclose a cause of action against him, the said defendant.

40

BENJAMIN M. WEINBERG,
Attorney of Defendant.

Reply

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

JULIUS G. FABRY and
W. SPECTOR,

Plaintiffs,

—vs—

FREDERECK JAY,

Defendant,

Action at Law 10

REPLY

The plaintiffs, replying to the defenses set up in the answer filed by the defendant in this cause, says:—

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REPLY TO FIRST SEPARATE DEFENSE.

They deny that the defendant was employed by the said plaintiffs for the purpose of having prepared and drawn the instruments set up in the first separate defense of the answer but assert that the defendant was retained by the plaintiffs to represent the plaintiffs as attorney for them in consummating the transaction referred to in the complaint, and admit as attorney for the plaintiffs the defendant prepared the option agreement dated March 16th, 1926, receipt and agreement dated April 22nd, 1926, and the assignment bearing date May 19th, 1926, for all of which services the plaintiffs paid the defendant the sum of Forty (\$40.00) Dollars.

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REPLY TO SECOND SEPARATE DEFENSE

Plaintiffs admit that the assignment contained the provision set forth in the second separate defense, but deny that they were apprised of any infirmities and omissions in the agreement between the Osborns

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Reply

and the said Frank Holzhauser, but on the contrary assert that they were advised by the defendant that the said contract between the Osborns and the said Frank Holzhauser was a legal, valid subsisting and enforceable contract under the laws of the State of New Jersey for the purchase and sale of real estate.

10

REPLY TO THIRD SEPARATE DEFENSE

Plaintiffs have no knowledge as to the alleged rights that they may have as set forth in the third separate defense of the answer.

REPLY TO FOURTH SEPARATE DEFENSE.

Plaintiffs have no knowledge or information sufficient to form a belief as to the financial responsibility of the Osborns or of the said Frank Holzhauser.

20

REPLY TO FIFTH SEPARATE DEFENSE.

Plaintiffs join issue on the fifth separate defense set up in the answer.

REPLY TO SIXTH SEPARATE DEFENSE.

They deny the sixth separate defense.

REPLY TO SEVENTH SEPARATE DEFENSE

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They deny the seventh separate defense.

KOEHLER & AUGENBLICK,
Attorneys of Plaintiffs.

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Rejoinder

NEW JERSEY SUPREME COURT
ESSEX COUNTY.

JULIUS G. FABRY and
EDWARD W. SPECTOR,

Plaintiffs,

—vs—

FREDERICK JAY,

Defendant.

Action at Law

REJOINDER.

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The defendant, by way of rejoinder to the reply of the plaintiffs, filed herein, says:

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He denies each and every allegation in the nature of new matter set forth by the plaintiffs under their reply to defendant's "First and Second Separate Defenses."

BENJAMIN M. WEINBERG,
Attorney of Defendant.

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Amended Complaint

NEW JERSEY SUPREME COURT
ESSEX COUNTY.

10	JULIUS G. FABRY and EDWARD W. SPECTOR, <p style="text-align: right;"><i>Plaintiffs,</i></p> <p style="text-align: center;">—vs—</p> FREDERICK JAY, <p style="text-align: right;"><i>Defendant.</i></p>	} Action at Law } AMENDED } COMPLAINT.
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20 The plaintiff Edward W. Spector, residing in the City of Newark, in the County of Essex and State of New Jersey, and the plaintiff, Julius G. Fabry, residing in the Boro of Bradley Beach, in the County of Monmouth, and State of New Jersey, say:—

FIRST COUNT

1. At the time hereinafter mentioned, the defendant, Frederick Jay was and still is a duly licensed practicing attorney and counsellor at law of the State of New Jersey.
- 30 2. On or about the 16th day of March, 1926, the plaintiffs, Julius G. Fabry and Edward W. Spector retained the same defendant, Frederick Jay to represent them as attorney in a certain realty transaction involving the sale and purchase of certain real estate lying and situated in the Township of Brick, in the County of Ocean and State of New Jersey.
- 40 3. The said defendant Frederick Jay, attorney at law, negligently and carelessly and without ex-

Amended Complaint

ercising due care, advised, permitted and caused the plaintiffs to take an assignment of a certain contract for the sale and purchase of the lands and premises mentioned aforesaid, which contract is dated September 5th, 1925, made and executed by C. C. Osborn and I. B. Osborn, vendors, and Frank Holz-
 10 hauer, vendee, and which contract is unenforcible by reason of the facts stated in paragraph four of this complaint.

4. The said contract dated September 15th, 1925, made between the aforesaid vendors and the aforesaid vendee, was and still is an unenforcible contract under the laws of the State of New Jersey, in that the signature of Carrie C. Osborn, wife of I. B. Osborn, vendors, is not acknowledged in accordance
 20 with the Statute in such cases made and provided.

5. That the said contract between the aforesaid vendors and the aforesaid vendee, Frank Holz-
 hauer, was drawn, prepared and drafted by the defendant, Frederick Jay, attorney at law of the State of New Jersey.

6. That the assignment to the plaintiffs of the aforesaid contract unacknowledged, was prepared,
 30 drawn and drafted by the defendant, Frederick Jay, attorney at law of the State of New Jersey, representing the plaintiffs herein, informed and advised the plaintiffs that the contract assigned by the said Frank Holz-
 hauer was a legal, valid and enforcible contract under the laws of the State of New Jersey.

7. That the plaintiffs, relying upon the knowl-
 edge, skill and advise and experience of the said Frederick Jay, their attorney, paid unto the said Frank Holz-
 40 hauer, vendee, the sum of \$2100.00, in

Amended Complaint

cash, in consideration of obtaining said assignment of contract. That the said sum was paid by the plaintiffs in various installments up until the 19th day of May, 1926, on which date the last installment was paid and the assignment delivered.

10 8. That the said sum of \$2100.00 was turned over and paid by the plaintiffs unto the said Frank Holzhauser and the said plaintiffs, relying upon the advice, skill, representations, experience and legal knowledge of the said Frederick Jay, their hired attorneys, believed that the said contract was a valid, legal and enforceable contract under the laws of the State of New Jersey.

20 9. For the said services as above, the plaintiffs paid the defendant, Frederick Jay, the sum of \$40.00, relying on his legal knowledge, skill, experience, advice and representations.

30 10. The plaintiffs have made several attempts to obtain a conveyance of the premises mentioned aforesaid in accordance with the terms of the contract entered into between the said Osborn and the said Frank Holzhauser, and assigned to the plaintiffs, but the plaintiffs have been unable to and are still
40 unable to obtain title by reason of the fact that the said Carrie C. Osborn, wife of I. B. Osborn, refused and still refuses to convey her dower interest to the said premises. And the said plaintiffs are advised and verily believe that they cannot obtain a marketable title to said premises from the said Carrie C. Osborn and I. B. Osborn for the reason that the signature of the said Carrie C. Osborn, wife of the said I. B. Osborn is not acknowledged in accordance with the laws of the State of New Jersey, and for other reasons known to defendant.

Amended Complaint

11. The plaintiffs have attempted to obtain a return of the said sum of \$2100.00 paid by them as mentioned aforesaid, from the said Osborns and the said Frank Holzhauser, but the said Frank Holzhauser and the said Osborns have refused and still refuse to pay the plaintiffs the said sum. 10

12. The said plaintiffs have demanded from the defendant Frederick Jay the said sum of \$2100.00 paid by them to the said Frank Holzhauser, but the said defendant Frederick Jay has refused and still refuses to pay the same.

SECOND COUNT

1. On or about March 6th, 1926, the defendant induced the plaintiffs to pay to Frank Holzhauser the sum of \$250.00 as a deposit for an option to purchase from the said Frank Holzhauser, a certain contract between Carrie Osborn and I. B. Osborn, her husband for the sale of forty lots for \$20,000.00 situated in Brick Township, Ocean County, N. J. Before the payment of said sum of \$250.00 by the plaintiffs to the said Frank Holzhauser, defendant did represent to the plaintiffs that the said contract between the said Carrie Osborn and I. B. Osborn her husband of one part and the said Frank Holzhauser of the other part, was a good and legal contract binding upon the parties thereto, and enforceable. 20 30

2. Thereafter, on or about April 2, 1926, the defendant did again represent to the plaintiffs that the said contract between the said Osborns and the said Holzhauser whereby the said Holzhauser had agreed to purchase the said forty lots of land, was a good, valid, subsisting and enforceable contract for the purchase and sale of said lots. 40

Amended Complaint

10 3. The defendant is an attorney and counsellor at law of the State of New Jersey and is and was at the times herein referred to, an attorney and counsellor at law of the State of New Jersey, licensed and practicing in the City of Newark, County of Essex and State of New Jersey.

20 4. Plaintiffs had no independent knowledge as to whether or not the said contract was a good, valid, subsisting and enforceable contract for the purchase and sale of said lots and relied upon the representations of the defendant and were because of said representations induced to pay to the said Holzhauser, the sum of \$2100. on account of said assignment of said contract because of the representations aforesaid.

5. The representations aforesaid so made by the defendant, were false and fraudulent and known by him to be false and fraudulent and were made with the intent of deceiving the plaintiffs into taking an assignment of said contract and the defendant well knew that the plaintiffs relied upon the truth of the representations so made by him as aforesaid.

30 6. The said contract was worthless and of no value and is unenforceable. By reason whereof plaintiffs have been damaged in the sum of \$2100.

Judgment will be claimed on both counts in the sum of \$2100 together with interest and costs.

KOEHLER & AUGENBLICK,
Attorneys of Plaintiffs.

Amended Complaint

NEW JERSEY SUPREME COURT
ESSEX COUNTY.

JULIUS G. FABRY and EDWARD W. SPECTOR, <i>Plaintiffs.</i>	}	Action at Law	
—vs—		ANSWER TO SECOND COUNT OF PLAINTIFFS' AMENDED COMPLAINT.	10
FREDERICK JAY, <i>Defendant.</i>			

1. Paragraphs 1 and 2 are denied.

20 2. Defendant admits that he is an attorney at law of the State of New Jersey, and was such at the times referred to in plaintiffs' complaint.

3. Paragraphs 4, 5 and 6 are denied.

SEPARATE DEFENSES.

Defendant repeats all of the defenses heretofore pleaded by him in his answer to the First Count of plaintiffs' original complaint.

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BENJAMIN M. WEINBERG,
Attorney of Defendant.

Notice of Appeal

NEW JERSEY SUPREME COURT
ESSEX COUNTY.

10	JULIUS G. FABRY and EDWARD W. SPECTOR, <i>Plaintiffs-Appellees,</i> —vs— FREDERICK JAY, <i>Defendant-Appellant.</i>	}	Action at Law NOTICE OF APPEAL.
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To: KOEHLER & AUGENBLICK, Attorneys of
the above named plaintiffs-appellees.

20 TAKE NOTICE, that the above named defendant
Frederick Jay, appeals to the Court of Errors and
Appeals in the last resort in all causes in New
Jersey, from the whole of the judgment entered in
the above entitled cause in the New Jersey Supreme
Court, Essex County.

Dated December 5th, 1927.

30 BENJAMIN M. WEINBERG,
Attorney of Defendant.

Service acknowledged December 5th, 1927.

40

Grounds of Appeal

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10	JULIUS G. FABRY and EDWARD W. SPECTOR, <i>Plaintiffs-Appellees,</i> —vs— FREDERICK JAY, <i>Defendant-Appellant.</i>	}	Action at Law GROUNDS OF APPEAL.	10
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The defendant-appellant, as and for his grounds
of appeal from the judgment entered against him in
the above cause, hereby specifies and assigns the
following: 20

1. The Court erroneously declined and refused
to grant defendant's motion for a non-suit, although
regularly moved so to do.

2. The Court erroneously declined and refused
to grant defendant's motion for the direction of a
verdict in favor of said defendant, although reg-
ularly moved so to do. 30

3. The Court erroneously declined and refused
to charge defendant's requests, to wit:

"1. Should the jury find the defendant
negligent and answerable to the plaintiffs or
either of them, the damages to be awarded must
be limited to a nominal sum, and by a ~~normal~~ *nominal*
sum is usually understood the sum of six cents."

"2. No verdict, however, can be rendered 40

Grounds of Appeal

against the defendant unless the jury shall be satisfied by the weight of the evidence that the plaintiffs were misled by information given by the defendant during the course of his engagement or service as attorney for them or either of them."

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"3. Unless the defendant was acting as attorney for the plaintiffs, or either of them, for the particular purpose of advising them as to the contract mentioned, the defendant is entitled to a verdict."

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"4. Assuming that the defendant did tell the plaintiffs, or either of them, that the contract in question was enforceable, the defendant cannot be found guilty of negligence for the reason that the contract mentioned is and was actionable in law."

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"5. If the plaintiffs understood and were informed that they could not get the lots as described in the contract with the Osborns, and took an assignment with the knowledge, and were advised by the defendant, or had independent knowledge that an action of specific performance could not be maintained thereon, the verdict of the jury must be for the defendant."

to all of which the defendant duly excepted.

4. The Court erroneously charged the jury the following propositions:

40 (a) "But unless the land was worth more than \$20,000, of which there is no testimony in this

Grounds of Appeal

case, the most the plaintiffs could recover from the Osborns, would have been the \$600.00, which Mr. Holzhauser has paid to them and which was taken over by the plaintiffs."

(b) "Even if you find that he had been their attorney and that he represented to them, that the contract was a good and enforceable contract, the plaintiffs must go a step further and show that they have lost money because they were negligently advised and represented by Mr. Jay." 10

(c) "First, did Mr. Jay represent the plaintiff?"

(d) "If he did not, if he was negligent and careless to their damage, then they may recover from him such damages as they have sustained by reason of his negligence." 20

to all of which the defendant duly excepted.

Dated: December 12th, 1927.

BENJAMIN M. WEINBERG,
Attorney for Defendant-Appellant.

Service acknowledged Dec. 12, 1927.

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Exhibits

EXHIBIT P-1.

Bradley Beach, N. J., Mar. 16, 1926 No. 1131
The First National Bank
Bradley Beach, N. J.

10 Pay to the
Order of Frank Holzhauser.....\$250.00
Two Hundred and Fifty.....00/100 Dollars

Ellen Fabry

Endorsement:

For deposit on 224 feet on Ocean Front running
to Boulevard, 224 on Boulevard.
Frank Holzhauser
Fred'k Jay.

20

EXHIBIT P-2.

Received from Julius Fabry and Edward Spector
Two Hundred and fifty Dollars (\$250.00) as a de-
posit for an asignment of a contract made by and
between Carrie Osborn and I. B. Osborn, her hus-
band, for the sale of forty lots for Twenty Thousand
Dollars (\$20,000.00), situated in the Township of
Brick, County of Ocean, and State of New Jersey,
to me, Frank Holzhauser, of the City of Newark,
County of Essex and State of New Jersey.

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The time of said option is to be ten days from
the date hereof, at which time the said Julius Fabry
and Edward Spector shall have the right to either
accept or reject the said option and in case of the
rejection of the said option, the said sum of Two
Hundred and Fifty Dollars (\$250.00) paid as de-
posit, shall be returned to the said Julius Fabry and
Edward Spector. If the said assignment is ac-
cepted, then the balance of Twelve Hundred and

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Exhibits

Fifty Dollars (\$1250.00) is to be paid on or before
the expiration of the said option. The privilege
heretofore extended to the said Julius Fabry and
Edward Spector in which they may select the re-
turn of their deposit is only upon the condition that
if the said Frank Holzhauser cannot deliver to the
said Julius Fabry and Edward Spector all the lots
namely from 1 to 40 inclusive.

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It is further agreed that Six Hundred Dollars
(\$600.00), as deposit, given by said Frank Holzhauser
to Carrie Osborn and I. B. Osborn, is to be returned
to the said Frank Holzhauser by the said Julius
Fabry and Edward Spector.

Witness:

FRED'K JAY
Dated: March 16, 1926.

20

FRANK HOLZHAUER
JULIUS G. FABRY.

EXHIBIT P-3.

Newark, N. J., April 2, 1926 No. 1074
NEWARK TRUST COMPANY

Pay to the
Order of Frank Holzhauser.....\$1000.00
One Thousand and 00/100.....Dollars

30

Edward W. Spector.

Endorsement:

Frank Holzhauser
Fred'k Jay.

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Exhibits

Exhibit P-4

Received of Julius Fabry and Edward W. Spector, a further deposit of One Thousand Dollars (\$1,000.), making a total of Twelve Hundred and Fifty Dollars received to date, for an assignment of a certain contract of sale made by and between Carrie Osborn and I. B. Osborn, her husband, and Frank Holzhauser, for the sale of certain lots in Brick Township, Ocean County, New Jersey, it being understood and agreed that the said Frank Holzhauser is to execute an assignment of said contract to the said Julius Fabry and Edward W. Spector for the sum of Fifteen Hundred Dollars, in addition to which the said Julius Fabry and Edward W. Spector are to return to Frank Holzhauser the sum of Six Hundred Dollars paid by him to the said Carrie Osborn and I. B. Osborn as deposit on said lots: leaving a balance due the said Frank Holzhauser of the sum of Eight Hundred Fifty Dollars (\$850) which is to be paid him in cash by said Julius Fabry and Edward W. Spector on or before the third day of May, 1926. Said assignment above mentioned is to be executed upon the payment of the balance due the said Frank Holzhauser.

It is further understood and agreed that the said Julius Fabry and Edward W. Spector are accepting an assignment of said contract under the same terms and condition as are mentioned therein, it being further understood and agreed that upon the failure of the said Julius Fabry and Edward W. Spector to pay the balance due on the date above mentioned, the deposit moneys herein paid to date shall be forfeited by them.

It is further understood and agreed that in the event the said Julius Fabry is unable to carry out

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Exhibits

his part of this agreement, he shall assign all his right, title and interest herein to the said Edward W. Spector and in that event does hereby authorize the said Edward W. Spector to close said title and pay the balance due.

Dated, April 2nd, 1926.

Witness:

Fred'k Jay.

Frank Holzhauser
Julius Fabry
Edward W. Spector

For and in consideration of a further deposit of Two Hundred Dollars (\$200.00) this agreement is hereby extended by mutual consent from the above date herein mentioned to May 18th, 1926, when the assignment is to be made on the terms and conditions as hereinabove stated and that the said Two hundred Dollars (\$200.00) given this day, to be deducted from the purchase price.

Sworn and subscribed)
to before me this 4th)
day of May, 1926.)

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Exhibits

EXHIBIT P-5.

Newark, N. J., May 4, 1926 No. 1101

NEWARK TRUST COMPANY

10 Pay to the
Order of Frederick Jay.....\$200.00
Two Hundred 00/100.....Dollars

EDWARD W. SPECTOR

Endorsement:

Frederick Jay
Fred'k Jay

EXHIBIT P-6.

20 Newark, N. J., May 19, 1926 No. 1114

NEWARK TRUST COMPANY

Pay to the
Order of Fred'k Jay, attorney for
Frank Holzauer.....\$650.00
Six Hundred and Fifty 00/100.....Dollars

30 Edward W. Spector.

Endorsement:

Fred'k Jay, Atty for
Frank Holzauer
Fred'k Jay

40

Exhibits

EXHIBIT P-7.

Newark, N. J., May 19, 1926 No. 1115

NEWARK TRUST COMPANY

Pay to the
Order of Fred'k Jay.....\$40.00
Forty 00/100Dollars

Edward W. Spector.

Endorsement:

Fred'k Jay
Fred'k Jay, Special.

EXHIBIT P-8.

KNOW ALL MEN BY THESE PRESENTS;

That Frank Holzauer, of the City of Newark, in the County of Essex and State of New Jersey, party of the first part, in consideration of the sum of One Dollar and other valuable consideration, to him in hand paid by Edward W. Spector, of the City of Newark, in the County of Essex and State of New Jersey, party of the second part, at or before the sealing and delivery of these presents, receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over and by these presents does grant, bargain, sell, assign, transfer and set over unto the party of the second part, his heirs, or assigns, a certain agreement bearing date of October 31, 1925, between Carrie C. Osborn and I. B. Osborn and Frank Holzauer, for lots No. 1 to No. 40 inclusive, from the Boulevard to the ocean front, situated in the Township of Brick, Ocean County and State of New Jersey.

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Exhibits

The party of the second part shall take this assignment to all the equities, rights that exist for and against the said party of the first part.

10 IN WITNESS WHEREOF, I have hereunto set my hand and seal the 19th day of May, in the year of our Lord One Thousand Nine Hudred and Twenty-Six.

Signed, Sealed and Delivered
in the presence of: FRANK HOLZHAUER
(L. S.)

Fred'y Jay.

20 STATE OF NEW JERSEY, }
COUNTY OF ESSEX } ss.

30 BE IT REMEMBERED that on this 19th day of May, in the year of our Lord, One Thousand Nine Hundred and Twenty-Six, before me the subscriber, a Master in Chancery of New Jersey, personally appeared Frank Holzhauser, who, I am satisfied, is the grantor mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

FRED'K JAY,
A Master in Chancery of
New Jersey.

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Exhibits

EXHIBIT P-9.

Received from Frank Holzhauser, the sum of \$100. as a deposit on lots Nos. 1 to 40 inclusive, from the Boulevard to the ocean front, in the Township of Brick, Ocean County, N. J., an agreement for the sale of said lots to be signed within ten days from the payment of this deposit. The purchase price of said lots shall be the sum of \$20,000. Twenty Thousand Dollars; all further conditions of said sale to be set forth in the said agreement. 10

Dated: September 5th, 1925.

C. C. OSBORN
I. B. OSBORN

Received of Frank Holzhauser, a further deposit of Five Hundred Dollars, making Six Hundred Dollars in all, on the purchase price of Twenty Thousand Dollars for lots situated in Brick Township, Ocean County, New Jersey, title to be closed on or before November 18th, 1925, when the balance of Forty-Four Hundred Dollars (\$4400.) is to be paid in cash, making the entire cash payment of Five Thousand Dollars, and a mortgage to be given for the balance of Fifteen Thousand Dollars. Said mortgage shall contain a clause that upon the sale of each lot the sum of Two Hundred Fifty Dollars is to be paid by the said Frank Holzhauser, for which he is to receive a release of said lot from the mortgage herein mentioned. 20 30

IN WITNESS WHEREOF we have hereunto set our hands and seals this 31st day of October, 1925.

Signed, Sealed and Delivered
in the presence of:

CARRIE C. OSBORN (L. S.)
I. B. OSBORN (L. S.) 40
FRANK HOLZHAUER (L. S.)

Exhibits

EXHIBIT P-10.
Law Offices
Frederick Jay
790 Broad Street
Suite 412-417
Newark, N. J.

10

Telephone: 6554 Market.

March 16, 1926.

Benjamin Pearce, Esq.,
Manasquan, N. J.

My dear sir:

In reply to the many telephone conversations regarding the ground bought by Mr. Holzhauser from Mrs. Osborn and her husband, situated in the Township of Brick, County of Ocean, New Jersey, I wish to state that an agreement was received from Mr. and Mrs. Osborn on September 5, 1925 at which time \$100. was paid as deposit. The agreement stated that we were to get lots 1 to 40 inclusive.

20

On October 31, 1925, a further deposit of \$500. was paid with the same understanding. However, upon making our survey, we find that two lots on the ocean front had been taken out by Mr. and Mrs. Osborn—with whose consent, of course, I do not know.

30

You stated to me over the telephone that there are deeds on record for these two lots which Mr. Osborn had sold to some other party. I do not know when nor to whom, nor does it interest me as we propose to stand by our contract. After searching the records, my people have failed to find any deeds on record for these particular lots.

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Exhibits

While Mr. Holzhauser is a peaceful person and does not like law suits, he has instructed me to state that unless the contract is carried out to the letter within the next few days, such action will have to be taken as will give him all he contracted for with your parties.

10

Awaiting an early reply, I am

Yours very truly,
FRED'K JAY.
B.

FJ.B.

EXHIBIT P-11.

Benj. B. Pearce,
Counsellor at Law

20

Owen C. Pearce,
Attorney at Law

Manasquan, N. J.
Telephone 124.

March 30, 1926.

Mr. Frederick Jay,
790 Broad Street,
Newark, N. J.

Re: Holzhauser—Osborn

30

Dear Sir:

In reply to your letter of March 16, I would advise that Mr. and Mrs. Osborn are ready to carry out their agreement just as made.

I have investigated the statements of your clients to you and find that he has misinformed you as to the true facts. The exact land mentioned in the agreement is still unsold. The two ocean lots re-

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Exhibits

ferred to were sold before Mr. Holzauer bought the remaining lots. Three responsible witnesses have made statements to me to the effect that the sale of these lots was made with his knowledge, in his presence and before his contract. To substantiate these facts we have the statement of the surveyor who was employed by Mr. Holzauer to survey the property which he was about to purchase, and the surveyor, under the instruction of Mr. Holzauer, located two lots as being sold. If he had no knowledge of this sale, how could he so instruct the surveyor? The lots, however, are located northerly fifty feet too far.

The true situation seems to be that Mr. and Mrs. Osborn are willing and able to comply with their part of the contract, while your client is endeavoring to avoid doing so.

The contract was not acknowledged by Mrs. Osborn as a married woman, and could have no standing in court for a specific performance; nor could you recover damages, as no damages could be shown.

