

INDEX

1356

	PAGE
Summons	1
Complaint	2
Answer	7
Rule for Judgment	10
Judgment	11
Testimony	13

PLAINTIFF'S TESTIMONY:

Walter E. Edge—Direct	14
Cross	17
Re-direct	21
Re-cross	23
Paul J. O'Neill—Direct	24
Cross	41
Recalled—Direct	118, 123
Marvin G. Corson—Direct	43
Cross	52
Joseph B. Gaines—Direct	52, 62
Cross	59, 71
Re-direct	77
Re-cross	81
Robert M. Snively—Direct	83
Cross	96
Re-direct	101
Re-cross	102
Theodore B. Bleecker—Direct	104
Cross	109
Re-direct	116
Sigmund Ojserkis—Direct	122

	PAGE
Motion for Non-suit.....	128
DEFENDANT'S TESTIMONY:	
Sigmund Ojserkis—Direct	133
Cross	144
Recalled—Cross	223
Theodore J. Lapres—Direct.....	193
William C. Boyer—Direct.....	197
Cross	200
Recalled—Cross	213
Recalled—Re-direct	216
Robert Beyer—Direct	209
Cross	210
William Gordon—Direct	217
Cross	219
PLAINTIFF'S TESTIMONY IN REBUTTAL:	
Max E. Blatt—Direct.....	224
Cross	234
Dorothy Blatt—Direct	235
Albert J. Feyl—Direct.....	237
Paul J. O'Neill—Direct.....	239
DEFENDANT'S TESTIMONY IN SUR-REBUTTAL:	
Sigmund Ojserkis—Direct	245
Cross	246
Motion to Direct Verdict for Defendant.....	248
Court's Charge to Jury.....	251
Plaintiff's Requests to Charge.....	277

	PAGE
Defendant's Requests to Charge.....	284
Notice of Appeal.....	334
Grounds of Appeal.....	336

EXHIBITS

Exhibit P1, Letter, Sigmund Ojserkis, President, to Hon. Walter E. Edge, 6-22-26....	289
Exhibit P2, Letter, Walter E. Edge to Boardwalk Securities Corporation, 4-27-33.....	293
Exhibit P3, Letter, Walter E. Edge to Boardwalk Securities Corporation, 6-10-33.....	295
Exhibit P6, Letter, Paul J. O'Neill to Sigmund Ojserkis, 10-4-27	297
Exhibit P7, Certificate of Incorporation of the Boardwalk Securities Corporation.....	298
Exhibit P9, Letter, Paul J. O'Neill to Sigmund Ojserkis, 5-26-31	318
Exhibit P10, Letter, Paul J. O'Neill to Sigmund Ojserkis, 5-22-31.....	319
Exhibit P11, Letter, Sigmund Ojserkis, President, to Paul J. O'Neill, 5-23-31.....	320
Exhibit P12, Letter, Sigmund Ojserkis, President, to Miss Dorothy Blatt, 4-24-28.....	321
Exhibit D1, Letter, Sigmund Ojserkis, President, to Hon. Walter E. Edge, 5-1-33....	322
Exhibit D3, By-Laws of the Boardwalk Securities Corporation	325

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SUMMONS.

*The State of New Jersey to Boardwalk Securities
Corporation, a corporation of the State of New
Jersey:*

10

You are summoned to answer the annexed complaint of Walter E. Edge, in an action at law in the Atlantic County Circuit Court. And take notice that unless you file your answer to the said complaint with the clerk of the Atlantic County Circuit Court at Mays Landing, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, HONORABLE WILFRED H. JAYNE, Judge of
the Atlantic County Circuit Court, at Mays Landing,
this day of July, nineteen hundred and
thirty-three.

WILLIAM A. BLAIR,
Clerk.

WALTER D. VAN RIPER,
Attorney.

30

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

10

WALTER E. EDGE,

Plaintiff,

v.

BOARDWALK SECURITIES
CORPORATION, a New Jer-
sey corporation,*Defendant.*Action at Law.
Complaint.

20

The plaintiff, Walter E. Edge, residing in the City of Atlantic City, County of Atlantic and State of New Jersey, says:

FIRST COUNT.

1. On June 22d, 1926, defendant, Boardwalk Securities Corporation, a corporation of the State of New Jersey, agreed with the plaintiff that if he would purchase from the defendant certain S. W. Strauss & Company bonds at the price then being asked for them by the defendant, that the defendant would repurchase the said bonds from the plaintiff at any time, and pay therefor at the rate of ninety-nine cents (99c) on the dollar, plus the accrued in-

terest thereon. Said agreement is in writing and a copy is hereto attached and made a part hereof.

2. As a result of the said promise made by the defendant to the plaintiff and relying upon the representation made by the defendant to the plaintiff as contained in a letter from the defendant to the plaintiff under date of June 22d, 1926, a copy of 10 which is attached hereto and made a part hereof, the plaintiff did purchase from the defendant certain S. W. Strauss & Company bonds as follows:

\$10,000 Hearst Brisbane 6s, 1939;	
\$10,000 60 Park Place Newark 6s, 1937;	
\$10,000 Broadway Barclay 6s, 1941;	
\$10,000 48 West 48th Street 6s, 1936;	
\$10,000 Dorsett 6s, 1941;	
\$10,000 American Insurance Union 6s, 1941;	
\$10,000 Lefcourt Manhattan 5¾, 1941;	20
\$10,000 Albany Metropolitan 6¼s, 1938.	

All of the above mentioned bonds were purchased by the plaintiff from the defendant on June 28, 1926, and were paid for at par except the Lefcourt Manhattan bonds, which were purchased at the rate of \$97.55 per \$100.00 par.

3. On July 7, 1926, the plaintiff relying upon the representation made by the defendant in its letter 30 of June 22d, 1926, as above referred to, purchased from the defendant, at par value, the following bonds:

\$15,000 Hearst Brisbane 6s, 1936;
\$10,000 48 West 48th Street 6s, 1936;

Complaint

\$10,000 Lefcourt Manhattan 5 $\frac{3}{4}$ s, 1941;
\$15,000 Albany Metropolitan 6 $\frac{1}{4}$ s, 1938;
\$10,000 502 Park Avenue 6s, 1941;
\$10,000 Chicago Builders 6s, 1929.

4. On December 17, 1926, the plaintiff relying upon the representation made by the defendant in
10 its letter of June 22d, 1926, as above referred to, purchased from the defendant, at par value, the following bonds:

\$7,000 Albany Metropolitan 6 $\frac{1}{4}$ s, 1928.

5. On January 5, 1927, the plaintiff relying upon the representation made by the defendant in its letter of June 22d, 1926, as above referred to, purchased from the defendant, at par value, the following bonds:

20 \$20,000 New York Athletic Club 6s, 1946.

6. On April 12th, 1927, the plaintiff still relying upon the representations made by the defendant in its letter of June 22d, 1926, as above referred to, purchased from the defendant at par value, the following bonds:

\$2,500 60 Park Place Newark 6s, 1937;

10,000 Keith Albee Building 6s, 1936.

30 8. On April 27, 1933, and again on June 10th, 1933, plaintiff demanded of the defendant that it purchase said bonds from him and to pay the amount due him on the respective bonds at the rate of 99 and accrued interest, and tendered said bonds to the defendant for delivery upon receiving the

Complaint

amount due pursuant to the terms of said agreement.

9. Defendant refused to carry out its part of said agreement, refused to accept the tender and refused to pay anything. Judgment will be claimed for the sum of \$189,609.50, with interest from the date of the purchase of said bonds by the plaintiff from the 10 defendant.

WALTER D. VAN RIPER,
Attorney of Plaintiff.

COPY

BOARDWALK SECURITIES CORPORATION
SIGMUND OJSERKIS, PRESIDENT

Atlantic City, N. J. 20
June 22, 1926

Hon. Walter E. Edge,
Washington, D. C.
Dear Senator:—

At the suggestion of your Mr. O'Neill, I welcome the opportunity to be of some financial service to you, and I am taking the liberty to enclose a list of 25 bonds at \$10,000 each, well diversified with a good income, for your temporary investment. These bonds we own and can deliver to you, of course subject to prior sale. 30

The Bond market at present is too high for permanent investment, as you will note from the enclosed ad. of the National City Co., but I propose to let you have our Bonds and, gradually, as the market is more favorable, replace each \$10,000 lot of Bonds,

Complaint

or such as you may not favor, with issues which will have a good prospect for appreciation and better yield. In such cases we will accept in payment S. W. Straus & Co. Bonds, which you purchase from us, at par and accrued interest. The other Stock Exchange issues we will accept at market and accrued interest. Should you wish to cash in your

10 Straus Bonds at any time we will be glad to take them from you at 99 or \$10 per bond less than you paid for them and the accrued interest. My idea is if you will give me the time to gradually supply you with a high grade, conservative list of investment Bonds, you will be proud of it and have absolute safety with a good income.

It is difficult for me to explain everything in a letter, but I wish to assure you that I will use the same care and diligence in your case as I am doing

20 for my "Pet"—the Boardwalk National Bank.

No matter who you entrust with your investments, it must be a case of confidence.

Thanking you for this opportunity, and with highest personal regards, I am

Respectfully yours,
(sgd.) Sigmund Ojserkis,
President.

30 Received Aug. 1, 1933 Sheriff.

I hereby deputize and appoint Henry Halpern to serve the within writ. Witness my hand and seal this 1st day of August, 1933.

ALFRED H. JOHNSON, (L.S.)
Sheriff of Atlantic Co.

Duly served within summons and complaint August 1st, 1933, on Boardwalk Securities Corporation, by delivering a copy personally to Sigmund Ojserkis, in the Boardwalk National Arcade Building, Atlantic City, Atlantic County, N. J.

ALFRED H. JOHNSON,
Sheriff.

By HENRY HALPERN,
Special Deputy Sheriff. 10

Shffs fees \$5.10

Filed August 18, 1933, at 9 A. M.

WILLIAM A. BLAIR,
Clerk.

ANSWER.

ATLANTIC COUNTY CIRCUIT COURT. 20

WALTER E. EDGE,

Plaintiff,

v.

BOARDWALK SECURITIES
CORPORATION, a New Jersey corporation,

Defendant.

Action at Law.
Answer.

30

Defendant, Boardwalk Securities Corporation, answering plaintiff's complaint filed in the above-stated cause, says:

ANSWER TO FIRST COUNT.

1. Answering paragraph 1:

(a) It denies that the Boardwalk Securities Corporation agreed with plaintiff that it would repurchase certain bonds mentioned in said paragraph 10 1 at any time at the rate of ninety-nine cents (99c) on the dollar, plus the accrued interest thereon.

(b) It denies that by the terms of the letter of June 22nd, 1926, that Boardwalk Securities Corporation was obligated indefinitely to repurchase said bonds at ninety-nine cents (99c) on the dollar, plus the accrued interest thereon.

(c) It denies that by the terms of said letter of 20 June 22nd, 1926, Boardwalk Securities Corporation was obliged to repurchase said bonds at ninety-nine cents (99c) on the dollar, plus the accrued interest thereon.

(d) It denies that the letter of June 22nd, 1926, obliges Boardwalk Securities Corporation to repurchase said bonds at any price.

(e) It denies that Sigmund Ojserkis had authority 30 to bind the Boardwalk Securities Corporation by the terms of said letter of June 22nd, 1926.

(f) It denies that said letter of June 22, 1926, is an obligation requiring the repurchase of said bonds in perpetuity, but only within a reasonable time;

and says that the said plaintiff did not request a repurchase of said bonds within a reasonable time.

2. It neither admits nor denies the allegations contained in paragraph 2, and leaves plaintiff to prove the same.

3. Defendant repeats the several answers made hereinabove to paragraph 1, as the answers to paragraph 3. 10

4. Defendant repeats the several answers made hereinabove to paragraph 1, as the answers to paragraph 4.

5. Defendant repeats the several answers made hereinabove to paragraph 1, as the answers to paragraph 5. 20

6. Defendant repeats the several answers made hereinabove to paragraph 1, as the answers to paragraph 6.

8. Defendant denies the allegations contained in paragraph 8.

9. Defendant denies the allegations contained in paragraph 9. 30

FIRST AFFIRMATIVE DEFENSE.

Defendant says that it did not at any time within six years next preceding the commencement of this

BOURGEOIS & COULOMB,
Attorneys of Defendant.

WILLIAM A. BLAIR,
Clerk.

ATLANTIC COUNTY CIRCUIT COURT.

Plaintiff,

V.

BOARDWALK SECURITIES
CORPORATION, a New Jer-
sey corporation,
Defendant.

Action at Law.
Rule for Judgment.

A verdict having been entered in this cause on Thursday, November 15, 1934, for the plaintiff, Walter E. Edge, and against the defendant, Boardwalk Securities Corporation, a New Jersey corporation,

Judgment

in the sum of one hundred and fifty thousand (\$150,000) dollars, it is, ordered that judgment final be entered against the defendant and in favor of the plaintiff for the said sum of one hundred and fifty thousand (\$150,000) dollars, with costs to be taxed by the Clerk of this Court.

WILFRED H. JAYNE,
Judge. 10

WALTER D. VAN RIPER
On motion of

WALTER D. VAN RIPER,
Attorney of Plaintiff.

Filed and entered November 23, 1934, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT. 20
October Term, 1934.

WALTER E. EDGE,
Plaintiff,
v.
B O A R D W A L K S E C U R I T I E S
C O R P O R A T I O N , a N e w J e r -
s e y c o r p o r a t i o n ,
Defendant.

Action at Law.
On Verdict.
Walter D. VanRiper,
Atty.

30

Judgment entered November 23, 1934, at 9 A. M.

Damages	\$150,000.00
Costs	64.26
Total	\$150,064.26

Judgment

This action was tried before Honorable Wilfred H. Jayne, Judge, with a jury on November 15, 1934.

The cause having been heard and submitted to the jury, they returned their verdict in favor of the plaintiff and against the defendant.

Whereupon it is ordered that the plaintiff, Walter E. Edge, recover of the defendant, Boardwalk Securities Corporation, a New Jersey corporation, the
10 sum of one hundred fifty thousand dollars damages and sixty-four dollars and twenty-six cents costs of suit.

WILLIAM A. BLAIR,
Clerk.

Circuit Court Judgment Book No. 17, page 60.

TESTIMONY.

ATLANTIC COUNTY CIRCUIT COURT.

WALTER E. EDGE,	}	Action at Law.	10
<i>Plaintiff,</i>			
v.			
BOARDWALK SECURITIES CORPORATION,			
<i>Defendant.</i>			

Atlantic City, New Jersey, November 13, 1934.

Before HON. WILFRED H. JAYNE, Judge, and a jury.

APPEARANCES:

For plaintiff: HON. WALTER D. VAN RIPER. A. W. LITTMAN, Esq., of counsel.

For defendant: MESSRS. BOURGEOIS & COULOMB (Mr. BOURGEOIS appearing). ELWOOD F. KIRKMAN, Esq., of counsel.

30

(The jury was impanelled and sworn at ten forty-five A. M.)

(Mr. Van Riper opened the plaintiff's case to the jury and Mr. Bourgeois opened for the defendant.)

WALTER E. EDGE, SWORN.

Direct examination.

By Mr. Van Riper:

10 Q. Senator Edge, you are the plaintiff in this suit, are you?

A. I am.

Q. Do you reside in Ventnor, in this county?

A. I do.

Q. In 1926, was Mr. Paul J. O'Neill your personal business representative?

A. He was then and is now.

Q. And in 1926, June, 1926, were you actually in the Senate of the United States at Washington?

20 A. I was.

Q. And sometime the early part or about the middle of June, 1926, did you have a conversation with Mr. O'Neill with reference to your desire to make some permanent investments in bonds?

A. I did.

Q. After you had that conversation with Mr. O'Neill did you receive a letter from the Boardwalk Securities Corporation at Washington? Did you receive a letter?

30 A. I received the letter read by Mr. Bourgeois a few moments ago.

Q. I show you this letter on the stationery of the Boardwalk Securities Corporation, dated June 22, 1926, signed, "Sigmund Ojserkis, President," and addressed to you at Washington, and ask you if that is the letter which you received?

A. To the best of my knowledge, it is the letter which I received.

Q. And so far as you know, you received it about a day or so, I suppose, after the date of the letter?

A. I assume so, yes.

Mr. Van Riper: I offer the letter in evidence. 10

(The letter was marked exhibit P1.)

Q. After you received this letter, Senator Edge, which has just been marked P1 in evidence, did you refer that letter to Mr. O'Neill with certain instructions with reference to the purchase of bonds?

A. I did.

Q. Did you instruct him to purchase certain bonds? 20

A. I did.

Q. Which bonds did you instruct him to purchase?

A. Well, I will have to consult the list.

Q. I don't want the issues. Generally speaking, what class of bonds?

A. I instructed him to purchase a number of Straus bonds.

Q. All of the bonds you instructed him to purchase were Straus bonds, is that it? 30

A. They were.

Q. Up until that time had you ever owned any Straus bonds?

A. I had never owned any before that time.

Q. Up until that time had you ever done any busi-

ness with the Boardwalk Securities Corporation of Atlantic City?

A. I never had.

Q. You knew of the corporation, did you?

A. In a general way, as one of Atlantic City's corporations.

Q. That was in June, 1926. Do you know how
10 many bonds were purchased as a result of your instructions by Mr. O'Neill after that time?

A. Oh, approximately \$190,000 to \$200,000, I should think, upon my instructions.

Q. All Straus bonds?

A. All Straus bonds.

Q. You went abroad to assume your duties as Ambassador to France in December, 1929, was it?

A. That is right, December, 1929.

Q. When did you come back to take up your resi-
20 dence permanently in Atlantic City?

A. April, 1933.

Q. I show you a letter written on your stationery bearing date April 27, 1933, addressed to the Boardwalk Securities Corporation, bearing your signature, and I ask you if that is your signature and if you wrote that letter?

A. That is my signature and I wrote that letter four days after I arrived home from Europe.

Q. I show you another letter on your stationery
30 bearing date June 10, 1933, addressed to the Boardwalk Securities Corporation of Atlantic City, bearing evidently your signature, and I ask you if it is your signature and if you wrote the letter?

A. It is my signature and I wrote the letter.

Mr. Van Riper: I offer the two letters in evidence.

(The two letters were marked exhibits P2 and P3.)

The Court: Is it admitted that the two letters were received by the defendant company?

10

Mr. Bourgeois: Yes.

(Mr. Van Riper read to the jury exhibits P1, P2 and P3.)

Q. Now, Senator Edge, after you wrote those two letters to the Boardwalk Securities Corporation did they ever repurchase any of the bonds from you?

A. None whatever.

Q. Did they ever offer to take any of them back 20 at 99 or at any price?

A. None whatever.

Q. You still own the bonds?

A. I still own the bonds.

Cross-examination.

By Mr. Bourgeois:

Q. What time in December, 1929, did you go 30 abroad?

A. December 6th.

Q. Then you remember the crash that came in the New York stock market on the 29th of November of 1929, do you not?

Mr. Van Riper: I object. It is entirely irrelevant, immaterial and incompetent.

The Court: The question in itself is harmless, I think. I will permit the question.

(An exception was noted for the plaintiff.)

10

(The question was repeated.)

A. I recall the crash very vividly. My recollection was at the time, speaking from pure memory, that the stock market was very much more affected than the bond market.

Q. Now, the first paragraph of this letter addressed to you that Judge Van Riper has read says: "I welcome the opportunity to be of some financial
20 service to you, and I am taking the liberty to enclose a list of twenty-five bonds at \$10,000 each, well diversified, with a good income, for your temporary investment." What, if any, effect did you attribute to the words, "Your temporary investment"?

A. The letter to me appealed entirely from the definite offer that he would—that the Boardwalk Securities Corporation would redeem my bonds at any time at 99.

Q. And you gave no —

30 A. There was no reason for me to consider temporary investment and make changes when I had that guaranty.

Q. Then you gave no effect whatever, no force, to the words, "Temporary investment"?

A. Merely a suggestion if I wanted to take ad-

vantage of it, and I didn't want to take advantage of it, and at no time —

Q. Then in the next paragraph, "The bond market at present is too high for permanent investment." What force or effect did you consider that language to have in this letter?

A. None, in view of the agreement and guaranty contained in the letter. 10

Q. Where was the guaranty? This part that—I suppose what you mean by the guaranty, "Should you wish to cash in your Straus bonds at any time we will be glad to take them from you at 99"? Is that the guaranty?

A. That is the agreement and guaranty which disposed of any other thought in my mind.

Q. That you considered to be a contract? Is that the idea?

A. I considered it to be an agreement between 20 the Boardwalk Securities Corporation and myself, signed by its president.

Q. An agreement, if it is to be enforced, is a contract, I suppose.

A. An agreement which was accepted by me, because a few days afterwards I purchased some bonds on the basis of that agreement.

Q. You purchased some bonds then? How many did you purchase?

A. I will have to consult the list to tell you that. 30

Q. Let me show you a copy of a letter. Let me ask you something first. There was attached to the letter, exhibit P1, a list of those bonds that Mr. Ojserkis spoke about, wasn't there?

A. Yes, I think there was. I believe there was, to my memory.

Q. On the left-hand side there were marks to indicate that there were eight of those bonds that you selected, were there not?

A. I think so. Mr. O'Neill can give you those details better than I, but my recollection is that
10 on the original list I selected eight ten thousand dollar Straus bonds.

Q. I show you a copy of a letter, photostatic copy of this same letter, as a matter of fact, and call your attention to the second page of the list and ask you if that doesn't contain the eight series of bonds that you purchased the first time, that is, about the 26th of June, 1926?

Mr. Van Riper: The Senator probably has not
20 that information. We will admit it.

A. As nearly as I can recollect it is, Mr. Bourgeois, but that can easily be secured for evidence in a more definite way through Mr. O'Neill.

Q. Let me ask you if the words in the left-hand margin of that photostatic copy, "Straus bonds," are in your handwriting?

A. My guess is that they are in Mr. O'Neill's handwriting. I think so. I can't swear to it.

30 Q. Then these eight bonds were all that you selected of the first purchase?

A. As far as I recall. That is subject to correction if I consult the records.

Walter E. Edge—Re-direct

Re-direct examination.

By Mr. Van Riper:

Q. Now, Senator, Mr. Bourgeois has called your attention to this paragraph of the letter, P1, being the letter written by the Boardwalk Securities Corporation under date of June 22nd, that part of it 10 which says that the bond market at present is too high for permanent investment, and asked you about your reaction on it. What were you buying these bonds for? For speculation or for permanent investment?

Mr. Bourgeois: I object.

Mr. Van Riper: You quoted this sentence from the letter, "The bond market at present is too high 20 for permanent investment."

Mr. Bourgeois: But the letter would have to speak for itself, what he was going to buy them for.

The Court: That is what I thought when you asked the question, but you asked what he understood to be the meaning of it. Now counsel desires to show whether the bonds were purchased by the 30 plaintiff pursuant to the letter for temporary investment or otherwise.

Mr. Bourgeois: He excluded that, because he said

he paid no attention to the temporary or the permanent.

The Court: That in itself would not restrict the re-direct examination. The objection will be overruled.

10 (An exception was noted for the defendant.)

(The question was repeated.)

A. I was buying them for permanent investment. In fact, all bonds, generally speaking, are bought for permanent investment.

Q. That is, so far as you are concerned?

A. So far as I am concerned, and I think so far as 90% of the purchasing public is concerned.

20 Q. I call your attention to this list of bonds that was attached to the letter of June 22, 1926, and specifically with reference to the Straus bonds, and ask you what the income was on those bonds at the prices at which you purchased them?

A. Approximately 6%.

Q. Is that what you considered a sufficient return for a permanent investment, for your investment?

30 A. That is the reason I bought them, that and the guaranty.

Q. When you buy bonds for investment purposes, if you have a sufficient return—and you say you consider 6% a sufficient return on your money—plus an available market, does that make it a permanent investment so far as you are concerned?

A. Absolutely.

Re-cross examination.

By Mr. Bourgeois:

Q. Then you bought these bonds because you wanted them for a permanent investment, as I understand, and not because it was said in there, "Should you wish to cash in your Straus bonds," 10 they would give you 99?

A. Oh, no, Mr. Bourgeois. I bought them as a permanent investment, backed up by that guaranty. Otherwise I would not have bought them.

Q. Did you think that guaranty, as you call it, was going to run forever?

A. "At any time," it was clearly specified in the letter.

Q. In other words, it might run along for ten years and then if the bonds went to nothing you 20 would simply go in and cash in?

A. I think that has already been decided by your Supreme Court, "At any time". Maybe I am wrong.

Q. Well, I don't know where it is, if it has. Do you mind telling me where?

Mr. Van Riper: I will tell you, Mr. Bourgeois.

PAUL J. O'NEILL, sworn.

Direct examination.

By Mr. Van Riper:

- 10 Q. Where do you reside, Mr. O'Neill?
A. Ventnor, New Jersey.
Q. You are the personal business representative of Senator Edge, are you?
A. I am.
Q. And you were in 1926?
A. Yes.
Q. Do you know the Boardwalk Securities Corporation?
A. Yes.
- 20 Q. Prior to June, 1926, did you ever have any business relationship with it?
A. Not that I recall.
Q. Did you have any interest in the corporation?
A. I was a stockholder in the corporation.
Q. Were you a stockholder at that time?
A. Yes.
Q. Are you still a stockholder?
A. Yes.
- 30 Q. About the middle of June, 1926, did you have a conversation with Senator Edge with reference to some funds which he had available for investment purposes?
A. Yes.
Q. After you had the conversation with him, did you go to the Boardwalk Securities Corporation?

Paul J. O'Neill—Direct

A. I did.

Q. Where is their office located?

A. In the Boardwalk National Bank.

Q. On the Boardwalk in Atlantic City?

A. Yes.

Q. What is the set-up of the office? What is the physical lay-out of the office there?

10

Mr. Bourgeois: That is objected to as irrelevant and immaterial.

The Court: I will permit it.

(An exception was noted for the defendant.)

The Court: I assume the inquiry is whether or not this witness visited the office of the defendant company.

20

Mr. Van Riper: Of the defendant company, and to show what the set-up is, particularly when one of the defenses raised is lack of authority.

Q. How is the office fixed up there, Mr. O'Neill? I don't want to know about the color of the desks, whether they are good mahogany or not?

A. The executive offices are on the left as you go in from the Arcade entrance, and Mr. Ojserkis' 30 office is through a little hall there, and Mr. Boyer's is just before you reach Mr. Ojserkis' office.

Q. Does Mr. Ojserkis occupy any other office there in the bank that you know of, any other position?

A. President of the Boardwalk National Bank.

Q. You knew at this time that he was also president of the Boardwalk Securities Corporation?

A. I did, and he did business in the one office.

Q. And you knew that because of your contact with the corporation because you were a stockholder?

A. I was.

10 Q. Did you have a conversation with Mr. Ojserkis with reference to Senator Edge's position of availability for investment purposes?

A. I did.

Q. I show you a list of bonds on a sheet printed, "Boardwalk Securities Corporation, Sigmund Ojserkis, president," and an ink written memorandum attached to it, and I ask you if you received that memorandum and that list of bonds?

A. I did.

20 Q. When did you receive it?

A. Well, I would say it was around the 16th of June, the day it is dated.

Q. Referring to that memorandum for the purpose of refreshing your memory, can you tell us fairly accurately what day you talked to Mr. Ojserkis in the office of the Boardwalk Securities Corporation?

30 Mr. Bourgeois: I do not think that is relevant.

Mr. Van Riper: He has already testified it was prior to the date of the letter. If you have any real objection. I don't care. I just wanted to fix the date with accuracy.

Q. Mr. O'Neill, calling your attention to this handwritten memorandum here, do you know whose handwriting that is?

A. I would say it was in the handwriting of Mr. Ojserkis.

Q. The initials signed to it are what?

A. S. O.

Q. Those are the initials of Mr. Ojserkis, are they?

A. They are.

Mr. Van Riper: I offer this sheet and the attached memorandum in evidence.

Mr. Bourgeois: I object. It is not relevant.

The Court: What has been shown about it so far to make it at all evidential? You simply handed it to him and asked him by looking at it to refresh his recollection. 20

Mr. Van Riper: He said he received it from Mr. Ojserkis sometime after he had the conversation with him.

Mr. Bourgeois: It is not relevant because the whole thing was included in this letter of June 22nd. That was the culmination of all the negotiations and this is not relevant. 30

Mr. Van Riper: This in no way attempts to contradict or vary the terms of it. It simply tends to support it.

Mr. Bourgeois: That does not make any difference. It is not a part of the contract that they are suing on. It is only what led up to the contract, if it is a contract.

The Court: How is it relevant?

10 Mr. Van Riper: I won't press it.

Q. Mr. O'Neill, I show you this letter which has been marked P1 in evidence and ask you if that letter was referred to you by Senator Edge?

A. It was.

Q. Approximately about the time of the date of the letter?

A. Yes.

20 Q. And when you received that letter from Senator Edge, did you receive from him instructions to purchase certain bonds from the Boardwalk Securities Corporation?

A. I did.

Q. What bonds did he instruct you to purchase?

Mr. Bourgeois: That is hearsay. I object. He can show what bonds he did purchase.

30 Q. Did you purchase certain bonds from the Boardwalk Securities Corporation after that?

A. Yes.

Q. What bonds did you purchase?

A. A number of bonds, including a number of Straus bonds.

Q. Did you purchase some Straus bonds?

Paul J. O'Neill—Direct

A. Yes.

Q. About how many?

A. In the neighborhood of \$200,000.

Q. Have you the list of the dates of these purchases?

Mr. Van Riper: Do you admit these purchases?

10

Mr. Bourgeois: We will admit the bonds were purchased.

The Court: Can we save time on this branch of the case?

Mr. Bourgeois: But we will not admit that they were purchased by Senator Edge, all of them.

Mr. Van Riper: Those that you talked about the other time, you mean? 20

Mr. Bourgeois: Yes.

Mr. Van Riper: I will call attention to those.

Mr. Bourgeois: Let him take this complaint if he wants to and tell what bonds were purchased.

Q. Have you a list of your own, Mr. O'Neill, showing the dates you made the purchases? 30

A. The dates we made the purchases?

Q. Yes.

A. Yes.

Mr. Van Riper: If he will read that, we will follow them here.

A. You made the first purchase on June 26th, did you not?

A. 28th is the proper date.

Q. June 28, 1926? What did you purchase on
10 that date?

A. 8,000 Straus bonds.

Q. Just read them off for us so we will have them in the record.

A. The individual issues?

Q. Yes.

A. Hearst-Brisbane 6s, '39, \$10,000; 60 Park Place, \$10,000; Broadway-Barclay, \$10,000; 48 West 48th Street, \$10,000; Dorset \$10,000; American Insurance Union, \$10,000; Lefcourt-Manhattan, \$10,
20 000; Albany Metropolitan, \$10,000.

Q. On July 7, 1926, did you purchase some bonds?

A. Purchased \$70,000 Straus bonds.

Q. Tell us what they were.

A. Hearst-Brisbane, \$15,000; 48 West 48th Street, \$10,000; Lefcourt-Manhattan, \$10,000; Albany-Metropolitan, \$15,000; 502 Park Avenue, \$10,000; Chicago Builders, \$10,000.

Q. On December 17, 1926, did you make a purchase?

30 A. \$7000 Albany Metropolitan.

Q. On January 5, 1927, did you make a purchase?

A. \$20,000 New York Athletic Club.

Q. April 12, 1927, did you make a purchase?

A. \$2500 Hearst-Brisbane and \$10,000 Keith-Albee.

Paul J. O'Neill—Direct

Q. That constitutes all of the purchases of the Straus bonds?

The Court: \$2500 Hearst-Brisbane?

The Witness: Yes.

Mr. Van Riper: This says 60 Park Place. 10

The Witness: It should be Hearst-Brisbane. Hearst-Brisbane is the correct issue.

Mr. Van Riper: Suppose we let the testimony stand until we check that to make the correction.

Q. Now, Mr. O'Neill, you have charge of these bonds now for Senator Edge, do you not?

A. Yes. 20

Q. And he still has the bonds, does he?

A. He does.

Q. All of these bonds?

A. Yes.

Q. There is some question raised, and I want to be perfectly fair with Mr. Bourgeois about this so we will have the record perfectly clear. Some question about \$7000 Albany-Metropolitan purchased on December 17, 1926—the Lincoln Hotels are not in here, are they? 30

A. No Lincoln. They were retired.

Q. Some question about \$7000 Albany-Metropolitans purchased on December 17, 1926. Are they Senator Edge's bonds? How are they held by him? He has them now, doesn't he?

A. He has the bonds and they were purchased by him, but he is guardian for his boy and they were paid for with that money out of the boy's account.

Q. But Senator Edge has the bonds now?

A. He has the bonds, yes.

Q. Then there is some further question about \$2500 Hearst-Brisbane and \$10,000 Keith-Albee
10 purchased on April 5, 1927, in April, 1927.

A. It is that purchase of April 12, 1927, you are referring to.

Q. \$10,000 Keith-Albee and \$2500 Hearst-Brisbane. How were they purchased?

A. They were purchased by Mr. Edge and paid for with Mrs. Edge's check, and technically considered Mrs. Edge's bonds in her account.

Q. Did Mr. and Mrs. Edge have an arrangement between them that —
20

Mr. Bourgeois: I object to that.

Mr. Van Riper: I think if we can show in advance one purchased for the benefit of the other, it is certainly a legitimate business proposition. It is done every day.

The Court: This witness did the actual purchasing?
30

Mr. Van Riper: Yes.

The Court: He may testify for whom he purchased them.

Mr. Bourgeois: He may testify for whom he purchased them, but the bonds would belong to that person.

Mr. Van Riper: I just want to get the actual facts on the record, and whatever they are we are willing to abide by.

Q. You say you purchased them for Senator Edge with money from Mrs. Edge's account?

10

A. Mr. Edge told me to purchase the bonds and I usually paid for bonds out of Mrs. Edge's account if she had some money that was available. The same way out of the boy's account. I had power of attorney on those accounts.

Q. You handled both Mr. Edge's and Mrs. Edge's account?

A. Yes.

20

Q. And if you wanted money for some purpose in one account and there wasn't sufficient there, you would advance it out of another account and charge the person for whose benefit it was advanced; is that it?

A. Yes, certainly I did, and in this particular case those two bonds were treated as for the account of Mrs. Edge. That is very clear, that is, on the books. But they weren't ordered that way.

Q. Now, Mr. O'Neill, from time to time, both as a customer of the Boardwalk Securities Corporation and in your individual capacity as a stockholder you received communications from the Boardwalk Securities Corporation?

A. I have.

30

Mr. Bourgeois: What is the object?

Q. Written on their letterhead?

A. I have.

Q. I show you this letter of June 22, 1926, and ask you if that is the same type of letterhead which you have always received from the Boardwalk?

10

Mr. Bourgeois: That is objected to as irrelevant and immaterial.

The Court: The objection is overruled.

(An exception was noted for the defendant.)

Mr. Bourgeois: Besides that, it is hearsay.

20 The Court: What is hearsay? Showing that he has received communications from the defendant on their stationery?

Mr. Bourgeois: Yes. If he wants to produce them, that is the best evidence. When he testifies to it without producing it we cannot cross-examine on it and it is hearsay.

Mr. Van Riper: I will produce them.

30

Q. Here is one, two, three, four, five, six, seven, eight, nine. Now I ask you if those nine sheets which I show you represent communications which from time to time you received from the Boardwalk Securities Corporation?

A. They do.

Q. Are they all on the same type of letterhead?

Mr. Bourgeois: I object to that because the letters would speak for themselves if they are relevant. Not his judgment about it.

Mr. Van Riper: We are not offering the letters, 10 but this letterhead contains the name of the one that is in evidence, the name of the corporation and the name of Sigmund Ojserkis, President, stamped on it, the only name that is on the letterhead.

Mr. Bourgeois: I object because all of these letters are dated after this letter of June 22, 1926, and therefore they cannot form a basis of any value as to whether or not this letter was authorized by the 20 Boardwalk Securities Company. The fact that there may have been letters afterwards will not do that. It is letters beforehand that have to count, if anything does.

The Court: Of course, it is not necessary in proving apparent authority to show that a particular individual has definite knowledge of the apparent authority and acts upon such knowledge. It seems to me, however, that counsel may be antici- 30 pating a little bit here. In the present state of the case there is nothing to show that Mr. Ojserkis had no authority.

Mr. Bourgeois: Apparent authority must pre-

cede the letter they are endeavoring to show, to be the basis —

Mr. Van Riper: On the question of authority I do not intend to put in my case now with reference to that, but Mr. Bourgeois in his opening attempted to make much of the fact that this particular letter
10 on which the suit is based is signed, "Sigmund Ojserkis, President," and he says it does not say president of what.

The Court: Why worry about that at this stage of the case?

Mr. Van Riper: All right. I have made the offer and I am willing to withhold it until further
on.

20

Q. Mr. O'Neill, after the first purchase of \$80,000 worth of bonds, which was on June 28, 1926, did you have some conversation with Mr. Ojserkis, the president of the Boardwalk Securities Corporation, with reference to those subsequent purchases?

A. Yes.

Q. Where did you have that conversation?

A. In his office.

Q. What was the conversation?

30

Mr. Bourgeois: I object.

Mr. Van Riper: This is a conversation not in contradiction or in variance, but in corroboration of the agreement previously made.

Mr. Bourgeois: If your Honor please, if he is relying on the letter of June 22nd as authority for him to collect money from the Boardwalk Securities Company, that letter cannot be supplemented by some conversation after that time so as to bind the Boardwalk Securities Company. Certainly not a conversation with Mr. Ojserkis.

10

The Court: Counsel has assured the Court it is not his purpose to supplement it in any way.

Mr. Van Riper: To corroborate it, I said.

The Court: Not to supplement it or to alter it?

Mr. Van Riper: No, sir.

The Court: Let us say, however, that he is endeavoring to show that Mr. Ojserkis personally signed the letter, which might be a circumstance the plaintiff wanted to establish. 20

Mr. Bourgeois: To avoid any confusion on that part of it, we will admit Mr. Ojserkis signed that letter. No question about that at all.

Mr. Van Riper: I was not going to question him with reference to the signature. 30

The Court: I only spoke of that as a matter of illustration. It is not necessarily irrelevant because the conversation was with Mr. Ojserkis, because it is the contention of the plaintiff here that Mr. Ojserkis acted for the defendant corporation.

Mr. Bourgeois: If that is what he wants to show, I submit he cannot show that by any conversation after the time the letter was written on which they bring this suit. It must have preceded it because, in order to be of value, it must be a letter that Edge knew and relied upon at the time they made the purchase.

10

The Court: We are all groping somewhat in the dark.

Mr. Van Riper: If your Honor please, Mr. Bourgeois is going to contend here first of all two things. I don't know which one he wants to put first and I don't care, but two things: One, that the letter was of a temporary nature and the other that all it referred to was the \$80,000 worth of bonds which were
20 purchased immediately after the receipt of the letter, and the purpose of this question is to show that the further purchases were made on the basis of this letter and it was so understood by both the plaintiff and the defendant.

The Court: The plaintiff has testified to that already, as I understand his testimony.

30 Mr. Van Riper: Absolutely, but this is to show that the defendant acquiesced in that.

Mr. Bourgeois: That means another agreement?

The Court: I do not so understand him.

Mr. Bourgeois: I object to that testimony.

The Court: He desires to show that the purchases were made pursuant to the letter.

Mr. Bourgeois: I object to that. He is trying to bind the Boardwalk Securities Company by a conversation Mr. O'Neill had with Mr. Ojserkis. I submit they cannot do that. The letter is complete in itself. They have either to rely on that letter as it is or else — 10

The Court: Do you desire to elicit some statement made by Mr. Ojserkis or some statement by Mr. O'Neill to Mr. Ojserkis?

Mr. Van Riper: Some statement made by Mr. Ojserkis, and it cannot bind the corporation any more than it is already bound by the letter. I am perfectly willing to stand on that. I think I have a right to show a statement made by the president of the corporation in the carrying out of the offer made in that letter. 20

The Court: You have not shown this conversation took place in the execution of the agreement.

Mr. Van Riper: The witness testified that at the time he made the subsequent purchases at the office of the corporation he had a conversation with Mr. Ojserkis. 30

Mr. Bourgeois: I object because it is not relevant.

It is subsequent to the date of the letter on which the suit is brought, and they cannot now graft on that some conversation between Mr. Ojserkis and Mr. O'Neill.

The Court: The objection will be overruled. A motion may be made to strike out the answer on
10 conversation that may not be relevant.

(An exception was noted for the defendant.)

Q. Now, Mr. O'Neill, what was the conversation which you had with Mr. Ojserkis?

The Court: When and where?

Q. This conversation you are about to give us,
20 Mr. O'Neill, before you give us the conversation, I understood you to say, did I not, that it took place in the office of the Boardwalk Securities Corporation?

A. Yes.

Q. You and Mr. Ojserkis were both there when it took place, of course?

A. Yes.

Q. I ask you if this conversation took place at the subsequent dates when you purchased bonds after
30 the original purchase of \$80,000 on June 28, 1926?

A. Well, it might—we might not have had a conversation on every date when we purchased bonds, but from time to time I was in there talking to him about these investments, as we hadn't purchased the amount that we originally said we would like to in-

vest, and several times I know Mr. Ojserkis said, "What better investment can you get than these Straus bonds when we are willing to buy them back from you at any time at 99?"

Mr. Bourgeois: I move to strike that out.

The Court: Strike it out. You see, you are anticipating to some extent. After there is some evidence in this case denying authority on the part of Mr. Ojserkis, then what he did and said may become evidential. 10

(An exception was noted for the plaintiff.)

Cross-examination.

By Mr. Bourgeois:

20

Q. Mr. O'Neill, I understood you to say that the \$7000 worth of bonds purchased in the name of Walter E. Edge, Jr., were ordered to be purchased by Senator Edge?

A. They were not purchased in the name of Walter E. Edge, Jr. They were paid for by a check signed Walter E. Edge, guardian for Walter E. Edge, Jr.

Q. Then they were Walter E. Edge's bonds, inas- 30
much as his money paid for them? I mean Walter E. Edge, Junior's bonds.

A. Walter E. Edge, Junior's bonds?

Q. Yes.

A. I suppose technically you could call them such.

Q. How old was Walter E. Edge, Jr., at that time?

A. In 1926?

Q. Yes.

A. About ten years old. Ten or eleven years old.

Q. And yet he had an estate of his own?

A. He has some money that Mr. Edge had given
10 him.

Q. And then Mrs. Edge also had money, and there were purchased for her \$12,500 worth of bonds?

A. When you say purchased for her, I can't answer that, that they were purchased for her. They were purchased by Mr. Edge. Mr. Edge didn't tell me where to put them or what account to pay for them out of, but they were purchased for Mr. Edge and they were paid for by Mrs. Edge's check with my signature as attorney.

20 Q. Is Senator Edge the agent for those two people?

A. Yes.

Q. In the making of those purchases?

A. Yes, he was the agent.

Q. Did the interest recovered on these bonds go into the account of Mrs. Edge?

A. Yes.

Q. And those purchased in the name of Walter E. Edge, did the interest go on his account there, Wal-
30 ter E. Edge, Jr.?

A. They went in that account, yes.

MARVIN G. CORSON, SWORN.

Direct examination.

By Mr. Van Riper:

Q. Mr. Corson, where do you live? 10

A. 1 St. Paul's Court, Brooklyn, New York.

Q. What is your occupation?

A. Editor.

Q. Editor of what?

A. National Quotation Bureau.

Q. What is the National Quotation Bureau?

A. It furnishes markets on all classes of securities.

Q. With particular reference to any class of securities? 20

A. No; all classes.

Q. Listed and unlisted securities?

A. Yes.

Q. How long have you been employed in that occupation?

A. Twenty-two years.

Q. You say that the National Quotation Service furnishes the market. Where does it furnish the market?

A. It furnishes the market in the publication issued each day. 30

Q. You edit a publication then; is that it?

A. Yes.

Q. What is that publication called?

A. National Daily Quotation Sheet.

Q. How is it published? In what form?

A. It is published every business day in the year, and then brought forth each month in a bound volume.

Q. I hand you some sheets here and ask you if that is typical of the type of sheet which you publish each day?

10 A. Yes.

Q. What does that sheet show?

A. It shows bid and asked prices on all stocks and bonds, listed and unlisted.

Q. Where do you get the information from, published in that sheet?

A. Directly from dealers and banks that deal in these securities.

Q. How do you get it from them?

A. By our own messenger each day, who calls
20 at all these places and brings them in directly.

Q. You say all these places. How many of them are there?

A. About six thousand.

Q. Where are they located?

A. Throughout the United States and Canada.

Q. To whom is this sheet sent each day after you have published it?

A. It is sent to all dealers and banks with bond departments throughout the United States.

30 Q. Do they have to be subscribers in order to receive it?

A. Yes.

Q. How many subscribers to this service have you?

A. This particular service? About two thousand.

Marvin G. Corson—Direct

Q. Where are they located?

A. Throughout the United States, in all cities.

Q. How much do you charge a year for that service?

Mr. Bourgeois: I object. I do not think that is relevant at all.

10

The Court: It shows, I suppose, a part of the business in which he is engaged. I will permit it.

(An exception was noted for the defendant.)

A. \$350.00 a year, for this particular service.

Q. \$350.00 a year?

A. Yes, sir.

Q. Just tell me a little bit in detail, will you, 20
how you get this information from the dealers?
What do they make up?

A. Any bond or any stock they wish to buy or sell, they publish it in here for direct information to all other houses. In other words, they being interested to either buy or sell at the price at the time it is put into this publication.

Q. Is it the purpose of this sheet to tell the trade and those brokerage houses which are interested in buying and selling these bonds or stocks, which- 30
ever it might be, where they can buy these bonds and who they can buy them from?

Mr. Bourgeois: I object. That is leading.

The Court: Yes, it is.

Mr. Van Riper: I will withdraw the question.

Q. What is the purpose of this sheet that is published each day?

A. The purpose of it is to find out where to buy and sell various classes of securities and what house or bank to go to.

10 Q. Does this sheet show the name of the house who is making a bid or an offer?

A. It does.

Q. And does it show the price at which the offer or the bid is made?

A. Yes.

Q. And does it show the bond for which the offer or the bid is being made?

A. Yes.

20 Q. And does it show the number of bonds for which the offer or bid is being made?

A. Yes.

Q. You say you distribute that daily to something like two thousand dealers in the United States? Is that so?

A. That is right.

Q. That is the sheet that you distribute daily?

A. Yes.

Q. Are those sheets afterwards compiled into a book?

30

Mr. Bourgeois: I object.

A. Yes.

Mr. Van Riper: It might be leading.

Marvin G. Corson—Direct

Mr. Bourgeois: It is leading.

Mr. Van Riper: I will withdraw the question.

Q. What happens to the sheets after a month or two months or three months?

A. It is published in a bound book, volume form, each month. 10

Q. And is the information which is in the book the same information which is on the sheet?

A. Yes.

Q. Except that the book covers a period of time and the sheet covers a day? Is that so?

A. That is right.

Q. I show you a book here and ask you what this book is?

A. That is a summary of the issues.

Q. For what period of time? 20

A. This is for a period of six months.

Q. What six months?

A. From January 1933, until July 1933.

Q. Are you familiar with Straus bonds?

A. Yes.

Q. Particularly are you familiar with the bonds that are involved in this suit? I have shown you a list of them, have I not?

A. Yes. 30

Mr. Bourgeois: I object to that. That is improper.

The Court: Yes. If you object to it, it will only necessitate going into it.

Mr. Bourgeois: I do object to it.

The Court: Call his attention, then, to the bonds.

Q. Are you familiar with Hearst-Brisbane, 60 Park Place, Newark, Broadway-Barclay, 48 West 48th Street, Dorset, American Insurance Union, Lef-
10 court-Manhattan, Albany-Metropolitan, New York Athletic Club, 42nd Street and Lexington Avenue, Keith-Albee, 502 Park Avenue, Chicago Builders?

A. Yes.

Q. Are they known as Straus bonds?

A. Yes, they are.

Q. What does that mean, Straus bonds?

A. Straus was a securities corporation that issued securities on certain real estate properties.

Q. And Straus was what? An underwriting
20 house?

A. Yes.

Q. Those bonds that I have just referred to particularly, and Straus bonds generally, are they what is known as listed or unlisted bonds?

A. Unlisted.

Q. What do you mean by an unlisted bond?

A. Well, they were not listed on any stock exchange.

Q. There are some bonds that are listed on the
30 New York Stock Exchange? Is that it?

A. Yes.

Q. And they are known as listed bonds?

A. That is right.

Q. An unlisted bond isn't listed on the New York Stock Exchange?

Marvin G. Corson—Direct

A. That is right.

Q. How are these unlisted bonds sold?

A. Well, they are generally sold throughout the trade.

Q. What do you mean? Is there such a thing as an over-the-counter security?

A. Yes.

Q. What about these bonds with reference to 10 over-the-counter securities? Is that what you call them?

A. Yes.

Mr. Bourgeois: I object to that. I don't know what that means.

Mr. Van Riper: I am going to ask him, because I knew you would want to know.

20

Q. Just tell Mr. Bourgeois, will you, please, Mr. Corson, what over-the-counter securities mean?

A. Over-the-counter security is any security that is generally traded in but not listed on any exchange.

Q. Do you know whether or not this book which you have just referred to—suppose we have it marked for identification?

(The book was marked P4 for identification.) 30

Q. This book which has just been marked P4 for identification and those sheets which you have there, whether or not they are used as a guide in the trade?

Mr. Bourgeois: I object to that.

The Court: The objection will be overruled.

(An exception was noted for the defendant.)

A. Yes.

10 Q. Are they used as a guide in the trade?

A. Yes.

Q. Do you know by whom they are used?

A. By a great majority of all houses interested in buying and selling securities, and banks, also.

Q. Do you know whether or not they are used by any government?

A. By the United States Government.

Q. Any other? Any state government?

A. All state governments in general.

20 Q. Do you know whether or not it is the guide which is commonly used by brokers, bankers and security houses, and so forth, for the purpose of making adjustments between customers?

Mr. Bourgeois: I object to that. It is leading and does not give a chance at all for the witness to testify.

30 The Court: It is somewhat leading.

Q. For what purpose is this book used, Mr. Corson?

Mr. Bourgeois: Within his knowledge, of course.

Marvin G. Corson—Direct

Q. So far as you know, Mr. Corson, for what purpose is this book used by brokerage houses, banks and governments and so forth?

A. It is used to determine the valuation of all securities, as to their value.

Q. The book shows the valuations as of different dates, does it?

A. Yes.

10

Q. You have been in this business in the publication of this book, and therefore in close contact with the bond market, for twenty-two or twenty-three years?

A. Twenty-two years.

Q. And as a result of your experience of twenty-two years in this business and your twenty-two years of contact with the bond market, are you able from this book and these sheets to tell the market value of bonds on a certain day?

20

A. Yes.

Q. Have you testified to that fact from this book and these sheets in any court?

A. Yes.

Q. Where?

Mr. Bourgeois: I object. That is not relevant.

The Court: The objection will be overruled.

30

(An exception was noted for the defendant.)

A. In various courts throughout the United States.

Q. Where?

A. In various courts throughout the United States.

Q. How many times, approximately?

A. Hundreds of times.

Cross-examination.

10

By Mr. Bourgeois:

Q. You have a pretty good opinion of the sufficiency and the value of that book that those sheets, I take it?

A. Yes.

Q. And you are the publisher of the sheets?

A. Editor.

Q. And also of the book?

20

A. Yes.

Q. In other words, you think pretty well of your work?

A. I would say so.

JOSEPH B. GAINES, SWORN.

Direct examination.

30

By Mr. Van Riper:

Q. Mr. Gaines, where do you live?

A. 1201 Avenue I, Brooklyn, New York.

Q. What is your business?

Joseph B. Gaines—Direct

A. Real estate security broker, member of the New York Real Estate Securities Exchange.

Q. How long have you been in that business?

A. Ever since 1929.

Q. Are you a member of any firm?

A. President of Gaines, Droge & Company, 80 Broad Street, New York City.

Q. What is the business of that firm? 10

A. Dealing in real estate securities.

Q. How long has that firm been in existence?

A. Since 1931.

Q. Does it deal continuously or daily or all the time in real estate securities?

A. Yes, sir, 95% of our business is in real estate securities.

Q. By real estate securities what do you mean?

A. Bonds issued by Straus & Company, the American Bond and Mortgage Company, G. L. Miller & Company, and such securities issued by the Title Guaranty & Trust Company, Lawyers' Mortgage Company, Lawyers' Title & Guaranty Company, various underwriters, Hayden, Stone, Chester Securities Corporation. 20

Q. How many real estate security bonds has your firm dealt in in the last three years?

A. Several million dollars worth.

Q. Is there an exchange in New York known as the New York Real Estate Securities Exchange? 30

A. Yes, sir.

Q. Are you a member of its board of governors?

A. Yes, sir.

Q. How long have you been?

A. One year.

Q. What is the business of that exchange?

A. It is a public market place for real estate securities. In other words, the exchange was formed in 1929, for the purpose of creating a market for real estate securities. In other words, in case someone had to sell securities at a market price, the public would get a fair deal by charging a legitimate commission. It is formed by members of the—prominent real estate brokers and quite a number of members of the New York Stock Exchange.

Q. Who are some of the members of the Real Estate Securities Exchange?

A. Hayden, Stone & Company, members of the New York Stock Exchange, Carreau & Company, members of the New York Stock Exchange, Nash & Company, dozens of others; and such prominent real estate brokers as Joseph P. Day, Charles F. Noyes, Douglas Elliman, Peter Grimm, William A. White, and Mr. Stevens, of Brown, Wheelock, Harris & Company.

Q. Just tell us, will you, please—most of us know about the New York stock market, know of it rather unfavorably, as far as that is concerned, but most of us have heard about it and know what it does and how it does it, too, but just tell us how the New York Real Estate Securities Exchange works, in comparison with the New York Stock Exchange.

A. As far as the buying and selling, it is worked on the same principle, the brokers are only permitted on the floor, and in case a bank should call a member of the exchange to sell \$5000, for instance, of bonds of Hearst-Brisbane 6s, 1942, the particular bonds, these bonds are entered on the Real Estate

Joseph B. Gaines—Direct

Exchange, and in case another broker should buy those securities he will sell them to his customer. Sometimes a broker has the buyer and the seller, and they will be known as crossed on the exchange. He gets a commission for buying and selling, because he gets the two parties, he finds a buyer and a seller.

Q. Would you say that, generally speaking, the 10
New York Real Estate Securities Exchange was to real estate securities what the New York Stock market is to listed securities?

A. Yes, sir.

Mr. Bourgeois: I object. That calls for his conclusion.

The Court: He answered before the objection 20
was interposed.

Q. Now, Mr. Gaines, I call your attention to this book which has been marked P4 for identification, known as the National Corporation Bond Summary, and ask you if you are familiar with it?

A. Yes, sir.

Q. How many years did you say you had had experience in this business?

A. Since 1929, as far as real estate securities 30
are concerned.

Q. In your five or six years of experience in real estate securities and the selling of millions of dollars worth, which you said you had sold, are you familiar with the National Bond Summary as repre-

sented by this book and the sheets which are there before you?

A. Yes, sir.

Q. Have you ever had occasion to use them?

A. Yes, we do.

Q. Do you know whether or not this book and sheets which precede the book by way of publication
10 are used as a standard in the trade?

Mr. Bourgeois: That is leading.

The Court: I will permit that.

(An exception was noted for the defendant.)

Q. Do you know whether it is?

20 A. They are.

Q. And for what purpose are they used in the trade?

30 A. They are used by the over-the-counter brokers to find a buyer and a seller. In other words, these sheets will come out every day, and a concern that specializes in that particular issue, for example, like the Hearst-Brisbane bonds, if he is interested in those particular bonds, he will send his report in to the National Bond Quotation Bureau, stating that he is interested and he will make a market and he will say he will be interested in buying \$5000 worth of those bonds at 45, and then the next day those sheets are published and they will show that concern's name in there bidding 45 for \$5000 worth of bonds. In case he should be a seller, he

will be offering \$5000 worth of bonds at a particular price, 46, 47, whatever the case might be.

Q. Do I understand, then, that by consulting this book, or daily, as they come out, by consulting the sheets, you are able to tell what the market is and where it is?

A. Why, yes, we can determine that very easily.

Q. Have you ever tested actual sales against the figures shown in this book, to determine the accuracy of the book? 10

A. Yes.

Q. From actual sales which you made through your own office?

A. We have.

Q. Or by sales made on the New York Real Estate Securities Exchange?

A. No, none on the Real Estate Exchange, so far as over-the-counter is concerned. 20

Q. Well, I don't know whether you understood my question or not. Have you any information of sales made of real estate securities through the New York Real Estate Securities Exchange?

A. Oh, yes.

Q. And have you ever tested those sale prices against the prices in this book?

A. Yes, in the market.

Q. And as a result of all that, from your twenty-three years experience in the business, whatever it has been, from your years of experience in the business, are you able from the use of these sheets and the book which supersedes them to determine the market value of bonds that are listed therein? 30

A. Yes, sir.

Q. Are you familiar with S. W. Straus & Company bonds?

A. Yes, sir, I have bought plenty of them myself.

Q. How many of them have you bought and sold?

A. At least a million dollars worth.

Q. During what period of time? In the last 10 how many years?

A. The last few years.

Q. Are you familiar particularly with the following bonds: Hearst-Brisbane, 60 Park Place Broadway-Barclay, 48 West 48th Street, Dorset, American Insurance Union, Lefcourt-Manhattan, Albany-Metropolitan, New York Athletic Club, 42nd Street and Lexington Avenue, Keith-Albee, 502 Park Avenue, and Chicago Builders?

A. Yes, sir.

20 Q. Are they all Straus bonds?

A. Bonds originally issued by S. W. Straus & Company.

Q. And at my request did you ascertain the market value of those bonds, some of them as of April 27, 1933, and some of them as of June 10, 1933?

A. Yes, sir.

Q. Will you tell me, please, what the market value of Hearst-Brisbane 6s was as of April 27, 30 1933?

Mr. Bourgeois: I think I ought to have an opportunity to cross-examine him before he testifies to that.

The Court: Very well.

By Mr. Bourgeois:

Q. From what sources did you obtain the market value of these Straus bonds?

A. We determined the price of these particular securities from the National Bond Summary, and then there is another book known as the American Bond Quotation Service. I can show you that, 10 if you wish.

Q. Is it not a fact that when a broker has a market, as you call it, for bonds at a certain price, that he puts in a bid at a very much lower price?

A. No, sir.

Q. Doesn't he get the bonds as cheaply as he can and sell them to his purchaser, prospective purchaser, for the price he is willing to give?

A. I didn't quite follow that.

Q. There is a bid and offer here, an offer and 20 bid?

A. Bid and asked.

Q. Now, when the broker bids, he always has a person in his mind to whom he is going to sell, doesn't he?

A. No, sir, not necessarily. He may have a position. He may be a specialist and he buys them for his own account.

Q. And as a matter of fact, don't these bond people that you are speaking about, not yourself, 30 but people in the same business you are, don't they frequently find a customer for bonds at a good figure, and they submit a bid in the market so maybe there will be a spread of maybe 10 or 20%?