I do not think the property could be sold for as much as the present contract price. It might be that I can persuade Mrs. Osborn to return the down payment if your client wishes to rescind the contract, but we have no fear whatever of any litigation which you see fit to bring.

Yours very truly,
BENJ. B. PEARCE.

40

Exhibits

EXHIBIT D-1.

Harry H. Koehler
Harry A. Augenblick

LAW OFFICES OF
KOEHLER & AUGENBLICK
14 Mechanic Street
Newark, N. J.

10

March 16, 1926.

Frederick Jay, Esq.,
Kinney Building,
Newark, N. J.

Dear Sir:

I am advised that a client of yours named Frank Holzauer, and possibly you yourself, are interested in a contract covering property at Sea Bay near Normandy, N. J., wherein parties named Osborns are the owners.

I would appreciate being advised whether there is any difficulty between your client and the Osborn family relative to that title.

I am about to examine another title coming through the same family and preferred to avoid making the examination if there is any reason known to you which would make it ill-advisable for me so to do.

I would appreciate your giving the bear of this letter your answer.

Very truly yours,

H. H. KOEHLER.

Dict. H. H. Koehler
CJ.

40

Rule for Judgment

RULE FOR JUDGMENT

This cause was tried before the Honorable Nelson Y. Dungan, Judge, at the Essex Circuit, with a jury, on October 26th, 1927.

10 The jury rendered a verdict against the defendant and in favor of the plaintiffs for Twenty-One Hundred (\$2100.00) Dollars.

Whereupon it is adjudged that the plaintiffs, Julius G. Fabry and Edward W. Spector, do recover of the said defendant Frederick Jay, the sum of twenty-one hundred dollars damages, together with their costs, which have been taxed at the sum of sixty-two dollars and fifty-eight cents, making in the whole the sum of two thousand, one hundred and sixty-two dollars and fifty eight cents.

Damages...\$2100.00
Costs..... 62.58
20 -----
\$2162.58

Judgment entered October 27, 1927.

30

WM. S. GUMMERE,
C. J.

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Plaintiffs' Witness, Julius G. Fabry, Direct

NEW JERSEY SUPREME COURT
ESSEX CIRCUIT.

Monday, October 25, 1927.

JULIUS G. FABRY and
EDWARD W. SPECTOR,
Plaintiffs,
—vs—
FREDERICK JAY,
Defendant.

10

Action at Law.

Before Hon. Nelson Y. Dungan, J., and a jury. 20

For the plaintiff appears Koehler & Augenblick.

For the defendant appears Benjamin M. Weinberg.

[A jury is called and sworn.]

Mr. Augenblick opens in behalf of plaintiffs.

Mr. Weinberg opens in behalf of defendant.

JULIUS G. FABRY sworn in behalf of plaintiffs.

30

Q Where do you live?

A Avon-by-the-Sea, New Jersey.

Q What is your business?

A Artist.

Q Where is your business?

A Market Street, Newark, New Jersey.

Q Do you know the defendant, Frederick Jay?

A Yes, sir.

Q What is his vocation?

A Lawyer.

40

Plaintiffs' Witness, Julius G. Fabry, Direct

Q When was the first time that you met Mr. Jay?

A About the 16th of March, 1926.

Q What was the occasion of your seeing him?

A I went down to see him about a piece of property that he had a contract to buy down at Brick
10 Township, New Jersey.

MR. WEINBERG. I move that that part of it be stricken out, that he had a contract to buy.

THE COURT. "That he had a contract to buy" will be stricken out.

Q What date was that?

A The 16th of March.

20 Q What year?

A 1926.

Q Did you see him on that date?

A Yes.

Q What did you say to him?

A I said, "Mr. Jay, Mr. Osborn told me that you had a contract to buy a property, some lots down in Ocean County."

Q What did he say?

A He said a client of his by the name of Mr.
30 Holzhauser had.

Q What did you say to him?

A I asked him if he would mind telling me what the contract for the purchase price was, and he said he would, and he said \$20,000, and I said, "Mr. Jay, would you care to sell that contract." He said, "My client would sell that contract." He said, "We have already paid \$2000." I said, "Mr. Jay, is this a good enforceable contract?" And he said, "Absolutely." I said, "Well, Mr. Jay, I would like to
40 have you represent me as my attorney for procuring

Plaintiffs' Witness, Julius G. Fabry, Direct

the assignment of this contract and also make the search for me." He said, "Mr. Fabry, there is a question of two lots on the ocean front. I could get them for you." And I said, Mr. Jay, that makes an entirely different situation."

Q What did you say? 10

A I said, "That is an entirely different aspect on the situation," but after a considerable talk we agreed that he would give me a ten-day option, and that I was to pay him \$250 for that ten day option. If in that time I should decide that I wanted the property with the two ocean lots I should take it and if I didn't want the property without the two ocean lots, he would refund my money.

Q Was Mr. Holzhauser there?

A Yes, sir. 20

Q Was that arrangement satisfactory to Mr. Jay and Mr. Holzhauser?

A Yes, sir.

Q And as a result did you give him a check to Mr. Holzhauser for \$250?

A Yes, sir.

Q (Showing witness paper.) I show you a check and ask you if that is the check you gave him?

A Yes, sir. 30

MR. AUGENBLICK. I offer it in evidence.

MR. WEINBERG. I object to it. It is immaterial.

Q At the time you paid the check did you get Mr. Holzhauser also to sign the option agreement?

A Yes, sir.

Q (Showing witness another paper.) I show you this paper and I am asking you whether or not that is the option agreement that was signed by
40

Plaintiffs' Witness, Julius G. Fabry, Direct

you and Mr. Holzhauser in the presence of Mr. Jay?

A Yes, sir.

MR. AUGENBLICK. I offer that in evidence.

MR. WEINBERG. No objection.

(The paper referred to is marked Ex. P-2.)

10 Q Was anything else said by you and Mr. Jay at that time?

A After I got the option for that \$250 I said to Mr. Jay, "I want you to represent me in getting this option to take care of me." And he said he would, and he said he would make his charges reasonable and he would also make the search for me.

Q Did you see the contract that he had?

A No.

Q Did he show it to you?

20 A No.

Q You just took his word that he had a contract for the sale of this property?

A Yes, sir.

Q And you left it to him?

A Yes, sir.

Q In the option is included the name of Edward W. Spector, a co-plaintiff with you?

A Yes, sir.

30 Q Did you instruct Mr. Jay to insert his name in that option?

A Yes, sir.

Q Was anything else said?

A No.

Q Nothing else was said?

A No.

Q When is the next time that you saw Mr. Jay?

40 A On the 2nd of April, I was on my way up to Mr. Jay's office with Mr. Spector. I had to stop to see Mr. Koehler of the firm of Koehler and Augen-

Plaintiffs' Witness, Julius G. Fabry, Direct

blick on some other business, and I showed Mr. Augenblick the option I had gotten from Mr. Jay, and he told me that everything was—

Objected to.

Q You can't relate any conversation that you had with Mr. Augenblick unless it was in Mr. Jay's presence. You had a conversation with Mr. Augenblick? 10

A Yes.

Q After that conversation did you go to see Mr. Jay?

A Yes, sir.

Q What date was that?

A April 2nd.

Q Who was with you?

A Mr. Spector.

Q When you saw Mr. Jay that day what did you say to him and what did he say to you? 20

A I told Mr. Jay that I had been over to see Mr. Augenblick and I had shown him the option. He said the option was very satisfactory, but felt that there ought to be a provision that in the event that Mr. Holzhauser, for some unknown reason, could not deliver that property, I was to have my money refunded. Mr. Jay carefully read over the papers that Mr. Augenblick gave him to show him and he said, "Look here, gentlemen, if you want me to represent you you cannot consult any other lawyer." I said, "Mr. Jay", I said, "I fell that I want a good enforceable contract." And he said, "Look here, I don't want any instructions from a youngster of a lawyer." I said, "Mr. Jay, I don't want to displease you in any way. I want the contract." And he said, "You leave it to me and I will see that you get a good contract and that you get the property." 30

Q As the result of that conversation did you and 40

Plaintiffs' Witness, Julius G. Fabry, Direct

Mr. Spector advance any further money to Mr. Holz-
hauer?

A Yes, sir, a thousand dollars.

Q (Showing witness paper.) Is this the check
that you gave to Mr. Holzauer?

10 A Yes, sir.

(The check referred to is offered in evidence
and marked Ex. P-3.)

Q At the time that the thousand dollar check was
given to Mr. Holzauer was there an additional
paper prepared by Mr. Jay acknowledging the re-
ceipt of this thousand dollars?

A Yes, sir.

Q (Showing witness another paper.) I show
you a paper dated April 2, 1926, and ask you whether
or not that was the paper which was prepared by
Mr. Jay at that time?

20 A Yes, sir.

(The paper referred to is offered in evidence
and marked Ex. P-4.)

Q At the time the thousand dollars was paid and
this receipt for the thousand dollars was given to
you, was there any conversation between you and
Mr. Jay or between Mr. Spector and Mr. Jay?

A No.

Q None at all?

30 A No.

Q Was there any conversation between Mr.
Spector and Mr. Jay?

A I think there was.

Q Since that date have you seen Mr. Jay?

A No.

Q With reference to this matter?

A No.

*Plaintiffs' Witness, Julius G. Fabry, Cross**Cross Examination by Mr. Weinberg.*

Q Do I understand that the first you knew of
the field respecting the Brick Township lots was
when you received some information from the
Osborns?

A Yes, sir. 10

Q Where did they live?

A Manasquan.

Q Did you go down to see them?

A Yes, I did.

Q About this land?

A About the same land.

Q Did you go down to see them about this land?

A I asked them about it, yes.

Q Did you know at that time that they had made
an agreement to sell these lots up to the forty?

A Yes. 20

Q Where did you receive that information?

A Mr. Osborn.

Q He told you that before this visit to his house?

A At the time.

Q When you went to his home you already knew
about the sale of this land to Holzauer?

A At the time I went there he told me about it.

Q Did you know before you went there?

A No. 30

Q Why did you go there?

A I had other dealings with Mr. Osborn.

Q Were you told all about the nature of the
sale?

A He told me that Mr. Jay had the contract to
purchase those lots.

Q He told you that Mr. Jay had the contract?

A He was Mr. Jay's client.

Q Which one was it?

A He didn't know. He said Mr. Jay. 40

Plaintiffs' Witness, Julius G. Fabry, Cross

Q You don't mean to say that they told you that they sold those lots to Mr. Jay?

A He said he didn't know who bought the land. He said that Mr. Jay had the notes about the contract. He said, "You go up and see Mr. Jay, they have made a contract to buy these lots."

10 Q Did he tell you how much?

A No.

Q Did you ask him?

A No.

Q You were not interested in knowing how much he sold the land for?

A I was interested, but I didn't think it was advisable to ask him.

20 Q You thought it was advisable to go to Mr. Jay and ask him about what his client is paying for the land?

A No.

Q Before you called upon Mr. Jay had you consulted other counsel about this matter, other lots?

A I may have.

Q Don't you think so?

A I don't know.

Q Just think a minute and see if you didn't consult some other person regarding these lots?

A I think I did consult somebody.

30 Q Who?

A Mr. Koehler.

Q Did you refer to the land that the Osborns had sold in this conversation with Mr. Koehler, your attorney?

A That I don't remember.

Q You just told Mr. Koehler that you were interested down in a Brick Township.

A Yes.

40 Q Did Mr. Koehler tell you that he knew that Mr. Jay had a contract on behalf of his client?

Plaintiffs' Witness, Julius G. Fabry, Cross

A No, I told Mr. Koehler that Mr. Jay had.

Q You told Mr. Koehler that you heard that the Osborns sold this land to somebody?

A Yes.

Q Represented by Mr. Jay?

A Yes, sir.

Q Did you tell him anything more about it?

A No.

Q Why did you go to see Mr. Koehler about it?

A In reference to some other property I had bought from Osborns.

Q Mr. Koehler was your attorney at that time, was he?

A Yes, sir.

Q Mr. Koehler gave you a letter of introduction to Mr. Jay?

A I don't remember.

Q (Showing witness paper.) I show you letter dated March 16th, 1926, and ask you if you didn't bring that note to Mr. Jay?

A Yes.

(The paper referred to is marked Ex. D-1 for identification.)

Q Did you give Mr. Koehler the name of Frank Holzhauser as the possible purchaser of this property?

A Yes.

Q From whom?

A Mr. Jay.

Q Had you been to see Mr. Jay before you got that letter from Mr. Koehler?

A Possibly.

Q Everything is possible. Don't you know that the first time you met Mr. Jay you had this letter with you, this letter which is marked?

A I don't know whether I got the information from Mr. Koehler or from Mr. Osborn.

Plaintiffs' Witness, Julius G. Fabry, Cross

Q That is what I asked you a little while ago, whether you had received any information from Mr. Osborn.

A I may have told Mr. Jay or I may have told Mr. Holzhauser.

10 Q Did you see the agreement that Mr. Osborn showed you?

A No.

Q Didn't he show you the memorandum agreement made with Holzhauser?

A No, sir.

Q Didn't you know Mrs. Osborn?

A I knew Mr. Osborn.

Q It was on this occasion that you brought this letter to Mr. Jay that you inquired about the Holzhauser contract?

20 A Yes.

Q You asked Mr. Jay if his client had a contract for the purchase of this land and he told you that he did and had made all the terms concerning the sale of that contract?

A Yes, sir.

Q And you didn't see it?

A No.

Q Was all this done, this money paid, \$250, without Mr. Holzhauser being present?

30 A Mr. Holzhauser was present.

Q You haven't mentioned that. When did Holzhauser come into the scene?

A The day I went over to see Mr. Jay.

Q Do you know how he came to Mr. Jay's office?

A He came in there on other business.

Q How do you know that?

A Mr. Jay told me he expected his client in very shortly.

40 Q After Mr. Holzhauser came in there did you have any talk with him?

Plaintiffs' Witness, Julius G. Fabry, Cross

A Yes, sir.

Q What did you have to say to him?

A I told him I had spoken to Mr. Jay in reference to this property and I would like to get together on the deal if we possibly could.

Q Did you read the terms that Mr. Jay told you? 10

A Yes.

Q Tell us that.

A I told him, I said, "I would like to purchase that property," and we agreed on the price.

Q Tell us how you agreed on the price.

A I said to Mr. Holzhauser, "I understand that you have a contract for the purchase of the same lots down in Ocean County," and he said they had.

Q With whom are you now speaking? 20

A Mr. Holzhauser.

Q This is your conversation with Mr. Holzhauser, is it?

A Yes.

Q Go ahead.

A And he told me the same as Mr. Jay.

Q Don't tell us that.

A I said what the price was and he consulted Mr. Jay if that price would be satisfactory to him, as well as Mr. Holzhauser, and he agreed it was, and relying on Mr. Jay's— 30

MR. WEINGERG. I ask that that be stricken out.

THE COURT. It will be.

Q Give me only the conversation.

A And he told me they had already paid \$600 on the contract, that if I would pay an additional \$1500, making \$2100 in all, they would give me an assignment of that contract. 40

Plaintiffs' Witness, Julius G. Fabry, Cross

Q That is what Holzhauer told you?

A Yes, sir.

Q And that he would give you ten days to make up your mind whether you wanted to go through with the deal?

A Yes, sir.

10 Q And did he tell you the trouble about those two lots?

A Yes, sir.

Q What did he say about that?

A He said two lots had been sold out.

Q Who had sold two lots out?

A The Osborns.

Q He told you that the Osborns had sold two lots?

A Yes, sir.

20 Q What else?

A He said he thought he could get it even if he had to sue for it, it was a good enforceable contract which would bind them down to the two lots.

Q What else?

A And I told him that the price was satisfactory, willing to buy the lots, pay the money—

Q Did you inquire as to the terms of payment?

A He gave us a ten day option.

Q Whom did you inquire of as to what manner

30 Holzhauer was to pay to the Osborns, I mean cash or mortgage?

A There was a small mortgage that Osborns was to take back.

Q Did he tell you how much it was?

A I don't think so, at the time.

Q You don't mean to tell us that you entered into an agreement without seeing the original contract or agreement?

40 A I saw no original contract or agreement at all.

Plaintiffs' Witness, Julius G. Fabry, Cross

Q Mr. Holzhauer told you that you wouldn't get those two lots, didn't he?

A He didn't.

Q You didn't say to him about that when he said you couldn't get them?

A He said they would try to get it.

Q He said he would try. How was he going to get them if he sold you his contract? 10

A Because he said he had a contract with Osborn whereby he could force him.

Q He was selling his contract to you?

A Yes, sir.

Q And all his rights?

A Yes, sir.

Q And you were to try to get them if you could?

A Yes, sir. He said they would fight Osborn if they had to in order to get those two lots. 20

Q You agreed to give him \$1500 profit on the contract?

A Yes, sir.

Q In the ten days granted you in the option you did not decide not to take the property, you did not decide the option to rescind and get your money back?

A No.

Q And instead you went there and told them you did not have the money and you couldn't make good the balance of the purchase price of that contract, didn't you? 30

A I told him I didn't have the money we owed him.

Q And you asked him for further time in which to make the payments?

A I think we might have asked for a little extension. I am not sure.

Q As a matter of fact, the thousand dollars, the 40

Plaintiffs' Witness, Julius G. Fabry, Cross

second payment, wasn't made by you at all, it was made by your partner Spector?

A Yes, sir.

Q His money and his check?

A Yes, sir.

10 Q And that was after the ten days had expired?

A I don't think it was. It might have been.

Q I think you said it was?

A There might have been a little extension.

Q All the money you had into it was \$250?

A Yes, sir.

Q The rest of the deal then was carried on by Spector and you stepped out of the picture?

A Yes, sir.

20 Q What was it you said you brought to Mr. Jay on April 2nd, some sort of a paper? Where is that paper?

A I don't know.

Q When you spoke to Mr. Jay on March 16th you said you told him that you wanted him to represent you; is that so?

A Yes, sir.

Q Then after that on April 2nd you brought him some sort of paper from the same attorney that you had first consulted, Koehler and Augenblick?

A Yes, sir.

30 Q From March 6th to April 2nd you were consulting Koehler & Augenblick in this transaction?

A On other business.

Q On this particular business, weren't you?

A No.

Q Didn't you ask their advice in this matter?

A I have asked their advice.

Q Free?

A Yes, sir.

40 Q And as your attorney they gave you the advice?

Plaintiffs' Witness, Edward W. Spector, Direct

A Yes, sir.

Q So that they were your attorneys up to that time, weren't they, in this matter?

A Yes, sir.

Q Up to March 16th Mr. Jay wasn't your attorney in this transaction?

A We asked Mr. Jay to represent us. 10

Q He was not your attorney on that day?

A He was our attorney.

Q You just told us after April 2nd Koehler & Augenblick.

A From March 16th.

Q Up to April 2nd, you told us that?

A Yes, sir.

Q And on April 2nd, when Mr. Spector paid the thousand dollars, you were through?

A Yes, sir. 20

Q And you were not present when the final assignment was drawn?

A No, sir.

EDWARD W. SPECTOR sworn in behalf of plaintiffs.

Direct Examination by Mr. Augenblick.

Q Where do you live?

A 287 Renner Avenue, Newark. 30

Q What is your business?

A Commercial artist.

Q Do you know Frederick Jay, the defendant?

A I do.

Q When is the first time you met him?

A On April 2, 1926.

Q Where?

A In his offices, in the Kinney Building.

Q Who was with you at the time?

A Mr. Fabry was with me at that time. 40

Plaintiffs' Witness, Edward W. Spector, Direct

Q What was the occasion of seeing Mr. Jay at that time?

A Mr. Fabry and I was to buy these forty lots down in Ocean County, presented the price, and we had gone to Mr. Jay to give an additional thousand dollars on the purchase of this contract. We had gone first to Koehler & Augenblick. Mr. Fabry had some business with Mr. Koehler and we saw Mr. Augenblick and he gave us a paper advising us—

Objected to.

Q He gave you a paper?

A He gave us a paper.

Q Then what did you see him do?

A We took this paper to Mr. Jay and Mr. Jay read the paper and flew up in the air, he got very excited. He said that on a small deal like this why couldn't he take care of us and not have any interference by any other lawyers, that he would take care of us on this deal. We told him that Fabry was the spokesman, and he told him that he didn't want anybody to interfere, that everything would be all right, and he said that he would, he made out a receipt for the thousand dollars and he left that day. Mr. Fabry made it clear that Mr. Jay was to take care of us.

Q What did Mr. Fabry say about making it clear, just tell us what was said.

A Mr. Fabry says, "Well, if you don't want any interference we will trust you in this matter." And Mr. Jay said, "Yes, I will take care of you in this deal."

Q Was there anything said by Mr. Jay relative to charges?

A I don't believe he said anything at that time about any charges.

Q When is the next time that you saw Mr. Jay?

Plaintiffs' Witness, Edward W. Spector, Direct

A The next time was May 4th. We went up there and said I wanted to give an additional deposit—

BY THE COURT.

Q Who said that?

A I went up with an additional deposit to Mr. Jay in the Kinney Building, at which time I asked him if everything was all right, and he said, "Yes, everything was fine, everything was going along very nicely, and I asked him to make a search of this property, and he said he would, and I gave him \$200, and he made an additional part, a typewritten part, to this first receipt, and I left with the agreement I would come back after a little trip I was making and give him the rest of the money.

BY MR. AUGENBLICK.

Q Is this the check that you gave him at that time for \$200 on May 4th?

A It is.

(The paper referred to is marked Ex. P5.)

Q After you had paid the \$200 when is the next time that you saw Mr. Jay?

A May 19th.

Q Had you up until that day seen the contract that you were purchasing?

A No, I didn't.

Q Who has that contract?

A I believe Mr. Jay has that contract.

Q You never received it from him, did you?

A No, I didn't.

Q Did you ever receive the original of that contract?

A I did after I had taken the assignment, after I had paid him the full sum of money.

Q On the 19th of May, 1926, you saw Mr. Jay again?

Plaintiffs' Witness, Edward W. Spector, Direct

A I did.

Q And what was done and what was said between you and Mr. Jay at that time?

A I came up to Mr. Jay's office ready to give him the balance of \$650 due him. He had an assignment ready for me and I gave him a check for \$650. I reminded him that I wanted a search on this property, and he said that he would get it, that he had partly searched it for Mr. Holzhauer, and that he would continue to search or go back further, I don't remember which, but the search wasn't complete, he would complete the search. I asked him if he wanted to be paid for his services. He said yes, he would like to be paid up to that time, and he said \$40, and I gave him an additional check for \$40.

Q (Showing witness paper.) I show you a check dated May 19, 1926, for \$650 and ask you if that was the check which you gave him at that time?

A It is.

MR. WEINBERG. I object to the check on the ground of immateriality.

THE COURT. It will be admitted.

(The check referred to is marked Ex. P6.)

Q (Showing witness another paper.) I also show you another check dated May 15, 1926, for that sum of \$40, payable to the order of Frederick Jay, and ask you whether or not you gave him that check and what it was for.

A That check was for Mr. Jay's services up until that time.

(The paper referred to is offered in evidence and marked Ex. P7.)

Q At the time you paid the \$650 and the \$40 did Mr. Holzhauer execute this paper?

Plaintiffs' Witness, Edward W. Spector, Direct

A I believe that is the paper.

Q Did you receive it?

A I saw it, but I didn't receive it.

Q After you paid the money the paper was left with Mr. Jay?

A It was left with Mr. Jay.

(The paper referred to is offered in evidence and marked Ex. P8.)

Q When you paid \$650 and the \$40 and the assignment was executed by Mr. Holzhauer, did he have it ready?

A I believe he had it ready.

Q Was anything said by Mr. Jay and anything by you?

A Only Mr. Jay said he was going to get in touch with the Pearces and Osborns and have them come up so that we could get the deed for the property, and I left after that.

Q What happened after that?

A I came up to see Mr. Jay from time to time, not receiving any 'phone calls from him or any notification, and I thought I would drop in, and I did, and finally he told me that the Osborns hadn't responded, that they wouldn't come or give me the property, so he said to me, "You better make a legal tender of money, a few thousand dollars in cash, and show them that you are ready." I went down there and showed that to Osborns, that I was ready with the money.

MR. WEINBERG. I object to his conversation with the Osborns.

WITNESS. I showed him that I was ready and I had the money and I wanted to go through with the deal. They refused.

MR. WEINBERG. I don't think we should be bound by that.

Plaintiffs' Witness, Edward W. Spector, Direct

THE COURT. I think the testimony is not objectionable so far, as to what he did.

(To the witness.) Do not tell us what they told you.

10 Q I understood you took the money there and tendered it to them and they refused to go through with the deal and therefore—

Objected to.

Q After they refused to go through with the deal what did you do?

A I went back and told Mr. Jay that they had refused.

Q Did they tell you why?

A They refused to give me; they said they would go to court.

20 Q What did you tell Mr. Jay?

A I told Mr. Jay they had refused. I didn't spend much time there. I told them I want to go through with this, I told Mr. Jay they wouldn't go through with it, they didn't give a reason but—I can't testify.

Q You can testify to anything you told Mr. Jay.

30 A I told Mr. Jay they would prefer to go to court than give up the property, they felt they didn't want to give up the property. I told this to Mr. Jay and Mr. Jay says, "Don't worry about that, I have a way whereby we can make as much money without you investing any more of your money, I will sue them for damages." So he says, "I have a fairly good case and you won't have to worry about it, no more of your money need to be put in. We will make as much on this as if you had invested your money." He said that the way this is done, "We will get somebody who is in the real estate business and testify in this damage case, that is, that this individual at one time wanted to buy this

40

Plaintiffs' Witness, Edward W. Spector, Direct

property from me at a considerable profit—let's see—\$30,000." He showed me a big stack of papers in an envelope on a previous case that he had had that was very similar, where these people didn't want to deliver, and he said that he had got a verdict of between six or seven thousand dollars and he would do the same for me. I said, "Mr. Jay, I am really surprised at this damage action. I want the property. I never went in any real estate deal before and I thought I was going to get land and here I have a law suit." He said, "Don't worry, I will take care of you and we will make plenty of money." I was rather shakey at some of the things—

10

Objected to.

20 WITNESS. At any rate, Mr. Jay persuaded me that he bring this action against the Osborns for damages and he had already showed me how we could prove that I was damaged. I dropped in to see Mr. Jay every now and then and I wondered how the thing was progressing. He said the papers were filed, and I didn't see any notes drawn, so I was leaving it to him until some weeks afterwards I happened to see a letter that Mr. Jay had in his possession, that he had opened, but not meant for me to see, about the Osborns, and I read at the bottom of this letter—

20

30 MR. WEINGERG. I object unless this letter is identified.

Q To whom was this letter?

A This letter I believe, was written by Mr. Pearce, the attorney for the Osborns, and it stated—

Objected to.

40 MR. AUGENBLICK. Mr. Weinberg, will you produce the letter of March 30, 1926?

40

Plaintiffs' Witness, Edward W. Spector, Direct

WITNESS. This was an old letter.

(Defendant's counsel produces paper.)

Q (Showing witness paper.) Is this the letter that you are talking about?

A That is the letter.

10 MR. AUGENBLICK. I want to offer this letter in evidence.

MR. WEINBERG. I object. The witness started to say that he saw something in this letter, he said he saw something in the letter, but that does not make the whole letter admissible.

20 MR. AUGENBLICK. I have given notice to counsel to produce a series of letters.

THE COURT. I have some doubt about the admissibility of this letter. I suppose by reason of having seen that letter some action was induced by Mr. Spector, but to tell what was in the letter which induced that action is not material in this case. I will sustain the objection.

Plaintiffs counsel prays an exception to this ruling of the court.

30 Exception noted as ground of appeal.

Q After you saw the letter what did you say to Mr. Jay?

40 A I said to Mr. Jay, "I am very much surprised that you didn't let me know that there was something wrong with the contract." I said, "Now, I realize that you knew that in the event that the Osborns wouldn't deliver, as far as I knew of law, in the event that the Osborns wouldn't deliver those lots to me, that I have only a piece of paper." He said I was very distrustful of him, and I said, "You

Plaintiffs' Witness, Edward W. Spector, Direct

knew before, before we had accepted the option," and with that I told him I didn't think it was fair to have me go ahead, especially that the Osborns refused to give me the property, I didn't think it was fair to have spent this money together with Mr. Fabry, and that I had nothing more than a paper or a lawsuit and no more than I take the assignment I am thrown into the lawsuit, by his own suggestion, so I told him I didn't like that kind of a deal, and I said I would like to have my money back, and I asked him to please to go to Mr. Holzauer or get in touch with him and try to get my money back, he can have, I told him, the contract, and all the wonderful opportunities for making money they had. Told me how I could build houses and how to make cement block, and that even the building and loan would help me out to build these small houses down there. I said, "Please get in touch with Mr. Holzauer," all I wanted was to get my money back, and he seemed very agreeable, and I said that I wanted my money back. I saw Mr. Jay from time to time and he said, "Mr. Holzauer has refused to return this money." And I said, "Mr. Jay, I will hold you responsible, what else can I do but hold you responsible?"

Q Can you tell us whether or not you ordered Mr. Jay to record that assignment in the County Clerk's office of Monmouth County on June 15, 1926?

A I didn't order him. He believed it essential in order to proceed with this damage suit.

Q And on the day when that was recorded did you have any conversation with him or don't you remember?

A He said that day that was out of my hands at that time.

Q Did you tell him that you didn't want him to proceed with any damage suit against the Osborns?

Plaintiffs' Witness, Edward W. Spector, Direct

A I told him I didn't like the idea, but he persuaded me to go into the damage suit.

Q Then did you stop him?

A I did after I seen what was in the letter, that there was something wrong with the contract.

10 Q I show you the original contract between the Osborns and Mr. Holzhauser and ask you whether or not you ever saw the original of that contract?

A I saw these papers for the first time at the time of the assignment of the contract on May 19th.

Q Who showed them to you?

A I believe he read them for me. I believe we looked them over—I don't know.

MR. AUGENBLICK. I want to offer this contract.

20 MR. WEINBERG. No objection.

(Paper referred to is marked Ex. P9.)

Q When you saw the contract on the date the assignment was executed did he offer to give it to you?

Objected to.

THE COURT. What was said about it, if anything?

30 Q What was said about the delivery of this contract?

A Nothing was said about it. I left them there.

Q Why did you leave them there?

A Mr. Jay was to get in touch with the Osborns and have them come up and go through with this deal. I considered Mr. Jay an attorney in the other way.

Q Did Mr. Jay represent you?

Objected to.

Objection sustained.

40 Q Did you retain Mr. Jay to represent you?
Objected to.

Plaintiffs' Witness, Edward W. Spector, Cross

Objection sustained.

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

Exception noted as ground of appeal.

Cross Examination by Mr. Weinberg.

10 Q You are a partner of Mr. Fabry's, are you?

A Yes, sir.

Q And you were first told about this deal of Mr. Fabry's when?

A A while before I went to see Mr. Jay, a little while before this option was taken, I should say several weeks.

BY THE COURT.

Q Before the option was taken?

A Before the option was brought in—before Mr. Fabry saw the option. 20

Q Have you been down to see the Osborns at any time?

A I saw Mr. Osborn.

Q When and where?

A This was a little while before I went into the deal.

Q Was that before you went to see Mr. Koehler?

A Yes.

Q You went to see Mr. Koehler with Mr. Fabry 30 did you?

A Yes—when?

Q I am not telling you when.

A Yes, I did.

Q When?

A On April 2nd.

Q You have, of course, taken it up with Mr. Fabry, before March 16th, the date on which you paid the \$250?

A Yes, sir. 40

Plaintiffs' Witness, Edward W. Spector, Cross

Q Had you been to the office of Koehler & Augenblick before that day?

A No, sir.

Q Weren't you there before the letter referred to dated March 16th, 1926?

A No, sir.

10 Q Had you seen the land before March 16th?

A Yes, sir.

Q Had it been pointed out to you the section containing lots 1 to 40?

A Repeat that.

Q Had the section containing lots 1 to 40 been pointed out to you by any one?

A Yes.

Q Whom?

A Mr. Fabry.

20 Q I am asking you now before the date of the first payment?

THE COURT. The \$250.

Q Yes; how long before that payment was made did you go down?

A A week or two weeks before.

Q How did you come to look at lots 1 to 40?

30 A I told Mr. Fabry I had a little cash and I wanted to go in some real estate deal and he said when he came across something that he would let me know, and this was it.

Q And Fabry let you know that lots 1 to 40 in the Osborn tract was for sale?

A Yes, sir.

Q He told you that they had been sold or arrangement to sell to Holzhauser?

A No.

Q He told you that Mr. Holzhauser had the lots for sale?

40 A He didn't tell me at that time. It was later

Plaintiffs' Witness, Edward W. Spector, Cross

on that I had seen that tract that he told me.

Q At the time that you saw that tract did you talk to either of the Osborns?

A No, I was introduced to them.

Q All the talking was done by Mr. Fabry?

A Yes, sir.

Q And then you put up this \$250 for you and your partner? 10

A Yes,

Q But you didn't go to Mr. Jay's office on that occasion?

A No.

Q The first time you visited his office was on April 2nd?

A Yes.

Q And on that occasion you put out of your own money \$1000? 20

A Yes, sir.

Q And received the paper that Mr. Augenblick showed you that he procured, that was the one in which the thousand dollars was mentioned and on the second sheet the notation of receiving this further payment of \$250 for extending the time?

A No, sir.

Q This \$250 wasn't charged for a mere extension of time? You were given credit on the contract? 30

A Yes, sir.

Q And this portion alleged in the complaint went to Mr. Holzhauser?

A Yes, sir.

Q And you had something to say to Mr. Holzhauser?

A Yes, sir.

Q What did you say to Holzhauser about the land? He was the owner of the tract. You haven't mentioned his name so far. 40

Plaintiffs' Witness, Edward W. Spector, Cross

A We talked about the advisability of buying that land. It was land for development.

Q You have given a conversation with Mr. Jay in his language and in your language. Won't you give us the conversation with Mr. Holzhauser, confining it to this tract of the Osborns?

10 A He said how he could make some other money out of season, and he said he had a house down there he didn't know what to do with it, and he wanted to sell it or rent it, if we knew anybody that wanted it to let him know, and he figured out how it could be mortgaged and how much could be gotten out of it, just the development of that land, that we could break up the lots.

Q Did you know that the Osborns had refused two of the forty lots?

20 A I learned that from Mr. Osborn.

Q You went down there, as you say, with the papers and made a tender, didn't you?

A I did.

Q Did they say anything to you about those two lots that we have been referring to?

A No, they didn't say anything about it.

Q You knew about it?

A I knew about the questionability of those two lots; Mr. Fabry told me that.

30 Q When was that?

A That was before the option.

Q Before you had paid your money?

A Yes, sir.

Q And you knew that the Osborns were willing to give you two other lots that they wanted to take out of this original tract of 1 to 40?

A Yes, sir.

Q You wouldn't take those two lots in the place of two other lots?

40 A I would take two others.

Plaintiffs' Witness, Edward W. Spector, Cross

Q The two that they offered to give you in place of the two that they took out, you weren't willing to accept those?

A Yes, I was.

Q Why didn't you get them?

A I told Mr. Jay we were willing to take the property with the other two lots. 10

Q Didn't you know that the Osborns were always willing to let you have the 40 made up that way?

A I understood we could get it that way.

Q In place of those two they were willing to give you two others nearby?

A Yes, sir.

Q You didn't want them?

A I did want them.

Q Why didn't you get them? 20

A When I went down to the Osborns and presented the money they refused to deliver anything.

Q When you went down with the money and the mortgage that included the original lots from 1 to 40?

A No.

Q When you went down to see the Osborns what did you have with you besides cash—did you have a bond and mortgage?

A I don't recall having a bond and mortgage. 30

Q How could you make a tender without paying the purchase price?

A I was to have sufficient money and make the legal tender.

Q Did you have \$20,000 with you that day?

A No, I didn't.

Q How much did you have with you?

A I had \$2000.

Q How are you making up the other eighteen? 40

Plaintiffs' Witness, Edward W. Spector, Cross

A I believe Mr. Jay did give me a bond and mortgage, I seem to recall that now, that he did give me some papers to take down.

10 Q Do I understand that on April 2nd when you went and paid your thousand dollars that you didn't ask to see the agreement between the Osborns and Mr. Holzhauser?

A What date?

Q April 2nd, that is the first time that you called on Mr. Jay?

A No, I didn't.

Q Any reason why you didn't?

A I left it to Mr. Jay.

Q You hand't told Mr. Jay anything about it before?

20 A Mr. Fabry had asked me in my presence whether he had a good contract and I heard Mr. Jay say that he had.

Q When was that, on April 2nd?

A It was on April 2nd.

Q You knew on April 2nd there was no conversation with Mr. Jay as to whether this contract was good or bad?

A The conversation was that Mr. Jay would take care of us.

Q In what respect?

30 A That we would get the assignment of the property.

BY THE COURT.

Q When was it that you heard Mr. Fabry ask Mr. Jay if the contract was a good contract, when was that?

A I heard Mr. Fabry ask him and Mr. Jay said he would take care of us.

40 Q Were you mistaken when you said Mr. Fabry asked Mr. Jay if he had a good contract?

Plaintiffs' Witness, Edward W. Spector, Cross

A Yes, sir.

Q You were mistaken?

A Yes, sir.

Q When did you ask about that?

A When I came up alone I asked Mr. Jay if everything was all right.

BY MR. WEINBERG.

10

Q Is that what you mean in answer to his Honor's question, everything was all right?

A Yes, sir.

Q What did you ask him?

A I said, "Have no fear, everything will go along all right?" and he said, yes, and he said everything was O. K.

Q When was that?

A That was on May 4th.

20

Q What was Mr. Jay instructed by you to do after you got this assignment, after or before, or anytime at all?

A I didn't instruct Mr. Jay.

Q You didn't instruct Mr. Jay to do anything?

A No, he said he would get in touch with Mr. Pearce, of the Osborns.

Q For what purpose?

A To get them to come up and give me the land.

Q What?

30

A To come up to Newark and to see about giving the deed for the land.

Q You knew right along that there was a dispute about these two lots, didn't you?

A Yes.

Q And you knew that the Osborns were positive on that question of giving you two lots they said they had previously sold? You knew the Osborns had taken the stand that they couldn't give you two lots in that tract?

40

Plaintiffs' Witness, Edward W. Spector, Cross

A Yes, sir.

Q What did you expect Mr. Jay to get and where was he to get it?

A He was to get the 38 with the other two on the other side.

10 Q But you didn't want them so very much?

A Yes, I was willing to take them.

Q Did you ever tell the Osborns that you wanted them?

A I told them I was ready to take the lots.

Q Mr. Jay wasn't acting as your real estate broker, was he?

A No, sir.

Q Why did you tell the Osborns that you were willing to take the 40 lots?

20 A I did tell them.

Q Don't you know that you can have those two lots, for all I know, you can have them today, in place of the two that were not in the contract?

A I was willing to take anything.

Q They didn't refuse to give you anything. Did you ever tell them you would take those two lots, the 38 and the two near them?

A I didn't specify.

Q Then you did insist upon getting the originals from the numbers 1 to 40?

30 A I told them that I had an assignment of that original contract, that I would like to get the property.

Q You told them that you wanted the 1 to 40 specified in that piece?

A I didn't specify 1 to 40.

40 Q When you paid your last deposit there of \$650 did you look at the final assignment? This paper that was put in evidence by your attorney, Exhibit P8, dated March 18th, did you ever look at it yourself?

Plaintiffs' Witness, Edward W. Spector, Cross

A Yes, sir.

Q Did you ever read it?

A I believe I looked it over.

Q My question is, did you read this paper marked Exhibit P8?

A Yes, sir.

10

Q And who gave it to you?

A Mr. Jay.

Q Of course, you read this particular paragraph in that paper which says, "That the party of the second part", meaning you, "shall take this assignment to all the equities and rights that exist in and against the party of the first part," who is Holzhauser. You read that, didn't you?

A Yes, sir.

Q Did you ask Mr. Jay what that meant?

20

A No, I didn't. I read it over. I didn't question him.

Q You accepted it just as it was, subject to any equities for or against the man who was buying the property—there was a lame duck in there—and you took it home with you?

A I thought it was all right.

Q You read it and it said you were taking it against the rights of Holzhauser?

A Yes, sir.

30

Q You knew there was something wrong?

A No, sir, I didn't know that it meant anything.

Q What did you understand by that language, what did you understand by it?

A That I was taking it the way it was.

Q And which way did you know it was?

A The only thing that I knew was wrong was that the two lots were somewhere else and I was willing to take that way.

Q You took the word "equities" to mean lots

40

Plaintiffs' Witness, Edward W. Spector, Cross

subject to equities. Now, you did ask Mr. Jay what it meant?

A No, sir.

Q Didn't he tell you that the Osborns wouldn't give you those lots, that the so-called contract could not be enforced in equity, but that you had a good
10 suit for damages if they didn't convey?

A No, sir.

Q You just undertook to take a paper with the language that was in it without asking any explanation about it; is that right?

A Yes, sir.

Q You did talk about a suit for damages, didn't you, afterwards?

A Yes, sir.

Q And you agreed with Mr. Jay that an action
20 for damages should be brought, didn't you?

A I was not anxious about it.

Q Whether you were anxious or not, you agreed that he should bring such a suit?

A Yes, sir.

BY THE COURT.

Q Was it brought?

A I believe it was.

30 BY MR. WEINBERG.

Q You knew you stopped him from bringing it?

A Yes, sir.

Q So it wasn't brought?

A I meant it was commenced. I can't testify how far it went.

Q When was it that you came in there and stopped Mr. Jay from going ahead with the suit on the damages?

A It was toward the end of the summer, toward
40 the end of last summer.

Plaintiffs' Witness, Edward W. Spector, Cross

Q That was shortly afterwards that a payment was made and this assignment of May, 1926?

A Several months.

Q Was it in that same summer that you told Mr. Jay that you didn't want him to go ahead with the suit for damages? 10

A Yes, sir.

Q Did you consult a lawyer by the name of Morris Isserman?

A Yes, sir.

Q Are you related to a lawyer named Colton?

A Yes, sir.

Q What relation are you to Mr. Colton?

A Brother-in-law.

Q You didn't consult him about bringing this suit for damages? 20

A Consult him?

Q Mr. Isserman was conducting a suit for Mr. Jay?

A No, sir.

Q After you stopped Mr. Jay from bringing an action for damages did you consult any other lawyer?

A No, sir.

Q Just let it drop right there?

A I believe Mr. Jay—

Q But you stopped Mr. Jay from going ahead? 30

A Yes, sir.

Q You asked this young man whether this suit had been commenced?

A Yes, sir.

Q You did?

A Possibly I did.

Q Before that you had been told that your case would be brought any time after other business ahead of you was attended to—you were told that? 40

Plaintiffs' Witness, Edward W. Spector, Cross

A I was told they were taking care of it the best they could.

Q With respect to this payment of \$40 that you made to Mr. Jay, you said that was paid to him for services rendered to you?

A Yes, sir.

10 Q What services had he rendered you up to that time?

A He had drawn up these papers.

Q What papers?

A He had drawn up the receipts.

Q From Holzhauser?

A Yes, sir.

Q Were you to pay for the paper given to you by Mr. Holzhauser?

20 A At the time of May 19th I asked Mr. Jay if he wanted to be paid and he said yes, and I said, "How much?" And he said, "\$40."

Q You are getting away from my question. I am asking you to tell the court and jury what services Mr. Jay had rendered you or Fabry up to May, 1926?

A For all his legal work.

Q What was that?

A I didn't question him.

30 Q What was it that he did for you—you are not throwing your money away?

A I believe he was representing me at that time.

Q What did he do for you?

A He was getting the land.

Q He was getting the land for you—what do you mean by that?

MR. AUGENBLICK. I object. He is not a lawyer. He can't tell just what his services consisted of.

40 A I didn't know. Mr. Jay demanded the money,

Plaintiffs' Witness, Edward W. Spector, Cross

and I believe that when lawyer asks for a fee it is for whatever he has done. I dealt with Mr. Jay for several months and I believe he had done something for his work.

Q Don't you know the way you came to pay the \$40 was before the last payment was taken by Mr. Holzhauser, and you said, "I want to know"—speaking to Mr. Jay.—"What is this going to cost me?" And Mr. Jay said, "For the conferences with you and drawing of receipts, I want a hundred dollars".

A No, sir.

Q Don't you know that Mr. Holzhauser turned around to you and said, "Well, I won't pay the hundred myself, you will have to pay fifty of it?"

A No, sir.

Q Don't you know that instead of being particularly liberal with your money you said, "I will give you \$40"?

A No, sir.

Q And Mr. Holzhauser said, "I will give you the \$60 and that is Mr. Spector won't pay the \$50 I can pay the other ten."

A No.

Q Did you ever get any bill for services?

A I don't recall any.

Q Instead of saying you don't recall that any was given, won't you say that none was given?

A I always believed my check was a receipt.

Q I ask you whether you received a receipt or a bill that was rendered to you?

A No, sir.

10

20

30

40

Plaintiffs' Witness, Edward W. Spector, Redirect

REDIRECT EXAMINATION by Mr. Augenblick.

Q At the time you paid the \$40 was Mr. Holz-
hauer in the office?

A I don't think so.

Q Mr. Jay had the assignment read?

10 A I believe it was read.

Q Was Mr. Holzauer there?

A I don't recall whether he was there. I don't
believe he was there.

Q At the time you went down to the Osborns
did you tell them that you were willing to take the
thirty-eight lots and not the forty lots?

A I said I was ready to take the land.

Q Did you at any other time attempt to get a
conveyance from the Osborns of this land?

20 A Once before I had gone down and told them
I had taken this property and apprized them of it.

Q Were you willing to take the thirty-eight lots
instead of the forty lots?

A Yes, sir.

BENJAMIN B. PEARCE sworn in behalf of plain-
tiff.

DIRECT EXAMINATION by Mr. Augenblick.

Q What is your vocation?

30 A Member of the New Jersey Bar.

Q How long have you been a member of the
New Jersey Bar?

A About thirty-five years.

Q Do you know the Osborns that we are talking
about in this case?

A Yes, sir.

Q How long have you known them?

A Over thirty years.

40 Q You represented the Osborns, did you, at the
time of these negotiations that were taking place?

Plaintiff's Witness, Benjamin B. Pearce, Direct

A In part.

Q You knew all about this contract that Mr. and
Mrs. Osborn had entered into with Mr. Holzauer?

A Not until they had entered into it.

Q This letter was received by Mr. and Mrs.
Osborn and turned over by them to you?

A Yes, sir. 10

Q Referring to the purchase of these lots by Mr.
and Mrs. Osborn?

A Yes.

MR. AUGENBLICK. I offer this letter.

MR WEINBERG. I object to the letter. This
action is within very narrow chanel.

20 THE COURT. How is this letter material?
I do not see the point. I observe that the title
was to be closed November 18, 1925 and I heard
you in your opening say that you expected to
insist that this was an enforceable contract.

MR. WEINBERG. I said actionable.

THE COURT. I will sustain the objection.

Plaintiffs counsel prays an exception to this
ruling of the court.

Exception noted as ground of appeal.

30 Q Have you got the letter of March 16, 1926
written by Mr. Jay to Mr. Pearce?

A (Produces paper.)

MR. WEINBERG. No objection.

(The paper referred to is marked Ex. P10.)

Q Have you a letter written by you to Mr. Jay
dated March 30, 1926?

A I have a copy of one (producing letter.)

MR. AUGENBLICK. I offer letter from Mr. 40

Plaintiffs' Witness, Benjamin B. Pearce, Cross

Pearce to Mr. Jay dated March 30, 1926.

(Paper referred to is marked Ex. P11.)

Q Is there a provision in the statute books of this State providing for the acknowledgment of a contract of sale of real estate to a married woman that he signature must be on before the property can be conveyed?

A I don't know, except as to the general statute of conveyances. It comes under the same law.

BY THE COURT.

Q The question is, do you know?

A Offhand, I can't say so.

Q Is a contract not containing the acknowledged signature of a married woman an enforceable contract?

20 Objected to.
Objection sustained.

CROSS EXAMINATION by Mr. Weinberg.

Q You were representing the Osborns in this matter of the sale of land referred to?

A After a certain date. I didn't at the start.

Q After a certain date you were or were not?

A Yes.

Q You started to represent them after a certain date?

30 A About December 15, 1925.

Q So that you were representing the Osborns on March 30, 1926?

A Yes, sir.

Q And what you wrote in your letter of March 30th was put there with the authority of the Osborns?

A Yes, sir.

Q So that irrespective of time of performance mentioned between Mr. and Mrs. Osborn, they were,

40

Plaintiffs' Witness, Benjamin B. Pearce, Cross

according to your letter, ready and willing to go through with the contract of March?

A By excepting those two lots.

Q The insistent of the Osborns was that they wouldn't convey the forty, but would convey two other lots?

A I didn't get your question.

10

Q With whom was the dispute in respect to the two lots?

A I don't get your question.

Q There was a dispute about two lots?

A They had sold them prior to this contract.

Q You say in your letter of March 30th the two ocean lots were sold before Mr. Holzhauser bought the remaining lots, that is so?

A He stated that to me, that is all I know.

Q They were not sold through you?

20

A No.

Q And the only information you had was what your client told you?

A Yes, sir.

Q In your reply to the letter of March 16th, Mr. and Mrs. Osborn were willing to carry out their agreement as made?

A I think that should have been "intended" instead of "made".

Q When you said that your clients were willing to go through with the contract?

30

A No.

Q There is no exception in the agreement?

A Not in the agreement, as I recall it.

Q You were resting your contention upon some arguments between the parties?

A Yes, sir.

Q Are the Osborns still living down the coast?

A I think they are back in Manasquan now.

40

Plaintiffs' Witness, Benjamin B. Pearce, Cross

They were living down there this summer on this property.

BY THE COURT.

Q Where is Brick Township?

A Down near Lavellette.

10 BY MR. WEINBERG.

Q How long did you continue to represent the Osborns in this transaction?

A About January 18, 1926.

Q So far as you know, up to that time you represented the Osborns and they were willing to go through with this deal concerning the 38 and 2?

A So far as I know.