A. No, sir. The market is only about—in other

words, if Hearst-Brisbane should be, say for example, 50, you could purchase them around probably two or three points difference. The spread is about two points, two or three points.

Q. And who gets that spread?

A. Well, in other words, if someone wants—if the market should be 50-52, that would mean 50
10 bid, offered at 52, should someone want to sell those securities he would get in between that, probably 50-1/2 or 51. It all depends on how good a broker he is.

Q. Doesn't the broker get the difference, the spread, for his compensation?

A. Over-the-counter brokers buy these securities net, on a net basis. They usually figure a point for their overhead.

Q. I don't care about usually. I want to know
20 what the possibilities are.

A. There is usually a spread of only about three points. That is about all, between the bid and the offer.

Q. And that goes to the broker?

A. No.

Q. To whom does that go?

A. If, for example, a bond is 50 bid and offered at 53, that doesn't necessarily mean that the man who
30 wants to buy it will have to pay 53. If the bid is 50, sometimes he will say, "I will pay 51," and the broker gets it for him for 51.

Q. Is it not a fact that if a person who is maybe irresponsible wants to put in a bid for bonds, that this National book here, National Bond Summary, will publish that as a bid?

A. Oh, no, because he would be quickly found out and banished from the trade. As a matter of fact

Q. How is that?

A. He will be quickly found out and if his bids aren't good he will be banished from the trade. We do millions of dollars of business just over the telephone. \$50,000 worth of bonds right over the 10 phone, and we will take the man's contract for it, and there is no such thing as a written contract in our business.

Q. You don't have a written contract, but you have a bid, and if somebody makes a bid, that is accepted as being bona fide, isn't it?

A. Yes, sir.

Q. Without any investigation at all?

A. The market may change the next day. In other words, if a broker will send in a quotation 50 20 bid, the market may vary, it may go down a point or it may go up a point the next day.

Q. And if a person wants to bid the market down so he will be able to make some money on a certain bond, he can submit a very low bid, can he not, and that will be published?

A. No. They have to publish it within the market. In other words, it has to be reasonable. There is not only one broker who makes a market. There are usually a number of brokers who make the 30 bids.

Q. What do you call a market? Do you consider these situations where there is an ask and a bid a market?

A. That is known as an over-the-counter market, an unlisted security market.

Q. And no sale at all?

A. There may be some sales during that day and there might not be any sales the next day in that security.

Q. And there might not be any sales for a month?

10 A. I wouldn't say that.

Q. At any rate, this what you call over-the-market —

A. Over-the-counter.

Q. —over-the-counter market represents what you gather from the ask and the bid and not from actual sales?

A. Not as far as the National Bond Quotations are concerned, but on the New York Real Estate Securities Exchange we have actual sales which
20 are published in the newspapers, which are in public print, and we have records here of the actual sales that were made on the Real Estate Exchange, and that was shown in the New York Times and all the various leading papers.

Q. Have you a record of sales made on the day that these offers were made?

A. Yes, sir, I have the records here.

By Mr. Van Riper:

30 Q. Referring to Hearst-Brisbane 6s, will you tell me what the market value of Hearst-Brisbane 6s was on April 27, 1933?

A. The Hearst-Brisbane 6s is known as a serial bond. The last maturity is due 1942. These bonds were unconditionally guaranteed by William —

Joseph B. Gaines—Direct

Mr. Bourgeois: That is objected to.

Q. Just tell me, will you? Give me the figure.

A. We figure ——

Mr. Bourgeois: I object. He is giving the figures for the 1942 issue.

A. 1939, I am going to give the market. We 10
figure ——

Q. All I want from you is one word. The figure.

A. 47.

Q. What was the market value of Hearst-Brisbane 6s of 1939, on April 27, 1933?

A. 47.

Q. What was the market value of 60 Park Place, Newark, 6s on April 27, 1933?

A. 35. There were \$3500 worth. Of the Hearst- 20
Brisbane ——

Q. The value on the market of 60 Park Place was 35?

A. Right.

Q. Now, go back. I overlooked asking you a question on the Hearst-Brisbane. You said the market was 47?

A. 47 on the Hearst-Brisbane 6s.

Q. What would have been the market value of \$25,000 worth par value of Hearst-Bisbrane on that 30
day? We will hold that. I will withdraw that question. You say the market value of 60 Park Place, Newark, was 30 or 35?

A. 35.

Q. What would have been the market value of \$10,000 par value?

A. 35. 35¢ on the dollar.

Q. If you had \$10,000 worth, par value.

A. You would get \$3500 for them if you had to sell them in the open market on April 27, 1933?

Q. What was the market value of Broadway-Barclay 6s as of April 27, 1933?

A. April 27, 1933? 14. We made actual sales.

10 Q. What was the market value —

Mr. Bourgeois: What year was it?

A. 1933.

Mr. Bourgeois: What was the year of the bond?

A. Hearst-Brisbane, last maturity.

Q. Broadway-Barclay?

20 A. There is only one maturity. That isn't a serial bond.

Q. What year?

A. 6s of 1942, I believe it is.

Mr. Bourgeois: These are not 1942.

A. It is a 1948, but there is no serial bond.

Q. We have 1941.

A. That is the last maturity. In other words,
30 they were due in 1941. They all fell due at that particular date.

Q. Getting back to it again, I didn't get that figure. You say the market on Broadway-Barclay 6s, 1941, was what?

A. 14.

Joseph B. Gaines—Direct

Q. What would be the market value of \$10,000 par value?

A. \$1400. That was what you could realize on that particular day if you wanted to sell them in the open market.

Q. What was the market value on April 27, 1933, of 48 West 48th Street 6s of 1936?

A. 10. We made actual sales, as a matter of fact, 10 at 10.

Mr. Bourgeois: What year bonds?

A. 1933.

Mr. Bourgeois: What year bonds?

A. 48 West 48th Street 6s, 1936.

Q. What would have been the market value of \$20,000 par value of those bonds? 20

A. 48 West 48th Street?

Q. Yes.

A. \$1000.

Q. Not for \$20,000 worth?

A. \$2000.

Q. What was the market value on April 27, 1933, of Dorset 6s of 1941?

A. 15.

Q. What would have been the market value of \$10,000 worth of par value? 30

A. \$1500.

Q. What was the market value on April 27, 1933, of Lefcourt-Manhattan 5¾s of 1941?

A. 5¾s, 1941, 17. There were actual sales on the Real Estate Exchange.

Q. What was the market value of \$20,000 par value of those bonds?

A. \$3400.

Mr. Bourgeois: Where does that come in?

A. 20 times 17 would be \$3400.

10

Mr. Bourgeois: I am wondering where the amount comes in. All right.

Q. What was the market value on April 27, 1933, of Albany-Metropolitan 6 $\frac{1}{4}$ s, 1938?

A. 12.

Q. What would have been the market value of \$25,000 worth on that day?

A. \$3000.

20 Q. By the way, Mr. Gaines, just for our information, when we refer to a bond as Albany-Metropolitan 6 $\frac{1}{4}$, 1938, what does that 6 $\frac{1}{4}$, 1938, mean?

A. That means that is a first mortgage bond, which originally was issued to pay 6 $\frac{1}{4}$ %, and the last maturity—and it was due in 1938. In other words, if an investor bought that, he figured he was going to get interest at 6 $\frac{1}{4}$ % if he bought it at par, and in 1938, he would get his principal back, and that Albany-Metropolitan represented a first
30 mortgage on a particular piece of property. That is a hotel in Albany.

Q. Referring again to April 27, 1933, what was the market value of American Insurance Union 6s of 1941, as of that day?

A. 13. Property in Columbus, Ohio.

Joseph B. Gaines—Direct

Q. What would have been the market value of \$10,000 par value?

A. \$1300.

Q. Now, going to June 10, 1933, what was the market value of 502 Park Avenue 6s of 1941, as of that day?

By Mr. Bourgeois:

10

Q. Let me ask the witness one question. What are you testifying from?

The Court: You examined him with respect to his qualifications.

Mr. Bourgeois: No, I did not ask him about this memorandum.

20

A. I am testifying as to the prices which we have here made on the Real Estate Exchange, the records which we have made in our office, and we have also the records here of the National Bond Summary and the American Bond Quotation Service. That is this little book here.

Q. Whose work is it that you are testifying from?

A. I made that all up myself. I prepared the whole thing.

Q. Did you do the writing of it yourself?

30

A. It was typed by my secretary. I will explain it to you.

Q. I don't care anything about that. It is a question of what you are using for a memorandum.

A. It is simply a matter of accuracy. That is

why I had it prepared. This was all prepared a few days ago.

Mr. Bourgeois: I do not think a man can come in here and testify from a memorandum made by somebody else.

10 The Court: He says some stenographer typed it. He did not actually write it. It is your information, is it?

The Witness: Yes, sir. I prepared everything in it. It was all prepared by myself.

By Mr. Van Riper:

Q. Now, referring to June 10, 1933, what was the
20 market value of 502 Park Avenue 6s, 1941, as of that day?

A. 12.

Q. What would have been the market value of \$10,000 par value?

A. \$1200.00.

Q. And as of the same date, June 10, 1933, what was the market value of Chicago Builders 6s of 1939?

A. 12¢ on the dollar.

30 Q. What would have been the market value of \$10,000 par value?

A. \$1200.

Q. And as of the same date, June 10, 1933, what was the market value of Albany-Metropolitan 6 $\frac{1}{4}$ s, 1938?

A. 17.

Q. What would have been the market value of \$7000 par value?

A. \$1190.

Q. As of the same date what was the market value of New York Athletic Club 6s, 1946?

A. 21½.

Q. What would have been the market value of 10 \$20,000 par value of them?

A. \$4300.

Q. And as of the same date what was the market value of Hearst-Brisbane 6s of 1939?

A. 55.

Q. What would have been the market value of a thousand dollars par value?

A. \$550.

Q. And as of the same date what was the market value of Hearst-Brisbane 6s of 1942? 20

A. 52.

Q. What would have been the market value of \$1500 worth of them?

A. \$780.

Q. As of the same date, what was the market value of Keith-Albee 6s, 1936?

A. 35.

Q. What would have been the market value of \$10,000 par? 30

A. \$3500.

Q. Mr. Gaines, what was the total market value that you gave?

A. As of April 27, 1933, \$27,850, and as of June 10, 1933, \$12,720.

Q. That makes a total market value of \$40,570. Is that so?

A. Well, we can easily figure that. \$40,570.

The Court: We will recess now until 1:45. Ladies and gentlemen of the jury, let me impress you with the importance of not permitting any person to
10 discuss with you this case during the recess inter-
mission. Do not discuss the case yourselves with
anyone else. It is highly important that you do
not discuss the case or permit any other person
to discuss it with you during the progress of the
trial. The opportunity to discuss it or the oppor-
tunity of someone to discuss it with you is most
likely during the recess interval, and let me im-
press you with the importance of refraining from
discussing the case or permitting anyone to discuss
20 it with you. Your motives may be ever so innocent
in doing it, and yet if information comes to the
Court that you have discussed the case with some-
one or someone has discussed it with you, it will
result in what we speak of as a mistrial. All of the
testimony so far taken is for nothing and the trial
will end and will have to begin all over again from
the very beginning, so be exceedingly cautious and
careful in that particular.

30 (A recess was taken until 1:45 P. M.)

(Afternoon session, 1:45 P. M.)

The Court: Counsel for all parties in this action have been informed of the reasons why juror number 5, whose name is William Hawkins, should be excused. A member of Mr. Hawkins' family, is, we understand, critically ill, and his presence is required at the hospital. This is, in substance, the reason. Do I understand that counsel for all parties in this action are agreeable and consent that the trial shall proceed before the remaining eleven jurors? 10

Mr. Van Riper: Yes, sir.

Mr. Bourgeois: That is satisfactory to me.

The Court: Therefore, under those circumstances, juror number 5 may be excused. 20

JOSEPH B. GAINES, resumed.

Cross-examination.

By Mr. Bourgeois:

30

Q. Mr. Gaines, you testified that on the 27th of April, 1933, the Hearst-Brisbane 6s sold at 47?

A. Sold at 47? No, sir. I said we determined the price as of April 27, 1933, at 47, the Hearst-Brisbane 6s, 1939.

Q. You determined the price?

A. Yes, we determined the price, based on four various markets, that is, the National Bond Summary, which is used among the unlisted brokers, the American Bond Quotation Service, that is the little red book I wanted to explain to you if you cared to, the New York Real Estate Securities Exchange market, and the office sales, sales made in our office, and from that we determine that as a basis.

Q. How many sales were there that you know of on that day of these bonds?

A. On that particular date? The National Bond Summary, according to my records, on April 18th showed a bid of 42½ and an ask at 45. In other words, you could have purchased those bonds at 45, that is, the last maturity, the 1942 maturity.

20 The American Bond Quotation Service showed a market of 42 bid, offered at 45. That means 42 bid, offer 45.

Q. Then you didn't have any actual sales at all?

A. The only actual sales we made was in our own office on March 17th. We sold bonds at 42¾.

Mr. Bourgeois: I object to that. That is too remote.

30 A. The market is very inactive on real estate bonds.

Q. That may be true, but it is fluctuating property, isn't it?

A. No, they don't fluctuate much.

Q. I didn't ask you that. It is fluctuating, isn't it?

A. Not very much.

Q. Is it fluctuating at all?

A. Yes.

Q. Then it is fluctuating?

A. Yes, sir.

Q. So you had no sales at all on the 27th of April, 1933, for the Hearst-Brisbane 6s maturing in 1939?

A. As far as an actual sale, that is correct. 10

Q. Now, the 60 Park Place, Newark, 6s, did you have any sales of those bonds on that date?

A. On that particular date?

Q. Yes.

A. No, sir.

Q. Did not?

A. No, sir, but I will be glad to explain to you how we determined that.

Q. I don't want to know how you determined it. I just want to know if there was any sale there. 20

A. All right.

Q. Did you have any actual sales of the Broadway-Barclay 6s maturing in 1941?

A. No, sir, not as of April 27, 1933.

Q. Did you have any actual sales of the 48 West 48th Street 6s of 1936, on that date?

A. Yes, sir, we sold it at 10.

Q. How many did you sell?

A. Well, they are traded in thousand dollar denominations. We sold more than a thousand dollars. These bonds are sold in thousand dollar denominations. 30

Q. And you sold more than one bond?

A. Yes, sir.

Q. You sold more than one bond?

A. Yes.

Q. How many bonds?

A. I don't believe we sold more than two. They are very inactive real estate securities.

Q. Do you know if you did sell two?

A. Yes. Sold at 10. 10¢ on the dollar, and the market on the National Bond Summary was 6 bid
10 and on the ——

Q. I don't care anything about what was bid.

A. I just wanted—as far as fluctuation, you said before 20 point spread. I just wanted to explain it to you.

Q. The Dorset 6s of 1941, did you have any actual sales of them on the 27th of April?

A. No, sir.

Q. The American Insurance Union 6s?

A. No, sir.

20 Q. The Lefcourt-Manhattan 5¾s, 1941?

A. No, but on the Real Estate Exchange there was actual sales on the 5th of the month at ——

Q. That is too remote.

A. And on April 22nd, 16½ on the Real Estate Exchange.

Q. None on the 23rd?

A. No, sir.

Q. The Albany-Metropolitan 6¼s, 1938, did you have any sales?

30 A. Not on that particular date, no.

Q. Did you have any sales on the date of June 10th of that bond?

A. No, not on that particular date.

Q. Then the Hearst-Brisbane 6s, 1936—well, we had that, \$15,000.

Joseph B. Gaines—Cross

A. No, those 6s are 1939, not 1936.

Q. What about the 1936?

A. The 6s of 1936?

Q. Yes.

A. I don't believe—I wasn't asked to make any appraisal on 1936's. Just the 6s of 1939, and 6s of 1942. New York Athletic Club ——

Q. There is no question pending. 10

A. Pardon me.

Q. The 502 Park Avenue bond, 6s for 1941, any actual sales?

A. No actual sale on that particular date.

Q. The Chicago Builders 6s of 1939, any actual sale?

A. Not on that particular date.

Q. Then the \$7000 of Albany-Metropolitan 6 $\frac{1}{4}$ s of 1938? Have any actual sale?

A. No, sir, but on the 22nd, June 22nd, at 18 20

Q. I am not asking you for that. I just want to know on this day. Did you have any actual sales of the \$20,000 New York Athletic bonds?

A. Yes, sir, on June 10th there was actual sales between 21 and 22.

Q. What?

A. They sold on the New York Securities Exchange between 21 and 22, and we determined a price of 21 $\frac{1}{2}$. 30

Q. Do you know that they actually did sell?

A. Yes, sir. I inspected the records on the Exchange. Sold them to Sheriff Knott. He owns the building.

Q. Then the \$10,000 of Keith-Albee 6s of 1936?

A. Keith-Albee, New Rochelle, 6s of 1936. No actual sales on June 10, 1933, no, sir.

Q. What bonds, if any, did you actually sell on June 10th, excepting that one? You said you sold one.

10 A. On June 10th, 48 West 48th Street, that was in our office on that particular date, and June 10th the New York Athletic Club bonds sold on the Real Estate Exchange at 21 and 22, and, as I said before, these real estate bonds are very inactive and there aren't sales made every single day. They are not like bonds on the New York Stock Exchange.

Q. As I understood, the 21½ you fixed because it was half-way between what was asked and what was bid?

20 A. No, sir. The sales were made at 22 and they closed at 21, and we arrived at a price at 21½ for the lot.

Q. And there were two bonds?

A. Oh, no, not on the New York Athletic Club. That month there sold a hundred thousand dollars worth of bonds on the real estate. It was very active in that particular month.

Q. Up until when?

A. For that month.

Q. What about the Hearst-Brisbanes? Have they ever defaulted in their interest?

30 A. No, sir, they haven't defaulted in interest.

Q. Never have defaulted in interest?

A. No, sir. Just the Keith-Albee and Hearst-Brisbane. All the others have defaulted.

Q. Notwithstanding that, you say they sell for only 42?

A. 47.

Q. And they are guaranteed, aren't they, by Hearst?

A. Yes, sir, Hearst-Brisbane bonds are unconditionally guaranteed by William Randolph Hearst, but still there are plenty of bonds on the New York Stock Exchange —

Q. I didn't ask you that. 10

Re-direct examination.

By Mr. Van Riper:

Q. What does this guaranty by William Randolph Hearst mean on the bonds?

A. It means that —

Mr. Bourgeois: I object to that. 20

The Court: You asked him.

Mr. Bourgeois: I asked him if they were. I didn't ask him what it meant.

Mr. Van Riper: I want to know. I don't know.

The Court: The objection is overruled.

30

A. These bonds were originally issued by S. W. Straus & Company, and when Mr. Hearst applied for the loan he agreed to guarantee the principal and the interest, irrespective of whether the properties would earn—these are first mortgages cover-

ing a group of properties, and irrespective of whether the properties would have any earning power or not, he guaranteed to pay the principal and the interest.

Q. And that means, does it, that during the life of the bond he is personally responsible for the interest payment and when the bond becomes due he is personally responsible for the payment when it becomes due?

A. Yes, sir.

Q. In these cases, Mr. Gaines, where you have given us a market value as of April 27th and June 10th for bonds for which there were no actual sales as of that date, how did you arrive at the market value as of that date?

A. At the basis of the National Bond Summary, the American —

20 Q. That is this book here we have been referring to as exhibit P4 for identification?

A. Yes. The American Bond Quotation service, the New York Real Estate Securities Exchange, and sales made in our office, we put them all together and figured out the price. In other words, if the market on the National Bond Summary book stated there was 42 bid and offered at 45, in other words, by that I mean if anyone wanted to sell those bonds, they would get 42 for them, and if 30 they wanted to buy them they would have to pay 45, if they wanted to buy them immediately, and they might get in between that, between 42 and 45. Then the American Bond Quotation Service had a market 42-45, and if we made sales at 45 or 46, we made a sale of $42\frac{3}{4}$ on Hearst-Brisbane on March

17th—of course, the market is very inactive on all these real estate bonds, and as of April 27th we figured it at 47.

Mr. Bourgeois: I move that all be stricken out because that is not market value.

The Court: The question was how he arrived 10 at the value.

Mr. Bourgeois: He is giving that as market value.

The Court: What are you moving to strike out?

Mr. Bourgeois: All of this explanation of how he arrived at it and also what it is. That is what I am really moving to strike out, the testimony of 20 value, because, excepting for those few instances where there was actual sales, he has not given any actual value.

The Witness: May I answer that?

The Court: No. You talk too much. You want to strike out his answer to the present question?

Mr. Bourgeois: I think the answer should be 30 stricken out. No, I don't care about striking that out to the present question, but I want to strike out his testimony.

The Court: Well, counsel has not finished.

Q. Mr. Gaines, from your years of experience in the business and judging from, as you say, you have sold millions of dollars worth of these real estate securities, is it your judgment, qualified as you are by virtue of that background, that in fixing the market value of one of these particular bonds, for instance, on a certain day, you take the National
10 Bond Summary, do you, and if there is no particular bid and ask on that day, how do you arrive at the market value?

A. We guide ourselves on that book.

Mr. Bourgeois: You do what?

A. Guide ourselves with that book.

Q. What do you take from the book? Assuming you wanted a market value as of the 10th of the
20 month and there was no bid and asked price in the book as of the 10th of the month, what would you take from the book?

A. Well, if there was nothing in there as a bid and ask, I would look through other channels.

Q. I mean is there anything in the book besides on that one specific date that you would refer to?

A. I would refer to the records of the Real Estate Exchange or our office.

Q. Let us stick to the book. Suppose you are
30 asked to find the market value of a certain bond in this book as of the 10th of the month and the book doesn't show any price as of the 10th?

A. Then I would take the whole month, the entire month, and determine a price as of that particular date, because they are very inactive.

Q. Would you take the last day before the 10th and the next day after the 10th on which there were bids?

A. I would figure out the market. In other words, if there were bids in, say, 5000 bid 42, 10,000 bid 45, 15,000 offered at 48, I would say 47 would be a fair price.

Q. And in your judgment is that an honest, fair 10 way to arrive at the market value for those bonds on that particular date?

A. Yes, sir.

Re-cross examination.

By Mr. Bourgeois:

Q. Well, with bonds that are fluctuating, that would be a very, very uncertain way of finding the 20 market value, wouldn't it?

A. They don't fluctuate very much, not real estate bonds.

Q. Well, they seem to have fluctuated from 12 up to 55 in one instance you gave us ——

A. They are different bonds.

Q. —between April 22nd and June.

A. Which bond is that? Hearst-Brisbane? No, sir. Albany-Metropolitan 12 and Albany-Metropolitan 17. It only went up five points from April 27th 30 to June 10th.

Q. And you don't know when that five points went up? It may have all gone up in one day?

A. No, I wouldn't say that.

Q. I beg your pardon.

A. I wouldn't say that.

Q. I didn't ask you to say it. I say they may have? That whole five points may have gone up on the 9th day or the 10th day of June? Isn't that true?

A. Albany-Metropolitans on the 22nd the Exchange made sale at 18 and the National Bond book
10 had a market of 16 bid, and the American Bond Quotation Service 12½-16, and we arrived at a figure of 17 as of June 10th.

Q. And those figures that you are giving are simply a compilation of figures prepared by different people, different concerns?

A. Different concerns and the Real Estate Exchange records and our records, and we determine a price. We have made many appraisals and they have been recognized in New York State and also
20 in New Jersey.

Mr. Bourgeois: I object to that. There is no question leading to that at all.

By Mr. Van Riper:

Q. When you say "By different concerns," you are referring to this National Bond Summary?

A. Yes, sir.

30 Q. And that is recognized as a standard in the trade?

A. It is.

Mr. Bourgeois: I object.

Mr. Van Riper: That is all.

Robert M. Snively—Direct

ROBERT M. SNIVELY, sworn.

Direct examination.

By Mr. Van Riper:

Q. Where do you live? 10

A. Brooklyn.

Q. What is your business?

A. I am a bond trader.

Q. With whom are you associated?

A. I am with Watson & White at the present time, 149 Broadway.

Q. New York?

A. Yes.

Q. What is their business?

A. They are members of the New York Stock 20 Exchange.

Q. Do you deal in bonds?

A. Yes.

Q. What kind of bonds?

A. Real estate bonds.

Q. How long have you been in the business of dealing in real estate bonds?

A. I have been since November 1931. Three years.

Q. Were you ever employed by S. W. Straus & 30 Company?

A. Yes, sir.

Q. Do you know Straus bonds, generally speaking?

A. I have traded for three years in them.

Q. What is referred to, generally speaking, when you refer to Straus bonds?

A. Bonds issued by S. W. Straus & Company.

Q. What do those bonds cover?

A. Cover real estate properties. Usually mortgages on properties.

Q. They are all real estate properties, are they?

10 A. Yes, sir.

Q. Are you familiar with these bonds; Hearst-Brisbane, 60 Park Place, Newark, Broadway-Barclay, 48 West 48th Street, Dorset, American Insurance Union, Lefcourt-Manhattan, Albany-Metropolitan, New York Athletic Club, 42nd Street and Lexington Avenue, Keith-Albee, 502 Park Avenue and Chicago Builders?

A. Yes, sir. I have had actual transactions in all of them.

20 Q. Do you know whether or not they are Straus bonds?

A. I know they are all Straus bonds.

Q. Was S. W. Straus & Company in existence in April, 1931?

A. No, sir.

Q. Or in June of 1931?

A. They were in business in 1931, yes, sir. April, 1931?

30 Q. April and June of 1931.

A. S. W. Straus & Company were in business as of those dates in 1931.

Q. Were they afterwards succeeded by Straus & Company?

A. Straus Securities Corporation.

Robert M. Snively—Direct

Q. When did Straus Securities Corporation succeed S. W. Straus & Company?

A. They were formed about, I will say, April 1933.

Q. Straus Securities Corporation?

A. Yes, right after the bank holiday.

Q. And you were with both of them?

A. Yes, sir.

10

Q. 1933 was the date I meant to ask you about So S. W. & Company wasn't in business in April, 1933, or June, 1933?

A. No, sir.

Q. And they were succeeded by Straus Securities Company?

A. That's right.

Q. In April 1933, and June 1933, was the Straus Securities Company dealing in buying and selling Straus bonds?

20

A. Yes, sir.

Q. Would that include dealing in these bonds I have just read off to you?

A. Yes, sir.

Q. At what price or on what basis were they buying and selling those bonds?

Mr. Bourgeois: I object unless he actually knows of his own information.

30

Q. What did you do with Straus Securities Company?

A. I bought and sold their bonds. I was their bond trader.

Q. How many real estate Straus bonds have you bought and sold in the last three years?

A. Oh, I would hate to venture. You might say I am exaggerating, but I would say anywhere from three to five million.

Q. Well, that is enough. Then on what basis was Straus Securities Company dealing in these bonds in April and June 1933?

A. At the market.

10 Q. Now, Mr. Snively, are you familiar with this book marked P4 for identification and known as the National Bond Summary?

A. Yes, sir, I am.

Q. How long have you been familiar with it?

A. Twelve years.

Q. And you have been familiar with that as the result of your business of trading in real estate securities? Is that it?

20 A. Not only for that reason, but for trading in other bonds. I have not only traded in real estate bonds.

Q. All kinds of bonds?

A. Yes, sir.

Q. What information is there in this National Bond Summary?

A. Well, it is an indicated desire on the part of the brokers to buy and to sell.

30 Q. These bonds in question I have just read to you, these Straus bonds, they are known as unlisted bonds?

A. Yes, sir, they are all what we term over-the-counter.

Q. They are not listed on the New York Stock Exchange?

A. No, sir, nor on any exchange except in some cases on the Real Estate Exchange.

Q. Where does the market exist for those bonds?

A. Over-the-counter. That is, between dealers who specialize in real estate bonds.

Q. There are several hundred of those dealers, are there?

A. Well, I would say at least two hundred, any way. It isn't as wide a field as the usual market field would be.

Q. That is in New York City?

A. Well, yes, and then scattered out all over the country.

Q. From your years of experience in the business, the price of the market in New York City is the market all over the country, is it?

A. It is practically in line with the rest of the country at all times. 20

Q. Are you a subscriber to this National Bond Summary?

A. Yes, sir, I have been all the time, practically, since I have been in the trade.

Q. How do you get your information to that concern?

A. How do we get it from them?

Q. To them.

A. Each day we make up our listings, with the bid and the offer and the prices, the price at which we are willing to buy and the price at which we are willing to sell, and that is collected by a boy who comes around in the morning and takes it over to the office, and it is set up and delivered to us the next morning. 30

Q. Then do I understand you send to the publisher of this book each day a list of the bonds you want to buy and how much you will pay for them?

A. That is true.

Q. And a list of the bonds you want to sell and how much you will take for them?

A. Yes, sir. We are buying and selling practically at the same time.

Q. Is that the way all of the subscribers do?

A. Yes, sir.

Q. Is this book and the sheets which precede it—I understand, do I, that this book is simply a graduation from the daily sheets?

A. Yes, sir.

Q. And the book contains the same information that the sheets have, except the book is for a longer period of time?

20 A. Yes. It is more convenient to keep.

Q. Is this book and the sheets which precede it and come out daily looked upon as a standard work in the trade?

A. Yes, sir.

Q. And is it used as a guide by people who are in the trade?

A. Yes, sir.

Mr. Bourgeois: I object unless three years in
30 the bonding business makes an expert. There has not been shown anything here to show that he is qualified to give an opinion on these books.

The Court: Isn't it a matter of knowledge, whether the book is in use by bond traders and brokers?

Mr. Bourgeois: That does not fix the market price.

The Court: It is a circumstance. It is one of the circumstances, I presume, that counsel desires to prove in connection with the information contained in the book.

Q. Now, Mr. Snively, have you ever checked the information which you have had of actual sales against the prices in this book, to determine the accuracy of the book?

10

A. Yes, sir, on numerous occasions I have.

Q. You have?

A. Yes, sir.

Q. On the basis of that and on the basis of your years of experience and on the basis of the millions of dollars worth of these sales which you say you have supervised, which have taken place through your hands, would you say this book was a safe guide to go by at arriving at a price of the market value of bonds?

Mr. Bourgeois: I object. It does not appear that because he has checked it many times that would vouch for its accuracy.

Mr. Van Riper: I am certainly entitled to have his opinion.

The Court: I am not so sure. He has given you some testimony as to the source of his information and how it was obtained by the publishers of this

book, and that from his own experience he has checked actual sales of which he has knowledge with the report of such sales in the book, and so forth, which are matters of fact. Now you ask him merely to express his opinion whether he considers that a safe guide to go by. I have permitted you to show, also, that in the general use of real estate bond brokers —

Mr. Van Riper: I will reframe the question.

Q. In determining the market value of a bond on any particular date, Mr. Snively, and with particular reference to the Straus bonds which we have been discussing here, would you use this book, this National Bond Summary, for the purpose of arriving at a fair market value for a bond on that day?

A. Yes, sir.

Mr. Bourgeois: That is leading.

Q. In using this book what would you do? What figures would you take from the book and how would you use them?

A. You mean in determining the price on a certain date?

30 Q. Yes, to determine the market value.

A. Well, in most cases you will find at least maybe five, ten brokers all bidding and offering bonds on that day, and they can't all be wrong, because, after all, they are practically in line in their bids and offers.

Q. All right. Take this book and refer to—take it alphabetically, perhaps will be the quickest way to do it. Refer to Albany-Metropolitan on the 27th of April. On the 27th of April 1933, what would you say the market value of Albany-Metropolitans was?

A. Well, on April 29th, which is the nearest date shown, there was one house bidding 12 and another house was bidding 10 and another house was bidding 11 and another house was bidding $11\frac{1}{2}$, another house $11\frac{1}{2}$, and another house bidding $10\frac{1}{2}$, and a house bidding 10, and there were bonds offered at the same time at 13. So your market there would be 12-13; 12 bid, offered at 13.

Q. You say the market value was what?

A. I say the market value there was 12 bid, offered at 13.

Q. Between 12 and 13? 20

A. Yes, sir.

Q. What is the next one there? I have these little pieces of paper in here for expediency's sake.

A. American Insurance Union.

Q. What would you say was the market value of American Insurance Union 6s of 1941, as of April 27, 1933?

A. April 27th? Here was a definite market made by a firm in Cincinnati. On April 27, 1933, the market was 11-15, five bonds bid for five bonds offered. 30

Q. 11-15, you say?

A. Yes. Five bonds bid for and five bonds offered at 15.

Q. Between 11 and 15?

A. Yes, sir.

Q. What is the next one you have there?

A. The next one is on page 332, Broadway-Barclay.

Q. What was the market of Broadway-Barclays as of April 27, 1933?

A. April 27, 1933? The nearest there was May 10 7, 1933. They were 15½ bid and none offered.

Q. That is after the date. What was the market at the last date that there is a record before April 27th?

A. Well, this book here is a continuation of that monthly book. I think we can get it with a greater degree of accuracy if you will let me use that other book, because I can get closer dates that way.

(A book was handed to the witness.)

20

A. On April 28, 1933, Broadway-Barclays, there were about eight firms all making a market of about 13 bid, offered at—here bonds are offered at 14½. The market then was 13-14½.

Q. That was on April 28th?

A. That was on April 28th, yes, sir.

Q. Judging from the information which you have there, would you say that the market was any different on April 27th?

30 A. No, sir.

Q. It was not?

A. No, sir, it wouldn't have fluctuated that much in one day.

Q. What is the next one you have?

A. You had better read them off to me now.

Robert M. Snively—Direct

Q. Hearst-Brisbane 6s of 1939.

Mr. Bourgeois: What is that book you are reading from now?

The Witness: This book here is graduated from this book. This book here is a semi-annual book and this is a monthly book. Hearst-Brisbane 6s of 10 1939?

Mr. Bourgeois: As of what date?

A. April 27th. The market, I would say, was 42-44. That is indicated here.

Q. 42-44?

A. Yes, sir.

Q. Now, turn to 60 Park Place, Newark, 6s, 1937, as of the same date, April 27, 1933.

A. On April 28, 1933 there was a bid of 35. They were 28½ bid here on the 28th and they were offered at 35, but I see a bid in here of 35 and offering of 40. That would indicate to me that there evidently had been a misprint there. I would say in that case the market was 30-35. 20

Q. 30-35?

A. Yes, sir.

Q. As of the 27th?

A. Yes, sir.

Q. Now turn, please, to 48 West 48th Street 6s of 1936. 30

A. There was a bid here of 9 and there was an offering at 10. There was a bid of 9 on the 28th and there was an offering at 10 on the 29th, so I would say your market was 9-10.

Q. Dorset 6s of 1941, what was their market as of April 27, 1933?

A. Dorset 6s of 1941, April 28th there were a number of houses bidding 13 for bonds, and bonds were offered at 15. The market was 13-15.

Q. Lefcourt-Manhattan $5\frac{3}{4}$, 1941, what was the market for them on April 27, 1933?

- 10 A. Lefcourt-Manhattan $5\frac{3}{4}$ of 1941? There were two houses bidding 18 and there was no offering there. Yes. $18\frac{1}{2}$. And here bonds are offered at 19 on the 29th. I would say the market there was $18\frac{1}{2}$ -19.

Q. 502 Park Avenue 6s, 1941, as of June 10, 1933.

A. 502 Park Avenue were $6\frac{1}{2}$ bid by two houses, with a house bidding 7, and bonds were offered at $7\frac{1}{2}$. The market was 7 - $7\frac{1}{2}$.

Q. On June 10th?

- 20 A. No, I beg your pardon. You wanted June 10th?
Q. Yes.

A. I am sorry. I gave it to you for April. You will probably better let me have the book for June, because this one is for May.

Q. We will have to use the big one, because that is the only monthly book we have.

- A. This is page 995. June 26th—there was an offering of one bond on June 10th at 13th, and then the next is June 26th there was a bid of $13\frac{1}{2}$, and
30 on May 29th there was a bid of 10. The market would be there, say, 12-13.

Q. On June 12th?

A. Yes, sir. June 10th.

Q. Pardon me. Chicago Builders 6s, 1939, of the same date, June 10th.

A. On June 10th there was a house in Chicago bidding 10 for them and they were offered at 14 by the same house. 10-14 on that exact date. That was on page 530.

Mr. Bourgeois: Did I understand you to say the same house was bidding one price and offering another price?

10

A. Yes, sir, that is true. Willing to buy and sell at the same time, you see, in making markets we have to do that.

Q. Albany-Metropolitan 6 $\frac{1}{4}$ s, 1938, as of the same date, June 10th.

A. June 14th there was a house bidding 16 for bonds and on June 28th the bonds were offered at 19. The market there was 16-19.

Q. New York Athletic Club 6s of 1946 of the same date.

20

A. New York Athletic Clubs on June 10th one house was willing to buy and sell at 21 bid and offered at 24.

Q. What would you say was the market?

A. I would use that as an absolute market. One house willing to buy and one house willing to sell at the same time. 21-24.

Q. Between 21 and 24?

A. Yes, sir, between 21 and 24.

30

Q. Hearst-Brisbane 6s, 1939, as of June 10th.

A. Well, '37 maturity is a shorter maturity. There is no '39 shown here. '37 is still a shorter maturity than '39, and being a shorter maturity, it usually sells for a better price. The market on the 1937 maturity was 55, offered at 61. 55 to 61.

Q. That is 1937?

A. Yes, sir, that was the Hearst-Brisbane 6s of 1937.

Q. In your judgment, what would be the market on 1939?

A. Slightly under that. I would say maybe two points under that. Around 53, 54.

10 Q. 54 to what—56?

A. Yes, sir.

Q. And Hearst-Brisbane 6s, 1942, of the same day?

A. June 9, 1933 they were 51 bid, and on June 7th they were offered at 53½, so I would say the market there was 51-53.

Q. Keith-Albee 6s of 1936?

A. June 29th Keith-Albees were 33 bid. That is the closest date we have to the 10th. Then on the
20 29th of May they were 29 bid. I would say they were worth 30 on June 10th.

Q. From your experience in the market would you say it was safe where you wanted to find the market value of a bond on a certain day and there were no sales on that day, no information in the book as to that particular day, to take the information from the sale date or the information of the day before and the day after and arrive at a market value?

A. Yes.

30

Cross-examination.

By Mr. Bourgeois:

Q. Suppose one house should offer Hearst-Brisbane bonds at 38 and on the same day another house

should bid for those same bonds 45, and both houses find out at the end of the day. If the man who had a bid at 35 or 38 would go to the house where they had bid 45 the day before, would that house have to buy the bonds at 45?

A. No, he wouldn't buy the bonds at 45. He would make a bid for the bonds.

Q. But he wouldn't have to buy the bonds that had 10 been offered for a less sum?

A. If the bonds were offered at 38 and there was a 45 bid —

Q. Yes, a man asked 38.

A. He is offering bonds at 38?

Q. And another house offers 45.

A. Bids 45?

Q. Yes. The house that has them at 38 wants to sell them at that. If the next day he should go to the house where they bid 45, would that house have 20 to buy those bonds at 45?

A. Wouldn't have to buy them, but they would buy them pretty quickly, because there is seven points profit in there.

Q. I didn't ask you that. Does he have to buy them?

A. He doesn't positively have to buy them, but he would have an awful hard time to keep him from buying them.

Q. The man of the house that has made an offer to 30 sell and was asking 38 for them, and the house that was offering 45 for them, if he were to go to the house that was offering them at 38, would that house have to sell at 38?

A. Well, if they make an offering, if they show a

desire to sell, and a man is willing to pay 45 for them, of course he is going to —

Q. You don't quite understand what I have in mind. I want to know whether there is anything compulsory about this bid and offer?

A. Absolutely. That is the only way you can trade.

10 Q. A bid that is made on a bond for which they offer 35 today and some other concern—they will sell it at 35, they ask 35 for it, some other concern offers 45, that is a split of 10, does either of them have to trade the next day on that basis?

A. No, sir. You only have to trade at the moment that thing becomes —

Q. But you never know what that is until the next day.

A. You know immediately. We are in constant
20 communication with each other by telephone and by telegraph wires.

Q. You don't get it all over the country by telephone?

A. We go all over the country by telegraph wires.

Q. You don't get it immediately?

A. We do. I can communicate with San Francisco inside of five minutes and get an answer back in five minutes.

30 Q. But if you don't do that, if you don't happen to see it, and the day goes past, neither is bound by that?

A. Yes, but that is the way we make our living, because we keep in constant communication.

Q. When a man asks a certain price for a bond

and there is no counter offer at all, no counter proposition at all, no bid at all, does that fix the price?

A. Well, no, that offering wouldn't fix the price, no, sir.

Q. I notice here on the Keith-Albee Building, New Rochelle, there are offers for a whole month and not a single bid. What would you say about that? You gave a value for that, too.

10

A. That is June 10th?

Mr. Kirkman: Page 1436.

Q. It is June 29th. It ought to have been June 10th, but it is June 29th. From January 1st until 6/30/33 there weren't any bids.

A. They were all bids. We are confused in our minds as to the bids and the offering. That was all bids. That even gives me a greater determination 20 there.

Q. All bids, but no offers?

A. Yes.

Q. The same thing. I don't care whether it is one way or the other. It is a single proposition. What do you say about the value if they are offering it at these prices and nobody will buy? Do you say that fixes the value?

A. No. These people are willing to buy at these prices. 30

Q. If they are willing to buy and nobody is willing to sell, does that fix the value?

A. It indicates there are no bonds offered. I think that would indicate in this particular instance—I know the Keith-Albee so well that the offer

would probably have been about three or four points higher than the bid.

Q. What I want to find out is about this particular situation.

A. In this particular case I wouldn't say that the bid would establish the value there.

10 Q. And then another instance where you said there was a bid, I think of 35 and 40, but you concluded the 40 was too high and that probably was a typographical error or misprint.

A. Well, in that case I figured—I mean after all, you might have a typographical error, but in the same case I think we had a number of other houses bidding and offering at the same time.

Q. You put what you figure to be the actual sales value midway between what is bid and what is asked?

A. Yes, sir.

20 Q. Does that take care of the broker's commission?

A. Well, the broker's commission in the over-the-counter business is pretty much what you can get out of it by trading. Usually is a quarter of a point, \$2.50.

Q. If you have a client who wants to buy a certain class of bond, you find out how much he will give for them?

A. Yes, sir.

30 Q. Then you go in the market and buy them just as cheap as you can, don't you?

A. Yes, sir.

Q. And the difference between what you pay and what he pays you is your profit?

A. It depends entirely how you are operating,

whether you are operating for his account or whether you are acting as a principal in the matter. If I buy the bonds as a principal, then I am entitled to get what I can for them.

Q. You are only operating for his account when he furnishes the money with which to buy?

A. That is true.

Q. If he doesn't furnish the money with which to buy, but you know he will buy them, then you go in and buy them as cheaply as you can and sell them to him for whatever price you can get?

A. Yes.

Q. I understand from what you have said you don't know of any actual sales that were made on these figures?

A. No, sir. I am citing it from the trading market at the time.

Q. No actual sales?

20

A. No.

Re-direct examination.

By Mr. Van Riper:

Q. It is your judgment, however, that these figures which you have given represent the fair market value on that day?

A. Yes, sir, I am perfectly convinced in my own mind that the markets are reasonably within being absolutely accurate.

Q. You said as far as the book was concerned bids wouldn't show the actual market value in the case of the Keith-Albee?

A. Yes.

Q. But you gave the market value on the Keith-Albee as of 30. Do you stick to that? I mean even if the book doesn't show the market value, the bid doesn't furnish the basis for the market value, are you still of the opinion that 30 was the fair market value?

10 A. 30 in my opinion would be a fair valuation if you desired to buy at a particular price.

Q. As a matter of fact, from your personal knowledge, forgetting the book, but from your personal knowledge and your experience which you had last April and last June in the bond market, buying and selling these bonds, real estate bonds generally, would you say that these prices which you have given are a fair reflection of what the market was at that time?

20 A. Yes, I would say that.

Re-cross examination.

By Mr. Bourgeois:

Q. In arriving at a fair market value of a piece of property do you take into consideration the actual physical structure?

A. No, sir, that has nothing to do with it. It
30 doesn't interfere with it in any particular case at all. It is our business to buy and to sell —

Mr. Van Riper: I think the witness and counsel ought to get the question in mind the same. He says if you are arriving at the value of a property do you take into consideration the structure.

A. I am talking about the bonds, not about the physical property.

Q. Is the value of the bonds reflected in the value of the property?

A. I should say it would be the reverse. The value of the property would probably be reflected in the value of the bonds. On the other hand, it wouldn't absolutely determine the market value of 10 them. It may be other conditions of the market would have other influences.

Q. Are these bonds you have been speaking about fluctuating in value?

A. They do fluctuate, yes, sir.

Q. Would the fact that there was a reorganization of the properties of one of these defaulted bonds pending reflect on the market value of the bonds?

A. It may have some effect, yes. 20

By Mr. Riper:

Q. And if it did have any effect on the market value, it would reflect itself in these prices which you have given?

A. Oh, surely.

THEODORE B. BLEECKER, SWORN.

Direct examination.

By Mr. Van Riper:

- 10 Q. Mr. Bleecker, where do you reside?
A. In New York City, 439 East 51st Street.
Q. What is your occupation?
A. Bond broker.
Q. Are you associated with any firm?
A. Yes.
Q. What is the name of the firm?
A. At the present time?
Q. Yes.
A. Bleecker & Fritz, 115 Broadway, New York.
- 20 Q. Before you were associated with Bleecker & Fritz were you associated with anybody else?
A. Bleecker, Parke & Green.
Q. How long were you associated with them?
A. Three years.
Q. And before that?
A. I was associated with Curtis & Sanger, a stock exchange firm at 49 Wall Street, for eleven years from 1920 to 1931, before I formed my own firm.
Q. Are you familiar with real estate bonds?
- 30 A. Yes.
Q. Are you familiar with Straus bonds?
A. In a general way, yes.
Q. Have you dealt in real estate bonds and in Straus bonds?
A. I have.

Q. These real estate bonds, and particularly these Straus bonds, are known as unlisted bonds, are they not?

A. That is right.

Q. Meaning bonds that aren't listed on the New York Stock Exchange?

A. Or any other exchange.

Q. Are you familiar with a book we have had 10 marked here P4 for identification, known as the National Corporation Bond Summary?

A. I am.

Q. And the sheets which precede it?

A. I am.

Q. Do you know how that book is made up, in a general way?

A. Yes.

Q. How?

A. The various subscribing members send in list- 20
ings daily in some cases and weekly in other cases to the publishers, and they are published on the daily sheets. The daily sheets are then summarized in the weekly and monthly editions of the book and then in the semi-annual edition of the book.

Q. In a general way, how long have you been familiar with this book and the sheets which precede it?

A. I think as long as I have been in the bond 30
business. If I am correct, I think they have been in—the book has been published for about fourteen or fifteen years, and as long as I can remember, I have used it.

Q. Do you know whether or not this book is used

as a standard and a guide in the trade for brokers and dealers in securities to go by?

A. It is, so far as I know.

Q. And for the purpose of arriving at market values, and so forth?

A. Yes.

Q. You have before you, have you, the list of
10 bonds about which we have been talking here all day?

A. Yes.

Q. On April 28, 1933, did you secure quotations on certain of these bonds?

A. I did.

Q. On that day did you secure a quotation on Hearst-Brisbane 6s of 1939?

A. I did, yes.

Q. What was the quotation?

20 A. 43 bid, offered at 45.

Q. Did you secure a quotation on 60 Park Place, Newark, 6s of 1937?

A. I did.

Q. What was it?

A. 28 bid, none offered.

Q. Did you get a bid on Broadway-Barclay 6s of 1941?

A. 12½ bid, offered at 14.

Q. What was the bid on 48 West 48th Street, 6s,
30 of 1936?

A. 9 bid, offered at 11.

Q. What was the bid on Dorset 6s of 1941?

A. 13-15. 13 bid, offered at 15.

Q. American Insurance Union 6s, 1941?

A. 9 bid, 14 offered.

Q. Lefcourt-Manhattan 5 $\frac{3}{4}$ s, 1941?

A. 18 bid; no offering.

Q. Albany-Metropolitan 6 $\frac{1}{4}$ s, 1938?

A. 10.

Q. I have been asking you what was the bid and you have been giving me a figure. Would you say that figure which you gave me was the market, that is, the market was between those two figures which you have given? 10

A. In my opinion, the bids that I have given you are the prices that could have been obtained had bonds been offered for sale on that day, and in some cases probably fractionally higher.

Q. When you say fractionally higher, how much higher do you mean?

A. Maybe I should say a point higher in some cases. 1%.

Q. Any appreciable amount, would you say, above a point it was possible to get for them on that day? 20

A. In two or three cases where there was no actual offering of bonds, such as the Keith-Albee 6s, the actual bid on that day was 20 —

Q. Pardon me. I didn't ask you about the Keith-Albees, because they are in a later group. Just going back again, what would you say the Hearst-Brisbane market was?

A. I gave you a market, 43 bid, offered at 45.

Q. You say the market was in between there? 30

A. I would say if I had been able to obtain a price of 44 when bonds came in for sale that day, that would have been a very fair price.

Q. Now, would you say from your judgment and from your years of experience in the business, that

a safe way to find the market value of a particular bond, one of these bonds, if you will, on a day in question would be to take the information contained in this National Corporation Bond Summary and arrive at a market value from that?

A. Yes, but I would go a step further.

Q. What would you do?

- 10 A. I would refer to the daily sheets on the day in question and take a list of brokers or dealers who were bidding or offering bonds on that particular day. If there were no entries on that day for a particular bond, I would take the day before or the day before that or the day after, the nearest day that it was possible, and then make one or two or more phone inquiries to dealers whose names appeared as interested in those bonds, and find out actually what they were willing to bid for bonds or
- 20 what they were actually offering bonds for sale at.

Q. These figures which you have given us as of April 27th you actually secured yourself in the market on that day, did you not?

A. I did part of them myself and the trader in my office did part of them in my office under my supervision.

Q. And relayed the information to you as it was being done?

A. Yes.

- 30 Q. Have you checked those figures against the book for accuracy?

A. I did, yes.

Q. Based upon that check, and upon any other check you may have made, if you made any, and upon your experience, and so forth, would you say

that the book furnished a fair guide to go by for the purpose of arriving at market value?

A. I would.

Cross-examination.

By Mr. Bourgeois:

Q. Did I understand you to say that the sheets—10
this red book, the National Corporation Bond Summary, was made up from those sheets?

A. It is a summary of the entries on the daily sheets. Not all the entries that are on the daily sheets appear in this book.

Q. Doesn't the first book show how it is made up, the first printed page there?

A. "Contains a summarization of all inactive listed and over-the-counter securities."20

Q. That doesn't say anything about the sheets.

A. Oh, yes, it does.

Q. What?

A. "Contains a summarization of all inactive listed and over-the-counter offerings and wants which have appeared either in the National Bond Service"—which is this sheet we are referring to—"the leading daily newspapers and financial periodicals or in dealers' circulars or special lists between December 31, 1932, and July 1, 1933."30

Q. It says a National Daily Service?

A. That is right.

Q. It doesn't say it consists of these sheets?

A. Well, this is the National Daily Service. That is the name it is known by.

Q. But there is nothing in the book to show it? Leading daily newspapers, financial periodicals or in dealers' circulars or special lists between December 31, 1932 and 1933.

A. The daily service we have had under discussion is the National Daily Service. This is the sheet. National Daily Quotation Service. There
10 is the name printed at the top of it and that is used in part to compile this book. Not in its entirety, but it is used in part. You can see the name printed on there. It is very definitely connected with the book.

Q. If there was an offer of $15\frac{1}{2}$ made for a period of a month, we will say, for some bond and there was—I mean a bid made for it, but there was no bond offered, would that indicate to you that the price that they were trying to purchase them for
20 was less than the owners of those bonds would sell for?

A. Very definitely.

Q. What?

A. Very definitely, yes.

Q. Very definitely?

A. Yes.

Q. That would, then, indicate that that wasn't a fair price or a fair basis for fixing a market value, wouldn't it?
30

A. A bid without an offer?

Q. That is right, a bid without an offer.

A. It is an indication. That is all.

Q. Of what is it an indication? That the owner won't sell?

A. Well, it so happened that there were probably no bonds offered for sale at that time.

Q. Isn't that a fair indication, if it continued for any period of time, say for several days, isn't it a fair indication that the owner of those bonds is unwilling to sell them for the price somebody wants to bid for them?

A. It probably so happened in the case you are speaking of that nobody wanted to sell bonds at any price. 10

Q. You don't think it makes any difference, the price that is bid for them makes no difference at all?

A. I should say it would make a considerable difference in different issues. In the bonds under discussion, some of the issues run as high as six and a half million dollars, roughly, and other issues are down under a billion, six or seven hundred thousand dollars. It follows quite naturally that in an issue of \$600,000 there are fewer buyers and sellers in the normal course of events than there are where you have an issue of six or seven million dollars, and, therefore, you might have a bid—if you want to take the Keith-Albee bonds, there might be a bid continuously in the market for three months and no sellers, because the small issue of bonds were all held by individuals who didn't care to dispose of them at any price. 20 30

Q. Then that shows that bid wasn't a fair price, because anybody who has bonds will sell them if the price is high enough, won't he?

A. Generally speaking, yes.

Q. It is always so, isn't it, if the price is high enough?

A. Well, no, I wouldn't say so.

Q. What would a man have bonds for if they weren't for sale if he got enough for them?

A. It happens there are a great many issues of bonds that are owned by, we will say, three or four
10 or five corporations or investment trusts or banks and they are not for sale at any price. You could bid 125 for them and you couldn't buy them, because none of the owners want to sell them.

Q. Then the bid wouldn't indicate at all the market value, would it?

A. I would say in a general way it would, in issues of any reasonable size.

Q. Suppose there were a small corporation having bonds outstanding and they were bid 15 for
20 them and the people who had them knew the income of the properties and they wouldn't sell them for less than 150. Do you think in a case of that kind the fact that somebody offered 15 would indicate the market value of that bond?

Mr. Van Riper: I object. I have no objection at all to these things coming out, but we are talking about a hypothetical situation here and this witness has testified to specific market values of specific
30 issues, and I think these questions ought to be confined to those issues so the witness can tell what the situation is about, and not about a hypothetical situation.

Mr. Bourgeois: I am trying to find out whether a

bid without any offer at all is any indication of market value.

The Court: The witness has said there are circumstances to be considered, if I understand his testimony.

Mr. Bourgeois: Then I asked him another question, a question that I think puts it clearly, and that is whether or not if there were a bond that was worth, and the owners knew it was worth \$150.00, 50% above par, and nobody would sell because they were satisfied with the bonds and the income from them, whether a bid of \$15.00 or 15% on that bond would indicate any market value. That is what I want to know from the witness. 10

The Court: Well, you may answer it. 20

A. It is a pretty broad question. I don't see how it can apply to any of these particular issues.

Q. I didn't ask you that, because the jury is going to determine that question, whether it can or not.

A. Well, in my experience as a bond broker, I would say that generally speaking a bid is an indication of what you can sell a bond for. If there is no offering, it is reasonable to assume you can get a somewhat higher price than the initial bid which is made. 30

Q. If you can get a higher price, then that wouldn't indicate the market value, would it?

A. The bid? It is an indication of the market value, yes.

Q. An indication?

A. Yes.

Q. If you can get something higher than that?

A. The bid in the first instance is an indication, I would say, of the market value.

Q. Then do I understand it to be your notion that if there was a bond that was fairly worth par and
10 the people didn't want to sell it, they weren't going to sell it, they were going to keep it, and some man would come along and offer 15 for it, it would be some indication that was the market value of it? Is that right?

A. No.

Q. I would think that is so, too. It wouldn't be.

A. How do you determine a fair indication of the value of it?

Q. Beg pardon?

20 A. How do you define a fair indication of the value of it? You say a fair indication of the value is par. How do you arrive at that conclusion?

Q. There are instances where you can't arrive at a fair indication of value from any book or anything else excepting a sale, and if they don't make any sales, then you have got nothing. Isn't that true?

A. There are other ways of determining values besides actual sales.

30 Q. Other ways of determining market value?

A. I would say so, yes.

Q. What is market value?

A. Market value is what you can get for something at the time in question.

Q. And then if you have a certain price bid and

a different price offered or demanded, then you haven't got any market value, have you, unless you guess at it between them?

A. The market value is somewhere in the range between the bid and the offer.

Q. In this book proposition here where it is bid and offered, you don't have any actual market value? It is just a spread, and the theory is that 10 somewhere in that spread is the market value? Isn't that right?

A. Well, if I may disagree a moment and tell you how I arrived at the figures I gave on these bonds, as I said in my testimony before, I made telephone inquiries to certain dealers I knew were interested in some specific issue.

Q. When did you determine the value of these bonds or attempt to determine it?

A. It was either the 27th or the 28th of April, 20 1933.

Q. For what purpose?

A. I was requested by a New York Stock Exchange firm to supply them with a list of quotations on these bonds.

Q. Who was it for?

A. It was a New York Stock Exchange firm. Do you want the name of the firm?

Q. I don't think so. That is all.

Re-direct examination.

By Mr. Van Riper:

Q. By the way, Mr. Bleecker, you don't know of any of these bonds that we have been discussing here today that were selling in April, 1933, or June, 10 1933, or at any time for some months, at least, prior to that for anywhere around par, do you?

A. Don't know of any of them that were selling at par?

Q. Yes.

A. No, sir, I do not.

Q. Or for half of par, with the exception of Hearst-Brisbane, which was selling around 50?

A. Hearst-Brisbanes, as I recall it, were the highest priced bonds on the list.

20 Q. With the exception of Hearst-Brisbanes, there weren't any of them selling anywhere near half of par, were they?

A. No, sir.

By Mr. Bourgeois:

Q. They were selling at par, though, in June of 1926, weren't they?

30 Mr. Van Riper: I object to that.

Mr. Bourgeois: You opened it up. That is when the bonds were purchased.

The Court: What is the materiality of that?

Mr. Bourgeois: I want to find out if they were sold at par then, and when the fall commenced to come. He opened it up. He talked about par. I did not.

The Court: His inquiry was whether they were selling at par at the time the demand was made, because the demand was to repurchase them, and we are concerned with values here in April and June, 1933. If it were not for the demand being made we would not be concerned with values on that day. 10

Mr. Bourgeois: I think I have a right to show when the depreciation set in, for the purpose of the Court determining and the jury determining whether or not they offered to sell these bonds within a reasonable time. 20

The Court: That being the sole purpose, the objection will be sustained.

(An exception was noted for the defendant.)

PAUL J. O'NEILL, recalled.

Direct examination.

By Mr. Van Riper:

10 Q. Mr. O'Neill, you testified this morning. Have you made a compilation of the accrued interest that was due on the bonds named in this suit as of April 27, 1933, and as of June 10, 1933?

A. Yes.

Q. What bonds did you figure accrued interest on as of April 27, 1933?

Mr. Bourgeois: I don't quite understand what the object of that is.

20

Mr. Van Riper: The sole purpose of this is to show the price we say we were entitled to receive from the Boardwalk Securities Corporation, namely, 99 plus accrued interest. I want to give the jury the benefit of a compilation in actual dollars and cents so they will know what the figures are.

Mr. Bourgeois: I object.

30

The Court: Why?

Mr. Bourgeois: Because the damage is the difference between the price that was agreed to be paid

The Court: What was the price agreed to be paid?

Mr. Bourgeois: It didn't take the interest after the 27th of June, 1933.

The Court: 99 plus the accrued interest, or \$10.00 per bond less.

10

Mr. Van Riper: Maybe you misunderstood my question. I am not asking for any interest after April, 1933. I am asking for interest up to that date, the accrued interest up to that date.

The Court: I understand that to be the meaning of the word "accrued."

Mr. Bourgeois: I understood that he said from 20 April 27th to the present time.

Mr. Van Riper: No.

Q. What did you figure accrued interest on as of April 27, 1933?

A. Hearst-Brisbane —

Q. Just give us the name of the bond and the amount.

30

Mr. Bourgeois: Won't you get the date so I won't have to cross-examine?

The Witness: An explanation is necessary here in order to explain it.

Q. Explain it.

A. The Hearst-Brisbane bonds, which we figured at a definite price and market value with interest, we didn't add to this interest statement any interest, because the interest that would be due on the bond would offset the interest that would be due in the market price.

10 Q. We are not charging any interest on Hearst-Brisbanes, then? Is that it? Go ahead, Mr. O'Neill.

A. The interest is figured on the bonds. Where we figured the value flat, we figured interest due us on those bonds up to the date we surrendered them or offered to surrender them, but where the market value was established by us as a figure plus accrued interest, we haven't charged any accrued interest here, because one would offset the other. Is that clear?

20

The Court: What you want to know is what interest had accrued, isn't it?

Mr. Van Riper: Yes. I understand what Mr. O'Neill has tried to do in this compilation is not charge the defendant with any interest in the case where the interest was included in the price of the bond. Some of these bonds, I understand, sell what they call flat, which means with interest or without?

30

The Witness: Flat is without interest.

Mr. Van Riper: In other cases where they sell with interest, where the interest goes with the bond, all we would be entitled to is the straight 99, so we

have not charged any interest in those cases where the interest goes with the bond.

A. On that basis we didn't charge any interest on Hearst-Brisbane or 60 Park Place. On Broadway-Bareley, \$10,000, we charged \$445 interest from August 1, 1932, to April 27, 1933, \$445. On 48 West 48th Street, on \$10,000, April 1, 1931, to April 27, 1933, \$1245. On Dorset, \$10,000, from January 1, 1932, to April 27, 1933, \$795. American Insurance Union, on \$10,000, November 5, 1932, to April 27, 1933, \$288.33. Lefcourt-Manhattan, on \$20,000, December 14, 1932, to April 27, 1933, \$428.04.

Q. Excuse me just a minute. I think I have a copy of that here.

A. Yes, that is a copy.

(Mr. Van Riper handed a paper to Mr. Bourgeois.)

A. Albany-Metropolitan, on \$10,000, June 1, 1932, to April 27, 1933, \$567.70. On Hearst-Brisbane—there wasn't any on that, on account of the offset. On \$10,000 additional 48 West 48th Street, April 1, 1931, to April 27, 1933, \$1245.00. On Albany-Metropolitan, additional \$15,000, June 1, 1932, to April 27, 1933, \$851.55. 502 Park Avenue, \$10,000, October 1, 1931, to June 10, 1933, \$1016.67. Chicago Builders, \$10,000, May 28, 1931 to June 10 1933, \$1221.66. Albany-Metropolitan, \$7000, June 1, 1932, to June 10, 1933, \$449.65. New York Athletic Club, \$20,000, October 1, 1932, to June 10, 1933, \$833.33. Then there are two other items there of

Hearst-Brisbane and Keith-Albee, and they are offset. The total interest would be \$9386.93.

Q. \$9386.93 total interest?

A. Yes.

Q. Have you computed the value of these bonds in question at 99, the price?

A. Yes.

10 Q. What does that amount to?

A. \$187,115.

Q. I show you this packet of bonds, Mr. O'Neill, and ask you if these are the bonds in question here?

A. They are, unless some of them have gotten lost.

Q. They were all there when you left the office with them, were they?

A. Yes.

20 Mr. Van Riper: I offer them in evidence as one exhibit.

(The package was exhibit P5.)

(No cross-examination.)

SIGMUND OJSERKIS, SWORN.

30

Direct examination.

By Mr. Van Riper:

Q. Mr. Ojserkis, what is your name?

A. Sigmund Ojserkis.

Paul J. O'Neill—Direct

Q. Where do you reside?

A. Hammonton, New Jersey.

Q. You are the president of the Boardwalk Securities Corporation, are you?

A. I am.

Q. How long have you been the president of the Boardwalk Securities Corporation?

A. Since its organization in 1925.

10

Q. Were you the president of the Boardwalk Securities Corporation on June 22, 1926?

A. I was.

Q. When I refer to the Boardwalk Securities Corporation, I am referring to the one that is the defendant in this suit, and that is the same one that you are referring to, are you not?

A. There is only one.

Q. Was Mr. Max Blatt a director of your corporation in June, 1926?

20

A. He was.

Q. Was Albert Feyl a director at that time?

A. Yes.

(No cross-examination.)

PAUL J. O'NEILL, recalled.

30

Direct examination.

By Mr. Van Riper:

Q. I show you a letter, Mr. O'Neill, on the stationery of Walter E. Edge, dated October 4, 1927, ad-

dressed to Mr. Sigmund Ojserkis, Boardwalk Securities Corporation, Atlantic City, signed "Paul J. O'Neill for Walter E. Edge." Is that your signature?

A. It is.

Q. Did you write that letter and send it?

A. I did.

10

Mr. Van Riper: Is its receipt admitted?

Mr. Bourgeois: I object. It is not relevant.

Mr. Van Riper: What are you objecting to?

Mr. Bourgeois: I am objecting because it is not relevant.

20

Mr. Van Riper: I have not done a thing.

Mr. Bourgeois: I thought you offered that in evidence.

Mr. Van Riper: I ask that it be marked for identification.

(The letter was marked P6 for identification.)

30 Mr. Van Riper: I offer a certified copy of the certificate of incorporation of the Boardwalk Securities Corporation.

(The paper was marked exhibit P7.)

Mr. Van Riper: I offer in evidence this book marked P4 for identification.

Mr. Bourgeois: I object to that. I submit there is no sufficient proof to warrant that book going in evidence.

(In Chambers):

Mr. Bourgeois: That book shows it is partly made up from newspaper clippings, and there is no evidence of the authenticity of the newspaper records. 10

Mr. Van Riper: When I offer the book I think I should offer the daily sheets with it. I offer the daily sheets.

The Court: The daily sheets covering the period?

Mr. Van Riper: Yes.

The Court: What are you offering, in addition to the book marked P4 for identification? 20

Mr. Van Riper: In addition to that book I am offering the daily sheets covering the dates in question, April 27, 1933, April 28, 1933, April 26, 1933, and the daily sheets for June 10, 1933, and June 12, 1933.

Mr. Bourgeois: I am going to object to these because there is a vast difference between a bundle of loose sheets going into evidence and a published book. Of the two, the published book stands on a very much safer ground than those sheets do, and the book is not evidential, because of the fact that it 30

appears right on the first page what it is made up from.

Mr. Van Riper: The sheets are published every day.

10 Mr. Bourgeois: It is nothing but a collection of information that they got from different brokers. He does not know whether it is true or is not true, and he puts it together and calls it a daily sheet. That certainly cannot be evidential.

Mr. Van Riper: It is the market.

Mr. Bourgeois: I don't think it is evidential of the market.

20 The Court: There is testimony in this case indicating that the National Quotation Bureau publishes daily quotation sheets relating to so-called unlisted or over-the-counter real estate securities which it currently issues and circulates to its subscribers who are dealers in such securities. Testimony has also been introduced relating to the source of the information contained in these daily sheets, as well as to the method by which such information is currently obtained. Additional testimony is to the
30 effect that these daily sheets are uniformly used by brokers dealing in unlisted securities. Then there is additional testimony that the information contained in these daily quotation sheets is reproduced either, in some instances in full or in other respects summarized in semi-annual books, of which exhibit

Offer of Evidence

P4 for identification is one. Such book is likewise used by brokers and traders in unlisted real estate securities, and there is testimony indicating that both the daily quotation sheets, as well as the books, of which exhibit P4 for identification is an edition, are generally accepted by the trade, that is to say, by those buying and selling and engaged in the business of buying and selling unlisted securities. In 10 this state of the evidence the quotation sheets, as well as the book, will be admitted in evidence.

(An exception was noted for the defendant.)

(The book was marked exhibit P4 and the sheets exhibit P8.)

PLAINTIFF RESTS.

20

An adjournment was had until 10 A. M., Thursday, November 14, 1934.

30

Atlantic City, N. J., November 14, 1934.

(Trial of the cause resumed at ten A. M.)

10

(In Chambers.)

MOTION FOR NON-SUIT.

Mr. Bourgeois: If your Honor please, I move for a non-suit in this case on the following grounds:

1. That the offer contained in the letter of June 22, 1926, was never accepted.
- 20 2. That, assuming it were accepted, if it had been accepted, the language of that letter, the connection of the first clause, wherein it speaks of the temporary investment, and the second clause, wherein it speaks of the permanent investment, and the clause starting out, "Should you at any time," indicates in law that it was only to be exercised within a reasonable time.
- 30 3. That the clause that reads, "Should you at any time wish to cash in your Straus bonds," is an independent clause, is not to be considered as a part of this letter with any connection with any other part of it. It is independent.
4. That that independent clause is void even as an offer, because it is unilateral, indefinite as to the

Motion for Non-suit

quantity to be sold, and lacks mutuality, as well as lacks consideration.

5. It appears that this case, as appears from the letter, is dealing with a commodity of fluctuating value, and in such a case the option, if there is an option, must be exercised promptly.

6. Because this action is barred by the Statute of Limitations.

The Court: In disposing of this motion I shall make only this brief statement of my reasons:

There is testimony in this case tending to disclose that prior to June 22, 1926, Mr. O'Neill, representing the plaintiff, visited the offices of the defendant company, with a view of ascertaining from the defendant company whether certain bonds might be purchased for the plaintiff. Mr. O'Neill conferred with Mr. Ojserkis, the president of the defendant company, and it may be logically inferred that thereafter, on June 22, 1926, and in consequence of the conference had between Mr. O'Neill and Mr. Ojserkis, the latter addressed to the plaintiff the letter which has been offered in evidence, bearing date June 22, 1926. This letter obviously constitutes the foundation of the present alleged cause of action, because it is alleged that the letter contains the promise which the defendant company has failed to perform.

Briefly stated, it seems to me that a reading of this letter justifies the conclusion that Mr. Ojserkis addressed the letter to the plaintiff for the purpose of inducing the plaintiff to purchase bonds of the de-

fendant company. It seems to me the meaning of each sentence and paragraph of the letter can be reconciled. Obviously, Mr. Ojserkis in this letter contemplated future sales by the defendant company to the plaintiff, and, in turn, future purchases by the plaintiff from the defendant company. This letter appears to have been accompanied by a list of
10 bonds. It is, perhaps, significant that the list included some so-called Straus bonds, and, in addition, a number of other bonds.

I think there may be found in this letter a significant statement in this particular in the words: "My idea is if you will give me the time to gradually supply you with a high grade, conservative list of investment bonds," and so forth. It seems to me the clear meaning of this excerpt from the letter is that the author of the letter contemplated that in consid-
20 eration of the undertakings and promises contained in the letter, transactions involving the purchase and the sale of bonds and securities between the plaintiff and the defendant would eventuate and take place from time to time, to the end that ultimately the plaintiff, as a result of these transactions, would become possessed of a high grade, conservative list of investment bonds.

It also becomes obvious that the author of this letter had confidence in the value of the Straus bonds.
30 The pertinent part of this letter in its relation to the alleged cause of action here is as follows: "Should you wish to cash in your Straus bonds at any time, we will be glad to take them from you at 99 or \$10.00 per bond less than you paid for them, and the accrued interest."

Motion for Non-suit

My notion of the meaning of this sentence in the letter is somewhat fortified by the language that follows it, in that the language that followed it is an expression of the very idea which Mr. Ojserkis had in mind, and he expresses it in this language: "My idea is that if you will give me the time to gradually supply you," and so forth. He was looking to the future, and obviously intending to promote business relations between the plaintiff and the defendant company in the future. 10

There is testimony to the effect that after the receipt of this letter the plaintiff purchased bonds of and from the defendant company. It is my recollection of the plaintiff's testimony that he acted upon this letter and, relying upon the alleged promise contained in the letter to which I have referred, he chose to purchase a relatively large number of Straus bonds. Such bonds were the bonds meant by 20 the words, "Your Straus bonds."

In determining the meaning to be ascribed to the words, "At any time," I am not unconscious of the force of the argument made by the attorney for the defendant, but I feel constrained in this case to follow and be governed by what appears to me to have been the conclusion reached by the Court of Errors and Appeals in *Weinstein v. Sheer*. In the opinion reported in this latter case it would seem to me that the Court of Errors and Appeals had applied to the 30 words, "At any time," the well settled rule that a Court is not at liberty to ascribe to words contained in a contract a meaning other than the natural and commonly accepted meaning of such words, unless, by reason of their context or otherwise, the meaning

of such words is doubtful, ambiguous and not clear. In the Sheer case the words, "At any time," were used in association with the words, "To suit the buyer." In the instant case the words, "At any time," are used in association with the words, "Should you wish to cash in your Straus bonds," and with the words, "We will be glad to take them
10 from you."

I feel, therefore, obliged to hold in determining this motion that the words, "At any time," mean at any time, and not within a reasonable time.

My conclusion upon this point is, of course, determinative of some of the other reasons assigned by the attorney for the defendant for the granting of this motion.

Then there is testimony in constituting a prima facie case that the plaintiff requested the defendant
20 to take the Straus bonds from him in accordance with the promise contained in the letter, and that the defendant company then and has ever since refused so to do. If the words, "At any time," are to be given the meaning which I have here ascribed to them, then it follows that a cause of action did not accrue to the plaintiff until he demanded that the defendant company repurchase the bonds, and in such a situation the Statute of Limitations has not tolled.

In the existing state of the testimony, having in
30 mind the construction that I feel obliged to give to the letter of June 22, 1926, the motion for a non-suit will be denied.

(An exception was noted for the defendant.)

DEFENDANT'S TESTIMONY.

SIGMUND OJSERKIS, recalled.

Direct examination.

By Mr. Bourgeois:

10

Q. Mr. Ojserkis, you live where? You testified to that, didn't you?

A. Yes; Hammonton, New Jersey.

Q. You also testified that you were the president of the Boardwalk Securities Company?

A. I am.

Q. I show you Exhibit P1, which is a letter signed by you under date of June 22, 1926?

20

A. Yes.

Q. After the signing of that letter did you sell some bonds under the terms of it?

A. I did.

Q. What bonds and in what amount did you sell under the terms of that letter?

A. You have got the attached copy?

Q. That is the attached copy.

A. Out of the offering of the twenty-five issues of \$10,000 each, Senator Edge had selected eight, 30 \$10,000 each, \$80,000.

Q. Where are they on the attached copy? The first eight?

A. The first eight.

Q. At the top of the page?

A. At the top of the page.

Q. After you sold those bonds, those eight bonds, were there any other bonds sold by you to Senator Edge or to Senator Edge's family, as the case may be?

A. Later on.

Q. I see. Were those bonds that were sold later
10 on sold by you under the terms of this letter?

Mr. Van Riper: I object. That calls for an interpretation of this letter and it is an attempt by oral testimony to vary or alter the terms of the letter. It calls for a conclusion on the part of this witness.

Mr. Bourgeois: He is the only one who knows. This says he proposes to sell \$250,000 worth, and not \$80,000 worth and not \$190,000 worth, but \$250,-
20 000 worth, whatever it may be. They testified before, Senator Edge or Mr. O'Neill testified they bought all of those bonds under the terms of this letter. It cannot be possible that we are not entitled to contradict that.

The Court: You might contradict that, but that is not the purpose of this question. You are not asking him whether Senator Edge or Mr. O'Neill made the purchases under the letter. You are asking him
30 what his conclusion is as to whether bonds were subsequently sold under the terms of that letter.

Mr. Bourgeois: If they say they bought all of them under the terms of that letter, he may deny it.

The Court: That is not your question.

Q. Were any Straus bonds sold by you under this letter other than those that you have testified to?

Mr. Van Riper: The same objection.

The Court: The letter does not state what bonds were sold.

Mr. Van Riper: No, but the testimony shows which bonds were sold.

10

The Court: The testimony of the plaintiff is that all bonds mentioned in the complaint, is it not?

Mr. Van Riper: Yes, and the testimony is that all of the bonds mentioned in the complaint were bought. If they want to put in testimony to show that the bonds were not purchased from them, that is all right, but now he is asking this witness to give the witness's conclusion as to whether or not the bonds which were purchased were purchased under the terms of this letter, and that cannot do anything else, it seems to me, but to alter or vary or construe the terms of the letter, and I submit it is not permissible.

20

The Court: I do not follow you in the latter part of your argument in that. The inquiry is whether or not events subsequent to the letter took place under the letter. He may have in mind that the subsequent sales were made under an entirely different agreement made between the parties. That is by way of illustrating the point. The objection will be overruled.

30

(An exception was noted for the plaintiff.)

(The question was repeated.)

A. Will your Honor pardon me? If counsel would allow me to state the facts before the Court —

Q. No. Just answer the question.

10

(The question was again repeated.)

A. Not under this letter.

Q. Well, did Senator Edge sometime after the making of this letter call upon you?

A. About a year after.

Q. Where?

A. At my office.

Q. Was there some conversation had between you
20 and him with relation to the Straus bonds?

A. There was.

Q. Will you tell the jury what that conversation was?

A. I told Senator Edge that the stocks were boiling at that time, stocks were going up, and it was a good opportunity to switch and invest in high grade stock exchange bonds and municipals, because the bonds were going down and stocks were going up, and Senator Edge told me that he prefers to keep
30 the Straus bonds, he is satisfied with the yield and he knows Mr. Straus personally and he is satisfied to keep his investment.

Q. After that conversation did you ever sell him any more Straus bonds?

A. I did.

Sigmund Ojserkis—Direct

Q. Within the list that is in this complaint?

A. I would have to see the list. I can't remember exactly.

Q. All right. They begin there and go down to there.

A. But there is a list of dates.

Q. I beg your pardon?

A. There is a list of the dates of the purchases. 10
I can't tell from here on what dates the different bonds were purchased.

Mr. Bourgeois: I withdraw the question, because I haven't got the data to show.

A. Senator Edge's letter, I think, to us of April 27 —

Mr. Van Riper: I don't understand that is an 20
answer to the question.

A. —states the dates, if I am not mistaken.

Q. Mr. Ojserkis, let me call your attention to this: According to the complaint, the first sale was approximately June 22nd. The next sale was July 7, 1926, and the next sale —

A. July 7th? Yes.

Q. And the next sale was December 17, 1926?

A. Yes.

Q. And the next sale was January 5, 1927, and the next and last one was April 12, 1927. Now, can you tell me by looking at those bonds which of them you sold after the conversation with Senator Edge?

A. I don't think there was any after that, because

this says the last sale here was April, 1927, and I saw Senator Edge during the summer, late summer of 1927.

Q. Then you sold him no bonds after that conversation with him ——

A. No.

Q. —of the Straus bonds? Did a time come when
10 you were requested to cash in those Straus bonds?

A. On April 28th, I think, we received the letter dated April 27th, from the Senator.

Q. I show you a letter. It is marked Exhibit P2. I ask you if that is the letter that you refer to?

A. Yes, I feel sure that is the letter.

Q. Did you make reply to that letter?

A. I did, sir.

Q. Under what date? Do you recall?

A. Around May 1st, I think. I don't remember.

20 Q. I show you a letter dated May 1, 1933, and ask you if that is the letter that you wrote in reply to the one you received from Senator Edge?

A. Yes, sir, that is the letter.

Mr. Bourgeois: I offer the letter.

Mr. Van Riper: I object to the offer of the letter. It is purely an interpretation on the part of the writer, who happens to be this witness, as to what
30 he thought of this agreement, and it is also an attempt on his part, as will appear to the Court from a reading of the letter, to vary and alter the terms of the agreement, and I submit it is inadmissible under all rules of evidence.

Mr. Bourgeois: I understand that where a letter

Sigmund Ojserkis—Direct

is in answer to another letter that has already been offered in evidence, the answer is admissible in evidence. That is the letter of April 27th and that is the letter answering it, of May 1st, three days afterwards.

The Court: Is there any testimony by Senator Edge that he received a reply to the letter of April 27, 1933? 10

Mr. Van Riper: I think he did testify to that, and if he did not, we admit we received it. I am not sure he was asked that question, but we admit we received it.

The Court: I notice this letter is marked for identification. Of course, if there was some testimony making reference to receiving a reply, then the reply 20 is admissible.

Mr. Van Riper: If there was testimony, I am sure it was testimony from the Senator simply that he received the reply, and if he was asked, he said yes.

Mr. Bourgeois: You will admit that he did, anyway?

Mr. Van Riper: Yes, I will admit we received the letter. 30

The Court: I think that makes it admissible. The letter will be admitted in evidence, because it is my recollection that when the plaintiff was on the stand

he testified to having received a reply to his letter of April 27, 1933, and this letter is now being offered as the reply to which the plaintiff referred.

(An exception was noted for the plaintiff.)

(The letter was marked Exhibit D1.)

10

(Mr. Bourgeois read Exhibit D1 to the jury.)

Q. Now, Mr. Ojserkis, after you had had the conversation in your office in 1927 with Senator Edge about exchanging his securities, did he ever have any other conversation with you about them?

A. He did not.

Q. When did you next hear with regard to them?

A. The letter of April 27th.

20

Q. 1933?

A. Yes, from Senator Edge.

Q. I want to ask you a question, but I don't want you to answer this until the Court says you may. I want to ask you whether or not this letter that you wrote contemplated the purchase of a portion of this block of bonds that you offered or the purchase of all of them?

Mr. Van Riper: I object.

30

The Court: I understand you are referring to the letter of June 22, 1926?

Mr. Bourgeois: Yes. I ask him that because there was a portion of them that were bought under the

Sigmund Ojserkis—Direct

letter. There were eight of those bonds that they sold to him that came under that letter, and I want to know whether or not the letter, as he understood it, contemplated the whole thing as one proposition or was divisible.

The Court: The objection will be sustained. The letter speaks for itself. 10

Q. I call your attention to the signature to the letter of June 22, 1926, which says, "Respectfully yours, Sigmund Ojserkis, President."

A. Yes.

Q. And the suit is brought against the Boardwalk Securities Corporation. Did you have any authority from the Boardwalk Securities Corporation to sign and send this letter of June 22, 1926, marked P1?

A. I had no authority from the Board to write 20 that letter or sign it.

The Court: What was that?

A. I had no authority from the Board to write that letter or sign it.

The Court: What Board?

A. From the directors of the Boardwalk Securities 30 Corporation.

Q. You were its president?

A. I was.

Q. The Boardwalk Securities Company had a board of directors?

- A. It had.
Q. And how frequently did they meet?
A. Once a month.
Q. You had by-laws, I suppose?
A. We had.
Q. Who was the secretary?
A. Mr. William C. Boyer.
- 10 Q. Did you report to the Board of Directors the sale of stocks that were made by you?
A. Stocks?
Q. Sales of stocks or bonds made by you?
A. No.
Q. Did you report to them the purchase of stocks and bonds?
A. I did.
Q. Did the subject of this letter ever come before the Board of Directors?
- 20 A. It did not.
Q. I suppose it did after suit was brought?
A. It did then, yes.
Q. But not before?
A. Not before.
Q. Was the question of the sale of these bonds and the contents of this letter ever discussed before the Board of Directors —
- A. It was not.
Q. —prior to the suit being brought?
- 30 A. Not prior to the suit.
Q. How many directors were there?
A. I believe eleven in 1926.
Q. How many stockholders were there?
A. Over two hundred.
Q. All in Atlantic City or diversified?

Sigmund Ojserkis—Direct

A. Stockholders all in Atlantic City. Very few out of Atlantic City.

Q. Who were the directors? Were they Atlantic City people?

A. All Atlantic City people.

Q. What about Mr. Gordon? Is he an Atlantic City man?

A. He is considered an Atlantic City man. He 10
lives in Philadelphia lately, but he is considered an Atlantic City man. He has his business here. Always had it.

Q. You considered him an Atlantic City man when you said "All"?

A. Yes. I beg your pardon. We had one director who was out of town originally. I don't know if he was at that time. I think he was. He was D. T. Anderson, of St. Louis, the vice-president and treasurer of Liggett & Myers Tobacco Company. 20

Q. Do you know if he was a director at that time or do you not know?

A. I think he was. I am satisfied of that, but I know he was a director and he was a non-resident.

Q. Can you recall some of the directors that were directors at the time this letter was written and following it?

A. Mr. Lapres, Mr. Gordon, Mr. Feyl, Mr. Blatt, Mr. Beyer, Mr. Boyer. It is pretty hard to go back. 30

Q. How about Judge Higbee?

A. Judge Higbee, Justice Perskie.

Q. Is Judge Higbee still living?

A. He is dead.

Q. And Justice Perskie is not now a director?

A. No, he is not now a director.

Cross-examination.

By Mr. Van Riper:

Q. Now, Mr. Ojserkis, let me understand the situation a little bit, if you will. You are president of the Boardwalk Securities Corporation on June 22, 1926? Is that right?

A. I was.

Q. And you had been president for how long?

A. Ever since. Since the organization of the company.

Q. Well, when was it organized?

A. 1925.

Q. Then at that time you had been president a little over a year?

A. Yes, sir.

20 Q. And you were the largest stockholder in the company, were you?

A. I was not.

Q. You were when the company was organized?

A. I was not.

Q. You were not when it was organized?

A. You mean when we applied for a charter?

Q. Yes. You were the largest stockholder?

A. At that time, yes.

30 Q. And you were elected president? You are the only president the corporation has ever had; is that right?

A. That is right.

Q. And on June 22, 1926 you wrote this letter which has been marked D-1 in evidence, addressed to Senator Edge, did you?

Sigmund Ojserkis—Cross

A. I did.

Q. And you signed it, "Sigmund Ojserkis, President"?

A. Yes, sir.

Q. And you meant as president of the Boardwalk Securities Corporation?

Mr. Bourgeois: I object. The letter speaks for 10
itself.

Mr. Van Riper: It seems to me the witness has
been examined on this by his own counsel, as to his
signature of the letter.

The Court: The cross-examination, I assume, is
relating to the question of authority?

Mr. Van Riper: To a certain extent, yes. 20

Mr. Bourgeois: The letter speaks for itself. If he
wants to examine him about his authority, I haven't
any objection.

The Court: I think if counsel would reframe the
question, it would be better.

Q. You signed this, Mr. Ojserkis, as president? 30

A. Yes.

Q. President of what?

Mr. Bourgeois: I object. The letter speaks for
itself.

The Court: Then I will ask you of what does it speak?

Mr. Bourgeois: I don't care what it speaks of, he cannot supplement it. He may examine him as to his authority. I have no objection to that and won't object to it, but I do object to his supplying any
10 meaning to that letter.

The Court: You see, we are interested in two phases, probably, of the matter, in view of the issues framed here by the pleadings in the case. First, for whom did he act? Secondly, having acted, did he act within the scope of his authority? We first must know whether he acted for himself or someone else, must we not?

20 Mr. Bourgeois: He can't change it. I am not saying he can't answer those questions that way, but he cannot testify with regard to the signature to that letter as to whom he represented or what he represented by it. The letter speaks for itself.

Mr. Van Riper: Mr. Bourgeois in his opening to the jury read this letter and he said, "It is signed, 'Sigmund Ojserkis, President,' and it does not say
30 president of what." If the jury is not entitled to that information, it is perfectly all right with me.

Mr. Bourgeois: It may be entitled to it, but it cannot get it in that form of question. He cannot supplement a complete document.

The Court: I do not understand that is the purpose of the question. The question might be framed, probably, in a little different form, which would escape the objection. After all, I assume what counsel wants to know is for whom he was acting.

Mr. Van Riper: That is all.

10

Mr. Bourgeois: He cannot get it by trying to supplement a written document. The document speaks for itself.

The Court: Suppose you reframe your question.

Q. Mr. Ojserkis, at the time that you signed this letter with your name to it as president, for whom were you acting?

20

Mr. Bourgeois: I won't object to that, because he might have been acting for himself.

The Court: I think you ought not to suggest that.

Q. At the time you signed this letter with your name, president, for whom were you acting?

A. I was acting mostly for myself.

Q. Mostly for yourself?

A. Yes, because I was a friend of Senator Edge 30 for years, for thirty years with Senator Edge, and I had the opportunity to be of service to him.

Q. You wanted to do him a favor?

A. Yes, I did.

Q. All right.

A. As the letter states, I did.

Q. You say you were acting mostly for yourself?

A. Yes.

Q. You said in this letter, did you not, "These bonds we own and can deliver to you"?

A. Yes.

Q. Who is "We"?

10 A. Boardwalk Securities Corporation.

Q. It was the bonds of the Boardwalk Securities Corporation that you were attempting to sell to Senator Edge, was it not?

A. Yes.

Q. And it was the bonds of the Boardwalk Securities Corporation that Senator Edge eventually bought and paid for? Is that right?

A. Yes.

Q. And not your personal bonds?

20 A. No. I said about the service I tried personally to give to Senator Edge —

Q. Just a minute. We will get to that in a minute.

A. I was asked.

Q. Please, Mr. Ojserkis. Do I understand you to say, Mr. Ojserkis, that at the time you wrote this letter to your friend, Senator Edge, on June 22, 1926, that you had no authority from the Directors of the Boardwalk Securities Corporation to write it?

A. I had not.

30 Q. You wrote it with the right hand, too, didn't you?

A. Yes.

Q. When did you find out you didn't have that authority?

A. I never had, to make any contract or agreement or guaranties.

Mr. Van Riper: I move to strike it out.

The Court: Strike it.

Q. When did you find out you didn't have the 10
authority to write this letter?

A. I had authority to write ordinary business letters, which I considered that.

Q. You considered this an ordinary business letter, didn't you?

A. I did.

Q. You considered that a letter in the ordinary course of your business? Right?

A. I did.

Q. And that is the reason you wrote it, because 20
you considered it in the ordinary course of business and you had authority to conduct the business?

A. I had no authority to guarantee anything or to make contracts.

Q. But you considered this a letter in the ordinary course of business, did you not?

A. I had written that at the request of Mr. O'Neill. He had a proposition —

Q. You and I will get along a lot better if you will just try and answer the questions. 30

A. All right.

Q. You considered this letter to Senator Edge a letter in the ordinary course of business, did you not?

A. A business proposition.

Q. Beg pardon?

A. An ordinary business proposition.

Q. You considered this an ordinary business proposition? Is that right? Do we understand each other on that?

A. For this particular purchase of \$250,000 worth of bonds.

10 Q. And you considered that ——

A. At his request.

Q. And you considered that an ordinary business proposition, for which you were authorized to write a letter?

A. I wasn't authorized to write that letter.

Q. What did you mean when you said a minute ago you considered it an ordinary business proposition and therefore you had authority to write the letter? You just said that, didn't you?

20 A. If Senator Edge had acted according to the letter, this suit wouldn't be here.

Q. Never mind about the "If". I am asking you what you meant a few moments ago when you said you thought you had authority to write this letter because you considered it in the ordinary course of business and an ordinary business proposition. What did you mean by that?

A. I meant this letter wasn't an agreement nor a guaranty. That is what I meant.

30 Q. Well, Mr. Ojserkis, I haven't asked you anything about an agreement nor about a guaranty.

A. I would like to be frank if you people would give me a chance to tell ——

Q. We will be friends. Don't worry about that.

But I would like to save a little time and get an answer to this.

A. I didn't say friends. I said frank.

Q. Do you still say, as you said a moment ago, that you had no authority to sign this letter on behalf of the corporation?

A. I had no authority to sign this particular letter, no. 10

Q. When did you find that out?

Mr. Bourgeois: I object to this as irrelevant and immaterial.

The Court: It is cross-examination. It will be permitted.

Q. When did you find that out?

A. After suit was brought. 20

Q. After suit was brought?

A. Yes.

Q. Senator Edge was in your office in the summer of 1927, wasn't he?

A. Yes.

Q. Wasn't he?

A. He was.

Q. You had a discussion with him?

A. Yes, sir.

Q. Did you ever say anything to him then to the effect that you had no authority to sign this letter? 30

A. There was no question about this letter.

Mr. Van Riper: I move to strike it out.

The Court: Strike it.

Q. When Senator Edge was in your office in the summer of 1927 did you tell him you had no authority to sign this letter?

A. He didn't ask me.

Q. Did you tell him?

10 A. I did not.

Q. You know Mr. O'Neill?

A. I do.

Q. You know Mr. O'Neill as the personal business representative of Senator Edge, don't you?

A. Yes.

Q. And Mr. O'Neill is the man who actually did the buying of these bonds from the Boardwalk, is he not?

20 A. He didn't do the buying. He never bought a bond only when Senator Edge consented.

Q. Of course, but acting for Senator Edge he is the man who actually did the business? Is that right?

A. He didn't do the buying. Senator Edge did the buying. Everything had to be submitted to Senator Edge.

Q. Did Senator Edge ever come into your office with a check and say, "Give me so many bonds"?

A. We had to send to him for his approval.

30 Q. Did he?

A. No.

Q. The man you actually did business with was Mr. O'Neill, was it not?

A. Mr. O'Neill paid for the bonds. He received the bonds.

Q. You did the business through him? He transacted the business, did he not?

A. Yes.

Q. Did you ever tell Mr. O'Neill that you had no authority to sign this letter that went to Senator Edge?

A. He never asked me and I didn't say anything to him. 10

Q. I didn't ask you that. Did you ever tell him that you had no authority?

A. I did not.

Q. Beg pardon?

A. I did not.

Q. And you didn't find it out until after suit was started? Is that right?

A. Find out what?

Q. That you had no authority.

A. I told you before I had no authority to make 20 contracts or agreements.

Q. But you said you found out that you didn't have the authority after this suit was started. Is that right? Is that when you found out?

A. I don't know how to answer that question.

Q. A few moments ago didn't you say that you first found out that you lacked authority after this suit was started?

A. I didn't mean it the way you took it.

Q. Never mind the way I took it. I am not tak- 30 ing it anyway. I am taking your words as you gave them to us. Isn't that what you said a few minutes ago?

A. I knew I had no authority —

Q. Wait a minute. Please don't get away from

it. Didn't you a few minutes ago, in response to my question, "When did you find out you had no authority?" say after this suit was started?

A. I did, but I didn't mean it the way you took it.

Q. Never mind about how I take it. The jury will take it. That is all that is essential. From
10 whom did you find that out after the suit was started?

A. This suit?

Q. The suit you are talking about. What suit are you talking about?

A. You asked me about this suit.

Q. Well, you asked me about this suit. Now, I ask you what suit did you have in mind when you said it was after the suit was started that you found out?

20 A. To be frank, I don't understand your question. I don't know what you are driving at. If you give it to me frankly I will give it to you frankly back and answer it. I am not trying to hide anything.

Q. You say you had no authority to write this letter?

A. No.

Q. When did you find out that you didn't have any authority?

A. I did not find out. I had no authority to make
30 any agreement.

Q. Yes, but when did you find that out? When did you know that?

A. I always knew that.

Q. You always knew that? You knew it when you wrote the letter, didn't you?

A. I knew it then.

Q. And you wrote the letter a day after you had the conversation with Mr. O'Neill, didn't you?

A. I wrote the letter the very same day.

Q. And did you tell Mr. O'Neill, "I am going to write Senator Edge a letter, but I haven't any authority to write it"? Did you tell him that?

A. I didn't tell him that. 10

Q. Did you say in this letter to Senator Edge, "I am writing you a letter, but I haven't any authority to write it"?

A. I did not.

Q. Didn't say that in the letter?

A. No.

Q. And you have never told it to Senator Edge from that day until this, have you?

A. No.

Q. And you have never told it to Mr. O'Neill 20 from that day until this, have you?

A. I did not.

Q. And on April 28, 1933, you got a letter from Senator Edge asking you to take back certain of these bonds, didn't you?

A. Yes.

Q. Didn't you?

A. I did.

Q. And under date of May 1, 1933, you wrote Senator Edge a letter, didn't you? 30

A. Yes, sir.

Q. Did you say in that answer anything to the effect that you had no authority to sign the letter of June 22, 1926?

A. I did not.

Q. And as a matter of fact, you had some correspondence with Mr. O'Neill, between June 10, 1926, and May 1, 1933, did you not?

A. I may have had, yes.

Q. Did you ever say in any of those letters that you addressed to Mr. O'Neill that you had no authority to write this letter?

10 A. I did not.

Q. You did not say that?

A. No.

Q. Now, so there is no misunderstanding about it, you are sure you always knew you didn't have the authority?

A. The authority for what?

Q. To write this letter?

A. I did not.

Q. You always knew that you didn't have the
20 authority?

A. I always knew I didn't.

Q. Then do you want to withdraw your previous statement that you found out you didn't have the authority after the suit was started? If you want to withdraw it, it is all right with me.

A. I can't quite understand what you mean.

Q. What I mean is this, Mr. Ojserkis: The record now shows that you made one statement to the effect that you found out that you did not have the author-
30 ity after the suit was started, and it shows you made another statement to the effect that you always knew that you didn't have the authority.

A. I always knew that I didn't have the authority, and that is correct.

Q. And that is the one you want to stand by?

A. Yes.

Q. Is that right?

A. Yes.

Q. Now, in 1927, you say in the summer you had a conversation with Senator Edge in your office?

A. I did.

Q. At that time he had purchased approximately \$200,000 worth of Straus bonds; is that so? 10

A. Approximately, yes.

Q. What was that conversation?

A. A general conversation about investments, and I called Senator's attention that the stock market was high and boiling and high grade bonds are getting down in price and that it was a good time to change his investments.

Q. Is that all?

A. And he told me that he was perfectly satisfied with the Straus bonds, that he knew Mr. Straus 20 personally and he was satisfied with the income of it and he is going to hold it as it is. I can't give it verbatim, it is so many years back.

Q. I don't want it verbatim, but that is the substance of what was said on that occasion?

A. Yes.

Q. You told him it was a good time to buy bonds, didn't you?

A. Yes, stock exchange bonds, high grade bonds.

Q. You dealt in stock exchange bonds? 30

A. We did.

Q. Speaking about high grade bonds, Straus bonds were high grade bonds, weren't they?

A. They were high grade real estate bonds at that time.

Q. You told your customers that they were high grade bonds?

A. They were.

Q. And you recommended them to your customers on the basis of being high grade bonds, did you not?

A. I recommended every high grade bond. I
10 didn't make any specific one above the others.

Q. I am not trying to reflect on any of the other bonds. I am saying you recommended Straus bonds to your customers as being a high grade, conservative investment, did you not?

A. I did.

Q. And as a matter of fact, at the time you wrote this letter to Senator Edge in June of 1926 you at that time attached to it a sheet containing a list of bonds?

A. Yes, sir.
20

Q. And you said there on the sheet, "We recommend the following \$250,000 worth of bonds as a conservative, well diversified investment." Is that so?

A. Yes.

Q. And what were the Straus bonds paying Senator Edge on the basis on which he had bought them and paid for them?

A. A little bit over 6%, some, and some 6%.

Q. Is 6% on a bond a pretty good yield, Mr. Oj-
30 serkis?

Mr. Bourgeois: I object. It is irrelevant.

The Court: Well, I think it is a matter of common knowledge.

Mr. Bourgeois: I will withdraw the objection.

A. What is the question?

Q. The question is whether or not 6% return on a bond isn't a pretty good yield?

A. At that time it was.

Q. It would be pretty good today, too, wouldn't it? 10

A. It would.

Q. In fact, at any time a 6% return on a bond is considered a good return, isn't it?

A. It depends what class of securities people want. If they want a government bond, they can never get 6%, or if they want a State bond, they can never get 6%.

Q. You can't get 6% on a government bond, and therefore it isn't as good a return as one on which you can get 6%? 20

A. No.

Q. Don't you as a bond man, a man having been in the financial business for a great many years, consider a 6% return on an investment bond as a good return?

A. At that time it was, yes.

Q. Don't you consider it so at any time?

A. Yes.

Q. Now, you said, Mr. Ojserkis, on your direct examination by Mr. Bourgeois, that you had this conversation with Senator Edge in the summer of 1927? 30

A. Yes, sir.

Q. And after that you heard nothing further about these bonds until April 28, 1933?

A. Not from Senator Edge I didn't.

Q. Well, whom did you hear from about them?

Mr. Bourgeois: I object as not cross-examination and not relevant.

Mr. Van Riper: If he heard from Senator Edge's
10 agent it is certainly relevant.

Mr. Bourgeois: Ask him that.

Q. Did you hear from anyone representing Senator Edge?

A. I might have. I don't remember.

Q. You wouldn't say you didn't, would you?

A. I wouldn't say I didn't.

Q. I show you a letter on the stationery of Senator Edge dated May 26, 1931, signed, "Paul J. O'Neill for Walter E. Edge," and ask you if you
20 received that letter?

A. I think I received that letter.

Q. You received that letter? And that letter was with reference to some of these Straus bonds which Senator Edge then owned and which he had bought from the Boardwalk Securities Corporation, was it not?

A. Yes.

30

(The letter was marked P9 for identification.)

Q. Now, Mr. Ojserkis, you have just read this letter, have you, marked P9 for identification?

A. I did.

Sigmund Ojserkis—Cross

Q. Mr. O'Neill says, "I have your letter of the 23rd." Evidently you had written him, had you?

Mr. Bourgeois: I will consent to your offering that letter in evidence at this time if you want to.

(The letter was marked exhibit P9.)

10

Q. I show you what purports to be a copy of a letter, Mr. Ojserkis, under date of May 22, 1931, addressed to you as president of the Boardwalk Securities Corporation, and signed, "Paul J. O'Neill for Walter E. Edge," and ask you if you recall receiving that letter?

A. It seems to me I did receive that letter.

Mr. Van Riper: I will offer that. I understand that Mr. Bourgeois consents to using the copy of that letter of May 22, 1931, the original not being available. 20

(The letter was marked exhibit P10.)

Q. Now, Mr. Ojserkis, getting back to the first one of these letters, namely, the one of May 22, 1931, which has just been marked P10, you received that letter from Mr. O'Neill, did you?

A. I think I did. I replied to it, I think.

30

(Mr. Van Riper read exhibit P10 to the jury.)

Q. You replied to that letter, Mr. Ojserkis, did you not?

A. I think I did.

Q. I show you what purports to be a copy of your reply and ask you if that is your reply. We will just forget the copy and use the original.

A. I wrote that letter.

Q. That is your reply?

A. Yes, sir.

10

Mr. Van Riper: I offer it in evidence.

Mr. Bourgeois: No objection.

(The letter was marked exhibit P11.)

(Mr. Van Riper read to the jury exhibits P11 and P9.)

20 Q. Now, Mr. Ojserkis, I call your attention to this letter which I have just finished reading, marked P9, in evidence, dated May 26, 1931, signed by Mr. O'Neill, and ask you if you ever answered it?

A. I don't remember.

Q. You haven't any recollection at all?

A. I don't remember.

Q. Do you remember receiving it?

A. I remember receiving it.

30 a Q. And you remember receiving the other letter a few days earlier, that I showed you?

A. Yes, sir.

Q. And you remember you answered the first letter?

A. Because we have copies of it.

Q. You remember that?

A. Yes.

Q. But you don't remember whether or not ——

A. Unless there is a copy here. We have got all the correspondence right here.

Q. If you don't remember, all right. I just wanted to make sure you don't remember. In this letter under date of May 23rd, which you wrote to Mr. O'Neill, you used this sentence, the last sentence in the letter: "We have never guaranteed any bonds, and no bond house in the United States has ever guaranteed any," didn't you? 10

A. Yes, sir.

Q. Did Mr. O'Neill say anything in his letter to you about a guaranty of bonds?

Mr. Bourgeois: I object to that. The letter speaks for itself.

20

The Court: Of course it does.

Q. Now, Mr. Ojserkis, when you received these letters from Mr. O'Neill, one dated May 22, 1931, and one dated May 26, 1931, did you report them to your Board of Directors?

A. I did not.

Q. Did you have a meeting of your Board of Directors sometime shortly after that?

A. I think we did.

30

Q. Did you say anything to your Board of Directors about having that letter from Mr. O'Neill in which he suggested that they would want you to take in some bonds?

A. I did not.

Q. But now, in view of these letters which I have just shown you and which you say you received in 1931, do you still say that after you talked with Senator Edge in the summer of 1927 you never heard anything more from him about these bonds until April, 1933?

A. Not from Senator Edge personally, I said.

10 Q. That is the distinction you make, is it?

A. Senator Edge purchased all the bonds himself, approved every bond. Mr. O'Neill never did.

Q. All right. We have been all through that and won't take any more time on it. Now, you said—very early in your direct examination by Mr. Bourgeois you said that you sold \$80,000 worth of Straus bonds under the terms of this letter of June 22, 1926?

A. Part of the \$250,000 offered.

20 Q. You sold some bonds to a company known as the Camedge Company, did you not?

Mr. Bourgeois: I object to that as irrelevant and immaterial.

Mr. Van Riper: I only want a yes or no answer.

The Court: I do not know the object. He may answer yes or no. I see no harm in that.

30

A. I would have to look up the records.

The Court: Just yes or no.

A. I can't say no or yes. I don't remember.

Q. You have heard of the Camedge Company?

A. I did, yes, sir.

Q. And you know it is an Edge family corporation, don't you?

A. Yes.

Q. And you know Mr. O'Neill represented them, do you not?

A. Yes.

10

Q. Do you recall whether or not on October 4th or thereabouts, 1927, you sold some bonds to the Camedge Company?

Mr. Bourgeois: I object as irrelevant and immaterial.

Mr. Van Riper: I only ask for an answer yes or no.

20

Mr. Bourgeois: It is irrelevant and immaterial, anyway. It has nothing to do with this case.

Mr. Van Riper: The witness has testified that he sold \$80,000 worth of bonds under the terms of this agreement, in an attempt to limit the purchases under this agreement to the first purchase which was made a few days after the agreement was made. I am prepared to show by the testimony which I am now seeking to adduce that purchases were made a considerable length of time afterwards, through this witness, under the terms of that agreement. 30

Mr. Bourgeois: And I object to that as not within the limits of the pleadings.

The Court: Bonds other than the ones in suit?

Mr. Van Riper: Yes, sir. I am prepared to show that at the time these purchases were made the agreement was called to the attention of the witness as being the agreement under which the purchases were being made.

10

Mr. Bourgeois: I object to that because the agreement does not go to anybody but Senator Edge.

Mr. Van Riper: I am not trying to hold the corporation for liability on any other bonds. I am not trying to do that at all, but it seems to me I have a perfect right to show that sometime later, a considerable period of time later, a purchase was made, and he was told at the time it was being made under
20 this agreement.

Mr. Bourgeois: I object as irrelevant and immaterial and not within the pleadings in this issue.

A recess was taken until 2 P. M.

30

Sigmund Ojserkis—Cross

Afternoon session, 2 P. M.

SIGMUND OJSERKIS, resumed.

Cross-examination (continued).

10

By Mr. Van Riper:

The Court: I will permit him to answer yes or no.

Mr. Van Riper: I do not care about pressing that.

Q. Now, Mr. Ojserkis, do you recall having a conversation with Mr. O'Neill sometime about the 1st of October, 1927, with reference to the purchase of Straus bonds in accordance with the terms of this letter of June 22, 1926? 20

Mr. Bourgeois: I object. If he did, it is irrelevant and immaterial. It was after the transaction took place, long after.

Mr. Van Riper: But the witness comes in and says there were no more Straus bonds sold in accordance with the terms of this letter after the first purchase. Certainly I am permitted to contradict that statement if I can do so. 30

Mr. Bourgeois: All the conversation and all the

questions that were addressed to Mr. Ojserkis with regard to those bonds were with relation to the bonds sold to Edge, not the bonds sold to anybody. He may have sold to Peter Jones bonds, but that was not included in the question I asked him.

The Court: Under this letter of June 22nd?

10

Mr. Bourgeois: Yes. I asked him if he sold any bonds—I was talking about Senator Edge all the time—if he sold any other bonds under that letter after that first block. The whole conversation was with relation to Senator Edge. It was not with the public generally.

Mr. Van Riper: I am not talking about the public generally, but it seems to me the jury has the right
20 to know.

Mr. Bourgeois: Then this is not cross-examination. If he wants to cross-examine about selling any of the bonds to Senator Edge under this letter, that is a different thing.

Mr. Van Riper: The defendant is trying to draw the inference that no other bonds were sold under this agreement after this date. The jury has the
30 right to know whether this witness considered this agreement in effect and acted on it after the first purchase was made and whether it was called to his attention when subsequent purchases were made.

Mr. Bourgeois: Suppose that is allowed and he

says no, and the Judge calls somebody in to show there was, that introduces into this case an independent issue that is not in the pleadings at all.

The Court: It may not. It might be the end of it.

Mr. Bourgeois: This is the beginning of an independent issue, as I see it, and I submit to you that it is not relevant nor is it admissible. 10

The Court: I am concerned more with the suggestion made here by counsel that statements perhaps made—I do not know—if the examination reaches that point, by this witness are contradictory to his testimony upon direct examination in the case.

Mr. Bourgeois: If he will examine him on the direct examination in the case I won't object at all. My examination was within the limit of these pleadings. If he cross-examines within the limits of them I have no objection. 20

The Court: Now he is asked whether he had a conversation at or about a certain time with a certain named person. That is this question.

(The question was repeated.)

Mr. Bourgeois: Do you mean the bonds mentioned in the pleadings, the sale of the bonds mentioned in the pleadings? 30

Mr. Van Riper: Yes and no. That and other bonds.

Mr. Bourgeois: Then I object to the "No" part.

The Court: The objection will be overruled.

(An exception was noted for the defendant.)

The Court: The question is whether or not you
10 had a conversation.

Q. Did you hear the question?

A. Yes.

Q. Can you answer it?

A. No. I don't remember.

Q. You don't remember?

A. No.

Q. I don't understand by that that you deny the
conversation?

20 A. I don't remember.

Q. By that you mean that it may have happened
or may not have happened? Is that correct?

A. You are asking me if I had a conversation with
Mr. O'Neill and I say I don't remember.

Q. You won't deny you did have one?

A. I had many of them.

Mr. Bourgeois: I object to this.

30 Q. I show you this letter and ask you to see if that
refreshes your memory any?

A. It is our letter, is it? You got it from our
files?

Mr. Bourgeois: I assume it is a letter received
from you.

Sigmund Ojserkis—Cross

A. If it was in our files I must have received it.

Q. The question is—have you read the letter?

A. Yes.

Q. Does that help you —

Mr. Bourgeois: I object. You asked him if that letter refreshed his memory.

10

Mr. Van Riper: I am going to ask him that very question.

Q. Mr. Ojserkis, now that you have read the letter, does it help you any easier to remember as to whether or not you did have a conversation with Mr. O'Neill around about the 1st of October, 1927?

A. I might have had a conversation, but I don't remember what the conversation was.

Q. Then this letter doesn't help you any more than to that extent, simply to say that you might have had a conversation?

20

A. No.

Q. But if you did have it, you don't remember what it was?

A. No, I don't.

Q. Showing you this letter again, do I understand you to say you received the letter?

A. I think I must have received it, yes.

30

Q. Now, Mr. Ojserkis, do you recall whether or not you had a conversation with Mr. O'Neill on or about the 1st day of October, 1927, or in the neighborhood of the 1st of October, in which the discussion centered around the purchase of more Straus

bonds in accordance with the terms of the letter of June 22, 1926?

A. No, I don't.

Q. When you say no, do you mean you don't recall or you didn't have the conversation?

A. I mean I didn't have that kind of conversation. I know that.

10 Q. You are sure of that?

A. Sure.

Q. You are positive that at about the 1st of October—I am not binding you down to a certain date; a few days one way or the other—1927, you did not have a conversation with Mr. O'Neill with reference to the purchase of Straus bonds from the Boardwalk Securities Corporation in accordance with your letter to Senator Edge of June 22, 1926?

A. That is right.

20 Q. You are positive about that?

A. Yes.

Q. No question about that in your mind now, is there?

A. To the best of my belief and remembrance.

Q. Is there any question about it or are you sure?

A. I am almost sure.

Q. You are sure about it?

A. I must have answered that letter.

Q. Beg pardon?

30 A. Did I answer that letter?

Q. I can testify, but I don't think Mr. Bourgeois wants me to. I will ask you. Did you?

A. I don't remember. The papers are all here. I can't remember eight years' conversations.

Mr. Van Riper: If you have an answer to it I will be very glad to see it.

Q. Now, Mr. Ojserkis, you said something on direct examination in answer to a question of Mr. Bourgeois about reporting your purchases to the Board of Directors?

A. Yes, sir.

Q. Is that right? How many directors did you have in your company in 1927?

A. I think about eleven.

Q. Who was it that spent their time in the offices of the company each day handling the business of the corporation?

A. Mr. Boyer and myself were active and there were always several directors coming in off and on, but regular meetings were held once a month and all the purchases and expenditures were reported to the Board, and the Board approved.

Q. Mr. Boyer and yourself were active, however?

A. Yes.

Q. You at the same time were president of the Boardwalk National Bank, weren't you?

Mr. Bourgeois: That is objected to as irrelevant and immaterial.

Mr. Van Riper: It is to show who was doing the active work of this business, and it certainly is not immaterial to show that here was a corporation, as is already admitted, engaged in the securities business, to show the qualifications of its president to handle its business, particularly when his authority is being attacked.

The Court: That is not material, whether he was qualified, or whether he was not, if he was actually representing the company.

Q. Mr. Boyer at the time at which he was secretary, and you say he was active, was also occupied in a bank position, was he not?

10

Mr. Bourgeois: That is objected to as irrelevant and immaterial.

Mr. Van Riper: This witness has said he and Mr. Boyer were the active men. I think it is proper to show how active each one was, how much time they put in at this thing.

The Court: All right.

20

Q. Wasn't Mr. Boyer at that time an official or officer of some kind of the Boardwalk National Bank?

Mr. Bourgeois: I object to that as irrelevant and immaterial.

The Court: The objection will be sustained. I will permit you to show how much time he devoted.

30

Q. How much time did Mr. Boyer devote to the active business of the Boardwalk Securities Corporation each day?

A. It is pretty hard to tell. It depends on how much work there was. Sometimes there was and

sometimes there was none. It is different from any other business.

Q. What was his position with the Boardwalk Securities Corporation?

A. Secretary and director.

Q. And how much time did you devote to the business of the Boardwalk Securities Corporation each day? 10

A. As much time as it required.

Q. Whatever business demanded you gave to it?

A. Yes.

Q. What other directors besides you and Mr. Boyer gave any of their time to the transactions of the business of the Boardwalk Securities Corporation except at directors' meetings?

A. Justice Perskie, perhaps, in a legal capacity when he was a director.

Q. He was acting as your attorney, was he not? 20

A. Yes.

Q. And the work which he did for you as attorney he did in his law office, did he not, or in Court, wherever it may have been?

A. Sometimes consulted him right there in the offices.

Q. Sometimes you asked him to come in the office?

A. Yes.

Q. And then you consulted him about legal matters? 30

A. Yes.

Q. But, of course, the law business wasn't the business of your corporation, was it?

A. No.

Q. You were engaged in the business of buying and selling securities? Is that right?

A. That is right.

Q. How much time did any of your directors except Mr. Boyer and yourself give to the transaction of the company's business except to attend Board meetings?

10 A. The same as any other directors in any corporation or in any bank.

Q. I don't know about any other directors in any other corporation. I want to know about yours, if you will, please.

A. They attended at the Board meetings and attended to the business of the corporation at the Board meetings.

Q. And outside of the time which they spent attending to the business of the corporation at the
20 Board meetings, did any of them spend any time in the offices of the company transacting the business of the company?

A. They did not.

Q. When you had a meeting of the Board of Directors, you met once a month?

A. Once a month.

Q. What did you report to the Board?

A. All the purchases, expenditures, bills.

Q. Is that all?

30 A. General course of business. I can't recollect now what occurred at that time.

Q. You presided at the meetings of the Board of Directors?

A. I did.

Q. You reported the purchase of securities which you had bought?

A. Yes, sir.

Q. Did you report the sales of securities?

A. I did not.

Q. Did you ever at any time report the sales of securities?

A. Not to my knowledge.

10

Q. Did your corporation make its profits—and properly so—from the sale of securities? You made your profits on the sales of securities?

A. We made our commissions, yes.

Q. And did you ever report to the Board of Directors the fact that you had sold so many securities and made so much money on them?

A. We submitted a monthly statement to the Board that showed up the profits.

Q. That showed your profits for the month?

20

A. Yes.

Q. Did it show where they came from?

A. It showed where they came from, from interest or commission, whatever the case might be.

Q. And they showed what percentage of the profits, or what amount in dollars and cents came from the sale of securities, did it not?

A. It did.

Q. So you did, then, report to the Board the sale of your securities? Is that right, or isn't it?

30

A. Just a monthly statement on the profits and loss account.

Q. Wouldn't you give them any information on that monthly to show how many securities you had sold in that month?

A. When we bought 25,000 bonds, we might have sold them to fifteen or eighteen different people, one here and two there and three there. We didn't report those sales. We were dealers. We bought them in blocks and sold them at retail and made our commission, and we couldn't report to the Board every sale.

10 Q. If you sold them at retail, that was the business of your corporation?

A. Yes, sir.

Q. Didn't you as the president of the corporation, sitting at the head of the table, when you had a Board meeting report to your directors who were seated alongside of you at the table the sales you had made during that month?

A. They could tell that by the purchases.

20 Q. I am not asking what they could tell. I am asking you whether or not you reported it to them?

A. I did not report any sales.

Q. In any manner whatsoever?

A. In any manner whatsoever.

Q. When you had business negotiations and transactions in the course of business for the corporation, did you report that to the Board of Directors?

A. No. That was details.

Q. You didn't pay any attention to that?

30 A. No.

Q. You were not required to report that to the Board of Directors?

A. No.

Q. Is that right?

A. That is right.

Q. You had authority to handle that? Is that right?

A. I suppose so.

Q. Did you ever report to the Board of Directors that you had made an agreement or signed a letter to repurchase any Straus bonds at 99¢ on the dollar or at any other price?

10

Mr. Bourgeois: I object. That is not cross-examination, and it is too broad, anyway, because it is not limited in this question to any of the testimony in this case.

Mr. Van Riper: I think it is competent. I certainly have a right, it seems to me, to have the broadest leeway in cross-examining this witness as to the question of his authority.

20

Mr. Bourgeois: He has testified as to his authority and I am not objecting to him cross-examining with regard to the Edge sale. What I am objecting to is to a question which is broad enough to take in anything he ever did.

The Court: There are different kinds of authority, express authority, implied authority, apparent authority, so that when this witness said he had no authority he embraced them all, I suppose. Now 30 counsel is endeavoring to elicit from the witness just what he actually did with the knowledge of the Board of Directors.