Q You say so far as you know. Do you know?

20 A I don't know that they stated that after the date of this letter. After the letter of March 16th I don't want to go further than that, unless I have something to show for it.

Q The statement in your letter is based on their statement to that effect?

A Yes.

Q And after that you don't recall?

A No, sir.

30 Q Were you ever informed by the Osborns, to your recollection, after March that they wouldn't go through with the deal?

A No, I don't recall.

Q When before March 30th, 1926, had you consulted with the Osborns with respect to this property?

A I can't recall.

Q So that you were wrong then on the general authority from the Osborns?

A Yes.

40 Q In the letter referring to March 30, 1926, you

Plaintiffs' Witness, Benjamin B. Pearce, Cross

say: "The true situation seems to be that Mr. and Mrs. Osborn are willing to comply with their part of the contract, while your client is endeavoring to avoid doing so"?

A I think I meant what I said at that time.

Q What was Holzhauer doing or Holzhauer's assignee doing to avoid the carrying out of this contract if your people refused to give the land stated in this agreement? 10

A The contract didn't mean what they had agreed.

Q As a lawyer, you were attempting to vary the terms of the written contract by some oral agreement?

A No, I was trying to have them carry out the contract as Mr. Osborn said it had been mutually between them. 20

Q You saw the written agreement?

A Yes, sir.

Q And this land that they were to give was 1 to 40?

A Yes, sir, I don't think the property should be sold for as much as the contract price.

Q Do you know anything about the value of that land?

A Only as they stated it to me.

Q Did they state that they sold the land for more than it was worth? 30

A No, but they were satisfied.

Q As far as the valuations are concerned, you say that personally you have knowledge of the value of this land?

A No, I don't know anything about it. 40

Motion for Non-Suit

PLAINTIFF RESTS.

10 MR. WEINBERG. I move for a non suit on the grounds, first, assuming that the defendant made the representations alleged by the plaintiffs, or either of them, either of the plaintiffs is not entitled to maintain this action because it has not been shown that the defendant made any misstatement of law which can, under the rules, be held to be an interpretation of the law—in other words, such a statement as could be proved untrue, that it is so clear that a practitioner of Mr. Jay's standing could have been known it was not true.

20 Second, that the plaintiff's action, assuming that he has shown a cause of action against the defendant, is premature, in that the plaintiffs fail to show at this stage of the proceedings that they have sustained any damages, and damages is the basis of all of these actions. He has failed to show any damage which might be said to be the proximate cause of the defendant's negligence, and even if the defendant did what the plaintiffs say, or either of them say he said or did, it has not been shown that he did anything that was wrong.

30 THE COURT. The motion for a nonsuit will be denied.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

At one o'clock P. M., the court takes a recess of one hour.

40

Defendant's Witness, Frank Holzhauer, Direct

AFTER RECESS.

FRANK HOLZHAUER sworn in behalf of defendant.

DIRECT EXAMINATION by Mr. Weinberg.

Q Where do you reside? 10

A 250 Runyon Street, Newark.

Q What is your business?

A Truckman just at the present time.

Q You were in what business in 1925?

A Contractor and builder.

Q Where was your place of business?

A Newark.

Q How old are you?

A Fifty-eight.

Q Do you know the defendant in this case, Fred- 20
erick Jay?

A Yes, sir.

Q How long have you known him?

A About thirty years.

Q During those thirty years did you do any
business with him?

A All my life.

Q That is, he looked after all your legal matters?

A Yes, sir.

Q So from January, 1925, to 1926, you were a 30
client of his?

A Yes, sir.

Q Are you today?

A Yes, sir.

Q You are the Mr. Holzhauer mentioned in the
two receipts and agreements from and with Osborn
and his wife?

A Yes, sir.

Q (Showing witness paper.) I show you first
Exhibit D9 and ask you if that is correct, that you 40

Defendant's Witness, Frank Holzhauser, Direct

paid to C. C. Osborn and I. B. Osborn a hundred dollars and received that for lots 1 to 40 in Brick Township?

A Yes, sir.

10 Q And also the two other papers attached, receipts that you gave another deposit of \$500?

A Yes, sir.

Q Did you ever see this property?

A Yes, sir.

Q Can you tell us where it is?

A I can't just mention the town, but I bought this property—

Q Where is it, about where?

A Down at Toms River, between lower Bayhead. I can't just think of the town.

20 Q It is somewheres around Lavellete. You saw the property before you bought it?

A Yes, sir.

Q From that time on who looked after you with respect to getting the property for you?

A I hired Mr. Jay.

Q You know about this dispute as to the two lots?

A Yes, sir.

30 Q Where and when did you first meet either Mr. Fabry—in Mr. Jay's office?

A Yes, sir.

Q When was that?

A I can't just recall the date.

Q With respect to the \$250 payment when was it?

A It was around June—

Q With respect to that wasn't it the same day you got the \$250?

A Yes, sir.

Q Which one of them was there, Mr. Fabry?

40 A Yes, sir.

Defendant's Witness, Frank Holzhauser, Direct

Q What conversation did you have with Mr. Fabry?

A Mr. Fabry told me that he would like to buy my option that I had down at Toms River; I asked him what he would tell me, and he made an offer of \$1000 and my money back, and I told him I wouldn't sell, and he said, "I will give \$1500 and your money back." I said "What kind of money have you got?" And he said, "I will give you \$250," and he asked for more time, ten days, which I gave him, to raise the balance of the money, and he came into Mr. Jay's office and he said, "I couldn't get the money"—

Q Just a minute. Going back to the day when the \$250 was paid.

A When the \$250 was paid he asked for time to raise the balance of the money and I agreed to give him whatever time he wanted and told him I would give him his \$250 back just the same as he gave it to me if he didn't want to go on with the deal after the ten days.

Q Was there anything said at that time about the two lots?

A Yes, sir.

Q What was it?

A That the two lots—I had a surveyor—

Q What was said?

A He said he didn't care about the two lots—

Q Tell us whether you told him about the two lots?

A I told him that I couldn't get the two lots, that they only want to give me thirty-eight lots and he says, "never mind them clam diggers;" he says, "I know how to handle them;" he says, "I am Jewish and my wife is not Jewish, and she knows how to handle them." The same day I had a long talk in Mr. Jay's office and told him everything,

Defendant's Witness, Frank Holzhauer, Direct

- showed him the receipt. I told him everything, that they wouldn't let them have the property, and he says, "I can handle them clam diggers". And Mr. Osborn said he wouldn't sell. I told him about those two lots, the reason they wouldn't give them to me, they were willing to give me two lots beyond where
- 10 I had this tract, and he says, "All right, my wife is buying right alongside of these two lots and it will be all right." He says, "I am willing to go on with the thirty-eight lots," and I told him all right.
- Q Were you present until Mr. Fabry left or not?
- A Yes, sir.
- Q During that time did you hear Mr. Fabry ask Mr. Jay if this was an enforceable contract, did you say anything like that?
- 20 A I don't remember.
- Q Did he ask you anything about these contracts other than what you said?
- A He read over the paper that I had over and over. When I paid the first hundred dollars Mr. Fabry read the papers over and over.
- Q Which papers did he read over and over?
- A My option on the deposit of the first one hundred dollars and the part on the five hundred dollars, he read them over, and I told him to put up the two hundred and fifty, and after that was all
- 30 over he made another appointment which he didn't keep and had me waiting in Mr. Jay's office for hours and hours.
- Q When that \$250 was paid did you have your option on the \$500
- A Yes, sir, I had the option on the hundred and on the \$500 option.
- Q Continue.
- A Then after that the first time when he paid
- 40 the \$250 we were all set and then he asked for ten

Defendant's Witness, Frank Holzhauer, Direct

days time to raise the balance of the other thousand dollars. In the meantime he had some other lawyer to hear all about this and they sent him over to Mr. Jay, and he said, "All right, I can't go on with it, but Mr. Spector will come with me as a partner," and Mr. Spector produced \$1000 also.

- Q Where was that? 10
- A In Mr. Jay's office.
- Q Was anything said in Mr. Jay's office at this time about this property or your option or anything else?
- A Yes, he told Mr. Spector and Mr. Fabry when they were both in the office that if they didn't want to go on with the deal they could have the money back, and Mr. Spector argued with Mr. Fabry about the balance of this money and Fabry says, "I can't raise this money, I can't get it in, but my partner will take possession and we will pay the balance of the money," and in the meantime Spector fights with Mr. Fabry what is to become of \$250 and Mr. Spector says, "I will take care of it, and one was afraid of the other, and one didn't trust the other as far as I felt, and I gave them a chance by reading the papers time and time again. 20
- Q Just tell us what they said that bears upon this particular contract?
- A Then Mr. Spector went to work and he read all the papers again. Then Mr. Jay says, "Mr. Holzhauer, this is going to cost you some money." 30
- Q When was that?
- A At the closing of the title.
- Q That was when the last payment was made?
- A Yes, sir.
- Q The last payment was this \$50?
- A Yes, sir. Mr. Jay says, "This is going to cost you a lot of money." I said, "Why should I pay the counsel fees when Mr. Fabry and Mr. Spector is 40

Defendant's Witness, Frank Holzhauer, Direct

having all the trouble." And I says, "How much will it cost?" And he said, "\$100". And I said, "I will pay \$50, and I want Mr. Spector to pay \$100, to pay it to the counsel." Mr. Spector says, "I don't need no lawyer, I can read and I can write, I know what I am doing." And as far as I know his brother-

10 in-law was a counsel, that he didn't need him, that he could do it himself." Mr. Jay says, "I can't represent two parties in a deal, and an argument about the paying the \$50 I says, "All right, the deal is off, if he doesn't want to pay me half of that counsel fee," so I stuck my hand in my pocket and I says, "\$50." And he says, "I will not pay it." And I said, "All right, gentlemen, the deal is off." Mr. Jay says, "Don't get hasty, we will try to close this deal up," and he drew up a check for \$40. He says, "I will

20 only pay \$40". I says, "All right, I will pay the other \$10." And Mr. Jay says, "Pay the \$10 fee, if Mr. Spector wants to belittle himself for \$10, I will be the loser, and I will take the \$90." And Mr. Jay was my counsel and for nobody else in that deal.

Q Who got the \$1500?

A I did.

Q All of it?

A Yes, sir.

Q Did Jay get any part of it?

30 A No, sir, outside of the \$50 that I paid.

Q Did Fabry or Spector ever ask you to go down to the Osborns?

A Yes, sir.

Q Tell us about it.

A After the time that my deal was closed and Mr. Spector asked me and Mr. Jay asked me would I go down with Mr. Spector to enter this deed, with the money. He made an appointment with me to take me down in his automobile and I am supposed

40 to introduce Mr. Spector to Mr. Osborn, and I waited

Defendant's Witness, Frank Holzhauer, Direct

and waited, and Mr. Spector never came near me, he went down alone.

Q He told you he went down?

A He didn't tell me he went down. I was to go down with him, but he never kept his appointment with me to go with him. After that I met Mr. Spector on a trolley car, which we didn't see one another, and just as we were getting off the car, just as we were getting off the car, he said, "I want to talk to you." And I said, "What is it?" He said, "I am going to sue Mr. Jay for \$2100 and I want you as a witness." And I said, "I can't do it."

10

Q Did he ask you for the money?

A No, sir.

Q Did he tell you why he wanted to sue Mr. Jay?

A He told me that he wanted to get this \$2100, that he was going to get this \$2100 where Mr. Jay hasn't got anything to do with this at all.

20

CROSS EXAMINATION by Mr. Augenblick.

Q Were you in business at that time?

A Yes, sir.

Q What business?

A Building business and making cement blocks.

Q What bank did you bank at?

A Clinton Trust.

Q Had an account there at that time?

A Yes, sir.

Q (Showing witness paper.) I show you Exhibit P-1 for the sum of \$250 made out to Frank Holzhauer. Did you endorse that check on the back?

A Yes, sir.

Q Who asked you to endorse it?

A Was that the check—

Q I will show it to you.

30

40

Defendant's Witness, Frank Holzhauer, Cross

A I don't think anybody asked me to sign it. I signed it myself.

Q What did you do with it?

A That was the check that went to Mr. Osborn.

Q Look at it again. What was done with that \$250?

10 A I told Mr. Jay to keep it until I had all the other balance of the money.

Q I show you a check for a thousand dollars, marked Exhibit P-3 and ask you what was done with that thousand dollars?

A I told Mr. Jay to keep that.

Q You put your name on the back of it?

A Yes, sir.

Q And you told Mr. Jay to keep it?

20 A Yes, sir.

Q I show you a check for \$650 and ask you whether or not you put your name on the back of that check. What was done with that \$650?

A I told Mr. Jay to keep that.

Q And the check for \$200?

A I didn't sign that one.

Q What was done with the \$200?

A I suppose Mr. Jay had that also.

Q You suppose so?

30 A Yes, sir.

Q Will you look at these checks and tell us whether these checks passed through the bank or whether they were cashed?

A Those checks were cashed.

Q How about this check of \$250?

A That also was cashed.

Q Look at the stamp on the back.

A That I can't read.

Q You see the stamps on the back. Was it cashed or did it pass through the clearing house?

40 A That I can't say.

Defendant's Witness, Frank Holzhauer, Cross

Q Who cashed the \$1950?

A Mr. Jay.

Q What did he do with the cash?

A Gave it to me.

Q When?

A The same day the deal was closed.

10

Q He gave you \$2100 in cash?

A Yes, sir.

Q What day was that?

A I can't just recall the date. As I says, I have a very poor memory on dates.

Q Here is a check for a thousand dollars dated April 2, 1926, that was cashed on the same day. What was done with the cash on that day?

MR. WEINBERG. May I inquire if this is at all relevant? The complaint itself discloses the fact that the money was paid to Mr. Holzhauer.

20

THE COURT. Is there any allegation in the complaint that this was Mr. Jay's own deal and not really Mr. Holzhauer's?

MR. AUGENBLICK. No. The second count is based on misrepresentation.

THE COURT. I think this testimony is objectionable. I will sustain the objection.

30

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

Exception noted as ground of appeal.

Q When did you receive the thousand dollars?

A I didn't receive the thousand dollars until at the time we closed the whole deal.

Q You said at that time that you got the money and that the checks were cashed.

A I didn't say anything of the kind. As soon as we got the thousand dollars I said to Mr. Jay,

40

Defendant's Witness, Frank Holzhauser, Cross

"Keep all this money until the deal is closed."

Q Who cashed the thousand dollar check?

A Mr. Jay cashed them, I assume, all.

Q You assume?

A He did cash them all.

10 Q Got the cash?

A Got the money from me.

Q What did he do with the cash?

A Gave it to me.

Q As each check was given to you by Mr. Fabry and Mr. Spector, is that how you got the money?

MR. WEINBERG. I object to this. I don't think this is relevant.

THE COURT. Objection overruled.

20 Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q When did you tell Mr. Fabry that you couldn't get the property and he said he could take care of those clam diggers down there himself?

A Before he ever put up any deposit at all, the first day that he ever came in Mr. Jay's office.

Q You wanted to sell the property?

30 A I didn't want to sell it. He told me that he had to have it, that he bought alongside of me, and I told him of the trouble, I had to go on with the deal, that the plans were drawn for twenty houses, I had the contractor already to put them up for me and I had bought another house down at Normandy and I am going to get the contractors, Fred Bowles, of Trenton. He said he wanted this property next to mine. I said, "There is a great future for me there."

And he said, "I have got to have it", and he made me the offer, and I said "How much money have you got?"

40 And he said, "\$250." The reason was I couldn't get the two lots.

Defendant's Witness, Frank Holzhauser, Cross

Q You didn't tell him there was anything wrong with the contract?

A There was nothing wrong with the contract.

Q It was a perfectly good contract?

A Yes, sir.

Q Did Mr. Jay tell you the contract was all right? 10

A I had it all made up myself.

Q When you brought it to him did he say it was all right?

Objected to as immaterial.

Objection sustained.

Q Did Mr. Jay speak of this contract in the presence of Mr. Fabry and Mr. Spector?

A Yes, sir.

Q What did he say about the contract?

20 A He read it all over carefully and he told them they needed counsel, and they said they didn't need any counsel, they could write and read, and they read over an over, they read it over, to my estimation, three or four times. Every time they came into the office they read it over.

Q When did Mr. Jay tell them they had better get their own lawyer?

A The same day we closed the deal.

Q The day of the payment of the \$250?

A Yes, sir. 30

Q To whom did he deliver it?

A Mr. Spector and Mr. Fabry.

Q Don't you know that Mr. Spector wasn't there?

A The day the \$250 was paid Spector wasn't there.

Q When did Mr. Jay tell Mr. Spector that he had better get his own lawyer?

A When he produced the \$1000.

Q That was the second occasion? 40

Defendant's Witness, Frank Holzhauser, Cross

A It was the second time when they came into the office.

Q He told Mr. Fabry and Mr. Spector that they had better get their own lawyers?

A Yes, sir.

Q Did they tell Mr. Jay at that time that they were up to see Koehler & Augenblick?

A I think Koehler & Augenblick introduced them to Mr. Jay first.

Q (Question read.)

A Yes, sir.

Q Why did Mr. Jay tell them they had better get their own lawyer if they had one?

Objected to.

Objection sustained.

Q Didn't they have a lawyer?

A No, sir, there was no lawyer when I transacted my business.

Q Was there anything said by Mr. Jay about charges?

A He didn't say anything about charges. I asked him, that is the transaction we are going on—

Q Just answer the question. Was there anything said by Mr. Jay about charging for his services?

A No, sir.

Q Anything said on March 16th about charging for his services?

A Only for mine.

Q He told you that he would charge you for his services?

A Certainly.

Q When?

A The last day that we closed the deal.

Q I am speaking now of March 16th.

A I didn't carry things. I figured that everything was all over, that is all there was to it.

Defendant's Witness, Frank Holzhauser, Cross

Q On March 16th, when the \$250 was paid to Mr. Jay, was anything said to Mr. Fabry or Mr. Spector about charges?

A No, sir.

Q Did Mr. Fabry ask Mr. Jay what his charges would be?

A No, sir.

Q On April 2nd, when the thousand dollars was paid, or did Mr. Jay say anything to you or to Mr. Fabry about charges?

A No, sir.

Q Did Mr. Fabry say anything to him about charges?

A No, sir.

Q Did Mr. Spector say anything about charges?

A No, sir.

Q When did Mr. Jay make the remark that he cannot represent two parties?

A When we were closing the deal, when the last money was paid, the \$650.

Q At that time he said he could not represent two parties?

A Yes, sir; when the papers were supposed to be drawn up.

Q Whom did he say that to?

A To Mr. Spector and me.

Q Did he ever say at any other time that he couldn't represent two parties?

A No, sir.

Q He didn't say it at the time the thousand dollars was paid?

A No.

Q He didn't say it at the time the \$250 was paid?

A No.

Q He didn't say it at the time the \$200 was paid?

A No.

Defendant's Witness, Frank Holzhauer, Cross

Q The only time he said it then was when the full sum was paid over, the \$650?

A Yes.

Q Did he say it before or after the \$650 was to be paid over?

A Before.

10 Q What did he say?

A I asked Mr. Jay, "How much is this going to cost?" And he said, "It will cost you a hundred dollars." I said, "I will not pay the hundred dollars if Fabry and Spector go on this way."

Q Was it at that time he said he can't represent two parties?

A Yes, sir.

Q He did represent two parties?

A No, sir.

20 BY THE COURT.

Q The question is, did he take \$40 from Mr. Spector?

A The check was made out to Mr. Jay and handed to him.

Q Did Mr. Spector say anything when he paid the \$40?

A He argued that he wasn't going to pay that \$50 to me.

30 Q Was there anything said about what the balance of the work would cost?

A No, sir.

Q Did you leave with Spector at that time?

A No, sir, I stayed in the office.

Q You stayed in the office?

A And got my money.

Q In cash?

A Yes, sir.

Q You got all your money in the case?

40 A Yes, sir.

Defendant's Witness, Frank Holzhauer, Cross

Q What was the secrecy about this transaction?
Objected to.

Objection sustained.

Q What did you do with the money?

A I don't know as I have to tell anybody what I do with my own money.

Objected to.

Objection sustained.

Q When was it that you met Mr. Spector in the trolley car?

A Away after the deal was all closed.

Q How long after?

A I guess about three or four or five weeks.

Q Some time in June?

A I think it was some time later.

Q Was that before Mr. Jay had recorded this assignment or after? 20

A After the assignment was put on.

Q After the assignment was put on?

A Yes, sir.

Q Are you positive about that?

A Yes.

FREDERICK JAY, defendant, sworn in his own behalf.

DIRECT EXAMINATION by Mr. Weinberg.

Q Where do you live? 30

A Newark.

Q How long have you lived here?

A Fifty-eight years, born here.

Q How long have you been practicing law?

A About June, 1897.

Q Where is your office?

A At the present time in the Federal Trust Building.

Q Do you know Mr. Holzhauer? 40

Defendant's Witness, Frederick Jay, Direct

A Very well.

Q He has been a client of yours for some time?

A I think one of my first ones, since I am practicing.

10 Q Do you know or did you have anything to do with the agreement that Mr. Holzhauer made with the Osborns?

A No.

Q You took no part in that?

A No, sir.

Q Didn't draw any of the papers?

A No, sir.

Q And wasn't present when they were signed?

A No, sir.

20 Q What was the first you knew that Holzhauer had any agreement with the Osborns?

A Mr. Holzhauer brought to my office that first payment of \$100.

Q What was the first thing you had to do with either Fabry or Spector and where was it?

A Mr. Fabry came into my office March 16th with a letter from Mr. Harry Koehler, of the firm of Koehler & Augenblick.

Q (Showing witness paper.) I show you Exhibit D1 for identification and ask you whether that was the letter that was brought in by Mr. Fabry?

30 A That is the paper, March 16th.

(The paper referred to is offered in evidence and marked Ex. D1.)

Q This letter was handed to you by Mr. Fabry?

A Yes, sir.

Q How did the conversation open between you and he?

40 A I told him that a client of mine, Mr. Holzhauer had this property, and Mr. Fabry asked me if he had a contract to sell, and I told him I could not speak for my client, but I would try to get him, and

Defendant's Witness, Frederick Jay, Direct

I had my operator call him, and Mr. Holzhauer came down within an hour.

Q Did you tell Mr. Fabry that it was your contract?

A No, sir.

10 Q Did you make a proposition to Mr. Holzhauer and say that Mr. Fabry offered \$500?

A I said "No, sir", and said furthermore to Mr. Fabry, "probably Mr. Holzhauer would take \$500 and his deposit." I answered that, "I am not speaking for my client, I will have to wait until Mr. Holzhauer arrives."

Q Were you at the office when Mr. Fabry came?

A Yes, sir.

Q What office was it?

20 A Into my private room from the reception room.

Q Was Holzhauer in there?

A No, sir.

Q When Holzhauer came were you all three together?

A I don't remember. I went about my business, in and out. I think I allowed Mr. Fabry to sit in my private room and I saw people in my library until Mr. Holzhauer came.

30 Q At any time that Holzhauer and Fabry were together, did you have any conversation with Mr. Fabry, and if so, what was it?

A Not until the time came for me to draw the papers.

Q Did Mr. Fabry at any time on that day ask you if Mr. Holzhauer had a good and enforceable contract?

A No, sir.

40 Q Do you know whether or not Mr. Fabry saw the contract?

Defendant's Witness, Frederick Jay, Direct

A Mr. Fabry saw the contract and it might have been Mr. Holzauer handed him it from my folder.

Q Is this the blue print which I have in mind, handed to me by Mr. Augenblick, the blue print referred to?

10 A No, sir, that is not the blue print.

Q Is there another one?

A No, sir, there is another blue print with the two lots marked off. These all, I think, have red pencil marks.

Q See if the tracing there is intended to show two lots cut out, these indentations here?

A I don't know. This is not the blue print handed to Mr. Fabry. It shows the two lots cut out.

20 Q Whom did you see give the blue print to Mr. Fabry?

A I think I handed the blue print and the contract to Mr. Holzauer. I never saw the lots. I didn't know anything about them.

Q How did you know that Mr. Fabry had the blue print?

A Mr. Holzauer had that blue print. Mr. Fabry didn't have any blue print. Mr. Holzauer showed him where the two lots were cut out and those were the two lots that were cut out.

30 Q Who had the blue print, in whose possession was it?

A Mr. Fabry. That was in the office and he was comparing it with the contract.

Q Were you asked anything concerning this contract at all by Mr. Fabry?

A Absolutely nothing.

Q You say you drew the paper when the \$250 was paid?

A Yes, sir.

40

Defendant's Witness, Frederick Jay, Direct

Q What else transpired on the occasion at your office in connection with this property? I call your attention to a description regarding the option or that talked about?

A Yes, sir.

Q Who talked about that?

A Mr. Fabry.

10

Q With whom?

A With Mr. Holzauer.

Q Did you have any interest in that at all?

A No, none whatever.

Q Did you have any interest in this Osborn contract?

A Absolutely none.

Q Have you any interest in it now?

A No, absolutely not.

Q While we are on the subject, did you get any part of this money? 20

A I got \$90. Mr. Holzauer is a little mistaken. I have taken care of his financial work.

Q Can he read well?