Mr. Bourgeois: Yes, but apparent authority and

implied authority is not an authority in the person himself, in the agent. That is only an authority that the Court raises as to the conduct that has taken place or sales that have taken place or what he has done, and that is a question as to afterward. This question takes in whether he made a statement to anybody, without relation to the Edge bonds, 10 whether it was before or after the Edge bonds were purchased. After the Edge bonds were purchased it would not be relevant.

Mr. Van Riper: I have a right to show a course of conduct.

Mr. Bourgeois: And that course of conduct must be prior to the sale in question.

20 Mr. Van Riper: I think it can be at any time approaching the time of the sale.

The Court: The question in that form is permitted. I will permit it.

(An exception was noted for the defendant.)

(The question was repeated.)

30 Q. Did you get it?

A. Yes. No.

Q. You never did report?

A. No.

Q. Did you ever sign any letter or agreement to repurchase Straus bonds at 99¢ on the dollar except

this letter to Senator Edge which I have shown you here?

Mr. Bourgeois: That is objected to as irrelevant and immaterial, because he might have signed a thousand letters after this time and it would not have affected Senator Edge at all in the buying of these bonds. If he wants to make that evidential it must be limited to the time before Senator Edge's purchase. 10

Mr. Van Riper: I don't understand we are bound down to proving this authority to the particular day on which this letter was written. Certainly if it is competent to show a course of conduct, you have to show it over a period of time.

The Court: Do you want to state the time when? Not specifically. 20

Q. On August 1926.

Mr. Bourgeois: I object. That is after.

The Court: After the letter, but not after the purchases.

Mr. Bourgeois: Well, I suppose I ought not to object, because if he wants to make it appear that Senator Edge purchased these later issues because of apparent authority, it escapes this letter of June 22nd. 30

Mr. Van Riper: I am not trying to make anything appear except what the evidence justifies.

(The question was repeated.)

(The question was withdrawn.)

10 Q. Mr. Ojserkis, did you in August 1926 sign a letter agreeing to repurchase Straus bonds at 99¢ on the dollar?

Mr. Bourgeois: I object on the ground that it is irrelevant and immaterial.

The Court: What have you to say? The purpose is to show —

20

Mr. Van Riper: To show other transactions, for the purpose of showing a course of conduct. I think it is fundamental that on the question of showing apparent authority and showing the power with which the president of a corporation was vested by its directors in the conduct of its business, you can show other transactions of a similar nature, and if you can show other transactions of a similar nature, it does not seem to me it can be within the realm of
30 reason that you are confined to showing those transactions on the particular day. It has to have some bearing, of course, with reference to the date on which the action was performed, but certainly we are allowed some leeway for the purpose of showing a general course of conduct over a period of time.

Sigmund Ojserkis—Cross

The Court: Are you proposing to connect it with any knowledge on the part of the Board of Directors of such conduct?

Mr. Van Riper: I can connect it with some director, at least. I don't say I can connect it with all the directors.

The Court: Of course, it is quite clear to us here that in your attempt to show apparent authority the ultimate query is whether he had apparent authority on June 22, 1926.

Mr. Van Riper: Yes, but I think in order to spell out an apparent authority on June 22, 1926 I ought to have a right to show what he did on some other day, provided it is not too remote, from June 22, 1926.

Mr. Bourgeois: Let me add another reason, and that is that it raises a separate, distinct, independent issue.

The Court: Upon what?

Mr. Bourgeois: I am going to assume he wrote another letter in August, after this transaction. The writing of that letter would not show anything. He has to go on a step farther and show that it was brought to the attention to the Board of Directors, not to a director, not acting in an official capacity, but it has got to be shown that it came to the knowledge of the Board of Directors. That is another issue.

The Court: Not necessarily, with respect to apparent authority.

Mr. Bourgeois: Well, his apparent authority is all right, as I understand the law, if it is directed to transactions that took place prior to the time when the purchase in question was made, because that is
10 based upon the theory that the person who bought those was induced to buy them by reason of his knowledge of similar transactions having taken place before.

The Court: That is not exactly accurate. The purchaser need not have any knowledge.

Mr. Bourgeois: He is presumed to have.

20 The Court: The question is the other way around, whether the corporation has voluntarily placed an officer in such a situation with respect to the transaction of its business that an ordinarily prudent person doing business with the officer would believe in such circumstances that he had authority to act for the corporation.

Mr. Bourgeois: That goes prior. That all refers to a prior time.

30 (The question was repeated.)

The Court: Having in mind, also, that this is cross-examination of this witness, I am inclined to sustain the objection. That does not mean to foreclose the showing of apparent authority in rebuttal.

Q. I show you a letter dated August 26, 1926, on the Boardwalk Securities Company, addressed to Miss Dorothy Blatt, signed, "Boardwalk Securities Corporation, Sigmund Ojserkis, President," and ask you if you signed that letter?

Mr. Bourgeois: I object to that as not cross-examination and not relevant nor material in this suit. 10

The Court: I see no harm in having him identify it. He is simply asked whether he signed the letter or not.

A. I signed the letter.

Q. Did you deliver it to Miss Blatt or mail it to her or something?

Mr. Bourgeois: I object to that as irrelevant and 20 immaterial.

(The letter was marked P12 for identification.)

Q. Now, Mr. Ojserkis, did you in the year 1926 sell any Straus bonds with a verbal understanding with the purchaser that the Boardwalk Securities Corporation would repurchase them at 99¢ on the dollar?

30

Mr. Bourgeois: I object because it is irrelevant and immaterial and it does not appear whether it could be evidential or not without some date.

The Court: It embraces the whole year. If he

did before June 22, 1926, it might be material. The question is proper, simply yes or no whether he did or not. It is admitted.

(An exception was noted for the defendant.)

(The question was repeated.)

10

A. I did not.

Q. You are sure about that?

A. I might have told them in the over-the-counter market that I can sell those bonds at 99, but not agreed to repurchase, and there was a market.

Q. Do you know Mr. Max Blatt?

A. I do.

Q. One of your directors, wasn't he, in 1926?

A. Yes.

20

Q. Did you sell Mr. Max Blatt in 1926 some Straus bonds with a verbal understanding with him that if he wanted to sell them at any time the Boardwalk Securities Corporation would buy them back at 99?

Mr. Bourgeois: I object unless the time is fixed.

Mr. Van Riper: At any time in 1926.

Mr. Bourgeois: I object to that unless the specific
30 time is fixed.

Mr. Van Riper: This is a little bit different situation than the one that was based upon the letter. It would produce a situation which I think I can fairly and honestly say could be called to the attention of

the Board of Directors. In other words, I think that the follow-up of this situation, if the testimony was permitted to go in, would show a matter which at least in the ordinary course of business, and maybe a little bit more than that, was known or should have been known to the Board of Directors.

Mr. Bourgeois: I object to it on the ground that I 10
have mentioned and also on the ground that it introduces an independent issue. Suppose he says, "I did not," and for the purpose of contradicting him the Judge brings on Max Blatt and Max Blatt says he did. Then I have got to produce members of the Board of Directors to show they had no knowledge of it. Otherwise it is going to militate against the Board of Directors in this suit.

Mr. Van Riper: This certainly is just as strong, 20
if not stronger, than the situation that developed in the Blatt case, where testimony was admitted from a witness by the name of Baker who testified to a situation on behalf of one of his clients.

The Court: He may answer. I will strike it if not material.

(The question was repeated.)

30

(An exception was noted for the defendant.)

A. Absolutely not.

Q. The answer is "Absolutely not"? Did the Boardwalk Securities Corporation purchase any Straus bonds from Mr. Max Blatt in 1929?

A. They did.

Q. At 99?

A. They did.

Q. Do you know how many?

A. I don't remember.

Mr. Bourgeois: I object as irrelevant and imma-
10 terial.

The Court: Yes.

Q. Just a question or two with reference to these reports at the Board meetings. Outside of reporting your purchases of securities during the month and the bills and submitting this monthly statement, that is all that you reported?

A. Yes, sir.

20 Q. Is that so?

A. Yes.

Q. Is that all that you were required to report?

A. That is all there was to report.

Q. If there was anything else, you didn't report it, anyhow?

A. There was nothing else.

Q. Well, there were times when you received letters from people, weren't there?

A. In the ordinary course of business.

30 Q. Mr. O'Neill wrote you a letter which we had here this morning, in May 1931. You received that?

A. Yes.

Q. You didn't report that to the Board of Directors?

A. No.

Q. Because that was considered in the ordinary course of business?

A. Yes.

Q. And the Board of Directors never asked you to report any further than what you did, did they?

A. Not to my knowledge.

Q. Well, you would know it if they had asked you?

A. Yes.

10

Q. And they never have asked you, have they, to make any further report than what you have? Right?

A. I reported everything there was to report.

Q. I say they never have asked you to make any further report than the one you have told us about, the type of report?

A. Not to my knowledge.

Q. And you are still president and still making the same kind of report? Is that right?

A. Right.

20

By the Court:

Q. Who fixed the prices at which the bonds of the defendant company were sold?

A. The underwriting houses.

Q. Who fixed the prices at which your company sold them?

A. That is what I mean, your Honor. In other words, when J. Pierpont Morgan brought out an issue, the price was fixed. Every dealer in the country sold at the same price, and we received our commission, and the same way with Straus bonds. The price was fixed at par and we received our commissions, and when we bought back a bond over-the-

30

counter at 99 we sold it again at par to another customer, because it was the fixed price. No dealer dares to go under that price because we have had dealings direct with the houses.

By Mr. Van Riper:

10 Q. You say the price was fixed by the house that issued these bonds. Is that right?

A. Yes, sir.

Q. They fix the price on their bonds, don't they? You said something about J. P. Morgan & Company.

A. When a new issue comes out, the price is fixed, and those 25,000,000 or 30,000,000 bonds are sold at that price.

Q. And before you can get any of those bonds at any price you have to subscribe to J. P. Morgan &
20 Company for a certain number, don't you?

A. We join the selling group.

Q. You become part of what they call a syndicate?

A. Not a syndicate. Selling group.

Q. And when you join that group you agree to sell them at a certain price?

A. We agree to sell them at that price.

Q. And those bonds which you agree to sell at that price still belong to J. P. Morgan?

A. No, they belong to us, but we get the discount.
30 We get that commission, the spread between the cost price to the dealer and the selling price to the retailer.

Q. You have already purchased them, haven't you?

A. We purchase them.

Q. And you purchase them under an agreement to sell them at a certain price?

A. Well, that is the regular procedure of all bonds.

Q. That is what you are talking about, the regular procedure, isn't it?

A. Yes.

Q. When you have bonds that belong to you and that you own and they are in your safe, you can sell 10 them for what you want to, can't you?

A. No, we can't.

Q. What stops you?

A. Because we don't. There is the market price, the regular price.

Q. Of course, you get for your bonds what the market is, don't you?

A. No. So long as the syndicate is operating, sometimes sixty days or ninety days—

20

The Court: Counsel now means after you have bought a block of bonds of an issue and you are not restricted by a dealer's agreement.

A. After the syndicate is over, then we can sell them on the stock exchange or anything at the established market price.

The Court: Sell them at any price, can't you?

30

A. Well, we usually sell them—we can't sell them for more than what the quotations are on the exchange.

Q. The reason you can't is because the public won't buy them for more than the quotations?

A. No. We wouldn't sell them for that.

Q. So far as you are concerned it is nobody's business what you sell them for except yours? Is that right?

A. I can't answer you that, because we never did it that way.

Q. You can answer me this: When you buy a
10 hundred thousand dollars worth of bonds and they are your property and you have paid for them and your corporation has them locked up in its safe, they belong to the corporation, don't they?

A. Yes.

Q. And you can sell them for what you please?

A. No, we can't.

Q. What stops you?

A. S. W. Straus & Company for forty-seven years
20 maintained the price at par, and those bonds always sold for par.

The Court: Suppose you wanted to sell them for less than par, couldn't you do that?

A. No, because they would cut us out from participation in the selling group and we could never get another bond.

Q. Still they were your bonds and you could sell
30 them, and if you wanted to do a favor for a friend you could sell them?

A. No, we wouldn't.

Q. But there was nothing to stop you if you wanted to?

A. No, it wouldn't be ethical to do it.

Theodore J. Lapres—Direct

By Mr. Bourgeois:

Q. But you wouldn't be permitted to buy bonds any more and sell them with those concerns?

A. No.

By Mr. Van Riper:

Q. You are talking about this S. W. Straus & Company agreement. S. W. Straus had advertised the fact that they bought these bonds back at par, too, hadn't they?

10

Mr. Bourgeois: I object to that.

Mr. Van Riper: He opened it up by talking about an agreement he had with S. W. Straus & Company.

20

THEODORE J. LAPRES, SWORN.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Lapres, you live where?

A. Kentucky Avenue and the Boardwalk, Atlantic City. 30

Q. How long have you lived in Atlantic City?

A. Since 1887.

Q. How old are you?

A. I am fifty-eight years old.

Q. Then or now?

A. Now.

Q. In what business are you engaged and have you been engaged?

A. In the candy business, wholesale and retail.

Q. Retail or wholesale?

A. Both.

10 Q. How long have you been engaged in that business?

A. Since 1887.

Q. Are you familiar with the Boardwalk Securities Company?

A. I am.

Q. Stockholder in it?

A. I am a stockholder.

Q. Director?

A. Director.

20 Q. Since when have you been a director?

A. Since it was organized.

Q. I show you a letter marked P1, dated June 22, 1926, signed by Sigmund Ojserkis, and ask you to look at that letter and ask you whether you ever saw that letter before?

A. I never did.

Q. You say you are a director of the Boardwalk Securities Company?

A. I am.

30 Q. Did you attend their meetings?

A. Yes, I did.

Q. During the year 1926 and the first part of 1927?

A. I did.

Q. How frequently?

A. Well—most all the time I was in Atlantic City.

Q. And was that the greater part of the time at that time?

A. It was the greater part of the time.

Q. Was the subject matter of that letter ever brought before any meeting of the Board of Directors of the Boardwalk Securities Company at which you were present?

A. It was not.

10

Q. Was there ever any discussion of the subject matter of that letter before the Boardwalk Securities Company at any meeting when you were present?

A. I can't remember of any.

Mr. Van Riper: I would like to enter an objection here to the attempt now to disprove lack of authority from the Board of Directors, and I should like to call your Honor's attention to the case of *Safir vs. West Ridgelawn Cemetery*, 20 108 Law, 315, which was a case where the plaintiff purchased certain lots from the cemetery and paid \$3000 for them and entered into an agreement signed by the president of the cemetery corporation, and the Court said: "There was evidence that the president acted for the company in the sale of other lots on other occasions, from which an authority to act in the present case would be inferred, but if it were otherwise it would not justify a non-suit. The defendant had received moneys of the plaintiff, 30 and in accepting the same it could not repudiate the means by which they had been obtained." I submit that is the unanimous opinion of the Court of Errors and Appeals, in an opinion by Mr. Justice Lloyd, and it estops the corporation from now coming in, the

corporation having received the money, they are now estopped from attempting to prove lack of authority.

The Court: For what was that suit? What was the cause of action? For what? Suing for what?

Mr. Van Riper: The case is very brief. It says,
10 “The plaintiff entered into an agreement in writing to purchase certain lots.” It does not give any information as to what the details were.

The Court: I assume it was a payment of money for lots.

Mr. Van Riper: Yes. “The plaintiff entered into an agreement in writing to purchase certain lots from the cemetery company.”

20 The Court: That is a little different situation from the one here.

Mr. Bourgeois: They could not very well sell the lots without the corporation knowing it.

Mr. Van Riper: No more could you sell bonds without the corporation knowing it.

The Court: Go ahead.

30 (An exception was noted for the plaintiff.)

Q. Was there ever any corporate action on it, any motion made, motion passed, vote passed?

A. No, no.

(No cross-examination.)

WILLIAM C. BOYER, SWORN

Direct examination.

By Mr. Bourgeois:

Q. Mr. Boyer, you live where?

10

A. Atlantic City.

Q. How long have you lived in Atlantic City?

A. Since 1909.

Q. Are you familiar with the Boardwalk Securities Company?

A. Yes, sir.

Q. Hold any office there?

A. Yes, sir.

Q. Own any stock in it?

A. Yes, sir.

20

Q. What office do you hold?

A. Secretary.

Q. Do you know anything about the Board of Directors?

A. Yes, sir.

Q. Who were they, if you know—were you secretary in 1926?

A. Yes, sir.

Q. Who were the Board of Directors at that time? Who composed it?

30

A. Mr. S. Ojserkis, Mr. Lapres, Mr. Gordon, myself, Mr. Perskie, Mr. Beyer, Judge Higbee, Mr. Blatt.

Q. I show you a letter marked exhibit P1 under date of June 22, 1926 and ask you if you ever saw

that letter before, and if you did, what was the earliest date?

A. I have seen this letter before today, yes, sir.

Q. When did you first see it?

A. The latter part of—let me see. 1933. April 1933.

Q. See this particular letter or a copy of it?

10 A. I may have seen this letter. I saw a copy of it at the time that Senator Edge wrote in asking us to buy back some bonds.

Q. Now, prior to the time when you were requested or asked to buy back the bonds in 1933, I suppose by Mr. O'Neill, had you prior to that time ever seen that letter?

A. No, sir.

20 Q. You say you are secretary of the Board. Was there ever any Board action before the Board of Directors concerning the subject matter of that letter?

Mr. Van Riper: I have made my objection and it has been ruled upon, but if the witness is to testify as secretary it seems to me he should testify from his minutes, if he is testifying in that capacity.

30 The Court: Can it be conceded that there is no resolution or minute of any express authority?

Mr. Van Riper: I haven't any definite information as to whether there was or not.

The Court: I may say that no evidence of any

resolution or minute of any express authority has ever been disclosed.

Mr. Van Riper: I am perfectly willing to have the witness testify to that as coming from the minutes.

Q. Mr. Boyer, I show you a book purporting to be the minutes of the Boardwalk Securities Company and ask you to examine it and tell me what it is. 10

A. These are the minutes of the meetings of the Board of Directors of the Boardwalk Securities Corporation.

Q. Have you made a search of those minutes to ascertain if there is any vote, resolution or any express authority to Mr. Ojserkis to write the letter of June 22, 1926, which you have just had?

A. Yes, sir.

Q. Is there any such there?

A. No, sir. 20

Q. Either by vote, resolution or other means?

A. No, sir.

Q. No express authority? Were you present at all of the meetings of the Board?

A. All of the meetings that I was in Atlantic City, yes, sir.

Q. Were you present at all of the meetings since the corporation was incorporated?

A. Whenever I was in Atlantic City, yes, sir.

Q. Were you in Atlantic City at or about the time of June 22, 1926? 30

A. Yes, sir.

Q. Was there ever any action taken by the Board of Directors concerning this letter marked P1, this letter of June 22nd?

A. No, sir.

Q. Was there ever in the Board meetings any discussion of that letter or the contents of it?

A. No, sir.

Q. How many directors were there? Do you recall?

A. I think about ten or eleven.

10 Q. And how many stockholders?

A. In the neighborhood of two hundred.

Q. Where were those stockholders? Where did they principally live?

A. In Atlantic City.

Q. Some outside of the City?

A. Yes, sir.

Q. What proportion would you say lived in Atlantic City and what proportion out?

20 A. I would say eighty-five or ninety per cent lived in Atlantic City.

Cross-examination.

By Mr. Van Riper:

Q. Mr. Boyer, what does this minute book represent?

A. It is the things that transpired at the meetings of the Board of Directors.

30 Q. The things that transpired at the meetings of the Board of Directors? What does it represent with reference to the business of the corporation which was conducted?

A. This includes such action as was brought before the Board and approved by the Board of Directors.

Q. What part of the company's business was brought before the Board?

A. Do you care for me to read any particular one?

Q. I am asking you in a general way. What part of the company's business was brought before the Board? I am not asking you to read anything in particular.

A. The purchase of securities, the payment of 10 bills, the declaration of dividends.

Q. Go ahead.

A. That's about all.

Q. Well, your company did other things besides purchasing securities, paying bills and declaring dividends, didn't it?

A. If they were discussed at the Board, they were recorded on the minutes.

Q. Did your company do anything else besides purchase securities, pay bills and declare dividends? 20

A. We sold securities.

Q. That is where you got the dividends from?

A. Yes, sir.

Q. And the sales of your securities were not reported to the Board, were they?

A. No, sir.

Q. Who sold the securities?

A. I sold some; Mr. Ojserkis sold some.

Q. Anybody else?

A. Not that I recall.

30

Q. You and Mr. Ojserkis were the active officers in charge of the conduct of the company's business, weren't you?

A. Yes, sir.

Q. And you were both there at the company's office practically all the time?

A. Yes, sir.

Q. And you were dividing your time between the Boardwalk Securities Corporation and some other work which you had?

10 Mr. Bourgeois: Objected to as irrelevant and immaterial.

Q. And you never reported any sales which you made to the Board of Directors?

A. No, sir.

Q. Mr. Ojserkis never reported any sales which he made to the Board of Directors?

A. No, sir.

20 Q. Did the Board of Directors ever ask you for any information as to your sales?

A. No, sir.

Q. Never asked you for any?

A. No, sir.

Q. Did you ever hear discussed at a meeting of the Board of Directors this letter that has just been shown to you, the letter to Senator Edge, under date of June 22, 1926?

A. I did not.

30 Q. Did you ever hear discussed at a meeting of the Board of Directors any letter or agreement to repurchase Straus bonds?

A. No, sir.

Q. Did you ever report to the Board of Directors any letter or agreement entered into on behalf of the company or through its officers to repurchase Straus bonds?

A. No, sir.

Q. You knew they were in effect, didn't you?

A. No, sir.

Q. You signed some, did you not?

Mr. Bourgeois: I object. What are you talking about?

10

Mr. Van Riper: Letters to repurchase Straus bonds at 99.

Mr. Bourgeois: You mean he signed some letters?

Mr. Van Riper: Yes.

Mr. Bourgeois: I object.

The Court: He has already testified he never 20
knew of any such agreement and now he is being
asked if he did not sign some.

Q. You say you never knew of any? Didn't you
sign some, Mr. Boyer?

Mr. Bourgeois: I object to that as irrelevant and
immaterial.

The Court: The objection will be overruled. 30

(An exception was noted for the defendant.)

Q. Didn't you sign some such letters?

A. I may have signed some letters.

Q. You may have? Did you or didn't you?

A. Yes, sir.

Q. Why did you say a moment ago you didn't know of any?

A. I was referring to this letter on these minutes here of June 26th.

10 Q. Didn't you understand my question when I said to you did you know of any letters that were out agreeing to repurchase these Straus bonds and you said no, did you not?

A. I did.

Q. Meaning that you didn't know of any such letters? Is that right?

A. I had in mind the Edge letter, Senator Edge letter.

Q. My question didn't say Senator Edge's letter, did it, Mr. Boyer?

20 A. I didn't understand your question.

Q. I am very sorry. All right. I show you a letter written on the stationery of the Boardwalk Securities Corporation dated December 12, 1927, addressed to Mr. H. S. Kline, and ask you if you signed that letter?

Mr. Bourgeois: I object to that as irrelevant and immaterial.

30 The Court: I am going to permit these witnesses to identify their signatures and have the documents marked for identification.

A. Yes, sir, I signed that letter.

Mr. Bourgeois: I have no objection to that, but when you are going to try to introduce a document, as I understand the practice, you do not identify the letter before the jury. You simply show the letter to the witness and say, "Is that your signature?"

The Court: That is all.

10

Mr. Bourgeois: He did more than that.

Mr. Van Riper: I beg your pardon. I didn't.

(The question was repeated.)

Mr. Van Riper: The witness answered yes, I think, didn't he?

A. I signed this letter.

20

(The letter was marked P13 for identification.)

Q. I show you one on the stationery of the Boardwalk Securities Corporation, dated July 22, 1927, addressed to Colton Manor Hotel Company and ask you if you signed that letter.

Mr. Bourgeois: I object to these letters being identified by name. If he signed them I have no ob- 30
jection to it.

Q. I show you this letter and ask you if you signed it?

A. Yes, sir.

(The letter referred to was marked P14 for identification.)

Q. Now, Mr. Boyer, was the writing or the existence of either one of those letters ever reported to your Board of Directors?

A. No, sir.

10 Q. Nobody asked you for them?

A. No, sir.

Q. When was the first time that the so-called Edge letter—no misunderstanding now; I am talking about the letter to Senator Edge under date of June 22, 1926. When was the first time that that letter was discussed at a meeting of the Board of Directors?

A. In April 1933.

Q. Will you turn to it, please?

20 A. We didn't have any meeting in April.

Q. I don't care when you had the meeting. Then you were in error about that, when you said it was discussed at a meeting in April 1933? Is that right?

A. I mean when we had the next meeting following the receipt of that letter.

30 Q. I want to be very fair to you. I don't want to put you in an unfavorable light, but in fairness to yourself you ought to tell us what you mean. Don't tell us one thing and then when you find out it isn't so tell us you meant something elce. I don't want to take any advantage of you. Now show me the minute at which meeting the Edge letter was discussed.

A. August 1, 1933.

Q. August 1, 1933? What took place at that meeting?

A. Meeting of the Board of Directors.

Q. Yes. What did they do after they got around the table?

A. "The minutes of previous meeting were read and approved. The Board acknowledged being served with papers in the suit of Senator Edge vs. The Boardwalk Securities Corporation, and the same were delivered to Mr. Elwood F. Kirkman, Esq., with instructions to confer with George Bourgeois, Esq. On motion, adjourned." 10

Q. Is that all?

A. Yes, sir.

Q. The Board acknowledged that they had been served by the Sheriff? Is that right?

A. They had been served with the papers.

Q. Suit had been started?

A. Yes, sir.

Q. And they referred it to Mr. Kirkman, their solicitor? 20

A. Yes, sir.

Q. No discussion about it?

A. No, sir.

Q. Nothing done about it so far as discussion was concerned?

A. Nothing in the minutes.

Q. Well, the minutes are an accurate report of what happened at the meeting? Is that so?

A. Well, that covered it. 30

Q. No director asked Mr. Ojserkis about this letter that was written in 1926, did he?

A. I don't remember.

Q. Well, if he had you would have put it in the minutes, wouldn't you?

A. Yes, sir.

Q. And no one asked you about whether or not you knew about this letter that was written in 1926, did they?

A. No, sir.

Q. And no one asked Mr. Ojserkis whether he had authority to write that letter in 1926, did they?

10 A. No, sir.

Q. And no one asked him why he wrote it?

A. No, sir.

Q. And there was no discussion on behalf of any of the directors when they found out they had been served by the Sheriff with a suit which Edge was bringing against them for \$150,000 or \$200,000—there wasn't any discussion about that at all, was there?

20 A. No, sir.

By Mr. Bourgeois:

Q. Mr. Boyer, do you know of anything that could have been done if they had discussed it?

Mr. Van Riper: I object.

The Court: The objection is sustained.

30

ROBERT BEYER, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Beyer, you live where? 10

A. Atlantic City.

Q. How long have you lived in Atlantic City?

A. Since 1890.

Q. In business here?

A. Yes, sir.

Q. What?

A. Poultry, butter and eggs.

Q. Do you know a corporation named the Boardwalk Securities Company?

A. Yes, sir. 20

Q. What is your connection with it, if you have any?

A. None at all now.

Q. Did you ever have any connection with it?

A. Yes, sir.

Q. From what time?

A. From the time it started in 1925 until 1933.

Q. Your connection was stockholder or employe?

A. Stockholder and director.

Q. How many years were you a director? 30

A. That would be from 1925 to the spring of 1933; eight years.

Q. I show you Exhibit P1, which is a letter written by Sigmund Ojserkis on June 22, 1926, and ask you whether or not that letter was ever the subject

of any vote, resolution or act of the Board of Directors?

A. No, sir.

Q. Was it ever discussed before the Board of Directors in your presence, when you were there?

A. No, sir.

10 Cross-examination.

By Mr. Van Riper:

Q. What is your business, Mr. Beyer?

A. Chicken business. Poultry, butter and eggs.

Q. Butter and eggs? That is better than chickens.

A. Well, that is with it, too. Chickens, butter and eggs.

20 Q. How long have you been a director of the Boardwalk Securities Corporation?

A. How long was I or am I?

Q. You are out now, I understand?

A. Yes, sir.

Q. You have resigned. How long were you?

A. I imagine about eight years.

Q. You started in when the company started in 1925?

A. Yes, sir.

30 Q. How much time did you give to the transaction of the Boardwalk Securities Corporation's business, Mr. Beyer?

A. How much time?

Q. Yes.

A. Just once a month when we had a directors' meeting.

Q. At the directors' meeting?

A. Yes, sir.

Q. Who was the man in active charge who conducted the business of the corporation?

A. Mr. Ojserkis and Mr. Boyer.

Q. And the only time you gave was when you went to the meeting once a month?

A. Yes, sir.

10

Q. When you went to the meeting once a month, what was discussed, Mr. Beyer?

A. The purchases and bills payable.

Q. Sales ever discussed?

A. I can't recall.

Q. Can't recall?

A. No, I don't think so.

Q. What do you mean, you say you don't think so? You don't think they were discussed or you don't think you can recall?

20

A. I don't think they were discussed.

Q. You knew that the business of this corporation was buying and selling securities, did you not?

A. Yes, sir.

Q. And you knew that the only way you had of making money was selling that which you had already bought?

A. Right.

Q. And yet you say that the president of the corporation and the secretary, who were the men in active charge of the daily transaction of its business, made no report to the Board of Directors of sales which they made?

30

A. They did not.

Q. And as a director you never asked them for one?

A. No.

Q. You never heard any other director ask them for one, did you?

A. No.

Q. When did you get off the Board, Mr. Beyer?

10 A. 1933. About a year and a half ago.

Q. When was the first time that you ever heard about this case we are trying here now?

A. When was the first time?

Q. Yes.

A. I saw it in the papers.

Q. Were you a director then?

A. No, sir.

Q. You were not a director?

A. No, sir.

20 Q. And you were not a director at the meeting of August 1st or August 8th, whichever it is, 1933, when this matter was brought to the attention of the Board?

A. No, sir.

Q. You were not functioning at that time?

A. No, sir.

Q. Did you ever take any part in any discussions at the meetings of the Board of Directors?

A. Well, whatever showed up for discussion.

30 There wasn't a whole lot to be said.

Q. There wasn't much showed up, was there?

A. No. Didn't have a whole lot to do with the selling of it.

Q. Didn't have anything to do with the selling of it, did you?

William C. Boyer—Cross

A. No.

Q. Mr. Ojserkis and Mr. Boyer had to do with that?

A. Yes.

Q. They had all to do with it? Is that right?

A. Yes, I think they had.

10

WILLIAM C. BOYER, recalled.

Further cross-examination.

By Mr. Van Riper:

Q. Mr. Boyer, I show you this letter which has been marked P5 for identification and ask you if you know whether or not that was ever reported to the Board of Directors? 20

Mr. Bourgeois: I object.

Mr. Van Riper: I have asked him generally. I just now want to get a specific answer as to this particular letter.

Mr. Bourgeois: I don't think it is relevant.

The Court: I will admit it. I understood he did not report any. 30

Mr. Van Riper: Yes, but I wanted to get it specific as to this.

A. It was not.

Q. Now I ask you whether or not there was ever a report made to the Board of Directors of a transaction with Dr. Albert J. Feyl?

Mr. Bourgeois: I object to that.

- 10 Mr. Van Riper: I am making my questions very general because I don't want to incorporate in the question something that ought to be proven by testimony, and trying to be fair to the defendant in doing that.

Mr. Bourgeois: Unless it is prior to this transaction I don't see any relevancy in this line of questioning.

- 20 Mr. Van Riper: It may and it may not be. I don't know when it was, and I think I have a right to inquire from the witness and find out.

Mr. Bourgeois: I think he ought to find out first from the witness whether he can prove it or not.

Mr. Van Riper: I will try to find it out from the witness.

- 30 The Court: Go ahead.

Q. Do you know about a transaction—you know Mr. Feyl, do you not?

A. Yes, sir.

Q. He is one of your directors, isn't he?

A. Yes, sir.

Q. Do you know about a transaction between Mr. Feyl and the Company with reference to the purchase of some bonds?

A. I know Mr. Feyl bought some bonds.

Q. Do you know whether or not that purchase was ever reported to the Board of Directors?

A. It was not.

10

Q. It was not reported?

A. No, sir.

Q. Do you know whether or not there was an agreement in connection with it?

Mr. Bourgeois: I object to that.

Mr. Van Riper: It seems to me he can answer that yes or no.

20

The Court: I suppose that is immaterial at the present stage of the testimony, if it were not reported. He says none of it was reported. I presume you mean by that that no part of the sale or transaction was reported, don't you?

The Witness: Yes, sir.

Q. Who made the purchases for your corporation of securities?

30

A. I made some; Mr. Ojserkis made some.

Q. And you would report those to the Board?

A. Yes, sir.

Q. And they would confirm your action?

A. Yes, sir.

Q. And the approval of your action, the confirmation of it, came after you made the purchases?

A. Yes, sir.

Re-direct examination.

By Mr. Bourgeois:

10

Q. You testified that this book was the minute book of the company?

A. Yes, sir.

Mr. Bourgeois: I want to offer this in evidence.

Mr. Van Riper: I object because of the rule that is set forth in the cemetery case, that in view of the corporation having received the money through
20 the acts of its officers, it cannot now repudiate it.

The Court: The minute book may be admitted.

(An exception was noted for the plaintiff.)

(The minute book was marked Exhibit D2.)

Q. I show you, Mr. Boyer, what are indicated as by-laws of the Boardwalk Securities Corporation
30 and ask you to tell me what they are?

A. The by-laws of the Boardwalk Securities Corporation.

Mr. Bourgeois: I offer in evidence the by-laws of the Boardwalk Securities Corporation.

William Gordon—Direct

Mr. Van Riper: I would like to object to their admission in evidence and I would like emphatically to call the Court's attention to the case of Boston Food Products Company v. Wilson & Company, 199 Northeastern, 637.

The Court: The objection will be overruled. The case is not limited to the issue of apparent author- 10
ity.

(An exception was noted for the plaintiff.)

(The by-laws were marked Exhibit D3.)

WILLIAM GORDON, SWORN.

20

Direct examination.

By Mr. Bourgeois:

Q. Mr. Gordon, where do you live?

A. I live in Philadelphia.

Q. You have a business?

A. No, I resigned from business about eight years ago.

Q. You formerly had a business down here? 30

A. Atlantic City, for thirty-five years.

Q. Now, Mr. Gordon, are you familiar with a corporation known as the Boardwalk Securities Corporation?

A. I am.

Q. How long have you known of that company?

A. Since its organization in 1925 up to the present time.

Q. What has been your relation to it?

A. I have attended the Board meetings.

Q. Were you a stockholder?

A. Stockholder and director.

10 Q. And director, and you attended the Board meetings?

A. Yes.

Q. With what degree of regularity?

A. Well, I think I missed very few. I couldn't just enumerate how many, because we got no salary, so we didn't keep any record of it very closely.

Q. I show you Exhibit P1, which is a letter dated June 22, 1926, signed by Mr. Ojserkis, and addressed to Honorable Walter E. Edge, and ask you

20 to look over that letter —

A. I have seen the contents of this letter, Mr. Bourgeois.

Q. —and tell me whether or not the subject matter of that letter was ever a matter before the Board of Directors of the Boardwalk Securities Corporation, either in the form of a resolution, a vote or other form, other manner?

A. Never had any knowledge of it at all. I never heard of it.

30 Q. Was it ever discussed?

A. I never heard of it.

Q. When did you first learn of it?

A. Only recently, when we got the notice of suit sometime here—I think sometime last year, it seems to me. I couldn't recollect the exact time.

Q. Time goes rapidly as we get older.

A. Yes, it does.

Q. It was year before last. Then until you got the notice of the suit you hadn't heard of it at all?

A. Never had heard of it, no.

Q. Well, did Mr. Ojserkis have authority to sign such a letter as that?

10

Mr. Van Riper: I object. That calls for a conclusion in that form.

The Court: I think it does.

Q. Did the Board of Directors ever at a Board meeting authorize Mr. Ojserkis to sign that letter?

A. I never heard of it. Never knew of it. It wasn't at any attendance I was there. No authority given to him at all to sign a letter of that kind. 20

Cross-examination.

By Mr. Van Riper:

Q. You attended the meetings pretty regularly, Mr. Gordon?

A. Yes, I did.

Q. Of course, you didn't spend any other time in the conduct of the corporation's business except to attend Board meetings? 30

A. None at all.

Q. What is your business, or what was your business?

A. I was in the meat business for thirty-five years.

Q. And Mr. Ojserkis and Mr. Boyer were the active officers in charge of the conduct of the corporation's business, were they not?

A. They were.

Q. And they reported to the Board of Directors such things as were reported to the Board? Is that right?

10 A. Surely.

Q. And the Board of Directors acted only upon such things as Mr. Ojserkis and Mr. Boyer reported to them?

A. The report was generally approved.

Q. Beg pardon?

A. The report monthly was generally approved.

Q. Never any dissention over approving it?

A. No.

Q. That was done as a matter of course?

20 A. Yes.

Q. The report was approved as a matter of course? They didn't report sales to you, did they?

A. None at all.

Q. And the Board of Directors didn't ask them to report the sales?

A. Not in my presence.

Q. The Board of Directors, so far as you know, never made any inquiry of them as to the manner in which sales were made?

30 A. No.

Q. They never reported any correspondence to the Board of Directors?

A. Never seen any.

Q. Of any kind?

A. Not that I know of.

Q. Have you ever heard any of the directors at a Board meeting ask them for any correspondence?

A. No.

Q. They never reported to the Board of Directors any correspondence between Senator Edge or his representative, Mr. O'Neill, and Mr. Ojserkis in 1931?

A. No.

10

Q. You were at the meeting of the Board in August 1933, when they told you that they had been served with summons in a suit by Senator Edge?

A. I think at that time a letter was read off. There was a letter at that time read off about bringing suit.

Q. The minutes which are in evidence, Mr. Gordon, say that the Board acknowledged being served with notice in the suit of Edge against Boardwalk Securities Corporation. Does that refresh your memory any? 20

A. Well, I can't just recall the facts of it, but I know there was some letters, the company was notified of a suit, anticipation of a suit.

Q. Anyhow, the suit was called to the attention of the directors?

A. Yes.

Q. Would you say at that meeting?

A. I think it was.

Q. In August 1933?

30

A. I couldn't verify the date exactly.

Q. Well, was it sometime about that time?

A. About that time.

Q. There was no action taken by the Board of Directors about it?

A. No direct action except they referred it to get counsel, I think Mr. Kirkman.

Q. They referred it to counsel, and after that time, from that time on down to this, there has been no action by the Board of Directors with reference to this suit?

A. Not direct action.

10 Q. And Mr. Ojserkis is still president of the Boardwalk Securities Corporation?

A. He is.

Q. And I think you said that so far as you know there had never been any request from any of the directors for any report as to the sales or the manner in which they were being sold?

A. No.

Q. Or the terms on which they were being sold?

A. No.

20 Q. Everybody having relied upon and having confidence in Mr. Ojserkis?

A. I believe we had them take full charge of that and their report was accepted and approved.

Q. And you expected them to take full charge of it?

A. Yes.

Q. Is that right?

A. We expected them to take charge of it.

Sigmund Ojserkis—Cross

SIGMUND OJSERKIS, recalled.

(Further cross-examination.)

By Mr. Van Riper:

Q. Mr. Ojserkis, earlier this afternoon I showed
you this letter marked P6 for identification and
asked you if you had received it and you said you
thought you had? 10

A. Yes.

Q. Since the last recess here, the recess we just
had a moment ago, have you refreshed your memory
with reference to that?

A. I asked Mr. Kirkman if there is any copies
of an answer to that letter amongst his papers. 20

Q. Have you refreshed your memory, then, as
to whether you did receive this letter?

A. I didn't deny receiving it.

Q. Are you willing to say now that you did re-
ceive it?

A. Yes.

Q. And did you reply to it?

A. I replied to it.

Q. Have you a copy of the reply?

A. Yes. 30

Mr. Van Riper: May I see it?

(Mr. Kirkman handed a paper to Mr. Van Riper.)

Q. I show you this and ask you if that is a copy of the reply?

A. Yes, sir.

(The paper referred to was marked P15 for identification.)

10

DEFENDANT RESTS.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

MAX E. BLATT, sworn.

Direct examination.

20

By Mr. Van Riper:

Q. Where do you live, Mr. Blatt?

A. Ventnor.

Q. What is your business?

A. Merchandising.

Q. Beg pardon?

A. Merchandising.

Q. You are the president of M. E. Blatt & Company, the department store across the street?

30

A. Yes, sir.

Q. Are you acquainted with the Boardwalk Securities Corporation?

A. Yes, sir.

Q. For how long a time have you been acquainted with that corporation?

Max E. Blatt—Direct

A. From 1925 on.

Q. That was at the time it was organized?

A. Yes, sir.

Q. Were you ever a director of the Boardwalk Securities Corporation?

A. Yes, sir.

Q. For how long a period were you a director?

A. Until about 1929, I think. 1925 to 1929. 10

Q. You say until about then. From when? From the date of the organization?

A. Yes.

Q. At the time you were a director Mr. Ojserkis was president, was he?

A. Yes.

Q. And Mr. Boyer was secretary?

A. Yes, sir.

Q. What was the arrangement there so far as the conduct of the active business of the corporation was concerned, Mr. Blatt? Who carried it on? 20

A. Mr. Ojserkis and Mr. Boyer.

Q. They were the active men in charge?

A. The only ones, yes.

Q. Did they carry on under instructions from the Board of Directors or did they carry on and report to the Board?

A. No. They attended to all the business and reported to the Board.

Q. And the Board knew what they reported to them? Is that it? 30

A. Yes, whatever they reported.

Q. Do you know of any questions at any time when the Board questioned any acts of Mr. Ojserkis or Mr. Boyer?

A. No, sir.

Q. Or called upon them for any further or additional information?

A. No, sir.

Q. Now, while you were a director, Mr. Blatt, did you have knowledge of a letter written to Senator Edge in June 1926, by Mr. Ojserkis, on the
10 stationery of the Boardwalk Securities Corporation, referring to the repurchase of certain Straus bonds at 99?

Mr. Bourgeois: I would like to have the time fixed there.

Mr. Van Riper: While he was a director. I only want yes or no to this.

20 Mr. Bourgeois: I understand that, but I want to know the time, too, whether it was sometime after or before.

The Court: He may say no, and that will end it. Yes or no.

A. I never saw the letter.

Q. Did you have knowledge that one had been written?

30 A. Yes, that that arrangement was made.

Q. Where did you get that knowledge from?

A. Mr. Ojserkis.

Q. How did you get it? Did he tell you something?

A. Yes.

Max E. Blatt—Direct

Q. What did he tell you?

A. Told me he sold Senator Edge ——

Mr. Bourgeois: I object.

Mr. Van Riper: It seems to me it is certainly competent to show knowledge by a member of the Board of Directors, whether it was before or after 10 the letter was written.

Mr. Bourgeois: That is not binding on the company and it is not relevant, unless it is for the purpose of contradiction. If it is a question of contradiction, that is different.

The Court: Does not that make this particular question proper? Was not Mr. Ojserkis asked if he ever reported to any director that he had made 20 this arrangement with Senator Edge and he said no?

Mr. Bourgeois: I do not recall.

Mr. Van Riper: He was asked if he ever reported to the directors.

Mr. Bourgeois: When he was asked if he ever reported to the directors, that means to the directors at a meeting. The fact that you report to a director not in a meeting does not bind the company at all. 30

The Court: You take it that is what he meant, not at a meeting?

Mr. Bourgeois: He has not said that.

The Court: I am talking about the interrogation of Mr. Ojserkis, when he said he never reported.

Mr. Bourgeois: Well, I don't recall that. I can't tell you what I think he said, because I don't
10 recall that part of the testimony.

The Court: Of course, it is highly important with respect to the propriety of this question. If it is mere contradiction, of course, it is material.

Mr. Van Riper: It is a sure thing Mr. Ojserkis denied he ever reported this to the directors, but, in addition to that, it seems to me it is competent to show that a director had knowledge, to show
20 what the directors did with it.

Mr. Bourgeois: He may have said that he had not reported it to the directors, but that would mean, I assume, to the directors in session. He ought to have followed that up and found out, because I submit to your Honor that even though Mr. Ojserkis might have stated to Mr. Blatt that that letter had been written, unless it was made
30 to a meeting of the Board of Directors, or else made to him at a time when he was charged with that particular duty in hand, it would not be relevant.

Mr. Van Riper: He was a director at that time and he was charged with responsibility.

Max E. Blatt—Direct

The Court: Mr. Bourgeois' statement, of course, is correct ordinarily, that knowledge acquired by an individual in an individual capacity, which resulted in individual activity, is not knowledge to a corporation of which he may be a director. That rule is well settled, isn't it?

Mr. Van Riper: Yes, that is true, but I still 10
think the question is competent for the purpose of
contradicting what the witness Ojserkis said.

The Court: That is what I am trying to ascertain. I cannot recall all of the testimony in its details. Neither can counsel. The question remains in my mind whether or not Mr. Ojserkis was asked if he reported to any of the directors the writing of this letter.

Mr. Bourgeois: The question as I recall was if 20
he reported to the directors. Not to any of the
directors, but if he reported to the directors, because I am quite certain if he had been asked if he had reported it to any of the directors I would have objected.

Mr. Van Riper: If you want to ask him now, I am satisfied.

The Court: I am not inclined to allow the ques- 30
tion unless it has a basis in the case or unless it is
to be further pursued and connected and shown
that there was knowledge on the part of the corporation, so to speak, which would be more than
mere knowledge on the part of one director.

Mr. Van Riper: The purpose of it is to show that it was reported to Mr. Blatt as a director of the corporation.

The Court: In his capacity as a director?

Mr. Van Riper: Well, that he had the knowledge.
10 If he had knowledge personally, he had it as director, also.

The Court: That does not follow, because it is not the knowledge of a director. It is a question of the knowledge of the corporation. As I have already said, knowledge that an individual may acquire in connection with his own personal activities is not taken in law to be knowledge on the part of a corporation. For that reason I do not think the
20 question is proper, but there remains the question of whether or not there has been any foundation laid for this question in the cross-examination of Mr. Ojserkis. You are running a risk, so to speak, if there is none.

(The question was repeated.)

Mr. Bourgeois: I have objected to that on the ground it is not relevant and it is not material
30 and it does not go to the question of contradicting any statement made by Mr. Ojserkis while on the stand.

The Court: I haven't any knowledge sufficiently definite in my mind to say that such an inquiry

Max E. Blatt—Direct

was made of Mr. Ojserkis. Being of that state of mind, I sustain the objection.

(An exception was noted for the plaintiff.)

Q. Mr. Blatt, in 1926, did you purchase some Straus bonds from the Boardwalk Securities Corporation?

10

A. Yes, sir.

Q. With whom did you do business at the time you purchased them?

A. Mr. Ojserkis.

Q. When you purchased them did you have an agreement with reference to selling them back to the corporation?

A. Yes, sir.

Q. What was the agreement?

20

Mr. Bourgeois: I object unless it is shown when those bonds were purchased and shown it was prior to the date of the letter to Senator Edge.

Q. Do you know what dates you purchased the bonds?

A. Yes, sir.

Q. Will you give us the dates, please?

A. 11/15/1926.

30

Mr. Bourgeois: I object.

Q. Were they all purchased on that day?

A. 11/15/1926, 12/4, 12/4 and 10/1/1927.

Q. Then the first purchase was in October? Is that it?

Mr. Bourgeois: November.

Mr. Van Riper: October, he says.

A. That is 1927. November 15, 1926, is the first.

Mr. Van Riper: That is still within the time in
10 which we made some of the purchases set forth
in this complaint which we have proven as having
completed and carried out, and I submit we are cer-
tainly, in showing a course of conduct, entitled to
prove a conduct of the officers of this corporation
over a period of time and not have ourselves held
down to what they did on one particular day.

Mr. Bourgeois: I object on the ground it is not
relevant because it does not show any implied au-
20 thority or any apparent authority in Mr. Ojserkis
for the writing of the letter of June 22, 1926. If
they are going to contend that all these purchases
made by Senator Edge come within the scope of
that letter of June 22nd, then this testimony I sub-
mit is irrelevant. If they are going to withdraw
from that position and contend that these latter
bonds they speak of, that were purchased after
Mr. Blatt purchased these bonds—then that is a
different proposition. Then that might raise some
30 implied authority or apparent authority that would
have influenced Senator Edge in making the pur-
chase of these later bonds. He purchased, as the
Judge says, some few bonds, either for himself or
for his family, after the 15th of November, 1926.
I don't know what they are going to claim, so I am

Max E. Blatt—Direct

going to make my objection based on the letter of June 22, 1926, that it is immaterial and irrelevant because it shows neither implied authority nor apparent authority.

The Court: Of course, apparent authority does not rest upon the doctrine of estoppel at all. It is not a question of whether or not a corporation has influenced and actually induced a purchaser to rely upon a certain fact and therefore is estopped from denying it. That is not to be applied to apparent authority. It may be that a dealer with a corporation may have had no knowledge at all that the officer with whom he dealt had been transacting business of that nature for the corporation, but if it may in Court be proved that even though he did not have knowledge, he made such a transaction with the officer and that the officer was carrying on business of the same nature for the corporation, making agreements of the same nature and character at about the time, such proof tends to establish apparent authority, whether the particular purchaser knew of it or not. The objection will be overruled. I will permit it as a circumstance which the jury may consider, subject to such instructions as I shall give them in my charge.

(An exception was noted for the defendant.)

Q. Now, Mr. Blatt, tell us what the agreement was, will you, please?

A. That they will repurchase these bonds at any time at the loss of one point, at 99¢ on the dollar.

Q. You paid how much for them? Par?

A. Par.

Q. Can you tell us what the bonds were, what kind of bonds?

A. They were Park Place, Newark. These were Straus bonds, real estate bonds.

Q. All of them?

10 A. Yes, all real estate bonds. Hearst-Brisbane

Q. That is all I want to know. They were all Straus bonds?

A. Yes, sir.

Q. You bought those with that arrangement at the time you were director?

A. Yes.

Q. Do you still have the bonds?

A. No, sir.

20 Q. What did you do with them?

A. They repurchased them July 31, 1929.

Q. For how much?

A. 99.

Q. Did you get the money?

A. Sure.

Cross-examination.

By Mr. Bourgeois:

30

Q. All your dealings were with Mr. Ojserkis?

A. Yes, sir.

Q. You didn't report that purchase to the Board of Directors, did you?

A. No, I did not.

Dorothy Blatt—Direct

Q. And you didn't report getting the money back to the Board of Directors, either, did you?

A. No. That wasn't my job.

Q. I suppose you did get your share of the dividends that came from the sale and purchase?

A. Yes, that is what I was a stockholder for.

Q. You don't know who bought them? All you know is you sold them back to Mr. Ojserkis, as I 10 understand?

A. To Mr. Ojserkis, yes.

By Mr. Van Riper:

Q. I didn't get the date at which you said you resold them. What date?

A. July 31st—no, March 7, 1929.

20

DOROTHY BLATT, SWORN.

Direct examination.

By Mr. Van Riper:

Q. Miss Blatt, where do you live?

A. Atlantic City.

Q. And you are a sister of Mr. Max Blatt, who 30 was just on the stand?

A. Yes.

Q. I show you a letter dated August 26, 1926, marked P12 for identification and addressed to Miss Dorothy Blatt. Are you the lady referred to in there?

A. I am.

Q. Was that letter received by you?

A. Yes.

Q. You received it through the mail or did someone give it to you?

A. No. Mr. Ojserkis gave it to me.

Q. It was handed to you by Mr. Ojserkis?

10 A. It was.

Q. And at or about the time the receipt of that letter did you purchase any bonds from the Boardwalk Securities Corporation?

A. I did.

Q. What type bonds did you purchase?

Mr. Bourgeois: I object.

A. Straus bonds.

20

Mr. Bourgeois: I object to the question, the kind of bonds she purchased.

The Court: The objection will be overruled.

Q. You said Straus bonds, I believe?

A. With the exception of \$5000 worth. I think they were Staley bonds. They were not Straus bonds.

30 Q. This letter refers to Straus bonds, doesn't it?

Mr. Bourgeois: I object to that. The letter is not in evidence.

(No cross-examination.)

Albert J. Feyl—Direct

ALBERT J. FEYL, SWORN.

Direct examination.

By Mr. Van Riper:

Q. Mr. Feyl, where do you live? 10

A. Ventnor.

Q. You are a director of the Boardwalk Securities Corporation, are you?

A. I am.

Q. And you have been for how long?

A. Since its inception.

Q. Did you make a purchase of bonds from the Boardwalk Securities Corporation with an agreement connected with it?

A. Yes. 20

Q. Will you tell us when?

A. I think it was in September, 1926.

Q. And what was the agreement?

Mr. Bourgeois: I object, if your Honor please. That is not relevant in this case on any theory that I can think of, except introducing a new issue. What have we got to do with his individual agreement he may have made? The question was if he had bought bonds from the Boardwalk Securities Company. What difference does it make to us about what agreement he made with the Boardwalk Securities Company? How can that show apparent authority or implied authority in Mr. Ojserkis? What they are trying to do is show apparent authority in Mr. Ojserkis. 30

Mr. Van Riper: If we can show usage —

The Court: I suppose the transaction went through either Mr. Boyer or Mr. Ojserkis?

Mr. Van Riper: Frankly, I will have to ascertain from the witness. This is one witness I haven't
10 any information from in advance.

Q. With whom were your dealings, Mr. Feyl?

A. Mr. Ojserkis, as I recall it.

Q. He was president of the corporation at that time?

A. Yes.

Q. The arrangements were with Mr. Ojserkis, you say?

A. Yes.

20 Q. What was the agreement?

Mr. Bourgeois: I object because he says this took place in September, after the date of the letter, and I submit that that is irrelevant and immaterial as being evidential of apparent authority.

Mr. Van Riper: The hour is getting late and I would like to close this testimony tonight, and I won't press it.

30

(No cross-examination.)

Paul J. O'Neill—Direct

PAUL J. O'NEILL, recalled.

Direct examination.

By Mr. Van Riper:

Q. Mr. O'Neill, sometime around the 1st of Oc- 10
tober 1927, did you have a conversation with Mr.
Ojserkis with reference to some Straus bonds?

A. I did.

Q. After you had that conversation with Mr.
Ojserkis did you write this letter which I show
you, marked P6 for identification?

A. I did.

Q. You sent it, of course? The receipt has al-
ready been acknowledged by Mr. Ojserkis?

20

Mr. Van Riper: I offer the letter in evidence.

Mr. Bourgeois: I object to it.

Mr. Van Riper: I certainly think it is evidential
for the purpose of contradiction.

Mr. Bourgeois: I object to its admission. I
think it is not admissible or relevant.

30

The Court: The question is whether or not it is
a contradiction, whether or not it tends to contra-
dict the testimony of Mr. Ojserkis in the particular
that he heard nothing?

Mr. Van Riper: That is one particular, yes.

Mr. Bourgeois: I simply think it is not relevant. I do not think it is contradiction.

Mr. Van Riper: It certainly is a contradiction of the statement that he heard nothing until 1933.

Mr. Bourgeois: There is no contradiction in it
10 that I can see.

The Court: It relates to the agreement he made with the defendant.

Mr. Bourgeois: I think it is immaterial. It is a self-serving declaration, and I think it is irrelevant and immaterial.

The Court: The reason assigned for its admis-
20 sion is that Mr. Ojserkis testified on direct examination that he never heard anything further from Senator Edge about the alleged agreement of repurchase as contained in the letter of June 22, 1926, until demand was made in April, 1933.

Mr. Bourgeois: And then when it was shown to him he said he thought he had received that letter. Put them both in. Put that letter in and the answer.

30

Q. Mr. O'Neill, I understand that you don't have any record of having received an answer to this letter of yours of October 4, 1927?

A. I don't remember ever having received that letter.

Paul J. O'Neill—Direct

Q. You mean the answer of which this purports to be a copy?

A. No, sir, I never saw it until recess.

Mr. Van Riper: If Mr. Bourgeois says so, I am willing to admit that Mr. Ojserkis will say that he wrote the letter.

10

The Court: He did testify to that, didn't he?

Mr. Van Riper: Yes, he did.

(The letters previously marked for identification were marked Exhibits P6 and P15.)

Q. At the time you were making the subsequent purchases—I say subsequent; I mean subsequent to June 26th, I think you made the first purchase, or June 28, 1926, several purchases were made from time to time after that covering the bonds that are the subject matter of this suit. At the time you made the subsequent purchases did you have any conversation with Mr. Ojserkis? 20

A. Yes.

Q. What was the conversation?

Mr. Bourgeois: I object. That letter cannot be varied by oral testimony. If he had any additional conversations with Mr. Ojserkis, that should have been alleged in the complaint so we would have known what it was, because they would cover new purchases, but there is nothing in the complaint. The whole complaint is on this letter. The suit 30

is based on the letter and not on the verbal conversation at all, and I submit they cannot under the pleadings as they now are set up verbal conversations to supplement that letter.

10 The Court: That is quite true. The situation here now is whether or not this testimony is admissible as contradiction of the testimony given by Mr. Ojserkis. I have here a note that he was asked on cross-examination whether he didn't have subsequent conversations with respect to the purchase of bonds under the terms of the letter that he had written, with Mr. O'Neill, and he said he did not.

Mr. Bourgeois: Did not have?

20 The Court: Yes.

Mr. Bourgeois: Well, I don't remember that, but that may be correct, because I haven't any note of it; but even that being so, it would not give them an opportunity on rebuttal to come in and show what the conversations were. They would have a right to show by Mr. O'Neill contradictions, as it were, but they could not set up a new case on rebuttal of our case.

30 The Court: Of course, the broad contention you are making in this case, which I gathered from your opening, is that the plaintiff here did not assert this agreement in such a way as to indicate that it was a subsisting agreement from the time it was made up to the time he made a demand for the re-

purchase. The evidential tendency of the testimony of Mr. Ojserkis is that nothing more was said about it or done about it from that time on. The purpose of this testimony, I take it, is to rebut that. These are circumstances to which this witness now proposes to allude, if permitted, which are to the contrary to the testimony given by Mr. Ojserkis.

10

Mr. Bourgeois: I submit to your Honor that in view of the pleadings and the opening, the broadness of it, it was a part of their case to show on their main case all of the evidence they had to support that case, and they cannot on rebuttal offer evidence that they should have offered in their main case for anything outside of simply a new transaction that has been brought into the case by the defendant.

20

The Court: Well, it is not permitted for that purpose, to show a new transaction, nor is it offered for that purpose.

Mr. Van Riper: No. I offered this very testimony on my direct case and Mr. Bourgeois objected.

Mr. Bourgeois: That may be because it was not relevant then. What I am trying to put over is this: that Mr. O'Neill is brought here to contradict Mr. Ojserkis. He has testified contradicting Mr. Ojserkis. Mr. Ojserkis said that he did not have it and Mr. O'Neill says he did have it. That is the end of it, but he cannot go on then

30

and develop some new phase or some additional testimony in support of their original case.