A He can't read at all. From time to time I have taken charge of his transactions, and he said, "Mr. Jay, keep all the money until the deal was through." I didn't give Mr. Holzauer the check and those checks were deposited in my bank, and in the interval between the first and last payment Mr. Holzauer needed \$600 and I gave him the \$600 and I gave him the balance, I think, May 18th.

30

Q That was the date of the final payment?

A Yes, sir.

Q Will you tell us about the fee?

A The question of fee wasn't spoken of at any time until the last, when I turned to Frank Holzauer, I said, "Frank, it is going to cost you \$100." I said, "I have been on this job from March until the middle of May." And he said, "I am not going

40

Defendant's Witness, Frederick Jay, Direct

to pay that full amount, the entire amount." He said, "Spector and Fabry are the people that made me run around and come down to your office." And he said, "Mr. Spector will have to go fifty-fifty," and threw it on the desk, and he said, "There will be no deal if you don't." Spector said, "\$50 is too much", and he said, "I will give \$40," and Holzhauer said, "I will pay the \$10." And I said to Mr. Holzhauer, "If Mr. Spector is so small I will take the \$90," and he didn't have the cash and he made out a check. The first time I ever saw Mr. Fabry was on the 2nd day of May when Mr. Holzhauer was in my room, Mr. Isserman and I went off on the side by ourselves, and I happened to walk out from the private room into the waiting room and Mr. Isserman said—

20 Objected to.

WITNESS. I said to Mr. Spector, "You have a brother-in-law by the name of Dory Colton."

I said, "He is your brother-in-law, why don't you try to get him to represent you?" He said, "I can read, write and understand English and I don't need a lawyer."

Q You know Dory Colton?

A Very well indeed.

30 Q He is a young lawyer here in Newark?

A Comparatively young, probably a man of six or eight years practice.

Q Let me just take you back to this first: Was anything said in your hearing by Mr. Holzhauer with regard to the difficulty he was having and you were having to get these two lots from the Osborns?

A Yes, sir.

Q What did you hear said about that?

40 A When this blue print and this contract was placed before Mr. Fabry, Mr. Holzhauer said, "They

Defendant's Witness, Frederick Jay, Direct

claim I cannot get these two lots as sold, but they want to give me two lots at the other end, and Mr. Fabry said, "That makes very little difference to me because I have just purchased two lots on that side."

Q Was anything said about a Jew?

A Mr. Holzhauer turned to me and said, "Mr. Jay, I don't want to hurt your feelings," knowing that I was of the Hebrew faith, "but Mr. Osborn will not deal with Jewish people." Mr. Fabry said, "I live down at the shore, I am a Jew, but my wife is not, and I live down to the shore."

Q You said there was nothing said about the enforceability of this contract?

A No, sir.

Q Was there anything said about retaining you to act as his attorney?

A No, sir.

Q Did he bring you another paper from the firm of Kehler & Augenblick?

A No, sir; on the 10th day, when the option was up with Mr. Fabry, Mr. Fabry made an appointment— I don't know whether it was the 10th day or the following day, and Mr. Holzhauer was there, and as usual Mr. Spector was an hour late, and I said to the girl, "Call up his office," and a few minutes later there was a telephone from Mr. Koehler's office, that Mr. Koehler was in the hospital and Mr. Augenblick didn't know much about it, that he was in Cleveland and operated for a goitre, and he said, "I will talk to Mr. Fabry, in a little while I will talk to Mr. Fabry and send him over to you," and a little while later Mr. Fabry says he has not the money to close the deal.

Q Is that the day when Spector came in?

A No.

Q When did Spector come in?

40

Defendant's Witness, Frederick Jay, Direct

A I should judge four or five days.

Q I ask you whether anything was said that day as to whether this was a good or bad contract?

A No, sir.

Q Did he at any time tell you that he wanted you to represent him and to do anything necessary in the deal? 10

A Absolutely not.

Q Was the \$200 paid the same day as the thousand?

A I don't think so.

Q Were you present when it was paid?

A Oh, yes. I put it through my banks, we got \$250, we got a thousand, and I think we got \$200, and I think \$650 the last time.

Q When the \$200 payment was made was anything discussed other than the extension of time? 20

A No.

Q On the last time when the \$650 was paid you drew an assignment?

A Yes, sir.

Q (Showing witness paper.) I show you Exhibit P8 which is the assignment of the agreement between them?

A Yes, sir.

Q Was that drawn by you?

30 A Yes, sir.

Q And after it was drawn what did you do?

A I give it to Mr. Spector to read.

Q Why?

A Because he said he could read and write and he didn't need a lawyer. It took him about fifteen minutes to read it.

Q After he read it what did he say?

A He asked about the rights and equities. I said the rights and equities in this contract he takes over, 40

Defendant's Witness, Frederick Jay, Direct

and if there are any defenses it is subject to the same defenses as Mr. Holzhauser.

Q Was there anything said at that time about what kind of an action could be had?

A No.

Q After the money was paid over did you see him again? 10

A Yes, Mr. Spector came in about a week or ten days after.

Q What was the occasion of his call there?

A He wanted me, I believe, to record that paper.

Q Meaning P-8?

A And that whatever cost he would pay it. So I sent it down to Ocean County. I think the postal card is that I paid \$3, but I never got the money back.

Q When did you have any talk about the action as to the Osborns? 20

A A day or two later he came and being suspicious at all time he said did I record the paper, and then he brought up and said, "What position am I with the Osborns?" I said, "You are in a very good position to bring an action for damages". And to prove that I was correct I pushed the buzzer and asked the girl to bring in the folder in a case before Judge Mountain, and he said, "Go ahead."

Q Did he ever say that he didn't want a lawsuit, he wanted the land? 30

A Yes, sir.

Q Why didn't you bring the suit?

A He didn't give me the time.

Q What did you do?

A About two weeks after I told him it will have to take its turn and he came in to me one day and said, "What is an enforceable contract." I said, "An enforceable contract." I said, "There are very 40

Defendant's Witness, Frederick Jay, Cross

many kinds of contracts," and before I could answer he said, "You discontinue your suit and I want my money." I said, "Why, you don't want it from me?" And he said, "I want it from you," and he walked out and that is last I heard of him.

10 Q You don't know whether he went down there to try to get his land or not?

A No, sir.

CROSS EXAMINATION by Mr. Augenblick.

Q You said you had a telephone conversation with me some time in 1926?

A March.

Q When was that?

A It was between the 16th of March and 20th or 27th.

20 Q You are positive of that?

A Yes, sir, you spoke to me yourself.

Q Don't you know I was in Europe at that time and I didn't get back until April 1st?

A No, sir, you spoke to me. When was your partner operated?

Q Why, I don't know. I was in Europe.

A I may be mistaken about. Maybe it was in April you spoke to me about Fabry.

Q You called me up in April?

30 A I think positively it was between March 16th and 26th.

Q You still insist on that?

A No, sir, I don't. It was between the time that the original paper was given to Mr. Fabry and the final closing; I thought that was the time.

Q What did I say to you?

A You told me that your partner was in the hospital and I was very much surprised and I asked what hospital and you told me.

40 Q What was the occasion of my calling you up?

Defendant's Witness, Frederick Jay, Cross

A Mr. Fabry was in your office trying to get your advice on this contract.

Q When was that?

A I said between March—

Q If I was in Europe and didn't get back before April 1st, I couldn't have possibly talked to you. 10

A Possibly it was the time the thousand dollars was paid.

Q If I didn't talk with you on April 2nd, it was after the \$250 was paid by Fabry?

A Surely.

Q And before the thousand dollars was paid?

A Before the thousand dollars was paid.

Q Did you ask me to represent Mr. Fabry?

A I?

Q Yes.

A No; you told me that you represented Fabry and you are a partner of Mr. Koehler who sent that letter. 20

Q I told you that?

A You told me that you represent Mr. Fabry.

Q Did you tell me that I had better come over and represent Mr. Fabry while these papers were being prepared?

A I didn't, no, sir.

Q Why did you advise Mr. Spector to get Dory Colton? 30

A Because Mr. Spector came in without an attorney.

Q He came in with Mr. Fabry on April 2nd?

A Maybe they did; I don't remember, it is so long ago.

Q On March 16, 1926 when Mr. Holzhauer received the \$250 which you deposited in your account with other checks, did you know that you had an enforceable contract? 40

Defendant's Witness, Frederick Jay, Cross

MR. WEINBERG. I object to that as immaterial.

THE COURT. Overruled.

10 Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

A I don't know what you mean by unenforceable.

Q Do you know that the contract was void that day?

A I don't know whether I did or not at that time.

Q You didn't know?

A I don't say that.

Q What does that mean—either you knew or either you didn't know?

20 A I never gave it a particular thought because Mr. Fabry at that time said he could deal with the clam diggers and he spoke about the other two lots.

Q I didn't ask you that; I asked you whether you knew if that was an enforceable contract?

A I don't know whether I did or not.

Q Were you familiar with section 39 of the conveyance acts as amended by the Pamphlet laws of 1918?

30 MR. WEINBERG. I object to that. That is question of law.

THE COURT. Objection overruled.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q Were you familiar with section 39 of the conveyance laws as amended by Pamphlet Laws of 1918?

A Yes, sir.

40 Q You were familiar?

Defendant's Witness, Frederick Jay, Cross

A Yes, sir.

Q Then you knew that you didn't have an enforceable contract to give the holder a right to specific performance?

A No, sir, I didn't know that.

Q You didn't know?

A I will be frank, and here was a contract 10 signed by husband and wife, being familiar with the act, I thought possibly a contract signed by the real owner and his wife was all right; that question never came up.

Q You thought that even though the contract was signed by Mrs. Osborn that would give the right of specific performance?

A I thought possibly that might be so.

Q You had written to Mr. and Mrs. Osborn that unless you heard from them within five days you 20 would be compelled to file a bill for specific performance?

A Yes; it is not signed by me, but I admit I dictated that letter.

Q And you knew at that time that you had no action for specific performance?

A I told you I will not admit that; I was exactly a little perplexed. I am willing to admit that.

Q On March 30, 1926, you received a letter from Mr. Pearce, representing the Osborns, in which you 30 were apprised of the following, that the contract was not acknowledged by Mrs. Osborn as a married woman and could have no standing in court for specific performance nor could you recover damages as no damages could be shown.

A Why does he say no damages could be recovered?

Q (Question read.)

A That was the first time I was required to look 40

Defendant's Witness, Frederick Jay, Cross

up the law to make sure of it, because I had no occasion to look it up before that.

Q On April 2, 1926, with knowledge that you had of an unenforceable contract—

10 MR. WEINBERG. I object to the use of that word.

Q That you had an unacknowledged contract, and you permitted Mr. Spector to pay a thousand dollars?

Objected to.

Q You took a check from Mr. Spector to your order for a thousand dollars?

Objected to.

20 Q At the time that you took the thousand dollars from Mr. Spector and deposited it in your own account you knew that that contract was not acknowledged?

A Yes, sir.

Q And void, in so far as the specific performance was concerned?

A Absolutely I know it.

Q You knew at that time that if the Osborns refused to give the property Mr. Spector could have maintained a law suit. Did you know that or didn't you know that?

30 A I knew that.

Q Did you tell that to Mr. Spector at that time?

Objected to.

Objection overruled.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

A I don't think it was spoken of.

Q Did you think it was your duty?

A No, I didn't. I didn't represent Mr. Spector.

40 Q You didn't represent him. The \$40 that was

Defendant's Witness, Frederick Jay, Cross

paid to you was a part of the fee that Mr. Holzhauer was to pay?

A Absolutely, and he knows it, too.

10 Q I will call your attention to the first defense in your answer in which you say, "He denies that the relation of attorney and client existed between himself and said plaintiff except as he was employed by the said plaintiff for the purpose of having prepared the following papers, to wit"—

MR. WEINBERG. I object. Counsel knows that I drew that answer. Perhaps I should have asked to amend the answer in conformity with the opening. I don't think it is fair to ask the witness with respect to a paper that I drew.

20 THE COURT. Do you want to pursue it?

MR. AUGENBLICK. Yes.

Q You said in your defense that you were employed by the plaintiff to do the work mentioned in that defense and which are enumerated in that defense. Was the \$40 paid to you by Spector for the work mentioned done by you?

A No, sir, absolutely.

Q Is that erroneous?

30 A It must be. I didn't prepare that answer.

MR. AUGENBLICK. I move that all the testimony that was given by Mr. Holzhauer and this witness bearing on the payment of \$40 as a fee be stricken out.

THE COURT. The motion will be denied.

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

Exception noted as ground of appeal.

40 Q Did you receive Mr. Holzhauer's fee in cash?

Defendant's Witness, Frederick Jay, Cross

A In cash, yes, sir.

Q Did you pay Mr. Holzhauer the money in cash or check?

A Check.

Q You gave him a check for how much?

A I think I gave him a check at one time for a
10 thousand dollars in between the time he said he
needed money, and I think I gave him \$1550 on May
19th or 20th.

Q Was that by cash or check?

A Check.

Q Then, Mr. Holzhauer wasn't telling the truth—
Objected to.

Objection sustained.

Q Then Mr. Holzhauer didn't receive \$2100 in
cash on May 19th, did he?

20 A No, sir.

Q On the 19th of June, 1926 you recorded or
caused that assignment to be recorded in the office
of the Clerk of Ocean County?

A I don't remember the date. It was in the
month of June, I believe.

Q Why did you record this assignment?

A At the request of Mr. Spector. I explained
to you before, he came in before to see if I would
bring an action for breach of contract. I told him,
30 "Get your assignment recorded and make a legal
tender of the bond and mortgage."

Q Who prepared the bond and mortgage?

A I did.

Q For Mr. Spector?

A Yes, sir.

Q What was your object in telling him to record
the assignment when the contract wasn't recorded?

A To tell the world that he was the owner of the
tract.

40

Defendant's Witness, Frederick Jay, Cross

Q This is the assignment from Holzhauer to
Spector?

A What does it say?

Q Could it be ascertained on the record by any-
one searching the property that it affects the Os-
borns property?

A That a certain agreement bearing date—

10

BY THE COURT.

Q This would be an agreement from Holzhauer
to Spector. How was anybody to find this in search-
ing the Osborn property?

A A searcher will always go through assignments
and lands abandoned, and so forth. I did it at the
time which I thought was better protection for Mr.
Spector.

20

BY MR. AUGENBLICK.

Q You didn't represent Mr. Spector?

A He came in and asked me to bring this action
for damages for a breach of contract.

Q Then it was only from that date on that you
commenced to represent Mr. Spector?

A For that action only.

Q And prior to that date, June 16th, you hadn't
represented him at all?

A No, sir.

30

Q Are you sure about that?

A Positive.

Q I call your attention to a receipt that you pre-
pared for a thousand dollars. (Reads.) Who were
you representing when you put that provision in
that assignment?

A That was the assignment that arose between
Mr. Spector and Mr. Fabry, and they had the argu-
ment until they settled the matter and Julius said,
"Will you put that in there to protect me?"

40

Defendant's Witness, Frederick Jay, Cross

Q Then you were representing them?

A I wasn't representing either one of those gentlemen.

Q After the assignment of May, 1926, was prepared it was left in your office, was it not?

10 A I don't know.

Q You have always had possession of it?

A No.

Q The original assignment executed by Holz-
hauer to Spector, the one put on record?

A I think there were two copies. Mr. Spector brought this assignment in to have it recorded.

Q He brought it in to you?

A Yes, sir.

Q You didn't have it?

20 A No, sir.

Q You didn't have it?

A No, sir.

Q You are sure about that?

A Yes, sir.

Q When is the time that Mr. Spector saw you after May 19th?

A I said a week or two after.

Q Was that the time that you sent down to Mon-
mouth County a lot of cash?

A I never sent a lot of cash.

30 Q You sent the bond and mortgage?

A The bond and mortgage bears that date.

Q You sent them down at that time?

A I told him I would draw his bond and mort-
gage, the difference in cash, and the bond and mort-
gage, he would have to make a tender.

Q Were you representing him then?

A I was to represent him in this damage suit,
yes, sir.

40 Q You said there was nothing said about the

Defendant's Witness, Julius G. Fabry, Direct

damage suit until the 18th of June when the assign-
ment was recorded by you?

A That assignment was put on before the 18th
of June.

Q On the 12th of June?

A That is the day it got down to Ocean County. 10
Possibly a week or a week or two he then spoke
to me about the damage suit for these contracts.

JULIUS G. FABRY, recalled in behalf of defendant.

DIRECT EXAMINATION by Mr. Weinberg.

Q Did you at any time during the conversation
with either Holzhauser or Jay see the blue print?

A No, sir.

Q Never saw one?

A No. 20

EDWARD W. SPECTOR recalled in behalf of
defendant.

DIRECT EXAMINATION by Mr. Weinberg.

Q Did you at any time see a blue print of this
Osborn property?

A Yes, sir.

Q What blue print, where is it?

A I don't know what has become of it.

Q Did you have it in your office? 30

A I think I did. I made a copy of it for my
own use.

Q Where was it the last time you saw it?

A I don't recall.

Q Was it in your possession?

A I don't know.

Q You never saw me before this trial?

A No, sir.

Q Where was the blue print the last time you
saw it? 40

Defendant's Witness, Edward W. Spector, Direct

A I don't know. It may have been lost.

Q It wasn't lost the last time you saw it. Where was it before it was lost?

A I made a tracing of it and Mr. Augenblick has it.

10 Q Is that what you call a tracing (producing a paper)?

A That is a blue print.

Q I am asking you where the blue print was that you received. Is that the one that Mr. Augenblick had?

A No, sir.

Q Where is that?

A I don't know.

Q Who had it the last time you saw it?

A I had it and made a tracing of it.

20 Q Never mind what you did with it. Just answer my question. You had it the last time and where did you get it?

A I had it in my possession.

Q Where, in your home or in your office?

A I had it in my office.

Q And you don't recall just when?

A I don't recall.

Q You have no idea?

A It was when Mr. Jay was representing me.

30 Q I am asking you at the time.

A That is between April 2nd and May 19th.

Q And from whom did you get it?

A Mr. Jay.

Q And what was on it?

A It had the outline of this ground and showing where the lots ran over from the center to the side.

Q What else did it show?

A I don't recall anything else.

Q Didn't it show lots marked off?

40 A I don't recall. I think so. I don't remember

Defendant's Witness, Edward W. Spector, Cross

the two lots on that side, and I made a tracing of that just to have a sort of picture of the land I am getting.

Q Did the blue print that you had show these lots marked or cut off?

A It must have, surely.

Q You know that it did?

10

A Certainly.

Q You got that the very first time you were in Mr. Jay's office?

A I didn't say that.

Q When did you get it?

A I don't remember, but some time between April 2nd and May 19th is probably one of the times when I was giving Mr. Jay that money.

Q And you are quite sure where that is?

A I don't know where it went to.

20

Q You didn't tear it up?

A No.

CROSS EXAMINATION by Mr. Augenblick.

Q Did you give it to Mr. Jay?

A I don't know.

Q At any rate, this is a copy of it?

A Yes, sir.

Q This is the copy of the one that Mr. Jay gave you?

30

A Yes, sir.

BY MR. WEINBERG.

Q The other one had some markings as cutting the two lots out?

A Yes, sir.

Q This tracing shows the two lots cut out on the ocean front?

A Yes, sir.

40

DEFENDANT RESTS.

MR. WEINBERG. I move for the direction of a verdict on the same ground as I gave on my motion for a nonsuit.

THE COURT. The motion will be denied.

10 Defendant's counsel prays an exception to this ruling of the court.
Exception noted as ground of appeal.

ADJOURNED until Wednesday, October 26, 1927, at ten o'clock, A. M.

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30

40

Charge

SECOND DAY.

Wednesday, October 26, 1927.

Continued pursuant to adjournment.
Present, counsel as before stated.

(By consent of counsel for plaintiffs and defendant Juror No. 12 is excused from further service in this case, and it is agreed that the trial proceed with eleven jurors.) 10

THE COURT. I have been thinking over this matter of fraud and I want to ask you whether you think fraud has been established, whether there is any evidence for the jury to consider that question, if the jury believe that this was a good and enforceable contract, and if the plaintiff relied upon that representation, fraud has not been made out. *Isn't that a mere matter of opinion?* Is that a representation of a fact? There is no question but that the contract is not an enforceable one so far as specific performance is concerned. On the other hand, there is not the slightest doubt but that the contract is an enforceable one, so far as the action for damages is concerned. 20

MR. AUGENBLICK. That is true.

THE COURT. In order to simplify the argument, I have concluded, after considering the case very carefully and looking at these defenses and looking up the various cases, that the evidence in this case will not warrant a recovery against this defendant on the ground of fraud, and, therefore, that feature of the case will be eliminated and the question to be submitted to the jury is one of *negligence*. 30

Mr. Weinberg sums up in behalf of the defendant. 40

Mr. Augenblick sums up in behalf of plaintiffs.

Charge

The court charges the jury as follows:

DUNGAN, J:

10 Gentlemen of the jury. The plaintiffs are Julius G. Fabry and Edward W. Spector, commercial artists, doing business in this city. The defendant is Frederick Jay, an attorney at law, with an office in the City of Newark where he practices his profession. On September 5, 1925, Carrie C. Osborn and Ivy Osborn, of Ocean County, received from Frank Holzhauser \$100 and agreed in writing to sell and convey to him forty lots of land, numbers 1 to 40, in Brick Township, Ocean County, for \$20,000, and on October 31, 1925, Mr. Holzhauser paid them \$500 more, and they then agreed in writing to convey said lots to him on or before November 18, 20 1925, upon the terms therein stated. Neither of such writings was acknowledged by the Osborns, or either of them.

30 On March 16, 1926, the plaintiff proposed to Mr. Jay, who represented Mr. Holzhauser, the purchase of this contract. Mr. Holzhauser was called in by Mr. Jay, and that day, March 16, 1926, agreed in writing that he (Holzhauser) would assign the contract to Mr. Fabry and to Mr. Spector for \$1500 and the return to him of the \$600 that he had paid to the Osborns, making \$2100 in all, if the plaintiff should decide within ten days to take an assignment upon the terms stated in the option. This option was extended by mutual agreement, and on April 2nd, plaintiff notified Mr. Holzhauser that they would accept the assignment and paid him \$1000. Later \$200 was paid, and on May 19, 1926, \$600 was paid, making \$2100. Holzhauser signed the contract which contains the provision that the party of the second 40 part"—that is Spector, Mr. Fabry at this time hav-

Charge

ing dropped out of the transaction because he could not put up more money, and so the party of the second part here is Spector—"shall take this assignment to all the equities, rights that exist for and against the party of the first part"—the party of the first part being Holzhauser. The effect of that provision was to notify Spector that by this assignment he took over all the rights of Mr. Holzhauser against the Osborns and that the assignment to him was subject to equities and rights which either party might have against the other, which included the right to take advantage of the fact that the agreement between the Osborns and Holzhauser had not been acknowledged. 10

Much has been said in the argument about two lots. It appears that the two lots of the forty which had been agreed by the Osborns to be conveyed to Mr. Holzhauser had been sold by them, and from Mr. Pearce's testimony it might appear that these lots had been sold before the contract between Holzhauser and the Osborns was made and the Osborns had proposed that two other lots be substituted. There is no question in this case that this exception was called to the plaintiff's attention before they had paid any money or, certainly, before they had paid any considerable amount of money. Mr. Spector says that he agreed to that, he was entirely satisfied because he had purchased land beyond these two lots; that the two lots which they proposed to substitute for these two were between those lots and the forty, so there is no contention that there was any misrepresentation as far as the two lots are concerned, or that Spector was ready and willing to accept this contract with that modification and accept from the Osborns a conveyance of the thirty-eight lots remaining from the forty and the two additional ones. 20 30 40

Charge

10 Subsequently application was made to the Osborns to convey the land. This application was made by Mr. Spector. They refused to convey it. There is no testimony in the case that at that time Mr. Spector told them that he was willing to accept these two extra lots, two outside lots and, in fact, when he was questioned about that, he said that the two extra lots, the outside lots, were not mentioned; but the fact is that the Osborns refused to convey, and something has been said in the case that they would refuse, in any event, to convey to a Jew, Mr. Spector being a Jew. However, that constituted no good reason, no legal reason for a refusal on their part to convey. In the eyes of the law and morally and every other way, a Jew is entitled to his legal rights as much as a gentile. Subsequently Mr. Spector learned through a letter which he saw in the possession of Mr. Jay that there was a question about his ability to enforce his contract against the Osborns. That letter you will have with you in the juryroom, if you care to examine it, as it is an exhibit in this case; that then he called the matter to the attention of Mr. Jay, who admitted that the contract could not be specifically enforced, and suggested a lawsuit, into which Mr. Spector was persuaded, but which he stopped upon learning of this situation. 20 Thereupon he demanded \$2100 from Mr. Jay upon the ground that Mr. Jay had been his representative and that he had misrepresented him to his damage, and that the plaintiffs, as the result of the way the matter has been handled, have nothing for the \$2100 which they paid to Mr. Holzhauer. 30

These facts, standing alone, give no right of action against Mr. Jay.