10 The Court: The inquiry was made of Mr. Ojserkis, I am confident from my recollection of the testimony, whether or not he did not have such conversations with Mr. O'Neill concerning the purchase of bonds under the letter of June 22, 1926, and Mr. Ojserkis denied that he had such conversations. The objection will be overruled.

(An exception was noted for the defendant.)

Q. All right, Mr. O'Neill, just tell us briefly what was the conversation.

20 A. Well, the conversations were in reference to different Straus bonds which were being submitted to us from time to time, and during those conversations, Mr. Ojserkis had often referred to the fact that you couldn't get any investment better than a Straus bond, because of the agreement he had to purchase them back from Ambassador Edge at any time at 99.

(No cross-examination.)

(Mr. Van Riper read to the jury Exhibits P6 and P15.)

30 Mr. Van Riper: I did not ask Mr. Ojserkis when he was on the stand, but I suppose he signed that letter. It is blank in the copy.

Mr. Bourgeois: He signed it, yes.

PLAINTIFF RESTS.

Sigmund Ojserkis—Direct

DEFENDANT'S TESTIMONY IN
SUR-REBUTTAL.

SIGMUND OJSERKIS, recalled.

Direct examination.

10

By Mr. Bourgeois:

Q. Mr. Ojserkis, it has been testified that you bought bonds back from Mr. Max Blatt and paid him 99. Was 99 paid to him because of any verbal agreement or was that the market value of the bonds at the time?

A. It wasn't paid to him on account of any agreement. There was no agreement. It was paid to him the same as to any other purchaser who bought in bonds during that period and received 99, and those bonds being resold at a hundred to another customer. 20

Q. Did you ever make a statement to Mr. O'Neill that in view of the agreement that you had with Senator Edge to buy back bonds at 99, that the Straus bonds were as good as any investment he could get?

A. I did not. This letter explains the answer 30 distinctly to that letter, my answer to that letter, that we maintained a market. There was an over-the-counter market in 1931 —

Mr. Van Riper: This is not an answer.

Q. The letter explains it?

A. Yes.

Cross-examination.

By Mr. Van Riper:

10 Q. You did pay Mr. Blatt 99 for Straus bonds, didn't you?

A. I did.

Q. And they were the bonds that he had previously purchased from you at \$100?

A. That is right.

Q. And you bought them back at 99¢ on the dollar?

A. Yes.

Q. Three years after you bought them?

20 A. But there was no agreement.

Q. You bought them back at 99¢ on the dollar three years after he bought them?

A. Yes.

By Mr. Bourgeois:

Q. Was that the market at that time?

A. That was the market, yes.

30 (Adjournment was had until 10 A. M., November 15, 1934.)

Offer of Evidence

Atlantic City, N. J., November 15, 1934.

(Trial of the cause resumed at 10 A. M.)

(In Chambers.)

Mr. Van Riper: I want to offer in evidence this 10
letter to Miss Blatt which was identified by Mr.
Ojserkis as having been signed by him, and by Miss
Blatt as having been received by her.

Mr. Bourgeois: I object to that.

Mr. Van Riper: I think it is admissible for the
purpose of showing usage.

The Court: Showing what authority Ojserkis 20
assumed?

Mr. Van Riper: Yes.

Mr. Bourgeois: I object to it on the ground it
was after the transaction in the Edge matter.

The Court: The letter will be admitted.

(An exception was noted for the defendant.) 30

(The letter was marked Exhibit P12.)

MOTION TO DIRECT VERDICT
FOR DEFENDANT.

Mr. Bourgeois: If your Honor please, I move for a direction for the following reasons:

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1. Because the offer was for the sale of \$250,000 worth of bonds and plaintiff did not purchase, nor agree to purchase, that amount. Therefore, the offer was never accepted, and no contract resulted therefrom.

20

2. The option "should you wish to cash in your Straus bonds at any time, we will be glad to take them from you at 99 or \$10 per bond less than you paid for them, and the accrued interest," is unilateral, indefinite as to quantity, and lacks mutuality, and plaintiff was not bound.

3. The property purchased was of fluctuating value and the option was not exercised promptly.

4. The suit was not begun within six years after the date of the option or the date of the last purchase.

30

5. "At any time" in this case, means a reasonable time.

6. The clause "should you wish to cash in your Straus bonds at any time, we will be glad to take

Motion to Direct Verdict for Defendant

them from you at 99 or \$10 per bond less than you paid for them, and the accrued interest," does not form a valid offer because there was no consideration paid and no specified amount of said bonds to be sold, or cashed in, therein fixed, but left indefinite and no obligation on plaintiff to offer any bonds for purchase was contained therein, and therefore did not constitute an enforceable contract. 10

7. The language in the first and second clauses of the letter of June 22, 1926, to wit: "a temporary investment and permanent investment" show that the bonds then offered were for temporary investment, and the words "at any time" contained in the clause "should you wish to cash in, etc." taken in connection therewith, show that the right to cash in must be exercised within the period of temporary investment, to wit: within a reasonable time. 20

8. The property mentioned in said offer of June 22, 1926, to wit: bonds to be purchased at any time, was property of fluctuating value and the request made of defendant to buy, was not made promptly, or within a reasonable time, to wit: not until more than six years had elapsed.

9. Because the uncontradicted evidence is that 30 the letter of June 22, 1926, was not authorized by any resolution, or other act of the Board of Directors, and there is no evidence from which a jury can find, either implied authority or apparent authority, for the support of said letter.

10. The uncontradicted testimony is that plaintiff, in the summer of 1927, was requested by Mr. Ojserkis to change his investment to other bonds, but declined to change his investment in the Straus bonds and said "he was satisfied with them. They paid a good income and he was satisfied;" plaintiff thereby determined to retain his Straus bonds, and
- 10 his statement and determination to retain them amounted to an election, which is binding upon him and which election now precludes a recovery of damages in the suit by him.

11. The letter of June 22, 1926, was not an option, but only an offer to trade, and it never developed into a contract to support an action at law.

- 20 The Court: The motion for a direction in favor of the defendant will be denied.

(An exception was noted for the defendant.)

COURT'S CHARGE TO JURY.

JAYNE, J.:

Ladies and gentlemen of the jury: You will realize that you are presently concerned with a case of considerable importance, to which you must necessarily devote your very serious and very thoughtful consideration. 10

Some of the controversial issues of this case involve questions of law, while others present questions of fact. The duty to decide all questions of law that have arisen in this case falls upon me, and therefore, in your consideration of the case, you are to be governed by the rules and principles of law as I shall express them. No harm can come of that, lasting harm, so to speak, because if I inaccurately or erroneously state the law applicable to the circumstances of this case, the parties have an adequate and complete remedy; so that it is your duty to accept and to be guided by my statement of the law. 20

On the other hand, the solution of all questions of fact in this case becomes exclusively your duty, and it is, therefore, your task to settle and determine the facts from your consideration of the evidence, and then to apply the pertinent rules of law that I have expressed to such facts as you determine to have existed. 30

I shall, therefore, endeavor in my charge to analyze, so to speak, the problems that have been submitted to us for our decision, in order that you

Court's Charge to Jury

may have a definite understanding of the conflicting contentions of the parties in this case.

In this action the plaintiff, Walter E. Edge, seeks to recover from the defendant, Boardwalk Securities Corporation, an award of damages to which the plaintiff alleges he is entitled by reason of the alleged failure and refusal of the defendant company to perform the terms of an alleged agreement bearing date June 22, 1926. This alleged agreement constituting the foundation of this action is said to be embodied in the letter of June 22, 1926, addressed to the plaintiff and signed by Sigmund Ojserkis. This letter has been, as you know, offered in evidence and is, therefore, as well as other documents that have been offered and admitted in evidence, available for your personal examination and inspection, so you will, of course, consult the letter
10
20 itself to obtain precise and definite knowledge of its contents.

In the trial of this case the following sentence taken from the body of the letter has been particularly drawn to your attention: "Should you wish to cash in your Straus bonds at any time, we will be glad to take them from you at 99 or \$10.00 per bond less than you paid for them, and the accrued interest." It is contended in behalf of the plaintiff here that in the early part of June 1926, Mr.
30 O'Neill, at the request of Senator Edge, visited the office of the defendant company and there engaged in a conference with Mr. Ojserkis relating to the purchase of bonds and securities by the plaintiff, and that as a result of this interview Mr. Ojserkis, acting for the Boardwalk Securities Cor-

Court's Charge to Jury

poration, as the plaintiff contends, addressed the letter of June 22, 1926, to the plaintiff, and it is contended in behalf of the plaintiff that in this letter the defendant company contracted and agreed with the plaintiff that it, the defendant company, would repurchase at any time from the plaintiff those bonds known as S. W. Straus & Company bonds at 99 or \$10.00 per bond less than the plaintiff paid for them, and accrued interest. Additionally, it is contended that, acting and relying upon this alleged promise and undertaking, the plaintiff purchased the bonds which are specifically mentioned in the complaint in this action and frequently mentioned in the evidence throughout the trial, the plaintiff purchased these bonds from the defendant corporation, and thereafter, on April 27, 1933, and on June 10, 1933, the plaintiff requested the defendant company to repurchase the bonds, some of them on each occasion, in accord with the alleged agreement, tendering the return of the bonds to the defendant company; and that the defendant company then refused and has ever since refused to repurchase the bonds in compliance, as the plaintiff contends, with the alleged agreement. 10 20

Now, in resisting this contention, the defendant does not deny, as I recall the testimony, that Mr. O'Neill conferred with Mr. Ojserkis in June of 1926, nor does the defendant deny, as I recall the testimony, that the letter of June 22, 1926, was written and signed by Mr. Ojserkis and mailed to the plaintiff; but it is asserted in behalf of the defendant company in this case that the letter is not to be 30

taken as an offer to repurchase these Straus bonds mentioned in the complaint, and that the letter acted upon, if at all, by the plaintiff did not constitute a valid contract.

- Then, again, it is asserted in behalf of the defendant company that Mr. Ojserkis had no authority to enter into and bind the defendant corporation by any agreement to repurchase these bonds, and, moreover, it is argued in behalf of the defendant company that even if the letter of June 22, 1926, is to be regarded as binding upon the defendant corporation, that such letter did not have the legal effect of obligating the defendant corporation to repurchase the bonds on as late a date as April or June 1933.

Briefly stated, these are the contentions of the respective parties.

- 20 I have already determined in this case that as a matter of law the following part of the letter of June 22, 1926, namely, "Should you wish to cash in your Straus bonds at any time, we will be glad to take them from you at 99 or \$10.00 per bond less than you paid for them and the accrued interest," together with the letter at large legally constituted an offer to take back from the plaintiff such Straus bonds as he might thereafter purchase from the defendant company, in consideration of
30 such offer, and take them back at the figure stated, and that if such an offer was accepted by the plaintiff, you find it to have been accepted by the plaintiff, then such offer and its acceptance became such as to constitute a valid contract.

Of course, whether or not there was an accep-

Court's Charge to Jury

tance of the offer or whether or not such offer is to be regarded as an offer made by the defendant corporation, the latter question involves the problem of whether or not Mr. Ojserkis had authority, and this is a matter to which I shall presently refer.

Let me refer to another question of law, because I have said that this case perhaps presented questions of law and questions of fact. There is another question of law that has arisen in this case. It is contended in behalf of the defendant that even if the letter of June 22nd, 1926, is to be taken as constituting a contract binding upon the defendant corporation, it did not, it is claimed, obligate the defendant indefinitely, but only for a reasonable time thereafter. This is a question of law which I must assume the responsibility of deciding. Counsel for the defendant argues that the words, "At any time," are to be understood to mean within a reasonable time. I cannot so instruct you. I must apply to the decision of this question what I conceive to be the settled and established rules of law applicable to such a problem. The language to which I have referred contained in this letter is clear, definite, unambiguous. The letter appears to have been written by Mr. Ojserkis, president of the defendant company. It is his language. It is the language that he used and employed. The law obliges me to give to the words, "At any time," their natural and commonly accepted import and meaning, where such import and meaning is not in doubt from their context or otherwise. Now, we must appreciate that these words were written in 1926, and we cannot now ascribe a different meaning to

these words simply because some different meaning would seem to be more reasonable now, amid the economic changes that have since overtaken us. Mr. Ojserkis did not say in his letter, "Should you wish to cash in your Straus bonds within a reasonable time we will be glad to take them from you," but he did state, "Should you wish to cash
10 in your Straus bonds at any time, we will be glad to take them from you." Therefore, I am obliged to instruct you that if the defendant corporation is bound by this agreement—and that is another question to which I shall presently refer—if the defendant corporation is bound by this agreement, it is bound by the words that it employed in this letter, it is bound by the clear and indubitable meaning of the words that the president himself used in this letter. Therefore, if the defendant is to be held
20 bound by this agreement, the defendant is not to be relieved of its obligation to repurchase the bonds merely because the plaintiff did not request the performance of the agreement until April or June of 1933.

More simply stated, I hold and so instruct you, that the words, "At any time," as used in this letter are to be taken to mean at any time, and not "Within a reasonable time."

30 You see, where in an agreement or contract no time whatever for its performance is mentioned, the law implies that it shall be performed within a reasonable time; but in the present case, concerned as we are with this letter of June 22, 1926, we find in the letter itself evidence of a thought on the part of the author of the letter of a time

Court's Charge to Jury

within which the purchaser, here the plaintiff, should express his wish to cash in on the bonds, and within which the defendant corporation would take them back, and the author of this letter has used in the letter the word "Time," and he did not use in association with that word the words "Within a reasonable time," or, "Within a short time," but he did employ the words, "At any 10 time." So if the author of this letter intended to accord to the plaintiff here the right to designate the time at his, the plaintiff's will, when he desired to cash in the bonds and when he desired the defendant corporation to take them in, it seems to me—and I say this by way of comment—that such an intention would be naturally expressed by the use of those words, "Should you wish to cash in your Straus bonds at any time." And so I very definitely instruct you that the words, "At any 20 time," are to be taken by you in the consideration of this case to mean at any time, and not, as contended by counsel for the defendant, within a reasonable time.

The mere circumstance that in the light of subsequent events a banker or a business man may have made an imprudent bargain or engaged in an unwise agreement does not relieve him from the effect of such an agreement.

You have noticed that in my instructions concerning the legal questions I have used the expression, "If the defendant company is to be bound by this agreement." The question of whether or not the defendant company, as a corporation, is bound 30

by this agreement is a question that I am submitting to you for determination, because the solution of this question depends upon a consideration of the testimony and of the evidence relating to facts and to circumstances.

Let us move on, then, to the consideration of this latter issue. We see that the determination of this
10 issue depends upon whether Mr. Ojserkis, who was then admittedly the president of the defendant corporation, had the authority to enter into or make in behalf of the defendant corporation the agreement to repurchase expressed in the letter of June 22, 1926. It is with this branch of the case that you become particularly concerned. The question of the authority of Mr. Ojserkis arises under the broad contention here made that the defendant corporation as a corporation did not agree to repur-
20 chase these bonds. You will understand that in general, in order to obligate a corporation upon a contract, it must be shown by competent evidence that such a contract was the act of the corporation. Of course, a corporation in itself is an inanimate thing and can only function, so to speak, in the pursuit of its business by means of its officers, directors, employees, agents and servants. The mere circumstance, of course, that a certain individual may be president of a corporation does not enable
30 such an individual to bind the corporation by any and every kind of an agreement into which he may choose to enter for the corporation. As a general rule it may be said that an officer of a corporation can only bind the corporation in transactions within his express or implied authority. I shall discuss

Court's Charge to Jury

with you in a moment the effect of what we speak of as apparent authority.

Mention has been made in this case of express authority, implied authority and apparent authority. Perhaps you will better understand what is meant by express authority if I employ a very simple explanation. Express authority is the authority that is expressly conferred. We find that there is no 10 evidence in this case that the president of the defendant corporation, by the charter or by-laws or by any resolution or other minute of the board of directors, had been expressly clothed with any authority to agree for the defendant company in the sale of its bonds that it, the defendant company, would repurchase at a given figure any of the bonds sold by the president. Indeed, it is not contended here in behalf of the plaintiff that Mr. Ojserkis had any express authority from the board of direc- 20 tors to agree in behalf of the defendant company in making sale of its bonds that the defendant company would repurchase them or some of them.

It is contended here, however, in behalf of the plaintiff that Mr. Ojserkis had either the implied or the apparent authority to make such an agreement for the defendant company.

This is a question of essential importance in this whole case. Let us begin by considering the nature of the transaction in which the letter of June 22, 30 1926, is said to have been given and the relation of such transaction to the business that the defendant corporation was by its charter authorized to pursue. The evidence in this case has disclosed that the defendant corporation had the power under its

charter to engage in the business of buying and selling bonds and securities, and the defendant corporation could have authorized its president within its charter powers to agree in the sale of its bonds to repurchase them. Where a contract of a nature which a corporation has power to authorize its president to make is made by its president in
10 behalf of the corporation in the pursuit of the business of the corporation, such circumstances constitute prima facie evidence of the authority of the president to enter into the contract in behalf of the corporation. This rule of law is essential, I think, for the benefit of those who do business with an officer of a corporation, particularly at the place of business. You see, the precise authority conferred by a corporation upon an officer or employee is a matter usually entirely within the knowledge
20 of those parties, and the customer doing business with an officer of a corporation is not always or, indeed, usually possessed of knowledge of the definite authority conferred by a corporation upon such officer.

You have in this case evidence tending to show that the defendant corporation was engaged in the business of buying and selling bonds and such securities; that Mr. Ojserkis, the president of the company, acted for the defendant company in selling
30 its bonds in the usual course of the business of the company; and that the sales so made by him were not reported to the board of directors in the usual course of the business of the company. You have testimony that Mr. Ojserkis was the officer of the defendant corporation at the place of business of

Court's Charge to Jury

the defendant corporation with whom Mr. O'Neill discussed the plaintiff's desire or intention to make investments. Additional testimony is to the effect that Mr. Ojserkis signed and caused this letter of June 22, 1926, to be dispatched to the plaintiff. Then there is other testimony, to which I need not, I think, specifically refer or to which I need not refer in detail, tending to disclose to what extent the directors of this defendant corporation entrusted Mr. Ojserkis with the duty, so to speak, of selling bonds for the defendant company. 10

So it is contended here that Mr. Ojserkis had been so entrusted by the defendant corporation with the sale of its bonds, without submitting the terms of such sales to the board of directors for approval, and had been so entrusted with the right to conduct this business of the corporation by the managers, that is to say, the board of directors, that you may infer, claims the plaintiff, from the circumstances disclosed by the evidence that the authority of Mr. Ojserkis to make such sales comprehended the right to fix the terms upon which the bonds were to be sold and to agree with such purchasers that the defendant company would repurchase them, that is to say, to agree in accordance with the agreement alleged to be contained in the letter of June 22, 1926. 20

Now, to the contrary, it is argued in behalf of the defendant company that the circumstances established by the evidence do not justify you in drawing this inference that Mr. Ojserkis in selling bonds was authorized to agree to repurchase any of them at any time in the future. 30

Court's Charge to Jury

I have concluded that it is your duty, ladies and gentlemen, to settle the facts and circumstances and to determine what inferences are to be drawn from such facts and circumstances. What do you determine from the evidence here produced to have been the scope of the authority of Mr. Ojserkis in the sale of bonds for the defendant company?

- 10 Implied authority means the right of an officer or agent to do those things necessary and proper to carry out and perform the duty or purpose expressly conferred upon or assigned to him.

- If you conclude from the evidence in this case that the defendant company in the conduct of its business had knowingly and voluntarily conferred upon Mr. Ojserkis the power and authority to negotiate sales and to sell the bonds of the company upon any terms that he thought fit and proper in
20 the exercise of his own judgment, and that he made sales to the plaintiff upon the agreement and under the offer to repurchase the Straus bonds as expressed in the letter of June 22, 1926, then I instruct you that in such a situation Mr. Ojserkis had the incidental and implied authority to enter into this agreement for the defendant company and to bind the defendant company thereby.

- Of course, the plaintiff must satisfy you by the fair preponderance of the evidence that the offer
30 to repurchase the Straus bonds was accepted by him, the plaintiff. There is testimony that the offer to repurchase the bonds, as alleged to be contained in the letter of June 22, 1926, was acted upon by the plaintiff and was the promise which induced him to purchase the bonds of the defendant com-

Court's Charge to Jury

pany. It is my recollection that the plaintiff himself testified to that effect.

In these very general references to the testimony, let me pause here to say to you that it is your recollection and your understanding of the testimony by which you are to be entirely guided and influenced in deciding all questions of fact in this case.

Returning again to the question of authority of Mr. Ojserkis, what authority did the board of directors, not by resolution, but by the known usages and practices—and by “Known” I mean known to them—confer upon Mr. Ojserkis with respect to negotiating and making sales of bonds? Was it intended by the board of directors that Mr. Ojserkis should have full authority to exercise his own judgment and to fix the terms of the sales of the bonds of the defendant company? If so, and you conclude that this promise to repurchase Straus bonds was one of the terms upon which he chose to make sales of the defendant's bonds to the plaintiff, and the plaintiff accepted such promise, then the defendant company is bound by the act of Mr. Ojserkis in so doing. 10 20

But you have testimony to the effect that the board of directors never had any knowledge that Mr. Ojserkis in selling the bonds was entering into any agreement with the purchaser or purchasers to take back the bonds in the future, and there is testimony to the effect that Mr. Ojserkis never reported any such agreement to the board of directors. 30

Then, again, there is testimony tending to show the authority customarily exercised by Mr. Ojserkis in selling the bonds of the defendant company at or

Court's Charge to Jury

about the time of this transaction of the sale to the plaintiff.

Even though an officer of a corporation has no express or implied authority to enter into a given contract for the corporation, yet the corporation may in certain circumstances become bound by his acts. I refer to what we speak of as apparent authority. A corporation may become legally bound by the acts of its officer where such acts are within the apparent power which the corporation has knowingly and voluntarily caused those dealing with such an officer to believe it has conferred upon such officer. That is what we speak of as apparent authority. Of course, apparent authority must be conferred by the corporation. It does not arise out of the authority that an officer or agent may arbitrarily assume himself, without the knowledge or acquiescence, so to speak, of the corporation.

Now, in considering the existence or absence of apparent authority, you will consider whether under the evidence in this case the defendant company, in the conduct of its business, voluntarily placed Mr. Ojserkis in such a situation that a person of ordinary prudence, conversant with business usages and practices and familiar with the nature of the business of buying and selling bonds, was justified in the existing circumstances in presuming that Mr. Ojserkis had authority to sell the bonds of the company with an agreement that the company would repurchase the bonds at any time at the request of the purchaser.

This is the rule of law: Did the defendant voluntarily place Mr. Ojserkis in the situation to

Court's Charge to Jury

which I have just referred in the conduct of its business? If so, the defendant conferred apparent authority upon Mr. Ojserkis to enter into the agreement for the defendant company expressed in the letter of June 22, 1926. If the defendant company did not voluntarily place him in such a situation, then Mr. Ojserkis cannot be said to have had apparent authority to enter into such an agreement 10 for the company.

I am, therefore, submitting to you, ladies and gentlemen, for your determination the question whether under the evidence the defendant company conferred authority upon Mr. Ojserkis to sell its bonds with an agreement to repurchase certain of them, such as is alleged in this case. You will understand, having in mind the rules of law that I have expressed, that if Mr. Ojserkis had no authority to make, in behalf of the defendant corporation, 20 an agreement to repurchase the Straus bonds, then the defendant is not bound by his agreement and your verdict must be, in such situation, in favor of the defendant.

Of course, you are concerned with whether or not Mr. Ojserkis had the implied or apparent authority on June 22, 1926, because that is the date on which it is alleged he made the offer in behalf of the defendant company. The alleged cause of action of the plaintiff is founded solely upon the promise 30 —when I say founded solely, I am speaking of its foundation—upon the promise and undertaking contained in the letter of June 22, 1926, and not upon any similar promise or undertaking, if any, at any other time. I have permitted testimony to be in-

troduced at this trial tending to disclose the scope and the extent of the authority of Mr. Ojserkis, the extent of the authority that Mr. Ojserkis assumed to exercise in the conduct of the business of the defendant company, within what seemed to me to be a reasonable period with relation to the time of the transaction with the plaintiff, in order, however, 10 that you might be permitted first to determine whether such testimony is true and, secondly, if true, to determine what inferences are to be logically drawn from such facts respecting the knowledge of the board of directors of the authority that Mr. Ojserkis was assuming in June 1926, and respecting their acquiescence in and approval of, if any, his course of conduct as an officer of the defendant corporation in the course of the business of the company. I repeat, however, that the question that you 20 are to determine in this particular is necessarily confined to the authority, if any, of Mr. Ojserkis to make for the defendant company the offer and proposal contained in the letter of June 22, 1926.

If the plaintiff has satisfied you by a fair preponderance of the evidence that the promise and undertaking to repurchase Straus bonds of the plaintiff at any time that he, the plaintiff, wished to cash them in, was accepted by the plaintiff, and acted upon by the plaintiff, that Mr. Ojserkis acted 30 for the defendant company within the scope of the authority conferred upon him by the defendant company or within his apparent authority, as I have explained apparent authority, in making this promise to repurchase Straus bonds, and that the defendant company has failed and refused to re-

Court's Charge to Jury

purchase the bonds in compliance with such promise, then you will return a verdict in this case for the plaintiff. In such event, you will, of course, be concerned with the amount of damage to which the plaintiff under the evidence is entitled.

On this branch of the case the contention in behalf of the plaintiff is that under the agreement expressed in the letter of June 22, 1926, the defendant should have repurchased the Straus bonds from him when the requests were made on April 27, 1933, and on June 10, 1933, and paid to him the repurchase price in accordance with the undertaking set forth in the letter and the accrued interest. It is my recollection of the testimony that the repurchase price, plus the accrued interest, is said to amount to the aggregate sum of \$196,501.93. It is contended by the plaintiff that the defendant company failed to perform its agreement, and the plaintiff in this action asks you to award him the difference between the sum of \$196,501.93 and the market value, that is to say, the aggregate market values of the respective bonds as computed upon the dates when the plaintiff requested the defendant company to repurchase the respective bonds. There is testimony tending to prove that this aggregate market value of these bonds on the dates mentioned in 1933, was \$40,570.00. It is for you to say from your study and consideration of the evidence what was the market value or values of these bonds as of the dates on which the plaintiff requested the defendant to repurchase them. If you accept this testimony, however, to which I have referred as true, the difference here claimed by the plaintiff is

\$155,931.93, as I have calculated it. If my statement of the figures or my calculation is not in accordance with your understanding of the testimony or is in anywise inaccurate in the light of your recollection of the testimony, of course, disregard it. It is your recollection of the testimony by which you will determine the amount of the market value.

- 10 Then, again, did the plaintiff purchase from the defendant company all of the bonds specifically mentioned in the complaint in this action in consideration of the offer to repurchase as contained in the letter of June 22, 1926? This simple question, I think, will illustrate the point to which I now refer: Was it the mutual understanding and agreement between the plaintiff and the defendant company that all of these Straus bonds mentioned in this case, sold by the defendant and purchased by
- 20 the plaintiff subsequent to June 22, 1926, were to be taken back by the defendant company at the wish of the plaintiff, in accordance with the offer contained in the letter of June 22, 1926? If so, then the plaintiff would be entitled to recover a sum equivalent to the difference between \$196,501.93 and the aggregate market value of the respective bonds as of the dates on which the plaintiff requested the defendant to repurchase such bonds, having in mind, of course, what I previously said
- 30 to you relating to the right of the plaintiff to recover against the defendant in this case.

It therefore becomes necessary for you to determine the market values of the bonds on the dates to which I have referred. Testimony has been introduced in behalf of the plaintiff relating to such

Court's Charge to Jury

market values. No testimony with respect to such values has been offered by the defendant.

I desire to add this: One or more of the witnesses, in expressing his opinion as to the market value of these bonds, gave the testimony with the aid of certain daily quotation bulletins and with the aid of a book of quotations. I feel constrained to instruct you that you must determine the market value of these bonds from a consideration of the testimony given by the witnesses under oath and not from the unverified or from any unverified quotations that may appear in these bulletins or in the book. This is so, even though it may happen that the values given by the witness or witnesses are identical with those in the bulletins or in the book. It is the sworn testimony concerning market values that you must consider in ultimately determining the market values of the bonds on the respective dates.

I think it unnecessary to say, although I shall make this remark that it may come from the Court, as well, that the mere circumstance that the plaintiff in this case has held positions of honor and distinction in the State and nation must not influence you in the determination of this case. On the other hand, the mere circumstance that the defendant company has or has had many prominent and highly respected men on its board of directors or has many residents of Atlantic City among the number of its stockholders should not influence you in the determination of this case. Let me say to you, as I have so often said to other juries, you consider the evidence, apply the rules of law that the Court has expressed, and then courageously return a verdict in accordance

with your impartial and conscientious judgment. No one in the world can expect you to do more, and no one can ask you to do less or to do otherwise.

You are to be congratulated, ladies and gentlemen, I think, upon the patient attention you have given the testimony throughout the progress of this trial. So render a verdict, after a due consideration
10 of the evidence, that you yourselves regard as fair and just and right between the parties.

I may say to counsel that I have so many requests to charge I could not weave them all into my charge, so I shall briefly deal with them. I am referring now to the requests to charge submitted to me by the defendant.

The first request is: "In this case there can be no lawful verdict in favor of plaintiff unless it grows out of a breach of contract, resulting in his loss or
20 damage. The burden of proof is upon the plaintiff." I so charge you.

I decline to charge defendant's requests numbers 2, 3, 4, 6, 7, 13 and 19, except as I have already charged.

I am requested by request number 5 to instruct you that: "The letter of June 22, 1926 constitutes an offer made by Mr. Ojserkis to Senator Edge concerning the sale and purchase of bonds involved in this case; there was no written acceptance, and the
30 only acceptance was the purchase of the bonds. Unless the purchase of bonds fully met the offer, no contract resulted, and your verdict should be for the defendant." I decline so to charge you and employ the language contained in this request. I have already said to you that it is incumbent upon the

Court's Charge to Jury

plaintiff to prove by a fair preponderance of the evidence that the offer contained in the letter of June 22, 1926 was unconditionally accepted by the plaintiff, in order that such offer and acceptance might grow into, so to speak, an enforceable and valid contract.

I think I have substantially charged, Mr. Bourgeois, number 8.

10

Number 9: "Acts of an agent outside of the authority delegated to him by the principal are not binding upon the principal, unless his principal has conferred upon the agent an apparent authority, or the agent has acted by virtue of an implied authority, or the principal has ratified or acquiesced in the acts of the agent, or has knowingly received the benefits of the acts of the agent." I so charge you.

In accordance with request number 10 I charge you that: "There can be no apparent authority arising from the acts of the agent which are unknown to his principal." I have already instructed you that the principal, that is to say, the corporation, must knowingly and voluntarily place the agent in the situation to which I have more particularly referred in my charge.

20

In accordance with request number 11 I charge you that: "Apparent authority must be shown from the acts of the principal having knowledge of the circumstances pertaining to the matter in question."

30

I have substantially charged request number 12.

Request number 14: "There can be no ratification or acquiescence of any transaction or agreement made by an agent, unless the principal at the time of such ratification or acquiescence had notice of and

was fully informed of the transaction in question." I so charge you, although it is not contended in this case that the defendant becomes liable because of ratification of any unauthorized agreement.

Request number 15 is: "No implied ratification of a transaction can arise from receiving benefits therefrom by the principal, where knowledge of said transaction was received by him after the receipt of benefits therein." I so instruct you.

Request number 16: "There can be no implied ratification or acquiescence arising from the receipt of benefits from a transaction, unless at the time of receiving such benefits the principal had notice and knowledge of such transaction." I so charge you.

Request number 18: "A letter written upon the letterhead of a corporation not purported to be signed by the corporation, but signed by a person who designated himself as president, without mentioning of what he was president, pertaining to the business in which the corporation is engaged, is not binding upon the corporation, unless the matter mentioned in said letter is within the scope of authority delegated by the corporation to the person so signing said letter." I shall so instruct you, having in mind, however, what I have previously said to you about the authority of an officer or person representing a corporation.

Request number 20: "Plaintiff is not entitled to recover at all as to the \$12,500 worth of bonds owned by Mrs. Edge and the \$7000.00 worth of bonds owned by Walter E. Edge, Jr." This requires you to consider the testimony in the case. It is incumbent upon the plaintiff to prove by a fair preponderance

Court's Charge to Jury

of the evidence that these bonds to which this request relates were purchased by the plaintiff pursuant to the agreement of June 22, 1926. If they were not, if the plaintiff has failed to prove that these bonds to which reference is made in this request were so purchased, and you conclude that they were not purchased by the plaintiff or that they were not purchased, so to speak, under this agreement of June 22, 1926, then you will exclude those bonds in the consideration of the amount of damages to be awarded to the plaintiff. 10

Do you want me to go through your requests, Judge Van Riper?

Judge Van Riper: No. In the interest of time, I am perfectly willing—I assume your Honor has charged the part of my requests that you intended to charge, anyway, and I think most of the subjects in there have been fairly well covered, and so long as I do not waive my exceptions to that which your Honor has already charged, I am willing, in the interest of expediting this matter, to waive them. 20

Mr. Bourgeois: I ask an exception to the Court's refusal to charge requests 2, 3, 4, 5, 6, 7, 13, 19 and 20, and ask an exception to what the Court did charge with relation to request number 5 and what the Court did charge in connection with request number 20. 30

(Which exceptions are hereby noted.)

Court's Charge to Jury

Mr. Bourgeois: I would like to have an exception to that part where your Honor spoke about the apparent authority, because you did not limit it in your charge to conditions existing with the knowledge of the board of directors prior to June 22, 1926. That was not limited anywhere.

10 The Court: At the end I told them, didn't I?

Mr. Bourgeois: You told them practically, yes, but it did not exclude it. It left it so they might under that charge consider those letters which came in afterwards as within the scope.

(Which exception is hereby noted.)

20

(At three-thirty P. M. the jury sent a message to the Court, and the following occurred in Chambers:)

The Court: What the jury wants to know is the amount claimed by the plaintiff.

Mr. Van Riper: The Court charged on that, and I think it is perfectly proper for the Court to repeat a part of the charge.

30

Mr. Bourgeois: Well, Judge, I don't know, but I think after a case goes to the jury the evidence cannot be reviewed nor any record of it handed to them nor any record of it read to them, without it becoming a second trial, a retrial of that part of the case.

Court's Charge to Jury

I think they are bound to render a verdict according to their recollection of the evidence. I admit to you that if it was a matter where the attorneys both agreed and you did what they asked, we could not take any exception or anything of that kind, but I do not feel I am in a position where I can agree.

(The jury returned to the court room at three- 10
forty P. M.)

The Court: Ladies and gentlemen of the jury: I have received the message sent to me by your foreman, and I understand from the message that you would like to have your recollection refreshed with respect to the figures used by the witnesses who testified concerning the market value of the bonds as of the given dates in April and June, 1933. This testimony relates to one of the questions that I have in 20
my charge said to you was a question of fact, and in the solution of those questions you must rely upon your own recollection and understanding of the testimony. I feel in the circumstances that I cannot, with legal propriety, so to speak, comply with your request.

I will say this: All I can say to you is that if you conclude that the plaintiff is entitled to a verdict in his favor in this case, then the plaintiff will be entitled as damages to a sum equivalent—and it is 30
for you to fix that sum—which shall be equivalent to the difference between the sum representing the bonds which you conclude the plaintiff purchased under the agreement, having in mind all I said to you in my charge, representing such bonds at 99 or

\$10.00 per bond less than the plaintiff paid for such bonds, with the accrued interest, and—that is to say, the difference between that sum and the fair market value of such bonds at the time that the plaintiff demanded that the defendant repurchase them. When I say the time that the plaintiff demanded that the defendant repurchase them, I refer to the specific
10 dates in April and June when it is said the plaintiff made such a demand upon the defendant company. You will have to arrive at that figure representing that difference to which I have referred from your recollection of the testimony.

Your verdict, in the event that you should conclude to render a verdict for the plaintiff, must specify definitely the amount of damages to which the plaintiff is in your judgment entitled under the evidence. Your verdict must be in that form. It will not be
20 in accordance with my instructions for you to render a verdict in favor of the plaintiff and then undertake to award damages to him and fail to state and specify definitely in your verdict the amount of the damages.

So that in the event you should conclude that the plaintiff is entitled to recover, it is your duty, after a consideration of the evidence, to fix the amount to be awarded to the plaintiff as damages.

30 Is that all?

Juror Number 10: Your Honor, we are not in possession of the figures that we can arrive at that conclusion by.

The Court: You will have to use your memory and recollection of the testimony.

Plaintiff's Requests to Charge

Juror Number 10: We heard the figures read out, but none of us remember what the figures were.

The Foreman: What we want to know is the amount of the claim.

The Court: You may retire, and you will have to rely upon your recollection of the testimony. 10

Mr. Van Riper: May I have an exception to what your Honor has just said to the jury?

The Court: The exception will be allowed.

(Which exception is hereby noted.)

20

PLAINTIFF'S REQUESTS TO CHARGE.

1. The legal presumption is that the letter of June 22d, 1926, addressed to Senator Edge, and signed by Mr. Ojserkis, as President of the Boardwalk Securities Corporation, was written and signed by Mr. Ojserkis in his capacity as President of the Corporation and that he had authority to write and sign the same. 30

2. Defendant contends that this letter was written by its President without authority, but burden of proof is upon the defendant to satisfy the jury by a

preponderance of the evidence that Mr. Ojserkis did not have authority to write the letter.

3. It is not necessary that it be proven that the directors of the Corporation, expressly by word of mouth or by written resolution, authorized its President to write this letter, but it is sufficient to show
10 authority on his part if the Corporation permitted Mr. Ojserkis to exercise an authority not expressly given him, and the plaintiff was led to deal with him as one having authority which he purported to have had. (Boston Food Products Co. v. Wilson & Co. 139 N. E. 637.)

4. The public would be absolutely without any protection in dealing with corporations if it were not for the rule that their executive and managing offi-
20 cers, or agents, by whatever name called, possess implied power to bind the corporation by acts and contracts made and done in the conduct of ordinary business; and, such being the law, an innocent stranger dealing with a corporation through such an agent will not be affected by any limitation of the agent's authority contained in the by-laws and of which he has no knowledge. And the appointment of such general manager carried with it an implication of authority on the part of such agent to repre-
30 sent himself as possessing the full powers usually ascribed to such an office. The foregoing principles apply with peculiar force when the offices of president and general manager unite in one man, so that he becomes, in effect, the corporation itself so far as the public is concerned. (Western Investment

Plaintiff's Requests to Charge

and Land Company vs. First National Bank, 128 Pacific 476.)

5. Where a corporation through its president receives money for the sale of its merchandise, it cannot, after accepting the same, repudiate the means by which it had been obtained. (Safir vs. West Ridgelawn Cemetery, 108 Law 351.) 10

6. When in the usual course of the business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. (Claus vs. Bank of Montclair, 110 Law 394.)

7. The agreement to repurchase contained in the letter of June 22, 1926, being one which the corporation had the power to authorize its president to make, and he having made it in pursuit of the business of the corporation, such circumstances constitute prima facie evidence of the authority of the president to enter into the contract in behalf of the corporation, and the burden is upon the corporation to prove that the president did not have such authority. 20

8. The words "at any time" as used in the letter of June 22, 1926, must be given their natural and commonly accepted import and meaning. 30

The law is that if the defendant corporation is bound by the agreement so made by its president, it is bound by the words that he employed in that

agreement, and the defendant company is bound by the clear and indubitable meaning of the words that he used in the agreement.

We cannot give those words some other meaning which in the light of subsequent eventualities would remould the agreement and make it seem to be more reasonable in the light of such subsequent events.

10 The defendant cannot escape its obligation, if the agreement is the agreement of the defendant to repurchase, merely because the plaintiff did not request the performance thereof until April, 1933.

The words "for your temporary investment" as used in the letter must be construed in the light of the words agreeing to buy back "at any time," and there is a rule of law to the effect that where a contract is ambiguous, it will be construed most strongly
20 against the party preparing it or employing the words concerning which doubt arises, the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that he means one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage.

In other words, if the defendant corporation is bound by this agreement at all, it was bound to repurchase the bonds when they were offered in April
30 and June of 1923.

9. If the defendant corporation in the conduct of its business and by its business usages and practices has conferred upon Mr. Ojserkis as president power and authority to sell the bonds of the company upon

Plaintiff's Requests to Charge

such terms as he thought fit and proper, and if he made these sales to the plaintiff upon the terms expressed in the letter of June 22, 1926, then Mr. Ojserkis had the incidental and implied authority to enter into this agreement for the defendant company and the defendant is bound thereby.

10. Implied authority means the right of an officer 10
or agent to do those things necessary and proper to carry out and perform the duty or purpose expressly assigned to him. Express authority, unless restricted to the contrary, includes by implication such powers as are proper and necessary to effectuate the object and purpose of the agency.

11. Even though an officer of a corporation had no express or implied authority to enter into a given contract for the corporation, still the corporation 20
may in certain circumstances become bound by the acts of that officer. A corporation may become legally bound by the acts of its president where such acts are within the apparent authority which the corporation has caused those dealing with such officer to believe the corporation has conferred upon him. This is what is known as apparent authority.

12. A principal, either individual or corporation, is liable for the acts of the agent within his express 30
authority because the act of the agent is the act of the principal. The principal is also responsible for the acts of the agent within the scope of the authority he holds the agent out as having, or normally permits him to assume, because to permit him to dis-

pute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons.

- 10 13. If the Board of Directors of a corporation has by its voluntary act placed its agent, whether he be president or otherwise, in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform the act in question, the corporation is bound by the act of the agent, regardless as to whether or not he was in fact an authorized agent for the purpose of performing that particular act (News Printing Co. vs. Dillistin, 146 Atl. 475).

- 20 14. When in the usual course of the business of a corporation the officer has been allowed to manage its affairs, his authority to represent that corporation may be implied from the manner in which he has been permitted by the Directors to transact its business. In such cases the authority of the officer does not depend so much on his title or on a theoretical nature of his office as on the duties he is in the habit of performing (Fifth Ward Bank vs. First National Bank, 48 Law 513).

- 30 15. The evidence in this case shows that the Board of Directors left the entire management of the business of the corporation in the hands of Ojserkis the President, and Boyer the Secretary. No requests were made by the Directors at their meetings for information concerning the affairs of the company,

Plaintiff's Requests to Charge

except such as Ojserkis and Boyer desired to furnish. The Directors approved the purchase of securities after they had been made by Ojserkis and Boyer and never inquired as to the sales or the manner in which the securities were being sold, but they left that entirely to the judgment and discretion of Ojserkis, and in doing so the Directors fairly held him out as having sufficient authority to act in the corporation's behalf with reference to the letter of June 22, 1926, in evidence in this case, and the corporation is bound by the agreement to repurchase as mentioned in that letter, regardless of whether Ojserkis was in fact expressly authorized to write it. 10

16. The Directors of a corporation are under a duty to use strict vigilance and scrutiny to inquire into the manner in which the business of the corporation is being conducted by their agent. If they fail to make this inquiry the corporation becomes responsible for the acts of its agent even though those acts exceed any express authority which has been given to him. 20

17. This action is brought by the plaintiff based upon a breach of contract and he sues for the damages alleged to have been sustained by him as a result of the breach of this contract. If the plaintiff is entitled to recover, he is entitled to recover the difference between the price of 99 per one hundred dollar bond and accrued interest, which is the repurchase price mentioned in the letter of June 22, 1926, and the market price of those bonds as of April 27, 30

Defendant's Requests to Charge

1933, and June 10, 1933, when their repurchase was demanded by the plaintiff.

10 The testimony of Mr. O'Neill is that the price of 99 per one hundred dollar bond would amount to \$187,115 and that the accrued interest due as of the dates when the repurchase was demanded amounts to \$9,386.93, making a total purchase price that the plaintiff would have been entitled to receive if the bonds had been repurchased when he so demanded of \$196,501.93. Now, there should be deducted from this amount the market value of the bonds on the day on which they were offered. Mr. Gaines has testified that that market value was \$40,570; subtracting this amount from the price of 99, plus accrued interest, we have the sum of \$155,931.93, which is the amount the plaintiff is entitled to recover, if at all, together with interest thereon at 6% from 20 the 10th day of June 1933.

DEFENDANT'S REQUESTS TO CHARGE.

1. In this case, there can be no lawful verdict in favor of plaintiff unless it grows out of a breach of contract, resulting in his loss or damage. The burden of proof is upon the plaintiff.

30

2. In the letter of June 22, 1926, in the following language: "Should you wish to cash in your Straus bonds at any time, we will be glad to take them from you at 99 or \$10 per bond less than you paid for them, and the accrued interest."

Defendant's Requests to Charge

The words "at any time" do not mean that the offer to cash in may be delayed indefinitely and then exercised, but must be exercised within a reasonable time.

3. The letter of June 22, 1926, deals with an option to sell to defendant at a fixed price, an article of fluctuating value, and if the plaintiff intended to avail himself of that option, he must exercise that option promptly; and if he did not exercise it promptly, he is not entitled to recover. 10

4. In this case, the bonds, being of a fluctuating value, and the price having been fixed, plaintiff's right to compel defendant to respond to such option must have been demanded of defendant at a time when the purchase under said option would not have prejudiced the defendant. If the request was so long delayed that the purchase by the defendant would have been prejudiced, then defendant was not obliged to respond. 20

5. The letter of June 22, 1926, constitutes an offer made by Mr. Ojserkis to Senator Edge concerning the sale and purchase of bonds involved in this case; there was no written acceptance, and the only acceptance was the purchase of bonds. Unless the purchase of bonds fully met the offer, no contract resulted, and your verdict should be for the defendant. 30

6. The Statute of Limitations has been pleaded as a defense in this cause, and that statute will begin to run from the expiration of what you determine

would have been a reasonable time within which the plaintiff should have exercised his option to cash in his Straus bonds.

7. The period of reasonable time should be determined by you as to each of the several purchases of bonds, and if more than six years elapsed between the expiration of the end of the reasonable time, as
10 fixed by you, within which the plaintiff should have exercised his intention to cash in said bonds, and the date of instituting this suit, to-wit: July —, 1933, then as to all or such part of said bonds wherein the reasonable time elapsed more than six years before plaintiff's suit was instituted, plaintiff's right of action is barred, and your verdict as to them should be for the defendant.

20 8. An agent can bind his principal only when acting within the scope of the authority delegated to him by the principal.

9. Acts of an agent outside of the authority delegated to him by the principal are not binding upon the principal, unless his principal has conferred upon the agent an apparent authority, or the agent has acted by virtue of an implied authority, or the
30 principal has ratified or acquiesced in the acts of the agent, or has knowingly received the benefits of the acts of the agent.

10. There can be no apparent authority arising from the acts of the agent which are unknown to his principal.

Defendant's Requests to Charge

11. Apparent authority must be shown from the acts of the principal having knowledge of the circumstances pertaining to the matter in question.

Myrtle Ave. Corp. v. Mt. Prospect (112 NJL, 60.)

12. Implied authority means the right of an agent to do those acts which are necessary to carry into effect a power delegated by the principal, and does not apply to acts done by the agent outside of the authority conferred upon him by his principal. 10

13. In the case at hand, the principal delegated to Mr. Ojserkis, the President, authority to buy and sell bonds in the usual course of business. This authority would not authorize or empower the President to agree to purchase or repurchase bonds in the future at a stated price.

20

14. There can be no ratification or acquiescence of any transaction or agreement made by an agent, unless the principal at the time of such ratification or acquiescence had notice of and was fully informed of the transaction in question.

15. No implied ratification of a transaction can arise from receiving benefits therefrom by the principal, where knowledge of said transaction was received by him after the receipt of benefits therein. 30

16. There can be no implied ratification or acquiescence arising from the receipt of benefits from a transaction, unless at the time of receiving such benefits the principal had notice and knowledge of such transaction.

17. The authority of the President to buy and sell bonds, as such right appears in this case from the certificate of incorporation, by-laws and minutes of the corporation, does not include the right to bind the corporation by an agreement to purchase or repurchase bonds at some future time at a then stated price.

10

18. A letter written upon the letterhead of a corporation not purported to be signed by the corporation, but signed by a person who designated himself as President without mentioning of what he was President, pertaining to the business in which the corporation is engaged, is not binding upon the corporation, unless the matter mentioned in said letter is within the scope of authority delegated by the corporation to the person so signing said letter.

20

19. There was no market value established as to any of these bonds, excepting where the witness testified in relation to one or two series of bonds that he had actually sold at 10 or 12. As to all other issues, there was no market value established, and as to them plaintiff is entitled to recover nominal damage.

20. Plaintiff is not entitled to recover at all as to the \$12,500 worth of bonds owned by Mrs. Edge, and
30 the \$7000 worth of bonds owned by Walter E. Edge, Jr.

Plaintiff's Exhibits

EXHIBIT P1.

11-13-34m.

BOARDWALK SECURITIES CORPORATION

Sigmund Ojserkis, President

CAPITAL, \$1,000,000.00

Founded Upon:

10

Safety of Principal—

Sound—Equitable Policy—

Legitimate Margin of Profit

Address:

Boardwalk Nat. Bank Bldg.

Atlantic City, N. J.

June 22 1926.

Hon. Walter E. Edge,

Washington, D. C.

Dear Senator:

20

At the suggestion of your Mr. O'Neill, I welcome the opportunity to be of some financial service to you, and I am taking the liberty to enclose a list of 25 bonds at \$10,000 each, well diversified with a good income, for your temporary investment. These Bonds we own and can deliver to you, of course, subject to prior sale.

The Bond market at present is too high for permanent investment, as you will note from the enclosed ad. of the National City Co., but I propose to let you have our Bonds and, gradually, as the market is more favorable, replace each \$10,000 lot of Bonds, or such as you may not favor, with issues which will have a good prospect for appreciation and better yield. In such cases we will accept in payment S. W. Straus & Co. Bonds, which you purchase from us, at par and accrued interest. The

other Stock Exchange issues we will accept at market and accrued interest. Should you wish to cash in your Straus Bonds at any time we will be glad to take them from you at 99 or \$10 per bond less than you paid for them and the accrued interest. My idea is if you will give me the time to gradually supply you with a high grade, conservative list of
 10 Investment Bonds, you will be proud of it and have absolute safety with a good income.

It is difficult for me to explain everything in a letter, but I wish to assure you that I will use the same care and diligence in your case, as I am doing for my "Pet"—the Boardwalk National Bank.

No matter who you entrust with your investments, it must be a case of confidence.

Thanking you for this opportunity, and with highest personal regards, I am

20

Respectfully yours,

Sigmund Ojserkis

President.

BOARDWALK SECURITIES CORPORATION

Sigmund Ojserkis, President

CAPITAL, \$1,000,000.00

Founded Upon:

Safety of Principal—

30 Sound—Equitable Policy—

Legitimate Margin of Profit

Address:

Boardwalk Nat. Bank Bldg.

Atlantic City, N. J.

June 22nd 1926

We recommend the following \$250,000 Bonds as a conservative and well diversified Investment—subject to prior sale.

Straus Bonds	Security	(Straus)	Maturity	Price	Amount	Income
-	\$10,000 Hearst-Brisbane 6's		1939	100	\$10,000	\$600
-	10,000 #60 Park Plc. Newark 6's	"	1937	100	10,000	600
-	10,000 Broadway-Barclay 6's	"	1941	100	10,000	600
-	10,000 #48 W 48th St 6's	"	1936	100	10,000	600
-	10,000 Dorest 6's	"	1941	100	10,000	600
-	10,000 American Insurance Union 6's	"	1941	100	10,000	600
-	10,000 Lefcourt-Manhattan 5¾'s	"	1941	97.55	9,755	575
-	10,000 Albany-Manhattan 6¼'s	"	1938	100	10,000	625
	10,000 Dodge Bros. 6's		1940	94½	9,450	600
	10,000 Pacific Mills 5½'s		1931	96¾	9,675	550
	10,000 Bethlehem Steel 6's		1948	99¾	9,975	600
	10,000 National Distillers 6½'s		1935	99	9,900	650
	10,000 Cuban Dominican Sugar 7½'s		1944	98¼	9,825	750
	10,000 Otis Steel 6's		1941	98½	9,850	600
	10,000 City Transportation 6's		1936	98½	9,850	600
	10,000 Chicago Daily News 6's		1936	97½	9,750	600
	10,000 Associated G & E 5½'s		1946	95¼	9,525	550
	10,000 Price River 6's		1938	100	10,000	600
	10,000 Indiana Limestone 6's		1941	99	9,900	600

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Plaintiff's Exhibits

291

Plaintiff's Exhibits

EXHIBIT P2.

11-13-34m

Walter E. Edge
Atlantic City, N. J.

April 27, 1933 10

Boardwalk Securities Corporation
Boardwalk National Arcade
Atlantic City, N. J.
Attention: Mr. Ojserkis
Gentlemen:

As you will recall, during June and July, 1926, I purchased from you, as a result of negotiations conducted through Mr. Ojserkis, a list of S. W. Straus & Co. bonds.

As you know, these bonds were purchased at that 20 time on the representation by you that at any time I desired to cash them in you would take them back at 99, or \$10 per bond less than I paid for them and the accrued interest.

I now desire to cash in these bonds and am prepared to deliver to you:

\$25,000—Hearst Brisbane, 6's	
\$10,000—60 Park Place, Newark, 6's	
\$10,000—Broadway Barclay, 6's	
\$20,000—48 W. 48th Street, 6's	30
\$10,000—Dorset, 6's	
\$10,000—American Insurance Union, 6's	
\$20,000—Lefcourt Manhattan, 5¾'s	
\$25,000—Albany Manhattan, 6¼'s	

As you know, I paid par for these bonds with the

exception of the Lefcourt Manhattans, for which I paid 97.55, and I am prepared to deliver them to you at 99, or \$10 per bond less than I paid for them and the accrued interest. Of course, in the case of the Lefcourt Manhattans, for which I paid 97.55, I would not expect you to pay the 99, but would expect to deliver them to you at a price equal to what
10 I paid for them less \$10 per bond and accrued interest.

As you know, this offer to sell the bonds to you at this price is in accordance with the agreement which I had with you, as evidenced by your letter of June 22, 1926, which letter and guarantee contained therein provided the inducement for me to purchase these bonds.

I believe you realize that at the time these purchases were made I was relying upon the recommendation which you had made as to the safety of
20 these bonds and upon your guarantee that at any time I desired I could cash them in with you at the prices above mentioned.

—2—

Boardwalk Securities Corp'n

April 27, 1933

I realize that in view of the present economic conditions perhaps you might not find it convenient to
30 accept all of these bonds immediately and at one time. I am perfectly willing, of course, to cooperate with you in this respect and if it is working a hardship for you to take over the entire list as above mentioned at once, if you will be good enough to inform me on what dates it will be convenient for

Plaintiff's Exhibits

you to take them, I think perhaps I can work out a satisfactory arrangement provided the length of time during which they will all be taken back by you is not too long.

Very truly yours,
Walter E. Edge

10

EXHIBIT P3.

11-13-34m

Walter E. Edge
Atlantic City, N. J.

June 10, 1933

Boardwalk Securities Corp.,
Atlantic City
N. J.

Attention: Mr. S. Ojserkis

20

Gentlemen:

Under date of April 27, 1933, I wrote you informing you that I was prepared to deliver to you certain S. W. Straus Company bonds which I purchased from you subsequent to June 22, 1926 and that my offer to deliver these bonds to you was in accordance with your agreement contained in your letter of that date to the effect that at any time I desired to cash in these bonds that you would take them from me at 99 and the accrued interest.

30

At the time this letter was written by me I did not include all of the Straus bonds which I had purchased under the terms of this agreement because I did not want to cause any inconvenience in asking you to take all of these bonds at one time.

As a matter of fact, as I said in that letter, if to take the bonds all at once would cause you any hardship, I was willing to play along on a reasonable basis, but in view of your answer to me under date of May 1st, 1933, wherein it is apparent that you do not intend to fulfill your part of the contract, it seems evident that it is useless on my part to attempt to help you.

Therefore I am now notifying you that I am prepared to deliver to you, for cash, at 99, or \$10.00 per bond less than I paid for them, and the accrued interest, in accordance with the terms of your letter to me of June 22, 1926, the following bonds, all of which are Straus issues:

	Name of Bond	Amount	
	Hearst Brisbane	\$27,500.	par
	60 Park Place, Newark	10,000.	"
20	Broadway Barclay	10,000.	"
	48 W. 48th Street, N. Y.	20,000.	"
	Dorset	10,000.	"
	American Insurance Union	10,000.	"
	Lefcourt Manhattan	20,000.	"
	Albany Metropolitan	32,000.	"
	New York Athletic Club	20,000.	"
	42d & Lexington Ave. Bldg.	25,000.	"
	Keith Albee	10,000.	"
	502 Park Avenue	10,000.	"
30	Chicago Builders	10,000.	"
		Total —	\$214,500. "

Plaintiff's Exhibits

Delivery will be made immediately upon receipt of word from you that you are prepared to accept these bonds and pay for them as above outlined.

Very truly yours,

Walter E. Edge

EXHIBIT P4.

10

BROKER'S RECORD BOOK

(Printing of this exhibit waived.)

EXHIBIT P5.

BONDS

20

(Printing of these bonds waived.)

EXHIBIT P6.

11-14-34m

Walter E. Edge
Atlantic City, N. J.

October 4, 1927.

30

Mr. Sigmund Ojserkis,
Boardwalk Securities Corporation,
Atlantic City, N. J.

Dear Mr. Ojserkis:

As per our conversation of the other day, you

Plaintiff's Exhibits

can purchase \$25,000 of Straus, 42d & Lexington Ave. office building bonds, in accordance with the agreement you made with the Senator to buy back at any time, at one point less than cost, any Straus bonds purchased from you by him, his family, or the Camedge Company.

This purchase is made in the name of Camedge
10 Company.

Very truly yours,
Paul J. O'Neill
For Walter E. Edge.

PJON/q
Encl.

P. S. Please advise amount for check immediately.
P. J. O'N.

20

EXHIBIT P7.
11-13-34m.

CERTIFICATE OF INCORPORATION
of the
BOARDWALK SECURITIES CORPORATION

WE, THE UNDERSIGNED, for the purpose of
30 forming a corporation in pursuance of an act of the
Legislature of the State of New Jersey, entitled "An
Act Concerning Corporations" (Revision of 1896)
and the various acts amendatory thereof and supple-
mental thereto, do make, record and file this cer-
tificate.

Plaintiff's Exhibits

FIRST: The name of the Corporation is BOARD-WALK SECURITIES CORPORATION.

SECOND: The location of its principal office in the State of New Jersey is Boardwalk National Bank Building, Atlantic City, New Jersey, and the name of the agent therein and in charge thereof and upon whom process against the corporation may be served is Sigmund Ojserkis. 10

THIRD: The objects for which and for each of which the corporation is formed are:

To issue shares, stock, debenture stock, bonds and other obligations; to invest the money so obtained in, and to hold, sell and deal with stock, shares, bonds, debentures, debenture stock and securities of any government, State, corporation, public or private, or other body or authority; to vary the investments of the Company; to mortgage or charge all or any part of the property and rights of the company, including its uncalled for capital; to make advances upon, hold in trust, issue on commission, sell or dispose of any of the investments aforesaid, or to act as agent for any of the above or like purposes. 20

To raise money by the issue of shares or otherwise, and to invest the moneys so raised in the purchase of, or otherwise to acquire and hold and of the investments following, that is to say, any stocks, bonds, debentures, shares, scrip or securities issued or having any guarantee by any government, municipality, trust, local authority, or other body, incorporated or unincorporated, public or private, of the United States, or in any country of state under the 30

protection of the United States, or any stock, bonds, debentures, shares, scrip, or securities issued or having any guarantee by any corporation, or company incorporated, constituted or carrying on business in the United States or elsewhere.

To acquire and hold, or otherwise deal with any stocks, bonds, debentures, shares, scrip or securities
10 of any government in the world, state or authority, municipal, local or otherwise, and any bonds, debenture stocks, scrip, obligations, shares, stocks or securities of any company established for the purpose of any railway, tramway, gas, water, electric, dock, telegraph, electric lighting or other undertaking.

To borrow or raise money by the issue or sale of any bonds, mortgages, debentures or debenture stock of the company, and to invest any money so raised
20 in any such investment as aforesaid.

To acquire any such investments as aforesaid by original subscription, underwriting, participation in syndicates or otherwise, and whether or not fully paid up, and to make payments thereon as called for, or in advance of calls or otherwise, and to underwrite or subscribe for the same conditionally or otherwise, and to vary the investment of the company, and generally to sell, exchange, or otherwise dispose of, deal with, and to turn to account any
30 of the assets of the company.

To negotiate loans, to offer for public subscription, or otherwise aid or assist in placing any such investments as aforesaid; to give any guarantee in relation to any such investments issued by or acquired through or from the company.

Plaintiff's Exhibits

To offer for public subscription any shares or stocks in the capital of, or debentures or debenture stock or other securities of, or otherwise to establish or promote, or concur in the establishing or promoting any company, association, undertaking or public or private body.

To guarantee the payment of dividends or interest on any stocks, shares, debentures or other securities issued by, or any other contract or obligation of any such company, association, undertaking or public or private body. 10

To purchase, take on, lease, or in exchange, hire, or otherwise acquire any real or personal property which the company may think necessary or desirable, and to sell, improve, manage, develop, lease, mortgage, dispose of, turn to account, or otherwise deal with all or any part of the company's property.

To take, make, execute, enter into, commence, carry on, prosecute and defend all contracts, agreements, negotiations, legal and other proceedings, compromises, arrangements and schemes, and to do all other acts, matters and things which shall at any time appear conducive or expedient for the protection of the company as holders of or interested in any such investments and securities as aforesaid. 20

To transact a general real estate agency and brokerage business, including the management of estates; to act as agent, broker or attorney in fact for any persons or corporations in buying, selling and dealing in any real property and any and every estate and interest therein, and choses in action secured thereby, judgments resulting therefrom and other personal property collateral thereto, in making 30

- or obtaining loans upon such property, in supervising, managing and protecting such property and loans and all interests in and claims affecting the same, in effecting insurance against fire and other risks thereon, and in managing and conducting any legal actions, proceedings and business relating to any of the purposes herein mentioned or referred
- 10 to; to register mortgages and deeds of trust of real property or chattels real and all other securities collateral thereto; to investigate and report upon the credit and financial solvency and sufficiency of borrowers and sureties upon such securities; to purchase and hold real property and any and every estate and interest therein, and choses in action secured thereby, judgments, resulting therefrom, and other personal property, collateral thereto; to improve, manage, operate, sell, mortgage, lease and
- 20 otherwise dispose of any property so acquired; to loan upon such property, and to take mortgages and assignments of mortgages of the same; and to transact all or any other business which may be necessary or incidental or proper to the exercise of any or all of the aforesaid purposes of the corporation.

To buy, sell, own, hold, exchange mortgages, bonds, mortgages and other real estate securities.

- To buy, sell, own, hold, exchange, notes, bills of exchange, trade acceptances and commercial papers
- 30 of every nature and description.

To buy, sell, deal and loan money on bonds secured by mortgages on real and personal property generally; to buy, sell, deal and loan money on bonds secured by mortgages on real and personal property on the Ammortization Plan.

Plaintiff's Exhibits

To buy, sell, and deal in securities in general, and to buy, sell and deal in securities on the Partial Payment Plan.

IN FURTHERANCE, and not in limitation, of the general powers conferred by the laws of the State of New Jersey, and of the objects and purposes as herein above stated, it is hereby expressly provided that the Company shall have also, subject to the limitations imposed by the laws of the State of New Jersey, the following powers, that is to say; 10

(a) To do any or all things herein set forth as objects, purposes, powers or otherwise, to the same extent and as fully as natural persons might or could do, as principals, agents, contractors or otherwise.

20

(b) To conduct its business in all its brances and to have one or more offices, and to hold, purchase, mortgage and convey real and personal property, both within the State of New Jersey, and in all other States, Territories, Possessions and Dependencies of the United States, the District of Columbia and in all foreign countries.

(c) To manufacture, purchase or otherwise acquire, hold, own, sell, assign and transfer, invest, trade, deal in and deal with goods, wares and merchandise and property of every class and description. 30

(d) To purchase or otherwise acquire, to hold,

own, maintain, work, mine and develop, and to sell, convey, mortgage, lease, or otherwise dispose of, without limit as to amount, within or without the State of New Jersey, and in any part of the world, real estate and real property, and any interest and rights therein.

10 (e) To acquire, the goodwill, business, rights and property of all kinds, and to assume or undertake the whole or any part of liabilities of any person, firm, association or corporation, and to pay for the same in cash, stock of this corporation, bonds or otherwise.

20 (f) To apply for, obtain, register, purchase, lease, or otherwise acquire, and to hold, own, use, operate, introduce and sell, assign, or otherwise dispose of, any and all trademarks, trade names and distinctive marks, and all inventions, improvements and processes used in connection with or secured under Letters Patent of the United States or elsewhere, or otherwise, and to use, exercise, develop, grant licenses in respect of, or otherwise turn to account any such trademarks, patents, licenses, concessions, processes and the like, or any such property, rights and information so acquired, and with a view to the working and development of the same, to carry on
30 any business, whether mining, manufacturing or otherwise, which the corporation may think calculated directly or indirectly to effectuate these objects.

(g) To purchase, lease, exchange, hire or other-

Plaintiff's Exhibits

wise acquire, any and all rights, privileges, permits or franchises suitable or convenient for any of the purposes of its business, to erect and construct, make and improve, or aid or subscribe towards the construction, making and improvement of mills, factories, storehouses, buildings, roads, docks, piers, wharves, houses for employees and others, and works of all kinds; and in conjunction with and in furtherance of the general business and purposes of the corporation, as above described, to construct, purchase, lease, own, operate or sell a railroad or railroads, or both, in any state or country other than the State of New Jersey, subject to the laws of such other State or country. 10

(h) To make and enter into contracts for any lawful purpose with any individual, firm, association, corporation, private, public, or municipal, body politic, and with the government of the United States, or of any State, Territory, District, Possession or Dependency thereof, or of any foreign country. 20

(i) To do all and everything necessary, suitable or proper for the accomplishment of any of the purposes or the attainment of any one or more of the objects herein enumerated, or which shall at any time appear conducive or expedient for the protection of the business, property or rights of the corporation and in general to carry on any business, whether manufacturing, mining, or otherwise. 30

It is the intention that the objects, purposes and powers specified and clauses contained in this Third

paragraph shall, except where otherwise expressed in said paragraph, be nowise limited or restricted by reference to or inference from the terms of any other clause of this or any other paragraph in this certificate, but that the objects, purposes and powers specified in each of the clauses of this paragraph shall be regarded as independent objects, purposes
10 and powers.

FOURTH: The amount of the authorized capital stock of the corporation is One Million (\$1,000,000.00) Dollars, divided into five thousand (5000) shares of common stock of the par value of One Hundred (\$100.00) Dollars each and five thousand (5000) shares of Common B stock of the par value of One Hundred (\$100.00) Dollars each. The Common B stock shall share equally with the Common
20 Stock in the distribution of dividends. In the event of any liquidation or dissolution or distribution of the assets of the corporation (whether voluntary or involuntary) the residue of the assets of the corporation shall be ratably divided among and paid to the holders of its Common Stock and Common B stock without distinction between shares of Common Stock and Common B Stock. Provided further however, that the holders of Common B Stock shall not have
30 any voting power in respect thereof on any question.

FIFTH: The names and post office addresses of the incorporators and the number of shares of Common Stock and Common B Stock, with which the Company shall begin business is One Hundred Thousand (\$100,000.00) Dollars, divided into seven hun-

Plaintiff's Exhibits

dred and fifty (750) shares of Common Stock and two hundred and fifty (250) shares of Common B Stock, the aggregate of which is the amount of the Capital Stock with which the Company shall begin business, are as follows:

Name	Address	Common Stock No. of Shares	Common B Stock No. of Shares	
Robert L. Beyer,	Atlantic City,			
N. J.		50		
Enoch A. Higbee, Sr.,	Somers			
Point, N. J.		50		
Theo. J. Lapres,	Atlantic City,			
N. J.		10	250	
Albert J. Feyl,	Atlantic City,			
N. J.		10		
William Gordon,	Atlantic City,			20
N. J.		10		
Joseph B. Perskie,	Atlantic City,			
N. J.		60		
Wm. C. Boyer,	Atlantic City,			
N. J.		5		
Harry Schwartz,	Atlantic City,			
N. J.		50		
Sigmund Ojserkis,	Hammonton,			
N. J.		405		
Max E. Blatt,	Atlantic City	100		30
		750	250	

SIXTH: The duration of the Company shall be unlimited.

SEVENTH: The following provisions for the regulation of the business and the conduct of the affairs of the Company are hereby made:

10 The corporation may use and apply its surplus earnings, or accumulated profits authorized by law to be reserved, to the purchase or acquisition of property, and to the purchase or acquisition of its
own Capital Stock from time to time, to such extent and in such manner and upon such terms as its Board of Directors shall determine; and neither the property nor the Capital Stock so purchased and acquired, nor any of its Capital Stock taken in payment or satisfaction of any debt due to the corporation, shall be regarded as profits for the purposes of declaration or payment of dividends, unless otherwise determined by a majority of the Board of Directors, or a majority of the Stockholders.

20 The corporation, in its by-laws, may prescribe the number necessary to constitute a quorum of the Board of Directors, which number may be less than a majority of the whole number and may by its by-laws provide the date or dates for the payment of dividends.

30 The Boards of Directors shall have power without the assent or vote of the stockholders to make, alter, amend or rescind the by-laws of the corporation, to fix the amount to be reserved as working capital, to authorize and to cause to be executed mortgages and liens upon the real and personal property of the corporation; and from time to time to sell, assign, transfer or otherwise dispose of any or all of the property of the corporation.

The Board of Directors shall from time to time

Plaintiff's Exhibits

determine whether and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right of inspecting any account or book or document of the corporation, except as conferred by statute or authorized by the Board of Directors, or 10 by a resolution, of the stockholders.

The Board of Directors shall have power to hold its meetings, to have one or more offices, and to keep the books of the corporation (except the stock and transfer books outside of the State of New Jersey) at such places as may be from time to time designated by them.

EIGHTH: AND we do hereby associate ourselves into a corporation and further respectively agree 20 to all the provisions of the foregoing certificate, and to take and pay for the number of shares of stock hereinbefore set forth and accordingly have hereunto set our hands and seals this twenty-seventh day of February, nineteen hundred and twenty-five.

Sigmund Ojserkis	(Seal)	
Albert J. Feyl	(Seal)	
William Gordon	(Seal)	
Theo. J. Lapres	(Seal)	
M. E. Blatt	(Seal)	30
Robert L. Beyer	(Seal)	
Enoch A. Higbee, Sr.	(Seal)	
Harry Schwartz	(Seal)	
William C. Boyer	(Seal)	
Joseph B. Perskie	(Seal)	

In the presence of;
Howard E. Moore

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } SS:

10 BE IT REMEMBERED that on this twenty-seventh day of February, in the year of our Lord one thousand nine hundred and twenty-five, before me a Notary Public of the State of New Jersey, personally appeared Robert L. Beyer; Enoch A. Higbee, Sr.; Theo. J. Lapres; Albert J. Feyl; William Gordon; Joseph B. Perskie; Wm. C. Boyer; Harry Schwartz; Sigmund Ojserkis; and Max E. Blatt, who I am
20 satisfied are the persons mentioned in and who executed the foregoing certificate, and I having first made known to them and each of them the contents thereof, they did severally acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

Harry E. Moore
Notary Public of N. J.
My Com. Expires Mar. 1st, 1928.
(SEAL)

30 Endorsed: "RECEIVED March 2, 1925 at 8 A. M. and recorded in the Clerk's office of Atlantic County, at May's Landing, N. J. in book of Certificates of Incorporation No. 15, page 98 &c.

William A. Blair, Clerk
M. S."

Plaintiff's Exhibits

"FILED AND RECORDED MAR. 4, 1925
THOMAS F. MARTIN
SECRETARY OF STATE."

CERTIFICATE OF AMENDMENT OF CERTIFICATE OF INCORPORATION
of
BOARDWALK SECURITIES CORPORATION. 10

BOARDWALK SECURITIES CORPORATION,
a corporation of the State of New Jersey, by its
president and secretary does hereby certify:

I. That the principal office of the Company is
Boardwalk National Bank Building, Atlantic City,
New Jersey, and that the agent therein in charge
thereof and upon whom process against this corporation may be served is Sigmund Ojserkis. 20

II. That the Board of Directors of said Corporation, at a meeting duly convened and held on the
5th day of December, A. D., 1933, passed a resolution
resolving and declaring that it was advisable that
the objects and purposes of this company be increased and amended and for that purpose to amend
Article III of the Certificate of Incorporation by
adding thereto the following as objects and purposes 30
for which and for each of which the corporation is
formed as follows:

"To issue and sell shares, stock, debenture
stock, bonds and other obligations of the Corporation to raise money by the issue of such obli-

gations or otherwise; to invest the money so obtained in, and to acquire, hold and sell stock, shares, bonds and securities of any Government, State, Corporation, public or private, or other body or authority; to vary the investments of the Corporation; to mortgage or charge all or any part of the property and rights of the Corporation, including its uncalled for capital.

10

To loan money upon, buy, sell, own, hold, exchange, real and personal property generally and mortgage bonds, mortgages and other real estate securities.

To loan money upon, buy, sell, own, hold, exchange notes, bills of exchange, trade acceptance, commercial paper, securities and real and personal property generally.

20

To loan money generally either with or without security at lawful rates of interest and to hold, own, operate, conduct, lease, mortgage, sell and otherwise dispose of any real estate, machinery, equipment, fixtures, tools, materials, supplies and other real or personal property of every kind taken as security or consideration for the payment of money loaned.

30

To make loans of such character and for such purposes as are now or may be made the basis for loans to this Corporation by the Reconstruction Finance Corporation or any successors to or any corporation similar to said Reconstruction Finance Corporation and for these purposes to have, possess and enjoy all the rights, benefits, privileges and immunities granted by law to such companies."

Plaintiff's Exhibits

and called a meeting of the stockholders to be held to take action upon the said resolution.

III. That a copy of said resolution of the Board of Directors is hereto appended.

IV. That thereafter on January 10th, 1934, pursuant to such call of the Board of Directors and upon notice to each and every stockholder of said company a meeting of the stockholders of the Company was held at which meeting more than two-thirds in interest of the stockholders of said company having voting powers duly and regularly assented and by resolution voted in favor of such change and amendment as aforesaid by adding the foregoing as additional objects and purposes for which and for each of which the corporation is formed.

IN WITNESS WHEREOF, said corporation has made this certificate under its seal and the hands of its president and secretary, the 11th day of January, A. D., 1934.

Sigmund Ojserkis
President

Attest: William C. Boyer,
Secretary

(SEAL)

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } SS:

BE IT REMEMBERED, that on this 11th day of January, A. D., 1934, before me, the subscriber, a

Notary Public of New Jersey, personally appeared, William C. Boyer, Secretary of Boardwalk Securities Corporation, the corporation named in and which executed the foregoing certification, who, being by me duly sworn, according to law, does depose and say and make proof to my satisfaction that he is the Secretary of said corporation; that the seal
10 affixed to said corporation certificate is the corporate seal of said corporation, the same being well known to him; that it was affixed by order of said corporation; that Sigmund Ojserkis is the president of said corporation; that he saw the said Sigmund Ojserkis as such president sign said certificate, and heard him declare that he signed, sealed and delivered said certificate as the voluntary act and deed of said corporation, by its order and by authority of its Board of Directors and by the vote,
20 either in person or by proxy, duly constituted and thereunto duly authorized, of more than two-thirds in interest of the stockholders having voting powers of said corporation, for the uses and purposes therein expressed; and that the said William C. Boyer signed his name thereto at the same time as subscribing witness.

Subscribed and sworn to before me the day and year aforesaid.

30

Emma R. Tappin
Notary Public of N. J.

*Plaintiff's Exhibits*RESOLUTION OF THE BOARD OF
DIRECTORS.

BE IT RESOLVED, by the directors of this company that it is advisable that the certificate of incorporation of this company be amended, i. e., paragraph 3 thereof by adding the following as objects and purposes for which the corporation is formed: 10

“To issue and sell shares, stock, debenture stock, bonds and other obligations of the Corporation to raise money by the issue of such obligations or otherwise; to invest the money so obtained in, and to acquire, hold and sell stock, shares, bonds and securities of any Government, State, Corporation, public or private, or other body or authority; to vary the investments of the Corporation; to mortgage or charge all or any part of the property and 20 rights of the Corporation, including its uncalled for capital.

To loan money upon, buy, sell, own, hold, exchange, real and personal property generally and mortgage bonds, mortgages and other real estate securities.

To loan money upon, buy, sell, own, hold, exchange notes, bills of exchange, trade acceptance, commercial paper, securities and real and personal property generally. 30

To loan money generally either with or without security at lawful rates of interest and to hold, own, operate, conduct, lease, mortgage, sell and otherwise dispose of any real estate, machinery, equipment, fixtures, tools, materials,

Plaintiff's Exhibits

supplies and other real or personal property of every kind taken as security or consideration for the payment of money loaned.

10 To make loans of such character and for such purposes as are now or may be made the basis for loans to this Corporation by the Reconstruction Finance Corporation or any successors to or any corporation similar to said Reconstruction Finance Corporation and for these purposes to have, possess and enjoy all the rights, benefits, privileges and immunities granted by law to such companies."

and that this amendment to the certificate be submitted to the stockholders of this company for approval at the annual meeting of the stockholders of the company to be held on January 10th, 1934.

20 Endorsed:

"FILED AND RECORDED JAN. 12, 1934
THOMAS A. MATHIS
SECRETARY OF STATE."

STATE OF NEW JERSEY.

DEPARTMENT OF STATE.

30

I, THOMAS A. MATHIS, Secretary of State of the State of New Jersey, do hereby certify that the foregoing is a true copy of Certificate of Incorporation and all amendments thereto of Boardwalk Securities Corporation as the same is taken from and compared

Plaintiff's Exhibits

with the originals filed March 4, 1925, and January 12, 1934, and now remaining on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Trenton, this fourth day of June, A. D. 1934.

THOMAS A. MATHIS,

(Seal)

Secretary of State. 10

CERTIFIED COPY

of

Certificate of Incorporation and all amendments thereto of Boardwalk Securities Corporation.

20

EXHIBIT P8.

BROKER'S DAILY RECORD SHEETS.

(Printing of this exhibit waived.)

30

EXHIBIT P9.

11-14-34 M.

WALTER E. EDGE

Atlantic City, N. J.

May 26, 1931

10

Mr. Sigmund Ojserkis, President
Boardwalk Securities Corp'n
Atlantic City, N. J.

Dear Mr. Ojserkis:

I have your letter of the 23d instant, the second paragraph of which rather surprises me, and I am wondering if you have forgotten the arrangement we had, verbally as well as by your letter of June 22, 1926, copy of which is enclosed.

20

I know that the Ambassador has always felt that this arrangement was in existence, and before calling your letter of the 23d instant to his attention, I thought best to remind you of the arrangement we made several weeks ago, and under which arrangement you will recall the bonds were purchased.

I wanted to come down and see you about this, but have not had the opportunity, and rather than let it drag, I thought you would be interested in the enclosed copy of the arrangement. I will try

30 and see you personally after you receive this letter and within the next few days.

Sincerely,
Paul J. O'Neill
For Walter E. Edge.

encl.

EXHIBIT P10.
11-14-34 M.

COPY

May 22, 1931 10

Mr. Sigmund Ojserkis, President
Boardwalk Securities Corporation
Atlantic City, N. J.

Dear Mr. Ojserkis:

In connection with the Ambassador's bonds on 48 W. 48th St. and 502 Park Avenue, I understand that both these properties have been foreclosed, and I would like to report to the Ambassador on them, and for that purpose would you mind letting me have what information you can regarding them. 20

The Ambassador has advised me that he expects very shortly to have to realize some cash on some of these bonds, and although he has not stated which ones, or how much, I thought I had better mention it to you, in the event you want to make some plans to handle it, even though the information I can give you at this time is rather indefinite.

Sincerely,

Paul J. O'Neill

For WALTER E. EDGE. 30

EXHIBIT P11.

11-14-34 M.

COPY

10 BOARDWALK SECURITIES CORPORATION

Sigmund Ojserkis, President

Capital, \$1,000,000.00

Surplus and Profits over \$175,000.00

Founded Upon:

Safety of Principal

Sound—Equitable Policy—

Legitimate Margin of Profits

Address:

Boardwalk Nat. Arcade Bldg.

Atlantic City, N. J.

May 23 1931.

20

Mr. Paul J. O'Neill

c/o Dorland Advertising Co.

Atlantic City, N. J.

Dear Mr. O'Neill:

30 In reply to your letter of May 22nd, we have not heard of any foreclosure proceedings being instituted on properties 48 W. 48th St. nor 502 Park Ave. New York City. We had coupons on both issues paid when due April 1 1931.

We are not re-purchasing any bonds at present. We maintained a market on such bonds until New York established a Real Estate Bond Exchange some 2½ years ago. We have never guaranteed any bonds

Plaintiff's Exhibits

and no Bond House in the United States has ever guaranteed any.

Sincerely yours,
Sigmund Ojserkis
President.

10

EXHIBIT P12.
11-14-34 M.

BOARDWALK SECURITIES CORPORATION
SIGMUND OJSERKIS, President
CAPITAL, \$1,000,000.00
SURPLUS and PROFITS over \$175,000.00
Founded upon:

Safety of Principal—
Sound—Equitable Policy—
Legitimate Margin of Profits

20

Address:
Boardwalk Nat. Arcade Bldg.
Atlantic City, N. J.
April 24, 1928.

Miss Dorothy Blatt,
Dear Madam:

We will maintain a market of 99 and accrued interest on all Straus Bonds you have purchased from us and likewise a market of 99 and accrued interest on \$5000. Roosevelt Irrigation District 6's purchased from us this day. 30

Very truly yours,
Sigmund Ojserkis,
President.

13 N. Parker Ave.

"WE SELL ONLY SUCH BONDS AS WE BUY
FOR OUR OWN INVESTMENT"

EXHIBIT D1.

11-14-34 M.

10

COPY

BOARDWALK SECURITIES CORPORATION

Sigmund Ojserkis, President

Capital, \$1,000,000.00

Surplus and Profits Over \$175,000.00

Address:

Bdwk. Nat. Arcade Bldg.

Atlantic City, N. J.

May 1st, 1933

20

Hon. Walter E. Edge,

Atlantic City, N. J.

Dear Sir:—

We beg to acknowledge your letter of April 27, 1933 and regret to note that you misconstrued our letter of June 22, 1926 as a guarantee for the Bonds you purchased from us.

30 A guarantee on Bonds is similar to the guarantee you have on your Hearst-Brisbane Bonds. On each of these Bonds is imprinted the personal guarantee of William Randolph Hearst as to the payment of principal and interest.

Should Underwriters, Bond Houses and Bond Dealers guarantee the Billions of Dollars of Bonds

Defendant's Exhibits

they sell, their guarantees would be worthless anyhow, but none of them ever guarantee any securities they sell and in the case of a small Dealer who makes his meager commission, you surely would not expect him to guarantee the borrowers, the Mortgage the Bond represents, and also the Underwriting House, which is usually of good repute.

When we sold you the S. W. Straus & Co., Inc., 10 Bonds, and as our letter distinctly stated, it was as a temporary investment. We supplied you with an original circular issued by the Straus Company describing each issue in full—its security, location, with full particulars. In addition you personally visited the S. W. Straus & Co. Inc., 565 Fifth Avenue Offices on July 17, 1926 regarding the investments, showing you did not just rely on our recommendation and rightly so, as these Bonds were not our own security or even of our own issue. 20

In 1927 we asked you, while in our office, personally to buy New York Stock Exchange Bonds as the market was then favorable. You told us you preferred to hold onto the Straus Bonds as you knew Mr. S. W. Straus personally and you felt that the investment with its income was most satisfactory.

In 1929 during the Tariff hearing before the United States Senate, you discovered that the Penn Dixie Cement Bonds which we sold you, and which 30 were Underwritten and sold to us by the National City Company, were selling on the New York Stock Exchange about 20 points below what you paid for them. You were very much aroused and sent to us your Representative, Mr. Paul J. O'Neill, de-

manding that we repurchase the bonds at the price we sold them to you, which we naturally refused to do. Then you wrote strong and abusive letters and discontinued all your business relations with us both directly and indirectly. You further demanded that we repurchase \$50,000. Boardwalk National Corporation Bonds which we sold you, which we did at 10 par and accrued interest, although we did not have to do so. Now, had you even then wished to sell your Straus Bonds, we would have gladly and cheerfully sold them for you, as there was at that time and up to 1931 a strong demand for Straus Bonds which we could not supply.

—2—

Hon. Walter E. Edge

May 1, 1933

20

It is needless for us to say that had you even accepted our suggestion, as stated in our letter of June 22, 1926, "to gradually supply you with a high-grade conservative list of Investment Bonds," the result on account of conditions, that no one could for-see, might have been worse as you always insisted on high-grade securities. Fortunately, in your case, the holdings are well diversified and each issue represents a First Mortgage on a prominent, 30 individual property of intrinsic value and it is a question of patience and time.

Very truly yours,

Sigmund Ojserkis
President

Defendant's Exhibits

EXHIBIT D3.

11-14-34M

BY-LAWS

of the

BOARDWALK SECURITIES CORPORATION 10

Meeting of Stockholders.

1. All meetings of stockholders shall be held at the registered office in New Jersey.

2. A majority of the stock issued and outstanding represented by the holders thereof, either person or by proxy shall constitute a quorum for all meetings of stockholders. This proviso shall however 20 apply only to common stock.

3. The annual meeting of the stockholders after the year of 1925, shall be held on the second Wednesday in January of each and every year, at 11 o'clock A. M., when they shall elect by a plurality vote, by ballot, the Board of Directors as constituted in number and otherwise by these by-laws, each common stock holder being entitled to one vote in person or by proxy, for each share of common stock 30 registered in his name on the day preceding the election, exclusive of the day of such election. If for any cause, the annual election of directors is not held on the day fixed, the directors in office shall order an election to be held on some other day.

4. Notice of the annual meeting shall be mailed to each common stockholder, at his address as the same appears upon the records of the company, at least five days prior to the meeting.

5. At such meeting, if a majority of the common stockholders are not present or represented, the
10 stockholders present shall have the power to adjourn to a day certain, and notice of the meeting of the adjourned day shall be given by depositing the same in the post office address to such stockholder at least three days before such adjourned meeting, exclusive of the day of mailing, but if a majority of the common stockholders be present in person or by proxy they shall have the power from time to time to adjourn the annual meeting to an
20 subsequent date, and no notice of the adjourned meeting need be given.

6. Special meeting of the stockholders shall, at the request, in writing, of any three directors be called by the Secretary by mailing a notice stating the object of such meeting, at least five days prior to the date of the meeting, to each common stockholder of record at his address as the same appears on the records of the company.

30 Directors.

7. The Directors, not less than seven or more than fifteen in number, shall be chosen from the stockholders and shall hold office until the second Wednesday, in January, next preceding such election and

Defendant's Exhibits

until others are elected and qualify in their stead, provided however, that a two-thirds majority of the directors elected and qualified shall have the right to fill the required number at any time during the year. The number of directors may be increased or decreased by amendment of this provision of the by-laws.

10

Meeting of Directors: Quorum.

8. Stated meetings of the directors shall be held on the second Wednesday of each month, at 11 o'clock A. M. at the office of the Company in Atlantic City, N. J. When any meeting of the Board of Directors shall fall on a Holiday, such meeting shall be held on such other day as the Board may previously designate.

9. Five directors in office shall constitute a quorum for the transaction of business. 20

10. Special meetings of the Board may be called by the President on one day's notice by mail or personally to each director.

11. The directors may hold their meetings and have an office and keep the books of the Company (except the stock and transfer books) outside of the State of New Jersey, at such place or places as they may from time to time designate. 30

Power of Directors.

12. There shall be an executive committee of three directors, to be appointed by the President at each

annual re-organization meeting, who shall each serve for one year, and they shall have the power to purchase bills, notes, to buy and sell stocks and bonds or other securities, incur and pay bills. The Executive Committee shall at each regular meeting of the Board submit a written report of their actions. The President or any other one officer of the
10 Company shall be an ex-officio member of the executive committee.

Amendment to Article 12.

—and they shall have the power to invest the money of the Corporation; to buy and sell securities in which the Corporation has invested, or may invest its money; to loan the money of the Corporation with or without security; to incur and pay bills.
20

(amendment made by Resolution of Stockholders at meeting held January 10th, 1934, pursuant to notice)

13. The Executive Committee may act by and through the orders and directions of the Directors, or by the consent of a majority vote of said Committee, although not formally convened. A majority in number shall constitute a quorum.
30

Officers.

14. At the first meeting after the annual election of directors, when there shall be a quorum, the Board of Directors shall appoint a President and

Defendant's Exhibits

Vice President from their own number who shall hold office for one year and until their successors are appointed and qualified.

15. The Board shall also annually choose a Secretary and Treasurer (or one person to act as both Secretary and Treasurer) who need not be a member of the Board, who shall also hold office for one year, subject to the removal by the Board at any time, with or without cause. The Board may also appoint and remove such other officers and agents as they deem proper. 10

President.

16. The President shall be the chief executive officer and head of the company, and in the recess of the Board of Directors and of the Executive Committee shall have the general control and management of its business and affairs. He shall, with the Treasurer, sign all certificates of stock. 20

. Vice-President.

17. The Vice President shall be vested with all the powers, and shall perform all the duties of the President in his absence, and shall also perform such other duties as shall from time to time be assigned to him by the President or Board of Directors. 30

Secretary.

18. The Secretary shall be ex-officio Clerk of the Board of Directors and of the standing committees;

he shall attend all session of the Board, and shall record all votes and the minutes of all proceedings in a book to be kept for that purpose. The proceedings of all meetings shall be signed by the presiding officer and attested by the Secretary in the minute book.

- 10 19. He shall give notice of all calls for installments to be paid by stockholders, and shall see that the proper notice is given of all meetings of the stockholders and of the Board of Directors.

20. He shall be sworn to the faithful discharge of his duty and shall perform such duties as may be required by the Board of Directors or the President.

Treasurer.

- 20 21. The Treasurer shall keep full and accurate account of all receipts and disbursements in books belonging to the Company, and shall deposit all moneys and other valuable effects in the name and to the credit of the company in such depositories as may be designated by the Board of Directors.

- 30 22. He shall disburse the funds of the company as may be ordered by the Board, or the Executive Committee, taking proper vouchers for such disbursements, and shall render to the President and Directors at the regular meetings of the Board, and whenever they may require it, an account of all his transactions as Treasurer, and of the financial condition of the Company. He shall, with the President, sign all certificates of stock.

Defendant's Exhibits

Vacancies.

23. If the office of any director or member of the Executive Committee, or the President, Vice President, Secretary or Treasurer, or any one or more office or offices becomes vacant, by reason of death, resignation, disqualification or otherwise, the remaining directors, by a majority vote, though less 10 than a quorum, may elect such successor or successors, who shall hold office for the unexpired term.

Duties of Officers May Be Delegated.

24. In case of the absence of an officer of the company, or for any other reason that may seem sufficient to the Board, the Board of Directors may delegate his powers and duties for the time being to any other officer, or to any other director. 20

Offices.

25. The Company may have an office and transact business in the City of Atlantic City, New Jersey, and at such other place or places as the directors may from time to time appoint or the business of the company may require.

Fiscal Year.

30

26. The fiscal year of the Company shall begin on the first day of each year. The Directors may in their discretion publish a statement of the financial condition of the Company on the first day of January and July of each year.

Dividends.

27. Dividends upon the Capital stock of the company when earned and declared to be paid to Stockholders, shall beginning January 1, 1926, be payable semi-annually on the first day of January and July in each year.

- 10 28. Before payments of any dividends or making distribution of the profits there may be set aside out of the net profits of the company such sum or sums as the directors from time to time in their absolute discretion think proper as a reserve fund to meeting contingencies, or for equalizing dividends, or for repairing or maintaining any property of the company, or for any such other purpose as the directors shall think conducive to the interest

20 of the company.

Waiver of Notice.

29. Any stockholder or director may waive any notice required to be given under these by-laws.

Conveyance of Real Estate.

- 30 30. All transfers any conveyances of real estate shall be made by the association, under the seal thereof, in accordance with the orders of the Board of Directors, and shall be signed by two officers of the Association.

Transfers of Stock.

31. The stock of this Company shall be assignable and transferable only on the books of the corpora-

Defendant's Exhibits

tion and unless so registered no holder thereof shall have the right to vote at the annual meeting of the Company.

Expenses.

32. All expenses of the Corporation before incurred and paid shall be approved by the Board of Directors. 10

Signatures to Instruments, etc., and Safe Deposit Boxes.

33. If the Company shall rent a safe deposit box in any banking institution wherein there shall be kept any assets of the corporation, the presence of two members of the Board shall be required before the said box shall be opened. All checks, drafts, notes, acceptances, or orders from the payment of money, and all other instruments to be executed for the Company, shall be signed by the President, Vice President, Treasurer or Secretary, or by any two of said officers. 20

Examination.

34. Books of the Company shall be examined twice a year by a Committee of not less than three, to be appointed by the Board of Directors. This Committee shall be appointed by the annual organization meeting, and hold office for one year. 30

Amendment of by-laws.

35. The stockholders by a vote of the majority of the stock issued and outstanding of the common

Notice of Appeal

stock only, may at any annual meeting or special meeting alter or amend these by-laws if notice thereof be contained in the note of the meeting.

These by-laws were read article by article and approved by the unanimous vote of all the directors and stockholders present at the meeting of the stockholders and incorporators held on March 27, 1925.

NOTICE OF APPEAL.

ATLANTIC COUNTY CIRCUIT COURT.

20 WALTER E. EDGE,

Plaintiff,

v.

BOARDWALK SECURITIES
CORPORATION, a New Jersey corporation,

Defendant.

} Action at Law.
Notice of Appeal.

30 To Walter D. Van Riper, Esq., Attorney of Plaintiff:

Sir:

Take notice that defendant appeals to the Court of Errors and Appeals from the judgment entered

Notice of Appeal

in the above-stated cause on the 23rd day of November, 1934, in the Atlantic County Circuit Court, on the verdict of the jury, tried before Honorable Wilfred H. Jayne, Judge of the said Atlantic County Circuit Court, which adjudges defendant to pay to plaintiff the sum of One hundred and fifty thousand Dollars (\$150,000.00) and costs.

BOURGEOIS & COULOMB, 10
Attorneys of Defendant.

Dated: December 1st, 1934.

December 3rd, 1934.

Service of copy of the within Notice of Appeal is hereby acknowledged.

WALTER D. VAN RIPER, 20
Attorney of Plaintiff.

Filed December 4, 1934, at 9 A. M. William A. Blair, Clerk. #26042.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

WALTER E. EDGE,
Plaintiff-Appellee,
v.

BOARDWALK SECURITIES
CORPORATION, a New Jer-
sey Corporation,
Defendant-Appellant.

Action at Law.
On Appeal from At-
lantic County Circuit
Court.
Grounds of Appeal.

To Walter D. Van Riper, Esq., Attorney of Plaintiff-Appellee:

Take notice, that the following are the Grounds of Appeal hereby assigned for reversal of the judgment rendered against defendant-appellant, upon which it will rely upon the argument of the above-stated cause:

1. Because the trial Judge erred, after the following testimony had been produced by Paul J. O'Neill:
- “Q. After you had the conversation with him (Ojserkis) did you go to the Boardwalk Securities Corporation?

Grounds of Appeal

A. I did.

Q. Where is their office located?

A. In the Boardwalk National Bank.

Q. On the Boardwalk, in Atlantic City?

A. Yes."

in permitting the following question:

"What is the set-up of the office, that is, the 10
physical layout of the offices there?"

which was objected to as irrelevant and immaterial,
was admitted, and an exception noted to the defend-
dant-appellant.

Because the set-up of the office or the physical lay-
out of the offices could have no evidential bearing
upon the validity of the letter of June 22, 1926, on
which the suit was brought.

2. Because the trial Judge erred in permitting the 20
following question to be answered by Paul J.
O'Neill, over the objection of defendant-appellant:

"Q. I show you this letter of June 22, 1926,
and ask you if that is the same type of letter-
head which you have always received from the
Boardwalk?"

Because the evidential value of the letter of June
22, 1926, could not be determined, enhanced or in 30
any manner influenced by whether or not the letter-
head was the same kind of letterhead that Paul J.
O'Neill had always received from the Boardwalk.
It does not appear that he ever received any other
letter from the "Boardwalk," whatever the "Board-
walk" may mean.

3. Because the trial Judge erred in permitting Paul J. O'Neill, over the objection of defendant-appellant, to answer the following question:

"Q. What was the conversation?"

which question was repeated in the following language:

10 "Q. Now, Mr. O'Neill, what was the conversation that you had with Mr. Ojserkis?"

and was answered by Mr. O'Neill, and motion then made by defendant-appellant to strike it out, which motion was denied, and an exception noted.

20 Because the conversation which plaintiff-appellee was then endeavoring to develop was a conversation had with Mr. Ojserkis after the first purchase of the bonds had been made. It tended to explain or corroborate the letter of June 22, 1926, on which the action was founded, for which purpose it was inadmissible; and, further, constituted a subsequent cause of action; whereas the suit was brought on the letter of June 22, 1926, exclusively.

30 4. Because the trial Judge, during the examination of Paul J. O'Neill, erred in admitting in evidence over the objection of defendant-appellant, a book which had been marked Exhibit P4 for identification, together with the daily sheets, marked Exhibits P4 and P8, respectively.

Because there was no part of the book and no part of the sheets that had been authenticated. The book was made from unverified newspaper clippings and brokers' reports or sheets, but neither the news-

Grounds of Appeal

paper clippings nor the brokers' reports or sheets were in any manner authenticated. There was nothing to show that they were what they purported to be, except hearsay and conclusion of the witness.

5. Because the trial Judge erred in refusing to grant a non-suit on the following grounds:

1. That the offer contained in the letter of June 22, 1926, was never accepted. 10

2. That, assuming it were accepted, if it had been accepted, the language of that letter, the connection of the first clause, wherein it speaks of the temporary investment, and the second clause, wherein it speaks of the permanent investment, and the clause starting out "Should you at any time," indicates in law that it was only to be exercised within a reasonable time.

3. That the clause that reads, "Should you at any time wish to cash in your Straus bonds," is an independent clause, is not to be considered as a part of this letter with any connection with any other part of it. It is independent. 20

4. That that independent clause is void even as an offer, because it is unilateral, indefinite as to quantity to be sold, and lacks mutuality, as well as lacks consideration.

5. It appears that this case, as appears from the letter, is dealing with a commodity of fluctuating value, and in such a case the option, if there is an option, must be exercised promptly. 30

6. Because this action is barred by the Statute of Limitations.

6. Because the trial Judge erred in overruling defendant-appellant's objection to the question submitted to William C. Boyer touching the writing of letters, to wit:

"Q. You signed some, did you not?"

10 Because the letters that he wrote were irrelevant and immaterial to the letter that was admittedly written by Mr. Ojserkis, they had no connection whatever, and it was, therefore, improper to permit that question to be developed before the jury.

7. Because the trial Judge erred in overruling defendant-appellant's objection to Mr. Blatt, witness, giving the dates on which he purchased certain bonds (Straus), to wit: 11/15/1926, 12/4, 12/4 and 10/1/1927.

20 Because these dates were not relevant or material to show any implied authority or any apparent authority in Mr. Ojserkis, as they were all later than June 22, 1926.

8. Because the trial Judge erred in permitting the question propounded to Paul J. O'Neill over defendant-appellant's objection, to wit:

"Q. What was the conversation?"

30 Because the subject-matter referred to purchases made subsequent to June, of 1926, and if the conversation pertained to the letter of June 22, 1926, then it was irrelevant as the letter must speak for itself. If the conversation pertained to other purchases than those covered by the letter of June 22, 1926,

Grounds of Appeal

then they introduced new transactions that were not within the scope of the pleadings.

9. Because the trial Judge erred in admitting in evidence a letter written to Miss Blatt, marked Exhibit P12, over the objection of defendant-appellant.

Because the letter was written long after the writing of the letter of June 22, 1926, to Senator Edge, 10 plaintiff-appellee, and, therefore, the letter written to Miss Blatt could not show apparent authority, nor any authority, for the writing of the previous letter, and it was, therefore, irrelevant and improperly admitted.

10. Because the trial Judge erred in overruling defendant-appellant's motion for a direction on the following grounds:

1. Because the offer was for the sale of 20 \$250,000 worth of bonds and plaintiff did not purchase, nor agree to purchase, that amount. Therefore, the offer was never accepted, and no contract resulted therefrom.

2. The option "should you wish to cash in your Straus bonds at any time, we will be glad to take them from you at 99 or \$10 per bond less than you paid for them, and the accrued interest," is unilateral, indefinite as to quantity, and lacks mutuality, and plaintiff was not 30 bound.

3. The property purchased was of fluctuating value and the option was not exercised promptly.

4. The suit was not begun within six years

after the date of the option or the date of the last purchase.

5. "At any time" in this case, means a reasonable time.

10 6. The clause "should you wish to cash in your Straus bonds at any time, we will be glad to take them from you at 99 or \$10 per bond less than you paid for them, and the accrued interest," does not form a valid offer because there was no consideration paid and no specified amount of said bonds to be sold, or cashed in, therein fixed, but left indefinite and no obligation on plaintiff to offer any bonds for purchase was contained therein, and therefore did not constitute an enforceable contract.

20 7. The language in the first and second clauses of the letter of June 22, 1926, to wit: "a temporary investment and permanent investment," show that the bonds then offered were for temporary investment, and the words "at any time" contained in the clause "should you wish to cash in, etc.," taken in connection therewith, show that the right to cash in must be exercised within the period of temporary investment, to wit: within a reasonable time.

30 8. The property mentioned in said offer of June 22, 1926, to wit: bonds to be purchased at any time, was property of fluctuating value and the request made of defendant to buy, was not made promptly, or within a reasonable time, to wit: not until more than six years had elapsed.

9. Because the uncontradicted evidence is that the letter of June 22, 1926, was not author-

Grounds of Appeal

ized by any resolution, or other act of the Board of Directors, and there is no evidence from which a jury can find, either implied authority or apparent authority, for the support of said letter.

10. The uncontradicted testimony is that plaintiff, in the summer of 1927, was requested by Mr. Ojserkis to change his investment to other bonds, but declined to change his investment in the Straus bonds and said "he was satisfied with them. They paid a good income and he was satisfied;" plaintiff thereby determined to retain his Straus bonds, and his statement and determination to retain them amounted to an election, which is binding upon him and which election now precludes a recovery of damages in the suit by him. 10

11. The letter of June 22, 1926, was not an option, but only an offer to trade, and it never developed into a contract to support an action at law. 20

11. Because the trial Judge erroneously charged the jury as follows:

"Even though an officer of a corporation has no express or implied authority to enter into a given contract for the corporation, yet the corporation may in certain circumstances become bound by his acts. I refer to what we speak of as apparent authority. A corporation may become legally bound by the acts of its officer where such acts are within the apparent power which the corporation has knowingly and vol- 30

untarily caused those dealing with such an officer to believe it has conferred upon such officer. That is what we speak of as apparent authority. Of course, apparent authority must be conferred by the corporation. It does not arise out of the authority that an officer or agent may arbitrarily assume himself, without the knowledge or acquiescence, so to speak, of the corporation.”

Because there was neither expressed nor implied evidence in the case from which the jury could find that the corporation had ever conferred upon Mr. Ojserkis any apparent or implied authority at or prior to June 22, 1926. And because the charge of the trial Judge was not limited to the acts or conduct of the Directors of the corporation at or prior to the date of the letter of June 22, 1926.

12. Because the trial Judge erroneously charged the jury in connection with defendant-appellant's Request No. 5, as follows:

“Of course, you are concerned with whether or not Mr. Ojserkis had the implied or apparent authority on June 22, 1926, because that is the date on which it is alleged he made the offer in behalf of the defendant company. The alleged cause of action of the plaintiff is founded solely upon the promise—when I say founded solely, I am speaking of its foundation—upon the promise and undertaking contained in the letter of June 22, 1926, and not upon any similar promise or undertaking, if any, at any other time. I

Grounds of Appeal

have permitted testimony to be introduced at this trial tending to disclose the scope and the extent of the authority of Mr. Ojserkis, the extent of the authority that Mr. Ojserkis assumed to exercise in the conduct of the business of the defendant company, within what seemed to me to be a reasonable period with relation to the time of the transaction with the plaintiff, in 10 order, however, that you might be permitted first to determine whether such testimony is true, and, secondly, if true, to determine what inferences are to be logically drawn from such facts respecting * * * ”

That statement beginning with the statement: “I have permitted testimony to be introduced, &c.,” for two purposes was not limited to the conduct of the business prior to June 22, 1926, but applied to tes- 20 timony after that date, which was irrelevant.

13. The Court said concerning his refusal to charge Request No. 5, to wit:

“I have already said to you that it is incumbent upon the plaintiff to prove by a fair preponderance of the evidence that the offer contained in the letter of June 22, 1926, was unconditionally accepted by the plaintiff, in order that such offer and acceptance might grow 30 into, so to speak, an enforceable and valid contract.”

Because there was no evidence in the case to show an unconditional acceptance, nor from which an unconditional acceptance might be implied.

14. Because the trial Judge refused to charge defendant-appellant's second request, to wit:

10 “2. In the letter of June 22, 1926, is the following language: ‘Should you wish to cash in your Straus bonds at any time, we will be glad to take them from you at 99 or \$10 per bond less than you paid for them, and the accrued interest.’ The words ‘at any time’ do not mean that the offer to cash in may be delayed indefinitely and then exercised, but must be exercised within a reasonable time.”

15. Because the trial Judge erred in refusing to charge defendant-appellant's third request, to wit:

20 “3. The letter of June 22, 1926, deals with an option to sell to defendant at a fixed price, an article of fluctuating value, and if the plaintiff intended to avail himself of that option, he must exercise that option promptly; and if he did not exercise it promptly, he is not entitled to recover.”

16. Because the trial Judge erred in refusing to charge defendant-appellant's fourth request, to wit:

30 “4. In this case, the bonds, being of a fluctuating value, and the price having been fixed, plaintiff's right to compel defendant to respond to such option must have been demanded of defendant at a time when the purchase under said option would not have prejudiced the defendant. If the request was so long delayed that the purchase by the defendant would have been prejudiced, then defendant was not obliged to respond.”

Grounds of Appeal

17. Because the trial Judge erred in refusing to charge defendant-appellant's fifth request, to wit:

"5. The letter of June 22, 1926, constitutes an offer made by Mr. Ojserkis to Senator Edge concerning the sale and purchase of bonds involved in this case; there was no written acceptance, and the only acceptance was the purchase of bonds. Unless the purchase of bonds fully met the offer, no contract resulted, and your verdict should be for the defendant."

18. Because the trial Judge erred in refusing to charge defendant-appellant's sixth request, to wit:

"6. The statute of limitations has been pleaded as a defense in this cause, and that statute will begin to run from the expiration of what you determine would have been a reasonable time within which the plaintiff should have exercised his option to cash in his Straus bonds."

19. Because the trial Judge erred in refusing to charge defendant-appellant's seventh request, to wit:

"7. The period of reasonable time should be determined by you as to each of the several purchases of bonds, and if more than six years elapsed between the expiration of the end of the reasonable time, as fixed by you, within which the plaintiff should have exercised his intention to cash in said bonds, and the date of instituting this suit, to wit: July, 1933, then as to all or such part of said bonds

wherein the reasonable time elapsed more than six years before plaintiff's suit was instituted, plaintiff's right of action is barred, and your verdict as to them should be for the defendant."

20. Because the trial Judge erred in refusing to charge defendant-appellant's thirteenth request,
10 to wit:

"13. In the case at hand, the principal delegated to Mr. Ojserkis, the President, authority to buy and sell bonds in the usual course of business. This authority would not authorize or empower the President to agree to purchase or repurchase bonds in the future at a stated price."

21. Because the trial Judge erred in refusing to charge defendant-appellant's nineteenth request,
20 to wit:

"19. There was no market value established as to any of these bonds, excepting where the witness testified in relation to one or two series of bonds that he had actually sold at 10 or 12. As to all other issues, there was no market value established, and as to them plaintiff is entitled to recover nominal damage."

30 22. Because the trial Judge erred in refusing to charge defendant-appellant's twentieth request, to wit:

"20. Plaintiff is not entitled to recover at all as to the \$12,500 worth of bonds owned by Mrs.

Grounds of Appeal

Edge, and the \$7000 worth of bonds owned by Walter E. Edge, Jr.”

Because it was admitted that plaintiff was their agent in the purchase of the bonds; that their money paid for the bonds; and there was no evidence that he had any authority from either of them to institute a suit in his name for their benefit, and no such suit 10 was instituted.

23. And the trial Judge further erred in commenting upon his refusal to charge said request No. 20, in the following language:

“This requires you to consider the testimony in the case. It is incumbent upon the plaintiff to prove by a fair preponderance of the evidence that these bonds to which this request relates were purchased by the plaintiff pursuant 20 to the agreement of June 22, 1926. If they were not, if the plaintiff has failed to prove that these bonds to which reference is made in this request were so purchased, and you conclude that they were not purchased by the plaintiff or that they were not purchased, so to speak, under this agreement of June 22, 1926, then you will exclude those bonds in the consideration of the amount of damages to be awarded to the plaintiff.” 30

Because it is not a question of whether those bonds were purchased under the letter of June 22, 1926, or not. The question is whether the plaintiff has shown such title to the bonds in this case as will permit him,

Grounds of Appeal

as plaintiff, to recover against the defendant-appellant for the value thereof.

BOURGEOIS & COULOMB,
*Attorneys of Defendant-
Appellant.*

Dated: December 6th, 1934.

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73 FEB.T.1935

New Jersey Court of Errors and Appeals

No. 73. FEBRUARY TERM, 1935.

WALTER E. EDGE,
Plaintiff-Appellee,

vs.

BOARDWALK SECURITIES CORPORATION, a New Jersey corporation, SIGMUND OJSERKIS and WILLIAM G. PANCOAST, Receivers,
Defendant-Appellant.

On Appeal from
Atlantic County
Circuit Court.

Heard Before
Jayne, J., and
a Jury.

Judgment for the
Plaintiff for
\$150,000.

Defendant's
Appeal.

(Italics and the like ours, except where otherwise noted.)

BRIEF OF PLAINTIFF-APPELLEE.

Facts.

Sometime about the middle of June, 1926, Paul J. O'Neill, who was a personal business representative of the plaintiff-appellee, Walter E. Edge (hereinafter called plaintiff), had a conference with Sigmund Ojserkis, the President of the Boardwalk Securities Corporation, defendant-appellant (hereinafter called defendant), with reference to Senator Edge's financial availability for investment purposes (p. 26, ll. 10-15). On June 22, 1926, defendant, through its President, Sigmund Ojserkis, addressed a letter to plaintiff (Ex. P-1, p. 289).

This letter, to which there was attached a list of securities, is the basis of the present litigation. The letter reads:

“Atlantic City, N. J.
June 22, 1926.

“Hon. Walter E. Edge,
Washington, D. C.

“Dear Senator:

“At the suggestion of your Mr. O'Neill, I welcome the opportunity to be of some financial service to you, and I am taking the liberty to enclose a list of 25 bonds at \$10,000 each, well diversified with a good income, for your temporary investment. These Bonds we own and can deliver to you, of course, subject to prior sale.

“The Bond market at present is too high for permanent investment, as you will note from the enclosed ad. of the National City Co., but I propose to let you have our Bonds and, gradually, as the market is more favorable, replace each \$10,000 lot of Bonds, or such as you may not favor, with issues which will have a good prospect for appreciation and better yield. In such cases, we will accept in payment S. W. Straus & Co. Bonds, which you purchase from us, at par and accrued interest. The other Stock Exchange issues we will accept at market and accrued interest. *Should you wish to cash in your Straus Bonds at any time we will be glad to take them from you at 99 or \$10 per bond less than you paid for them and the accrued interest.* My idea is if you will give me the time to gradually supply you with a high grade, conservative list of Investment Bonds, you will be proud of it and have *absolute safety* with a good income.

“It is difficult for me to explain everything in a letter, but I wish to assure you that I will use the same care and diligence in your case, as I am doing for my ‘pet’—the Boardwalk National Bank.

“No matter who you entrust with your investments, it must be a case of confidence.

"Thanking you for this opportunity, and with highest personal regards, I am,

"Respectfully yours,

SIGMUND OJSERKIS,
President."

Attached to the letter was a printed sheet at the top of which was written, "Atlantic City, N. J., June 22, 1926. We recommend the following \$250,000 Bonds as a conservative and well diversified Investment—subject to prior sale." The list of bonds is then detailed as shown in Exhibit P-1 (pp. 290, 291), except that the words "Straus bonds" to the left of the column (p. 291) are written in pencil and were so written by O'Neill after the letter had been received by him from Senator Edge.

After the letter of June 22, 1926 (Ex. P-1) was received by plaintiff, which receipt was a day or two after the date of the letter, he referred it to his representative, O'Neill, with instructions to purchase Straus bonds from the list (p. 15, ll. 5-30). O'Neill thereupon purchased for Senator Edge Straus bonds from defendant (p. 31, l. 1) on June 28, 1926; July 7, 1926; December 17, 1926; January 5, 1927; April 12, 1927, with maturities running as late as 1946.

For all of these bonds plaintiff paid defendant cash on the basis of par, excepting the Lefcourt Manhattans, for which the price paid was 97.55.

On October 4, 1927, O'Neill, in the name of plaintiff, but acting for the Camedge Company, an Edge Family Corporation, ordered from defendant \$25,000 of Straus 42nd Street and Lexington Avenue bonds, which were subsequently delivered to O'Neill as the representative of plaintiff and which bonds were paid for out of funds of the Camedge Company. These bonds were ordered

by letter bearing date October 4, 1927 (Ex. P-6, p. 296), which reads:

"Walter E. Edge,
Atlantic City, N. J.

October 4, 1927.

"Mr. Sigmund Ojserkis,
Boardwalk Securities Corporation,
Atlantic City, N. J.

"Dear Mr. Ojserkis:

"As per our conversation of the other day, you can purchase \$25,000 of Straus, 42nd & Lexington Ave. office building bonds, *in accordance with the agreement you made with the Senator to buy back at any time, at one point less than cost, any Straus bonds purchased from you by him, his family, or the Camedge Company.*

"This purchase is made in the name of Camedge Company.

"Very truly yours,

PAUL J. O'NEILL,
For Walter E. Edge.

"PJON/q
Encl.

P. S. Please advise amount for check immediately.
P. J. O'N."

On May 22, 1931, O'Neill, for plaintiff, wrote defendant as follows (Ex. P-10, p. 319):

"May 22, 1931.

"Mr. Sigmund Ojserkis, President,
Boardwalk Securities Corporation,
Atlantic City, N. J.

"Dear Mr. Ojserkis:

"In connection with the Ambassador's bonds on 48 W. 48th St. and 502 Park Avenue, I understand that both these properties have been foreclosed, and I would like to report to the Ambassador on them, and for that pur-

No suit on this letter

pose would you mind letting me have what information you can regarding them.

"The Ambassador has advised me that he expects very shortly to have to realize some cash on some of these bonds, and although he has not stated which ones, or how much, I thought I had better mention it to you, in the event you want to make some plans to handle it, even though the information I can give you at this time is rather indefinite.

"Sincerely,

PAUL J. O'NEILL,
For WALTER E. EDGE,"

in reply to which defendant answered as follows (Ex. P-11, p. 320):

"Boardwalk Nat. Arcade Bldg.
Atlantic City, N. J.
May 23, 1931.

"Mr. Paul J. O'Neill,
c/o Dorland Advertising Co.
Atlantic City, N. J.

"Dear Mr. O'Neill:

"In reply to your letter of May 22nd, we have not heard of any foreclosure proceedings being instituted on properties 48 W. 48th St. nor 502 Park Ave., New York City. We have coupons on both issues paid when due April 1, 1931.

"We are not re-purchasing any bonds at present. We maintained a market on such bonds until New York established a Real Estate Bond Exchange some 2½ years ago. We have never guaranteed any bonds and no Bond House in the United States has ever guaranteed any.

"Sincerely yours,

SIGMUND OJSERKIS,
President."

To this letter O'Neill, acting for plaintiff, wrote the following (Ex. P-9, p. 318):

"Walter E. Edge,
Atlantic City, N. J.

May 26, 1931.

"Mr. Sigmund Ojserkis, President,
Boardwalk Securities Corp'n.,
Atlantic City, N. J.

"Dear Mr. Ojserkis:

"I have your letter of the 23d instant, *the second paragraph of which rather surprises me, and I am wondering if you have forgotten the arrangement we had, verbally as well as by your letter of June 22, 1926, copy of which is enclosed.*

"I know that the Ambassador has always felt that this arrangement was in existence, and before calling your letter of the 23d instant to his attention, I thought best to remind you of the arrangement we made several weeks ago, and under which arrangements you will recall the bonds were purchased.

"I wanted to come down and see you about this, but have not had the opportunity, and rather than let it drag, I thought you would be interested in the enclosed copy of the arrangement. I will try and see you personally after you receive this letter and within the next few days.

"Sincerely,

PAUL J. O'NEILL,
For WALTER E. EDGE."

Defendant made no reply although receipt of the letter is admitted.

On April 27, 1933, four days after plaintiff returned permanently to the United States, after completing his duties as American Ambassador to France where he had been for approximately four

years (p. 16, ll. 20-30), plaintiff addressed the following letter to defendant (Ex. P-2, p. 293):

“Walter E. Edge,
Atlantic City, N. J.

“April 27, 1933.

“Boardwalk Securities Corporation,
Boardwalk National Arcade,
Atlantic City, N. J.
Attention: Mr. Ojserkis.