40 However, the plaintiffs allege in their complaint that on the 16th day of March, 1926, the plaintiffs,

Charge

Fabry and Spector, retained him to represent them as their attorney, as their representative, that Mr. Jay negligently and carelessly, without exercising due care advised, permitted and caused them to take this contract which they alleged is unenforceable by reason of the fact that the signature of Carrie C. Osborn, one of the vendors, is not acknowledge in accordance with the statute of this state. That notwithstanding that fact Mr. Jay advised them that the contract was a legal, valid and enforceable contract under the laws of the State of New Jersey. And relying upon the skill of Mr. Jay, they paid the \$2100 for the assignment of this contract. In support of that allegation Mr. Fabry states that on the 16th day of March, the first time he consulted Mr. Jay about this contract, he asked Mr. Jay whether it was a good, enforceable contract, and he told him it was; that he said to Mr. Jay that he would like him to represent him and make the search. This, he said, was after he had obtained the option, when he said, "I want you to represent me and he said he would, that he would make his charges reasonable." He said he did not see the contract at all. Mr. Jay denies that, and Mr. Holzhauer denies it. He says he saw the papers and spent plenty of time reading them over. He said on April 2nd he had a conversation with Mr. Augenblick in which Mr. Augenblick said that he thought there should be a provision that if Mr. Holzhauer could not convey, that he should get his money back, and that he went to Mr. Augenblick's office, and then to Mr. Jay's office and told this to Mr. Jay and Mr. Jay said to him, "If you are going to consult any other lawyer I am not going to represent you. If you leave it to me, I will see that you get a good and enforceable contract." Mr. Spector, who was present at this second conversation (and he says that he was not 10 20 30 40

Charge

there at the first one) said that Mr. Jay was asked at that time if he would take care of him, and he said he would, that everything would be all right, and he made the payment of the \$200 on May 4th and again asked Mr. Jay if everything was all right, and he said yes, and then asked him to make a search, which he said he would make. On May 19th Mr. Spector says, when the contract was completed, when the assignment was made from Holz-
 10 hauer to the plaintiffs or to Mr. Spector, Mr. Jay said that he would like to be paid up to that time for his services, and Mr. Spector asked him how much, and he said \$40; that he then paid him \$40 for his services. If what Mr. Spector says is true, there would appear to be no question in this case, but that that Mr. Jay represented these plaintiffs.
 20 But it is denied by Mr. Jay that he did represent them as their attorney or that he represented to them that the contract between the Osborns and Mr. Holzauer was a good, enforceable contract. He says that these plaintiffs never asked him if Holz-
 30 hauer had a good and enforceable contract. On the contrary, he says that he suggested to Mr. Spector that he consult a lawyer named Colton, who is related to Mr. Spector, and have him represent him, and that Mr. Spector said to him, "I can read and write English, I don't need a lawyer." This is cor-
 40 roborated by the testimony of Mr. Holzauer. Mr. Jay says that at no time was anything said to him about acting as his attorney until after the Osborns had refused to convey the property under the contract; then he admits that he agreed to represent him in the suit brought against the Osborns by Mr. Spector. As to the receipt of \$40 from Spector he said it occurred this way—and that is corroborated by Holzauer—that he said to Holzauer, who was present, "Frank, this is going to cost you a hundred

Charge

dollars." To this Mr. Holzauer objected and said that Mr. Spector would have to pay \$50 of it; that Mr. Spector declined to pay the \$50, but said he would pay \$40, and that the \$40 which Mr. Spector paid was a part payment on the hundred dollar charge which Mr. Jay had made against Mr. Holz-
 10 hauer.

The burden of proving both of these propositions by the greater weight of the evidence is upon the plaintiff, that Mr. Jay represented the plaintiffs as their attorney and that he represented to them that this was a good and enforceable contract—that is, the contract between the Osborns and Holzauer, and before the plaintiff is entitled to your verdict both of these facts must be established by the greater weight of the evidence, as I shall presently charge you.
 20

There is no question but that if what the plain-
 30 tiffs desired was this land they cannot enforce this contract by compelling the Osborns to convey the land to them. Mr. Spector says that he told Mr. Jay that it was the land, and not damages, he wanted. This contract, which I have called to your attention, was not acknowledged by either of the Osborns, and the law of this state provides. "That no conveyance of land, or any interest therein, by a married woman shall be valid unless such conveyance shall be acknowledged in the manner provided by this act. And our courts in this state have decided that even where a married woman has agreed to convey land, that unless she has acknowledged that agreement in due form of law, that contract cannot be enforced by requiring her to convey. There is a proceeding which may be taken in the Court of Chancery where an owner of land agrees to convey it, after he or she refuses to do so, by which
 40

Charge

10 the Court of Chancery can order him to convey to person to whom they have agreed to convey it in this assignment and if they still refuse to convey the decree of the Court of Chancery may be invoked, and the result of that is that the people to whom they have refused to convey the land get the land by decree of the Court of Chancery. So I say that there can be no action taken upon this agreement between Holzhauser and Osborn to convey this land to his assignees, the plaintiffs in this case. These plaintiffs might have or may maintain a suit at law against the Osborns for their damages, for their refusal to convey the land to them under this contract, as there seems to be no question raised in this case about the time limit of November 18, 20 1925, fixed by the agreement of October 31, 1925, which date had passed several months, when the agreement of March 16th and April 2nd was made by Holzhauser and the plaintiffs, but it seems to be assumed that the Osborns extended the time; but unless the land was worth more than \$20,000, of which there is no testimony in this case, the most the plaintiffs could have recovered from the Osborns would have been the \$600 which Mr. Holzhauser had paid to them and which was taken over by the plaintiffs. They could not recover from the 30 Osborns the \$1500 which they had paid to Mr. Holzhauser for the assignment of this contract.

Three questions must be considered by you under all the evidence in the case. I have quoted some of it, not all of it by any means, not even all the pertinent evidence, but all of it must be considered by you in determining these three questions: First, does the greater weight of the evidence show that Mr. Jay accepted employment as the attorney of the plaintiffs in this action? Second, if he did, does 40 the greater weight of the evidence establish the fact

Charge

that he represented to them that this contract between the Osborns and Holzhauser was a good and enforceable contract? Third, does the evidence show, if you find that he did represent them, that he did state that it was a good and enforceable contract, and that in representing them and in acting as he did, he was negligent? If it does, then they are entitled to your verdict, but if the evidence does not convince you that Mr. Jay accepted employment of the plaintiff and represented them as their attorney, the plaintiffs are not entitled to your verdict, and your verdict should be in favor of Mr. Jay. But even if he did accept such employment, if the evidence does not convince you that he represented to the plaintiff that the contract was a good and enforceable contract, the plaintiffs are not entitled to your verdict, and your verdict must be in favor of Mr. Jay, because this is a negligence action which the complaint charges against him. Even if you find that he had been their attorney, and that he represented to them that the contract was a good and enforceable contract, the plaintiffs must go a step further and show that they have lost money because they were negligently advised and represented by Mr. Jay. If you decide the other two questions, then you should find a verdict in favor of Mr. Jay on the others. 10 20 30

It becomes the duty of the court to instruct you as to what constitutes negligence on the part of an attorney.

Mr. Justice Katzenbach states this much better than I can and, I will read to you what he says on the subject in his opinion in the case of *McCullough vs. Sullivan*, 132 *Atlantic*, at page 103. He says: "A lawyer, without express agreement, is not an insurer. *He is not a guarantor of the soundness of* 40

Charge

his opinions, or the successful outcome of the litigation which he is employed to conduct, or that the instrument he will draft will be held valid by the court of last resort. He is not answerable for an error of judgment in the conduct of a case or for every mistake which may occur in practice. He does, however, undertake in the practice of his profession of the law that he is possessed of that reasonable knowledge and skill ordinarily possessed by other members of his profession." Such was the duty of Mr. Jay if he represented the plaintiffs in this case. So if he represented them, you may consider his testimony that on March 16th when plaintiffs say he advised them that the contract was a good and enforceable one, that he did not know the contract could not be specifically performed—in other words, if he did represent them and if he did so state to them to their damage, whether he ought not to have known that situation, in view of the fact that as long ago as 1906, in the case of *Saldutti vs. Flynn*, 72 *Equity*, 157, and again in 1923, in the case of *Kotok vs. Rossi*, 120 *Atlantic*, 208, it was decided by our courts that an agreement of sale by a married woman which was not acknowledged could not be specifically enforced, and Mr. Spector says that this representation that it was an enforceable contract was made to him on April 2nd, which was, you see, only three days after Mr. Pearce's letter is dated, and there is no testimony as to when Mr. Jay received Mr. Pearce's letter or whether or not he had received it on that date. However, he says that he again asked him on the 4th day of May whether everything was all right, and with the knowledge that what he desired was an enforceable contract. If he made that statement to Mr. Jay, the assignment from Mr. Holzhauer to the plaintiff was not executed and delivered to them until the

Charge

19th day of May. So that when you go to the jury-room the three questions which have already been stated to you must be considered by you and decided before the plaintiff is entitled to your verdict. First, did Mr. Jay represent the plaintiff? If he did not, that ends your consideration of this case, and he is entitled to your verdict. If he did, then you go on to the consideration of the next question, whether or not he represented to them that this was a good and enforceable contract, and that it was not enforceable in the way they desired it to be enforced. If he did not, then that ends your consideration of this case, and your verdict should be in his favor. If he did, then you go to the third question as to whether or not he possessed a knowledge and exercised the degree of knowledge and skill in the interest of his client which is ordinarily possessed and exercised by other lawyers of ordinary knowledge and skill. If he did, and notwithstanding that fact they suffered loss, your verdict must be in his favor. If he did not, if he was negligent and careless to their damage, then they may recover from him such damages as they have sustained by reason of his negligence.

I decline to charge any of the plaintiff's requests except as I have charged.

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

Exception noted as ground of appeal.

I will decline to charge any of the defendant's requests except as I have charged.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.
(The jury retires.)

Exceptions to Charge

10 MR. AUGENBLICK. There is only one exception that I want to take to your Honor's charge and that is this, that you said to the jury that if the defendant was representing the plaintiff and he told them that it was an enforceable contract, and it was not, then he would be responsible to them for damages. My contention is that he does not have to represent to them, he does not have to tell them that it is an enforceable contract, so long as he represents the plaintiffs and he permitted them to take a contract of this kind without telling them that it was an enforceable contract.

Exception noted as ground of appeal.

20 MR. WEINBERG. I first desire to take an exception to your Honor's refusal to charge my requests specifically.

Exception noted as ground of appeal.

30 MR. WEINBERG. I desire to take exceptions to the following statements made to the jury: First, the statement to the jury that the plaintiff could not recover from the Osborns any damages unless they could prove that the land was worth over \$20,000, and that there was no evidence as to that. My opinion, is, of course, obvious, that unless they can prove what the damages are, they cannot maintain an action for substantial damage against the defendant.

Exception noted as ground of appeal.

40 MR. WEINBERG. Again, where your Honor said that if the jury finds that Mr. Jay was negligent, the verdict should be for the plaintiff, saying, as your Honor, did, according

Exceptions to Charge

to my notes, that that negligence of course must be the proximate cause of loss sustained by the plaintiffs.

THE COURT. I said that in two other places. You may take your exception. 10

Exception noted as ground of appeal.

MR. WEINBERG. The court has not stated what the damages to the plaintiff were—in other words, he stated no rule for the damages in this case which will guide the jury in the bringing in of the verdict in this case.

Exception noted as ground of appeal.

MR. WEINBERG. And in these questions which you say the jury should answer is, Did Mr. Jay *represent the plaintiffs*? My complaint is that the jury must find that Mr. Jay represented the plaintiff in this particular matter of advising them, the same thing that Mr. Augenblick has objected to, only in another way. If he was employed to draw a certain contract, and he is not asked as to the enforceability of validity of the contract, then the plaintiff is out of Court. 20

Exception noted as ground of appeal. 30

MR. WEINBERG. Your Honor did say that if the defendant was careless to the damage of the plaintiffs, that plaintiffs may recover against the defendant. I am a little diffident about pressing that because I do not know what your Honor said. I do not remember it.

THE COURT. You may take your exception.

Exception noted as ground of appeal. 40

Plaintiff's Requests to Charge

PLAINTIFF'S REQUESTS TO CHARGE.

The court is respectfully requested to charge the jury as follows:

- 10 1. A married woman cannot bind herself to convey land except by a contract in writing duly acknowledged, and such a contract by a married woman unacknowledged cannot be specifically enforced. All the enabling acts empowering a married woman to convey or to contract to convey land require as an essential to the exercise of the power, previous acknowledgement duly certified to her deed or contract.
- 20 2. The contract between Carrie C. Osborn, I. B. Osborn, her husband, and Frank Holzhauser, dated October 31st, 1925, is not binding on the said Carrie C. Osborn to convey the land mentioned in the contract, and the said contract cannot be specifically enforced against her.
- 30 3. It is the duty of an attorney who is employed by a client to pass title to real estate and investigate the contract pertaining to the sale of the real estate, to make a painstaking examination of the contract and report all facts relating to the contract, and to make sure that the contract is one that can be specifically enforced, and if the contract is a contract made by a married woman it is the duty of the attorney to ascertain whether such contract contains the acknowledgement of the married woman in accordance with Section 39 of the Conveyance Act as amended Pamphlet Laws of 1918, page 119, and if an attorney advises a client to take an assignment of an unacknowledged contract of a married woman, he is liable for any injury that may result to his client from negligence in the performance of his duties, that is, from a failure to exercise ordinary care and skill in ascertaining whether or not the
- 40

Plaintiff's Requests to Charge

contract of the married woman can be specifically enforced.

- 10 4. A lawyer undertakes in the practice of his profession of the law that he has possession of that reasonable knowledge and skill ordinarily possessed by other members of his profession. He contracts to use the reasonable knowledge and skill in the transaction of business which lawyers of ordinary ability and skill possess and exercise. He is immune from the responsibility if he fails to employ in the work he undertakes that reasonable knowledge and skill exercised by lawyers of ordinary ability and skill.
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- 30
- 40

Plaintiff's Requests to Charge

DEFENDANT'S REQUESTS TO CHARGE.

The court is respectfully requested to charge the jury as follows:

- 10 1. Should the jury find the defendant negligent and answerable to the plaintiffs or either of them, the damages to be awarded must be limited to a nominal sum, and by a nominal sum is usually understood the sum of six cents.
- 2. No verdict, however, can be rendered against the defendant unless the jury shall be satisfied by the weight of the evidence that the plaintiffs were misled by information given by the defendant during the course of his engagement or service as attorney for them or either of them.
- 20 3. Unless the defendant was acting as attorney for the plaintiffs, or either of them, for the particular purpose of advising them as to the contract mentioned, the defendant is entitled to a verdict.
- 4. Assuming that the defendant did tell the plaintiffs, or either of them, that the contract in question was enforceable, the defendant cannot be found guilty of negligence for the reason that the contract mentioned is and was actionable in law.
- 30 5. If the plaintiffs understood and were informed that they could not get the lots as described in the contract with the Osborns, and took an assignment with that knowledge, and were advised by the defendant, or had independent knowledge that an action of specific performance could not be maintained thereon, the verdict of the jury must be for the defendant.

New Jersey Supreme Court

JULIUS G. FABRY AND
EDWARD W. SPECTOR,

Plaintiffs,

vs.

FREDERICK JAY,

Defendant.

Judgment Record. 10
Action at Law.
On Postea.
Koehler &
Augenblick,
Attorneys.

Frederick Jay, the defendant in this cause was summoned to answer unto Julius G. Fabry and Edward W. Spector, the plaintiffs therein, in an action at law upon the following complaint: 20

(Summons issued October 14, 1926)

The plaintiff, Edward W. Spector, residing in the City of Newark, in the County of Essex and State of New Jersey, and the plaintiff Julius G. Fabry, residing in the Boro of Bradley Beach, in the County of Monmouth, and State of New Jersey, say:— 30

1. At the time hereinafter mentioned, the defendant, Frederick Jay was and still is a duly licensed practicing attorney and counsellor at law of the State of New Jersey.

2. On or about the 16th day of March, 1926, the plaintiffs, Julius G. Fabry and Edward W. Spector retained the said defendant, Frederick Jay to represent them as attorney in a certain realty transac-

On Postea

tion involving the sale and purchase of certain real estate lying and situated in the Township of Brick, in the County of Ocean and State of New Jersey.

10 3. The said defendant Frederick Jay, attorney at law, negligently and carelessly and without exercising due care, advised, permitted and caused the plaintiffs to take an assignment of a certain contract for the sale and purchase of the lands and premises mentioned aforesaid, which contract is dated September 5th, 1925, made and executed by C. C. Osborn and I. B. Osborn, vendors, and Frank Holzhauser, vendee, and which contract is unenforceable by reason of the facts stated in paragraph four of this complaint.

20 4. The said contract dated September 15th, 1925, made between the aforesaid vendors and the aforesaid vendee, was and still is an unenforceable contract under the laws of the State of New Jersey, in that the signature of Carrie C. Osborn, wife of I. B. Osborn, vendors, is not acknowledged in accordance with the Statute in such cases made and provided.

30 5. That the said contract between the aforesaid vendors and the aforesaid vendee, Frank Holzhauser, was drawn, prepared and drafted by the defendant, Frederick Jay, attorney at law of the State of New Jersey.

40 6. That the assignment to the plaintiffs of the aforesaid contract, unacknowledged, was prepared, drawn and drafted by the defendant Frederick Jay, attorney at law of the State of New Jersey, representing the plaintiffs herein, and the said Frederick Jay, attorney of the plaintiffs herein, informed

On Postea

and advised the plaintiffs that the contract assigned by the said Frank Holzhauser, was a legal, valid and enforceable contract under the laws of the State of New Jersey.

7. That the plaintiffs, relying upon the knowledge, skill and advice and experience of the said Frederick Jay, their attorney, paid unto the said Frank Holzhauser, vendee, the sum of \$2100.00 in cash, in consideration of obtaining said assignment of contract. That the said sum was paid by the plaintiffs in various installments up until the 19th day of May, 1926, on which date the last installment was paid and the assignment delivered. 10

8. That the said sum of \$2100. was turned over and paid by the plaintiffs unto the said Frank Holzhauser and the said plaintiffs, relying upon the advice, skill, representations, experience and legal knowledge of the said Frederick Jay, their hired attorney, believed that the said contract was a valid, legal and enforceable contract under the laws of the State of New Jersey. 20

9. For said services as above, the plaintiffs paid the defendant, Frederick Jay, the sum of \$40.00, relying on his legal knowledge, skill, experience, advice and representations. 30

10. The plaintiffs have made several attempts to obtain a conveyance of the premises mentioned aforesaid in accordance with the terms of the contract entered into between the said Osborns and the said Frank Holzhauser and assigned to the plaintiffs, but the plaintiffs have been unable, and are still unable to obtain title by reason of the fact that the said Carrie C. Osborn, wife of I. B. Osborn, refused, and still refuses, to convey her dower interest to the said premises. And the said plaintiffs 40

On Postea

are advised and verily believe that they cannot obtain a marketable title to said premises from the said Carrie C. Osborn for the reason that the signature of the said Carrie C. Osborn, wife of the said I. B. Osborn is not acknowledged in accordance with the laws of the State of New Jersey.

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11. The plaintiffs have attempted to obtain a return of the said sum of \$2100.00 paid by them, as mentioned aforesaid, from the said Osborns and the said Frank Holzhauser, but the said Frank Holzhauser and the said Osborns have refused and still refuse to pay the plaintiffs the said sum.

20

12. The said plaintiffs have demanded from the defendant, Frederick Jay, the said sum of \$2100.00 paid by them to the said Frank Holzhauser, but the said defendant, Frederick Jay, has refused and still refuses to pay the same

Plaintiffs demand from the defendant the sum of \$2100.00, together with interest thereon from the 19th day of May, 1926.

KOEHLER & AUGENBLICK,
Attorneys for Plaintiff.

(Filed October 26, 1926)

30

The defendant, Frederick Jay, residing in the City of Newark, in the County of Essex and State of New Jersey, answering plaintiffs' complaint, says:

1. Paragraph 1 is admitted.
2. Paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 are denied.
3. He has no knowledge or information sufficient to form a belief as to the allegations in Paragraph 10, and leaves the said plaintiffs to make due proof thereof.

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On Postea

4. He denies the allegations in Paragraph 11.

5. He admits the allegations in Paragraph 12, but denies that there is anything due from him to the said plaintiffs, or either of them.

10

DEFENSES

By way of separate and distinct defenses to plaintiffs' complaint, this defendant says:

FIRST SEPARATE DEFENSE

He denies that the relation of attorney and clients existed between himself and said plaintiffs, except that he was employed by said plaintiffs for the purpose of having prepared and drawn the following papers, to wit:

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A certain option given to the said plaintiffs by Frank Holzhauser, dated March 16th, 1926; receipt and agreement between said plaintiffs and said Frank Holzhauser, dated April 2nd, 1926; assignment from said Frank Holzhauser to plaintiff, Edward W. Spector, of all the rights of the said Frank Holzhauser in a certain agreement bearing date of October 31st, 1925, between Carrie C. Osborn and I. B. Osborn and Frank Holzhauser, for certain lands in Brick Township, Ocean County, New Jersey, which assignment is dated May 19th, 1926; a bond and mortgage from plaintiff, Edward W. Spector to Carrie C. Osborn, and miscellaneous receipts, etc., as well also recording the said assignment dated May 19th, 1926, and paying the sum of \$1.50 for its recording in the Clerk's Office of Ocean County, for which the said plaintiffs paid this defendant, the sum of \$40.00, which was a reasonable charge for the same.

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*On Postea***SECOND SEPARATE DEFENSE**

The assignment dated May 19th, 1926, referred to in the preceding defense, in which said Frank Holzhauser was the party of the first part, and the said Edward W. Spector was the party of the second part, contained the following clause:

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"The party of the second part shall take this assignment to all the equities, rights that exist for and against the party of the first part."

The said plaintiff, Edward W. Spector, therefore, was apprised of any infirmities and omissions, if any, in said agreement between the said Osborns and the said Frank Holzhauser.

THIRD SEPARATE DEFENSE

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Said agreement between said Osborns and said Frank Holzhauser, if not enforceable in equity, is actionable at law, and plaintiffs have a right of action against the said Osborns for breach of contract.

FOURTH SEPARATE DEFENSE

Said plaintiffs have not exhausted their remedy against either the said Osborns or the said Frank Holzhauser, all of whom are financially responsible.

30

FIFTH SEPARATE DEFENSE

Defendant denies any negligence or lack of reasonable skill on his part in any of the transactions between himself and any or either of said plaintiffs.

SIXTH SEPARATE DEFENSE

Said plaintiff, Julius G. Fabry, has no interest in the subject matter of this action, as any and all interest which he had in the Holzhauser transaction, was relinquished by him in favor of the plaintiff, Edward W. Spector.

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*On Postea***SEVENTH SEPARATE DEFENSE**

Said complaint failed to state a cause of action against said defendant.

NOTICE

10

Said defendant hereby gives notice that he reserves the right, at or before the trial of the above said cause, to move to strike out the said complaint upon the ground that the same fails to disclose a cause of action against him, the said defendant.

BENJAMIN M. WEINBERG,

Attorney of Defendant.

(Filed October 29, 1926)

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The plaintiffs, replying to the defenses set up in the answer filed by the defendant in this cause, says:

REPLY TO FIRST SEPARATE DEFENSE

They deny that the defendant was employed by the said plaintiffs for the purpose of having prepared and drawn the instruments set up in the first separate defense of the answer, but assert that the defendant was retained by the plaintiffs to represent the plaintiffs as attorney for them in consummating the transaction referred to in the complaint, and admit as attorney for the plaintiffs, the defendant prepared the option agreement dated March 16th, 1926, receipt and agreement dated April 22nd, 1926, and the assignment bearing the date, May 19th, 1926, for all of which services the plaintiffs paid the defendant the sum of Forty (\$40.00) dollars.

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*On Postea***REPLY TO SECOND SEPARATE DEFENSE**

10 Plaintiffs admit that the assignment contained the provision set forth in the second separate defense, but deny that they were apprised of any infirmities and omissions in the agreement between the Osborns and the said Frank Holzhauser, but on the contrary, assert that they were advised by the defendant that the said contract between the Osborns and the said Frank Holzhauser was a legal, valid subsisting and enforceable contract under the laws of the State of New Jersey for the purchase and sale of real estate.

REPLY TO THIRD SEPARATE DEFENSE

20 Plaintiffs have no knowledge as to the alleged rights that they may have as set forth in the third separate defense of the answer.

REPLY TO FOURTH SEPARTE DEFENSE

Plaintiffs have no knowledge or information sufficient to form a belief as to the financial responsibility of the Osborns or of the said Frank Holzhauser.

REPLY TO FIFTH SEPARATE DEFENSE

30 Plaintiffs joint issue on the fifth separate defense set up in the answer.

REPLY TO SIXTH SEPARATE DEFENSE

They deny the sixth separate defense.

REPLY TO SEVENTH SEPARATE DEFENSE

They deny the seventh separate defense.

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KOEHLER & AUGENBLICK,
Attorneys of Plaintiffs.

On Postea

(Filed November 26, 1926).

The defendant, by way of rejoinder to the reply of the plaintiffs, filed herein, says:

He denies each and every allegation in the nature of new matter set forth by the plaintiffs under their reply to defendant's "First and Second Separate Defense." 10

BENJAMIN M. WEINBERG,
Attorney of Defendant.

(Filed December 1, 1926).

AMENDED COMPLAINT

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The plaintiff, Edward W. Spector, residing in the City of Newark, in the County of Essex and State of New Jersey, and the plaintiff, Julius G. Fabry, residing in the Boro of Bradley Beach, in the County of Monmouth, and State of New Jersey, say:

FIRST COUNT

1. At the time hereinafter mentioned, the defendant, Frederick Jay was and still is a duly licensed practicing attorney and counsellor-at-law of the State of New Jersey. 30

2. On or about the 16th day of March, 1926, the plaintiffs Julius G. Fabry and Edward W. Spector retained the same defendant Frederick Jay to represent them as attorney in a certain realty transaction involving the sale and purchase of certain real estate lying and situated in the Township of Brick, in the County of Ocean and State of New Jersey. 40

On Postea

3. The said defendant Frederick Jay, attorney at law, negligently and carelessly and without exercising due care, advised, permitted and caused the plaintiff to take an assignment of a certain contract for the sale and purchase of the lands and premises mentioned aforesaid, which contract is dated September 5th, 1925, made and executed by C. C. Osborn and I. B. Osborn, vendors, and Frank Holz-
 10 hauer, vendee, and which contract is unenforcible by reason of the facts stated in paragraph four of this complaint.

4. The said contract dated September 15th, 1925, made between the aforesaid vendors and the aforesaid vendee, was and still is an unenforcible contract under the laws of the State of New Jersey, in that
 20 the signature of Carrie C. Osborn, wife of I. B. Osborn, vendors, is not acknowledged in accordance with the Statute in such cases made and provided.

5. That the said contract between the aforesaid vendors and the aforesaid vendee, Frank Holz-
 hauer, was drawn, prepared and drafted by the defendant, Frederick Jay, attorney at law of the State of New Jersey.

6. That the assignment to the plaintiffs of the aforesaid contract, unacknowledged, was prepared, drawn and drafted by the defendant, Frederick Jay, attorney at law of the State of New Jersey, representing the plaintiffs herein, informed and advised the plaintiffs that the contract assigned by the said Frank Holz-
 30 hauer was a legal, valid and enforcible contract under the laws of the State of New Jersey.

7. That the plaintiffs, relying upon the knowledge, skill and advice and experience of the said
 40 Frederick Jay, their attorney, paid unto the said

On Postea

Frank Holz-
 hauer, vendee, the sum of \$2100.00, in cash, in consideration of obtaining said assignment of contract. That the said sum was paid by the plaintiffs in various installments up until the 19th day of May, 1926, on which date the last installment was paid and the assignment delivered.

8. That the said sum of \$2100.00 was turned over and paid by the plaintiffs unto the said Frank Holz-
 hauer and the said plaintiffs, relying upon the advice, skill, representations, experience and legal knowledge of the said Frederick Jay, their hired attorney, believed that the said contract was a valid, legal and enforcible contract under the laws of the State of New Jersey.

9. For said services as above, the plaintiffs paid the defendant Frederick Jay the sum of \$40.00, relying on his legal knowledge, skill, experience, advice and representations.

10. The plaintiffs have made several attempts to obtain a conveyance of the premises mentioned aforesaid in accordance with the terms of the contract entered into between the said Osborns and the said Frank Holz-
 hauer, and assigned to the plaintiffs, but the plaintiffs have been unable to and are still unable to obtain title by reason of the fact that the said Carrie C. Osborn, wife of I. B. Osborn, refused and still refuse to convey her dower interest to the said premises. And the said plaintiffs are advised and verily believe that they cannot obtain a marketable title to said premises from the said Carrie C. Osborn and I. B. Osborn for the reason that the signature of the said Carrie C. Osborn, wife of the said I. B. Osborn is not acknowledged in accordance with the laws of the State of New Jersey, and for other reasons known to defendant.

On Postea

11. The plaintiffs have attempted to obtain a return of the said sum of \$2100.00 paid by them as mentioned aforesaid, from the said Osborns and the said Frank Holzhauser, but the said Frank Holzhauser and the said Osborns have refused and still refuse to pay the plaintiffs the said sum.

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12. The said plaintiffs have demanded from the defendant Frederick Jay the said sum of \$2100.00 paid by them to the said Frank Holzhauser, but the said defendant Frederick Jay has refused and still refuses to pay the same.

SECOND COUNT

1. On or about March 6th, 1926, the defendant induced the plaintiffs to pay to Frank Holzhauser the sum of \$250.00 as a deposit for an option to purchase from the said Frank Holzhauser, a certain contract between Carrie Osborn and I. B. Osborn, her husband for the sale of forty lots for \$20,000.00 situated in Brick Township, Ocean County, N. J. Before the payment of said sum of \$250.00 by the plaintiffs to the said Frank Holzhauser, defendant did represent to the plaintiffs that the said contract between the said Carrie Osborn and I. B. Osborn her husband of one part and the said Frank Holzhauser of the other part, was a good and legal contract binding upon the parties thereto, and enforceable.

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2. Thereafter, on or about April 2, 1926, the defendant did again represent to the plaintiffs that the said contract between the said Osborns and the said Holzhauser whereby the said Holzhauser had agreed to purchase the said forty lots of land, was a good, valid, subsisting and enforceable contract for the purchase and sale of said lots.

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On Postea

3. The defendant is an attorney and counsellor at law of the State of New Jersey and is and was at the time herein referred to, an attorney and counsellor at law of the State of New Jersey, licensed and practicing in the City of Newark, County of Essex and State of New Jersey.

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4. Plaintiffs had no independent knowledge as to whether or not the said contract was a good, valid, subsisting and enforceable contract for the purchase and sale of said lots and relied upon the representations of the defendant and were because of said representations induced to pay to the said Holzhauser, the sum of \$2100.00 on account of said assignment of said contract because of the representations aforesaid.

20

5. The representations aforesaid so made by the defendant, were false and fraudulent and known by him to be false and fraudulent and were made with the intent of deceiving the plaintiffs into taking an assignment of said contract and the defendant well knew that the plaintiffs relied upon the truth of the representations so made by him as aforesaid.

6. The said contract was worthless and of no value and is unenforceable. By reason whereof plaintiffs have been damaged in the sum of \$2100.

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Judgment will be claimed on both counts in the sum of \$2100. together with interest and costs.

KOEHLER & AUGENBLICK,
Attorneys of Plaintiffs.

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On Postea

(Filed October 4, 1927).

ANSWER TO SECOND COUNT OF PLAINTIFFS' AMENDED COMPLAINT

- 1. Paragraph 1 and 2 are denied.
- 10 2. Defendant admits that he is an attorney at law of the State of New Jersey, and was such at the time referred to in plaintiffs' complaint.
- 4. Paragraphs 4, 5, and 6 are denied.

SEPARATE DEFENSES

Defendant repeats all of the defenses heretofore pleaded by him in his answer to the First Count of plaintiffs' original complaint.

20 **BENJAMIN M. WEINBERG,**
Attorney of Defendant.

(Filed October 3, 1927).

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

30

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

EDWARD J. KELLEHER,
Clerk.

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New Jersey Court of Errors and Appeals

JULIUS G. FABRY and EDWARD
W. SPECTOR,
Plaintiffs-Respondents,

vs.

FREDERICK W. JAY,
Defendant.

*On Appeal.
from the
Supreme
Court.*

BRIEF OF PLAINTIFFS-RESPONDENTS.

Facts.

The plaintiffs are Julius G. Fabry and Edward W. Spector, commercial artists doing business in the City of Newark. The defendant is Frederick W. Jay, an attorney at law, practicing his profession in the City of Newark.

On September 5, 1925, Carrie C. Osborn and I. B. Osborn, her husband, of Ocean County, received from one Frank Holzhauser, \$100.00, and both agreed in writing to sell and convey to the said Frank Holzhauser 40 lots of land, Nos. 1 to 40 in Brick Township, Ocean County, for \$20,000.00 (Exhibit P. 9, State of the Case, p. 39). On October 31, 1925, Mr. Holzhauser gave the Osborns \$500.00 more and the Osborns again agreed in writing to convey the said lots to the said Frank Holzhauser on or before the 18th day of November, 1925, upon the terms therein stated (Exhibit P. 9, State of the Case, p. 29). Neither of such writings was acknowledged by the Osborns or either of them.

On March 16, 1926, Julius G. Fabry came to see Mr. Frederick Jay, an attorney at law of the State of New Jersey, who was the attorney for Holzhauser, regarding the purchase and assign-

ment of the aforesaid contract between the Osborns and Holzhauser. Mr. Holzhauser was called in by Mr. Jay and on that day, March 16, 1926, Mr. Holzhauser agreed in writing that he would assign the contract to Mr. Fabry and Mr. Spector, the plaintiffs herein, for the sum of \$1,500.00 plus the \$600.00 paid by him to the Osborns, making a total of \$2,100.00 if the plaintiffs should decide within ten days to take an assignment upon the terms stated in the option (Exhibit P. 2, State of the Case, p. 22). At that time before the \$250.00 was paid, Mr. Fabry asked Mr. Jay what the purchase price was under the contract. Mr. Jay told him it was \$20,000.00. Mr. Jay also told him that his client would sell the contract. Mr. Fabry then asked Mr. Jay, "is this a good and enforceable contract?" and Mr. Jay said "absolutely." Mr. Fabry then said, "Well, Mr. Jay, I would like to have you represent me as my attorney for procuring the assignment of this contract, and also to make the search for me" (State of the Case, p. 36, l. 30). Mr. Fabry then gave his check for \$250.00 to the order of Frank Holzhauser (Exhibit P. 1, State of the Case, p. 22).

After the option was turned over to Mr. Fabry, he again said to Mr. Jay, "I want you to represent me in getting this option, to take care of me," and Jay said he would, and that he would make his charges reasonable, and that he would also make the search for him (State of the Case, p. 38, l. 30).

On the 2nd of April, the plaintiffs Fabry and Spector again went up to see Mr. Jay. There was some talk about the contract and again Mr. Fabry said to Mr. Jay, "Mr. Jay, I feel that I want a good and enforceable contract," and Mr. Jay said "look here, I don't want any instruc-

tions from a youngster of a lawyer," (referring to Mr. Augenblick) and Mr. Fabry said, "Mr. Jay, I don't want to displease you in any way, I want the contract," and then Mr. Jay said, "you leave it to me and I will see that you get a good contract and that you get the property" (State of the Case, p. 39, l. 30).

The \$1,000.00 was then paid by Spector (Exhibits P. 3 and P. 4, State of the Case, p. 24). Before the \$1,000.00 was paid, Jay said to Spector and Fabry, "that on a small deal like this, why couldn't he take care of us, and not have any interference by any other lawyers, and that he (referring to Jay) would take care of us on this deal." We told him that Fabry was the spokesman and he (referring to Jay) told Fabry "that he didn't want anybody to interfere; that everything would be all right," and he made out a receipt for the \$1,000.00, and they left. Mr. Fabry made it clear that Jay was to take care of us, and that Mr. Fabry said, "well, if you don't want any interference, we will trust you in this matter," and Jay said, "yes, I will take care of you in this deal" (State of the Case, p. 50, l. 20). Later \$200.00 was again paid by Mr. Spector (Exhibit P. 5). On May 4, 1926, at which time Spector asked Mr. Jay if everything was all right, and Mr. Jay said, "yes, everything was fine, everything was going along very nicely," and Mr. Spector asked him to make a search of this property, and Mr. Jay said he would. Mr. Spector thereupon gave him the \$200.00 and at the same time gave a receipt to Spector for this sum (State of the Case, p. 51, l. 10).

Later on May 19, 1926, Spector again went to Mr. Jay's office and again paid \$650.00, and Jay had an assignment of the contract ready for him. Spector reminded Jay that he wanted a search on the property, and Jay said he would get it. That he had partly searched it for Holzhauser and that he would continue to search. Spector asked Jay if he wanted to be paid for his services, and Jay said, "yes," he would like to be paid up to that time, and asked Spector to give him a check for \$40.00, which Spector did, to the order of Fred'k Jay (Exhibit P. 6, State of the Case, p. 52, l. 10) for the payment of \$650.00, and Exhibit 7, for the payment of \$40.00 for services. The assignment of the contract was then made by Mr. Holzhauser (Exhibit P. 8, State of the Case, 27). The assignment was never delivered to Mr. Spector. Spector thereafter came to see Mr. Jay from time to time. Later, not receiving any telephone calls from him, or any notification, thought he would drop in and see Jay. That Jay told him that the Osborns had not responded. That they would not come or give him (Spector) the property. Jay said to Spector, "you better make a legal tender of the money, a few thousand dollars in cash, and show them that you are ready" (State of the Case, p. 53, l. 20). A bond and mortgage was prepared by Jay. Spector went down to the Osborns and made the tender. The Osborns refused to convey, and so informed Mr. Jay through their attorney Mr. Pearce, on the 30th day of March, 1926, that the contract was not acknowledged by Mrs. Osborn as a married woman and could not have any standing in a court for specific performance, nor could damages be recovered as no damages could be shown (Exhibit P. 11, State of the Case, p. 31).

When Spector came back from the Osborns, he told Mr. Jay that the Osborns refused to convey. Jay said to Spector, "don't worry about that, I have a way whereby we can make as much money without investing any more of your money; I will sue them for damages" (State of the Case, p. 54, l. 30). Mr. Spector answered, "Mr. Jay, I am really surprised at this damage action, I want the property. I never went in any real estate deal before. I thought I was going to get land and here I have a lawsuit" (State of the Case, p. 55, l. 10). Spector then told Jay that he didn't think it was fair to him or to Mr. Fabry; that he bought nothing more than a paper or a lawsuit, and told Jay that he would hold him responsible for his loss (State of the Case, p. 57, l. 20).

POINT I.

The motion for a non-suit was properly denied by the trial court.

The evidence clearly shows that Mr. Jay accepted employment as the attorney of the plaintiffs, and took a fee from them of \$40.00 as compensation for his services; that he represented to them that this contract between the Osborns and Holzhauser was a good and enforceable contract, when as a matter of fact, the contract was not a good and enforceable contract in that the signature of Mrs. Osborn, a married woman, was not acknowledged, that in making such a representation and advising them in this way he was negligent; and that relying on the representations of the defendant Mr. Jay, to wit, that the contract was a good and enforceable contract, and that they would be able to get the land, meaning

that the contract could be enforced in a suit for specific performance, plaintiffs paid Holzhauer \$2,100.00; that the contract that was assigned to them was not an enforceable contract; that they could not get title to the lands in a suit for specific performance with the result that they paid Holzhauer \$2,100.00 for something their attorney advised them they were getting when in fact they did not get at all, and that Holzhauer refused to return the money back to them.

Mr. Justice Katzenbach enlightens us as to what constitutes negligence on the part of an attorney in *McCullough v. Sullivan*, 132 Atlantic, page 103. Mr. Justice Katzenbach says:

“A lawyer without express agreement, is not an insurer. He is not a guarantor of the soundness of his opinions, or the successful outcome of the litigation which he is employed to conduct, or that the instrument he will draft will be held valid by the court of last resort. He is not answerable for an error of judgment in the conduct of a case or for every mistake which may occur in practice. He does, however, undertake in the practice of his profession of the law that he is possessed of that reasonable knowledge and skill ordinarily possessed by other members of his profession.”

This was the duty of Mr. Jay if he represented the plaintiffs in this case. If he represented them as their attorney and told them that the contract was good and enforceable, when as a matter of fact it was not, and they relied on his representation and believed when they paid the \$2,100.00 that they would be able to get the land by means of the contract, but discovered later that they only acquired a lawsuit, Jay the defendant is responsible for the moneys plaintiffs paid Holzhauer relying on their attorney's wrong advice. The plaintiffs paid Jay \$40.00 for advice and services, and Jay was

charged with the duty to render efficient and reliable services, and exercise reasonable skill and display reasonable knowledge in handling the matter entrusted to him. If he did not know that the contract between the Osborns and Holzhauer was unenforceable in equity, it was incompetency and unfamiliarity and negligence on his part. He ought to have known it for as far back as 1906, in the case of *Saldutti v. Flynn*, 72 Equity, 157, and again in *Kotok v. Rossi*, 120 Atlantic, 208, it was decided by our Courts that an agreement of sale by a married woman which was not acknowledged could not be specifically enforced, and Mr. Spector testified that this representation was made by Mr. Jay on April 2, 1926, which was three days after Mr. Pearce's letter of March 30th, and Mr. Fabry testified that the representation was made to him on March 16th.

In the late case of *Celendano, complainant, v. Mary Blazejewski, et als., defendants*, 98 Equity, page 45, Vice-Chancellor Backes said:

“But the contract cannot be enforced. A married woman cannot convey land except by a duly acknowledged deed. *Whalen v. Manchester Land Co.*, 65 N. J. Law 206. And she cannot bind herself to convey land except by a contract in writing duly acknowledged. *Corby v. Drew*, 55 N. J. Eq. 387; *Goldstein v. Curtis*, 63 N. J. Eq. 454; *Schwarz v. Regan*, 64 N. J. Eq. 139; *Ten Enck v. Saville*, 64 N. J. Eq. 611; *Saldutti v. Flynn*, 72 N. J. Eq. 157; *Chassman v. Wiese*, 90 N. J. Eq. 108; *Crandall v. Graham*, 93 N. J. Eq. 675; *Rittenhouse v. Swiecicki*, 94 N. J. Eq. 36; *Kotok v. Rossi*, 94 N. J. Eq. 327; *Kolinsky v. Pilz*, 94 N. J. Eq. 796. At common law a married woman could not contract to convey land. By the fifth section of the Married Woman's Act (Comp. Stat. p. 3226), she may contract as though she were

unmarried, and, for breach of her unacknowledged contract in writing to sell land, is personally liable in damages. *Wolff v. Meyer*, 75 N. J. Law 181. But such a contract cannot be specifically enforced. All the enabling acts empowering her to convey or to contract to convey land require, as an essential to the exercise of the power, a previous acknowledgment duly certified to her deed or contract. Section 39 of the Conveyance Act, amended P. L. 1918, p. 119, as to conveyances and contracts for the sale of lands."

In *O'Neill v. Linowitz*, 92 Equity, page 179, Vice-Chancellor Buchanan said,

"Finally, as to the defense of invalidity of the contract as to the wife, for lack of acknowledgment by her, and consequent want of mutuality. Section 39 of the act respecting conveyances (P. L. 1918, p. 119) has been construed to mean that a contract of sale by a married woman is invalid to affect her interest in lands unless it be acknowledged by her and such acknowledgment certified by the official before whom the acknowledgment is made. The statute by no means makes her contract void, but merely deprives it of efficacy to pass title. *Wolff v. Meyer*, 75 N. J. Law 181. Defendant contends that the contract in question here was not acknowledged by the complainant wife, and, hence, could not be enforced against defendant."

In 2 *Ruling Case Law*, page 1004, it is said:

"And the question of whether or not an attorney has been guilty of such gross negligence or ignorance in the pursuance of his professional duties as to render him liable to his client is usually deemed to be one of fact to be determined by a jury." 52 Amer. Dec. Digest, page 262, and on page 1015, it is further said:

"for loss to clients resulting from a want of proper knowledge of matters of law in common use or of such plain and obvious prin-

ciples as every lawyer is presumed to know, an attorney is liable and is usually held to be liable for the consequences of his ignorance or non-observance of the rules of the Courts in which he practices or for his ignorance of the statutes and published decisions in his own State." See 34 Amer. Dec. 90 notes. See *Citizens Loan Fund & Savings Association v. Friedley*, 123 Ind. 7 L. R. A. 669.

It is a universal rule of law that "an attorney is bound to execute business in his profession with a reasonable degree of care, skill and dispatch. If the client be injured by the gross fault, negligence, or ignorance of the attorney, the attorney is liable." This rule was laid down by the Supreme Court in 20 Main, 421, and is an expression of the general rule that has guided the Courts from the earliest cases to the present day. In 8 Mass., page 51, Judge Sedgwick said, "There is no doubt that for any misfeasance or unreasonable neglect of an attorney, whereby his client suffers a loss, an action may be supported and damages recovered to the amount of that loss."

In 1 *Tucker* (N. Y. Supplements), 236, the Court said:

"It is not claimed that an attorney should be acquainted with the whole circle of jurisprudence. He is, however, bound to understand the leading principles of common law, AND HE CANNOT BE EXCUSED FOR IGNORANCE OF THE PUBLIC STATUTES OF THE STATE."

In the case of *Allen v. Clark*, (Mew's Enc. Digest, Vol. XIII, 1475) the attorney was held liable for a failure to inquire into vendor's title. His client, the vendee was allowed to recover the full amount paid to obtain good title, plus interest to the time he was dispossessed.

This seems to be the general rule that has been followed in all the cases; the basis of recovery being the confidence placed in the attorney by his client, who has no visible means of ascertaining whether or not the attorney is acting for his best interests, but must rely on the confidence he reposes in him; and the amount recoverable against the attorney for his negligence or want of skill is measured by the amount of the actual loss sustained.

POINT II.

The motion for the direction of a verdict was properly denied.

On page 101, line 30 of the State of the Case, Mr. Jay was asked:

“Did Spector, one of the plaintiffs ever say that he didn't want a lawsuit, he wanted the land? A Yes, sir.”

On page 103 of the State of the Case, line 35, Mr. Jay was asked:

“Q On March 16, 1926, when Mr. Holzhauser received the \$250.00 which you deposited in your account with other checks, did you know that you had an enforceable contract?”

Mr. Weinberg: I object to that as immaterial.

The Court: Overruled.

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

Exception noted as ground of appeal.

A I don't know what you mean by unenforceable.

Q Did you know that the contract was void that day? A I don't know whether I did or not at that time.

Q You don't know? A I don't say that.

Q What does that mean, either you knew or either you didn't know? A I never gave

it a particular thought because Mr. Fabry at that time said he could deal with the clam diggers and he spoke about the other two lots.

Q I didn't ask you that; I asked you whether you knew if that was an enforceable contract? A *I don't know whether I did or not.*

Q Were you familiar with section 39 of the conveyance acts as amended by Pamphlet Laws of 1918?

Mr. Weinberg: I object to that. That is question of law.

The Court: Objection overruled.

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

Exception noted as ground of appeal.

Q Were you familiar with section 39 of the conveyance laws as amended by Pamphlet Laws of 1918? A Yes, sir.

Q You were familiar? A Yes, sir.

Q Then you knew that you didn't have an enforceable contract to give the holder a right to specific performance? A *No, sir, I didn't know that.*

Q You didn't know? A I will be frank, and here was a contract signed by husband and wife, being familiar with the act, I thought possibly a contract signed by the real owner and wife was all right; that question never came up.

Q *You thought that even though the contract was signed by Mrs. Osborn that would give the right of specific performance? A I thought possibly that might be so.*

Q You had written to Mr. and Mrs. Osborn that unless you heard from them within five days you would be compelled to file a bill for specific performance? A Yes; it is not signed by me, but I admit I dictated that letter.

Q And you knew at that time that you had no action for specific performance? A I told you I will not admit that; I was exactly a little perplexed, I am willing to admit that.”

The defendant admitted that he was not familiar with the decisions. He also displayed gross ignorance as appears from the following:

“Q What was your object in telling him to record the assignment when the contract wasn't recorded? A To tell the world that he was the owner of the tract.

Q This is the assignment from Holzhauer to Spector? A What does it say?

Q Could it be ascertained on the record by anyone searching the property that it affects the Osborns' property? A That a certain agreement bearing date—

By the Court.

Q This would be an agreement from Holzhauer to Spector. How was anybody to find this in searching the Osborn property? A A searcher will always go through assignments and lands abandoned, and so forth. I did it at the time which I thought was better protection for Mr. Spector.”

The motion for the direction of a verdict was properly denied.

POINT III.

The words “**Enforceable Contract**” mean a contract capable of being enforced in equity by a decree for specific performance.

Fabry and Spector told Jay that they wanted the land. Jay knew that Fabry and Spector paid the \$2,100.00 for the assignment of the contract in order to get the land. When Fabry asked Jay if it was an enforceable contract he was purchasing, Fabry wanted to know whether the contract was sufficiently binding to enable him to get the property and Jay knew that when he told him it was an enforceable contract it was the land that he wanted and not a damage suit.

The damage of the plaintiffs is at least \$2,100.00, the money that they paid for the contract. Not getting what they bargained for through the fault of their attorney, they are legally entitled to get their money back from the person responsible for their predicament. They asked Jay if the contract was a good and an enforceable contract. Jay told them that it was. Upon his advice and relying on his statement, they paid Holzhauer \$2,100.00 and took an assignment of the contract. They found out later that the contract was not an enforceable contract and that they could not get the land. Their damage clearly is \$2,100.00.

In *Celendano v. Blazejewski*, 98 Equity, page 46, Vice-Chancellor Backes said: “the contract cannot be enforced,” clearly implying that the word “enforced” applies to a suit for specific performance in equity. In that same case he also said on page 47, “the contract cannot be specifically enforced. A married woman cannot convey land except by a duly acknowledged deed and she cannot bind herself to convey land except by a contract in writing duly acknowledged. At common law a married woman could not contract to convey land. By the fifth section of the Married Woman's Act, she may contract as if she were unmarried, and for breach of her unacknowledged contract to sell land is personally liable in damages, BUT SUCH A CONTRACT CANNOT BE SPECIFICALLY ENFORCED.”