“Gentlemen:

“As you will recall, during June and July, 1926, I purchased from you, as a result of negotiations conducted through Mr. Ojserkis, a list of S. W. Straus & Co. bonds.

“As you know, these bonds were purchased at that time *on the representation by you that at any time I desired to cash them in you would take them back at 99, or \$10 per bond less than I paid for them and the accrued interest.*

“I now desire to cash in these bonds and am prepared to deliver to you:

(Then follows a list of bonds.)

“As you know, I paid par for these bonds with the exception of the Lefcourt Manhattans, for which I paid 97.55, and I am prepared to deliver them to you at 99, or \$10 per bond less than I paid for them and the accrued interest. Of course, in the case of the Lefcourt Manhattans, for which I paid 97.55, I would not expect you to pay the 99, but would expect to deliver them to you at a price equal to what I paid for them less \$10 per bond and accrued interest.

“As you know, this offer to sell the bonds to you at this price is in accordance with the agreement which I had with you, as evidenced by your letter of June 22, 1926, which letter and guarantee contained therein provided the inducements for me to purchase these bonds.

"I believe you realize that at the time these purchases were made I was relying upon the recommendation which you had made as to the safety of these bonds and upon your guarantee that at any time I desired I could cash them in with you at the prices above mentioned.

"I realize that in view of the present economic conditions perhaps you might not find it convenient to accept all of these bonds immediately and at one time. I am perfectly willing, of course, to cooperate with you in this respect and if it is working a hardship for you to take over the entire list as above mentioned at once, if you will be good enough to inform me on what dates it will be convenient for you to take them, I think perhaps I can work out a satisfactory arrangement provided the length of time during which they will all be taken back by you is not too long.

"Very truly yours,

WALTER E. EDGE."

Receipt of this letter was acknowledged and it was answered by defendant under date of May 1, 1933 (Ex. D-1, p. 322), and on June 10, 1933, plaintiff demanded of defendant that it repurchase all of the Straus bonds purchased by him from it in accordance with the terms of the letter of June 22, 1926 (Ex. P-3, p. 295). The demand reads:

“Walter E. Edge,
Atlantic City, N. J.

“June 10, 1933.

“Boardwalk Securities Corp.,
Atlantic City, N. J.
Attention: Mr. S. Ojserkis.

“Gentlemen:

“Under date of April 27, 1933, I wrote you informing you that I was prepared to deliver to you certain S. W. Straus Company bonds which I purchased from you subsequent to June 22, 1926, and that my offer to deliver these bonds to you was in accordance with your agreement contained in your letter of that date to the effect that you would take them from me at 99 and the accrued interest.

“At the time this letter was written by me I did not include all of the Straus bonds which I had purchased under the terms of this agreement because I did not want to cause any inconvenience in asking you to take all of these bonds at one time.

“As a matter of fact, as I said in that letter, if to take the bonds all at once would cause you any hardship, I was willing to play along on a reasonable basis, but in view of your answer to me under date of May 1st, 1933, wherein it is apparent that you do not intend to fulfill your part of the contract, it seems evident that it is useless on my part to attempt to help you.

“Therefore, I am now notifying you that I am prepared to deliver to you, for cash, at 99, or \$10.00 per bond less than I paid for them, and the accrued interest, in accordance with the terms of your letter to me of June 22, 1926, the following bonds, all of which are Straus issues:

(Then follows list of bonds.)

"Delivery will be made immediately upon receipt of word from you that you are prepared to accept these bonds and pay for them as above outlined.

"Very truly yours,

WALTER E. EDGE."

Defendant did not answer this letter and no bonds were ever repurchased by defendant from plaintiff, and thereupon this suit was started (Complaint 1, Answer, p. 7). Judgment was for plaintiff on a verdict of a jury (p. 11).

Plaintiff testified on cross-examination (p. 19, ll. 10-20) that he considered the words "should you wish to cash in your Straus bonds at any time we will be glad to take them from you at 99" as a *guaranty* on the part of defendant which disposed of any doubt which he might have in mind with reference to the advisability of purchasing this type of bond, plaintiff having previously testified (p. 15, l. 30, to p. 16, l. 1) that, prior to that time, he had never had any business relations with the Boardwalk Securities Corporation and had never owned any Straus bonds.

Plaintiff further testified (p. 22, ll. 12-35) that he bought the bonds as a permanent investment because they yielded an income of approximately 6% and had a *guaranty of repurchase* which guaranty was equivalent in the mind of plaintiff to an ever available market. On re-cross-examination (p. 23, ll. 10-25) plaintiff testified as follows: "I bought them as a permanent investment, *backed up by that guaranty. Otherwise I would not have bought them.* Question: Did you think that guaranty, as you call it, was going to run forever? Answer: '*At any time,*' it was clearly specified in the letter. Question: In other words, it might run along for ten years and then if the bonds went to nothing you would simply go in and cash in?

Answer: I think that has already been decided by your Supreme Court, 'at any time.' Maybe I am wrong."

ARGUMENT.

I.

Defendant argues that the trial court erred in refusing to grant its motion for a direction of a verdict on the following ground: "The letter of June 22, 1926, was not an option but only an offer to trade and it never developed into a contract to support an action at law" (p. 9, defendant's brief).

Defendant in its brief argues that the letter of June 22, 1926, being the letter upon which this suit is based, was merely an invitation to plaintiff to make a counter offer for the bonds which defendant owned and was attempting to sell to plaintiff.

A reading of the letter well indicates that it was *not* an invitation to bid. The subject matter of the letter was bonds. Defendant was not the only owner of similar bonds. There were millions of dollars worth of them in existence. They could be purchased from any investment concern. The price which was quoted in the letter was not a bargain price based upon any particular advantage which defendant might have had because of advantageous purchase by it. The bonds were being offered at the market, and they could have been purchased at the market price any place in the United States where contact with the market could have been made. There was only one reservation made in the letter of June 22 above mentioned, and that was that the bonds were offered subject to prior sale.

The letter was written, not as the initial step in negotiations between the parties, but after a conversation between O'Neill, the personal business representative of plaintiff, and Ojserkis, president of defendant, during which they had discussed Senator Edge's financial availability for investment purposes (p. 26, l. 10). The letter indicates, in the first line, that O'Neill had suggested to the president of defendant that a letter *be* written to plaintiff outlining the terms of the purchase and indicating the bonds available for sale.

It is apparent from the letter that defendant was anxious to secure the business of plaintiff. Not only did it thank him for the opportunity, but the writer of the letter attempted to impress, and unfortunately *did* impress upon, plaintiff the fact that the writer was one in whom confidence could and should be reposed.

Nowhere in the letter is there the least intimation that the writer expected a counter proposal from plaintiff. Certainly no one with any conception of business dealings would expect a purchaser to attempt to offer a seller a lower price for a standard commodity than could be obtained on the market.

Not only does plaintiff say that he bought the bonds under the terms of this letter but Ojserkis, who wrote it, says (p. 133, l. 20) that he sold plaintiff some bonds *under the terms of the letter*, although he attempts to limit the bonds so sold to those of the first eighty-thousand-dollar purchase, but, if that contention were correct, and we deny it, it indicates conclusively that the letter was intended as a contract and was acted upon as such by both parties.

To say, as defendant does in its brief, that the letter of June 22, 1926, was more in the nature of a business advertisement than an offer, is simply to ignore the language of the letter.

Defendant in its brief under this point cites several cases, none of which are in this State, but, most significantly, it appears that in no one of these cases was there an actual offer made to sell and a purchase as a result thereof, the money paid and the goods delivered.

In *Moulton v. Kershaw*, 59 Wis. 316, 18 N. W. 172 (p. 15, defendant's brief), it appeared that the plaintiff offered to sell and the defendant attempted to buy barrels of salt, but the actual sale never took place, the plaintiff attempting to buy 2,000 barrels without any information whatever from the defendant as to whether defendant was in a position to supply anywhere near that amount. In the letter in this case defendant distinctly says that it *owns the bonds and has them on hand*.

In *Beaupre v. Telegraph Co.*, 21 Minn. 155 (p. 18, defendant's brief) the Court expressly points out that the telegram which was the basis of the suit "did not purport to be an offer to sell any quantity of pork whatever, nor was the plaintiff's message an acceptance of any offer." In *Baston v. Toronto Vinegar Co.*, 4 Ont. L. R. 20 (p. 19, defendant's brief), there was no definite amount fixed and the letter indicated that it was but preliminary as "final arrangements" were to be made; and in *Richardson v. Hunter*, 88 Wash. 375, 153 Pac., p. 325 (p. 20, defendant's brief), the letter involved read that the writer would be willing to *enter into an agreement* to buy back the stock but there had been no agreement made, and the letter did not state the terms and the conditions upon which the agreement would be made. In *Johnston v. Rogers*, 30 Ont. 150 (p. 20, defendant's brief), there was not an offer to sell but merely a quotation of prices. The writer of the letter did not attempt to say that he could furnish

the flour at the prices or intimate that he owned or controlled any flour for sale.

No one of the cases cited by defendant presents a situation parallel to that at bar.

The citation from Williston on Contracts (p. 20, defendant's brief) has no application.

Even if the letter be not considered as containing an offer yet, when plaintiff ordered, his order was an offer *under the terms of the letter* and the furnishing of the bonds by defendant was an acceptance of the offer of plaintiff *under the terms of the letter*.

II.

Defendant in its brief argues that in the letter of June 22, 1926, it was proposing an investment of \$250,000 and that there could be no acceptance of its offer unless the full amount of \$250,000 worth of bonds was purchased (p. 22, defendant's brief).

By no possible stretch of the imagination can such an intention be inferred from the wording of the letter. If this *had* been the intention of the writer, it would have been easy for him to have used language clearly expressing his intention. One of the best indications that he intended otherwise is that he made a different proposition with reference to different bonds enumerated on the list which accompanied the letter. It will be noted that the letter says that, if plaintiff does not favor certain issues but wishes to replace them with other bonds, defendant will accept Straus bonds at par and accrued interest and that the Stock Exchange issues (Straus bonds not being listed on the Stock Exchange) would be accepted at market and accrued interest in cases of replacement, but that should plaintiff wish to *cash* in his

Straus bonds at *any time* it would be glad to take them from him at 99.

When the first purchase of \$80,000 of bonds was made a few days after the original letter was written, there had been no conversation or correspondence between the parties subsequent to the letter, and defendant could not have believed that plaintiff was purchasing on any basis except under the terms of that letter. If it had not considered this, or any of the other purchases subsequently made as being under the terms of that letter, it would or should have notified plaintiff to that effect.

Defendant argues that the language of the letter indicates that defendant had in mind a sale of \$250,000 of bonds for temporary not for permanent investment. Plaintiff testified that he bought the securities for permanent investment, but, regardless of his testimony, we cannot overlook the wording of the letter itself. It first reads that defendant will replace each ten-thousand-dollar lot of bonds "or such as you may not favor." This leaves entirely to the discretion of plaintiff as to whether he favored retention of the bonds, and if he did so, as he did, he was justified in holding them under the terms of the letter.

The provision in the letter for the repurchase of Straus bonds at 99 reads that *this* repurchase will be made when "YOU WISH," again fixing, not a temporary time when they must be cashed in, but a time *when plaintiff wishes*—in other words, when *in his judgment* he desires to exchange them for cash—and again the clear intent of the writer of the letter is expressed by the use of the word "glad" when he says that "we will be *glad* to take them from you at 99," showing that the writer of the letter was doing everything possible to make an impression upon plaintiff as to the value of the bonds and to secure his business.

In order to do this he was giving plaintiff every possible inducement to buy.

If defendant did not consider the letter of June 22, 1926, a contract and, if it did not consider all of the Straus bonds which were subsequently purchased by Senator Edge from it as being purchased under the terms of that letter, surely it would have said so when it received the letter of O'Neill dated October 4, 1927 (Ex. P-6, p. 297), wherein he says, "*In accordance with the agreement you made with the Senator to buy back at any time, at one point less than cost, any Straus bonds purchased from you by him, his family, or the Camedge Company.*"

Defendant made a sale on the basis of this letter and never by any word, sign or letter indicated in any way that it disagreed with the clearly understandable statement made therein as to the terms of the agreement which had previously been made.

The citations in defendant's brief (p. 25) have no application to the situation presented by the case at bar.

III.

Defendant argues that the fact that the property purchased was of fluctuating value and that the option was not exercised promptly is of some importance, basing its contention upon certain cases with reference to a rescission (p. 26, defendant's brief). These cases, we submit, have no application here because *rescission* for fraud, misrepresentation or for any other reason for which rescission is permitted, is not in issue here.

It is true that the property in question, being bonds and therefore the subject of a general market, was of fluctuating value, but it will be noted

that, while the offer to sell was based *upon market*, the offer to repurchase *was based upon a fixed price; namely, 99, or \$10 less per bond than plaintiff paid for them.*

McCracken v. Harned, 66 N. J. L. 37, cited on pages 27, 30 of defendant's brief, is not applicable because in that case there was no acceptance of the proposition. *Brooks v. Trustees*, 50 L. R. A. (N. S.) 594 (p. 30, defendant's brief), is also inapplicable because in that case there was a right of action which accrued at once upon the contract, whereas in the case at bar there was no right of action which accrued in behalf of plaintiff until he had made his demand upon defendant to repurchase in accordance with its agreement.

The cases of *Roberts v. James* (83 N. J. L. 492), *Brown v. Young* (110 N. E. 562, 62 Ind. App. 364), *Dennis v. James* (44 N. J. Eq. 513) (p. 29, defendant's brief), all involve rescission, the right resting upon matters extrinsic the contract. This case has nothing to do with rescission. It rests upon a right conferred by express contract.

THE WORDS "AT ANY TIME" IN THIS CASE CANNOT MEAN A REASONABLE TIME BUT MEAN EXACTLY WHAT THEY SAY (p. 32, defendant's brief).

It cannot be, and is not, argued that there is any legal bar prohibiting parties, if they so desire, from making a contract to do a certain thing without limitation as to time except such as the necessities of the case impose (*i. e.*, in *this* case the fact that if Senator Edge had parted with the bonds or if the bonds had matured the agreement would be at an end), and if that is what they intend to accomplish, what other possible words could they use that would be so easy of understanding and so little subject to misinterpretation as the words "*at any time*"?

It must be borne in mind in interpreting the language of the letter upon which this suit is

based, and particularly that part of it which contains the words "at any time," that it cannot be contended to import an obligation in perpetuity, which is the objection that has been raised in some cases to the giving effect of the simple, clear meaning of these words.

In the letter in question here the words are used as follows: "*Should you wish to cash in your Straus bonds at any time.*" These words make the agreement a purely *personal* contract and the obligation runs only to the plaintiff. Any rights which he might have under it could not succeed to his personal representatives because the exercise of the right must be based upon *a wish of his*; in other words, there must have been a mental process by him resulting in a demand by *him* upon defendant. So, instead of being a contract importing an obligation in perpetuity, it is limited to the lifetime of plaintiff. And defendant gave *to plaintiff the right to fix the time*—the effect of the language is "any time *you wish*."

In addition to this, all of the bonds that were mentioned in the letter and which were purchased by plaintiff under the terms of this letter, *had a certain fixed period of life*, the longest term expiring, as appears from the printed list (Ex. P-1), in 1941, and the shortest in 1936. Certainly the writer of the letter in using the words "at any time," *must have contemplated liability to repurchase at any time during the life of these bonds*.

If plaintiff had waited until after the bonds had become due and *then* demanded a return, the bonds having in the meantime defaulted and not been paid, a different question might have been presented. Defendant was contracting with respect to live obligations with periods of existence *definitely fixed*, and we submit that the words "at any time" must have, at the very least, meant—at any possible time during the life of the obligations.

Defendant cites several cases which it insists support its contention that the words "at any time" mean a reasonable time. A careful perusal of these cases, however, shows that practically all of them present different situations than that present in the case at bar.

The case of *Fitzpatrick v. Woodruff*, 96 N. Y. 561 (p. 32 of defendant's brief), does not support the position of defendant. The Court used the language quoted at page 33 of defendant's brief, but did not decide that that language applied to the situation at the bar. No one quarrels with this general language. At the conclusion of the opinion, the Court said:

"In view of the conclusion already reached it is *not necessary to consider* the question whether the plaintiff had a right, under the arrangement, to return the bonds whenever he became dissatisfied, without regard to the time when that event should occur, *and we do not determine the same.*"

The facts in that case were: defendant sold railroad bonds to plaintiff and promised "that if at any time he (plaintiff) became dissatisfied with the bonds, he (defendant) would take them back on thirty days' notice and return the money paid by the plaintiff for them with interest"; plaintiff relied entirely upon the defendant's statement; the bonds were purchased in December, 1872; interest was paid until July, 1875, almost three years; default was then made in the payment of the interest; plaintiff then wrote to defendant expressing his dissatisfaction and giving defendant the thirty days' notice required by the arrangement. The Court below held that the question of reasonable time did not arise. The Court of Appeals did not hold that the matter of reasonable time was involved, but proceeded to indicate that, assuming that it was, there was no proof

that there was any breach of the rule, and in reaching this conclusion the Court said (p. 565):

“Up to the time when the interest was refused no reason had existed for dissatisfaction on the part of the plaintiff, and, under the circumstances, the notice given by him to the defendant was within a reasonable time and within the rule contended for. There was no dispute as to the facts, and no request to go to the jury upon the question whether the notice was given within a reasonable time, on the contrary the appellant claimed that the question was entirely one of law, and *it was properly so determined*. The interest being paid promptly up to the time when the first default was made, and it not appearing that there was any occasion for the plaintiff, prior to that time, to doubt the responsibility of the Erie Railway Company and of the guarantors of the bonds, he was not called upon to make any inquiry on the subject in order to protect his rights.”

So here. What possible reason could there have been for a wish on the part of Edge to dispose of these bonds until there had been a change in market value or default in interest?

In *Paulson v. Weeks*, 80 Ore. 468, 157 Pacific 590 (p. 33, defendant's brief), although the Court applied the reasonable time interpretation, it *did* say that the word “‘any’ implies unlimited choice as to the particular unit, number or quantity and *generally* signifies an indeterminate unit or number of units out of many or all.”

This seems to be simple and easily understandable language. If *that* be so and the words “any time” are taken in connection with the words “*you wish*” as used in the letter of June 22, 1926, we submit it appears that plaintiff had the right to demand the repurchase of his bonds whenever, during his lifetime and the life of the bonds, *he* so desired. The Court in reaching its decision also

took into consideration the extraordinary character of the stocks involved—mining stocks.

In *Michaels v. Pontius*, 137 N. E. 579, 83 Indiana Appeals, 66 (p. 33, defendant's brief), William Michaels made a lease of certain lands in 1904. He died in 1920 and, while the case does not specifically say that the plaintiff therein is the heir or devisee of William Michaels, it is apparent that such is the case. Here again we have a different situation. The words used in that case were simply the three words "at any time." They were not in any way linked up with *any desire or expression or wish or act on the part of the plaintiff*. The general language of the Court is opposed to what this court said in *Weinstein v. Sheer*, 98 N. J. L. 511, even as that case is construed at page 41 of defendant's brief.

In *Park v. Whitney*, 148 Mass. 278, 19 N. E. 161 (p. 35, defendant's brief), a situation quite different from that here presented itself. Whitney, not as a business proposition but purely out of friendship for a man who had been long in his employ, wrote a letter to the employee retiring him and saying that at any time after January 1, 1886, he would purchase his stock. The employee did not reply to this letter or do anything about it until some two years afterward, when he wrote to Whitney saying that he wanted to sell the stock. Whitney refused to buy, and suit was brought. The Court in this case said that there was no contract, that the offer never became binding as a contract because there had never been any acceptance of it from the plaintiff. How different this situation is from the one at bar where bonds were purchased within a few days after the letter was written. And again in the *Whitney* case the Court lays emphasis on the fact that the letter was not written as a business proposition but was based solely upon friendship.

In the case at bar the offer to repurchase after the purchase was not a pure offer without consideration. There was an executed consideration for the offer, *i. e.*, the purchase by plaintiff of the bonds on the faith of the offer. Cases which deal with simple offers to buy or to sell have no application whatever.

In *Raynor v. Syracuse University*, 71 N. Y. Supp. 293 (p. 38, defendant's brief) the decision did not rest upon an interpretation of the words "at any time" because the Court expressly said that the contract which contained these words had been merged in subsequent conveyances.

In *Fletcher v. Lyon*, 98 Ark. 5, 123 S. W. 801 (p. 38, defendant's brief), the defendant, the owner of certain lands, sold the timber thereon, not the land, and gave the grantee the right to remove the timber at any time. The Court held this meant a reasonable time but indicated very clearly in its opinion that it did so because to do otherwise would permit the grantee to stand silently by without removing the timber and thereby forever, if he desired to do so, prevent the grantor from the use of his land, which situation the Court held was clearly not contemplated by the parties at the time of the signing of the contract. Again in this case it will be noted that the words "at any time" were not tied with the words "you wish." This case seems opposed to *Weinstein v. Sheer*, 98 N. J. L. 511, even as that case is construed at page 41 of defendant's brief.

Atlantic Pebble Co. v. Lehigh Valley R. R. Co., 89 N. J. L. 336 (p. 37 of defendant's brief), is not at all applicable to the case at bar. The Court at page 339 used the language quoted by defendant but the agreement involved was not in any respect an "any time" agreement. The Court was dealing with the ordinary contract with no time of performance fixed, and simply held

that the absence of a provision with respect to time of performance in the contract was not fatal for the law would inject a "reasonable time".

The case is of some importance however as we will hereafter point out upon the point as to whether before defendant could take advantage of the lapse of time, it was obliged to notify plaintiff that it intended so to do unless plaintiff acted within a time fixed in the notice. The fifth head-note of the case reads:

"5. Where a promise is in effect an offer contemplating acceptance by performance of a certain condition coupled with the entering into of a reciprocal promise by the offeree at the time of such performance, the performance of the condition under the circumstances contemplated, before a withdrawal of the offer, gives rise to a valid executory contract wherein the original promise is supported by the reciprocal promise arising upon the performance of the condition, irrespective of whether such performance is a benefit to the promisor or a detriment to the promisee."

In *Hawkins v. Duvall*, 177 N. Y. Suppl. 584 (p. 40, defendant's brief), the grantor had sold certain land, reserving the right to remove timber at any time. The length of time which had elapsed between the making of the deed and the suit was twelve or thirteen years. The Court held that the rule of reasonable time applied.

However, the facts in that case were distinctly different from those present in the case at bar. The plaintiff was not the person who had made the grant and had reserved the right to remove the timber. His heirs were the plaintiffs. The Court expressly said that the reservation "was not personal to the grantor" and that whatever rights he had thereunder passed by his will to the devisees mentioned therein. In that case if the words "at

any time'' were given their full meaning perpetuity was unquestionably contemplated.

Erie v. Pennsylvania Railroad, 92 Atl. 192; 246 Pa. 238 (p. 40, defendant's brief), was a case where the City of Erie, Pa., had conveyed certain land to the railroad company for specific purposes which were set out in the grant. The case involved the use of the three words "at any time." There was no possible limitation upon the phrase, if given its fullest meaning. The Court, while applying the reasonable time rule, calls attention to the fact that the railroad had already had sixty years in which to exercise its rights under the grant and could not now complain that it had not been allowed sufficient time. The Court pointed out at page 194 many elements which were present in the case then at bar which might be taken into consideration in determining what was meant by the words at "any time". There are no such elements in the case at bar.

In *Shellar v. Shivers*, 33 Atl. 95, 171 Pa. State 569, mentioned page 41 defendant's brief, the Court held that a lessee of an oil well had the right to remove the fixtures for a reasonable time after the failure of the well to produce oil or gas on a paying basis but did so because, construing the language of the entire agreement, it held that the words "at any time" must be construed in connection with the other language of the agreement and, so construed, must be held to mean a "reasonable time". It did *not* hold that the words "at any time" meant, in and of themselves, within a "reasonable" time but rather that, considered in the light of the *other* language in the agreement and of the circumstances, a reasonable time was intended by the parties. The reasoning of the Court is wholly inapplicable to the situation at bar where the time within "any time" is to be fixed by the will of plaintiff.

In *Atwood v. Clark*, 2 Maine 249 (p. 49, defendant's brief), there was no definite time mentioned and the Court, in its opinion, referring to the agreement in the case which was oral, said: "Nothing was said about the time when the plaintiff should furnish the defendant with the account" and further "that as to this particular there was no contract between the parties made and expressed by them". It appears that the case did not involve an interpretation of the words "at any time".

In *Brennan v. Sanborn*, 46 Cal. 8 (p. 39 defendant's brief), there was an agreement between the parties to perform certain acts. The Court expressly says that the time of performance was not fixed and the word "time" was not mentioned in the agreement. The case has no significance here.

It appears that although defendant cites numerous cases (none of which are New Jersey cases except that of *Atlantic Pebble Co. v. Lehigh Railroad Co.*, 89 N. J. L. 336, and this, as has been pointed out, is not analogous in any respect), all of them involve facts different from those present in the case at bar and no one of them is really apposite.

All of these cases were decided prior to 1923, when this Court considered the case of *Weinstein v. Sheer*, 98 N. J. L. 511, and it is reasonable to assume that the cases cited by defendant were called to the attention of the Court in the *Weinstein* case.

In that case the contract upon which the suit was based was as follows:

"September 1, 1920, Freehold, N. J.

"I the undersigned, received \$1,000 on amount of iron as laying in your yard, Manetta Avenue, Lakewood, N. J., at the price of 75 cents per hundred pounds in the yard. The stock can be removed *at any time to suit the buyer*, J. Weinstein, Freehold, N. J.

MAX SHEER, by M. BERNARD, Atty."

Some time after the contract was made the defendant, who was the seller, sold the iron to someone else and the plaintiff brought an action to recover upon the contract.

The Court decided the case squarely upon the significance of the words "at any time" and it said:

"The defendant's contention at the trial, and the substantial ground of appeal, is that, notwithstanding the *plain language of the contract*, the plaintiff was obliged to remove the iron *within a reasonable time*, and that having failed so to do, the defendant exercised a legal right in selling it to another."

"The rule is indubitable that *where parties by written contract have freely chosen their own unambiguous verbal formula*, to define their rights and duties, *they are bound by the plain terms of their contract*; and the court cannot in the absence of fraud or like recognized equitable ground, reconstruct the contract, for the purpose of making its terms accord with a post contractual conception *more suitable to the situation of the parties.*"

And the Court further said, "The language employed by the parties in this instance is *conspicuously plain* and leaves *no room for interpretation*, viz., 'the stock can be removed *at any time to suit the buyer*,' or transposed in the reverse order. 'The vendor will keep the stock *until the vendee is ready to remove it.*' Such a situation, the voluntary creation of the parties, manifestly, may possess its inconvenience so far as the vendor is concerned; but to this it may be answered that the indefinite retention of the stock in the vendor's yard, *was one of the elements which induced the purchase*, and *ipso facto became part of the consideration for the purchase*. And it may be also observed that it was within the vendor's power to modify or change the con-

tractual situation in that respect before executing the instrument. His contention now is that the language thus employed is equivalent to a limitation that the vendee must remove the stock within a reasonable time."

While the Court in the *Weinstein* case calls attention to the fact that a bailment had been created, it expressly says that the plaintiff had waived any right that he might have for trespass under the bailment and had sued upon the contract.

Defendant (p. 42) in an effort to indicate that the rule of law laid down by this Court in the *Weinstein* case does not apply here argues (p. 42, defendant's brief) that in the *Weinstein* agreement no term of the contract was left undetermined. It says that the right of determining the period of time when the iron might be removed had been *transferred for a consideration to the purchaser* and that he then became the sole person to make the determination as to when it should be removed and that in the matter of the making that determination the seller had no right whatsoever.

This is true, and how aptly and accurately it describes the situation created by the letter of June 22, 1926, upon which the action at bar is based. In our case the right of determining the period of time when Edge might cash in his bonds at 99 had been *transferred* by the Boardwalk Securities Corporation *for a consideration to Edge*, who became the *sole person to determine "when the iron should be removed"* because the letter says, "*should you wish at any time to cash in your bonds.*" There was no *undertermined* (in the legal sense) factor of time in the letter for the time was to be fixed by the *wish* of plaintiff.

There was a consideration for the agreement made by defendant if that agreement is to be con-

strued as plaintiff insists it should be. If the agreement is to be construed as defendant insists it should be, plaintiff did not receive from defendant the consideration which, by the language of the letter, he assumed he was getting for the consideration which *he* gave. It is apparent that defendant desired to secure plaintiff as a client. Plaintiff did not have to deal with defendant. It was for *him* to determine the terms upon which he would deal with it if at all. When defendant offered that it would take the securities at a fixed price "at any time" he, the plaintiff, wished, for that is the construction which must be put upon the language of the letter, he *then* agreed to purchase. The tendered agreement on the part of the defendant was equivalent to a "guaranty" that the securities would, so long as they were in existence and so long as plaintiff held them, realize for plaintiff, *at any time he wished*, the prices fixed by the agreement. There is nothing unconscionable or illegal in such a "guaranty." The subject matter of the "guaranty" was the securities. There is nothing unusual in a guaranty of the convertibility of a piece of property sold into cash so long as that property is in existence and in the possession of the purchaser.

Much is made in the brief of defendant under other points (p. 27, defendant's brief) of the fact that the securities purchased were of a fluctuating value. Had they not been of a fluctuating value there would have been no reason for the "guaranty." It is not usual to guaranty the convertibility into cash of a piece of property which, under no circumstances, cannot be converted at any time for the amount that the purchaser pays for it. The fact that it is recognized by both parties that the type of property dealt with *is* of a fluctuating nature is the *sole* reason for the making of contracts of the kind now under consideration.

The person making the guaranty to induce a purchaser to buy does so because he, the seller, has such faith in the integrity of the securities which he has for sale, as that he is willing to guaranty that whenever the purchaser desires to translate the security into cash he may do so at such a price as the seller is willing to guaranty. If the purchaser should buy without such a guaranty the purchaser gambles on the future. If he does not desire to gamble on the future and refuses to do so, the seller says to him "*I will relieve you of the gambling and I will do the gambling.*"

Unless this is the underlying thought which induces the making of each and every contract of this character, then there is no reason whatever to support such a contract.

Far from the fact of possible fluctuation being a reason for circumscribing the effect of the language of such a contract, the fact of possible fluctuation is the basis of the contract and *unless there be fluctuation* the contract is meaningless to the purchaser. If the securities are always of a value equal to at least the price which he paid, and convertible into cash at that price, he needs no such contract. Why should he call upon the seller to repurchase so long as he can get at least the price which the seller will pay him on the open market? Neither of the parties expects that the right of the purchaser to call upon the seller to repurchase will be exercised unless and until the purchaser needs the money and the securities cannot be sold on the market at the price fixed in the contract to repurchase. A contract such as is here involved may be improvident from the standpoint of the seller but it is not unreasonable nor is it unusual. If the seller desires to assume the risk of the gamble there is nothing in the law to prevent him from so doing.

And that this is so is indicated by what the Court of Appeals of New York said in *Fitzpatrick v. Woodruff*, 96 N. Y. 561, quoted at page 18 of this brief. The Court in that case clearly indicates that in agreements of this kind the parties contemplate that no demand will be made upon the seller of the securities to repurchase unless a reason arises for the making of the demand and *that* reason can only be the creation of a situation in which the purchaser cannot convert the securities into cash upon terms better or as good as those upon which the seller agrees to repurchase.

The assumption by the seller of the risk of the gamble "was one of the elements which induced the purchase, and *ipso facto* became part of the consideration for the purchase," as this Court said in the *Weinstein* case. As interpreted by defendant, the seller does not assume the gamble and, as so interpreted, it means precisely nothing to the purchaser.

This Court at the present term decided the case of *Blatt v. Boardwalk Securities Corporation*, No. 124 of the October Term, 1934. That case had to do with the construction of two letters reading as follows:

"August 26, 1926.

Miss Dorothy Blatt,

Dear Madam:

We hereby agree to repurchase from you *at any time*, all or any part of the following S. W. Straus Co. Bonds at 1% discount, purchased this day as follows."

(Then follows a list of the bonds purchased.) The letter was signed "The Boardwalk Securities Corp., Sigmund Ojserkis, President."

The second letter reads as follows:

"April 24, 1928.

Miss Dorothy Blatt,

Dear Madam:

We will maintain a market of 99 and accrued interest on all Straus Bonds you have purchased from us, and likewise a market of 99 and accrued interest of \$5000. Roosevelt irrigation District 6's purchased from us this day.

Very truly yours,

SIGMUND OJSERKIS,
President."

This Court, interpreting the words "at any time" contained in the letter of August 26th, said:

"The next point urged for reversal is that the judge erred in refusing to instruct the jury relative to the following clause in the letter of August 26, 1926: 'We hereby agree to repurchase from you at any time,' which clause referred to the repurchase of bonds purchased by the plaintiff under said letter which did not mean that the writer obligated the company to purchase indefinitely or in perpetuity but only that he would purchase the bonds within a reasonable time; and also because the court charged, in effect, to the contrary. Respondent claims that this clause in the letter is controlled by the case of *Weinstein v. Sheer* (98 N. J. L. 511). The case of *Weinstein v. Sheer* is not a parallel case for in that case the defendant agreed after an amount of iron had been purchased by the plaintiff it might remain in the defendant's possession and be removed at any time to suit the plaintiff. Under such circumstances the defendant was acting as bailee. In the case now before us the title to the property was in the plaintiff and defendant was not acting as bailee. We think that the effect of the two letters as far as repurchase of the

bonds or the maintaining of a market was in effect the same as to when the plaintiff was compelled to act under the agreements in order to enforce the same. It seems to us that the plaintiff was bound to act within a reasonable time and that under all the circumstances of the case it was for the jury to say whether or not the plaintiff did act within a reasonable time in tendering the bonds to the defendant for repurchase according to the terms of the two letters of April 24, 1928 and of August 26, 1926. There was proof in the case that a depression had taken place on the bond market several years before the tender was made. The bonds were purchased sometime in August, 1926 and tender was not made until April 11, 1932 nearly six years thereafter. Whether or not this was a reasonable time was for the jury to determine under all the circumstances of the case."

It will be at once observed that there is a distinguishing feature between the language used in the letter of August 26, 1926 in the *Blatt* case and the language of the letter of June 22, 1926 in the case at bar.

In the letter of August 26, 1926, in the *Blatt* case the words "at any time" stand alone. In the letter of June 22, 1926 they do *not* stand alone.

We repeat the language of the letter of June 22, 1926, in the case at bar,—"*Should you wish to cash in your Straus Bonds at any time we will be glad to take them from you at 99 or \$10 per bond less than you paid for them and the accrued interest. My idea is that if you will give me the time to gradually supply you with a high grade conservative list of investment bonds you will be proud of it and have absolute safety with a good income*".

The significance of the difference is this—that in the letter of August 26, 1926 in the *Blatt* case

there is no indication as to who shall fix the time at which the repurchase is to be made within the "at any time", whereas, in the letter in the case at bar defendant has delegated to plaintiff the power to fix the definite time within the "at any time" that the repurchase is to be made by the use of the words—(transposed) "at any time *you wish*". As we have heretofore indicated, there is nothing indefinite or uncertain about this language. It may be that if the words "at any time" stand alone, with no indication as to who shall fix the specific time within the "at any time", the law will say that *it* will fix the specific time as some time within a "reasonable time," but what room is there for the law translating the language "at any time" into "at any reasonable time" when the parties themselves have determined who shall fix the definite time by the use of the language (transposed) "at any time *you wish*"? If the law then interposes with the interjection of "reasonable" it changes the contract. In reality, the argument made by defendant in its brief at page 42, in attempting to distinguish the *Weinstein* case, most clearly indicates that it *is* applicable.

There is another distinguishing feature between the *Blatt* case and that at bar. So far as the record shows in the *Blatt* case, whatever future dealings occurred between the parties rather tended to limit the language "at any time" as for instance the letter of April 24, 1928,—“We will maintain a market of 99 * * *”—does not say that defendant will *always* maintain a market. It is limited in its application. Had the word "always" been used before the word "maintain" a different situation might have been created and one more nearly like that at bar, although even then we would not have the "you wish" of the instant case.

When a second purchase was made in the case at bar on October 4, 1927, which it will be observed

was *sixteen months* after the first purchase, the letter of October 4, 1927 was written by O'Neil which contained the language "in accordance with the agreement you made with the Senator to buy back *at any time*".

If there was a limitation upon the "at any time" so that it should read "at any reasonable time", it would seem that sixteen months was a rather long period, and yet defendant raised no question as to the language of the letter of October 4, 1927 and sold bonds under the terms of that letter.

Again, when O'Neil wrote the letter of May 22, 1931, to which defendant replied by the letter of May 23, 1931, it is significant that defendant did not raise any question as to what its contract was; it merely tells plaintiff "we are not repurchasing any bonds at present" and we have never guaranteed any bonds and no bond house in the United States has ever guaranteed any". The letter of June 22, 1926 was equivalent to a guaranty that the securities could be readily converted into cash at a certain price at any time plaintiff wished. Why did not defendant at *that* time, if it did not so understand its contract, say to plaintiff "you have waited too long and your demand at this time is unreasonable"?

Why did it not answer the letter of May 26, 1931 sent by O'Neil to defendant? Why, when it answered the letter of April 27, 1933, Exhibit P-2, page 293 with its letter of May 1, 1933, Exhibit D-1, page 322, did it, instead of indulging in explanations as to what "guarantees" mean and the like, place the interpretation upon the letter of June 22, 1926 which its counsel now desires to place upon it? It informs plaintiff that he has "*misconstrued* our letter of June 22, 1926 as a guaranty for the bonds you purchased from us" but it does not point out wherein the letter *in its terms* was misconstrued by plaintiff. It tells

plaintiff that he surely cannot expect such a guaranty but whether the plaintiff can expect such a guaranty is not the important factor. The important factor is what the letter of June 22, 1926 says and nowhere in the letter of May 1, 1933 is any such construction as defendant now wants to put upon the letter of June 22, 1926 placed upon it.

The fact is that conditions had so changed at the time plaintiff demanded that defendant repurchase as that it would mean a loss of money to defendant. But if defendant did not repurchase, it would mean a loss of money to plaintiff. By the letter of June 22, 1926, defendant agreed to assume that loss. We repeat that, unless there was to be a loss, the letter of June 22, 1926 meant nothing to plaintiff.

What defendant says in the letter of May 1, 1933, as to the investment being intended to be temporary is considered under another point (p. 16 of this brief).

In the case at bar the parties themselves have placed a practical construction upon the agreement contained in the letter of June 22, 1926, which is inconsistent with the construction which defendant now seeks to put upon the letter and the Court will be governed by the practical construction of the contract placed upon it by the parties.

Basic Iron Ore Co. v. Dahlke, 103 N. J. L. 635;
Camden Land Co. v. Lippincott, 45 N. J. L. 405.

If the matter of reasonableness plays any part in this case at all, then we submit that, under the circumstances, the "reasonable" period does not begin to run until *defendant* has notified plaintiff

that, unless he exercises the option of the repurchase agreement within a fixed time after notice (which must be a reasonable time) defendant will consider itself free of the contract. It is clear that, to say the best for defendant, time was not of the essence of the repurchase agreement. It was a continuing offer for which plaintiff had given a consideration. The definite time which was to be fixed within the "any time" was a time selected by *plaintiff*. If defendant desired on its motion to reduce that time to a certainty or to withdraw its offer, then it was the duty of defendant to notify plaintiff that, unless the offer were accepted within a limited period of time, which must be a reasonable time after the giving of the notice, the offer would be withdrawn. This is the classical way of terminating a continuing offer or, in other words, making time of the essence.

13 C. J., Title "Contracts," p. 605, Sec. 630;

McCullough-Dalzell Crucible Co. vs. Philadelphia Co., 223 Pa. 336, 72 Atl. 633;

Bullock vs. Adams' Exrs., 20 N. J. Eq. 367;

Ulikowski vs. Casper, 130 Atl. 454 (not officially reported);

Barry vs. Ruskin, 99 N. J. Eq. 730.

So long as defendant did not notify plaintiff that he must accept the benefit of the repurchase agreement within a *specified* length of time, he had the right to assume that the offer to repurchase *still subsisted*, for the offer by its terms was to subsist until such time as *he* wished to act. Until he was so notified, he could rest secure that, in the event of the market falling, he could call upon defendant to repurchase. Had defendant notified him, he might *then* have elected to dispose of these bonds to defendant or, if he could

get more upon the market, to someone else, rather than to continue to hold them, even if they were then on the market at prices above that which he paid for them, without the benefit of the guaranty of defendant.

In 1931 defendant had ample opportunity, if it had so desired, either to repudiate this agreement or to call upon plaintiff to exercise his option to compel defendant to repurchase, if defendant had any such right to compel election, which we do not concede as the right of plaintiff under the terms of the contract were dependent upon *his* "wish." By the letter of May 22, 1931 (Ex. P-10, p. 319, quoted p. 4 of this brief), defendant's attention was directed to the fact that Edge might shortly desire to convert some of these securities into cash. By the letter of May 23, 1931 (Ex. P-11, p. 320), defendant merely said: "*We are not repurchasing any bonds at present*" and that "*We have never guaranteed any bonds and no Bond House in the United States has ever guaranteed any.*" The last assertion must be taken in connection with the letter of May 1, 1933 (Ex. D-1, p. 322), and, *in the sense used by defendant*, perhaps defendant had *not* guaranteed the bonds. We have considered this letter at page ~~31~~³⁴ of this brief. To the letter of May 22, 1931 Edge, through O'Neill, promptly answered with the letter of May 26, 1931 (Ex. P-9, p. 318, quoted p. 6 of this brief) directing defendant's attention to the fact, in effect, that it must have, in writing the letter of May 23, 1931 (Ex. P-11, p. 320), "*forgotten the arrangement we had, verbally as well as by your letter of June 22, 1926, a copy of which is enclosed.*"

The failure of defendant to answer this letter of plaintiff's of May 26, 1931 (Ex. P-9, p. 318), indicated an acquiescence in these statements and properly led plaintiff to believe that, in fact, de-

fendant, when it wrote the letter of May 23, 1931 (Ex. P-11, p. 320), had forgotten the *special arrangement* which it had made with plaintiff under the terms of the letter of June 22, 1926 (Ex. P-1, p. 289, quoted p. 2 of this brief), and also led plaintiff to believe that, by the acquiescence in the construction put upon that letter by plaintiff, which was to the effect that at *any time* (with the broadest significance of that term) he wished he might require defendant to take the securities at the prices fixed by the letter of June 22, 1926, he need not move until he wished to. The conduct of defendant in not replying to the letter from plaintiff to it under date May 26, 1931 (p. 318) not only constituted a failure on the part of defendant to place plaintiff in a position where he had to exercise his rights within a reasonable time (if it were defendant's right to place him in that position) but also indicated defendant's acquiescence in the continuance of the obligation and so plaintiff was led to believe.

In addition to this, by the letter of May 23, 1931 (Ex. P-11, p. 320), defendant stated that it had not heard of the foreclosure proceedings which plaintiff had, in his letter of May 22, 1931 (Ex. P-10, p. 319), said he understood had been instituted on the mortgage securing two of the bond issues, and further stated "We had coupons on both issues paid when due April 1, 1931." This led plaintiff to believe that, at *that* time, there was no occasion for his being dissatisfied with the investment and therefore had no occasion to express a wish that defendant should repurchase the securities. Defendant, unquestionably, was endeavoring to lull plaintiff into a belief of security, to the end that it would not be formally called upon to repurchase whereas, if it, at *that* time, had any idea that "reasonable time" was involved it was its duty to so indicate or at least to attempt to put plaintiff to his election.

By the letter of May 1, 1933 (Ex. D-1, p. 322, at p. 324), defendant refers to the fact that in 1929 on the demand of plaintiff it repurchased \$50,000 of Boardwalk National Corporation Bonds, which it had sold plaintiff, the demand of plaintiff being predicated upon the fact that the market for the bonds had fallen to twenty points below what plaintiff had paid for them. Defendant says that it "did not have to do so" (p. 324) and that may be true, for these securities were not purchased under the terms of the letter of June 22, 1926, or any agreement similar to that contained in that letter. The fact that defendant repurchased *these* bonds upon fall of the market, certainly had the effect of leading plaintiff to believe that defendant would recognize its obligation to repurchase *when that obligation was expressed in a written paper, i. e.,* the letter of June 22, 1926, and that there was no occasion for the exercise by him of any wish that defendant repurchase unless and until his mind had been so affected by a fall in the market as would create a condition in his mind which would be expressed by a wish that the defendant repurchase.

Again, by the letter of May 1, 1933 (Ex. D-1, p. 322, at p. 324), defendant said: "Now, had you even then wished to sell your Straus Bonds, we would have gladly and cheerfully sold them for you, as there was at that time and up to 1931 a strong demand for Straus Bonds which we could not supply."

This indicates that, up to 1931, there was a strong demand for Straus Bonds which could not be supplied by defendant and that it was defendant's view, as indeed it inferentially expressed in its letter of May 23, 1931 (Ex. P-11, p. 320), that there was no reason why plaintiff should call upon defendant to repurchase.

A distinction must be made between a case of this kind where there is an offer to repurchase which enters into the consideration for the purchase of property and a simple offer to sell or to buy without consideration. Where there is *such* an offer either to buy or to sell without consideration, it may be that it must be accepted within a reasonable time else it is considered as withdrawn, but not so where there is an offer to repurchase as an integral part of the original contract to purchase for, if the offer is unexpectedly withdrawn, a part of the consideration for the original purchase fails and it is only right that, before withdrawing the offer either upon the theory that a reasonable time has expired for its acceptance or otherwise, the offerer notify the offeree that the offer is to be withdrawn unless it is accepted on or before a *fixed* time which must be a reasonable time after notice.

Assuming that the statement contained in the letter of May 1, 1933 from defendant to plaintiff (Ex. D-1, p. 322) is correct that in 1927 defendant asked plaintiff to buy New York Stock Exchange bonds because the market was then favorable and that he told it that he preferred to hold on to the Straus bonds because he knew Mr. Straus personally and felt that the investment with its income was most satisfactory—why did not defendant at *that* time inform plaintiff that it was no longer liable upon its letter of June 22, 1926, and that, if he continued to hold the securities, he did so at his own risk. It not only failed to advise him to *that* effect at that time but subsequently, when it sold securities as a result of the letter of October 4, 1927 (Ex. P-6, p. 296), it raised no question as to the continued existence of the contract embodied in the letter of June 22, 1926, specifically mentioned in the letter of October 4, 1927. The testimony fixes the date of this occurrence

as in the month of June 1927 (p. 136) prior to the letter of October 4, 1927.

If the matter of reasonableness is involved in this case there is nothing in the record which would indicate that plaintiff had not acted within a reasonable time and the matter was not one properly to be considered by the jury.

The argument has already been made. Assuming that the intent of the agreement was, as we contend, that Edge would not be expected to demand that defendant repurchase the securities until it was apparent to him that the securities were in such shape as that it would be to his financial interest to compel defendant to repurchase and that after that situation was apparent to him he had a reasonable time to act (which we submit is not the case) then we submit that, as matter of law, he acted within a reasonable time.

Upon this subject, the remarks of the New York Court of Appeals in *Fitzpatrick v. Woodruff*, 96 N. Y. 561, considered at page 18⁹ of this brief, are applicable.

We refer to *Kaplan v. Reid Bros.*, 285 Pac. 868 (Cal. 1930), 104 Cal. App. 268, and in quoting from that case, as we will now do, we shall make the argument with respect to its application to the facts in the case at bar.

The California case involved a suit for specific performance of a contract which, in terms, purported to give a stockholder the option "at any time" to have his stock repurchased by the corporation; the contract was made January 24, 1921 and demand for repurchase on February 10, 1927. The appellant insisted that the option must be exercised within a reasonable time notwithstanding the use of the language "at any time" and

that more than a reasonable time had elapsed before the making of the demand and that the action was barred by the statute of limitation. The Court said (p. 869):

“The use of the words ‘at any time’ in the contract before us indicated an intention of the parties that the option given respondent was not one as to which there was any necessity or occasion for promptness in its exercise, *but quite the contrary*. Literally construed, it would give respondent the right to exercise the option in perpetuity,”

(In the case at bar, as we have pointed out, Edge’s right did not rest in perpetuity for it was limited to a time *when he personally held the securities*, and to a time when the securities were still unmatured (p. 17 of this brief)

“and even though it will not bear this construction as a matter of law, its inclusion in the contract is to be taken into consideration in determining what is a reasonable time for exercise of the option under all circumstances . . .” In cases where a demand is necessary before a cause of action arises, the statute of limitations does not begin to run until the demand is made. The demand however must be made within a reasonable time, and a time coincident with the period of the statute of limitations will ordinarily be deemed to be reasonable;”

(The letter containing the terms of the contract in the case at bar was written June 22, 1926, Ex. P-1, page 2 of this brief, but the contracts were made at the time of the purchase of the securities. These purchases extended from June 28, 1926 to October 4, 1927. The *formal* demand to repurchase was made April 27, 1933, which was but six weeks after the expiration of six years after the purchase of April 12, 1927, and before the expiration of six years after the purchase

of October 4, 1927 but we submit that the effect of the failure of defendant to dissent from the terms of the letter of plaintiff to it of May 26, 1931, Ex. P-9, page 318, page 6 of this brief, was to revive the agreement, if it needed revival, and to start a new period running if there was any need that a new period be commenced.)

“but ‘where delay in making the demand is expressly contemplated, even though the obligation is payable on demand, there is no rule of law that requires that demand shall be made within the statutory period for bringing an action.’ *Wood on Limitations*, 4th Ed. Vol. 1, sec. 118, p. 617, 37 *Corpus Juris*, pp. 966, 967, *Vickrey v. Maier*, 164 Cal. 384, 390, 391, 129 Pac. 273, 274. In *Vickrey v. Maier*, the Supreme Court had under consideration a contract for the repurchase of stock ‘at any time after six months’ and held that a delay of *more than four years* in making a demand after the lapse of the six months period *was not unreasonable*. In our case, the delay was somewhat longer, but the question of what was a reasonable time was primarily a question to be decided by the trial court, and we cannot hold that the trial court’s determination that the option was exercised within such time as to entitle respondent to recover under the contract was erroneous.”

While it is true, as pointed out by this Court in the *Blatt* case, that *Weinstein v. Sheer*, 98 N. J. L. 511, involved a bailment, we cannot see that that fact can make any difference in the construction of language and, as we have heretofore pointed out, any right under the bailment was waived and the suit was on the contract.

The language of this Court interpreting the words of the contract gave no force to the fact that a bailment was involved.

We have examined the briefs in the *Blatt* case and we find that the brief of the respondent upon this point relies solely upon the *Weinstein* case and there is no argument in support of the reasoning of the *Weinstein* case.

There was a substantial consideration for the agreement of defendant in the case at bar—and the parties by their contract for *that* consideration determined the question as to when the proposal to repurchase could be accepted—namely, *at any time plaintiff wished*; and as this Court said in the *Weinstein v. Sheer* case, under *these* circumstances the Court will not apply a judicial construction upon the plain language of the contracting parties.

In *Hawkins v. Duvall* (177 N. Y. Supp. 584 N. Y. Supreme Court), mentioned in defendant's brief (p. 40), the New York Court said that the "well understood rules of construction require that the phrase used, if susceptible of two interpretations, be given that *according to settled law*." The settled law as laid down by this Court in the *Weinstein* case in effect at the time of the writing of the letter of June 22, 1926, was that the words "at any time" did not mean a *reasonable* time, but rather what they said.

In *Village of New Rochelle v. Clark*, 19 N. Y. Supp. 989, the New York Supreme Court in interpreting the meaning of an ordinance which provided that no fire should be set or "burned in any street at any time" held that the words "at any time" meant at all times.

I V .

The contention of defendant (p. 43, defendant's brief) that the Statute of Limitations is applicable is, we submit, without merit. No right of action accrued against defendant until plaintiff had made a demand upon it to repurchase his bonds.

V .

The theory upon which the 7th ground for a direction of a verdict was based, *i. e.*, that the language in the first and second clauses of the letter with reference to a temporary and permanent investment show that the "at any time" clause was only to be considered temporary—is not supported by a reading of the letter (p. 44, defendant's brief).

The words "temporary investment" in the letter were, at the best for defendant, used in an advisory capacity. As soon as the writer of the letter comes to speak of the terms under which the bonds can be replaced or sold, nothing whatsoever is said as to a *temporary* investment. As a matter of fact, in speaking of replacing certain bonds he says, "But I propose to let you have our bonds and gradually as the market is more favorable, replace each ten-thousand-dollar-lot of bonds or such as you may not favor" with other issues which it might recommend because of better prospect for appreciation and better yield.

If there was any intention to have any investment considered as a temporary one, it was coupled with the disinclination of plaintiff to continue it as permanent, because in saying that it will exchange such bonds as plaintiff did not favor, defendant left it squarely up to *him* to

decide which issues he favored and which he did not. It will be noted that the only reason which it suggests that plaintiff might not favor certain bonds would be that others would be a better prospect for appreciation and better yield.

Both plaintiff and the president of defendant testified that the Straus bonds purchased by plaintiff yielded six per cent. or better and both testified that this was *considered a good yield for a permanent investment*.

When it says that it would accept *Straus bonds* in exchange for other bonds at par and accrued interest, nothing is said referring to a *temporary* investment, and likewise it says that it will accept the stock exchange issues at market and accrued interest. Neither does any reference to a temporary investment appear when it writes about cashing in the Straus bonds *at any time*. It is clear from the letter that whether the investment was to be of a temporary character was to depend solely upon the *favor* or *disfavor* of plaintiff.

VI.

Defendant contends that the Trial Court erred in refusing to charge its 20th request with reference to the bonds purchased with money of Mrs. Edge and Walter E. Edge, Jr. (p. 47, defendant's brief).

The testimony was to the effect that \$12,500 worth of bonds were purchased for Mr. Edge with money of Mrs. Edge and that \$7,000 worth of bonds were purchased for Mr. Edge with money of Walter E. Edge, Jr. The testimony also showed that it was the custom in the Edge family to use money from one another's accounts in making purchases of this kind and that afterwards an adjustment would be made, the money used being paid back by the person who received the

benefit therefrom, or it was charged against his account.

The Court properly left to the jury the question as to whether these bonds, under the testimony, were the property of plaintiff, that being the only question with reference thereto, and the jury evidently decided that they were.

At the best for defendant, if the Court erred, the only result would be a reduction of the verdict by deducting therefrom the value of the \$19,500 face value of the bonds purchased with money of Mrs. Edge and Walter E. Edge, Jr., and the loss upon these bonds, according to the testimony (p. 66, l. 15), amounting to \$13,785.

VII.

Defendant contends that the Court erred in refusing to direct a verdict on the 10th ground; *i. e.*, that when plaintiff had a conversation with the president of defendant in the Summer of 1927, his statement to the effect that he did not wish to exchange his Straus bonds amounted to an election on his part which precludes the recovery of damages (p. 51, defendant's brief).

The testimony of Ojserkis (p. 136, l. 26) was to the effect that Senator Edge visited him and that he, Ojserkis, suggested a "switch" of bonds. It will be noted that the only effect of his suggestion was that he wanted to exchange Edge's Straus bonds for other bonds which defendant was selling. He made no suggestion whatsoever, and it is not even intimated by him in his testimony that he did, to the effect that Edge should turn in his Straus bonds for *cash*; nor did he give plaintiff any intimation whatever that the terms of the contract as expressed in the letter of June 22, 1926, with reference to the taking over the bonds at any time at 99, was not still in effect.

Even if defendant through its president at this time had suggested to plaintiff that he turn in his bonds for cash, he was not obligated to do so, because the contract permitted him to do this at any time that he *wished* to do so.

Counsel cites the case of *Reed v. Benzine-ated Soap Co.*, 81 N. J. E. 182, which is based upon a rescission and has no application whatsoever with the case at bar.

And, generally, cases of rescission for reasons extrinsic the contract have no application here. In such case the law creates the right and provides the remedy which the law may control. The right of plaintiff in *this* case rests upon the *contract*. The right conferred upon him is not to rescind but to enforce defendant's contract.

Conclusion.

It is respectfully submitted that for the reasons aforesaid the judgment in the above stated case should be affirmed.

WALTER D. VAN RIPER,
MERRITT LANE,
Of Counsel Plaintiff-Appellee.





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**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

WALTER E. EDGE,
Plaintiff-Appellee,

v.

BOARDWALK SECURITIES CORPORATION, a New Jersey
corporation, SIGMUND OJSERKIS and WILLIAM
G. PANCOAST, Receivers,
Defendant-Appellant.

ON APPEAL FROM ATLANTIC COUNTY CIRCUIT COURT.

**BRIEF OF BOURGEOIS & COULOMB, ATTOR-
NEYS OF DEFENDANT-APPELLANT.**

FACTS.

On the 22nd day of June, 1926, Sigmund Ojserkis, President of Boardwalk Securities Corporation, wrote a letter to Walter E. Edge, plaintiff-appellee, which letter is Plaintiff's Exhibit P1, found on p. 289 of State of Case.

This letter, with the list of securities thereunto annexed, is the foundation of the present litigation, and is as follows:

Brief of Defendant-Appellant

“Atlantic City, N. J.,
June 22, 1926.

Hon. Walter E. Edge,
Washington, D. C.

Dear Senator:

At the suggestion of your Mr. O'Neill, I welcome the opportunity to be of some financial service to you, and I am taking the liberty to enclose a list of 25 bonds at \$10,000 each, well diversified with a good income, for your temporary investment. These Bonds we own and can deliver to you, of course, subject to prior sale.

The Bond market at present is too high for permanent investment, as you will note from the enclosed ad. of the National City Co., but I propose to let you have our Bonds and, gradually, as the market is more favorable, replace each \$10,000 lot of Bonds, or such as you may not favor, with issues which will have a good prospect for appreciation and better yield. In such cases, we will accept in payment S. W. Straus & Co. Bonds, which you purchase from us, at par and accrued interest. The other Stock Exchange issues we will accept at market and accrued interest. Should you wish to cash in your Straus Bonds at any time we will be glad to take them from you at 99 or \$10 per bond less than you paid for them and the accrued interest. My idea is if you will give me the time to gradually supply you with a high grade, conservative list of Investment Bonds,

Brief of Defendant-Appellant

you will be proud of it and have absolute safety with a good income.

It is difficult for me to explain everything in a letter, but I wish to assure you that I will use the same care and diligence in your case, as I am doing for my 'pet'—the Boardwalk National Bank.

No matter who you entrust with your investments, it must be a case of confidence.

Thanking you for this opportunity, and with highest personal regards, I am,

Respectfully yours,

SIGMUND OJSERKIS,

President."

"Atlantic City, N. J.,

June 22nd 1926

We recommend the following \$250,000 Bonds as a conservative and well diversified Investment—subject to prior sale.