From the testimony of Jay himself, it is clear that he understood the word “enforceable” to mean specifically enforceable in equity.

On page 105 of the State of the Case, line 15, he was asked the question, “you thought that even though the contract was signed by Mrs. Osborn that would give the right of specific per-

formance?" Jay's answer was, "I thought possibly that might be so," and further on he is asked the question, "and you knew at the time that you had no action for specific performance?" and his answer was, "I told you I will not admit that, I was exactly a little perplexed, I am willing to admit that." All indicating that it was specific performance the plaintiffs desired, and that Jay knew it. Plaintiffs did not have to use the words "specific performance" to inform Jay what they wanted. He knew that. On page 39 of the State of the Case, line 22, Mr. Fabry's testimony was as follows:

"I told Mr. Jay that I had been over to see Mr. Augenblick and I had shown him the option. He said the option was very satisfactory, but felt that there ought to be a provision that in the event Mr. Holzhauer, for some unknown reason, could not deliver that property, I was to have my money refunded. Mr. Jay carefully read over the papers that Mr. Augenblick gave him to show him and he said, 'Look here, gentlemen, if you want me to represent you you cannot consult any other lawyer.' I said, 'Mr. Jay,' I said, 'I feel that I want a good enforceable contract.' And he said, 'Look here, I don't want any instructions from a youngster of a lawyer.' I said, 'Mr. Jay, I don't want to displease you in any way. I want the contract.' And he said, 'YOU LEAVE IT TO ME AND I WILL SEE THAT YOU GET A GOOD CONTRACT AND THAT YOU GET THE PROPERTY.'"

If plaintiffs collect the \$2,100.00 from the defendant Frederick Jay, they cannot again collect the \$600.00 from the Osborns or successfully recover damages from the Osborns for their breach of the contract. Surely in equity the defendant Mr. Jay would be subrogated to such rights, and the argument of our adversary that the plain-

tiffs in the event that they hold this judgment against Jay will be in a position wherein they could go after either Holzhauer or the Osborns, or both of them, and such moneys as they might collect will be theirs, a clean profit above their losses, is untenable. The defendant Jay is a tortfeasor, and we know no rule of law where a tortfeasor can compel the injured party to seek mitigation in damages.

POINT IV.

The entire case is one of fact to be decided by a jury. There were three questions of fact involved: First, Did Mr. Jay represent the plaintiffs? Second, Did he represent to them that this was a good and enforceable contract? Third, Did he possess and did he exercise that degree of knowledge and skill which is ordinarily possessed and exercised by other lawyers of ordinary knowledge and skill?

There is ample proof on the first question. The testimony of Fabry, Spector and Jay himself proves this beyond a shadow of a doubt. The plaintiffs paid Jay \$40 for his services. First Separate Defense of the Answer sets forth that the \$40 was paid for the preparation of the various instruments (Exhibits in the Case) and this means nothing else but a relationship of attorney and client. When Jay prepared Exhibit P. 4 (State of the Case, p. 24, l. 40) he evidently was asked by his clients to provide for the rights as between themselves which he did, clearly indicating that he was acting as their attorney. Jay also prepared the bond and mortgage that was tendered to the Osborns and Jay advised Spector to take some cash and make a tender to the

Osborns. All these facts prove that there existed the relationship of attorney and client between Jay and the plaintiffs.

Both Fabry and Spector testified that Jay represented to them that it was a good and enforceable contract. Jay denies this. This was a question of fact decided by the jury.

Jay admitted that he did not know whether or not the contract could be enforced in equity. He did not know that the statute required the acknowledgment of the wife in order for it to be an enforceable contract. This, in the opinion of the jury was lack of knowledge ordinarily possessed and exercised by other lawyers of ordinary knowledge and skill.

We therefore respectfully submit that the judgment of the Supreme Court should be affirmed.

KOEHLER & AUGENBLICK,
Attorneys for and of Counsel
with Plaintiffs-Respondents.

New Jersey Court of Errors and Appeals

JULIUS G. FABRY and EDWARD W. SPECTOR, <i>Plaintiffs-Appellees,</i> vs. FREDERICK JAY, <i>Defendant-Appellant.</i>	} <i>Action</i> } <i>at Law.</i> } <i>On Appeal</i> } <i>from</i> } <i>Supreme</i> } <i>Court.</i>
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BRIEF ON BEHALF OF DEFENDANT-APPELLANT.

Preliminary Statement.

Plaintiffs brought an action in the Supreme Court against the defendant, an attorney-at-law of this State, to recover damages for alleged negligence in giving an unsound opinion regarding a certain contract. A verdict having been rendered in favor of the plaintiffs, the case is now before this Court on an appeal from the judgment rendered on said verdict.

Statement of Facts.

The complaint charges, *inter alia*, in its First Count, that the said defendant, while representing the said plaintiffs, "informed and advised the plaintiffs" that a certain contract * * * was "a legal, valid and enforceable contract, under the laws of the State of New Jersey."

The Second Count of that complaint charges the defendant with having fraudulently made the representations aforesaid; but this count was stricken out by the Court, as having no foundation in fact whatsoever. (See p. 115 and charge of the Court, ll. 10 to 20, p. 121.)

It appeared from the evidence that on September 5, 1925, Carrie C. Osborn and I. B. Osborn, her husband, by their written agreement, contracted to sell to one Frank Holzhauser, for the sum of \$20,000.00, a tract of land comprising lots numbers 1 to 40, in Brick Township, Ocean County, New Jersey, on account of which purchase, the said Frank Holzhauser paid the sum of \$600.00, leaving a balance of \$19,400.00, to be paid in the following manner, to wit, \$4,400.00 in cash, and \$15,000.00 by giving a mortgage in that sum (Exhibit P. 9, p. 29.)

Thereafter, the plaintiffs, desiring to purchase said contract from the said Holzhauser, consulted the defendant, who was the attorney for the said Holzhauser, with respect to purchasing the same. Plaintiff, Fabry, testified that he called upon Mr. Jay at his office, and told him that he would like to have him, Mr. Jay, represent him as his attorney for procuring the assignment of the contract in question, and also to make a search for him. He said he asked Mr. Jay (although he never saw the contract from the Osborns) whether it was "a good, enforceable contract," to which Mr. Jay replied: "Absolutely." Mr. Jay then told him that there was a dispute with the Osborns as to two of the lots mentioned in the tract (bot. p. 36, top p. 37).

It was agreed between the parties that Mr. Holzhauser would sell the contract for \$1,500.00 profit, making the total to be paid by the plaintiff, Fabry (later joined by the plaintiff Spector, as a purchaser) the sum of \$2,100.00. In accordance with this understanding, plaintiff, Fabry, paid to said Holzhauser, on March 16, 1926, by his check, the sum of \$250.00, and received in his name and in the name of the plaintiff, Edward Spector, a receipt and option to pur-

chase the contract for the price mentioned. (See Exhibits P. 1 and P. 2 on p. 22.) Thereafter, on April 2, 1926, plaintiff, Spector, paid to said Holzhauser, by check, the sum of \$1,000.00 (Exhibit P. 3, p. 23), receiving a receipt for said sum (Exhibit P. 4, p. 24), and on May 4, 1926, said Spector, by check, paid to the defendant, \$200.00, and again on May 19, 1926, paid to said defendant, as attorney for said Holzhauser, the sum of \$650.00 (Exhibits P. 5 and P. 6, p. 26), making the total sum of \$2,100.00, as agreed.

At the time the last payment of \$650.00 was made to Holzhauser, an assignment of the contract in question was made by said Holzhauser to the said Spector, which assignment was acknowledged before the defendant. (See Exhibit P. 8, pp. 27 and 28.)

Before reciting the testimony further, it is well to call attention at this time to the last clause in that assignment, found on top of p. 28, viz:

"The party of the second part (Spector) shall take this assignment to all the equities, rights that exist for and against the said party of the first part."

Plaintiff, Edward Spector, knew of this clause, having read it at the time. He says that he read this assignment over, but did not question Mr. Jay concerning its meaning (l. 10, p. 67).

The dispute with the Osborns concerning the two lots above mentioned, which they desired to take out of the tract agreed to be sold, was known to the plaintiffs before they paid their first money and obtained the option in question (l. 18, etc., p. 62).

Benjamin B. Pearce, an attorney-at-law, who represented the Osborns, had some correspondence with the defendant, Jay, in which the dis-

pute concerning the two lots was carried on (p. 75).

In a letter written by the defendant to Pearce, on May 16, 1926, Jay notified Mr. Pearce that unless the contract was carried out, action would have to be taken to compel the Osborns to give him all he contracted to buy (Exhibit P. 10, p. 30). To this letter, Pearce replied under date of March 30, 1926, informing Mr. Jay that the contract, not having been acknowledged by Mrs. Osborn, who was a married woman, Holzhauer would have no standing in court "for a specific performance, etc."

The defendant, Jay, admitted that he did not know such was the law until Mr. Pearce informed him as stated above (p. 105).

Defendant's version, was, that he never made any statement concerning the enforceability of that contract, but says that he did tell plaintiffs that they had a good cause of action against the defendants for damages (l. 20, p. 101). Plaintiffs admit that this is so, but say that Jay spoke about an action for damages only after he was informed that the Osborns would not go through with the deal.

At the time Jay spoke about the action for damages, plaintiff, Spector, according to his testimony, was satisfied to go ahead with the law action against the Osborns (bot. pp. 54, 55), but later on stopped the defendant from proceeding with such an action (top p. 58).

The facts having been submitted to the jury, they rendered a verdict against the defendant for the full amount paid by the plaintiffs to the said Holzhauer.

ARGUMENT OF THE LAW.

Defendant assigns a number of reasons on this appeal, why the judgment rendered as aforesaid, should not be reversed, which reasons will be discussed in the order in which they appear in the printed book commencing on page 19.

POINT 1.

The Court erroneously refused to grant defendant's motion for a non-suit.

When the plaintiffs rested their case, all that was proved was, that they consulted the defendant with respect to the Osborn contract, which they had never seen, and asked him if that was a "good, enforceable contract," and that he gave it as his opinion that it was. Nothing in the evidence shows that the defendant's mind was directed to the thought as to whether it was enforceable *at law* or *in equity*; certainly the contract was and still is enforceable at law against the Osborns, even though the contract had not been acknowledged by them.

(a) It is, therefore, urged that the defendant, not having his mind directed by plaintiffs to the fact that they wanted an opinion as to the enforceability in equity of the contract mentioned, the defendant cannot be said to have given improper advice when he said that the contract was a "good, enforceable contract."

Webster defines the word "enforceable" as that which may be enforced, and defines "enforce" as follows:

"To put in execution; to cause to take effect; as to enforce the laws."

Here we find that the word "enforce" has a distinct meaning at law.

If plaintiffs desired to know whether specific performance could be maintained on the contract, it was their duty to direct defendant's mind to that point. The contract, therefore, being an enforceable one at law, it is respectfully urged that the defendant did not mislead the plaintiffs by his opinion, and that, therefore, plaintiffs should have been non-suited.

(b) It is again urged, if this point be taken against the defendant, that the most that has been shown by the plaintiffs is, that the defendant gave a legal opinion which was unsound, and it is respectfully insisted that for any such erroneous or unsound opinion, no action will lie against an attorney at law in this State, unless such an opinion shows such unskillfulness and ignorance that it must be said that the attorney expressing such opinion, did not possess the knowledge which should be possessed by the ordinary practitioner, and of this, there was no proof in the case.

In the case of *McCulloch v. Sullivan*, 132 Atl. 102, the defendant was an attorney of this State. He was employed by the plaintiff to prepare a chattel mortgage, which he did, but drew the same improperly and defectively, by reason of which, the plaintiff suffered damages in having his mortgage, which was for a substantial sum, declared null and void by the Court. It appeared that had the mortgage been properly drawn, plaintiff would have been able to collect the amount secured thereby.

In the opinion of the Court of Errors and Appeals, holding the defendant responsible, it was said, that:

"A lawyer without express agreement, is not an insurer. He is not a guarantor of the soundness of his opinions, or the successful outcome of the litigation which he is

employed to conduct, or that the instruments he will draft will be held valid by the court of last resort. He is not answerable for an error of judgment in the conduct of a case or for every mistake which may occur in practice. He does, however, undertake, in the practice of his profession of the law, that he is possessed of that reasonable knowledge and skill ordinarily possessed by other members of his profession."

In the case of *Jacobson v. Peterson*, 91 N. J. L. 404, affirmed 92 N. J. L. 631, referred to in the *McCulloch* case, *supra*, the defendant, an attorney, negligently overlooked and failed to report a judgment for \$380.00, which was a lien upon land, the title to which he was employed to examine, and which land the plaintiff purchased in reliance upon the defendant's report and without knowledge of the existence of such judgment. The defendant was held liable, the Court saying:

"He is, therefore, liable for any injury that may result to his client from negligence in the performance of his duties, that is, for the failure to exercise ordinary care and skill in discovering in the records and reporting, all the deeds, mortgages, judgments, etc., that affect a title, in respect to which he is employed."

In the case of *Fenaille v. Coudert*, 44 N. J. L. 286 (N. J. Supreme Court, opinion by Magie, J.), the plaintiffs employed the defendants, as attorneys at law, to prepare a contract between plaintiffs and one Barnes for the erection by the latter of certain buildings in Hudson County, and to file the contract in that county before the beginning of the work, for the purpose of protecting said lands from claims under the Mechanic Lien law. The declaration charged that the defendants undertook to perform the duties so specified and that they carelessly and negli-

gently failed to file the contract, whereby plaintiffs were injured by being compelled to satisfy the claims made by a sub-contractor, upon which judgment had been obtained against Barnes, the builder, and the plaintiffs, as owners.

The plaintiffs' agent testified that his instructions to the attorney were, "To write the contract himself, make up all the clauses, all things for me in order. I have nothing to do myself and to be sure that all things would be in good order."

"Attorneys are doubtless liable for negligent omissions to file pleadings and to take the legal steps necessary in the progress of suits in which they have been retained, and in which they act for their client. But the filing of such a contract as that in existence in this case, is not a necessary concomitant of its existence or its binding force. Whether it should be filed or not must depend on circumstances. The owner may be thoroughly satisfied of the probity or responsibility of the builder."

The case of *McCulloch v. Sullivan, supra*, clearly holds, as pointed out, that an attorney

"is not a guarantor of the soundness of his opinions or the successful outcome of the litigation which he is employed to conduct, and is * * * not answerable for an error of judgment in the conduct of the case, etc."

What then is here involved other than a claim that defendant's opinion given in answer to a question susceptible of two answers, was unsound as to one of them? Yet the jury was permitted to and did find, the defendant to be an insurer and assessed against the defendant the total sum of money with which the plaintiffs parted and which may or may not represent plaintiffs' loss. That the learned Court consid-

ered the law as herein urged, is manifest by the following statement made by it to counsel for the plaintiffs after it, the Court, decided to strike out all allegations of fraud against the defendant. On page 115, the Court addressing itself to the question of negligence involved as related to the advice given them by the defendant, asked counsel for plaintiffs this question:

"Is not that a mere matter of opinion?"
(l. 20).

(c) Assuming that everything that has thus far been argued, is unsound, the defendant respectfully insists that no damages with which he can be charged, were proved against him.

As plaintiffs would perhaps be entitled to nominal damage in the event that the defendant was responsible in law to them for the alleged negligence charged, this question will be argued under Point 3 hereof.

It is urged, however, that for either or both of the reasons above advanced, the Court should have granted defendant's motion to non-suit.

POINT 2.

The Court erred in denying defendant's motion to direct a verdict in his favor.

When the evidence was all in, the case was practically, insofar as the law is concerned, in the same position it was at the time plaintiffs rested their case. Defendant's motion to direct a verdict, which was based, therefore, upon the same grounds urged by him upon the motion for a non-suit, should, therefore, have been granted for the reasons pointed out under Point 1 hereof.

POINT 3.

The defendant urges that the Court was in error when it denied defendant's request to charge the jury, as follows:

"1. Should the jury find the defendant negligent and answerable to the plaintiffs or either of them, the damages to be awarded must be limited to a nominal sum, and by a nominal sum, is usually understood the sum of six cents."

What damages were proved to have been sustained by the plaintiffs? The mere fact that a contract has been breached; that an accident has occurred, or that an opinion is unsound, if proved to be actionable in law, does not *per se*, entitle the plaintiffs to anything beyond an award of a nominal sum, unless a greater sum has been proved to have been lost by him.

Plaintiffs proved that they purchased a contract from one of defendant's clients, upon which, he had theretofore paid \$600.00. They further proved that they paid for this contract, the sum of \$1,500.00, in addition to the said sum of \$600.00, *which was a credit or payment on account of the purchase price of the premises in question.* Admitting that plaintiffs could not successfully maintain a specific performance suit because of the failure or negligence of Mrs. Osborn, a married woman, to acknowledge her signature and the delivery of the paper in question, it must also be admitted, as a legal truth, that the plaintiffs could either rescind the contract because of the Osborns' attitude, and so recover back the sum of \$600.00, which was paid to them by Holzhauser, or else, they could and still can bring an action on the contract against the Osborns for damages for their failure and refusal to deliver the premises which they agreed to deliver by their written agreement.

The plaintiffs, however, have done nothing in the matter. They are simply, in the vernacular, "sitting tight." They now have a judgment against the defendant for all the moneys laid out by them and hold—if they have not assigned the same—a good and "enforceable" action at law against the Osborns. Such an action might, perhaps result in plaintiffs obtaining a verdict for a considerable sum. It might, however, result in their obtaining nothing; but the situation, nevertheless, is, that they have come into court asserting a right that is based on *uncertain damages*, and that they now hold in the one hand, a judgment for the full amount expended by them on the contract, and in the other hand, they hold a good and enforceable contract that is good for the return, at least, of \$600.00, if not for a considerably larger sum that might be obtained for damages, because of the enhanced value of the property at the time the conveyance should have been made.

The learned Court, before whom the case was tried, undoubtedly realized the weakness of plaintiffs' case in the respect mentioned, when he charged, on this subject, that:

"the plaintiffs must go a step further and show that they have lost money, because they were negligently advised and represented by Mr. Jay" (ll. 25 to 30, p. 123).

And again where the Court, after reviewing the testimony, said of the defendant,

"If he did not, if he was negligent and careless to their damage, then they may recover from him such damages as they have sustained by reason of his negligence" (ll. 25 to 30, p. 125).

At the close of the Court's charge, the defendant, through his counsel, took an exception to the Court's omission of a rule for the guidance of

the jury in the assessment of damages against a defendant, which exception was noted as ground of appeal (ll. 10 to 18, p. 127).

This exception seems to have been omitted from the assigned reasons, but will, with the indulgence of this Court, be urged, as it is so intimately connected with the discussion under this point.

With nothing to guide the jury, therefore, in the way of proofs from the plaintiffs, or instructions from the Court, the request to charge the jury that the plaintiffs—assuming that they made out a good cause of action against the defendant—were entitled merely to nominal damages which are usually understood as being represented by the sum of six cents, should have been granted.

In *Teets v. Hahn*, 137 Atl. 559, one of the claims made by the plaintiff was for damages to his motor car. Although it appeared that, after the accident, the motor car "was a worthless heap of junk," there was no evidence from which the jury could assess the value of the car before the accident. The Court, therefore, directed the jury to award the plaintiff six cents for that item. This instruction was afterwards approved by the Supreme Court on appeal of the question, from the District Court of Plainfield.

That at most the damages to be awarded can be nominal only, seems to be indicated by the opinion in the case of *Sproul v. Lloyd*, 96 N. J. L. 314. In that case, the plaintiff instructed Lloyd, an attorney at law, to bid in certain property sold under a foreclosure brought by the defendant as attorney for the plaintiff. It seems he enlarged upon his authority and bid the sum of \$1,500 beyond that which his client instructed

him to bid. Plaintiff afterwards, and notwithstanding this apparent abuse of authority of his attorney, took title to the property. He resold the same later and lost the sum of \$1,500.00 on the sale. The theory of plaintiff's loss, was the difference between the amount of the bid originally authorized and the amount of a judgment for the deficiency, which he would have been able to recover against the mortgagor in case the defendant had adhered to his instructions. As to that insistence, our Chief Justice, speaking for the Supreme Court, said (bot. p. 317):

"But assuming the existence of liability, whether any such loss was in fact sustained, would depend altogether upon the pecuniary responsibility of the mortgagor in the foreclosure suit. The mere recovery of a judgment for deficiency against the latter, would not have resulted in any benefit to the plaintiff, unless the mortgagor was able to respond to that judgment and pay it. But whether he was or not, the proofs in the present case fail to disclose. For ought that appeared to the contrary, the mortgagor, at the time of the foreclosure sale and from thence until the time of the trial of the present case, may have been absolutely irresponsible financially, and a judgment for deficiency worth no more than the paper on which it was engrossed. In this situation, it was impossible for the jury to say, from the evidence, whether the loss sustained by the plaintiff was anything more than merely nominal and a verdict, therefore, for the full amount of the plaintiff's claim, was without legal support."

It will be seen from the above, that the Supreme Court, in the above case, considered the improbability of the plaintiff's sustaining any direct loss because of the fact that even though plaintiff could recover the amount of the deficiency, he might not be able to collect it, and, that

being so, he was not permitted to obtain a judgment against the defendant for the amount of his apparent loss.

In the case *sub judice*, the opposite of the argument in the Sproul case can fairly be indulged, to wit, that the plaintiffs assuredly, by Court action, could have obtained the return of their \$600.00, (assuming the responsibility of the Osborns, concerning which there was no proof) or might even recover a larger sum from the said Osborns for breach of the contract, which action, however, has never even been attempted, so that it is clear that the plaintiffs have simply experimented on this defendant.

Assuming that they will be able to hold this judgment against this defendant, they will be in a position where they can then go after either Holzhauser or the Osborns, or both of them, and such moneys as they might collect, will be theirs—a clean profit above their losses—a proceeding, which, it is apprehended, no court of law will countenance.

It is, therefore, respectfully submitted that, assuming the negligence of the defendant has been proved, the most that plaintiffs were entitled to recover, under all the evidence, was a nominal sum.

Defendant insists further that the Court erred in refusing to charge his request (Paragraph 2, under Assignment 3, p. 19) that:

“No verdict, however, can be rendered against the defendant, unless the jury shall be satisfied by the weight of the evidence, that the plaintiffs were misled by information given by the defendant during the course of his engagement or service as attorney for them or either of them.”

It appears from the testimony that the plaintiffs, or one of them, had consulted Attorney Koehler, before seeing the defendant, and surely, if plaintiffs had received information from said Koehler, or his partner, concerning the contract, and knew that it could not be enforced in equity, the mere fact that this defendant did not so inform them would not entitle plaintiffs to an action against him.

Paragraphs 3, 4 and 5 under defendant's Third Assignment, found on page 20, of the Printed Book, will not further be discussed as they have been considered in the general argument made herein.

POINT 4.

This point deals with alleged erroneous instructions given to the jury. In the first instruction, to which exception was taken, the Court charged the jury as follows (bot. p. 20):

“(a) But unless the land was worth more than \$20,000.00, of which there is no testimony in this case, the most the plaintiffs could recover from the Osborns, would have been the \$600.00 which Mr. Holzhauser has paid to them and which was taken over by the plaintiffs.”

Defendant respectfully urges that this instruction was prejudicial to him, inasmuch as it injected into this case a foreign issue which may have worked an injury to the defendant. If either of the parties was obliged to prove the land value as the basis of damages, surely that duty was cast upon the plaintiffs.

The reason for defendant's exception to the Court's charge, as pointed out under Paragraph

(b) of the Grounds of Appeal, page 21, as follows:

“(b) Even if you find that he had been their attorney and that he represented to them, that the contract was a good and enforceable contract, the plaintiffs must go a step further and show that they have lost money because they were negligently advised and represented by Mr. Jay.”

is, that it permitted the jury to find that the plaintiffs did “go a step further and show that they have lost money, etc.” whereas nothing in the evidence shows that plaintiffs did go that “step further” and proved that they lost money.

The reason for defendant’s exception to the Court’s charge, as pointed out under Paragraphs (c) and (d), of the Grounds of Appeal, page 21, as follows:

“(c) First, did Mr. Jay represent the plaintiffs?”

“(d) If he did not, if he was negligent and careless to their damage, then they may recover from him such damages as they have sustained by reason of his negligence.”

is that the question was not whether Mr. Jay represented the plaintiffs, but rather whether he represented the plaintiffs in advising them on the subject matter of the suit, and further, because the Court failed to state or indicate in any manner, what the measure of damages would or could be under the proven facts in the case.

It is, therefore, respectfully submitted that the Trial Court erred in (a) submitting the question of defendant’s alleged negligence to the jury, (b) in permitting the jury to find against the defendant, damages for which no basis was laid by the proofs in the case, and (c) in permitting the jury to consider matters as herein pointed

out, which were not proved and which tended to the damage and injury of the defendant.

Respectfully submitted,

BENJAMIN M. WEINBERG,
Attorney for and of Counsel with
Defendant-Appellant.