Straus Bonds	Security		Maturity	Price	Amount	Income
	-\$10,000 Hearst-Brisbane 6's	(Straus)	1939	100	\$10,000	\$600
	-10,000 #60 Park Plc. Newark 6's	"	1937	100	10,000	600
	-10,000 Broadway-Barclay 6's	"	1941	100	10,000	600
	-10,000 #48 W 48th St 6's	"	1936	100	10,000	600
	-10,000 Dorest 6's	"	1941	100	10,000	600
	-10,000 American Insurance Union 6's	"	1941	100	10,000	600
	-10,000 Lefcourt-Manhattan 5¾'s	"	1941	97.55	9,755	575
	-10,000 Albany-Manhattan 6¼'s	"	1938	100	10,000	625
	10,000 Dodge Bros. 6's		1940	94½	9,450	600
	10,000 Pacific Mills 5½'s		1931	96¾	9,675	550
	10,000 Bethlehem Steel 6's		1948	99¾	9,975	600
	10,000 National Distillers 6½'s		1935	99	9,900	650
	10,000 Cuban Dominican Sugar 7½'s		1944	98¼	9,825	750
	10,000 Otis Steel 6's		1941	98½	9,850	600
	10,000 City Transportation 6's		1936	98½	9,850	600
	10,000 Chicago Daily News 6's		1936	97½	9,750	600
	10,000 Associated G & E 5½'s		1946	95¼	9,525	550

10,000 Price River 6's	1938	100	10,000	600
10,000 Indiana Limestone 6's	1941	99	9,900	600
10,000 Czecho-Slovak 8's	1951	101 $\frac{1}{4}$	10,125	800
10,000 City Gratz 8's	1954	97 $\frac{1}{2}$	9,750	800
10,000 State San Paulo 7's	1956	96 $\frac{1}{2}$	9,650	700
10,000 Republic Peru 7 $\frac{1}{2}$'s	1940	98 $\frac{1}{2}$	9,850	750
10,000 Siemens & Halske 7's	1928	99 $\frac{1}{4}$	9,925	700
10,000 City Berlin 6 $\frac{1}{2}$'s	1950	91	9,100	625
			\$245,855	\$15,900

Average Income of 6.47%''

Brief of Defendant-Appellant

After receiving this letter, to wit, on the 28th day of June, 1926, on the request of Paul O'Neill, representing plaintiff-appellee, the following Straus Bonds were purchased from Boardwalk Securities Corporation:

\$10,000 Hearst Brisbane 6's, 1939;
\$10,000 60 Park Place Newark 6's, 1937;
\$10,000 Broadway Barclay 6's, 1941;
\$10,000 48 West 48th Street 6's, 1936;
\$10,000 Dorsett 6's, 1941;
\$10,000 American Insurance Union 6's, 1941;
\$10,000 Lefcourt Manhattan 5¾'s, 1941;
\$10,000 Albany Metropolitan 6¼'s, 1938.

On July 7th, 1926, the following bonds were purchased:

\$15,000 Hearst Brisbane 6's, 1936;
\$10,000 48 West 48th Street 6's, 1936;
\$10,000 Lefcourt Manhattan 5¾'s, 1941;
\$15,000 Albany Metropolitan 6¼'s, 1938;
\$10,000 502 Park Avenue 6's, 1941;
\$10,000 Chicago Builders 6's, 1929.

On December 17th, 1926, the following bonds were purchased:

\$7,000 Albany Metropolitan 6½'s, 1928.

On January 5th, 1927, the following bonds were purchased:

\$20,000 New York Athletic Club 6's, 1946.

On April 12th, 1927, the following bonds were purchased:

Brief of Defendant-Appellant

\$2,500 60 Park Place Newark 6's, 1937;
\$10,000 Keith Albee Building 6's, 1936.

About a year after having purchased said bonds, to wit, during the late summer of 1927, plaintiff-appellee was in the office of the Boardwalk Securities Corporation (p. 136, ll. 10-30), at which time there was a conversation between Mr. Ojserkis and plaintiff-appellee, with relation to the bonds purchased, in which Mr. Ojserkis told plaintiff-appellee that the stocks were boiling at that time; stocks were going up, and it was a good opportunity to switch the investment in high grade stock exchange bonds and municipals, because the bonds were going down and stocks were going up; and plaintiff-appellee told Mr. Ojserkis that he preferred to keep the Straus bonds; that he is satisfied with the yield, and knows Mr. Straus personally, and that he is satisfied to keep his investment.

Concerning the import of the letter of June 22, 1926, plaintiff-appellee (p. 19, l. 32) testified that he regarded the words "temporary investment" in the letter as "merely a suggestion" if he wanted to take advantage of it, and he did not want to take advantage of it.

Plaintiff-appellee testified that he gave no force or effect to the language of the letter wherein it said: "The bond market at present is too high for permanent investment," because of what he alleges to be the agreement and guaranty contained in the letter; and stated that the language, "Should you wish to cash in your Straus Bonds at any time, we will be glad to take them from you at 99," was

the agreement and guaranty, which disposed of any other thought in his mind, he stating: "I was buying them for a permanent investment."

After the purchase of said bonds, and in December, of 1929, plaintiff-appellee went abroad, and did not return to this country permanently until April, of 1933. Four days after his return to this country, to wit, on April 27, 1933, demand was made for the re-purchase of said bonds; and following that, on June 10th, 1933, a further demand was made for the re-purchase of bonds amounting in all to \$214,500; which demand was refused, and suit instituted.

At the close of plaintiff's case, a motion for a non-suit was made (p. 128) and overruled, and an exception noted.

Throughout the trial, a number of exceptions were taken to the admission and rejection of testimony, and exceptions noted thereto.

Upon the close of the defendant's case, a motion for direction was made (p. 248) and overruled, and an exception noted.

Certain requests to charge, to wit, 2, 3, 4, 5, 6, 7, 13, 19 and 20, were refused and exception noted, and exception taken to what the Court did state in charging No. 5, and in refusing to charge No. 20, as requested.

Brief of Defendant-Appellant

ARGUMENT.

I.

Defendant-appellant moved for a direction (p. 250), which is contained in the 10th ground of appeal (p. 343) in the following language:

“The letter of June 22, 1926, was not an option, but only an offer to trade, and it never developed into a contract to support an action at law.”

This motion was refused.

The letter is in the following language:

“Atlantic City, N. J.,
June 22, 1926.

Hon. Walter E. Edge,
Washington, D. C.

Dear Senator:

At the suggestion of your Mr. O'Neill, I welcome the opportunity to be of some financial service to you, and I am taking the liberty to enclose a list of 25 bonds at \$10,000 each, well diversified with a good income, for your temporary investment. These Bonds we own and can deliver to you, of course, subject to prior sale.

The Bond market at present is too high for permanent investment, as you will note from the enclosed ad. of the National City Co., but I propose to let you have our Bonds and, gradu-

Brief of Defendant-Appellant

ally, as the market is more favorable, replace each \$10,000 lot of Bonds, or such as you may not favor, with issues which will have a good prospect for appreciation and better yield. In such cases, we will accept in payment S. W. Straus & Co. Bonds, which you purchase from us, at par and accrued interest. The other Stock Exchange issues we will accept at market and accrued interest. Should you wish to cash in your Straus Bonds at any time we will be glad to take them from you at 99 or \$10 per bond less than you paid for them and the accrued interest. My idea is if you will give me the time to gradually supply you with a high grade, conservative list of Investment Bonds, you will be proud of it and have absolute safety with a good income.

It is difficult for me to explain everything in a letter, but I wish to assure you that I will use the same care and diligence in your case, as I am doing for my 'pet'—the Boardwalk National Bank.

No matter who you entrust with your investments, it must be a case of confidence.

Thanking you for this opportunity, and with highest personal regards, I am,

Respectfully yours,

SIGMUND OJSERKIS,

President."

Incomplete

"Atlantic City, N. J., June 22nd 1926

Straus Bonds	Security	<i>Complete p 2 S.C. 289</i>		Maturity	Price	Amount	Income
		(Straus)					
	-\$10,000 Hearst-Brisbane 6's	"		1939	100	\$10,000	\$600
	-10,000 #60 Park Plc. Newark 6's	"		1937	100	10,000	600
	-10,000 Broadway-Barclay 6's	"		1941	100	10,000	600
	-10,000 #48 W 48th St 6's	"		1936	100	10,000	600
	-10,000 Dorest 6's	"		1941	100	10,000	600
	-10,000 American Insurance Union 6's	"		1941	100	10,000	600
	-10,000 Lefcourt-Manhattan 5¾'s	"		1941	97.55	9,755	575
	-10,000 Albany-Manhattan 6¼'s	"		1938	100	10,000	625
	10,000 Dodge Bros. 6's			1940	94½	9,450	600
	10,000 Pacific Mills 5½'s			1931	96¾	9,675	550
	10,000 Bethlehem Steel 6's			1948	99¾	9,975	600
	10,000 National Distillers 6½'s			1935	99	9,900	650
	10,000 Cuban Dominican Sugar 7½'s			1944	98¼	9,825	750
	10,000 Otis Steel 6's			1941	98½	9,850	600
	10,000 City Transportation 6's			1936	98½	9,850	600
	10,000 Chicago Daily News 6's			1936	97½	9,750	600
	10,000 Associated G & E 5½'s			1946	95¼	9,525	550

Brief of Defendant-Appellant

10,000 Price River 6's	1938	100	10,000	600
10,000 Indiana Limestone 6's	1941	99	9,900	600
10,000 Czecho-Slovak 8's	1951	101 $\frac{1}{4}$	10,125	800
10,000 City Gratz 8's	1954	97 $\frac{1}{2}$	9,750	800
10,000 State San Paulo 7's	1956	96 $\frac{1}{2}$	9,650	700
10,000 Republic Peru 7 $\frac{1}{2}$'s	1940	98 $\frac{1}{2}$	9,850	750
10,000 Siemens & Halske 7's	1928	99 $\frac{1}{4}$	9,925	700
10,000 City Berlin 6 $\frac{1}{2}$'s	1950	91	9,100	625
\$250,000			\$245,855	\$15,900

Average Income of 6.47%''

Brief of Defendant-Appellant

It is the contention of defendant-appellant that this letter of June 22, 1926, which concededly is made the basis of plaintiff-appellee's cause of action, was not such an offer, as would result in a contractual obligation which would be legally enforceable as against defendant-appellant. We respectfully submit that this letter was at most a mere invitation to treat—a bid for business which required what might be termed a counter-offer on the part of the plaintiff-appellee, and an acceptance of said counter-offer by appellant before a contract resulted. A reading of this letter will disclose that it was nothing more than a proposal to deal with plaintiff-appellee. The letter invited plaintiff-appellee's attention to a list of securities therein, and stated that the Boardwalk Securities Corporation welcomed the opportunity to be of some financial service to him. It called not for an acceptance on the part of plaintiff-appellee, but rather for an offer from plaintiff-appellee to the Securities Corporation. There is no evidence in the case that plaintiff-appellee, or his agent, Paul J. O'Neill, made an offer to purchase any securities provided defendant-appellant agreed to repurchase them at any time. The proof merely shows that on dates subsequent to the date of the letter, securities were bought by Paul J. O'Neill for account of plaintiff-appellee.

There is no unqualified offer contained in any part of this letter. The pertinent parts thereof are as follows:

"I welcome the opportunity to be of some financial service to you and I am taking the

Brief of Defendant-Appellant

liberty to enclose a list of 25 bonds etc. * * * These bonds we own and *can deliver to you, of course, subject to prior sale.* * * * *I propose to let you have our bonds and gradually, as the market is more favorable, etc.* * * * *My idea is if you will give me the time to gradually supply you with a high grade, conservative list of investment bonds, etc.* * * * Should you wish to cash in your Straus bonds at any time we will be glad to take them from you at 99 or \$10 per bond less than you paid for them and the accrued interest. * * * Thanking you for *this opportunity.* * * *

This letter, it will be seen, is more in the nature of a mere business advertisement, rather than an offer intended by the writer thereof to ripen into a contract upon purchase of all or any number of the securities therein advertised. A letter of this type may lead to bargains, but it does not make them. It calls for offers which the defendant-appellant had the right to accept or reject. Nowhere in the testimony does it appear that plaintiff-appellee offered to purchase these securities, provided the Boardwalk Securities Corporation would agree to repurchase them at any time. He merely purchased the bonds; and it is our contention that this letter was merely an offer of an invitation to treat, at most, a mere business advertisement, and could not be used as the foundation for the action based upon the repurchase "offer" therein mentioned, when such repurchase offer was not made a part of the subsequent

Brief of Defendant-Appellant

purchase of the securities of plaintiff-appellee's agent. Our contention in this particular is supported by the authorities.

In the case of *Moulton v. Kershaw* (59 Wis. 316), an action for damages was brought upon the non-performance of a contract alleged to be contained in the following correspondence:

“Milwaukee, September 19, 1882.

J. H. Moulton, Esq., La Crosse, Wis.

Dear Sir: In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full carload lots of eighty to ninety-five bbls., delivered at your city, at 85 cents per bbl., to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.

Yours truly,

C. J. Kershaw & Son.”

“La Crosse, September 20, 1882.

“To C. J. Kershaw & Son, Milwaukee, Wis.:

Your letter of yesterday received and noted. You may ship me two thousand (2000) barrels Michigan fine salt, as offered in your letter. Answer.

“J. H. Moulton.”

The Court held that this correspondence did not form the basis of a contract, etc., which would support the action therein brought, and said:

“The counsel for the respondent claims that the letter of the appellants is an offer to sell to

Brief of Defendant-Appellant

the respondent, on the terms mentioned, any reasonable quantity of Michigan fine salt that he might see fit to order, not less than one car-load. On the other hand, the counsel for the appellants claim that the letter is not an offer to sell any specific quantity of salt, but simply a letter such as a business man would send out to customers or those with whom he desired to trade, soliciting their patronage. To give the letter of the appellants the construction claimed for it by the learned counsel for the respondent, would introduce such an element of uncertainty into the contract, as would necessarily render its endorsement a matter of difficulty, and in every case the jury trying the case would be called upon to determine whether the quantity ordered was such as the appellants might reasonably expect from the party. This question would necessarily involve an inquiry into the nature and extent of the business of the person to whom the letter was addressed, as well as to the extent of the business of the appellants. So that it would be a question of fact for the jury in each case to determine whether there was a binding contract between the parties. And this question would not in any way depend upon the language used in the written contract, but upon the proofs to be made outside of the writings. As the only communications between the parties upon which a contract can be predicated are the letter and the reply of the respondent, we must look to them and nothing else, in

Brief of Defendant-Appellant

order to determine whether there was a contract in fact. We are not at liberty to help out the written contract, if there be one, by adding by parol evidence additional facts to help out the writing, so as to make out a contract not expressed therein. If the letter of the appellants is an offer to sell salt to the respondent on the terms stated, then it must be held to be an offer to sell any quantity at the option of the respondent, not less than one carload. The difficulty and injustice of construing the letter into such an offer is so apparent that the learned counsel for the respondent do not insist upon it, and consequently insist that it ought to be construed as an offer to sell such a quantity as the appellants, from their knowledge of the business of the respondent, might reasonably expect him to order.

Rather than introduce such an element of uncertainty into the contract, we deem it much more reasonable to construe the letter as a simple notice to those dealing in salt that the appellants were in a condition to supply that article for the price named, and requesting the person to whom it was addressed to deal with them. This case is one where it is eminently proper to heed the injunction of Justice Foster in the opinion in *Lyman v. Robinson* (14 Allen, 254): 'That care should always be taken not to construe as an agreement, letters which the parties intended only as preliminary negotiations.' * * *

“The language is not such as a business man would use in making an offer to sell to an individual a definite amount of property. The word ‘Sell’ is not used. They say, ‘We are authorized to offer Michigan fine salt,’ etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say, we offer to sell to you. They use the general language proper to be addressed generally to those who were interested in the salt trade. It is clearly in the nature of an advertisement, or business circular, to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not as an offer by which they are to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order. We think the complaint fails to show any contract between the parties, and the demurrer should have been sustained.”

In the case of *Beaupré v. Telegraph Co.* (21 Minn. 155), the Court said:

“The plaintiffs had written to Ryan, enquiring if he had any more pork of certain kinds, and requesting him to ‘telegraph price on receipt of this.’ Ryan accordingly telegraphed as follows. ‘Letter received. No light mess here. Extra mess twenty-eight seventy-five (28.75).’ Upon receipt of this dispatch, the plaintiffs sent this message, which the defendant neglected to deliver in due season. ‘Dispatch received. Will

Brief of Defendant-Appellant

take two hundred extra mess, price named.' Ryan's dispatch did not purport to be an offer to sell any quantity of pork whatever, nor was the plaintiff's message an acceptance of any offer. The seasonable delivery of the plaintiff's message to Ryan would not have effected any contract binding him to deliver to the plaintiffs two hundred barrels, at the price named. Ryan's dispatch was rather (as it seems to be admitted by the plaintiffs in their printed argument) a quotation of the market price of pork, or perhaps, a statement of the price at which he held his own pork; and the plaintiff's message was an offer to take two hundred barrels at the price named—a mere order for goods, which Ryan might accept or reject at his pleasure, and until his acceptance no contract would exist between the parties."

In *Baston v. Toronto Vinegar Co.* (4 Ont. L. R. 20), the plaintiff, who had previous dealings with the defendants, wrote to them on May 5th asking them if they were going to buy cucumbers that year, and what they were going to pay for them; adding, "please let me know as I want to make a contract with someone for them, as I want to put in quite a few this year." The defendants replied, "We are pleased to learn that you are going to do a lot of growing this year, and will be pleased to take all you grow at same price as last year. We will see you later on and make final arrangements." Nothing further occurred until the following August, when the plaintiff sent several loads of cucumbers

to the defendants, who accepted them and paid for them, nothing being said at the time of any contract between the parties. Held, that the defendants' letter was not an offer to acceptance by the plaintiff, or by the delivery of cucumbers to them by the plaintiff, but a statement of their readiness to enter into an agreement with the plaintiff upon terms to be arranged.

In the case of *Richardson v. Hunter* (88 Wash. 375, 153 p. 325), a letter was written from a person connected with the promotion of a corporation to a discontented stockholder, with explanations which he manifestly hoped would satisfy the stockholders, containing no words of present promise, but stating that the writer would be willing to enter into an agreement to buy back the stock, without stating the terms and conditions on which he would make such an agreement. It was held that there was no agreement to buy the stock, *but only an offer to make an agreement.*

In *Johnston v. Rogers* (30 Ont. 150), the defendant wrote in regards to sales of flour: "We quote you Hungarian \$5.40 and Strong Bakers \$5.00, car-load lots only." * * * "We would suggest your using the wire to order, as prices are so rapidly advancing that they may be beyond reach before a letter would reach us." To this, this plaintiff promptly replied, by telegraph: "We will take two cars Hungarian at your offer of yesterday." The Court held, no contract was created.

In *Williston on Contracts*, Vol. 1, Section 27, the general rule is stated as follows:

Brief of Defendant-Appellant

“Frequently negotiations for a contract are begun between parties by general expressions of willingness to enter into a bargain upon stated terms and yet the natural construction of the words and conduct of the parties is rather that they are inviting offers, or suggesting the terms of a possible future bargain than making positive offers. Especially is this likely to be true where the words in question are in the form of an advertisement. Thus, if goods are advertised for sale at a certain price, it is not an offer, and no contract is formed by the statement of an intending purchaser that he will take a specified quantity of the goods at that price. The construction is rather favored that such an advertisement is a mere invitation to enter into a bargain rather than an offer. Even where the parties are dealing exclusively with one another by private letters, or telegrams, or oral conversation, the same question may arise; and language that at first sight may seem an offer may be found merely preliminary in its character.”

and cases therein cited.

We respectfully submit, in view of the foregoing authorities, that the letter of June 22, 1926, was a mere bid for business; and that none of the statements therein contained could be made the basis of a contractual obligation on the part of the defendant-appellant. As heretofore stated, the letter merely invited an offer on the part of the plaintiff-appellee, and if plaintiff-appellee desired to obtain

Brief of Defendant-Appellant

the advantage of the proposal of repurchase contained in the letter, he was obliged to make this provision for repurchase a condition of each purchase of bonds made by him subsequent to the receipt of said letter. In other words, the letter being merely "an offer to receive an offer" the repurchase factor should have been incorporated in each purchase of securities accepted by defendant-appellant. As heretofore stated, the record is barren of any evidence tending to show that any agreement for repurchase was undertaken by defendant-appellant on the several dates when the securities were actually sold by it to plaintiff-appellee's agent, Paul J. O'Neill.

For the reasons herein stated, it is, therefore, respectfully submitted that defendant-appellant's motion for a directed verdict should have been granted.

II.

The letter of June 22, 1926 (Exhibit P1, p. 289), in the 5th Ground of Appeal (p. 334), copied in full under ~~Argument I~~ ^{PC-36281}, did not constitute a contract, because the minds of the parties never met, and the offer, if the letter be considered as an offer, was never accepted. (Motion for Non-Suit, p. 128. Also Ground of Appeal No. 17, p. 347.)

The first paragraph of that letter states:

"At the suggestion of your Mr. O'Neill, I welcome the opportunity to be of some financial service to you and I am taking the liberty to enclose a list of 25 bonds at \$10,000.00 each,

Brief of Defendant-Appellant

well diversified with a good income for your temporary investment. These bonds we own and can deliver to you, of course, subject to prior sale. The bond market, at present, is too high for permanent investment. * * *

The list of securities attached thereto reads as follows:

“We recommend the following \$250,000.00 bonds as conservative and well diversified investment.”

From this it appears that Mr. Ojserkis was proposing an investment of \$250,000.00 and likewise proposing that the bonds therein mentioned were for temporary investment and not for permanent investment.

There was no written acceptance of this offer of sale, if it is considered an offer. The only acceptance was the purchase of \$80,000.00 bonds made on June 28th following with other bonds from time to time, the total amount of which was \$189,500.00. We submit the purchase of \$189,500.00 worth of bonds did not constitute an acceptance of an offer to sell \$250,000.00 worth of bonds.

Moreover, the language of the letter was to sell \$250,000.00 worth of bonds for temporary investment, not for permanent investment. Plaintiff-appellee on p. 18 at l. 20 when asked what effect, if any, he attributed to the words “your temporary investment” replied,

“A. The letter to me appealed entirely from the definite offer that he would—that the Board-

Brief of Defendant-Appellant

walk Securities Corporation would redeem my bonds at any time at 99.

Q. And you gave no —

A. There was no reason for me to consider temporary investment and make changes when I had that guaranty.

Q. Then you gave no effect whatever, no force, to the words, 'Temporary investment'?

A. Merely a suggestion if I wanted to take advantage of it, and I didn't want to take advantage of it, and at no time —

Q. Then in the next paragraph, 'The bond market at present is too high for permanent investment.' What force or effect did you consider that language to have in this letter?

A. None, in view of the agreement and guaranty contained in the letter.

Q. Where was the guaranty? This part that—I suppose what you mean by the guaranty, 'Should you wish to cash in your Straus bonds at any time we will be glad to take them from you at 99'? Is that the guaranty?

A. That is the agreement and guaranty which disposed of any other thought in my mind."

It is submitted that plaintiff-appellee was not entitled to rely upon what he called the guaranty, unless he had accepted the proposition in a writing as broad as the proposal or unless he had complied with the proposal in making a purchase of the amount of bonds that were offered as a temporary investment. It is perfectly apparent that Mr. Ojserkis had in mind the sale of \$250,000.00 worth of

Brief of Defendant-Appellant

temporary bonds to be replaced from time to time by permanent bonds. He was not offering these bonds as a permanent investment. He was not, when he wrote the alleged option, "should you wish at any time, etc.," contemplating the sale of permanent bonds with an offer to repurchase, but of temporary bonds.

Hence, it is submitted that there was no contract concluded between the parties; because there is no acceptance of the offer to buy \$250,000.00 worth of bonds and there was no meeting of the minds of the parties as to the term of investment. Mr. Ojserkis had in mind the sale of \$250,000.00 worth of bonds for temporary investment and plaintiff-appellee had in mind the purchase of so many bonds as he saw fit for permanent investment, and it necessarily follows that if the minds of the parties did not meet so as to constitute a contract, the alleged option, which was a part of the writing, gave to plaintiff-appellee no right of action against defendant-appellant.

"An understood term in every offer is that it shall be accepted in the terms in which it is made, and the alteration of such terms or the addition of any condition or limitation is tantamount to a rejection of the original offer. * * *

The principle that an offer must be accepted in the terms proposed and subject to all the conditions, qualifications and limitations imposed, applies to options as well as to other contracts."

21 *American & English Encyclopedia of Law*, 2nd Edition, p. 930.

Cold Blast Transport Co. v. Kansas City Bolt and Nut Co.

114 Feb 77

In the case of *Darby v. James* (100 Fed. 224), at pp. 227-228, the Court held:

"The rule is unvarying and the authorities uniform that in order to constitute an acceptance of an option or an offer to sell, the acceptance must be unconditional; there must be no new terms imposed, and no departure from those offered. If to the acceptance a condition be affixed or any modification or change in the offer be requested by the party to whom the offer is made, this, in law, constitutes a rejection of the offer." Citing cases.

"If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time."

In 21 *American & English Encyclopedia of Law*, 2nd Edition, p. 932, the author, in speaking of options, says:

"There is moreover a strong inclination on the part of the Courts to view any delay with great strictness, on the ground that the party seeking to enforce permanence was not bound, while the other party was bound." Citing the case of *Meidling v. Fretz* (43 N. J. Eq. 638), among other cases, as authority.

III.

The 3rd, 4th and 5th Grounds for Motion for Direction all pertain to the option, and will be considered together. They are found in Motion for Direc-

Brief of Defendant-Appellant

tion on pp. 248-249, and Request to Charge No. 4, p. 285; No. 7, p. 286; and No. 2, p. 284; in the following language:

“3. The property purchased was of fluctuating value and the option was not exercised promptly.”

Ground of Appeal No. 10, Section No. 3, p. 341.

“4. The suit was not begun within six years after the date of the option or the date of the last purchase.”

Ground of Appeal No. 10, Section No. 4, pp. 341-342.

“5. ‘At any time’ in this case means a reasonable time.”

Ground of Appeal No. 10, Section No. 5, p. 342; also Grounds of Appeal No. 5, p. 342; No. 8, p. 342; No. 16, p. 346; No. 14, p. 346; and Nos. 18 and 19, p. 347.

The property in question was unlisted bonds, of fluctuating value, and this fact is proven by the testimony of the various witnesses called by the plaintiff, viz., Corson (p. 43), Gaines (p. 52), Snively (p. 83), and Bleecker (p. 104). Being of fluctuating value, the plaintiff-appellee was required to act promptly, and before any measurable difference had arisen in the value of these bonds.

In the case of *McCracken v. Harned* (66 L. 37), at p. 39, our Supreme Court, in an opinion by Justice Dixon, founded on a writing in the following language:

Brief of Defendant-Appellant

"Therefore, in consideration of said payments by said McCracken, I agree to guarantee him against one-half of any loss he may sustain by reason of said investment after three months from this date; that is to say, said McCracken can put to me and I agree to take from him at his request, on or after three months from date hereof, 5,000 shares of said stock at cost thereof, to wit, 50¢ per share, or any part thereof.

(Signed) 'Thomas B. Harned.' "

McCracken claimed he never accepted the proposition contained in the letter. At p. 39, the Court, in opinion by Justice Dixon, said:

"If this writing of November 6th, 1891, had become a contract at or soon after its date, then April, 1898, was too late for the exercise of the option which it had given the plaintiff of tendering to the defendant five thousand shares, at fifty cents a share, on or after three months from November 6th, 1891. The defendant swore that after 1891, and as late as 1896, the stock was salable at from one to two dollars per share, and certainly it would be unreasonable to permit the plaintiff to speculate upon it during that period at the risk of the defendant, and afterwards call on him to make good the loss. An option to sell at a fixed price an article of fluctuating value should be exercised promptly."

Brief of Defendant-Appellant

3. THE PROPERTY PURCHASED WAS OF FLUCTUATING VALUE AND THE OPTION WAS NOT EXERCISED PROMPTLY.

The same principle and equity are involved in creating a contract by acceptance of an option as in voiding a contract by rescission. In neither case can the moving party succeed if he waits until there has been such a measurable difference in the value of the property involved as renders it inequitable to compel the other party to respond.

In the case of *Roberts v. James* (83 L. 492), our Court of Errors and Appeals said:

"It is also settled that one who desires to rescind a contract must act within a reasonable time."

In the case of *Brown v. Young* (110 N. E. 562), the Court of Appeals of Indiana, at p. 565, said:

"The question of how much time a party to a contract has permitted to elapse, is not necessarily determinative of the right to rescind; the immediate consideration being whether the period has been long enough to result in prejudice to the other party." Citing case of *Roberts v. James* (*supra*).

In the case of *Dennis v. Jones* (44 Eq. 513), which was an action for rescission, our Court of Errors and Appeals said (p. 516):

"It is the rule that the defrauded party to a contract has but one election to rescind, and

he must exercise that election with reasonable promptness after discovery of the fraud; and that when he once elects he must abide by the decision. Delay in rescission of the contract is evidence of a waiver of the fraud, and an election to treat the contract as valid." Citing cases.

Miller v. Steigley 113 L. 40

Goldsmith v. Adler 108 L. 37

4. THE SUIT WAS NOT BEGUN WITHIN SIX YEARS AFTER THE DATE OF THE OPTION OR THE DATE OF THE LAST PURCHASE.

In the case at hand, the last purchase of bonds was made on the 12th of April, 1927; and the suit was not instituted until July, 1933, or more than six years after the last transaction.

In the case of *McCracken v. Harned* (*supra*), the Court said:

"In the first place, the testimony made it quite manifest that the demand of April 13th, 1898, was not intended to be an acceptance of the agreement set forth in the writing of November 6th, 1891, but was only a precaution in case that writing should be proved to have been an existing contract. If it was a contract at all, it had become so at its date, or certainly within a reasonable time thereafter; it could not be regarded as an offer, kept open for upwards of six years after it was tendered."

In the case of *Brooks v. Trustees* (50 L. R. A.—ns—594), at pp. 599-600, the Court said:

Brief of Defendant-Appellant

“This agreement was made on May 24, 1906, the action was not begun until Sept. 16, 1912, or more than six years after the contract was entered into. It is plain upon its face that the offer to withdraw the investment was not made within a reasonable time, or even within the statutory limitation upon written instruments, which in this State is six years. The respondent's cause of action, if any she has, began to run at the date of the contract, viz., May 24, 1906. If she had accepted none of the earnings of the bonds during the time between the date of the contract and the date of the bringing of the action, it is true that the statute of limitations has more than run upon the contract, even if the phrase ‘at any time’ may be held to mean at any time within the period of the statute of limitations. * * * Again, it has been many times held, and this is another important reason why the action should be held to be barred, that it is not the policy of the law to put it within the power of a party to toll the statute of limitations, and this court has at least twice held that the failure of a party to take the necessary steps to perfect his right of action, although such steps were conditions precedent to the right, would not prolong the statute.” Citing the case of *Spokane Co. v. Prescott* (67 Am. St. Rep. 733—19 Washington, 418); *Spinning v. Pierce Co.* (20 Washington 126). “It is unimportant when a demand was made for the return of the money. The right of action accrued at

once upon the contract, and if, as above stated, the time within which the action might be maintained extended to the period of the statute of limitations, that time had fully run when the action was brought."

5. "AT ANY TIME" IN THIS CASE MEANS A REASONABLE TIME.

The Court refused to charge that "At any time" meant "within a reasonable time," but did charge (p. 256, l. 25) as follows:

"I hold and so instruct you that the words 'At any time' as used in this letter are to be taken to mean 'at any time' and not 'within a reasonable time.'"

The words "At any time" are indefinite; they do not fix any precise day that both parties are bound to accept.

"At any time" no more fixed the precise time that both parties must accept than if those words had not been mentioned in the letter at all; and we submit the words "At any time" means "within a reasonable time."

In the case of *Fitzpatrick v. Woodruff* (96 N. Y. 561), the plaintiff purchased from defendant certain bonds upon the latter's assurance that if *at any time* plaintiff became dissatisfied with the bonds, defendant would take them on a 30 days' notice and return the money paid. The Court said:

Brief of Defendant-Appellant

“It is undoubtedly the general rule, as is claimed by the appellant’s counsel, that where an option to be exercised or a condition to be performed is not limited by the agreement, then such option must be acted upon and condition performed or abandoned within a ‘reasonable time’.”

It will be noted that in that case the Court regarded the words “at any time” as not fixing any precise time.

In the case of *Paulson v. Weeks*, (80 Ore. 468—157 Pacific 590—Annotated Cases, 1918 D), it was held a contract for the sale of stock of a mining company, giving the buyer the option to rescind, if he became dissatisfied with his purchase at any time thereafter, set a reasonable time, and did not give unlimited time, though primarily the word “any” implies unlimited choice as to the particular unit, number or quantity and generally signifies an indeterminate unit or number of units out of many or all. The words “any time” when employed in agreements analogous to the one presented here, are almost universally construed to mean a reasonable time.

In the case of *Michaels v. Pontius* (137 NE, 579-83 Indiana Appeals 66), which arose out of an oil lease, the Court said:

“Appellees call our attention to the fact that the lease provides that the company should have the right to remove any machinery, fixtures, or buildings placed on said premises by it ‘at any time,’ and assert that they are within their

rights, in seeking to obtain possession of the property in suit, by reason of this provision. This Court has held that such a right is not unlimited as to time, but is limited to a reasonable time after the expiration of the lease. *Perry v. Acme Oil Co.* (1909), 44 Ind. App. 208—88 NE, 859). The undisputed evidence establishes facts which show that such time had expired long prior to the date on which appellees claim to have acquired title to such property, and hence the provision cited is not available to them. This is in harmony with the decision reached by the court in the well-considered case of *Shellar v. Shivers* (171 Pa. 569—33 Atl. 95). Having reached the conclusion that the undisputed evidence shows that the lease had been terminated by the abandonment, and that the property in suit had not been removed within a reasonable time thereafter, we must hold that the lessee, and any one claiming through it, has lost all rights thereto. We therefore conclude that the verdict is not sustained by the evidence."

In the case of *Atwood v. Clark* (2 Me. 249), the Court held:

"The statement of a few plain propositions and the principles will simplify the cause and lead to an easy decision. If the contract on which the original action is founded had been in writing, and no time had been mentioned within which the account or memorandum of broken ware was to have been furnished by Clark to Atwood, the law would have supplied

Brief of Defendant-Appellant

what the parties had omitted, or, rather, would have decided when the memorandum should have been furnished, *i. e.*, in a reasonable time. In such a case, the question of time would be purely a matter of legal construction.”

In the case of *Park v. Whitney* (148 Mass. 278—19 NE, 161), the Court said:

“Assuming, in favor of the plaintiff, that the language of the defendant’s letter which is relied on is to be considered as a direct offer to purchase the shares, and that it is to be taken as an offer by itself alone, and independently of the other proposals in the letter, still the offer never became binding as a contract upon the defendant, for want of a due acceptance of it by the plaintiff. In the first place, considering the nature of the offer, and the circumstances as shown in the letter, the plaintiff must make known his acceptance by January 1, 1886. In other words, ‘at any time,’ means the same as ‘at that date.’ But if that is not the true construction, at least the offer must be accepted within a reasonable time after that date. Plainly, the offer was not to continue forever. The words ‘at any time’ do not import perpetuity; and, if not, then the plaintiff was entitled only to a reasonable time, and there being no facts in dispute, this was to be determined by the Court. There was no acceptance within a reasonable time.”

In the case of *Atwood v. Cobb* (33 Mass. 227), the Court held:

“As to the uncertainty of the time when the agreement was to be executed, the case is clear that where on an executory contract a party stipulates to do some act and no time is limited, it is to be done within a reasonable time, and, therefore, want of any stipulation to that effect does not render the instrument void.”

In the case of *Ellis, Admr. v. Durkee* (79 Vt. 341—65 Atl. 94), the Court held:

“We agree with counsel for the defendant that in view of the failure to find that the intestate forbore to sell the stock in reliance upon defendant’s proposition, the offer of December 15th was a mere proposition unsupported by a consideration. But it was an offer just the same, and an offer need not be supported by a consideration, in order to serve its purpose as such. * * * But, though it be without consideration, it must be accepted so as to make a binding contract if not sooner revoked, but it may be revoked at any time before it is accepted. * * * It is the acceptance of such an offer, within the time and according to the terms specified, which completes the binding contract. * * * If no time is limited in the offer, it remains open a reasonable time, unless sooner withdrawn. The character of this proposition was such that it was a continuing offer, good, if not withdrawn, for six months and for a reasonable time thereafter.” Citing the cases of *Dawley v. Potter* (19 RI, 372—36 Atl. 92); *Park v. Whitney* (148 Mass. 278).

Brief of Defendant-Appellant

In the case of *Atlantic Pebble Co. v. Lehigh Valley Railroad Co.* (89 L. 336), this Court, at p. 339, said:

“So far as the express terms of the contract were concerned, therefore, there was a complete meeting of the minds, and in the absence of a provision defining the time for complete performance, the presumption is that such performance was to be within a reasonable time. What that is depends upon the circumstances of each case. Both parties are presumed to have had in mind, as an unexpressed term of the contract they entered into, a period for complete performance, which, in view of the existing conditions, and viewed in the light of their own actions, it is reasonable to suppose they had in contemplation. Not having seen fit to reduce it to definite, express form, the circumstances surrounding the transaction, taken in connection with its character or nature, and the actions of the parties themselves, will determine this unexpressed and otherwise undefined term of the contract. One of the parties to such a contract cannot, therefore, escape its obligations on the ground that he expected it would be performed within a shorter time than that which, under the circumstances, was a reasonable time for its performance. What was a reasonable time in the circumstances of this case was clearly a jury question.”

In the case of *Larmon v. Jordan* (56 Ill. 204), the Supreme Court of Illinois, concerning a written

proposition for the sale of land, at p. 207, quoting from Parsons on Contracts, said:

“If the proposer fixes a time or expresses his intention, and the other party knows precisely what it is, if no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated, and the law will decide this to be that time which, as rational men, they ought to have understood each other to have had in mind.”

In the case of *Raynor v. Syracuse University* (71 N. Y. Supp. 293), the Court said:

“It may be suggested that the contract between Mrs. Raynor and defendant provided that the City of Syracuse might ‘at any time’ continue and lay out Chestnut Street, and that therefore the six years statute, hereinbefore referred to, would not apply. My opinion would be, in the first place, that this contract was merged and satisfied by the deeds to the University and to the City, and that these conveyances define and limit the rights of the parties. In the second place, however, if this were not so, the provision ‘at any time’ would be construed to mean a reasonable time.”

In the case of *Fletcher v. Lyon* (123 S. W. 801—98 Arkansas 5), the Court held:

“Where a timber deed conveyed all timber standing and fallen, with the right to cut and remove it ‘at any time,’ that the words ‘at any

Brief of Defendant-Appellant

time' did not give the grantee the right to remove the timber at its own convenience without regard to lapse of time, but meant a reasonable time, without unnecessary delay."

In the case of *Perry v. Acme Oil Co.* (44 Ind. App. 207—88 N. E. 859), it was held:

"The right given in an oil and gas lease to remove fixtures at any time was not unlimited, but the removal must be within a reasonable time after the expiration of the lease."

In the case of *Cotton v. Cotton* (75 Ala. 345), it was held:

"1. When a contract does not specify a particular time, or appoint the happening of a particular event for the performance, the presumption is, that the parties intended performance within a reasonable time; and what is a reasonable time, depends materially upon the nature of the duty to be performed, the relation of the parties, and the peculiar circumstances of the particular case.

"2. What is a reasonable time for performance, is sometimes a question of fact, and sometimes a question of law. When it depends upon facts extrinsic to the contract, which are matters of dispute, it is a question of fact; but when it depends upon the construction of a contract in writing, or upon undisputed extrinsic facts, it is matter of law."

In the case of *Brennan v. Sanborn* (46 Cal. 7), it was held:

“When the terms of an agreement do not limit the time within which it is to be performed, the law implies that it is to be performed immediately, or, at most, within a reasonable time.”

In the case of *Hawkins v. Duvall* (177 N. Y. Supp. 584), at p. 586, it was held:

“The words ‘at any time,’ in a deed of land reserving to the grantor the right to remove timber at any time, did not vest ownership and right of removal in the grantor forever, but reserved to him only the right to remove the timber whenever convenient to him within what was under all the facts a reasonable time.”

In the case of *Terry v. Crosswy* (Texas), (264 S. W. 718), the Court held:

“Where an oil lease gave lessee a right to remove casing, pipes, and rods from wells at any time, he had only a reasonable time after the expiration of his lease to remove them.”

In the case of *Erie v. Pennsylvania R. R.* (92 Atl. 192—246 Pa. 238), the Court held:

“Where a city passed a resolution which was subsequently recited in a deed giving to a railroad company the right to appropriate ‘at any time’ so much of certain land as was necessary for its corporate uses, the phrase quoted meant ‘within a reasonable time,’ as determined from the circumstances of the particular case.”

Brief of Defendant-Appellant

In the case of *Sheller v. Shivers* (33 Atl. 95—171 Pa. 69), it was held:

“A lease of oil lands for a term of 3 years, or as much longer as gas or oil should be found in paying quantities, if found between the expiration of the term, giving the lessee the right to remove ‘at any time’ any or all machinery, does not make the lessee’s right to remove such machinery unlimited as to time. The right to enter at any time and to remove the machinery at any time was predicated on that part of the term that was uncertain; that is, after 3 years, the lessee had the right at any time to enter and drill additional wells, if oil or gas was being produced in paying quantities, and had the right, although 3 years had passed, to remove machinery and fixtures after or when the well would cease to produce oil or gas in paying quantities. The removal must be made within a reasonable time; or, in other words, the law in such cases allows the tenant a reasonable time for the removal of fixtures.”

It is respectfully submitted that the case of *Weinstein v. Sheer* (98 L. 511), is not in conflict with the cases hereinabove cited, for the following reason:

The Court based its charge upon the case of *Weinstein v. Sheer* (98 L. 511), which we then contended and still contend is not in point in this case, and does not express the law of this case. In that case, the agreement was contained in the following letter:

Brief of Defendant-Appellant

"September 1, 1920, Freehold, N. J.

I, the undersigned, received \$1,000 on account of iron as laying in your yard, Manetta Avenue, Lakewood, N. J., at the price of 75¢ per hundred pounds in the yard. The stock can be removed at any time to suit the buyer.

J. Weinstein,

Freehold, N. J.

Max Sheer

By M. Bernard, Attorney."

In that agreement, there was no term of the contract left undetermined. The right of determining the period of time that Weinstein, the buyer, might continue the storage of the iron in Sheer's lot, had been for a consideration transferred by Sheer to the purchaser, who became, under the words of the contract, the sole person to make the determination as to when the iron should be removed, and in that determination the seller, Sheer, had reserved in himself no right. In other words, there was no undetermined factor in that regard in the contract, and Sheer had parted with all his right to determine when the iron should be removed. The parties having, by their contract, for a consideration, determined that question, there was no room for judicial construction touching the words "at any time," whereas, in the present case, the meaning of the words "at any time" is left as an undetermined indefinite term of the contract, which indefinite term the Court, by judicial construction, will supply, as stated in the case of *Atlantic Pebble Co. v. Lehigh Valley R. R. Co.* (89 N. J. L. 336).

IV.

Because the Court refused to charge Defendant-Appellant's Requests No. 6 and No. 7 (pp. 285-286), Grounds of Appeal No. 18 and No. 19 (p. 347), as follows:

"The statute of limitations has been pleaded as a defense in this cause, and that statute will begin to run from the expiration of what you determine would have been a reasonable time within which the plaintiff should have exercised his option to cash in his Straus bonds."

"The period of reasonable time should be determined by you as to each of the several purchases of bonds, and if more than six years elapsed between the expiration of the end of the reasonable time, as fixed by you, within which the plaintiff should have exercised his intention to cash in said bonds, and the date of instituting this suit, to wit, July, 1933, then as to all or such part of said bonds wherein the reasonable time elapsed more than six years before plaintiff's suit was instituted, plaintiff's right of action is barred, and your verdict as to them should be for the defendant."

It seems quite clear from the decided cases that the statute of limitations is applicable in this case, either from the language of the statute or else by using the statute as a measuring stick for reasonable time and requests to charge, numbers 18 and 19 above, were intended to apply in case it should

be decided that the statutory period did not run from the date of the contract above mentioned, but from the end of a period of reasonable time, based upon the language of the Court in the case of *McCracken v. Harned*, so that the question would be covered in any event if this Court holds that the words, at any time, are in any manner controlled by the statute of limitations, and the Court, relying upon his interpretation of the meaning of the words at any time, refused both requests, which we claim was erroneous.

In the case of *Doe v. Thompson* (22 N. H. 217), it was held:

“Where a contract to pay money on a condition, no time of payment or performance of condition being mentioned, is payable if the condition is not performed in a reasonable time. Such contract is barred by the lapse of 6 years after the expiration of a reasonable time for payment.”

V.

The 7th Ground for Direction, found on p. 249, is in the following language:

“The language in the first and second clauses of the letter of June 22, 1926, to wit, ‘a temporary investment and permanent investment,’ show that the bonds then offered were for temporary investment, and the words ‘at any time’ contained in the clause ‘should you wish to cash in, etc.,’ taken in connection therewith, show that

Brief of Defendant-Appellant

the right to cash in must be exercised within the period of temporary investment, to wit, within a reasonable time."

Ground of Appeal No. 10, paragraph No. 7, p. 342, also Grounds of Appeal No. 15, p. 346.

It will be observed that the trial Court, in refusing appellant's motion for a directed verdict, gave controlling force and effect in construing the letter of June 22, 1926, to the particular words therein "at any time." We respectfully submit that these three words may not be singled out in order to ascertain the intent of the parties, as evidenced by this letter. It would certainly seem clear that the interpretation of this letter ought not to depend entirely upon the literal meaning of these words removed and standing apart from the context of the entire instrument. The meaning of the words "at any time" must be ascertained from the whole letter, and they must be interpreted with reference to the situation of the parties and the object which they had in view. These words may not be detached from the letter of which they are a part and made the determinative factor in the construction of that letter. On the contrary, they should be read in the light of and in connection with the other parts of the letter. In the case of *Cheddick v. Marsh* (21 N. J. L. 463), the Court held:

"The intention of every part of a contract must be ascertained from all the parts of the contract taken together."

In *Nusbaum v. Hartford Insurance Co.* (276 Pa. 526, 120 Atl. 481), the Court held:

“The primary object in construing a contract is to discover the intention of the parties which is ordinarily taken from the instrument itself; effect being given to every part where possible, and each part being read in the light of and in connection with every other part.”

When these rules of construction are applied to the letter in question, any idea of an offer to repurchase at any time in perpetuity is at once dispelled. The first paragraph of the letter clearly shows that the securities were offered to plaintiff-appellee for his “temporary investment.” If the bonds were merely offered for a temporary investment, an agreement to repurchase them at any time in the future would be an evident absurdity. The words “at any time,” if given their literal meaning, are clearly irreconcilable with an offer made for a temporary investment—and yet the trial Court in effect ruled that by the terms of the letter, defendant-appellant agreed to repurchase the securities which he offered to plaintiff-appellee merely for a temporary investment at any time in the future, however distant.

We respectfully submit that this letter can only be intelligently construed by giving to the words “at any time” a meaning which would be consonant with the context of the entire letter—and that is, that the defendant-appellant agreed to repurchase the securities sold to plaintiff-appellee at any time during the period which a person would ordinarily

Brief of Defendant-Appellant

hold securities which he purchased for a temporary investment. "At any time," as thus construed, would mean within a reasonable time during which securities are held for a temporary investment.

It is true that the question of what is reasonable time is usually a question for the jury, but it is likewise true that in cases where the facts are not disputed and only one conclusion can legitimately be drawn therefrom that then the question of what is a reasonable time may and should be determined by the Court as a matter of law. The facts in the instant case were not in dispute and we submit that the Court should have held as a matter of law, under the circumstances, that the demand for the repurchase of these securities was not made by plaintiff-appellee within a reasonable time, and accordingly directed a verdict in favor of the defendant-appellant.

VI.

Because the Court refused to charge Defendant-Appellant's 20th Request (p. 288), Grounds of Appeal No. 22 (p. 348), as follows:

"Plaintiff is not entitled to recover at all as to the \$12,500 worth of bonds owned by Mrs. Edge, and the \$7,000 worth of bonds owned by Walter E. Edge, Jr."

The testimony of Mr. O'Neill touching this matter, is found on p. 32, l. 12:

"Q. \$10,000 Keith-Albee and \$2500 Hearst-Brisbane. How were they purchased?"

Brief of Defendant-Appellant

A. They were purchased by Mr. Edge and paid for with Mrs. Edge's check, and technically considered Mrs. Edge's bonds in her account."

P. 33, l. 10:

"Q. You say you purchased them for Senator Edge with money from Mrs. Edge's account?

A. Mr. Edge told me to purchase the bonds, and I usually paid for the bonds out of Mrs. Edge's account if she had some money that was available. The same way out of the boy's account. I had power of attorney on those accounts."

P. 41, l. 20:

"Q. Mr. O'Neill, I understood you to say that the \$7,000 worth of bonds purchased in the name of Walter E. Edge, Jr., were ordered to be purchased by Senator Edge?

A. They were not purchased in the name of Walter E. Edge, Jr. They were paid for by a check signed 'Walter E. Edge, Guardian of Walter E. Edge, Jr.' "

P. 42, l. 20:

"Q. Is Senator Edge the agent of these two people?

A. Yes.

Q. In the making of these purchases?

A. Yes, he was the agent.

Q. Did the interest recovered on these bonds go into the account of Mrs. Edge?

A. Yes.

Brief of Defendant-Appellant

Q. And those purchased in the name of Walter E. Edge, Jr., did the interest go on his account there, Walter E. Edge, Jr.?

A. They went in that account, yes."

It is submitted that the testimony in this case shows that the bonds amounting to \$19,500 were the property of Mrs. Edge and Walter E. Edge, Jr. The fact that they were endeavored to be purchased, or were purchased under the letter of June 22, 1926, can make no difference to the ownership of the bonds. The person who pays for personal property and receives the income therefor to his own use, is surely the legal owner of the property, and the plaintiff-appellee had no right in this suit to recover damage for property belonging to another, and it is submitted that the Judge erred in refusing to charge plaintiff's request and allowing the question to go to the jury, because there was no disputed fact about it.

The refusal of the Court to charge defendant's request was not cured by his charge in the following language:

"I have already said to you that it is incumbent upon the plaintiff to prove by a fair preponderance of the evidence that the offer contained in the letter of June 22, 1926, was unconditionally accepted by the plaintiff, in order that such offer and acceptance might grow into, so to speak, an enforceable and valid contract." Ground of Appeal 13, p. 345.

Because there was no evidence in the case to show an unconditional acceptance, nor from which an unconditional acceptance might be implied.

VII.

The language used by the trial Judge in connection with Request No. 20 (p. 288), Grounds of Appeal No. 23 (p. 349), as follows:

“This requires you to consider the testimony in the case. It is incumbent upon the plaintiff to prove by a fair preponderance of the evidence that these bonds to which this request relates were purchased by the plaintiff pursuant to the agreement of June 22, 1926. If they were not, if the plaintiff has failed to prove that these bonds to which reference is made in this request, were so purchased, and you conclude that they were not purchased by the plaintiff or that they were not purchased, so to speak, under this agreement of June 22, 1926, then you will exclude those bonds in the consideration of the amount of damages to be awarded to the plaintiff.”

The Judge charged, p. 272, l. 30, as above stated, concerning the ownership of the bonds above mentioned, in No. 20, and exception was taken to that portion of the charge. See p. 273, l. 30.

It is submitted that the charge as made by the Court was erroneous, and that it was not a question of whether the bonds were purchased pursuant to

Brief of Defendant-Appellant

the agreement of 1926, but the question was whether loss, if any, growing out of the ownership of these bonds, could be recovered by the plaintiff-appellee in that action.

Neither Mrs. Edge nor Walter E. Edge, Jr., were parties to the action, and if they were the owners of bonds, even though they had been purchased under the agreement of June 22, 1926, they could not recover for the loss in the name of plaintiff-appellee, so long as they remained the owners of the bonds.

VIII.

The 10th Ground for Motion for Direction (p. 250) in the following language:

"The uncontradicted testimony is that plaintiff, in the summer of 1927, was requested by Mr. Ojserkis to change his investment to other bonds, but declined to change his investment in the Straus bonds, and said 'he was satisfied with them. They paid a good income and he was satisfied;' plaintiff thereby determined to retain his Straus bonds, and his statement and determination to retain them amounted to an election, which is binding upon him, and which election now precludes a recovery of damages in the suit by him." *SC 136*

Ground of Appeal No. 10, paragraph 10, p. 343.

It is submitted that when plaintiff-appellee refused to exchange the Straus bonds, which had been

sold to him by defendant as a temporary investment to be exchanged for higher grade bonds at the request of Mr. Ojserkis, as was testified to by Mr. Ojserkis and uncontradicted by plaintiff-appellee in the language above stated, the plaintiff-appellee waived any right to rely further upon the option, if it be an option, and elected to accept the bond he then had, which election was binding upon him and final.

In the case of *Read v. Benzine-ated Soap Co.* (81 Eq. 182), at p. 184, the Court held:

"It is well settled in this court, that where a party has an election to rescind, he must act promptly, and having elected, must abide by his decision, and the failure to rescind within a reasonable time is plenary evidence of his election not to do so." Citing cases of *Dennis v. Jones* (44 N. J. Eq. 513); *Clampett v. Doyle* (73 N. J. Eq. 638); *Falkner v. Wassner* (77 N. J. Eq. 537). *Dwight v. BARR 77 E 103-110*
Williamson v. Griston 56 E 3
Beece v. Hutchins 205 N. J. 346 E 61 518

It is submitted that these cases on rescission are applicable in the case at hand, because what plaintiff-appellee was attempting to do was to rescind the original contract by virtue of the alleged option.

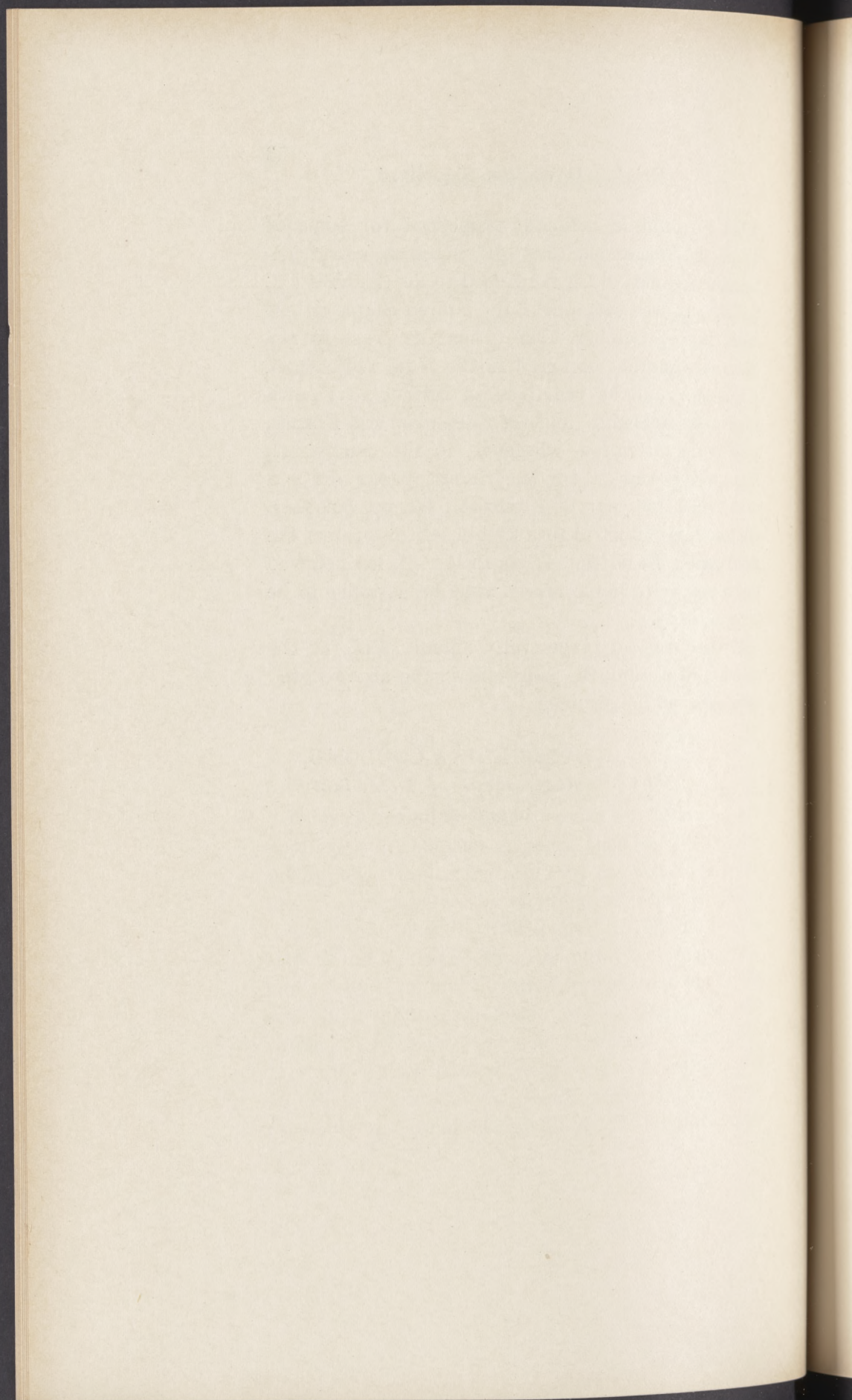
The right of plaintiff-appellee to recover in this case would be most highly inequitable. In the summer of 1927, he had declined to exchange his bonds for other high grade investments, stating he was satisfied with them; but when the tariff hearing before the United States Senate was in session, and the Penn Dixie Cement bonds which he had purchased from defendant-appellant fell 20 points below

Brief of Defendant-Appellant

what he paid to defendant-appellant for some of them, he demanded that defendant-appellant repurchase same, which it refused to do (Exhibit D1, p. 322); and he was still in the United States on the 29th day of October, 1929, when the crash in the securities market occurred in the New York Stock Exchange, and he remained in this country until December following, and then departed for France, paying no attention, whatever, to the market, although the market for the Straus bonds did not break until the year 1931 (Exhibit D1, pp. 322-324). He made no effort to protect himself or protect the Boardwalk Securities Corporation, if he believed that they were liable under what he assumes to be his guaranty.

Wherefore, we respectfully submit that for the reasons aforesaid, the judgment in the above-stated cause should be reversed.

BOURGEOIS & COULOMB,
*Attorneys of Defendant-
Appellant.*







INDEX

	PAGE
Verdict	1
Complaint	2
Answer	11
Reply	13
Amended Answer	14
Reply to Amended Answer	19
Summary	21
Opening Statement by Counsel for Plaintiff	23
Opening Statement by Counsel for Defendant	27
Plaintiff's Testimony	
1. Walter A. Smith	34
2. Joseph L. Smith	105, 171
Defendant's Testimony	
1. John A. Smith	36
2. Joseph L. Smith	37
Exhibits and Answers of Henry L. Ott	38
Plaintiff's Testimony	39
Defendant's Testimony	
1. John A. Smith	40
2. Joseph L. Smith	105

